BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

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No. 23-717

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

Petitioners, Plaintiffs Below,

v.

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

Respondents, Defendants Below.

Appeal from the Intermediate Court of Appeals of West Virginia

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PETITIONERS' JOINT APPEAL BRIEF

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I. ASSIGNMENTS OF ERROR

A.

Whether the Intermediate Court of Appeals ("ICA") erred in affirming the trial court's order granting summary judgment based upon the statute of limitations where:

1. **The ICA applied the improper standard for when the statute of limitations begins to run in product defect claims, relying on the standard for traumatic injuries (the time a victim suspects "something was wrong" due to trauma), rather than the standard for "pure latent injuries" recognized by this Court in *Goodwin v. Bayer Corp.*, 218 W.Va. 215, 222, 624 S.E.2d 562, 569 (2005), *Jones v. Bethany College*, 177 W.Va. 168, 170, 351 S.E.2d 183,185 (1986), and *Hickman v. Grover*, 178 W.Va. 249, 252, 358 S.E.2d 810, 813 (1987);**

2. **The ICA fashioned a bright-line rule holding the statute of limitations began to run on three certain dates, notwithstanding disputed material facts about when Petitioners' "pure latent disease" became "sufficiently pronounced" to place them on notice that they should exercise reasonable diligence to determine whether Respondents' defective respirators had a causal connection to their pulmonary disease that was caused by coal-mine dust; and**

3. **The ICA resolved material disputed facts bearing on (1) when Petitioners knew or should have known of their occupational pulmonary injuries; and (2) whether Petitioners exercised reasonable diligence in determining whether Respondents' defective respirators were causally connected to their pure latent occupational diseases?**

B.

Whether the ICA erred when it resolved disputed material facts as to whether the doctrine of fraudulent concealment equitably tolls the statute of limitations for reasonable coal miners (Petitioners) where Petitioners presented evidence that Respondents misrepresented their products' efficacy in marketing and packaging throughout the period of use and continue to suppress their actual knowledge and internal reports acknowledging their respirators were unfit for use in coal mines to this day?

II. STATEMENT OF THE CASE

A. Petitioners timely filed their complaints

Petitioners Ronald Hardy, Ralph Manuel, Edgel Dudleson, Ricky Miller, Mark Scott and Gary Scott are coal miners who were diagnosed as suffering from pulmonary massive fibrosis ("PMF"), sometimes referred to as complicated pneumoconiosis or complicated black lung. PMF is a pure latent disease that may develop over time due to exposure to coal, rock, and sand dust, or due to a variety of non-occupational causes. It is not caused by any one traumatic event. Petitioner James Cruey is a coal miner who was not diagnosed with PMF, but was awarded federal black lung benefits because, after many years of conflicting medical opinions, he was determined to suffer from a totally disabling pulmonary or respiratory impairment arising from his coal mine dust exposure.

All seven of these Petitioners timely filed separate products liability complaints in the Circuit Court of McDowell County against Respondents 3M Company (Respondent 3M), Mine Safety Appliances Company, LLC (Respondent MSA), American Optical Corporation, Cabot CSC Corporation, and Cabot Corporation (referred to collectively as Respondent AO), as manufacturers of respirators used in coal mines. Petitioners also sued Respondent Eastern States Mine and Industrial Supply (Respondent Eastern States) and Raleigh Mine and Industrial Supply (Respondent Raleigh Mine) as distributors of these respirators.

Specifically, in August and September 2021, all seven Petitioners filed their products liability complaints within two years from the date they had actual knowledge that there was a causal connection between their use of Respondents' respirators and their latent pulmonary diseases. All seven Petitioners filed their complaints within two years from the date each of these Petitioners either was diagnosed with or reasonably understood or knew they were suffering from

PMF while Petitioner Cruey filed his complaint within two years from the date of his federal black lung award.

The main allegation in these complaints is that the respirators worn by these Petitioners when they worked in coal mines were defective and contributed to them inhaling coal dust, which resulted in latent pulmonary diseases. Allegations regarding the defectiveness of Respondents' respirators were addressed by this Court in *State ex rel. 3M Co. v. Hoke*, 244 W. Va. 299, 852 S.E.2d 799 (2020), where Respondents sought to prohibit the Attorney General from proceeding on a Consumer Credit and Protection Act claim, based upon the expiration of the statute of limitations. In denying the writ and concluding that the statute of limitations defense raised multiple issues of fact, this Court, 244 W. Va. at 304, 852 S.E.2d at 804, gave the following summary of the Attorney General's allegations:

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

Unbeknownst to Petitioners when they were wearing these respirators for protection, Respondents freely acknowledged in their internal documents that their respirators were not suitable for use in coal mines. (*See* Part II(H) of this **BRIEF**). The coal miners who wore these respirators and the coal companies that purchased these devices had no access to this critical information, so the coal companies continued to buy respirators and provided them to their

employees.[1] Despite this knowledge, Respondents continued to market and sell these respirators knowing they were defective.

In the present case and despite the holding in *Hoke*, once again these same respirator manufacturers along with two distributors argue the products liability claims filed against them by seven coal miners are barred by the statute of limitations. As is more fully set forth below, the trial court and the ICA both erroneously applied the incorrect standard for evaluating whether the Petitioners' claims are barred by the statute of limitations.

Because the Petitioners' claims arise from a pure latent injury, the trial court and the ICA should have evaluated whether there are any triable issues regarding when the miners knew or should have reasonably known they suffered an injury, which had become sufficiently pronounced requiring Petitioners to exercise reasonable diligence to discover whether Respondents' respirators had a causal connection to their injury. In Syllabus Point 1 of *Hickman v. Grover*, 178 W.Va. 249, 358 S.E.2d 810 (1987), this Court recognized a particularized discovery rule standard must be applied in products liability cases, including when a product is alleged to have caused a latent injury or disease:

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

Petitioners were able to identify the manufacturers of the respirators they wore in the coal mines, so the focus is on the first and third elements of *Hickman*. As to these two elements, fact issues were raised as to when a Petitioner knew or should have known he had a latent occupational pulmonary disease. Was the diagnosis still being disputed by other doctors? Was the claim denied

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[1] Generally speaking, the respirators at issue are Respondent 3M's 8710 and 8210, Respondent MSA's Dustfoe Series, and Respondent AO's R2090N.

and still being litigated? When did the Petitioner receive black lung benefits? When was a final black lung diagnosis communicated to the Petitioner? Once the Petitioner knew he had such disease, the jury, based upon all of the facts, then must evaluate the reasonableness of the diligence exercised by the Petitioner to determine whether or not his use of Respondents' respirators was a cause of his disease.

Neither the trial court nor the ICA appear to suggest that any of these seven West Virginia coal miners had "actual knowledge" of the three *Hickman* requirements to trigger the statute of limitations to run more than two years prior to the date the complaints were filed. Instead, they found as a matter of law that the trial court's selected "should have known" objective dates are what dooms their cases, but this type of reasonableness inquiry into when the degree of the lung injury became sufficiently pronounced to trigger an assessment of the causal connection between the defect in the respirator and the sufficiently pronounced injury is a fact laden one that courts have long said belongs to juries, not trial judges on summary judgment. The objective "should have known" standard boils down to reasonableness, *see, e.g.*, Syllabus Points 5-6, *Hoke*; Syllabus Points 4-5, *Dunn v. Rockwell*, 225 W.Va. 43, 699 S.E.2d 255 (2009); Syllabus Point 4, *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997), and in a slightly different context, "our prior cases also have concluded that such a determination of reasonableness is a question of fact for the jury." *Travelers Indem. Co. v. U.S. Silica Co.*, 237 W.Va. 540, 547, 788 S.E.2d 286, 293 (2015).

However, in this case, the lower courts applied the standard applicable to injuries arising from a traumatic injury, which do not typically have complicated factual circumstances relating to the knowledge of a progressive injury and its causal connection to a defective product. The traumatic event itself establishes both the injury as well as the causal connection to a defective

product. In contrast, Petitioners in these seven cases established genuine issues of material fact on when they knew or should have known they had a sufficiently pronounced impairment due to black lung disease and whether their black lung disease was causally connected to the defective respirators.

The coal miners who wore these respirators and the coal companies that purchased these devices had no way of knowing these Respondents had internal studies and memos admitting their respirators were not protective in the coal mine environment. Despite this knowledge, Respondents continued to market and sell these respirators knowing they were defective. Through time, many coal miners in West Virginia, Kentucky, and other states developed a variety of latent diseases caused by the inhalation of coal dust. The unsuitability of these respirators and the hidden health hazards they posed to people using them is no longer in doubt. However, from the perspective of the miners developing these pure latent diseases, the question as to whether they should have known the defective respirators had a causal connection to their disease is very much in question given the many individual circumstances surrounding the miners' claims.

The discovery focused on developing facts relevant to when each Petitioner knew or should have known he had suffered a coal dust related pulmonary disease. Once that date was determined, the other critical factual issue is when each Petitioner, through the exercise of reasonable diligence, should have known there was a causal relationship between the latent pulmonary disease and the use of Respondents' respirators. Consistent with this Court's decisions and the evidence developed, Petitioners contend both of these issues are questions of fact for the jury to resolve.

B. Standard of review

First, in cases involving the review of a summary judgment order, all facts and reasonable inferences must be reviewed in the light most favorable to Petitioners. *See, e.g., Bowden v. Monroe*

County Comm'n, 239 W.Va. 214, 218, 800 S.E.2d 252, 256 (2017). At the summary judgment stage, a court's role is not to weigh the evidence or discern the truth, but rather is to determine whether there are genuine issues of material fact. Syllabus Point 3, *Painter v. Peavy,* 192 W. Va. 189, 451 S.E.2d 755 (1994); *see also Goodwin v. Shaffer*, 246 W.Va. 354, 873 S.E.2d 885 (2022) (summary judgment reversed where trial court weighed the evidence and addressed credibility of some witnesses). Although the trial court and the ICA referenced these standards, they failed to apply them correctly and instead resolved disputed material facts, weighed the evidence, and foreclosed a jury from resolving the statute of limitations issue based upon all of the evidence presented.

Second, the Court repeatedly has held that whether a claim is barred by the statute of limitations is a jury issue. Syllabus Point 5, *Dunn v. Rockwell*, 225 W.Va. 43, 689 S.E.2d 255 (2009) ("Only the first step is purely a question of law; **the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.**") (emphasis added). The reversible error committed by the trial court and the ICA in these seven cases was their focus on certain occurrences a jury could consider in concluding these Petitioners acted reasonably and timely filed their claims.

Third, in applying the discovery rule to toll the statute of limitations, the jury has to determine whether the plaintiff who sustained some injury knew or by the exercise of reasonable diligence should have known of the elements of a possible cause action, the identity of the defendant who owed a duty to plaintiff and breached that duty, and that the defendant's conduct caused the injury. Syllabus Point 4, *Gaither v. City Hosp., Inc.*, 199 W.Va. 706, 487 S.E.2d 901 (1997). As applied in products liability litigation, the jury must determine whether a causal relationship exists between the defective product and the plaintiff's injury. Syllabus Point 1,

Hickman v. Grover, 178 W.Va. 249, 358 S.E.2d 810 (1987). The reasonableness of a party's actions and questions of causation always have been left to a jury to decide. Syllabus Point 5, *Hatten v. Mason Realty Co.*, 148 W.Va. 380, 135 S.E.2d 236 (1964).

Fourth, where a defendant fraudulently conceals facts that prevent a plaintiff from discovering or pursuing a cause of action, such fraudulent concealment can be considered by a jury in deciding whether the claim was filed within the statute of limitations. Syllabus Point 5, *Dunn*; Syllabus Point 6, *Hoke*. This equitable rule prevents a defendant from having a lawsuit barred by the statute of limitations where the defendant fraudulently concealed critical facts relevant to the plaintiff's cause of action.

As is more fully set forth below, the trial court and the ICA omitted facts and inferences in the light most favorable to Petitioners and failed to apply the foregoing legal principles consistent with decisions by this Court. The trial court and the ICA also failed to note the conflicting medical information where the doctors not only disagreed about the proper diagnosis (*i.e.*, whether the miner had black lung), but sometimes concluded there was no pulmonary impairment present.

Finally, at the time this **BRIEF** was filed, the Court had not yet issued a decision addressing what standard of review will be applied by this Court to appeals from ICA decisions. Petitioners respectfully submit that the foregoing standard of review this Court applies to an appeal of a summary judgment order issued by a circuit court similarly should be applied to an appeal of an ICA decision affirming the circuit court's decision to grant summary judgment.

The entry of summary judgment is reviewed *de novo*; summary judgment should be granted only when it is clear there is no genuine issue of fact to be tried; the ICA's function is not to weigh the evidence and determine the truth of the matter, but is to determine whether there is a genuine issue for trial; and summary judgment is appropriate where the record taken as a whole could not

lead a rational trier of fact to find for the nonmoving party, such as where the nonmoving party has failed to make a sufficient showing on an essential element of the case that it has the burden to prove. Syllabus Points 1, 2, 3, and 4, *Painter*.

In light of these controlling standards and principles, Petitioners have provided the Court with a detailed review of the relevant facts developed in the record.

C. Procedural History

1. Trial court grants summary judgment in all seven cases

Petitioners' cases were treated jointly for purposes of discovery and summary judgment. (JA 47, 49).[2] Respondents filed separate motions for summary judgment in all seven cases, asserting that Petitioners' claims were barred by the statute of limitations. The issues were fully briefed, and a hearing was held.

From the facts raised in the briefs, there are several different occurrences a properly instructed jury would need to consider in resolving whether each Petitioner filed his complaint within the applicable two year statute of limitations.

Respondents argued below, without any evidence and without publicly "admitting to any defects, that it was common knowledge more than two years before any of the Petitioners filed suit in these cases that there might be a problem with the masks and respirators and there might be a connection between the alleged defects in the masks and respirators and the development of lung diseases from inhalation of coal, rock, and sand dust." (JA 26). However, there is a fundamental factual dispute with both parts of Respondents' assertion: the questions of whether a reasonable

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[2] Citations to the record are to the Joint Appendix (JA) agreed to by the parties. The documents developed before the ICA are cited as "JAICA." Finally, several documents developed during the discovery conducted in the individual respirator cases litigated in recent years in Kentucky, were placed under seal by those courts and are cited as "JAS."

miner should have known that the respirators were defective beforehand **and** that the defective products caused their pure latent diseases are not common knowledge. That is because the miners had no reason to suspect a defect until they learned: a) they had pulmonary disease from coal-mine dust, and b) that disease became sufficiently pronounced to raise a suspicion about a possible defect in the respirators they wore during part of their career.

On September 7, 2022, the trial court, the Honorable Judge Edward K. Kornish presiding, issued a final order ignoring evidence establishing Petitioners timely filed their complaints and instead usurping the role of the jury by holding as a matter of law the statute of limitations barred these claims. Consequently, the trial court granted summary judgment and all seven cases were dismissed. (JA 1). To reach this result, the trial court first selected a date from the many conflicting dates relevant to when each Petitioner knew or should have known he suffered impairment from a latent coal-dust related pulmonary disease. Once this arbitrary date was selected, the trial court simply looked to see if the complaint had been filed within two years from this arbitrary date. In all instances, the trial court held that each Petitioner had filed after the two year statute of limitations had expired.

2. ICA affirms trial court's summary judgment order

Petitioners timely appealed the trial court's final order to the ICA. The ICA entered an order permitting Petitioners to file one joint appeal. (JA 47). On November 8, 2023, the ICA issued a Memorandum Decision affirming the Circuit Court of McDowell County. *Hardy v. 3M Co.*, 2023 WL 7402890 (WVICA 2023). (JAICA 2). Petitioners then timely appealed to this Court.

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

D. Medical overview of pneumoconiosis-related latent diseases

Highly significant background information is pertinent, and indeed central, to this Court's ability to undertake an informed analysis of the material facts in two key regards: a) medical information regarding the latent lung diseases experienced by these by Petitioners, and b) procedural information regarding the state and federal administrative procedures that coal miners follow in order to apply for black lung benefits.

Pneumoconiosis is a latent fibrotic disease of the lungs that can first develop years after a worker is no longer exposed to the hazards of respirable dust – and which may or may not progress to an advanced, totally-disabling disease that is known as Pulmonary Massive Fibrosis ("PMF"). Simply because a coal miner develops pulmonary impairment does not mean the miner suffers from or will in the future suffer from clinically-diagnosable pneumoconiosis, and it certainly does not mean he or she will develop PMF. Pulmonary impairment arises from many natural factors and exposures such as asthma or environmental exposure. Indeed, toxic exposures from avian excrement may cause histoplasmosis that closely mimics the effects of Coal Workers' Pneumoconiosis ("CWP"), and workers often consult with physicians and litigate for many, many years before determining whether or not they suffer from CWP, PMF, histoplasmosis, sarcoidosis, and/or some other non-occupationally-correlated pulmonary ailment.

There is nothing inevitable or linear about the progression of pneumoconiosis from simple to advanced, which are two medically distinct diseases. First, there is simple pneumoconiosis, and second, there is the advanced disease known as complicated pneumoconiosis or PMF, which may be present for years without causing functional impairment.

Determining the existence and etiology of PMF requires a complex analysis of a patient's medical, radiological, and occupational histories:

> PMF is defined radiographically by the formation of large (diameter ≥ one cm) opacities. … Extensive fibrosis, emphysema formation, and cavitation and destruction of lung parenchyma including blood vessels and bronchioles can result in significant impairment of pulmonary function. On chest radiography, PMF may be confused with carcinoma, tuberculosis, or abnormalities caused by bacterial infections (Castranova & Vallyathan, 2000). Important risk factors for developing PMF include high levels of cumulative respirable coal mine dust or respirable crystalline silica inhalation, the presence of small opacity disease, and history of tuberculosis (Attfield et al., 2022; Ng & Chan, 1991).
>
> …
>
> PMF is most often caused by CWP and silicosis … However, a small number of cases of PMF have been also described in pulmonary talcosis (Gibbs et al., 1992) and kaolin pneumoconiosis (Edenfield, 1960). Also, large conglomerate masses resembling PMF can occur in sarcoidosis (Criado, et al., 2010).

David N. Weissman, M.D., *Progressive Massive Fibrosis: An Overview of the Recent Literature* (Pharmacol Ther. Dec. 2022). A complex social and environmental exposure history is required before a radiologist can diagnose PMF due to underlying CWP.

Petitioners' expert pulmonologist, Dr. Leonard Go, M.D. of the University of Illinois, further explained in Petitioner Hardy's report: "Coal mine dust lung disease is a spectrum of lung disease that includes not only coal workers' pneumoconiosis, mixed-dust pneumoconiosis, and silicosis, but also obstructive lung disease such as chronic obstructive pulmonary disease, as well as pulmonary fibrosis known as dust-related diffuse fibrosis." (JAS 73). PMF is a distinct disease process that involves progression of large opacities. PMF is generally defined as a chronic dust disease of the lung which, when diagnosed by chest X-ray yields one or more large opacities (greater than one centimeter in diameter) and would be classified in Category A, B, or C in accordance with the classification system established in Guidelines for the Use of the ILO International Classification of Radiographs of Pneumoconioses. *See* 20 C.F.R. §718.304.

The United States Supreme Court and the Fourth Circuit Court of Appeals have long recognized that PMF is a distinct disease process as a medical and legal matter in cases involving

black lung disease. "This leads us to the Supreme Court's description of the two types of pneumoconiosis, which, of course, we follow: 'pneumoconiosis ... is generally regarded by physicians as seldom productive of significant respiratory impairment" whereas "[c]omplicated pneumoconiosis is generally far more serious, involves progressive massive fibrosis [and] usually produces significant pulmonary impairment and marked respiratory disability, [which] may induce death by cardiac failure, and may contribute to other causes of death.' *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7, 96 S. Ct. 2882, 49 L.Ed.2d 752 (1972) (citing Surgeon General's report)." *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 361 (4th Cir. 2006).

This Court has likewise recognized the "progressive nature of the disease" in analyzing how to toll the running of statutes of limitations for coal workers' pneumoconiosis. In the context of state workers' compensation claims, the Court has found the statute of limitations for claims based on occupational pneumoconiosis ("OP") begins to run **"when a diagnosed impairment due to OP was made known to the claimant by a physician."** (Emphasis added). *Pennington v. W. Va. Office of the Ins. Comm'r*, 241 W.Va. 180, 182, 820 S.E.2d 626, 628 (2018). Whether the statute of limitations has expired is a fact intensive analysis. In this appeal, Petitioners have provided this Court with the relevant facts–specific to each Petitioner--upon which a jury could conclude their claims were timely filed.

Finally, simply because one physician concludes that a miner has black lung is not the end of the medical analysis. During the administrative process, these x-rays and CT scans are reviewed by multiple medical experts, who often reach different conclusions. It is not until the administrative process concludes that the miner knows whether or not he has a latent pulmonary disease related to the inhalation of coal and other dust, and the extent, if any, to which disease is the cause of any physical impairment.

The diagnosis of any level of pneumoconiosis is a complex medical determination where often there are disagreements between the various health care providers who analyze the relevant records. This fact pattern is repeated in virtually all of the administrative claims filed by Petitioners. For example, Dr. Go explained in his report issued after reviewing the medical records of Petitioner Cruey that at the time of the report, Petitioner Cruey presently suffers from advanced, totally disabling pneumoconiosis. However, Dr. Go noted that before Petitioner Cruey was awarded federal black lung benefits in September 2020, the most recent x-rays reviewed were found to be **totally negative** for pneumoconiosis by all four of the experts who reviewed them. (JAS 88-90).

Petitioners respectfully submit that one of the most significant errors committed by the trial court and the ICA is the assumption that the mere filing of an application for federal black lung benefits by a coal miner triggers, as a matter of law, such coal miner's obligation to exercise reasonable diligence to discern whether some product defect contributed to his condition. This conclusion is asserted regardless of whether the miner has any impairment at all and prior to the miner having a sufficiently pronounced latent injury triggering this obligation to exercise reasonable diligence. Due to the nature of coal mining, coal miners apply for black lung benefits all the time and those claims are denied because the miner does not have black lung at all, or it is causing only minimal harm, as evidenced by some of Petitioners involved in this appeal.

In *Kirkwood v. John Darnell Coal Co.*, 602 S.W.2d 170, 171 (Ky. 1980), the Kentucky Supreme Court made the following practical observation about the reasons a coal miner may file for federal black lung benefits:

> A reading of the appropriate federal black lung statutes reveals that **the presence of pneumoconiosis is not necessary to successfully pursue a federal black lung claim because of various presumptions contained in the statute.** Functional disability is one means by which a claimant can be awarded federal

> black lung benefits even though there is no x-ray evidence of pneumoconiosis. **Many coal miners apply for federal black lung benefits because they have a great number of years in the mines and think that they are automatically entitled to these benefits, or simply because their friends and neighbors sign up.** (Emphasis added).

When a coal miner thinks he or she may have symptoms relating to black lung, it makes sense to apply for black lung benefits because through that process, medical testing is conducted to determine whether the miner: a) does have pulmonary impairment, as opposed to generalized breathing trouble which may be due to obesity or to physiological deconditioning from age or other infirmities, and b) to what extent, if any, black lung is a contributing cause of such impairment. Simply filing a claim is no evidence the coal miner actually has PMF or any specific sufficiently pronounced latent pulmonary disease, or that he or she has suffered any actual impairment or harm from that disease. To hold otherwise demonstrates a misunderstanding of this administrative process, which often takes years before a final medical conclusion is reached. Ultimately, a coal miner cannot know he or she has a sufficiently pronounced remediable injury from a latent disease related to exposure to coal dust unless and until the disease is confirmed by physicians and that opinion is made known to the miner.

E. Procedural overview of state and federal black lung benefits---two very different systems with different medical predicates to file an application

In the State of West Virginia's workers' compensation system, a coal miner may be awarded black lung benefits based upon the miner's degree of permanent partial pulmonary functional impairment, i.e., how much air can the miner exhale in one second relative to the amount predicted for a person of the miner's age and height, or how much CO2 the miner can exhale for every unit of oxygen that the miner inhales. In order to file a claim, a miner must submit a report of injury, indicating impairment due to an occupational exposure to respirable dust. Under the state system, the employee must file a report of injury, W.Va.Code §23-4-1a, and the employer must also file a

report of injury, W.Va.Code §23-4-1b. Presently, black lung benefits are awarded for 10%, 15%, and on up incrementally to totally disabling impairment. "Benefits [from West Virginia workers' compensation], however, cannot be awarded on a diagnosis of OP alone. An impairment is also required." *Pennington*, 241 W.Va. at 186, 820 S.E.2d at 632.

In the federal system, unlike the state workers' compensation system, a **miner is not required to offer any evidence of impairment when submitting a black lung application**. 20 C.F.R. §§725.304, 305 ("The filing of a statement signed by an individual indicating an intention to claim benefits shall be considered to be the filing of a claim for the purposes of this part."). Unlike the state system, the employer is not required to file a report of injury. Claimants typically complete only some basic forms describing their own subjective assessment of their breathing ability and their employment history. After the form is processed, the Department of Labor is required by law to provide every coal miner applicant with a free medical examination, which includes a physical examination by a physician, a chest X-ray, a pulmonary function test and an arterial blood gas test (unless medically contraindicated), which measures the coal miner's ability to breathe. *See* 20 C.F.R. §§718.101(a), 104; 20 C.F.R. §725.406. The claims examiner's conclusion regarding whether the miner suffers impairment due to black lung is not conveyed to the miner until months following the examination when the Department of Labor issues a "Schedule for the Submission of Additional Evidence" that provides the miner with a summary and analysis of the pulmonary evaluation. *See* 20 C.F.R. §725.410.

Federal benefits are predicated on a showing of total disability or death due to pneumoconiosis. 30 U.S.C. §§932(c), 922(a) (persons entitled to benefits are those with total disability due to pneumoconiosis, or whose death was due to pneumoconiosis, and their dependents); 20 C.F.R. §718.3(a). There are two ways for a living miner to qualify for federal

black lung benefits. First, the medical evidence may prove the miner has a totally-disabling impairment of pulmonary function using objective medical testing or medical opinion evidence. 20 C.F.R. §718.204. In federal black lung claims, the occupational cause of such impairment is often established not by the presence of pneumoconiosis, as recognized in *Kirkwood*, but rather by statutory presumption, as in the case of Petitioner Cruey. 20 C.F.R. §718.305. Second, a coal miner can qualify by proving that the miner has large opacities of pneumoconiosis, a condition that is also known as PMF or "complicated pneumoconiosis." 20 C.F.R. §718.304. Once a miner submits a federal black lung application, the U.S. Department of Labor provides medical testing to determine: a) whether the mine has CWP at all, b) what degree of disability the disease may be causing, if any. 20 C.F.R. §718.101(a) ("The Office of Workers' Compensation Programs … must develop the medical evidence necessary to determine each claimant's entitlement to benefits.")

Merely because a coal miner applies either for State or federal black lung benefits simply does not mean the miner actually has black lung---only that they suspect that they might and they want to be examined to explore that possibility. And even if they do have it, the miners do not know the extent to which the black lung is causing or contributing to their pulmonary impairment, if at all, until often many years of medical examinations, investigations, and administrative proceedings.

F. Relevant facts for each Petitioner

The following section affords an overview of the material facts pertinent to the work history, mask usage, and medical conditions of each Petitioner. Because Petitioners filed separate products liability actions, the ICA was required to apply the discovery rule applicable in products liability actions first outlined by this Court in *Hickman*.

In *Hickman*, 178 W.Va. at 252-53, 358 S.E.2d at 813-14, the Court was concerned that a discovery rule for products liability actions had to be adopted, particularly where the plaintiff suffers from a latent disease:

> In a progressive or creeping disease or injury, many plaintiffs will often not realize that they were actually injured. *See, e.g., Louisville Trust Co. v. Johns-Manville Products Corp.,* 580 S.W.2d 497 (Ky.1979) (asbestos). Other plaintiffs will realize they are injured, but have no reason to connect the product with the injury. *See e.g., Mack v. A.H. Robins Co.,* 573 F.Supp. 149 (D.Ariz.1983) (Dalkon Shield). In both instances, **it would be a miscarriage of justice to hold that the plaintiff's claim was barred by the statute of limitations.** (Emphasis added).

Petitioners respectfully submit the ICA's decision ignored the concerns expressed by this Court in *Hickman* and resulted in a miscarriage of justice that can be remedied in this appeal. Under *Hickman*, the jury first must determine the date the plaintiff knew or had reason to know that he was injured. Where there is a traumatic injury, identifying the date of injury is simple. However, where a latent disease is at issue, identifying the precise date when the plaintiff knew or should have known he or she suffered from a latent disease is more complex. In its decision, the ICA identified multiple dates for each Petitioner regarding when each coal miner knew or should have known that he was suffering from a latent pulmonary disease. After noting all of these possible conflicting dates, the ICA affirmed the trial court's decisions selecting a date allegedly representing when each Petitioner knew or should have known he had a latent pulmonary disease and then the ICA declared that all of these Petitioners failed to file their products liability actions within two years from that date.

The ICA's decision is contrary to *Hickman* and several other decisions issued by this Court in three respects. First, the multiple conflicting dates identified by the ICA relating to each Petitioner's date of injury are relevant to the jury in deciding the first element of the *Hickman* products liability discovery rule. Because these cases involve Petitioners contracting pure latent

diseases rather than suffering from a traumatic physical injury, the dates for the various conflicting medical opinions and administrative rulings are relevant. Numerous disputed issues of fact were presented for the jury to decide as to the date each Petitioner knew or should have known his pure latent disease had become sufficiently pronounced to place him on notice of a potential respirator defect.

Second, because this Court's statute of limitations case law requires a detailed factual analysis unique to each Petitioner, it is important to understand that simply because a doctor issues a report on a particular date on it does not mean that the specific Petitioner whose test results were examined learned of that fact on that date. Thus, whether or not each Petitioner was made aware of a report, letter, or order identified in this factual discussion is relevant for the jury to consider.

Third, the ICA fails to discuss what information may have been available to a reasonably diligent coal miner to establish a causal connection between the sufficiently pronounced latent disease and the use of Respondents' respirators. Instead of analyzing this critical element of the *Hickman* discovery rule, the ICA merely picked a date of injury and then concluded each Petitioners' products liability claim had to be filed within two years from that date. The complete absence of the ICA addressing or applying this reasonable diligence requirement is fatal to the decision affirming the dismissal of these seven cases. cases.

1. Petitioner Ronald Hardy

Petitioner Ronald Hardy worked as a coal miner during the period from 1968 through 1994. (JA 169-70, 242, 251-52). He wore respirators manufactured by Respondent 3M but did not wear those respirators 100% of the time he worked around coal dust. He wore 3M respirators most generally about 30-40% of the time he worked at various mining operations, typically during the periods of greatest risk of dust exposure. (JA 212, 243-48, 250).

The ICA acknowledged Petitioner Hardy had "**received conflicting medical reports** regarding whether or not he suffered from PMF before the United States Office of Workers' Compensation Programs ("OWCP"), which initially resolved the conflicting factual records, and concluded that Mr. Hardy suffered from PMF." 2023 WL 7402890 at *2 (emphasis added). The OWCP's proposed decision resolving the medical question whether Petitioner Hardy suffere from black lung at all initially was conveyed to him in October-November, 2019, less than two years before Petitioner Hardy filed his respirator lawsuit. (JA 176). Despite these conflicting medical opinions, the ICA agreed with the trial court and concluded, as a matter of law, that Petitioner Hardy knew or should have known he suffered from a pulmonary disease either by **June 4, 2018**, when he applied for federal black lung benefits, or by **July 31, 2018**, when Dr. Forehand diagnosed Petitioner Hardy with black lung. *Id.*

Petitioner Hardy explained the first time he learned that he may have a possible cause of action against Respondents was when he met with counsel, who explained he may have products liability action based on the 3M respirators he wore while in the mines. (JA 177.) He became sure of the connection between breathing coal dust and black lung when he received his first black lung check in the Fall of 2019. He was surprised he had black lung because he thought he was in good shape. (JA 174-75.). "I thought that the respirators had protected me. That was a surprise when I found out I had black lung." (JA 177.)

In the depositions, counsel for Respondents, whose goal was to create a record that would result in Respondents being relieved of their responsibility for the massive damages caused by their defective respirators, attempted to get each Petitioner to jump to the conclusion that because he had a latent disease, the respirators obviously must have been one of the causes. Here is an exchange with Petitioner Hardy:

Q. Okay. Did you think to blame the respirators at that time?
A. No. I didn't know nothing about the respirators at that time.

(JA 177.)

Even after he received an initial diagnosis of black lung in **October-November, 2019,** (less than two years before filing this lawsuit), which was later disputed by multiple experts, Petitioner Hardy was not aware of any causal connection between his black lung diagnosis and wearing respirators and no physician had ever advised him of such a connection:

Had you not thought about bringing a lawsuit for the masks that you wore?
A. No.
Q. And why not?
A. I didn't know that the masks was -- that that dust and stuff could do that. I thought it protected you.
Q. Well, if Dr. Forehand is telling you that you were sick, did you not think that maybe the mask didn't protect you?
A. Well, I didn't know what it was, sir. They hadn't awarded me nothing yet.
Q. Okay.
A. After I got awarded.
Q. And you didn't ask any doctors whether or not those respirators may have worked?
A. No.

(JA 177.)

Until he met with counsel after learning he did have black lung, Petitioner Hardy had never heard of any lawsuits being filed against Respondents under a theory that their respirators were defective. (JA 178.) On **August 18, 2021**, Petitioner Hardy filed his complaint in the Circuit Court of McDowell County, which initiated the underlying action. (JA 56.)

While the following facts are referenced in its decision, the ICA did not discuss how the contradictory evidence developed might be weighed by a jury to determine whether or not Petitioner Hardy timely filed his complaint. 2023 WL 7402890 at *2. On **June 4, 2018**, Petitioner Hardy applied for federal black lung benefits. Although Petitioner Hardy did receive a diagnosis of black lung from Dr. Forehand on or about **July 31, 2018**, Dr. Forehand did not verbally convey

that diagnosis to Petitioner Hardy on that date, and he did not convey that Petitioner Hardy suffered pulmonary impairment due to black lung. On the other hand, Dr. Gregory Fino issued a report dated **December 12, 2018**, finding the x-ray to be **negative** for black lung. Similarly, the **April 26, 2019,** report from Dr. Robert Tarver, who authored a B-reading, read Petitioner Hardy's x-ray as **negative** for black lung. Despite these negative medical reports, on **October 15, 2019**, Petitioner Hardy began receiving black lung benefits. However, in a report dated **March 10, 2020**, Dr. Kim Adcock authored a B-reading of an x-ray and read it as **negative** for any black lung. -On May 10, 2022, the federal black lung benefits case was heard by an ALJ. It was not until **September 29, 2022**, that the ALJ awarded Petitioner Hardy black lung benefits. No appeal was taken, and the decision became final thirty days later.

Petitioner Hardy testified in his deposition he developed lung problems while working at Island Creek Coal from 1995 to 2001. As noted, Petitioner Hardy received conflicting medical reports regarding whether or not he suffered from PMF before the United States Office of Workers' Compensation Programs. Following the three negative B-readings, Petitioner Hardy was unsure as to whether he had black lung or PMF. However, the Department of Labor then began sending him monthly benefits and his black lung medical benefits card. Petitioner Hardy first received federal black lung benefits on or about **October 15, 2019**.

On **July 2, 2021**, Petitioner Hardy met with counsel regarding a potential products liability action based on the 3M respirators he wore while in the mines. On **August 18, 2021**, Petitioner Hardy filed a complaint in the Circuit Court of McDowell County, which initiated the underlying action. Petitioner Hardy brought claims for tort liability, negligence and fraud.

The trial court concluded and the ICA affirmed that by **June 4, 2018**, when Petitioner Hardy applied for federal black lung benefits and **July 31, 2018**, when Dr. Forehand diagnosed

him with black lung, Petitioner Hardy should have known of the possibility of a claim against Respondents, more than two years before he filed his complaint in August 2021. The trial court found that at the latest the statute of limitations began to run on **July 31, 2018**, when Dr. Foreman diagnosed Petitioner Hardy with lung problems.

From the coal miner's perspective, when multiple doctors review x-rays and conclude the miner does not have black lung, despite an earlier diagnosis from a different physician, what is the coal miner supposed to think? Do I have black lung? What does it mean when a physician reads an x-ray and concludes it is negative for black lung? In his deposition, Petitioner Cruey explained what he thought when he learned that other experts concluded he did not have black lung: **"so I assumed that means you ain't got it."** (JA 2556 (emphasis added).) This factual conflict and the inferences that flow therefrom are relevant both to when Petitioner Hardy actually knew or should have known he had a sufficiently pronounced latent pulmonary disease and whether he exercised reasonable diligence in determining whether there was a causal connection between the disease and the use of Respondents' respirators.

Additionally, the ICA noted that on **July 2, 2021**, Petitioner Hardy met with counsel regarding a potential products liability action. From this record, this was the first time Petitioner Hardy had any actual knowledge that Respondents' defective respirators contributed to his disease. On **August 18, 2021**, Petitioner Hardy filed his complaint.

A reasonable juror could have concluded the critical date when Petitioner Hardy should have known he had a latent pulmonary disease either was **July 2, 2021**, the date he met with counsel who advised him of his possible claim, or **September 29, 2022**, the date the ALJ awarded him federal black lung benefits, thereby concluding Petitioner Hardy exercised reasonable diligence and filed his complaint within the statute of limitations. Notably, had the trial court

correctly applied the applicable standards for summary judgment in Petitioner Hardy's case, Respondents still would have the opportunity to persuade the jury that the statute of limitations expired based upon some of the earlier events identified.

Material facts omitted from ICA decision.

The ICA's decision does not mention that Petitioner Hardy wore 3M respirators most generally about 30-40% of the time he worked at various mining operations, typically during the periods of greatest risk of dust exposure. (JA 212, 243-48, 250.) This fact is significant because a reasonable inference from this evidence is that Petitioner Hardy could have discerned that he contracted his 5-10% State impairment rating from the times he worked in the mine without wearing a respirator.

As found by the ICA, at the time of the summary judgment briefing, whether or not Petitioner Hardy would receive federal black lung benefits was still being litigated. Thus, the question as to whether or not Petitioner Hardy would be awarded benefits was still unresolved.

As a result of the numerous radiologists opining that he did not have black lung disease at all, Petitioner Hardy was, quite reasonably, unsure whether he had black lung or PMF until the Department of Labor actually provided him with black lung benefits. Petitioner Hardy testified as to when he knew he had black lung:

> Q. You first learned you had black lung from Dr. Forehand?
> A. He told me that I had all of the qualifications for it.
> Q. Okay.
> A. And then all of that information [conflicting opinions] was sent in and they awarded me the black lung.
> Q. Okay.
> A. I got the medical card and a check in November -- or October of 2019.
> Q. Okay.
> A. **I knew then I had it**. (Emphasis added). (JA 176).

The ICA did not acknowledge or apparently consider Petitioner Hardy's testimony of when he actually knew he had developed black lung or the fact that he learned of it in October-November, 2019, less than two years before he sued these Respondents. The ICA decision ignores all of the contrary medical evidence developed where the question as to whether Petitioner Hardy actually sustained a pulmonary disease was disputed by his employer. A jury could conclude that once a coal miner knows for sure that he or she has black lung, the reasonableness of the diligence required to determine any causal connection is much greater than when the miner applies for or merely suspects he may have black lung. Thus, the reasonableness of Petitioner Hardy's efforts to discover whether or not there was some causal connection between his use of the respirators and his sufficiently pronounced latent injury involves the evaluation of many facts.

2. Petitioner Ralph Manuel

Petitioner Ralph Manuel worked as a coal miner from about 1981 to January 19, 2021. (JA 862.) He wore respirators manufactured by Respondents to protect himself about 50% of the time. (JA 851-52, 1047). Petitioner Manuel wore respirators when he worked in various coal mines to protect himself from coal dust. (JA 851.) He wore a respirator depending on the conditions or what he was doing but did not wear a respirator all of the time. (JA 851). When he first worked as a coal miner, he did not know what black lung was or what caused it. However, after working for several years, he came to understand that black lung was caused by inhaling coal dust. (JA 853.) In 2000, Petitioner Manuel was diagnosed by the West Virginia Occupational Pneumoconiosis Board with a 5% diagnosis of occupational pneumoconiosis with no lung impairment. (JA 853-54, 978.) When he was diagnosed with silicosis, his doctor never explained to him how he contracted this disease and his doctor never commented on any connection between him wearing a respirator and contracting silicosis. (JA 862). In 2009, the West Virginia Occupational Pneumoconiosis

Board notified Petitioner Manuel that he had a 5% diagnosis of occupational pneumoconiosis with no lung impairment. (JA 855).

Petitioner Manuel wore a respirator to protect himself from coal dust and black lung. (JA 851). He thought the respirators were protecting him from inhaling dust. (JA 1047). Wearing a respirator was not mandatory, but it was a matter of personal choice. (JA 852).

Petitioner Manuel was examined by Dr. Forehand on **July 10, 2018**. While he recalls Dr. Forehand telling him that his lungs were bad, he does not recall Dr. Forehand explaining that he had CWP. (JA 865,1052-53.) In **October 2020**, Petitioner Manuel first learned he suffered from complicated black lung. (JA 1051.) In an order dated **October 5, 2020**, the Administrative Law Judge noted the employer had withdrawn its request for a hearing and remanded the matter for a pay order. (JA 1115.)

In 2003, the West Virginia Legislature abolished the 5% award as a remedy in worker's compensation, because it had been based on a finding of pneumoconiosis with no measurable impairment. *See* W. Va. Code § 23-4-6A (2005). However, for many years prior to 2003, 5% awards were issued to miners who had x-ray evidence of black lung without any impairment from the retention of dust in their lungs. Petitioner Manuel continued to work in the coal mines without receiving any accommodation.

While the following facts are referenced in its decision, the ICA did not discuss how the contradictory evidence developed impacts whether or not Petitioner Manuel timely filed his complaint. 2023 WL 7402890, at *3. Although Petitioner Manuel applied for federal black lung benefits on **July 10, 2018**, it was not until **October 2020** that he learned he suffered from PMF or any impairment due to black lung. On **May 21, 2021**, Petitioner Manuel met with counsel and learned that he had a possible products liability claim against Respondents based upon their

defective respirators. This was the first time Petitioner Manuel had any knowledge that Respondents' defective respirators could have a causal connection to his disease. On **August 19, 2021**, Petitioner Manuel filed his complaint.

A reasonable juror could have concluded the critical date when Petitioner Manuel should have known he had a dust-related latent pulmonary disease either was **October 2020**, when he learned he had PMF and his employer had withdrawn its request for a hearing or **May 21, 2021**, the date he met with counsel who advised him of his possible claim, thereby finding Petitioner Manuel exercised reasonable diligence and filed his complaint within the statute of limitations. Notably, had the trial court correctly applied the applicable standards for summary judgment in Petitioner Manuel's case, Respondents still would have the opportunity to persuade the jury that the statute of limitations expired based upon some of the earlier events identified.

Material facts given no weight in the ICA decision

Petitioner Manuel wore respirators manufactured by Respondents but did not wear those respirators 100% of the time he worked around coal mine dust. Petitioner Manuel testified that when he was diagnosed with silicosis, he did not question the use of the respirators because that was all they had. (JA 854.) When he received the silicosis diagnosis, he explained to his physician that he wore a respirator, but his physician did not advise him about whether or not the respirators worked. (JA 862.)

Petitioner Manuel did not expect to contract a totally disabling lung disease such as PMF. Yet, in 2020, Petitioner Manuel was diagnosed with PMF:

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

A. That might have been what, in October '20.
Q. Of 2020?
A. 2020, I believe.

(JA 1050.) Petitioner Manuel testified he did not recall being notified earlier than October 2020 that he had PMF. (JA 865.) ("All I can say is he said my lungs was bad. If he said all those words [*i.e.* PMF or complicated black lung], I probably didn't know what he was talking about no way, if he did."). Shortly following **October 5, 2020**, Petitioner Manuel first determined he had PMF after the factual dispute was resolved as to the cause and nature of his lung disease, and his last coal mine employer agreed he did have PMF. (JA 1054.) Thus, the factual question as to whether Mr. Manuel suffered from PMF was not resolved until **October 5, 2020**.

The ICA did not acknowledge or apparently consider Petitioner Manuel's testimony as to when he first learned he had complicated pneumoconiosis or whether he understood that his respirator was expected to protect him from developing such advanced black lung.

Under these disputed facts, a jury could conclude that once a coal miner understands that he or she has an advanced or pronounced case of black lung, what is required by way of reasonable diligence to determine any causal connection is much greater than when the miner merely applies for or thinks he may have black lung. Thus, the reasonableness of Petitioner Manuel's efforts to discover whether or not there was some causal connection between his use of the respirators and his sufficiently pronounced latent injury involves the evaluation of many facts best left for jury resolution.

3. Petitioner Edgel Dudleson

Petitioner Edgel Dudleson worked as a coal miner for at least nineteen years between 1976 and 1999. (JA 1498.) He wore a respirator because he thought it would protect him from inhaling harmful dust. (JA 1613.) According to Petitioner Dudleson, he wore respirators designed by

Respondents MSA and AO about 60-70% of the time he worked around coal mine dust at various mining operations from the 1970's through 1990's. (JA 1713-15, 1718-19). In 1996, he filed a state workers' compensation claim, but it was subsequently denied. In 2000, he received a 5% permanent partial disability award through workers' compensation based on occupational pneumoconiosis with zero impairment, and he continued to work in the coal mines without any accommodation. The following year his award was modified to 10%. (JA 1604, 1645.) He withdrew his initial federal black lung claim because at that time, he was told he did not have black lung. (JA 1492.)

When he began as a coal miner, Petitioner Dudleson recalls being involved in a course explaining that respirators would protect miners from inhaling coal dust. (JA 1480.) He wore a respirator to protect him from inhaling coal dust, (JA 1482), noting, "It sucks to watch somebody die of black lung." (JA 1490.)

In 2018, around when he filed his second federal black lung claim, he recalls receiving a telephone call from a nonmedical clinic staffer telling him that the CT scans and x-rays showed he might have black lung. (JA 1477-78). At that time, it did not occur to him that there may be a connection between using respirators and contracting a pulmonary disease quite logically because he had not yet learned whether he had black lung or any pulmonary impairment due to black lung. (JA 1481.)

The November 30, 2018, CT scan report found certain opacities likely from complicated pneumoconiosis. (JA 1505.) A CT scan report dated June 14, 2019, suggested that Petitioner Dudleson might have complicated coal workers pneumoconiosis. (JA 1657.) On **March 27, 2019**, the OWCP **denied** Mr. Dudleson's application, finding that he had not met the grounds for eligibility – *i.e.*, he did not suffer from PMF or totally-disabling pneumoconiosis. In a letter dated

March 19, 2020, counsel for Petitioner Dudleson asked the Claims Examiner to reconsider his decision based upon a misreading of the medical evidence. (JA 1659). On **June 10, 2020**, the Claims Examiner issued a new order modifying his earlier order and agreeing that Petitioner Dudleson suffers from complicated pneumoconiosis. (JA 1870).

The ICA acknowledged that Petitioner Dudleson had "received **conflicting reports as to whether he suffered from PMF** before the OWCP resolved the conflicting factual records by concluding that Mr. Dudleson did suffer from PMF." 2023 WL 7402890, at *3 (emphasis added). While the following facts are referenced in its decision, the ICA did not discuss how the contradictory evidence impacts whether or not Petitioner Dudleson timely filed his complaint. 2023 WL 7402890, at *3, *4.

While the trial court and the ICA focused on the date Petitioner Dudleson applied for federal black lung benefits, they both ignored the fact that on **March 27, 2019**, the OWCP denied Mr. Dudleson's application, finding no progressive impairment from black lung. On **June 10, 2020**, the OWCP reversed its prior decision and concluded that Petitioner Dudleson did suffer from PMF. On **August 15, 2020**, he received his first black lung benefits.

However, on **March 1, 2022**, medical experts continued to disagree over whether Petitioner Dudleson suffered from complicated pneumoconiosis. Robert Cohen, M.D., reviewed images taken from a CT scan on June 14, 2019, as well as his prior report of July 26, 2019, regarding the same images; he also reviewed the reports of Danielle Seaman, M.D., regarding CT scans dated November 30, 2018, and June 4, 2019. Dr. Cohen disagreed with Dr. Seaman's lack of finding of large opacities and reaffirmed his prior opinion that Mr. Dudleson's CT scan indicated the presence of complicated pneumoconiosis or PMF. On **June 23, 2022**, Dr. Leonard Go stated "I believe to a reasonable degree of medical certainty that Mr. Dudleson's years of exposure to

coal mine dust led to the development of `clinical pneumoconiosis, specifically simple and complicated coal workers' pneumoconiosis."

On **July 2, 2021**, Petitioner Dudleson met with counsel and learned that Respondents' respirators were defective and that he had a claim. From this record, this was the first time Petitioner Dudleson had any actual knowledge that Respondents' defective respirators contributed to his disease. On **August 19, 2021**, Petitioner Dudleson filed his complaint.

A reasonable juror could have concluded that a critical date when Petitioner Dudleson should have known he had a dust-related latent pulmonary disease either was **June 10, 2020**, the date the OWCP reversed its prior decision and concluded that Petitioner Dudleson did suffer from PMF, or **July 2, 2021**, the date he met with counsel who advised him of his possible claim, thereby concluding Petitioner Dudleson exercised reasonable diligence and filed his complaint within the statute of limitations. Notably, had the trial court applied the correct standard at summary judgment, Respondents still would have the opportunity to persuade the jury that the statute of limitations expired based upon some of the earlier events identified.

Material facts given no weight in the ICA decision

The ICA found that Petitioner Dudleson was "diagnosed with complicated pneumoconiosis" on **June 14, 2019**. However, the record below did not demonstrate that at all. The record demonstrated that on **July 26, 2019**, Dr. Robert Cohen initially read the June 14, 2019, CT as positive for Category A. Dr. Cohen's reading was not conveyed to Petitioner Dudleson until the Department of Labor made a decision on his claim. The Department of Labor did not reach a conclusion that the preponderance of evidence established that the miner had PMF until **June 10, 2020**. Even assuming Dr. Cohen's July 26, 2019, reading put Petitioner Dudleson on notice,

because the reading was not communicated to him until he received his award, he therefore filed his claim within two years of learning of Dr. Cohen's diagnosis.

Additionally, Petitioner Dudleson testified he wore his AO and MSA respirators combined about 60-70% of the time he worked around coal mine dust at various mining operations. (JA 1715.) This fact is significant because a reasonable juror could have inferred Petitioner Dudleson discerned he contracted black lung from the times he worked in the mine without wearing a respirator.

The ICA decision ignores all of the contrary medical evidence developed where the question as to whether Petitioner Dudleson actually sustained a dust-related pulmonary disease was disputed by his employer. A jury could conclude that once a coal miner knows for sure that he or she has black lung, the reasonableness of the diligence required to determine any causal connection is much greater than when the miner applies for or merely suspects he has black lung. Thus, the reasonableness of Petitioner Dudleson's efforts to discover whether or not there was some causal connection between his use of the respirators and his medical diagnosis involves the evaluation of many facts best left for jury resolution.

4. Petitioner Ricky Miller

Petitioner Ricky Miller worked as a coal miner from 1970 through 1982. (JA 2084.) When he started as a red hat, Petitioner Miller wore a respirator for most of the time, except when he ate lunch. (JA 2086-87, 2164). He recalls one time when his respirator had some dust on the inside during just one shift. (JA 2093.) He expected the respirators would prevent coal dust from getting into his lungs, (JA 2096), explaining he thought that wearing the respirator was better than having no protection at all. (JA 2091.)

Petitioner Miller recalls receiving an award for 20% impairment in December 2013, for pneumoconiosis. (JA 2084, 99, 2103). In an order entered May 5, 2017, his award was increased to 25%. (JA 2118). However, despite these increasing awards, **September 14, 2019,** is the first date he was diagnosed with black lung. (JA 2161).

Petitioner Miller did not recall discussing with any of his physicians about how he contracted black lung when he wore respirators. (JA 2094.) When he first was diagnosed with black lung, he never investigated whether or not the respirators somehow were a cause because he relied upon his employer to make sure they were effective. (JA 2094.) When he started having more frequent coughing, Petitioner Miller decided to check on whether he should file a lawsuit over the respirators. Somewhere along the way, a couple of years before his June 2022 deposition, he heard something about lawsuits being filed involving these respirators. (JA 2097.)

While the following facts are referenced in its decision, the ICA did not discuss how the contradictory evidence developed impacts whether or not Petitioner Miller timely filed his complaint. 2023 WL 7402890, at *4. After hearing about some lawsuits being filed against these Respondents based upon their defective respirators, Petitioner Miller on **July 9, 2021**, met with counsel to discuss whether he had a valid claim. This was the first time contained in the record Petitioner Miller had any specific actual knowledge that Respondents' defective respirators contributed to his disease. On **August 19, 2021**, Petitioner Miller filed his complaint.

A reasonable juror could have the critical date when Petitioner Miller should have known he had a latent pulmonary disease either was **September 14, 2019**, the date he was diagnosed with black lung, or **July 9, 2021**, the date he met with counsel who advised him of his possible claim, thereby concluding Petitioner Miller exercised reasonable diligence and filed his complaint within the statute of limitations. Notably, if the trial court had applied the correct summary judgment

standard, Respondents still would have the opportunity to persuade the jury that the statute of limitations expired based upon some of the earlier events identified.

Material facts given no weight in the ICA decision

Petitioner Miller was awarded partial workers' compensation benefits for silicosis in 2013, but it never occurred to him that his partial impairment could have been due to a concealed design defect in one or more of the respirators that he wore.

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

(JA 2163.) He first knew he suffered from complicated black lung in **September 2019**, when he received his initial federal black lung benefits:

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

(JA 2161.) The ICA did not acknowledge or apparently consider Petitioner Miller's testimony about when he actually knew of his injury.

Moreover, the ICA erroneously reconciled competing testimony as to whether Petitioner Miller wore his respirator 100% of the time that he was exposed to the hazards of pneumoconiosis or silicosis. His deposition testimony indicated that he did not wear the 3M respirators 100% of the time that he worked around coal mine dust. (JA 2164.) However, the ICA concluded "Mr. Miller testified that he wore a respirator at all times while in the mines" without acknowledging the contrary testimony.

The ICA decision ignores the contrary evidence presented by Petitioner Miller in his deposition. Where the statute of limitations is at issue and Petitioner Miller is seeking to apply the

Hickman discovery rule, his actual knowledge and perceptions play a critical role in the jury's analysis as to when he should have known he had a dust-related latent pulmonary disease and whether he exercised reasonable diligence under the facts to investigate a causal connection between the disease and his use of Respondents' respirators. Thus, the reasonableness of Petitioner Miller's efforts to discover whether or not there was some causal connection between his use of the respirators and his sufficiently pronounced dust-related impairment involves the evaluation of many facts. In Petitioner Miller's case, he saw a lawyer soon after learning that other coal miners had filed products liability lawsuits against Respondents. Learning about other similar litigation is a classic application of the discovery rule and Petitioner Miller acted promptly by seeing counsel and then filing his complaint. All of these facts present jury issues.

5. Petitioner James Cruey

Petitioner James Cruey worked as a coal miner for at least 30 years during the period from 1968 through 1999. When he worked in the coal mines, Petitioner Cruey sometimes, but not always, wore a dust mask for protection. (JA 2513). He wore a respirator the entire time he was working in the face. (JA 2515). Petitioner Cruey related a story – which demonstrates miners' lack of understanding about adequate protection from coal dust inhalation – that some coal miners believed that chewing tobacco would help prevent them from inhaling coal dust: "You either chew or have to wear a mask because that's the only thing you can do to control it, you know. They -- a lot of them said that chewing helps the dust. Now, I couldn't chew because it made me so sick I couldn't stand it, and so I wore the mask." (JA 2516). He did not wear a respirator when he was working in the outby. (JA 2518). He also wore a respirator when he was traveling in the mantrip to the section. (JA 2519). He did not wear a respirator when he worked at Baylor, which was a

wet mine that was not very dusty. (JA 2542). He thought the respirator was protecting him from rock dust while he was wearing it. (JA 2524).

By **September 4, 1985**, Petitioner Cruey received a 25% award for silicosis. (JA 2512). When he was awarded benefits for silicosis, it never occurred to him that the respirators he wore were not protecting him. (JA 2525). When asked whether he knew the respirators had not protected from the dust, he said, "No, not necessarily." (JA 2525).

On **July 11, 2016**, Petitioner Cruey filed for federal black lung benefits. (JA 2554.) He applied for federal black lung benefits twice and **both times his claims were denied.** (JA 2554, 2674). Before 2019, while he had been told by one doctor that he had black lung, thereafter other doctors told him he did not have that disease. Once other doctors told him he did not have black lung, Petitioner Cruey assumed he did not have it. (JA 2555). Two different company doctors who had examined him told him he did not have black lung. (JA 2572-73). When asked whether he knew he had some lung disease before 2019, Petitioner Cruey explained, **"but they said—they said not enough, and so I assumed that means you ain't got it."** (JA 2556).

Petitioner Cruey assumed the respirators worked and it never occurred to him to investigate whether the respirators worked properly. (JA 2556). Petitioner Cruey does not recall ever going through a fit test with a respirator and was not trained on how to use them. (JA 2567). He never spoke with any of his physicians about the respirators and also does not recall discussing them with coworkers. He thought the respirators were working, despite the fact that he contracted silicosis because it was his understanding that silicosis was caused by a much finer dust particle than the coal dust responsible for black lung. (JA 2568). He never noticed any dust on the inside of the respirators he wore. (JA 2569). Based on these facts, and the reasonable inferences that flow from them, a reasonable juror could have concluded that Petitioner Cruey was not aware that

he had black lung disease or that his defective respirator was causally connected to his disease until he was awarded federal black benefits.

On **September 4, 1985**, he received a 25% award from the State Occupational Pneumoconiosis Board. (JA 2576). On **May 5, 2005**, the OWCP denied his federal black lung application because their diagnostic medical examiner found Petitioner Cruey suffered no impairment at all from black lung disease. (JA 2580). On **January 4, 2007**, based on his understanding that he had no apparent impairment due to black lung, he withdrew his application for federal black lung benefits filed **August 8, 2006**. (JA 2593). On **October 9, 2013**, after Petitioner Cruey filed again for federal black lung benefits, the OWCP once more informed him that the medical examiner concluded he did not suffer from black lung disease at all. (JA 2596).

Although there is no evidence as to when or if this report was provided to Petitioner Cruey, in a **November 30, 2016** report, Petitioner Cruey was diagnosed as having interstitial lung disease with impairment of gas exchange. (JA 2608). Whether Petitioner Cruey had any symptoms relating to this diagnosis was not developed in this record.

On **August 24, 2016**, Petitioner Cruey applied for federal black lung benefits. (JA 2612). Over the next four years, his claim for benefits was vigorously contested. In a report dated **March 26, 2018**, Dr. Forehand concluded Petitioner Cruey suffered from coal mine related dust disease, legal coal workers' pneumoconiosis, an impairment of gas exchange, and a totally disabling respiratory impairment. (JA 2684). The employer continued to contest Dr. Forehand's opinion based on contrary medical evidence: on **February 7, 2017**, Dr. Adcock found Mr. Cruey did not have black lung at all, (JA 2643); on **August 3, 2018**, Dr. Tarver found Mr. Cruey did not have black lung at all, (JA 2644); on August 15, 2018, Dr. Seaman found Mr. Cruey did not have black lung at all. (*Id.*) On **April 20, 2018**, a proposed decision recommending an award was issued. (JA

2612.) At the employer's request, a hearing was held on **June 6, 2019**. (JA 2612). The employer continued to develop medical evidence and opinions that Mr. Cruey did not have black lung disease: on February 13, 2019, and again on October 3, 2019, Dr. Spagnolo reported that Mr. Cruey did not have black lung at all, (JA 2635-36, 45); on July 24, 2017, and again on October 10, 2019, Dr. Zaldivar reported that Mr. Cruey did not have black lung at all. (JA 2631-32, 2645). Based on these five reports by radiologists and pulmonologists, Mr. Cruey reasonably remained unsure whether he suffered from black lung at all, let alone any advanced sufficiently pronounced impairment. Not until **September 22, 2020**, was Petitioner Cruey awarded federal black lung benefits, payable back to August 24, 2016, the date he applied. (JA 2611, 2648).

Due to the trouble he has breathing, he believes his black lung is getting worse. (JA 2552.) After he was awarded black lung benefits, he heard from other people that lawsuits were being filed alleging these respirators were defective. (JA 2556).

While the following facts are referenced in its decision, the ICA did not discuss how the contradictory evidence developed impacts whether or not Petitioner Cruey timely filed his complaint. 2023 WL 7402890, at *4, *5. After having his claim for federal black lung benefits denied on two prior occasions, it was not until **September 22, 2020**, that Petitioner Cruey actually was awarded federal black lung benefits. The trial court and the ICA identified the date that a coal miner filed for federal black lung benefits as the key date when the miner should have known he had a latent pulmonary disease and should have been aware of the connection to the defective respirators. Applying this rule to Petitioner Cruey is irrational: application of this rule would have Mr. Cruey's claims expire within two years of his application for federal black lung benefits when those applications were denied in 2006 and 2013 and where he withdrew the application in 2007. Yet, the trial court and the ICA selected the year **2016** as the critical date for Petitioner Cruey,

charging him with the knowledge that his application would be approved four years later despite the fact that his two previous applications for federal black lung benefits were denied.

On **June 30, 2021**, Petitioner Cruey met with counsel to discuss filing a products liability claim. This was the first time Petitioner Cruey had any actual knowledge that Respondents' defective respirators contributed to his disease. On **September 3, 2021**, Petitioner Cruey filed his complaint in this case.

A reasonable juror could have concluded that the critical date when Petitioner Cruey should have known he had a latent pulmonary disease either was **September 22, 2020**, the date he was awarded black lung benefits, or **June 30, 2021**, the date he met with counsel who advised him of his possible claim, thereby concluding Petitioner Cruey exercised reasonable diligence and filed his complaint within the statute of limitations. Notably, had the trial court applied the correct summary judgment standard. Respondents still would have the opportunity to persuade the jury that the statute of limitations expired based upon some of the earlier events identified.

Material facts given no weight in the ICA decision

After Petitioner Cruey was awarded partial workers' compensation benefits for silicosis in 1985, 2004 and 2016, he continued working his normal job duties for many years notwithstanding his awards, and it never occurred to him his partial impairment could have been due to a concealed design defect in one or more of the respirators that he wore.

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

(JA 2803.) On **September 22, 2020**, Petitioner Cruey was awarded federal black lung benefits because he was determined to suffer from a totally disabling pulmonary or respiratory impairment

arising from his coal mine dust exposure. Prior to his federal black lung benefits being awarded on **September 22, 2020**, Mr. Cruey received conflicting reports from physicians regarding whether or not he suffered from black lung disease. (JAS 79-92).

> Q. Okay. So it's true, right, that doctors told you you had black lung disease before 2019?
> A. But the other doctors told me I didn't. (JA 2818).

The ICA did not acknowledge or apparently consider Petitioner Cruey's testimony regarding when he knew he had disabling black lung disease or his testimony bearing on whether he reasonably should have known that his disease was causally connected to the defective respirators. The conflicting medical opinions, the denial of his claims for federal black lung benefits, and his own testimony provide substantial evidence for a jury to consider in resolving whether or not Petitioner Cruey filed his complaint within the statute of limitations.

6. Petitioner Mark Scott

Petitioner Mark Scott worked as a coal miner for at least twenty-eight years during the period from 1980 through **April 19, 2017**. (JA 3239.) In 1998, Petitioner Mark Scott applied for State black lung benefits and received a 10% award for silicosis. (JA 3240.)

He understood that the respirators were supposed to block out most of the harmful dust. (JA 3241.) When he worked for Quality Energy, Petitioner Mark Scott wore a respirator for about one-half of the time. (JA 3244-45). Prior to 1990, he never wore a respirator, (JA 3246), but used a respirator prior some, not all of time, between **1990 to 1998**. (JA 3326).

Petitioner Mark Scott applied for federal black lung benefits in **December 2017**. (JA 3326.) Despite a report from Norton Community Hospital dated **April 19, 2018,** which found that Mark Scott had coal workers' pneumoconiosis, based in part on an attached radiograph finding, "Severe CWP with findings consistent with PMF," (JA 3263, 3271), on **November 28, 2018**, his application

for federal black lung benefits was **denied**. (JA 3335.) Thereafter, on **December 11, 2019**, a proposed recommended decision issued awarding federal black lung benefits. (JA 3348.)

Petitioner Mark Scott testified that he first was diagnosed with complicated black lung in 2019. (JA 3327-28.) He understood that the respirator was supposed to block out the harmful dust. (JA 3329.) When he started chewing tobacco, he stopped wearing respirators. (JA 3329.) Nobody ever showed him how to fit test the respirator. (JA 3330.) When he wore a respirator, he does not recall ever seeing any dust coming through it. (JA 3331.). These facts, and the inferences that naturally flow from them, are relevant to when Mark Scott should have reasonably known he suffered from sufficiently pronounced black lung disease and that his respirators had a causal connection to his disease.

While the following facts are referenced in its decision, the ICA did not discuss how the contradictory evidence developed impacts whether or not Petitioner Mark Scott timely filed his complaint. 2023 WL 7402890, at *5. After having his federal black lung claim denied, it later was approved on **December 11, 2019**. The trial court and the ICA identified the date, **December 20, 2017**, when Mark Scott filed for federal black lung benefits as the key date when he should have known he had a latent pulmonary disease and should have been aware of the causal connection to the defective respirators. But applying this rule to Mark Scott is irrational: application of this rule would have Mark Scott's claims expire within two years of his application for federal black lung benefits when that application was denied in 2018.

On **July 8, 2021**, Petitioner Mark Scott met with counsel and learned he may have a products liability claim to file against Respondents for their defective respirators. This was the first time Petitioner Mark Scott had any knowledge that Respondents' defective respirators were

causally connected to his disease. On **September 9, 2021**, Petitioner Mark Scott filed his complaint.

A reasonable juror could have concluded that the critical date when Petitioner Mark Scott should have known he had a latent pulmonary disease either was **December 11, 2019**, the date he was awarded federal black lung benefits, or **July 8, 2021**, the date he met with counsel who advised him of his possible claim, thereby concluding Petitioner Mark Scott exercised reasonable diligence and filed his complaint within the statute of limitations. Notably, had the trial court applied the correct summary judgment standard, Respondents still would have the opportunity to persuade the jury that the statute of limitations expired based upon some of the earlier events identified.

Material facts given no weight in the ICA decision

Petitioner Mark Scott first determined he had PMF shortly following **December 11, 2019**, when the OWCP finally first determined that he did suffer from PMF.

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

(JA 3327-28.) In 1998, he was awarded 10% partial workers' compensation due to silicosis, without any understanding that he suffered any perceptible or injurious harm from black lung disease at the time. (JA 3325-26). It was undisputed he continued working full-time, apparently unimpaired.

> Q. Okay. And you were, at that time [1998], told you had silicosis?
> A. Yes, I guess. Silicosis and black lung is not the same thing, is it?

(JA 3325.) The ICA did not acknowledge or apparently consider Petitioner Mark Scott's testimony concerning when he actually knew he suffered from disabling black lung disease nor evidence bearing on whether he should have reasonably known the defective respirators were causally connected to his disease. Further, the ICA decision failed to consider the conflicting medical evidence regarding whether he had black lung. The conflicting medical opinions, the denial of his claims for federal black lung benefits, and his own testimony provide substantial evidence for a jury to consider in resolving whether or not Petitioner Mark Scott filed his complaint within the statute of limitations.

7. Petitioner Gary Scott

Petitioner Gary Scott worked as a coal miner for at least thirty-eight years during the period from 1975 through April 30, 2020. From 1975 through 1982, he primarily, but not always, used Respondents' respirators when he was working to prevent breathing the coal dust. (JA 3615, 3901-07). Sometime in 1994, he received a 5% award from the State. (JA 3617.) In 1997 or 1998, Petitioner Gary Scott received an additional 5% award from the State. (JA 3618.) In **2020**, when he retired, he also learned he had PMF. (JA 3632.)

When he received his black lung diagnosis, he was surprised because he had done what he could to avoid black lung by wearing a respirator and avoiding dusty areas. (JA 3622.) His understanding was that by wearing a respirator, it would prevent him from breathing in too much dust. (JA 3623.) After getting his black lung diagnosis, it never occurred to him to question about whether the respirators worked. (JA 3623.) He accepted the fact that he had black lung and never investigated whether the respirators he wore worked properly. (JA 3626-27.)

Petitioner Gary Scott was initially diagnosed with black lung in 1998. Similar to Petitioners Dudleson and Mark Scott, he initially received a 5% workers' compensation partial disability

award for the black lung diagnosis without any evidence or testimony demonstrating he suffered any perceptible or injurious harm from black lung disease at the time of those awards.

While the following facts are referenced in its decision, the ICA did not discuss how the contradictory evidence developed impacts whether or not Petitioner Gary Scott timely filed his complaint. 2023 WL 7402890, at *5. On **July 12, 2021**, the OWCP issued a proposed decision and order awarding federal black lung benefits to him based on a finding of PMF. On **July 19, 2021**, Petitioner Gary Scott met with counsel and discussed the possible filing of a products liability action against Respondents. From this record, this was the first time Petitioner Gary Scott had any actual knowledge that Respondents' defective respirators contributed to his disease. On **September 9, 2021**, Petitioner Gary Scott filed his complaint.

A reasonable juror could have concluded that the critical date when Petitioner Gary Scott should have known he had a latent pulmonary disease either was in **2020**, the date he learned he had PMF, or **July 12, 2021**, the date the OWCP issued a proposed decision and order awarding federal black lung benefits to him based on a finding of PMF, or **July 19, 2021**, the date he met with counsel who advised him of his possible claim, thereby concluding Petitioner Gary Scott exercised reasonable diligence and filed his complaint within the statute of limitations. Notably, had the trial court applied the correct summary judgment standard, Respondents still would have the opportunity to persuade the jury that the statute of limitations expired based upon some of the earlier events identified.

Material facts given no weight in the ICA decision

Petitioner Gary Scott's employer continues to dispute that he suffers from PMF. He testified that the first time he understood he had advanced black lung was in 2020:

> Q. You mentioned you retired in 2020. That was also the same year that you were first diagnosed with complicated black lung disease; is that right?

A. Yes.
Q. Is that also known as progressive massive fibrosis?
A. Yes.

Q. That was the first time you ever understood that you had that diagnosis?
A. Understood that, yes. (JA 3908).

The ICA did not acknowledge or apparently consider Petitioner Gary Scott's testimony about when he first understood he had developed PMF or the conflicting medical evidence regarding his diagnosis. Moreover, the ICA decision failed to consider evidence bearing on whether he reasonably should have known the defective respirators were causally connected to his disease. When Petitioner Gary Scott's testimony is considered in light of the other relevant evidence, there is substantial evidence for a jury to consider in resolving whether or not Petitioner Gary Scott filed his complaint within the statute of limitations.

G. What facts were available to a reasonably diligent coal miner investigating whether there was any causal connection between using respirators and contracting a pulmonary disease associated with inhaling coal dust?

The trial court and the ICA automatically assumed that Petitioners should have known Respondents' respirators caused Petitioners' latent pulmonary diseases simply because Petitioners sometimes had used the respirators and subsequently suffered some form of lung impairment. Also, despite all of the conflicting dates and evidence relevant to each Petitioner, the ICA concluded no genuine issue of material fact was presented in any of Petitioners' cases, 2023 WL 7402890 at *7.

In reaching this conclusion, the ICA assumes it is readily apparent that because a coal miner once used a respirator and later developed a latent coal dust related disease that means the respirator must have been defective. This assumption is refuted **by Respondents own experts**, who testified in other litigation that when a coal miner is diagnosed with black lung and previously had worn a respirator, that does not mean the respirator was defective. It could mean the coal

miner contracted the disease from other sources or from when the respirator was not used. (JAS 105, 116). Thus, Respondents' own experts, educated in the field of industrial hygiene and respiratory protection, testified there was not necessarily a causal connection between their defective products and the miners' diseases. A reasonable juror could conclude that these Petitioners likewise did not have any reason to believe that the defective respirators caused their diseases.

The ICA gave almost no consideration to the final step in the *Hickman* analysis, where the jury is asked to decide whether the plaintiff, who becomes aware of a sufficiently pronounced latent injury, exercised reasonable diligence in determining whether a defective product caused or contributed to the latent injury. In analyzing reasonable diligence, one relevant issue for jury consideration would be what relevant public information was available for Petitioners to consider.

When faced with similar facts involving a coal miner who alleged Respondents' respirators were defective and caused his black lung, the Kentucky trial judge provided the following analysis regarding what is meant by reasonable diligence in this context:

> "Reasonable diligence meant that a plaintiff must be as diligent as the great majority of persons would [be] in the same or similar circumstances...." *R.T. Vanderbilt Co., Inc. v. Franklin*, 290 S.W.3d 654 (Ky.App. 2009)(quoting, *inter alia*, *Blanton v. Cooper Industries, Inc.*, 99 F.Supp.2d 797, 802 (E.D.Ky 2000). **How diligent the great majority of people would be under a given set of circumstances is the sort of question that is particularly apt for resolution by a jury.** (Emphasis added). (JA 4357).

Below is a list of some facts a jury evaluating whether Petitioners exercised reasonable diligence and should have known that the use of Respondents' respirators were causally linked to their contracting a sufficiently pronounced latent pulmonary disease, would need to consider:

1. Petitioners did not have any actual knowledge that Respondents' respirators were defective and a cause of their diseases until they met with counsel or heard about other similar litigation, which is why the jury will need to decide if, based

upon the record, Petitioners should have known through the exercise of reasonable diligence of this causal relationship;

2. The coal operators, who employed Petitioners, purchased Respondents' respirators to their coal miners on a daily basis along with other personal protective devices;

3. There is nothing in the record where anyone, including the coal operators, told Petitioners not to use the respirators because they were defective;

4. Coal operators spent millions and millions of dollars purchasing these respirators from Respondents, so whatever reasonable diligence they exercised based upon the public information available to them never resulted in the coal operators concluding that these respirators were defective;

5. Not one of the physicians who treated or examined Petitioners ever advised any of them that their use of respirators was causally related to their diseases;

6. When Petitioners wore these respirators, the respirators had been certified first by the Bureau of Mines and later by NIOSH and some of the respirators had the NIOSH label on the mask itself;

7. Because these respirators were designed and advertised to provide Petitioners with protection from inhaling coal dust, Petitioners had no reason to suspect the respirators were at fault;

8. All of these Petitioners acknowledged they did not wear the respirators 100% of the time and could have thought they suffered these latent pulmonary diseases from inhaling coal dust when they were not wearing respirators, which is consistent with the analysis quoted from Respondents' own experts;

9. These respirators had never been recalled from the market during the time Petitioners were wearing them; and

10. To this date and in this litigation, Respondents continue to deny that their respirators are defective and further deny Petitioners suffered any injury or disease from their use of these respirators.

Ultimately, whether or not these Petitioners, through the exercise of reasonable diligence, should have known that there was some causal connection between their use of Respondents' respirators and the sufficiently pronounced latent diseases they contracted is the type of question that only a jury can resolve, based upon all of the facts presented.

H. Respondents fraudulently concealed and otherwise misrepresented salient information indicating that respirators were unfit to protect against respirable coal-mine dusts

In Syllabus Point 5 of *Dunn*, the Court recognized that the statute of limitations can be tolled where the defendant "fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled." In the Kentucky and other litigation, Respondents were forced to produce internal documents revealing their knowledge that the respirators at issue were not suitable for use in coal mines, yet Respondents continued selling these respirators to coal companies, who thought they were helping their employees avoid black lung, and coal miners wore them under the mistaken belief they provided protection from coal dust.

It is undisputed that until Petitioners consulted with counsel, they had no knowledge of the critical facts Respondents fraudulently concealed from the public regarding how unsuitable their respirators were in a coal mining environment. Thus, the date Petitioners first learned of Respondents' fraudulent concealment, which occurred after meeting with counsel, is one of the dates the jury could conclude the statute of limitations began to run. Based upon this analysis, all of Petitioners' complaints were filed within two years from the date they learned of Respondents' deceit.

The amount of evidence regarding Respondents' fraudulent concealment is vast. In order to make a record on this issue, Petitioners endeavored to provide a small sampling of this material. Petitioners have included internal memos from Respondents as well as admissions by some of their employees and the depositions of experts explaining in great detail how the respirators manufactured by Respondents were not fit to be used in coal mines. Of course, Respondents did

not share this critical information, but instead kept it confidential while, at the same time, marketing these respirators as helping to prevent a wide variety of respiratory diseases. Petitioners, who used these respirators had no way of knowing Respondents already determined the respirators were ineffective and unsuitable in coal mines for a wide variety of reasons. Among other problems, the respirators failed to filter small respirable particles; degraded in the heat and humidity of the coal mine environment; needed to be properly fitted on the user; were designed as one size fits all instead of offering a variety of sizes; had problems with the straps; and were not tested in real coal mining conditions.

This concealed information is of critical importance in these products liability cases, where the trial court and the ICA, as a matter of law, surprisingly blamed Petitioners, and not Respondents, for failing to discover the respirators were defective and caused their pulmonary diseases. This ruling rewards Respondents for deceiving the public by having meritorious products liability claims dismissed against them. Petitioners had no way of knowing about the critical information fraudulently concealed by Respondents until they learned about it from their counsel. If this information was made available to Petitioners before they met with counsel, then a jury could conclude Petitioners reasonably should have known not to use these respirators.

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

1. Respondent 3M

Respondent 3M marketed the 8710 as being able to stop pneumoconiosis and fibrosis producing dusts from ever reaching the lungs. (JA 5005-06, 5010). For example, in a 3M advertisement entitled, "You don't have to work yourself to death" 3M stated:

> Black lung. Stonecutter's disease. Asbestosis. Grinder's rot.
> All of them caused by dust particles in the air. And all of them can kill a man.

That's why workers should wear a 3M Brand Respirator 8710.
The 8710 stops pneumoconiosis and fibrosis producing dusts from ever reaching the lungs. In fact it's so effective it has received Bureau of Mines approval.

****

The 3M Brand Respirator 8710. It helps keep deadly dust out of your lungs.

(Emphasis added). (JA 5005-06).

Another Respondent 3M advertisement for the 8710 asserted it was "so effective, it's 99% efficient against dusts with a mean particle diameter of 0.4 to 0.6 microns," and "it works. Fibrosis and pneumoconiosis don't have to spell tragedy anymore." (JA 5010). These misrepresentations were false and omitted the material fact that the respiratory protection devices were defective and unsuitable for use in industrial environments like coal mining. (*See, e.g.,* JA 1266, 3881-83, 3974-75, 3994-4010, 4160-63, 4903-06, 4996-5004, 5015).

These Respondent 3M ads prompted Mr. Robert Barghini, 3M laboratory manager, in 1973 to caution Respondent 3M's advertising section that ads for respirators should be "totally correct." (JA 5008). Mr. Barghini further cautioned that when an ad states 99% efficiency that the ad should make clear that this is only for the filter media, "because the overall efficiency of the product is much less than that *i.e.* fit efficiency." (JA 5007-08). Respondent 3M nevertheless ran advertisements in 1974 and 1975 which ignored Mr. Barghini's comments. (JA 5010).

None of Respondent 3M's public marketing materials, advertisements, packaging, instructions, or warnings for the entire time the 8710 was available for sale stated or otherwise suggested the 8710 was ineffective in or otherwise unsuitable for mining or industrial conditions or at combating the types of small particles that cause black lung, silicosis or other lung diseases. (*See, e,g.,* JA 346-363; *see also generally Hoke*).

Respondent 3M's public marketing materials, advertisements, packaging, instructions, and warnings for the 8710 stand in stark contrast to what was being observed and recounted internally

about the 8710. For example, in 1969, Respondent 3M's internal memorandum concluded "in its present form, I feel that the product [a modified 8705 which was a prototype of the 8710] would be unacceptable in the mine areas." (JA 5015). In 1973, Respondent 3M's internal memoranda observed the "8710 was not rugged enough for coal mines" and the "main problem with our disposable respirators [*i.e.*, 8710] is mechanical integrity," and the 8710 "will not stand up to the abuse" in "many places (mines, smelters, etc.)[.]" (JA 4900, 4902). In 1974, Respondent 3M's internal Quarterly Report indicated "[t]he functional testing of the 8710 indicates . . . the product is still borderline with no safety margin." (JA 5031). In 1975, Respondent 3M's "Interoffice Correspondence" with the subject line "8710 Certification U.K.," noted that its other model respirator was "less susceptible to collapse under high heat and humidity conditions, has a better strap than the 8710 and is about ten times better than the 8710 in functional performance" before later adding, "[c]oal mines are not our first choice." (J.A. 5033). On December 20, 1976, Respondent 3M's internal marketing plan for 1977 acknowledged that "**we now know that the 8710 is unacceptable in the underground mining area due to collapse and abuse from high heat and humidity.**" (Emphasis added). (JA 4225-27). Respondent 3M's marketing plan for 1977 further recognized that strap breakage and "collapse due to buildup of moisture in the filter media" were potential major problem areas and plainly that Respondent 3M "needed an improved product." (*Id.*). In 1991, Respondent 3M's internal "Market Plan" identified as a "key issue" that "[l]iability of the 8710 continues to be a major concern." (JA 5057-58).

The sources of leakage in respirators like the ones at issue in this case include both the filter (where small particles could leak directly through the mask) and the fit (where small particles could go around the mask). *See, e.g., Nat'l Cottonseed Prod. Ass'n v. Brock*, 825 F.2d 482, 492–93 (D.C. Cir. 1987). Both were problems for all of these respiratory products at issue. In a 1991

letter authored by a Respondent 3M manager, he acknowledged the 8710's filter efficiency was so poor that an accurate fit test could not be conducted when he wrote: "the filter efficiency of this type of respirator filter would allow 10 to more than 20 percent of the test agent to pass through the filter masking any attempt to quantify the test aerosol that was passing through faceseal leakages." (JA 4903-06).

This same 1991 letter written by Respondent 3M's manager also noted the importance of fit testing the 8710. In the letter, Respondent 3M acknowledged: "We strongly believe that there is a tremendous risk to the wearer of any respirator that has not been properly fit tested. This risk far out shadows any risk from the use of saccharin[,]" a known carcinogen. (JA 4903-06). The 8710 could not be fit tested until saccharin was approved as a fit test agent. (JA 4903-06). And so, between 1972, the year the 8710 was approved by the federal government, and the end of 1982, when saccharin was first approved as a fit test agent, Respondent 3M knowingly sold millions of 8710's that could not be fit tested at all, which it acknowledged was a "tremendous risk to the wearer[.]" None of this was ever shared with the public.

Respondent 3M also experienced a number of quality control issues in the production of the 8710 which made it well aware the respirator should not be used in mining. (*See, e.g.,* 351, 4996-5004, 5036). Dr. Nelson Leidel, a former official with the National Institutes for Occupational Safety and Health (NIOSH) and an expert witness who provided evidence in some of the Kentucky cases, prepared a 135-page report in the context of those cases entitled "Findings on the 3M Company 8710 Throwaway Paper Dust Mask for Protection Against Respirable Dust in Coal Mines." In this report, Dr. Leidel identified at least twenty general areas of Respondent 3M's misconduct, including quality control issues, some of which constituted violations of regulatory standards and misrepresentations made with respect to the unsuitability of the 8710 for

use in a coal mine. (JA 351-52, 362-63). Respondent 3M concealed these quality control issues as well.

In the early litigation in these cases in Kentucky, Respondent 3M produced documents under Protective Order and otherwise did not publicize the fact that it knew internally for decades that the 8710 did not protect coal miners from black lung, silicosis, and other lung diseases, despite its advertisements and marketing efforts to the contrary. (*See, e.g.,* JA 459-61).

2. Respondent AO

In its "take a breather!" advertisements, published between 1975-89, Respondent AO stated its R2090N respirator provided "dependable protection in atmospheres containing hazardous dusts and mists, including lead, and other pneumoconiosis-producing dusts." (JA 4166-72, 4191-93, 6832).

None of Respondent AO's public marketing materials, advertisements, packaging, instructions, or warnings for the entire time the R2090N was available for sale stated or otherwise suggested it was ineffective in or otherwise unsuitable for mining or industrial conditions or at combating the types of small particles that cause black lung, silicosis or other lung diseases. (*See, e,g.,* JA 4159-63, 4176-84, 4188, 4197; *see also generally Hoke*).

By contrast, Respondent AO knew long ago of the deficiencies with regard to its electrostatic filters to screen out small particles and to degrade and, accordingly, that use of these AO respirators with electrostatic filters by West Virginia coal miners could contribute to causing occupational pneumoconiosis. In 1951, Mr. William Revoir, former Chief Engineer of Respondent AO's Safety Products Laboratory, discussed the weaknesses of electrostatic felt, the decreased filtering efficiency, and the increase in the user's exposure as impacted by heat and humidity. (JA 5079-82). That is, Respondent AO knew at least beginning in the 1950's

that electrostatic charges decline over time from, among other things, many of the conditions present in coal mines such as high humidity, high temperatures, mists, liquid aerosols, water vapor, and dust. (JA 4159-63, 4176-84). Respondent AO's representatives have repeatedly admitted in testimony that electrostatic filter media were long known to degrade. (JA 4162, 4176-84).

Because in the late 1950's and into the 1960's, Respondent AO recognized electrostatic filters did not provide real protection against the small particles that cause these debilitating lung diseases and that the electrostatic filters degraded in industrial conditions, Respondent AO instead phased out electrostatic filters in favor of the "superior" mechanical filters for its respirators that were the precursors to the R2090N. (JA 3881-82, 4159-63, 4176-84, 6400-14, 7229).

In the late 1960's/early 1970's, however, after the government prohibited Respondent AO from using and selling its mechanical filters due to its asbestos components, Respondent AO went back to using an electrostatic filter with a mechanical pre-filter. (JA 4176, 5299-5320, 6453-64, 6501-05). At that point, internally, Respondent AO stated degradation was worth the risk in order to have a competitive filter on the market, but externally, Respondent AO did not communicate to the public about the weaknesses of the poor filtration and degradation of the electrostatic filters. (JA 4176). Later, in 1979, a Respondent AO internal "Development Report" noted that even the mechanical pre-filter was removed from the R2090N to make it more "cost effective." (JA 6506).

Despite all of these facts recited above, Respondent AO concealed its knowledge of the unsuitability of the R2090N respirator and R90N filters for use in coal mines from users and the general public and repeatedly and willfully continued marketing, advertising and selling substantial amounts of its R2090 and R2090N respirators with the electrostatic filters in West Virginia as providing dependable protection against pneumoconiosis-producing dusts that these

faulty respirators could not satisfy. All the while, Respondent AO knew the electrostatic filters would not protect West Virginia coal miners from contracting occupational pneumoconiosis. (JA 4159-63, 4176-84).

3. Respondent MSA

In a "Progress Report on Filter Media Development," dated February 12, 1951, Respondent MSA's Research Department noted: "It is well known that wool fibre will take up considerable moisture, and that moist fibres have a lower electrical resistivity. It is thought that this may result in a lowered filtering efficiency." (JA 7196-7217).

In 1976, Respondent MSA's engineer, John Monsted, applied for a patent for a blended electrostatic filter of wool and acrylic fibers and, in the patent application, Mr. Monsted stated that the all wool electrostatic filter that Respondent MSA had been using up until that point in time was "practically useless as a respirator filter" due to the filtering efficiency being drastically reduced in a charge-degrading atmosphere such as that which exists in coal mines. (JA 7218-20).

In 1994, a Respondent MSA Inter-Office Memorandum White Paper written by then Product Line Manager, Bill Lambert, who later became CEO, states: "And **what's unconscionable is that the user, who is depending on this electrostatic filter for respiratory protection, has no 'indicator' that the electrostatic filter is losing its efficiency** - there is no 'breakthrough' or 'warning properties' - that the user can detect, taste or smell; **only his uncontrollable, unwitting, unwanted exposure to the hazard**. This issue is not just a "hot DOP vs. cold DOP" argument, **this is a worker safety issue that must be addressed....**" (Emphasis added). (JA 4214-19, 7221-27).

Like its co-Defendants, none of Respondent MSA's marketing materials, packaging, instructions, or warnings on the Dustfoe series respirators ever suggested that these respirators

were ineffective in or otherwise unsuitable for mining or industrial conditions or at combating the types of small particles that cause black lung, silicosis or other lung diseases. *See generally State Hoke*. Also, like its co-Defendants, no such efforts were ever made by Respondent MSA to notify the public of the danger associated with their respirators.

4. The concealment remains ongoing

Still to this day, all three Respondent manufacturers conceal and otherwise suppress their knowledge of their respective respirators' defects by continuing to deny the fact that they were unsuitable for coal mining despite the above recitations and by insisting on protective orders and that documents previously produced in litigation pursuant to protective orders remain confidential such as those in the sealed appendix.

IV. SUMMARY OF ARGUMENT

The trial court and the ICA ignored this Court's multiple decisions holding that as a general rule, whether or not the statute of limitations has expired in a case is a individualized question of fact for the jury to resolve. Instead, these lower courts sought to create bright-line rules applicable in all products liability cases filed by coal miners against Respondents based upon their defective respirators. Fundamentally, the ICA violated this Court's admonition that in evaluating a motion for summary judgment, a court's role is not to weigh the evidence or discern the truth, but rather is to determine whether there are genuine issues of material fact.

The most critical error committed by the trial court and adopted by the ICA is the holding that Petitioners' statutes of limitations began to run when they knew "something was wrong." Citing a traumatic injury case rather than one involving a pure latent injury, the ICA held: "The West Virginia Supreme Court of Appeals has repeatedly held 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 the particular nature of the injury.'" This Court has rejected the "something is wrong" standard where the injury is latent and is discovered by the plaintiff sometime after exposure or a medical procedure.

In recognizing the distinctions between traumatic and latent injuries, this Court has held that because the injury initially is not sufficiently pronounced to put a plaintiff on notice that he has been injured, courts conclude the statute of limitations does not begin to run until the plaintiff is aware of the injury or through reasonable diligence should have been aware of the injury. In a progressive or creeping disease or injury, many plaintiffs will often not realize that they were actually injured. Other plaintiffs will realize they are injured, but have no reason to connect the product with the injury.

In cases involving "pure latent injury," the statute of limitations does not begin to run until the injury becomes "sufficiently pronounced" to put a plaintiff on notice that he has been injured by a defective product. Under this rule, Petitioners' injuries must have become sufficiently pronounced that they knew: 1) they were injured by coal mine dust, and 2) their dust-related pulmonary injuries became "sufficiently pronounced" that through the exercise of reasonable diligence they either knew or should have known there might have been a defect in the respirators they wore during a limited percentage of the time that they were exposed to the hazards of pneumoconiosis that was causally related to them contracting a pulmonary disease.

The ICA erroneously applied the tolling standard for claims involving traumatic injuries with latent manifestations, rather than applying the pure latent injury rule that this Court has consistently held to be applicable in cases of occupational lung disease. The ICA further erred in concluding that simply because a coal miner wore a respirator some of the time and was diagnosed with some lung impairment, the coal miner then was on notice that the respirators were defective

and caused the impairment. This conclusion is not supported in the record, ignores all of the genuine issues of material fact, and fails to recognize that Respondents' own expert witnesses disagree with this assertion.

In the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury. Whether or not the plaintiff exercised reasonable diligence also presents a fact issue for jury resolution. statute of limitations to the jury. It is the province of the jury to resolve conflicting inferences from circumstantial evidence. Because the ICA erroneously analyzed pulmonary fibrosis as a traumatic injury, it erred by failing to submit the disputed material facts to a jury for resolution regarding Petitioners' knowledge of when they first knew of their disabling black lung injury, the conflicting medical evidence regarding that diagnosis, and the evidence bearing on when they should have known of the causal connection between their injury and the defective respirators.

Petitioners here do not contend that the discovery rule is applicable in all products liability or personal injury cases. For example, the discovery rule is inapplicable as a matter of law in traumatic injury cases where the plaintiff suffered a latent injury after suffering an initial traumatic or acute injury. There also can be pure latent injury cased involving respirators that can be resolved through summary judgment. For instance, where it is established a miner wore a respirator 100% of the time that he worked around coal mine dust, then later developed pulmonary massive fibrosis, that miner could be charged with notice from the date he learned of that severe injury. It is only in a more limited set of cases like those on appeal, where the evidence regarding whether or not each Petitioner had any latent injury at all combined with the other disputed evidence, raises genuine issues of material fact that only the jury can resolve.

Coal miners are extremely knowledgeable about many matters, but the question of when a mild or totally undetectable, non-injurious case of black lung transforms into progressive massive fibrosis is not one such matter. Indeed, even the nation's preeminent expert radiologists routinely disagree about whether pulmonary fibrosis is attributable to coal mine dust exposure and/or whether it has progressed from the simple to complicated stage. It is unreasonable to hold that a lay person must detect the onset of such a latent and inherently undetectable injury as pneumoconiosis, or that if he or she does detect it, that such detection triggers a duty to investigate and prosecute legal claims in tort against the manufacturers of all potentially defective products that might have contributed to that injury.

Petitioners' claims should not be time-barred until their black lung disease progresses to become "sufficiently pronounced" as to constitute a measurable impairment to their pulmonary function that implicates their respirator usage--a fact-intensive medical-legal analysis involving multiple degrees of causation to determine whether coal-mine dust caused their pulmonary disease and whether the relevant respirators were worn at times that could have aggravated that exposure. Until the miner reasonably understands the injury has become "sufficiently pronounced" to represent a distinctly recognizable harm, it is manifestly unreasonable to impute notice to the miner that something might have been defective in one or more of the various safety devices utilized by that miner over the course of decades of underground labor.

The ICA accepted and adopted the following dates, when "something was wrong," as triggering the statute of limitations for each Petitioner:

1. The date Petitioners were awarded more than 5% *de minimis* disability compensation for work-related dust-based chronic lung injury;

2. The date Petitioners were medically diagnosed with any form of lung impairment resulting from their inhalation of coal, rock, and sand dust; or

3. The date Petitioners applied for federal black lung benefits. 2023 WL 7402890 at *8.

Selecting these bright-line dates as resolving the statute of limitations question as a matter of law is contrary to this Court's cases holding that these issues are best left for jury resolution, particularly when there are conflicting facts for the jury to consider and the issue to be decided is whether Petitioners exercised reasonable diligence in determining a causal connection between their latent injury and defects in Respondents' respirators.

The causation element in a product liability claim is very factual and often requires expert testimony to establish this element. Thus, these cases present a question as to what these coal miners, who are not experts in industrial hygiene, reasonably should have done to determine whether or not there was some causal connection between their pure latent injury and wearing Respondents' respirators.

A coal miner who applies for federal black lung benefits does not have to show that he or she has any actual impairment at the time. Thus, choosing the date a coal miner applied for federal black lung benefits as triggering the statute of limitations is inexplicable. Rather than focusing on the date each Petitioner filed for federal black lung benefits, the more pertinent fact for the jury to consider would be the date each Petitioner received an award of federal black lung benefits. All of Petitioners, except for Petitioner Gary Scott, received final awards of federal black lung benefits within two years of the filing of their complaints against Respondents. Petitioner Gary Scott is still waiting for a final ruling in his case.

The jury should be permitted to determine whether the fraudulent concealment engaged in by Respondents tolled their statutes of limitations until Petitioners learned of such concealment either just before or after they filed their complaints. Contrary to the ICA's conclusion, Respondents did not merely tout their respirators as being "good or effective," they made those

representations fully knowing, based upon their own internal studies and discussions, that their respirators were not suitable in the coal mine environment. As a result, the protection from the inhalation of coal dust that Petitioners relied upon and thought they were getting turned out to be false. Rather than Respondents simply engaging in puffery regarding their respirators, their actions in continuing to selling these defective respirators constituted a fraud on the coal operators who purchased them as well as the coal miners who used them.

In these seven cases, the trial court and the ICA fault these Petitioners and deny them their day in court for failing to exercise reasonable diligence in determining whether or not their use of Respondents' respirators caused their lung impairment. The fraudulent concealment engaged in by Respondents made it virtually impossible for these Petitioners or any other person to discover the facts relevant to the defects in these respirators. A jury evaluating whether or not Petitioners exercised reasonable diligence in determining whether or not Respondents' respirators were defective and, therefore, a cause for each of them to suffer from a coal-dust related lung disease, should be able to consider what information Respondents knowingly and fraudulently kept from the public about the unsuitability of their respirators for use in coal mines. By concealing this critical information while continuing to sell these respirators, Respondents directly impacted the ability of Petitioners, exercising reasonable diligence, to discover these defects and the causal connection to the respiratory diseases they are suffering.

V. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Due to the latent and progressive nature of the coal mine dust-related pulmonary diseases addressed in this joint appeal, more coal miners will be consulting with counsel and will be filing similar products liability claims against these Respondents. Clear guidance from the Court on how to apply established case law to these statute of limitations issues would benefit Respondents as

well as all of the other coal miners who will be filing their own complaints. Two West Virginia circuit courts have issued orders denying motions for summary judgment in similar products liability actions filed by coal miners regarding these respirators and several Kentucky trial courts similarly denied such motions. (JAICA 21, 32; JA 4348-60.) In all of these cases, the trial courts concluded fact issues were presented that only a jury can resolve.

Petitioners respectfully ask the Court for Rule 20 oral argument to permit the Court and the parties sufficient time to address all of the factual and legal issues raised in these seven different cases. Because there is confusion among the lower courts as to the correct standard to apply when considering the timeliness of these claims, an opinion authored by a Justice would clearly articulate the proper standard. Additionally, while it may be unusual, Petitioners respectfully suggest that an additional amount of time in excess of twenty minutes would be appropriate considering the seven separate factual circumstances at issue in this appeal and the voluminous factual record.

VI. ARGUMENT

A. Incorrect standard applied by the trial court and the ICA

The trial court and the ICA ignored this Court's multiple decisions holding that as a general rule, whether or not the statute of limitations has expired in a case is an individualized question of fact for the jury to resolve. *See, e.g.*, Syllabus Point 8, *Hoke*, 244 W.Va. at 302, 852 S.E.2d at 803; Syllabus Point 5, *Dunn*, 225 W.Va. at 46, 689 S.E.2d at 259. Instead, these lower courts sought to create bright-line rules applicable in all products liability cases filed by coal miners against Respondents based upon their defective respirators.

Fundamentally, the ICA violated this Court's admonition that in evaluating a motion for summary judgment, "a court's role is not to weigh the evidence or discern the truth, but rather is to determine whether there are genuine issues of material fact." Syllabus Point 3, *Painter v. Peavy,*

192 W. Va. 189, 451 S.E.2d 755 (1994). By identifying these three bright-line rules, the ICA weighed those facts as being dispositive of all issues raised, rather than recognizing that the conflicting evidence presented should be left for the jury to determine the reasonableness of these coal miners.

Although the ICA affirmed the three bright-line rules identified by the trial court, the ICA did not discuss the trial court's conclusion that the Attorney General's litigation addressed in *Hoke*, which began in 2003, as "a definite point where a reasonable coal miner in West Virginia should have known of a connection between the alleged defective masks and respirators and the possibility of developing a lung-related injury." (JA 25). Because this issue may arise in the future, Petitioners believe this conclusion by the trial court should be addressed by this Court.

The applicable test adopted by this Court is that the plaintiff must exercise **reasonable** diligence in determining whether a product defect caused the plaintiff's injury. Suggesting that all coal miners must monitor all litigation in this State is unreasonable and unrealistic not only for coal miners, but also for lawyers or anyone else. The ICA's attempt to resolve all of these respirator products liability claims by identifying specific dates applicable to all coal miners was clear error and contrary to this Court's statute of limitations jurisprudence.

Additionally, the most critical error committed by the trial court and adopted by the ICA is the holding that Petitioners' statutes of limitations began to run when they knew "something was wrong." Citing a traumatic injury case rather than one involving a pure latent injury, the ICA held: "The West Virginia Supreme Court of Appeals has repeatedly held 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 the particular nature of the injury.' *Goodwin v. Bayer Corp.*, 218 W. Va. 215, 221, 624 S.E.2d 562, 568 (2005)." 2023 WL 7402890, at *7 (emphasis added). As

discussed in more detail below, *Goodwin* is a traumatic injury case where the plaintiff inhaled paint fumes and suffered an immediate adverse reaction. Thus, there was nothing latent about the injuries that plaintiff suffered.

Furthermore, the ICA decision also fails to understand that pulmonary fibrosis, such as silicosis or pneumoconiosis, has been routinely recognized as the archetypal and paradigmatic form of a pure latent injury. *See Jones*, 177 W. Va. at 170, 351 S.E.2d at 185; *see also Hickman*, 178 W. Va. at 252, 358 S.E.2d at 813; *Louisville Trust Co. v. Johns-Manville Products Corp.*, 580 S.W.2d 497 (Ky. 1979).

In *Gaither*, this Court made it clear that the "something is wrong" standard is inapplicable where the injury is latent and is discovered by the plaintiff sometime after exposure or a medical procedure. After formulating a syllabus point modeled after Syllabus Point 1 of *Hickman* in the context of a medical malpractice claim, the Court in *Gaither* noted,

> In our holding today, we find on the one hand that knowledge sufficient to trigger the limitation period requires **something more than a mere apprehension that something may be wrong**. *See Hill v. Clarke*, 161 W. Va. at 262, 241 S.E.2d at 574 ("[P]ain, suffering and manifestation of the harmful effects of medical malpractice do not, by themselves, commence running of the statute of limitation"). Even if a patient is aware that an undesirable result has been reached after medical treatment, a claim will not be barred by the statute of limitations so long as it is reasonable for the patient not to recognize that the condition might be related to the treatment.

199 W. Va. at 714, 487 S.E.2d at 909 (emphasis added). Thus, the trial court and the ICA, which applied the "something was wrong" standard applicable in traumatic injury cases, erred in failing to apply the proper standard required in a pure latent injury case, which is applicable to these Petitioners.

The differences in the application of the statute of limitations involving traumatic or pure latent injuries was discussed by this Court at length in *Jones v. Bethany College*, 177 W.Va. 168,

351 S.E.2d 183 (1986), where the plaintiff suffered traumatic injuries in a car accident, but sought to extend the statute of limitations to address additional injuries discovered years after the crash. In *Jones*, this Court held that the two-year statute of limitations for actions in tort, W. Va. Code § 55-2-12(b), begins to run on the date when the injury is inflicted **in cases that involve a traumatic injury**: "Where there has been a noticeable injury caused by a traumatic event, the fact that there may be a latent component to the injury does not postpone the commencement of the statute of limitations according to a substantial majority of courts." 177 W.Va. at 169-70, 351 S.E.2d at 185.

This Court further explained the delayed nature of some pure latent injuries that occur years after exposure and take time before the latent injury is sufficiently pronounced:

> We acknowledge that other courts have expanded the discovery rule to product liability cases dealing with chemicals, drugs, asbestosis, and products like the Dalkon Shield. The common denominator in these cases is that the product often causes an injury only after a lengthy period of exposure or the injury surfaces only after a considerable period of time from the date of exposure. **Because the injury initially is not sufficiently pronounced to put a plaintiff on notice that he has been injured, courts conclude the statute of limitations does not begin to run until the plaintiff is aware of the injury or through reasonable diligence should have been aware of the injury**. E.g., *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949) (silicosis); *Young v. Clinchfield R.R.*, 288 F.2d 499 (4th Cir. 1961) (silicosis); *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), cert. denied, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974) (asbestosis); *Williams v. Borden, Inc.*, 637 F.2d 731 (10th Cir. 1980) (polyvinyl chloride fumes causing chronic lung disease); *Patrick v. Sharon Steel Corp.*, 549 F. Supp. 1259 (N.D.W. Va. 1982) (air pollutants); *Pauley v. Combustion Engineering, Inc.*, 528 F. Supp. 759 (S.D.W. Va. 1981) (asbestosis); *Barnes v. A.H. Robins Co., Inc.*, 476 N.E.2d 84 (Ind. 1985) (Dalkon Shield); *Cullender v. BASF Wyandotte Corp.*, 146 Mich. App. 423, 381 N.W.2d 737 (1985) (acrylonitrile inducing cancer); *Condon v. A.H. Robins Co., Inc.*, 217 Neb. 60, 349 N.W.2d 622 (1984) (Dalkon Shield); *Colvin v. FMC Corp.*, 43 Or. App. 709, 604 P.2d 157 (1979) (Pyrenone); *Anthony v. Abbott Laboratories*, 490 A.2d 43 (R.I. 1985) (DES); *Cavanaugh v. Abbott Laboratories*, 145 Vt. 516, 496 A.2d 154 (1985) (DES); *Olson v. A.H. Robins Co., Inc.*, 696 P.2d 1294 (Wyo. 1985) (Dalkon Shield).

Id., 177 W.Va. at 170, 351 S.E.2d at 185 (emphasis added). This Court's analysis in *Jones* prompted the Court in *Hickman* to adopt a particular discovery rule in products liability cases

where latent injuries are involved. In *Hickman*, the Court addressed products liability claims where the plaintiff did not learn until years after exposure to some harm that the use of a defective product contributed to the plaintiff developing over time a latent injury or disease.

Thus, the Court in *Hickman* and *Jones* expressly distinguished cases--such as cases of pneumoconiosis--that involve a "pure latent injury" from cases involving traumatic injuries. In derogation of *Hickman* and *Jones*, the trial court and the ICA failed to apply the discovery rule that this Court recognized to apply in these seven cases that involve archetypal "pure latent injuries."

In cases involving "pure latent injury," the statute of limitations does not begin to run until the injury becomes "sufficiently pronounced" to put a plaintiff on notice that he has been injured by a defective product. Under this rule, Petitioners' injuries must have become sufficiently pronounced that they knew: 1) they were injured by coal mine dust, and 2) their dust-related pulmonary injuries became "sufficiently pronounced" that through the exercise of reasonable diligence they either knew or should have known there might have been a defect in the respirators they wore during a limited percentage of the time that they were exposed to the hazards of pneumoconiosis that was causally related to them contracting a pulmonary disease.

Further demonstrating the erroneous analysis conducted by the ICA is its reliance on the *Goodwin* decision, involving injuries immediately suffered relating to the inhalation of paint fumes. This Court, in a *per curiam* decision, again fleshed out the application of the discovery rule in pure latent injury cases versus "traumatic event/latent manifestation case[s]." *Goodwin*, 218 W.Va. at 222, 624 S.E.2d at 569.

> In *Bethany College*, this Court acknowledged that other jurisdictions have clarified the "traumatic event/latent manifestation case" and its relationship to the statute of limitations, such as in the case of *Albertson v. T.J. Stevenson & Co.*, 749 F.2d 223, 230 (5th Cir.1984):

> "'The pure latent injury case ordinarily arises in one of three situations: a suit by a worker who contracts an occupational disease, a medical malpractice suit by a patient who discovers an injury long after the negligent medical treatment has been administered, or a product liability suit by a consumer of a drug or other medically related product who discovers a side effect from the use of the defendant's product. In each of the pure latent injury cases, the plaintiff fails to discover either the injury or its cause until long after the negligent act occurred.'" . . .
>
> In such a case, the discovery rule is applicable. However, Goodwin's alleged neuropsychological injury cannot be called a "pure latent injury."

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

The Court in both *Jones* and *Goodwin* concluded there was no issue of fact that the plaintiffs knew of their injury and the cause of the injury on or around the time of the traumatic event giving rise to their injuries. Notwithstanding those plaintiffs' claims of latent manifestations, the causes of action accrued in those cases at the time of the traumatic event. However, the Court in both *Jones* and *Goodwin* also specifically distinguished those cases from cases where the discovery rule indeed applied: where there are pure latent injuries.

The ICA erroneously applied the tolling standard for claims involving traumatic injuries with latent manifestations, rather than applying the pure latent injury rule that this Court has consistently held to be applicable in cases of occupational lung disease:

> Unlike in toxic tort cases, where the injury initially is not sufficiently pronounced to put the plaintiff on notice that he or she has been injured, here any diagnosis of something relative to a lung impairment or a dust exposure related injury put petitioners on notice that the respirators they wore were defective. **Petitioners, in this case, had knowledge of the fact that something was wrong** when they were first awarded any workers' compensation benefits, diagnosed with any form of lung impairment, or filed for federal black lung benefits.

2023 WL 7402890, at *9 (emphasis added).

The ICA decision lifts the emphasized language directly from *Goodwin*, which was discussing a traumatic injury. *Goodwin*, 218 W. Va. at 221, 624 S.E.2d at 568. Furthermore, the ICA once again assumes that any lung impairment suffered by Petitioners put them on notice "that the respirators they wore were defective." 2023 WL 7402890, at *9. Not only does the ICA fail to cite any authority for this interpretation of the facts, this conclusion is inconsistent with the multiple genuine issues of material fact developed and particularly ignores the above-cited testimony of Respondents' own expert witnesses, who soundly rejected the idea that simply because a coal miner wore a respirator and developed black lung, the respirators worn were defective.

B. Genuine issues of material fact preclude summary judgment

"'In the great majority of cases, the issue of whether a claim is barred by the statute of limitations is a question of fact for the jury.'" *Trafalgar House Const., Inc. v. ZMM, Inc.*, 211 W. Va. 578, 567 S.E.2d 294, 300 (2002) (quoting *Gaither*, 199 W. Va. at 714-15, 487 S.E.2d at 910). In both of these cases - *Trafalgar House* and *Gaither* as well as *Dunn*, this Court reversed the lower court's grant of summary judgment on statute of limitations grounds. *See also JA Streets Associates, Inc. v. Thundering Herd Development, LLC*, 228 W.Va. 695, 724 S.E.2d 299 (2011). *3M Co. v. Engle*, 328 S.W.3d 184, 189 (Ky. 2010) ("In latent disease cases such as this one, . . . **When a plaintiff is put on notice of his injury is a question of fact for the jury**.") (Emphasis added).

Whether or not the plaintiff exercised reasonable diligence also presents a fact issue for jury resolution, as explained by this Court in *Barney v. Auvil*, 195 W. Va. 733, 740, 466 S.E.2d 801, 808 (1995)(per curiam):

> The determination of when Ms. Barney knew or should have known with "reasonable diligence" the identity of the heater's manufacturer is a "genuine issue

> of fact" or at least presents a desire for "inquiry concerning the facts ... to clarify the application of law." Syl. pt. 1, *Aetna Casualty & Surety Co. v. Federal Ins. Co. of N.Y.*. Because of the existence of the factual dispute, we find that the circuit court should have granted Ms. Barney's motion to amend and then submitted the factual issue concerning the running of the statute of limitations to the jury. Our holding today continues to emphasize that " '**it is the province of the jury to resolve conflicting inferences from circumstantial evidence**.' " *Williams v. Precision Coil, Inc.*, 194 W.Va. at 60 n. 10, 459 S.E.2d at 337 n. 10, *quoting, Ford Motor Co. v. McDavid,* 259 F.2d 261, 266 (4th Cir.), *cert. denied,* 358 U.S. 908, 79 S.Ct. 234, 3 L.Ed.2d 229 (1958). (Emphasis added).

Petitioners' claims all arise from pure latent injuries involving occupational diseases and a products liability claim regarding a concealed defect that could have prevented the pure latent injuries. Because the ICA erroneously analyzed pulmonary fibrosis as a traumatic injury, it erred by failing to submit the disputed material facts to a jury for resolution regarding Petitioners' knowledge of when they first knew of their disabling black lung injury, the conflicting medical evidence regarding that diagnosis, and the evidence bearing on when they should have known of the causal connection between their injury and the defective respirators.

Petitioners here do not contend that the discovery rule is applicable in all products liability or personal injury cases. To be sure, the discovery rule is inapplicable as a matter of law in traumatic injury cases, such as *Jones* and *Goodwin* where the victim suffered a latent injury after suffering an initial traumatic or acute injury. Nor do Petitioners contend that there are no cases in which a pure latent injury case involving respirators and pneumoconiosis cannot be decided on summary judgment. For instance, there are cases where it is established a miner wore a respirator 100% of the time that he worked around coal mine dust, then later developed pulmonary massive fibrosis, and thus could be charged with notice from the date he learned of that severe injury. *See Teets v. Mine Safety Appliances Co.*, No. 3:19-CV-195, 2021 U.S. Dist. LEXIS 145247, at *7 (N.D.W. Va. July 2, 2021) ("Mr. Teets has stated that he **'always' wore respiratory protection, denied ever being exposed to dust while not wearing protection**, knew inhaling coal dust could

be harmful to his heath and he believed respirators 'absolutely' would prevent him from contracting black lung . . . .") (emphasis added); *Collins v. Mine Safety Appliances Co.*, No. 21-0621, 2022 W. Va. LEXIS 633, at *6 (Oct. 17, 2022) ("It is undisputed that Mr. Collins knew the name and make of the respirator **he contends he wore continuously throughout his employment** before the time of his diagnosis.") (emphasis added).

It is only in a more limited set of cases like those on appeal here, where the miners only wore the defective productive during part of their toxic exposure, and then later gradually developed a pure latent injury, that the discovery rule applies and the factual disputes and competing inferences about when the injury became sufficiently pronounced to trigger the statute of limitations should generally be submitted to the jury.

In *Mitchell v. Am. Tobacco Co.*, 183 F. Supp. 406, 411 (M.D. Pa. 1960), the District Court made the following observation applicable to these Petitioners, who deserve the chance to present their claims to a jury:

> That, it seems to me, is the only sound, logical and humane conclusion that can be reached in this case, and it seems to be the trend both in Federal and State courts. [W]hether plaintiff's averment that the lung cancer did not become apparent until it was discovered at a time well within the two year period can be supported by evidence, only the trial itself can determine, but the plaintiff is certainly entitled by law to have the opportunity to present his evidence, and by the same token defendant would then be entitled to introduce evidence as to any negligence on the part of plaintiff's decedent.

This is because pure latent injury product liability claims may present complex factual issues relating to the progressive injury and/or causation. *See Hickman*, 178 W. Va. at 252, 358 S.E.2d at 813 ("In a progressive or creeping disease or injury, many plaintiffs will often not realize that they were actually injured. . . . Other plaintiffs will realize they are injured, but have no reason to connect the product with the injury."); *see also Urie v. Thompson*, 337 U.S. 163, 169 (1949) ("It would mean that at some past moment in time, unknown and inherently unknowable even in

retrospect, Urie was charged with knowledge of the slow and tragic disintegration of his lungs; under this view Urie's failure to diagnose within the applicable statute of limitations a disease whose symptoms had not yet obtruded on his consciousness would constitute waiver of his right to compensation at the ultimate day of discovery and disability."); *Louisville Tr. Co. v. Johns-Manville Prods. Corp.*, 580 S.W.2d 497, 500 (Ky. 1979) ("[W]hen an injury does not manifest itself immediately the cause of action should accrue not when the injury was initially inflicted, but when the plaintiff knew or should have known that he had been injured by the conduct of the tortfeasor.").

In *3M Co. v. Engle*, the Kentucky Supreme Court squarely addressed the application of the discovery rule in the context of cases closely related to this one, expressly analyzing the case as a "latent injury" where disputed material facts regarding duration of respirator use and onset of disease had to be presented to the factfinder rather than be reconciled by the court:

> In latent disease cases such as this one, a plaintiff's cause of action accrues when he discovers, or in the exercise of reasonable diligence should have discovered, that he has been injured and that his injury may have been caused by the defendant. . . . When a plaintiff is put on notice of his injury is a question of fact for the jury.

328 S.W.3d at 189. The Supreme Court of Kentucky has long recognized that where causation is factually complex, the discovery rule applies. *See Wiseman v. Alliant Hosps., Inc.*, 37 S.W.3d 709, 713 (Ky. 2000) ("A mere suspicion of injury due to medically unexplainable pain following an invasive surgery does not equate to discovery of medical negligence. 'To require a man to seek a remedy before he knows of his rights, is palpably unjust . . . .'").

Here, the cases not only involve pure latent injuries, but also involve claims for product defects, which failed to mitigate the latent injuries. Plaintiffs are bringing claims not against the producers of the coal mine dust that caused their disease, but rather against the manufacturer of a protective device that could have prevented the disease from becoming so pronounced and severe

if the respirator product had not been defective. The point when the pure latent injury became sufficiently pronounced to put Petitioners on notice of that claim against the manufacturers of the respirators should be a question for the jury. *See* Syl. Pt. 5, *Dunn*, 225 W. Va. at 46, 689 S.E.2d at 259 (concluding application of the discovery rule "will generally involve questions of material fact that will need to be resolved by the trier of fact").

It is factually complex to determine why a given miner's pulmonary fibrosis becomes sufficiently pronounced to cause a functional impairment. The analysis involves questions of medical history, mineralogy, and occupational/environmental factors. As in *Wiseman*, an entity that the victims reasonably regarded as a fiduciary--here, the U.S. Government--reviewed and ratified the devices for use in coal mines as dust protection devices. As the Kentucky Court recognized in *Wiseman*, in such situations, a victim's mere suspicion of wrongdoing on the part of the manufacturer of a dust protection device is not enough to trigger the running of the statute of limitations. *See* 37 S.W.3d at 713. Two West Virginia and numerous Kentucky Circuit Court decisions rejected Respondents' statute of limitations arguments because there were too many genuine issues of fact and competing inferences that have to be resolved by the jury. (JAICA 21, 32; JA 4348-60).

Coal miners are extremely knowledgeable about many matters, but the question of when a mild or totally undetectable, non-injurious case of black lung transforms into progressive massive fibrosis is not one such matter. Indeed, even the nation's preeminent expert radiologists routinely disagree about whether pulmonary fibrosis is attributable to coal mine dust exposure and/or whether it has progressed from the simple to complicated stage. It is unreasonable to hold that a lay person must detect the onset of such a latent and inherently undetectable injury as pneumoconiosis, or that if he or she does detect it, that such detection triggers a duty to investigate

and prosecute legal claims in tort against the manufacturers of all potentially defective products that might have contributed to that injury.

The Court has long required that a physician must make known to the miner a finding of pulmonary impairment due to occupational pneumoconiosis before the statute of limitations begins to run--an eminently sensible rule that takes "into account the progressive nature of the disease, yet preclude[s] unsubstantiated, repeated claims which would unreasonably burden the [factfinders]." *Pennington*, 241 W.Va. at 188, 820 S.E.2d at 634. That is, there is no reason to impose a limitations period for plaintiffs to sue for injuries that have not caused the miner any appreciable loss of physical function.

This is precisely the same reason why Petitioners' claims should not be time-barred until their black lung disease progresses to become "sufficiently pronounced" as to constitute a measurable impairment to their pulmonary function that implicates their respirator usage--a fact-intensive medical-legal analysis involving multiple degrees of causation to determine whether coal-mine dust caused their pulmonary disease and whether the relevant respirators were worn at times that could have aggravated that exposure. Until the miner reasonably understands the injury has become "sufficiently pronounced" to represent a distinctly recognizable harm, it is manifestly unreasonable to impute notice to the miner that something might have been defective in one or more of the various safety devices utilized by that miner over the course of decades of underground labor.

Petitioners acknowledge there may be cases where a products liability claim is susceptible to summary judgment based on the statute of limitations. However, here Petitioners presented evidence that creates an issue of fact for the jury as to when they knew or should have known of their pure latent injury and that their injuries were causally connected to their defective respirators.

C. Chart identifying the multiple conflicting evidence for the jury to consider

The ICA accepted and adopted the following dates, when "something was wrong," as triggering the statute of limitations for each Petitioner:

1. The date Petitioners were awarded more than 5% *de minimis* disability compensation for work-related dust-based chronic lung injury;

2. The date Petitioners were medically diagnosed with any form of lung impairment resulting from their inhalation of coal, rock, and sand dust; or

3. The date Petitioners applied for federal black lung benefits. 2023 WL 7402890 at *8.

Selecting these bright-line dates as resolving the statute of limitations question as a matter of law is contrary to this Court's cases holding that these issues are best left for jury resolution, particularly when there are conflicting facts for the jury to consider and the issue to be decided is whether Petitioners exercised reasonable diligence in determining a causal connection between their latent injury and defects in Respondents' respirators.

Below is a chart that identifies the critical dates relevant to each Petitioner:

Petitioner	Respirator Usage	De Minimis Finding (Initial State Award)	Federal Claim	Learned of Advanced Impairment or Causal Connection	Complaint Filed
James Cruey	3M - 1990s; MSA 1968-1999	1984-1985	Applied: 8/24/16 Negative Report: 2/7/17 (Adcock found no BL) 8/3/18 (Tarver found no BL); 8/15/18 (Seaman found no BL) Final Award: 9/22/20	Advanced Impairment: 9/22/2020 Inquired with Counsel: 6/30/2021	9/3/2021
Edgel Dudleson	AO - 1990-1999; MSA 1976-86; 1990-1996	2000	Applied: 6/14/18 Negative Report: 11/5/18 (claim denial); 3/27/19 (claim denial); Final Award: 6/17/22	Advanced Impairment: June-August 2020 Inquired with Counsel: 7/2/2021	8/19/2021
Ronald Hardy	3M - 1990s to 2001	None	Applied: 6/13/18 Negative Report: 12/12/18 (Fino found no BL); 4/26/19 (Tarver found no BL); 3/10/20 (Adcock found no BL) Final Award: 9/29/22	Advanced Impairment: October-November 2019 Inquired with Counsel: 7/2/2021	8/18/2021
Ralph Manuel	3M - 2013-2019; MSA 1982-1990; 1998-2013	1999	Applied: 7/10/18 PMF Diagnosis: 10/2020 Final Award: 10/5/20	Advanced Impairment: October 2020 Inquired with Counsel: 5/21/2021	8/19/2021

Ricky Miller	3M - 1980-1990	2013	Applied: 1/4/18 Final Award: 6/4/19	Advanced Impairment: 9/14/2019 Inquired with Counsel: 7/9/2021	8/19/2021
Gary Scott	3M, AO, & MSA - 1975-1981; 3M also worn late 1980s-early 90s	1994	Applied: 1/21/20 Part 90 Letter (no finding of impairment): 1/10/18 Final Award: Not issued yet	Advanced Impairment: 2020 – 2021 Inquired with Counsel: 7/19/2021	9/9/2021
Mark Scott	MSA 1990-2001	1998	Applied: 12/20/17 Negative Report: 11/28/18 (claim denied) Final Award: 12/11/19	Advanced Impairment: 12/11/2019 Inquired with Counsel: 7/8/2021	9/9/2021

Establishing the causal relationship to the plaintiff's injury in a toxic exposure case can be very complicated because there are so many factors. Expert witnesses viewing the same facts can disagree over whether or not the defective mask caused Petitioners' latent injuries. In *Young v. Clinchfield Railroad Company*, 288 F.2d 499, 503 (4th Cir. 1961), the Fourth Circuit explained why it is untenable to charge a coal miner with receiving notice of injury for purposes of triggering the statute of limitations in cases just like these, where multiple expert radiologists have reviewed medical records and found no such pneumoconiosis, or formed conflicting opinions:

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

The causation element in a product liability claim is very factual and often requires expert testimony to establish this element. Thus, these cases present a question as to what these coal

miners, who are not experts in industrial hygiene, reasonably should have done to determine whether or not there was some causal connection between their pure latent injury and wearing Respondents' respirators.

First, each miner testified that he did not wear his respirator 100% of the time they were exposed to coal dust. [*See* Petitioner Hardy–30-40% (JA 212, 243-48, 250); Petitioner Manuel—less than 100% (JA 851); Petitioner Dudleson—40-60% (JA 1715); Petitioner Miller—"mostly" but not exclusively (JA 2086-87, 2164); Petitioner Cruey--only wore respirator when he worked in the face (JA 2515); Petitioner Mark Scott—did not wear 100% of the time and ceased respirator usage around 1994 (JA 4322-24); Petitioner Gary Scott—wore respirators from 1975 through 1981, but not 100% of the time (JA 3615).

Second, Respondents own experts testified that when a coal miner was diagnosed with coal workers' pneumoconiosis/black lung and previously had worn a respirator, that does not necessarily mean the respirator was defective. (JAS 105, 116). The leap in logic made by the trial court and the ICA that these facts alone are enough to prove that the use of Respondents' respirators caused Petitioners to be diagnosed with various coal-related lung diseases is too simplistic.

Finally, the complexity of the causal connection is further intensified by the fact that the respirators were intended to mitigate the effects of inhalation of coal dust, rather than the source of the toxic exposure. Petitioners wore these devices to help prevent the inhalation of coal dust when it turns out these respirators were not fit to be used in the coal mine environment.

There is no legal or factual basis for finding that any coal miner who receives more than a 5% disability compensation award for work-related dust-based chronic lung injury automatically is barred by the statute of limitations from filing a claim against Respondents as a result of their respirators. Where some award has been made, the jury should be permitted to consider what

symptoms such a coal miner had, whether the coal miner ability to work was impacted in any way, and whether the actual medical diagnosis was being disputed and litigated. From a reasonableness viewpoint, the more serious the latent injury suffered by each Petitioner, the more diligence such Petitioner would need to exercise in determining what may have caused that latent injury.

The date of diagnosis also is inappropriate because, as demonstrated in the chart, often whether or not a coal miner has some form of black lung is hotly contested. Petitioners Cruey, Dudleson, Hardy, Gary Scott, and Mark Scott received negative reports from doctors, who reviewed the xrays and CT scans and concluded no evidence of black lung was detected. These conflicting medical reports created uncertainty regarding the health of these Petitioners. The jury should be permitted to take these conflicting medical opinion into account in resolving whether or not these Petitioners exercised reasonable diligence.

Finally, the ICA's decision to focus on the date each Petitioner applied for federal black lung benefits, regardless of whether or not such benefits were granted, also is error. This ruling focuses on the mere application for such benefits, rather than the date such benefits were awarded. Thus, according to the ICA's analysis, although Petitioner Dudleson was awarded federal black lung benefits in 2022, the fact that he had applied for federal black lung benefits several years earlier and both applications were denied in 2018 and 2019 bars his products liability claims against Respondents. Similarly, Petitioner Mark Scott's application for federal black lung benefits was denied in 2018, but was granted in 2019, while Petitioner Cruey's claim for such benefits first was denied in 2016, but finally awarded in 2020.

Rather than focusing on the date each Petitioner filed for federal black lung benefits, the more pertinent fact for the jury to consider would be the date each Petitioner received an award of federal black lung benefits. All of Petitioners, except for Petitioner Gary Scott, received final

awards of federal black lung benefits within two years of the filing of their complaints against Respondents. Petitioner Gary Scott is still waiting for a final ruling in his case.

As noted earlier, a coal miner who applies for federal black lung benefits does not have to show that he or she has any actual impairment at the time. As the Kentucky Supreme Court explained, often coal miners will apply for federal black lung benefits simply because they had worked in the mines for several years and learned that a coworker had applied for and received such benefits.

Petitioner Cruey's facts demonstrate the internal inconsistencies in the way the ICA applied its bright-line rules. Petitioner Cruey's claim against Respondent 3M was dismissed based upon his 1985 award of partial impairment due to black lung. However, Petitioner Cruey had not worn a respirator manufactured by Respondent 3M until five years later in the 1990's. Thus, the ICA affirmed the complete dismissal of Petitioner Cruey's claims when the facts supporting his claims against Respondent 3M had not yet occurred.

After Petitioner Cruey began using Respondent 3M's respirators, he was told by numerous radiologists that he did not suffer from black lung at all. It is completely illogical to assert that Petitioner Cruey should have filed his claims against Respondent 3M within two years of his 1985 partial impairment award considering he had not even begun to use Respondent 3M's products yet, and once he did begin to use Respondent 3M's products, he was told by multiple doctors that he did not have black lung disease at all. Only years later, after a new factfinding process revealed that, indeed he did have black lung and it had become substantially more pronounced than it was back in 1985, did Petitioner Cruey have notice his injury had become "sufficiently pronounced" that it was reasonable to suspect Respondent 3M's respirators might have been defective and thus contributed to the pulmonary injury. As with Petitioner Cruey, the absurdity and illogic of the

ICA's erroneous application of the traumatic injury rule to these "pure latent injury" cases is readily apparent upon a more in-depth examination of the application of the trial court and ICA's holding to the facts of these seven plaintiffs.

D. Respondents' fraudulent concealment creates a fact issue tolling the statute of limitations

It is not disputed that the advertisements and instructions for Respondents' products stated that they would protect against respirable dust in coal mines. Further, Petitioners made formidable showings of internal documents indicating Respondents knew those ads and instructions to be patently false. Yet, the ICA held: "While a product manufacturer simply indicating that their product is good or effective may constitute a misrepresentation, that does not constitute fraudulent concealment. Here, there is no evidence in the record that respondents concealed facts that prevented the petitioners from discovering or pursuing their cause of action." 2023 WL 7402890 at *8.

Respondents did not merely tout their respirators as being "good or effective," they made those representations fully knowing, based upon their own internal studies and discussions, that their respirators were not suitable in the coal mine environment. As a result, the protection from the inhalation of coal dust that Petitioners relied upon and thought they were getting turned out to be false. Rather than Respondents simply engaging in puffery regarding their respirators, their actions in continuing to selling these dangerous and defective respirators constituted a fraud on the coal operators who purchased them as well as the coal miners who used them.

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

plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled.

In *Rice v. Diocese of Altoona-Johnston*, the Pennsylvania Supreme Court explained the differences between applying the discovery rule and fraudulent concealment doctrine in determining whether the statute of limitations was met:

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

255 A.3d 237, 247-48 (Pa. 2021) (emphasis added). Here, the Petitioners presented evidence sufficient to create a jury issue on whether the Respondents fraudulently concealed facts that prevented them from discovering that the respirators were defective and had a causal connection to their injuries.

Respondents knew of the defects in their products beginning as early as the 1950s and certainly by the 1970s with respect to their respirators' failure to protect coal miners from lung disease. Yet, Respondents continued to market, advertise, and sell these products through at least 1998, when the regulatory standards changed, and these respirators could not pass the new test administered by NIOSH. Between 1998 and the present, Respondents have settled many of these lawsuits confidentially, but have not otherwise taken any steps to correct the situation that is clear from their internal records: Respondents put coal miners who wore these products in danger of

serious injury and death. There have been no recalls, no warnings, no apologies, nor any public explanations.

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

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

In these seven cases, the trial court and the ICA fault these Petitioners and deny them their day in court for failing to exercise reasonable diligence in determining whether or not their use of Respondents' respirators caused their lung impairment. The fraudulent concealment engaged in by Respondents made it virtually impossible for these Petitioners or any other person to discover the facts relevant to the defects in these respirators. A jury evaluating whether or not Petitioners exercised reasonable diligence in determining whether or not Respondents' respirators were defective and, therefore, a cause for each of them to suffer from a coal-dust related lung disease,

should be able to consider what information Respondents knowingly and fraudulently kept from the public about the unsuitability of their respirators for use in coal mines. By concealing this critical information while continuing to sell these respirators, Respondents directly impacted the ability of Petitioners, exercising reasonable diligence, to discover these defects and the causal connection to the respiratory diseases they are suffering.

The victim must know the relevant product is defective. Here, it was at a minimum factually disputed whether the Respondents' misstatements and false advertising during the time they used the respirators, coupled with the government's approval of these products and Respondents concealment and suppression of their knowledge of the defects (which continues to this day), delayed the Petitioners' discovery that these with the respirators.

Considering Petitioners did not wear their respirators 100% of the time and relied on the fact that their employers provided respirators for their own protection against coal dust, a jury should be permitted to consider, in light of the governmental approval of the respirators and the implication that these respirators would protect against coal mine dust, that their disease arose from the dust they inhaled while they were not wearing the masks? Would it be reasonable if, once Petitioners actually learned of Respondents' fraudulent concealment that their respirators were defective when used in a coal mine, that Petitioners then promptly acted to file suit? In fact, all Petitioners filed their lawsuits shortly after learning of these facts. For these reasons, the question of whether Respondents fraudulent concealment tolled the statute of limitations must be left for the jury to decide, along with all of the other fact issues presented in these cases.

VII. CONCLUSION

For the foregoing reasons, Petitioners Ronald Hardy, Ralph Manuel, Edgel Dudleson, Ricky Miller, James Cruey, Mark Scott and Gary Scott respectfully move this Court to order oral

argument and to issue a full decision authored by one of the Justices reversing the final order entered by the ICA and remanding this case to the Circuit Court of McDowell County for trial. Further, Petitioners seek such other relief as this Court deems appropriate.

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

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-717

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

Petitioners, Plaintiffs below,

v.

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

Respondents, Defendants below.

JOINT APPEAL FROM THE INTERMEDIATE COURT OF APPEALS

CERTIFICATE OF SERVICE

I, Lonnie C. Simmons, do hereby certify that on April 11, 2024, a copy of the foregoing **PETITIONERS' JOINT APPEAL BRIEF** electronically was served on all counsel of record using the File & Serve Xpress system.

/s/ Lonnie C. Simmons
Lonnie C. Simmons (W.Va. I.D. No. 3406)