IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 23-717

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

Petitioners, Plaintiffs below,

v.

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

Respondents, Defendants below.

JOINT APPEAL FROM THE INTERMEDIATE COURT OF APPEALS

PETITIONERS' JOINT REPLY BRIEF

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I. SUMMARY OF ARGUMENT

This appeal concerns a limited universe of product liability claims relating to West Virginia coal miners who unwittingly inhaled excessive levels of coal-mine dust, suffering pure latent lung injuries due to allegedly defective personal protective equipment (PPE). The lower courts misunderstood the proper rule for applying the statute of limitations to Petitioners' claims. Respondents contend (1) there are not separate rules for applying the statute of limitations in product defect claims arising from "pure latent injuries" as opposed to injuries arising from traumatic events and (2) the same result occurs under either rule. This Reply Brief demonstrates both contentions are wrong. Were the correct rule applied to the Petitioners' claims, a jury would be tasked with resolving the factual dispute of whether the Petitioners reasonably should have known their injuries were caused by Respondents' allegedly defective respirators more than two years before filing their Complaints.

This Reply Brief closely examines the arguments that form a common thread through the response briefs of the numerous Respondent-manufacturers and elucidates the marked legal error that plagues the theories relied upon by Respondents and the lower courts. First, the lower courts concluded that the statute of limitations for Petitioners' claims began to run, **as a matter of law**, on the earliest of three dates (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. Every

other American jurisdiction has rejected such facile recourse to what courts have termed a "magic moment" to begin the running the statute of limitations for pure latent injuries. The lower courts' rulings announced the adoption in West Virginia of the very type of "Magic Moment Rule" that has been universally rejected elsewhere for pure latent injuries. The lower rulings were expressly based – erroneously – on the rule that typically applies to traumatic injuries: the date when the victim knew "something was wrong."

Respondents claim the lower courts' opinions are part of a "consensus" of decisions concerning the application of the statute of limitations to these types of product liability claims. But the controlling authorities cited by Respondents are exclusively drawn from cases involving traumatic injuries. In fact, the lower courts' decisions are contrary to decades of precedent from this Court in cases, like those of these Petitioners, that involve pure latent injuries. *See*, *e.g.*, *Hickman v. Grover*, Syl. Pt. 1, 178 W. Va. 249, 358 S.E.2d 810 (1987). As noted, every jurisdiction in this country has similarly held that the rule for applying the statute of limitations to pure latent injuries arising from product defects requires determining when a plaintiff knew or reasonably should have known both (1) they have a sufficiently pronounced injury and (2) that the injury was caused by the allegedly defective product. The question of whether victims of pure latent injuries should have reasonably known of these two facts is generally a question of fact. *See generally Childs v. Haussecker*, 974 S.W.2d 31, 37-38 (Tx. 1998) (holding that cases involving latent occupational diseases should be governed by the discovery rule, which is generally a question of fact for the jury) (collecting authorities). So it is here too.

Second, the lower courts' Magic Moment Rule erroneously assumes – in the face of contrary testimony and documentary evidence – that the receipt of a state workers' compensation award for ten percent partial pulmonary impairment, or the mere filing of an application for

federal black lung benefits, put Petitioners on notice, **as a matter of law**, they suffered a sufficiently pronounced injury, which imposed upon them a duty to investigate whether their respirators had a causal connection to that partial or subjectively-suspected injury. This assumption is also incorrect and inconsistent with West Virginia law and the law of other jurisdictions, which conclude that the mere filing of a workers' compensation claim – such as a federal black lung claim – without more does not trigger the statute of limitations for related torts as a matter of law. *See*, *e.g.*, *Rucker v. Deere & Co.*, 208 W. Va. 169, 175, 539 S.E.2d 112, 118 (2000); *Childs*, 974 S.W.2d at 43.

Especially for these Petitioners – for whom the allegedly defective product was not a primary instrument of harm, but rather failed to mitigate the exposures inflicting the pure latent injury – there are profuse factual questions whether reasonable miners should have known that simply because they suspect they might suffer adverse effects due to the inhalation of coal dust over an extended period of time, they also might suspect that their respirators were defective. *See Tucker v. Mine Safety Appliances Co. LLC, et al.*, No. 21-C-262 (Mon. Cty. Cir. Ct. March 24, 2023) (ICA000026) ("The Court is concerned that Defendant's position would promote a more litigious society in which many min[e]rs are compelled to file suit on speculative grounds.").

To be clear, Petitioners' claims allege design defects in protective equipment that should have prevented coal and silica dust from causing such severe disease among the Petitioners. It is not as though the Respondents' respirators collapsed and struck these miners in a traumatic event. Here, in addition to first having to ascertain whether their lung disease was due to coal mine dust, the Petitioners had to determine, as a factual matter, that there might be some design defect in their PPE that failed to mitigate their occupational lung disease. Petitioners reasonably could have believed that by awarding them state benefits, their employers accepted fault for

causing their lung disease and therefore would not have thought to investigate whether their respirators were defective and a contributing factor. *See Short v. Yamaha Motor Corp., U.S.A.*, No. 2:11-cv-00999, 2012 U.S. Dist. LEXIS 55175, at *11-12 (S.D.W. Va. Apr. 19, 2012) (third party admission of fault creates question of fact regarding timeliness of plaintiff's design defect suit against product manufacturer).

Finally, the lower courts concluded Petitioners failed to produce any evidence that Respondents' misrepresentations and fraudulent concealment prevented them from discovering the Respondents' respirators caused their injuries. In so concluding, the lower courts ignored undisputed evidence – namely misrepresentations in advertising and instructions on product packaging – that a reasonable juror could have concluded prevented Petitioners from discovering the respirators they wore were defective and consequently failed to mitigate their black lung diseases.

Because it is not the law in this state or any other jurisdiction, the lower courts' Magic Moment Rule should be reversed. This new rule is inconsistent with the overwhelming weight of authority, which has concluded that the statute of limitations does not begin to run **as a matter of law** based on any of the events set forth in the lower courts' Magic Moment Rule.

II. REPLY TO STATEMENTS OF FACTS

Respondents' recitations of the facts generally omit the abundant testimony and documentary evidence that Petitioners' lung diseases did not initially raise any suspicion of a potential respirator defect – much the same as the lower courts ignored or drew unfavorable inferences from this evidence. (*See* Pet. Br. at 17-45.) Petitioners' early diagnoses carried no findings of impairment at all, or such minimal partial impairment they were able to continue working in some cases for decades after the early onset of low-grade lung disease. This Court

may take judicial notice that low-grade lung disease is a common condition among coal miners in West Virginia.[1]

Respondents make a variety of factual assertions which ignore the testimony and evidence in the record about the dates that each Petitioner first realized they had an advanced case of black lung. In reply to the Respondents' briefs, the following discussion of facts highlights the key facts omitted from Respondents' argument.

Ronald Hardy. Respondent 3M cursorily addresses Mr. Hardy's facts in their Response. (3M Resp. at 4-5; *cf*. Pet. Br. at 19-25, 75.) Respondents and the lower courts assert that Petitioner Hardy should have filed his complaint within two years from June 4, 2018, when he applied for federal black lung benefits or no later than June 31, 2018, when Dr. Forehand diagnosed him with black lung – even though Dr. Forehand did not communicate to Mr. Hardy any diagnosis of impairment due to black lung. ***The lower courts gave no weight or consideration to the conflicting evidence and critical dates.*** Ronald Hardy had never received an award of state black lung benefits and did not understand he had black lung until he received the Department of Labor's proposed decision and order in October 2019, within two years before filing this claim. (Pet. Br. at 24.) Respondents and the lower courts simply ignored that numerous radiologists concluded Mr. Hardy did not have black lung disease at all throughout 2018-2020, reasonable signifying to Mr. Hardy he might not have a disease traceable to coal dust, let alone respirators, at all. (3M Resp. at 4; *cf*. Pet. Br. at 19-24; JA 230.)

Ralph Manuel. Respondents address Mr. Manuel's facts in several places. (3M Resp. at 5-6, 10, 20, 22, 31; MSA Resp. at 3-5, 19-20; *cf*. Pet. Br. at 25-28, 75). Mr. Manuel received a

[1] The 2022/2023 Annual Report of the West Virginia Occupational Pneumoconiosis (OP) Board indicates over three hundred and sixty (360) coal miners sought benefits annually in recent years, and nearly half of those received awards of partial impairment (167 in 2022 and 195 in 2023).

5% state OP award in 2000. (Pet. Br. at 25.) The lower courts did not find his statute of limitations was triggered on the date that he *filed* that OP claim. However, they found that the limitations period was triggered by the filing of his federal black lung claim in 2018. Yet, he did not learn he was diagnosed with advanced impairment until 2021 – less than two years before filing this respirator lawsuit. Petitioner Manuel specifically testified he did *not* recall being notified any earlier than October 2020 that he had any impairment due to black lung. *Id*. at 28.

The lower courts held Petitioner Manuel should have filed his complaint within two years from July 10, 2018, when he applied for federal black lung and Dr. Forehand diagnosed him with black lung. ***The lower courts gave no weight or consideration to the conflicting evidence and critical dates.*** The Respondents and the lower courts ignored Petitioner Manuel's testimony that he did not understand he had black lung until October, 2020, when he was diagnosed with PMF. On August 19, 2021, Petitioner Manuel filed his complaint.

Edgel Dudleson. Respondents address Mr. Dudleson's facts in several places. (MSA Resp. at 5-6, 26-27, 30, 33; AO Resp. at 3-4, 11, 16-25; *cf*. Pet. Br. at 28-32, 75.) Respondents and the lower courts urge that Petitioner Edgel Dudleson should have filed his complaint within two years from November 30, 2018, the date a CT scan was taken and which treatment notes indicated was "likely complicated pneumoconiosis." (JA 1505). First, Respondents tender no evidence establishing whether or when the radiologists' interpretations of the November 2018 or June 2019 CT scan were communicated by a physician to Mr. Dudleson before he was awarded benefits in 2020. (Pet Br. 29.) Second, Mr. Dudleson testified that those diagnoses *were not communicated to him by a physician at any time before he received his 2020 award of benefits*. At most, he testified that a non-medical staffer from a local clinic indicated she thought he might have black lung in 2019. (Pet. Br. at 29; JA 1477-78). But he explained that her comment did

not cause him to suspect any connection between his respirators and the disease. (Pet. Br. at 29; JA 1481).

Respondents do not address or grapple with any of those facts, and ***the lower courts gave no weight or consideration to those or other conflicting evidence and critical dates***. Most notably, the lower courts ignored the fact that on March 27, 2019, the federal Department of Labor's Office of Workers' Compensation Program (OWCP) denied Petitioner Dudleson's application, finding that he had not met the grounds for eligibility. (JA 1659.) On June 10, 2020, the OWCP reversed its prior decision and concluded that Petitioner Dudleson did suffer from PMF. (JA 1870.) On August 15, 2020, Petitioner Dudleson received his first black lung benefits. (Pet. Br. at 30.) On August 19, 2021, Petitioner Dudleson filed his complaint.

Ricky Miller. Respondent 3M addresses Mr. Miller's facts briefly (3M Resp. at 6-8; *cf*. Pet. Br. at 32-35, 76.) Respondent 3M and the lower courts urge Petitioner Miller should have filed his complaint within two years from October 24, 2013, when the Occupational Pneumoconiosis Board informed Petitioner Miller that he had occupational pneumoconiosis and granted him a 20% award. Alternately, they held he should have file this respirator suit no later than December 17, 2018, when he filed for federal black lung benefits. ***The lower courts gave no weight or consideration to the conflicting evidence and critical dates.*** The lower courts ignored the fact that Mr. Miller only worked twelve years in the mines and that he explained he not understand that his 2013 OP award was based on coal-mine dust. (Pet. Br. at 32.) He did not receive any federal black lung benefits until September 14, 2019, which is when he testified that he first learned he had black lung. (Pet. Br. 32-34.) On August 19, 2021, Petitioner Miller filed his complaint.

James Cruey. Respondents discuss Mr. Cruey's facts in several places. (MSA Resp. at 6-8, 20-26; 3M Resp. at 8-9, 10, 20, 23, 33; *cf*. Pet. Br. at 35-40, 75.) Respondents and the lower courts urge that Petitioner Cruey should have filed his complaint within two years from 2016 when he was diagnosed with "interstitial lung disease with impairment gas exchange" – and there was some suggestion he should have filed the complaint back in 1985 when he received a 25% partial impairment OP award. Significantly, Mr. Cruey had not even begun to utilize the 3M respirator yet at the time he received the 25% award of OP benefits in 1985. (JA 2803 (25% award in 1985); Pet. Br. at 75 (table setting forth periods of usage, noting Cruey used 3M respirators only in 1990s).) Logically, he could not have been on notice the 3M respirator had damaged him if he had not yet begun to use at the time he received his partial impairment award. ***The lower courts gave no weight or consideration to the conflicting evidence and critical dates.*** Several experts provided opinions that he did not have black lung and he did not receive federal black lung benefits until September 2, 2020. (JA 2784.) On September 3, 2021, Petitioner Cruey filed his complaint.

Significantly, MSA erroneously stated that Mr. Cruey was diagnosed with PMF. (MSA Resp. at 30.) Not only was Mr. Cruey never diagnosed with PMF, the doctors continued to disagreed about whether he had clinical pneumoconiosis at all, causing him to be unsure. (JA 2784) ("other doctors told me I didn't [have black lung].") The administrative law judge reviewing his case concluded he never established he suffered from clinical coal workers' pneumoconiosis at all – and rather awarded benefits to him based on a federal statutory presumption establishing disease causation based on his tenure of more than fifteen years of coal mine employment. (JA 2783-84.)

Mark Scott. Respondent MSA discusses Mr. Scott's facts in several places. (MSA Resp. at 8-10, 30, 33; *cf*. Pet. Br. at 40-43, 76.) Respondents and the lower courts urge that Petitioner Mark Scott should have filed his complaint within two years from December 20, 2017, when he applied for federal black lung benefits. ***The lower courts gave no weight or consideration to the conflicting evidence and critical dates.*** Although Mark Scott suspected he had PMF, the federal Department of Labor November 18, 2018, the OWCP determined that Petitioner Mark Scott did not suffer from PMF. (JA 3335.) On December 11, 2019, the OWCP determined that Petitioner Mark Scott did in fact have PMF. (JA 3327.) On September 9, 2021, Petitioner Mark Scott filed this complaint.

Gary Scott. Respondents address Gary Scott's facts in several places (3M Resp. at 9-10, 20, 22, 31; MSA Resp. at 10-11; AO Resp. at 4-5, 16-19; 20-25); *cf*. Pet. Br. at 43-45, 76.) Respondents and the lower courts held Petitioner Gary Scott should have filed his complaint within two years from January 10, 2018, when he received a letter from the National Institute of Occupational Safety and Health (NIOSH) notifying him that his lungs had been damaged by dust and that he had Category A complicated pneumoconiosis. Notably this letter contained no finding of any pulmonary impairment due to black lung disease – the notice it conveyed was akin to the notice conveyed by a 5% award, i.e. that you have disease without any finding of impairment. ***The trial court gave no weight or consideration to the conflicting evidence and critical dates.*** In 2020, Petitioner Gary Scott learned that he had PMF and that is the year he retired. (JA 3632.) On September 9, 2021, Petitioner Gary Scott filed his complaint.

Fraudulent Concealment

In their Response Briefs, the Defendants have not disputed the following significant facts pertinent to fraudulent concealment: 1) the packaging for MSA's Dustfoe series respirators

featured instructions indicating that the respirators would be safely worn in contaminant (gas, vapor, or particulate) concentrations up to ten times the exposure limit for the contaminant, 2) the instructions on the packaging of the relevant 3M products indicated that they were approved by MSHA and NIOSH for protection against dusts from the mining of minerals, such as silica, and 3) the AO instructions contained similar representations of fitness for protection against coal mine dust.

III. REPLY TO RESPONDENTS' ARGUMENTS

Under direct controlling authority from this Court, the statute of limitations applicable to product defects claims where the product failed to mitigate pure latent occupational pulmonary diseases does not begin to run until an injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury and that the Respondents' respirators were a cause, and determining that point in time is a typically a question of fact to be answered by the jury. Syl. Pt. 3, *3M Co., et al. v. Hoke*, 244 W. Va. 299, 301, 852 S.E.2d 799, 801 (2020); Syl. Pt. 1, *Hickman*, 178 W. Va. at 249, 358 S.E.2d at 810; *see also 3M Co. v. Engle*, 328 S.W.3d 184, 189 (Ky. 2010) ("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**.") (emphasis added). Because the lower courts applied the incorrect rule in finding Petitioners' claims were barred by the statute of limitations and ignored evidence that Respondents' fraudulent concealment prevented them from discovering Respondents' respirators were defective, the lower courts should be reversed and the case remanded for further proceedings in the circuit court.

A. Contrary to Respondents' Misguided Attempt to Analyze These Cases as Traumatic Injuries, the Consensus of Authority in West Virginia and in Every Jurisdiction in the United States Concludes that Pulmonary Fibrosis is a Pure Latent Injury and the Question of When a Plaintiff Discovers a Product Liability Claim for Pure Latent Injuries is "Generally a Question of Fact."

A pure latent disease generally triggers the statute of limitations in a design defect claim involving defective protective equipment when the plaintiff discovers, or through reasonable diligence should have discovered, a) the nature of the injury and b) the relevant product's causal relation to the injury. Courts consistently find that the causal connection presents a question of fact for the jury to resolve, as set forth at length herein.

West Virginia first extended the discovery rule to products liability claims in Syllabus Point 1 of *Hickman v. Grover*:

> 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.

Syl. Pt. 1, 178 W. Va. at 252, 358 S.E.2d at 813 ("This rule in products liability cases will allow the plaintiffs a fair chance to sue, while upholding the purposes behind the statute of limitations."). This Court acknowledged that the application of the discovery rule in product liability cases would prevent a miscarriage of justice:

> 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.

Id. (footnote omitted).

In discussing the progressive or creeping disease or injury, the *Hickman* Court referenced this Court's first acknowledgement of the distinction between traumatic injuries and pure latent

injuries in *Jones v. Trs. of Bethany Coll.*, 177 W. Va. 168, 170, 351 S.E.2d 183, 185 (1986) and drew on the Kentucky Supreme Court's analyses applying the discovery rule to a products liability claim concerning asbestos. *Jones* was a traumatic injury case, where the plaintiff was injured in an automobile accident, but discovered latent injuries related to the accident many years later. This Court concluded the plaintiff knew of his injury and the cause at the time of the traumatic event:

> 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.

Jones, 177 W. Va. at 170, 351 S.E.2d at 185. *Jones v. Bethany College* was not a products liability claim, but the Court in *Hickman* noted that the holding from *Jones v. Bethany College* would apply to products liability claims:

> [I]t may be possible for a plaintiff to suffer a traumatic injury, but be unaware of its consequences. However, he would have an extraordinarily high burden of demonstrating that he did not know and could not have timely known of its existence.

Hickman, 178 W. Va. at 253, 358 S.E.2d at 814 (citing *Jones*, 177 W. Va. at 172, n.4, 351 S.E.2d at 187, n.4.).

West Virginia's rule, as first announced in *Hickman* is the consensus position across all jurisdictions in the country. *See*, *e.g.*, *Childs*, 974 S.W.2d 3at 37-38 (collecting authorities). For example, in *Carter v. Brown Williamson Tobacco*, a case involving the latent disease of lung cancer, the Florida Supreme Court held the product defect cause of action accrues when the accumulated effects of the deleterious substance manifest themselves to the claimant in a way which supplies some evidence of a causal relationship to the manufactured product, and further held this is generally a question of fact for the jury to resolve. 778 So. 2d 932, 937 (Fla. 2000).

Similarly, in *Copeland v. Armstrong Cork Co*., a case involving occupational asbestosis, the court explained "**there is no magic moment** when [the point when the facts giving rise to the cause of action are known or should have been known by the plaintiff] arrives as we often deal here with inherently debatable questions about which reasonable people may differ." 447 So.2d 922, 926 (Fla. Dist. Ct. App. 1984) (emphasis added). Therefore, the question of when the statute of limitations begins to run in this type of case is "generally treated as [a] fact question for a jury to resolve, and therefore inappropriate for resolution on a summary judgment or directed verdict." *Id*.; *see also Carter*, 778 So. 2d at 937. When addressing the running of statutes of limitations in pure latent injury cases, it is the "rare case in which the issue may be decided as a matter of law." *Belanger v. R.J. Reynolds Tobacco Co*., 140 So. 3d 598, 607 (Fla. Dist. Ct. App. 2014).

The *Childs* court further explained:

> [E]ven when symptoms do arise that make the fact of injury objectively verifiable, the [latent occupational] injury and its etiology are difficult to diagnose and ascertain because of the lengthy latency period, the many potential causes of the specific symptoms, and some physicians' lack of education and experience in identifying occupational diseases. . . . Under these circumstances, permitting the cause of action of a 'blamelessly ignorant' plaintiff to accrue before he or she could possibly have been aware of the injury would be unjust.").

974 S.W.2d at 38.

All American jurisdictions have followed this reasoning in applying the discovery rule to tort claims involving pure latent injuries. *See e.g.* Ala. Code § 6-2-30(b) (claims for exposure to asbestos); *Cameron v. State*, 822 P.2d 1362, 1365-66 (Alaska 1991) (lung condition caused by dust inhalation); *Mack v. A.H. Robins Co., Inc*., 759 F.2d 1482, 1483 (9th Cir. 1985) (*per curiam*) (applying Arizona law) (pelvic inflammatory disease caused by intrauterine device); *Velasquez v. Fibreboard Paper Prod. Corp*., 97 Cal. App. 3d 881, 159 Cal. Rptr. 113, 117 (1979) (asbestosis);

Miller v. Armstrong World Indus., Inc., 817 P.2d 111, 113 (Colo. 1991) (*en banc*) (same); *Ricciuti v. Voltarc Tubes, Inc*., 277 F.2d 809, 813 (2d Cir. 1960) (applying Connecticut law) (berylliosis); *Bendix Corp. v. Stagg*, 486 A.2d 1150, 1152-53 (Del. 1984) (asbestosis); *Wilson v. Johns-Manville Sales Corp*., 684 F.2d 111, 116 (D.C. Cir. 1982) (applying District of Columbia law) (asbestosis); *Copeland*, 447 So.2d at 924, *aff'd in relevant part and quashed in part on other grounds sub. nom. Celotex Corp. v. Copeland*, 471 So.2d 533 (Fla. 1985) (asbestosis); *King v. Seitzingers, Inc*., 287 S.E.2d 252, 254-55 (Ga. App. 1981) (lead poisoning); *Carvalho v. Raybestos-Manhattan, Inc*., 794 F.2d 454, 456 (9th Cir. 1986) (applying Hawaii law) (asbestosis); *Nolan v. Johns-Manville Asbestos*, 421 N.E.2d 864, 868 (Ill. 1981) (asbestosis); *Barnes v. A.H. Robins Co., Inc*., 476 N.E.2d 84, 87-88 (Ind. 1985) (pelvic inflammatory disease caused by intrauterine device); *Montag v. T H Agriculture Nutrition Co., Inc*., 509 N.W.2d 469, 470 (Iowa 1993) (liposarcoma caused by toxic chemical); Kan. Stat. Ann. § 60-3303 (claims for exposure to "harmful materials," including asbestos); *Louisville Trust Co. v. Johns-Manville Prod. Corp*., 580 S.W.2d 497, 499 (Ky. 1979) (holding that discovery rule applies to tort actions for injury resulting from a latent disease caused by exposure to a harmful substance); *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809 (Ky. 1991) (lymphoma-inducing toxic exposure to Pentachlorophenol); *Griffin v. Kinberger*, 507 So.2d 821, 823-24 (La. 1987) (retrolental fibroplasia caused by alleged negligent administration of oxygen to premature child); *Harig v. Johns-Manville Products Corp*., 394 A.2d 299, 306 (Md. 1978) (extending discovery rule to cases involving latent diseases); *Pierce v. Johns-Manville Sales Corp*., 464 A.2d 1020 (Md. Ct. App. 1983) (asbestosis); *Olsen v. Bell Tel. Lab., Inc*., 445 N.E.2d 609, 611-612 (Mass. 1983) (toluene diisocyanate asthma); *Larson v. Johns-Manville Sales Corp*., 399 N.W.2d 1, 6 (Mich. 1986) (asbestosis); *Stinnett v. Tool Chemical Co*., 411 N.W.2d 740 (Mich. Ct. App. 1987)

(asbestosis); *Hildebrandt v. Allied Corp*., 839 F.2d 396, 398 (8th Cir. 1987) (applying Minnesota law) (respiratory ailment caused by exposure to toluene diisocyanate); *Sweeney v. Preston*, 642 So. 2d 332, 333-34 (Miss. 1994) (explaining that discovery rule applies when an injury or disease is latent); *Elmore v. Owens-Illinois, Inc*., 673 S.W.2d 434, 436 (Mo. 1984) (asbestosis); *Gomez v. State*, 975 P.2d 1258, 1260 (Mont. 1999) (paint fumes) ("where a person's exposure to chemicals or other substances results in a latent disease or injury, the situation involves facts which, by their nature, are self-concealing"); Neb. Rev. Stat. § 25-224(5) (claims for exposure to asbestos); N.H. Rev. Stat. Ann. § 508:4 (codifying discovery rule); *Vispisiano v. Ashland Chem. Co*., 527 A.2d 66, 72 (N.J. 1987) (applying discovery rule to toxic-tort case); N.Y. C.P.L.R. 214-c(2) (codifying discovery rule in latent injury cases); *Whitney v. Quaker Chemical Corp*., 683 N.E.2d 768 (N.Y. 1997) (respiratory disease due to coolant exposure); *Allied Resin Corp. v. Waltz*, 574 N.E.2d 913 (Ind. 1991) (deviated septum due to chemical exposure); *Biesterfeld v. Asbestos Corp. of Am*., 467 N.W.2d 730, 736 (N.D. 1991) (asbestosis); *Burgess v. Eli Lilly Co*., 609 N.E.2d 140, 143-44 (1993) (injuries from exposure to diethylstilbestrol); *Williams v. Borden, Inc*., 637 F.2d 731, 734 (10th Cir. 1980) (applying Oklahoma law) (noting that Oklahoma likely would apply the discovery rule in occupational disease cases); *Schiele v. Hobart Corp*., 587 P.2d 1010, 1013-14 (Or. 1978) (illness caused by exposure to polyvinyl chloride fumes); *Cochran v. GAF Corp*., 666 A.2d 245, 248 (Pa. 1995) (asbestosis); S.D. Codified Laws § 15-2-12.2 (codifying discovery rule for product liability actions); *Wyatt v. A-Best Co., Inc*., 910 S.W.2d 851, 854 (Tenn. 1995) (injuries caused by exposure to asbestos); *White v. Johns-Manville Corp*., 693 P.2d 687, 694 (Wa. 1985) (*en banc*) (mesothelioma from exposure to asbestos); *Hansen v. A.H. Robins, Inc*., 335 N.W.2d 578, 583 (Wisc. 1983) (pelvic inflammatory disease); *Nowotny v. L B*

Contract Indus., Inc., 933 P.2d 452, 456 (Wyo. 1997) (acknowledging that Wyoming is a "discovery state").

The lower courts' Magic Moment Rule, which is based on the application of the statute of limitations to claims arising from traumatic events where plaintiffs are on notice and have a duty to investigate their claims when they know "something is wrong" – is in direct contradiction with this Court's long-standing precedent and the overwhelming weight of authority from across the country. Respondents' position – that there are not separate rules for applying the statute of limitations to pure latent injuries arising from product defects as opposed to those arising from a traumatic event – is plainly incorrect.

The *Goodwin* case upon which Respondents and the lower courts primarily rely was a case involving a traumatic injury with a latent manifestation – not a pure latent injury. This Court, in a *per curiam* decision, fleshed out the application of the discovery rule in traumatic injury cases where there was a "traumatic event and a latent manifestation of injury." *Goodwin v. Bayer Corp.*, 218 W. Va. 215, 222, 624 S.E.2d 562, 569 (2005). In *Goodwin*, where there was a traumatic event, the plaintiff was on notice at the point that "something was wrong." *Id.* Here, the Intermediate Court of Appeals ("ICA") clearly applied the Magic Moment Rule that does apply in the context of traumatic injuries but not in pure latent injuries:

> 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. The ICA adopted the circuit court's Magic Moment Rule, exactly what every other jurisdiction nationwide has rejected. Both lower courts therefore applied the wrong

rule to consider the running of the statute of limitations on Petitioners' claims, which all concern pure latent injuries. Why should West Virginia be the only jurisdiction in the country that adopts this unrealistic and totally unsupported Magic Moment Rule, which has the effect of judicially resolving questions that would be committed to a jury in any other jurisdiction? There is an easy answer to this question: it should not be the Rule here.

The lower courts' Magic Moment Rule – that there are only three possible dates on which the statute of limitations could have begun – is exactly the sort of conclusion that this Court has reserved for a jury. This Court has long held that "[s]ummary judgment should be denied 'even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom.'" *Williams v. Precision Coil, Inc*., 194 W. Va. 52, 59, 459 S.E.2d 329, 336 (1995) (quoting *Pierce v. Ford Motor Co*., 190 F.2d 910, 915 (4th Cir. 1951)). Instead, it is up to the jury to decide what is a possible date and what is not, even if there are no underlying facts at issue, as "'the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Williams*, 194 W. Va. at 59, 459 S.E.2d at 336 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986)).

B. Contrary to Respondents' Arguments that Petitioners Lose Even if the Court Applies *Hickman*, the Application of the Pure Latent Injury Rule to Petitioners' Claims Does Raise Questions of Fact as to When Each Miner Reasonably Should Have Known They Had a Sufficiently Pronounced Injury.

First, the initial question of whether Petitioners, who all suffer from progressive or pure latent injuries, knew or reasonably should have known of their injuries is a question of fact for the jury:

> the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury.

Syl. Pt. 3, *Hoke*, 244 W. Va. at 301, 852 S.E.2d at 801; *see also Engle*, 328 S.W.3d at 189 (Ky. 2010) ("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**.") (emphasis added).[2]

The point in time when the pure latent injury became "sufficiently pronounced" to put the Petitioners on notice of that claim against the manufacturers of the respirators should be a question for the jury. *See* Syl. Pt. 5, *Dunn v. Rockwell*, 225 W. Va. 43, 46, 689 S.E.2d 255, 259 (2009) (concluding application of the discovery rule "will generally involve questions of material fact that will need to be resolved by the trier of fact"). None of the operative dates referenced in the lower courts' Magic Moment Rule were events that **as a matter of law** would put Petitioners on notice that their diseases were sufficiently pronounced to impose upon them a legal duty to investigate that their respirators might be defective.

1. The lower courts erred in holding that the date of filing a workers' compensation claim triggers the statute of limitations as a matter of law.

The lower courts held that the statute of limitations began running when Petitioners filed their federal workers' compensation claims (federal black lung claims) which occurred more than two years prior to the filing of the instant lawsuits for all Petitioners except Gary Scott. The

[2] In its Response, 3M incorrectly represents that *Engle* "does not accurately state Kentucky law." 3M Resp. at 25. 3M claims that "Kentucky recognizes that when the material facts are undisputed, the court must apply the statute of limitations as question of law," citing *Smith v. Fletcher*, 613 S.W.3d 18, 24 (Ky. 2020) (quoting *Emberton v. GMRI, Inc.*, 299 S.W.3d 565, 572-73 (Ky. 2009)). However, this citation to *Emberton* is a direct quote from *Lynn Mining Co.*, which explains "[w]here, however, there is a factual issue upon which the application of the statute depends, it is proper to submit the question to the jury." *Lynn Mining Co. v. Kelly*, 394 S.W.2d 755, 759 (Ky. 1965). *Engle* also relies on *Lynn Mining Co.*, 394 S.W.2d at 759 ("[w]hen a defendant is put on notice of his injury is a question of fact for the jury."). The "Kentucky law" that 3M invokes is the very basis for the *Engle* holding. One does not "accurately state Kentucky law" by ignoring the controlling authorities.

Childs court explained persuasively and at great length why the filing of a workers' compensation claim should not on its own trigger the running of the statute of limitations for related torts as a matter of law:

> Rather than demonstrating what a plaintiff actually knows or should have known, an occupational injury claim or suit may be filed by an overly cautious plaintiff merely because of that layperson's unfounded suspicions or belief that an injury is related to a particular exposure. Claims based exclusively on such suspicions or beliefs do not justify the filing of a lawsuit. *See* Tex.R.Civ. P. 13. This being the case, a latent occupational disease cause of action should not be deemed to accrue absent some objective verification of a causal connection between injury and toxic exposure, provided that the failure to obtain that verification is not occasioned by a lack of due diligence. Accordingly, a diligent plaintiff's mere suspicion or subjective belief that a causal connection exists between his exposure and his symptoms is, standing alone, insufficient to establish accrual as a matter of law.

Childs, 974 S.W.2d at 43.

The *Childs* Court went on to reason:

> Requiring plaintiffs to file suit based only upon their suspicions about causal connections is also undesirable in latent occupational disease cases because, among other things, **plaintiffs would be compelled to file premature, speculative claims**. … Accordingly, we hold that a plaintiff's suspicions about the nature and cause of his or her injury, which may be evidenced by the filing of a worker's compensation claim or a lawsuit, represent an additional factor that, when considered with the other facts and circumstances presented by each case, could give rise to conflicting inferences about the plaintiff's knowledge of the injury and its likely cause.

Id.; *see also Tucker*, No. 21-C-262, slip op. at 6 ("The Court is concerned that the Defendant's position would promote a more litigious society in which many [miners] are compelled to file suit on speculative grounds.").

West Virginia has adopted this reasoning as well. In *Rucker v. Deere & Co.*, this Court concluded that heavy equipment manufacturers were not entitled to summary judgment on statute of limitations grounds, despite the fact that plaintiffs, who claimed hearing loss from working near the equipment as early as the 1950s, had filed workers' compensation claims. *See*

Rucker v. Deere & Co., 208 W. Va. 169, 539 S.E.2d 112 (2000). The plaintiffs "were exposed to noise at differing times and under differing circumstances" and "underwent medical examinations at different times." *Id.*, 208 W. Va. at 175, 539 S.E.2d at 118. The plaintiffs were informed by their doctors that "their hearing loss was caused by noise on the job," but they did not file products liability claims within two years of filing their workers' compensation claims. *Id.*, 208 W. Va. at 174, 539 S.E.2d at 117. Although they "obviously knew that they had been injured in the workplace when they filed their workers' compensation claims," this Court found it was a different question altogether "when they learned, or when, by the exercise of due diligence, they should have learned, that the noise from equipment manufactured by Deere & Company or one of the other equipment manufacturers had a causal relationship to their hearing loss injury." *Id.*, 208 W. Va. at 175, 539 S.E.2d at 118. Similarly, Petitioners were exposed to coal dust at differing times and under differing circumstances and also underwent medical examinations at different times. Likewise, they also all filed for federal black lung benefits.

The reasoning of Childs and *Rucker* make common sense. Defendants should surely be entitled to argue, if Petitioner's federal black lung claim were denied as not compensable on the grounds the claimant did not have coal workers' pneumoconiosis ("CWP"), such a judgment would bar Respondents' liability for Petitioners' pulmonary injuries. Take for example Petitioner Cruey. Mr. Cruey filed for federal black lung benefits four separate times, often receiving information that he did not suffer from CWP at all and thus his claim was repeatedly denied. The lower courts offer no cogent rationale to distinguish why the filing date of Mr. Cruey's fourth federal black lung claim should trigger the statute of limitations in the instance when the claim eventually proved successful, but the filing date of the three prior unsuccessful federal claims should not trigger the running of the statute of limitations.

Moreover, the certification of miners on their federal black lung applications does not conclusively establish that, as a matter of law, the miners should have known their lung injuries were sufficiently pronounced so as to impose upon them a duty to investigate whether the respirators they wore were defective. As noted in the Opening Brief, federal black lung benefits may be awarded without any impairment at all (so long as a miner's black lung nodules are found to be over one centimeter in any linear dimension), and without having any clinical diagnosis of coal workers' pneumoconiosis at all due to the federal regulatory presumptions. When miners filed an application for federal black lung benefits, all they are necessarily certifying is that they have a subjective belief they deserve to be tested for black lung and that they may become entitled to benefit from the federal presumptions and administrative eligibility thresholds – not that they have any clinical diagnosis of coal workers' pneumoconiosis or that they have any diagnosed impairment due to such disease at all.

Finally, an award of state benefits does not put miners on notice that their disease has become sufficiently pronounced so as to put them on notice and impose upon them an affirmative duty to investigate whether the respirators they wore may have been defective. *See Tucker*, No. 21-C-262, slip op. at 6. As noted, hundreds of West Virginia miners are awarded partial impairment state OP benefits each year and go on performing heavy labor in the mines. Nothing about an award of partial pulmonary impairment from black lung would, as a matter of law, strike a reasonable coal miner as out of the ordinary so as to trigger a duty to investigate potential defects in PPE that coal companies themselves have continued to purchase for years without suspicion.

2. The lower courts erred in holding that the date of diagnosis of black lung disease, without impairment, triggers the statute of limitations as a matter of law.

The lower courts' Magic Moment Rule also erroneously cited the date of any diagnosis of black lung disease as an event when the Petitioners should be on notice and have a duty to investigate whether their respirators were defective. The date of a diagnosis of some form of CWP, in isolation, cannot **as a matter of law** trigger the running of the statute of limitations. From the perspective of a reasonable coal miner, the date of diagnosis may or may not bear on the question of whether the miner reasonably should have known his injury was sufficiently pronounced. a reasonable inquiry. *See Fortado v. Evonik Corp.*, No. 22-1518, 2022 U.S. Dist. LEXIS 172244, at *21 (E.D. La. Sep. 22, 2022) (concluding that diagnosis of cancer does not necessarily trigger the statute of limitations in a toxic exposure case).

First, a diagnosis may not even be communicated to a miner on the date it is made by the physician. For example, Petitioner Dudleson testified that the results of the CT scan from June 2019 were never communicated to him until he received his award of federal black lung benefits. A miner cannot possibly be charged with notice of a diagnosis that has not been communicated to them.

Second, a diagnosis may be only one of many conflicting medical opinions concerning the miner's condition. A jury could conclude a coal miner could not reasonably know they have occupational pneumoconiosis until discrepant medical reports are resolved. Indeed, it is frequently the case that radiologists and medical experts dispute whether a miner filing for federal black lung benefits suffers from CWP at all. Accordingly, there is necessarily a question of fact whether one diagnosis, which is contradicted by other medical opinions, put a miner on notice that his disease was sufficiently pronounced.

Third, it is inherently contradictory to find that a diagnosis of CWP without any significant impairment establishes conclusively and as a matter of law that a miner is on notice

that his injuries are sufficiently pronounced.[3] Moreover, the lower courts' findings that miners are on notice of respirator tort claims, **as a matter of law**, even absent a finding of impairment due to pneumoconiosis is at odds with this Court's own jurisprudence on the accrual of claims for pneumoconiosis. In West Virginia, the legislature and this Court have recognized that plaintiffs do not have notice of legal claims for black lung unless and until a medical doctor makes known to the claimant a diagnosed impairment due to black lung. The State of West Virginia recognizes two causes of action for mine-related lung disease – one for workers' compensation, and one based on "deliberate intent." The workers' compensation claim must be filed no later than three years from the date "when a diagnosed impairment due to OP [occupational pneumoconiosis] was made known to the claimant by a physician." *Pennington v. W. Va. Office of the Ins. Comm'r*, 241 W. Va. 180, 182, 820 S.E.2d 626, 628 (2018). The "deliberate intent" claim must be filed within one year after "written certification by a board certified pulmonologist that the employee is suffering from complicated pneumoconiosis or pulmonary massive fibrosis and that the occupational pneumoconiosis has resulted in pulmonary impairment as measured by the standards or methods utilized by the West Virginia Occupational Pneumoconiosis Board of at least fifteen percent (15%) as confirmed by valid and reproducible ventilatory testing." W. Va. Code § 23-4-2(d)(2)(B)(ii)(IV).

The fact that a miner may have a diagnosis of CWP is just one factor of many a jury may consider when deciding whether the miner reasonably should have known that the miner suffers

[3] The lower courts held that a 2018 letter from NIOSH triggered the running of the statute of limitations for Petitioner Gary Scott, even though that letter made no finding of any impairment due to black lung whatsoever. This finding contradicts the lower courts' express terms of the second prong of the Magic Moment Rule. The NIOSH letter did not set forth a diagnosed impairment. Rather, it merely conveyed a finding of clinical pneumoconiosis without a finding of impairment. The finding that a 2018 letter from NIOSH triggered the running of the statute of limitations for Gary Scott is contradicted by the lower courts' own flawed analysis.

from lung disease that is sufficiently pronounced. The lower court's Magic Moment Rule arbitrarily assigns dates of events that conclusively establish as a matter of law that the statute of limitations runs on Petitioners' claims. The Magic Moment Rule is inconsistent with this Court's long-standing precedent that the question of whether a plaintiff suffering from a pure latent injury reasonably should be aware that they have a sufficiently pronounced disease is a question of fact. *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."); Syl. Pt. 3, *Stemple v. Dobson*, 184 W. Va. 317, 318, 400 S.E.2d 561, 562 (1990) ("Where a cause of action is based on tort or on a claim of fraud, the statute of limitations does not begin to run until the injured person knows, or by the exercise of reasonable diligence should know, of the nature of his injury, and determining that point in time is a question of fact to be answered by the jury."); Syl. Pt. 4, *Hill v. Clarke*, 161 W. Va. 258, 241 S.E.2d 572 (1978) ("The question of when plaintiff knows or in the exercise of reasonable diligence has reason to know of medical malpractice is for the jury.").

C. Contrary to Respondents' Assertions and the Lower Courts' Rulings, Applying the Pure Latent Injury Rule to these Cases Does Reveal Genuine Issues of Fact About When the Petitioners Reasonably Should Have Known There Was a Causal Link Between Respondents' Allegedly Defective Products and Their Injuries.

The lower courts' application of the Magic Moment Rule essentially eliminates the causal connection requirement of the statute of limitations analysis. The lower courts leaped from a moment in time in which one of the designated events occurred to the conclusion, as a matter of law, that Petitioners should have known their injuries were related to their allegedly defective respirators. The only facts in the record that could have been considered by a jury that may have put these miners on notice that their respirators were defective was that they believed the respirators were supposed to mitigate the inhalation of coal, rock and sand dust in the mines. The

lower courts disregarded all other facts upon which a jury could conclude the Petitioners were reasonable in their undisputed lack of knowledge that the Respondents' products were causally linked to their diseases in any way until they were told by others – often their legal counsel.

Establishing the causal relationship to the plaintiff's injury in a toxic exposure case can be very complicated because there are so many factors. The ICA found these cases were "unlike a toxic tort case," but that is simply false because these cases are entirely based on exposures to toxic dust. Expert witnesses viewing the same facts have disagreed over whether or not these miners have an occupational lung disease at all, and whether the defective respirators caused the plaintiffs' injuries. In *Young v. Clinchfield Railroad Company*, the United States Court of Appeals for 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 about causation:

> 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.

288 F.2d 499, 503 (4th Cir. 1961). The causation element in a product liability claim is very fact-intensive and often requires expert testimony to establish this element. Thus, this case presents 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. Indeed, several authorities cited by Respondent AO tend to support the Petitioners' position in this regard. (AO Resp. at 9 (citing *Coffield v. Robinson*, 245 W. Va. 55, 62, 857 S.E.2d 395, 403 (2021) (holding courts can

determine the statute of limitations when the nature of the injury is undisputed). But, in the Petitioners' cases, the nature of the pulmonary injuries was factually disputed for years by experts. In *Coffield*, a paternity case, this Court reiterated its longstanding rule: "We are mindful that in most tort and fraud cases the issue of when the plaintiff knew or should have known of his cause of action is a question for the trier of fact." *Id*. at 403. Here, multiple experts drew opposing conclusions as to the presence of coal mine-related lung disease, certainly rendering reasonable the inference that Petitioners lacked awareness of a sufficiently pronounced workplace injury to put them on notice of a potential respirator defect as a matter of law.

These respirator cases present an especially challenging chain of causation because the defective product is not the thing that directly injured the Petitioners. That is, the Petitioners were injured by coal and silica dust, which the respirators could have mitigated had they functioned as advertised. When the Petitioners were first diagnosed with a limited or partial impairment from black lung, a reasonable person could conclude – as Petitioners testified – that they suffered that harm due to the dust they breathed while *not* wearing the respirators. Indeed, their coal-mine employers paid black lung benefits to each Petitioner more than two years before they filed these complaints, indicating the employers also held the belief they were responsible for the dust exposure.

Where a plaintiff initially believes their injury, even from a traumatic event, is caused by a party that accepts fault, the plaintiff is reasonable in failing to investigate a product liability claim. In *Short v. Yamaha Motor Corp*., the United States District Court for the Southern District of West Virginia applied West Virginia law in holding there was a genuine issue of material fact as to whether the plaintiff, Mr. Short, reasonably should have known of the existence of a possible cause of action against the defendant, Yamaha, as a result of the April 2, 2006 incident

in which he broke his leg as a passenger in a defective side-by-side utility vehicle called a "Rhino," which rolled over. *See Short v. Yamaha Motor Corp., U.S.A*., No. 2:11-cv-00999, 2012 U.S. Dist. LEXIS 55175 (S.D. W. Va. Apr. 19, 2012). Mr. Short averred that "although he knew he was injured, he did not know that his injuries were connected to the Rhino," instead believing it to be due to the actions of the driver. *Id*. at *9-10. The court found that "accidents involving all-terrain vehicles are not unusual, and a reasonable person would conclude that an accident involving such a vehicle was the result of human error. A reasonable person would not connect the manufacturer's design to an all-terrain vehicle accident absent facts indicating a causal connection." *Id*. at *10. Federal courts applying West Virginia law believe that the discovery rule will in many cases present issues of fact. *See Paynter v. GM LLC*, No. 5:19-cv-00888, 2020 U.S. Dist. LEXIS 158595, at *12 (S.D.W. Va. Sep. 1, 2020) (collecting cases).

Similarly, breathing impairment in coal miners who utilize respirators is not unusual. A reasonable person could conclude, and indeed most miners believe, that the conditions of the mines are the cause of their impairments not the use of the respirator, i.e. the respirable dust encountered when not wearing the mask. A reasonable person would not connect the manufacturer's design of any mask to any breathing impairment absent specific facts indicating a known defect giving rise to a causal connection: facts that the Petitioners testified they first encountered within less than two years prior to filing these complaints.

Even if a miner wears a respirator all of the time, the miner may reasonably understand that the device does not completely prevent but merely mitigates potential breathing impairment. A miner may simply attribute any noticeable impairment to the device's mitigative, rather than preventative, nature. After all, breathing impairment is not something miners either have or do

not have. It develops in phases. It is a purely latent injury that manifests in a variety of different stages and degrees.

This Court recently refused the writ of prohibition sought by 3M in a largely identical PPE defect case after the Circuit Court denied summary judgment in a product defect claim regarding the same 3M respirators at issue here on behalf of a coal miner who was diagnosed with impairment due to inhalation of coal dust more than two years before filing his complaint. (*State of W. Va. ex rel. 3M Co. v. Thompson (Rockey Pope)*, No. CC-30-2020-C-138 (Mingo Cty. Cir. Ct. Sept. 11, 2023) (ICA000037)). Unlike several of these Petitioners, Mr. Pope was clearly diagnosed with impairment due to black lung more than two years before suing 3M. Yet, this Court saw fit to deny the writ.

In *Baldwin v. Badger Mining Corp*, the Wisconsin Court of Appeals reversed summary judgment that had been in favor of defendants where the plaintiff raised a genuine issue of material fact as to whether he should have inquired into the effectiveness of the respirator masks he had used when he first learned that his disease, silicosis, was caused by inhaling silica dust, or at the later date when he learned that the masks may be defective. 663 N.W.2d 382 (Wisc. Ct. App. 2003). The *Baldwin* court observed:

> The cause of an injury is "discovered" when a potential plaintiff has information that would give a reasonable person notice of the cause of injury. A plaintiff cannot wait until he or she is certain about the cause, or wait for expert verification of known information. On the other hand, Wisconsin law does not require a plaintiff to bring a lawsuit before the plaintiff has sufficient information to reach an objective conclusion as to cause. This is because Wisconsin courts "have consistently recognized the injustice of commencing the statute of limitations before a claimant is aware of all the elements of an enforceable claim," including the discovery of the identity of the defendant and the cause of the injury.

Baldwin, 663 N.W.2d at 388 (citation omitted); *see also Salazar v. Am. Sterilizer Co.*, 5 P.3d 357, 363 (Colo. Ct. App. 2000) ("[S]uspicion of a possible connection does not necessarily put a

reasonable person on notice of the nature, extent, and cause of an injury."). Here, Petitioners did not always wear their respirators and believed their own failures to wear a mask had allowed for their damaging exposure. Their own subjective suspicion that they had a coal-dust-related injury did not raise any implication of a defective respirator. A jury could have concluded they were reasonable to postpone any investigation of their masks until they actually learned of their possible defects.

Petitioners here do not contend that the discovery rule is applicable in all product liability or personal injury cases. The discovery rule is generally inapplicable as a matter of law in traumatic injury cases, such as *Jones* and *Goodwin* where the victim suffers a latent manifestation of their injury after suffering an initial traumatic or acute injury.[4] For example, as the Florida court noted, although it will be the "rare case in which the issue may be decided as a matter of law," such circumstances may exist where a plaintiff developed the knowledge "that cigarettes were killing him," but neglected to obtain a diagnosis regarding his lung condition within two years of developing that knowledge. *See Belanger*, 140 So. 3d at 607.

In the context of respirator cases, 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

[4] *But see DeRocchis v. Matlack, Inc*., 194 W. Va. 417, 460 S.E.2d 663, 667 (1995) (recognizing traumatic event/latent manifestation may give rise to separate causes of action for successive, discrete respiratory exposures to toluene diisocyanate). Respondent MSA attempts to analogize the Petitioners' cases to *Donley v. Bracken*, 192 W. Va. 383, 386, 452 S.E.2d 699, 702 (W. Va. 1994). (MSA Resp. at 27.) In *Donley*, a child was tragically born in a breech position, developed complications immediately at the time of birth, and the "doctor panicked and ran out of the delivery room" – reasonably placing the parents on immediate notice of claims for medical negligence due to the traumatic brain injuries incurred at birth. *Donley*, 192 W. Va. at 386, 452 S.E.2d at 702. By contrast, Petitioners here had absolutely no such immediate traumatic experience or indicia of alarm regarding the respirators until many years after their exposures and their diagnoses of black lung. Petitioners have set forth sufficient evidence to support a reasonable factfinder in concluding that it was only after they learned their black lung had progressed out of proportion to their unprotected dust exposure that the disease became sufficiently pronounced to place them on notice of a causal relation to the respirators.

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 . . . ."); *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). If a miner wore their PPE 100% of the time, there may not be a question of fact whether the statute of limitations began to run at the time the miner's injury became sufficiently pronounced. That is not the case here. Also, unlike most of these Petitioners, Mr. Teets only ever wore one respirator. *Teets*, 2021 U.S. Dist. LEXIS 145247 at *7 (he "always picked Moldex over other brands.").

Moreover, these consolidated cases not only involve a pure latent injury, but the claims are for product defects representing an intervening or aggravating factor not the immediate or primary instrument of the pure latent injury. These Petitioners 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.

1. Petitioners created an issue of fact on when they reasonably should have discovered a causal link because none of the Petitioners wore their masks continuously, none of their employers knew of a defect, and all of their employers accepted fault for their lung disease.

First, each Petitioner testified that he did not wear his respirator 100% of the time they were exposed to coal dust, and Petitioners generally wore a variety of respirators. (*See* JA 243-

48, 250 (Hardy – 30-40%); JA 1268-72, 1279 (Manuel – less than 100%); JA 1941-46 (Dudleson – 40-60%); JA 2238-39 (Miller – "mostly," but not exclusively); JA 2892-93, 2895-96, 2897-10 (Cruey – only wore the respirator when he worked in the face); JA 3422-24 (Mark Scott cessation of respirator usage around 1994); JA 4084-93 (Gary Scott – wore respirators from 1975-1982).) 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 mean the respirator was defective. (JA 545-46). Thus, Respondents' own experts, educated in the field of industrial hygiene and respiratory protection, testified there was no apparent causal connection between their defective products and the miners' diseases.

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. Coal mining companies themselves purchased these respirators for years without suspecting a defect. Those same coal companies paid the Petitioners' black lung benefits (and continue to pay benefits) without seeking any indemnification from, or allocation of fault to, any third parties such as respirator manufacturers, which they could have done by proving in the OP claims that the workplace dust exposures were inadequate to cause the Petitioners' disease.

If sophisticated coal mining companies did not discover or pursue a causal link between the respirators and the Petitioners' black lung disease, how can courts say, as a matter of law, that the Petitioners reasonably should have known of such a causal link?

D. Respondents and the Lower Courts Ignored Material Facts as to Whether Respondents' Statements that Respirators Were Safe for Use in Dusty Work Environments Prevented Petitioners from Discovering the Alleged Defects.

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 Plaintiffs presented evidence sufficient to create a jury issue on whether the Manufacturer Respondents fraudulently concealed facts that prevented them from discovering that the respirators were defective and had a causal connection to their injuries. The lower courts, however, simply ignored this evidence and concluded that no such evidence existed.

Manufacturer 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, the Manufacturer 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 the Petitioners' cases, the statute of limitations is tolled under the fraudulent concealment doctrine until they 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. It is undisputed that no Petitioner had actual knowledge of the concealed defects present in Respondents' respirators more than two years prior to filing these lawsuits. However, again to be consistent with the case law, Respondents have the right to dispute this evidence and ultimately the juries in these cases should be left to resolve these disputed claims.

It is also not disputed that the advertisements and instructions for Respondents' products stated they would protect against respirable dust in coal mines. Further, Plaintiffs have made formidable showings of internal documents indicating the Defendants knew those ads and instructions to be patently false. (*See* Pet. Br. at 48-56, (II.H. fact section on fraudulent concealment).) The misrepresentations in advertising and packaging are evidence that the Manufacturer Respondents fraudulently concealed facts that prevented the Petitioners from discovering that these respirators were defective. The lower courts ignored this evidence. The Respondents do as well.

The victim must know that the relevant product is defective – and here it was at a minimum factually disputed whether the Defendants' misstatements and false advertising, coupled with the government's apparent sanction of the safety of these products, delayed the

Petitioners discovery of the defects with the respirators. Upon learning there were material misrepresentations on the packaging of the masks, Petitioners promptly filed suit. The lower courts held that the Petitioners failed to present evidence that Respondents' fraudulent concealment prevented them from discovering their claims. That finding was an error.

E. Applying the Discovery Rule Not Only Protects Miners, But Mine Operators Who Lacked Notice of the Defects, Purchased the Respirators, and Currently Possess an Unsubrogated Liability – a Disproportionate and Unjust Share of Fault – for Black Lung if Miners' Claims are Barred Against Respirator Manufacturers.

West Virginia has longstanding public policy interests in promoting miners' health and safety. *See* W. Va. Code § 22A-1-1 *et seq.* "The State also has a vital interest in the health and safety of West Virginia miners. This interest goes beyond the normal concerns of government for the welfare of its citizens. It also encompasses the interest of the State in continued mineral production, and resultant additions to its tax base, as well as the State's interest in reducing the cost of government sponsored social welfare programs and health services necessary to provide for the victims of mine disasters." *United Mine Workers of America v. Miller*, 170 W. Va. 177, 182 (1982). Consistent with those goals, ensuring a just measure of risk-spreading of the costs of coal workers' pneumoconiosis advances that critical public policy by ensuring that such costs do not fall disproportionately on the coal operators, and are instead borne by all entities with agency to affect the hazards of the disease.

Imposing an undue burden on coal operators themselves when they do not fairly share the entirety of responsibility for misfeasance that gave rise to the disease burden would not only be unfair to the coal industry but would substantially undermine the substantial public policy of promoting coal miners' health and safety in West Virginia. The Petitioners here did timely file claims for compensation for their black lung disease, which the coal mine employers accepted and paid. The evidence in these cases was that the coal mine operators always provided the

respirators to each petitioner. The coal mine operators did not seek any subrogation or indemnification from the respirator manufacturers, likely because – like the Petitioners – they were unaware of latent product defects that could cause purely latent pulmonary diseases.

F. The Trial Court Erred by Fundamentally Misunderstanding the Disease Process of Pneumoconiosis, which is a Pure Latent Disease – Making a Faulty Analogy to the Process of Pregnancy.

The trial court held that a miner is on notice that he suffers from the entire spectrum of dust-related disease (including the terminal disease process of PMF) from the first moment that he suffers any pulmonary symptoms – even at the point he first files an application to determine whether or not he suffers from pneumoconiosis. The trial court opined that, to hold that a miner is not on notice of black lung until he receives a diagnosis of impairment, is like saying that a woman's not pregnant until she delivers the baby nine months later. However, this is in direct contrast to this Court's decision in *Pennington* which held, for purposes of tolling the statute of limitations for black lung claims, a miner is not on notice until an impairment due to pneumoconiosis is made known to the miner by a physician. It is also a woefully inappropriate analogy to the latent diseases at issue in these cases. The question here is not only whether the person is pregnant; the other critical questions are who the father is, whose defective product (if any) failed to prevent the pregnancy and how to apportion responsibility for the child support between the father and the manufacturer of the defective product contributing to the pregnancy. Here the analogous questions are: does the miner have pulmonary impairment from coal-mine dust; which mine was he working at when he experienced the overexposure, and did the disease arise, or become materially aggravated, during the period when the miner wore a defective respirator?

As with the question of tolling in this instant appeal, paternity claims are equitable proceedings, which often depend on a fact-intensive analysis about the circumstances surrounding the conception. Indeed, West Virginia law recognizes a three-year limitation on retroactive child support unless there are circumstances akin to fraudulent concealment: (1) the alleged father had actual knowledge that he was the father of the child; (2) the alleged father deliberately concealed his whereabouts to evade process; or (3) the alleged father deliberately misrepresented relevant information. If any one of these is present, the court can go back to the birth of the child. *See* W. Va. Code § 48-24-104.

While Judge Kornish was off-base on his pregnancy analogy, the analogies of paternity and defective birth control claims are much more apt to these respirator cases. The legal framework for tolling the back payment of child support bears striking resemblance to the doctrine of fraudulent concealment that this Court utilized regarding the same respirators in the *Hoke* case. This Court should utilize that framework again here.

IV. CONCLUSION

The lower courts have simply applied the wrong rule. Rather than evaluate the evidence presented to determine whether there is a genuine issue of material fact as to when Petitioners reasonably should have known their injuries were sufficiently pronounced **and** there was a causal connection to the allegedly defective respirators they wore, the lower courts announced a new Magic Moment Rule, which has the effect of finding otherwise timely claims in any other jurisdiction as stale here in West Virginia. Moreover, the lower courts ignored evidence that Respondents' fraudulent misrepresentations and concealment prevented these Petitioners from discovering that the respirators they wore were defective. The decisions of the lower courts should be reversed.

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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, Samuel B. Petsonk, do hereby certify that on the 17th day of June, 2024, a copy of the foregoing PETITIONERS' JOINT REPLY BRIEF was electronically served on all counsel of record by using the File and Express system.

/s/Samuel B. Petsonk

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