No. 23-717

In the

Supreme Court of Appeals of West Virginia

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

Petitioners,

v.

3M Company, Mine Safety Appliances Company, LLC, AO-C-A (American Optical Corporation-Cabot CSC Corporation-Cabot Corporation), Eastern State Mine Supply Company, and Raleigh Mine and Industrial Supply,

Respondents.

On Appeal from the Intermediate Court of Appeals Case No. 22-ICA-123

BRIEF OF RESPONDENT 3M COMPANY

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INTRODUCTION

This consolidated appeal involves seven West Virginia coal miners' personal injury cases against respirator manufacturers. Like many other coal miners, Petitioners claim they wore respirators, imprecisely but frequently called "dust masks," to protect against the coal mine dust that causes coal workers' pneumoconiosis (CWP, commonly called black lung) and other lung diseases. The only reason a coal miner might wear a "dust mask" is to protect his lungs from dust. Petitioners claim that the "dust masks" were defective and failed to protect them from developing lung disease.

Petitioners' cases—like many others in the ever-expanding inventory of similar suits—present a dispositive legal issue. When, like Petitioners, the plaintiff reportedly wore an identified manufacturer's "dust masks" solely to protect against dust-caused lung disease; still developed that disease; sought governmental benefits by swearing he had lung disease due to dust exposure; but for more than two years after his diagnosis did *nothing* to investigate his possible tort claims, is the defendant entitled to summary judgment as a matter of law based on the statute of limitations?

This Court said yes in *Collins*. Applying West Virginia law, the Fourth Circuit subsequently said yes in *Teets*. Here, the circuit court (Kornish, J.) and Intermediate Court of Appeals said yes, too, applying this consensus position to Petitioners' cases. These decisions correctly hold that on the undisputed facts present here, a reasonable person would have investigated possible claims against the "dust mask" manufacturers. This Court should affirm summary judgment that Petitioners' claims are untimely in a published opinion. This will confirm for circuit courts and litigants how to resolve the many time-barred claims pending in West Virginia.

STATEMENT REGARDING PETITIONERS' ASSIGNMENTS OF ERROR

Disputing Petitioners' assignments of error, Respondent 3M Company provides this statement of the issues presented:

1. West Virginia's two-year statute of limitations begins to run when the plaintiff knows, or by exercising reasonable diligence should know, of the elements of a possible cause of action. More than two years before filing their lawsuits, Petitioners knew they wore 3M "dust masks" to prevent black lung or other dust-caused lung disease, yet still developed black lung or other dust-caused disease. Given these uncontroverted facts, did the circuit court and Intermediate Court correctly hold that West Virginia's two-year statute of limitations bars their claims? *Hardy v. 3M Co.*, No. 22-ICA-123, 2023 WL 7402890 (W. Va. App. Nov. 8, 2023) (memorandum decision).

2. Fraudulent concealment tolls a claim's accrual only if the plaintiff proves that the defendant prevented the plaintiff from learning of the claim. Petitioners claim 3M committed fraud. But they do not show how this alleged fraud prevented them from learning of their injuries, 3M's identity, or a possible causal link between the "dust masks" they say they used and their disease. Given the lack of evidence that 3M prevented Petitioners from learning of their claims, did the circuit court and Intermediate Court correctly reject Petitioners' claims of fraudulent concealment?

STATEMENT OF THE CASE

Petitioners are seven coal miners. Respondents, including 3M, either manufacture or allegedly supply respirators. Petitioners allegedly wore one or more of Respondents' respirators to prevent lung injuries, such as black lung, caused by coal mine dust exposure. Five Petitioners assert claims against 3M: Ronald Hardy, Ralph Manuel, Ricky Miller, James Cruey, and Gary Scott. Subsequent references to

"Petitioners" are to those specific miners. The circuit court granted summary judgment for Respondents on the statute of limitations, and the Intermediate Court affirmed.

I. Statement of Facts

A. Many West Virginia plaintiffs have claimed that Respondents' respirators failed to protect them from occupational lung disease.

These cases are among many West Virginia lawsuits filed against Respondents relating to federally certified respirators. West Virginia plaintiffs have been bringing similar lawsuits since the early 1990s. The cases continue to consume judicial and party resources. The circuit court recently held that seven more plaintiffs' claims were untimely.[1]

Petitioners' cases share common facts. They knew that inhaling coal mine dust could cause black lung and other lung diseases; they claim they specifically wore 3M "dust masks" to prevent those diseases; yet, even after being diagnosed with those diseases and using their diagnoses to seek compensation benefits, they waited more than two years before suing 3M. The chart below summarizes their diagnoses and lawsuit dates:

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

[1] These plaintiffs appealed to the Intermediate Court. *See Goodwin v. 3M Co.*, No. 24-ICA-186.

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

Petitioner Ronald Hardy worked in coal mines from 1968 to 2001.[2] His father had black lung, so his entire career he "wanted to stay away from that black lung."[3] That explains why he wore "dust masks"— he expected them to protect him from inhaling dust.[4] Yet while working, he saw dust inside the "dust masks."[5] And sometime between 1995 and 2001, he began experiencing shortness of breath while working.[6] In 2018, he said his breathing problems had worsened over time.[7]

Hardy applied for federal black lung benefits in June 2018. The application required him to certify under penalty of fine or imprisonment that he believed he had pneumoconiosis or other pulmonary or respiratory disease caused by coal mine employment—meaning by dust exposure.[8] In July 2018, as part of his federal black lung evaluation, a physician told him he had obstructive lung disease and impaired gas exchange.[9] When deposed in November 2018 for his federal benefits claim, Hardy was asked whether he had considered bringing a lawsuit about the "dust masks" he wore.[10] The same counsel who represented him for his benefits claim now represents him in this personal injury suit.[11]

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2 JA.000099.

3 JA.000101-02.

4 *Id.*

5 *Id.*

6 JA.000101.

7 *Id.*

8 *See* 20 C.F.R. § 718.201(a); 20 C.F.R. § 718.201(b).

9 JA.000100-01; JA.000183-88.

10 JA.000102.

11 *Id.*

Hardy sued on August 18, 2021. This was more than three years after his federal black lung application and diagnosis with dust-caused lung disease, and more than two years after he was asked in a deposition about bringing a "dust mask" lawsuit.

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

Petitioner Ralph Manuel worked in coal mines from 1981 to 2021.[12] By 1981, he knew that inhaling dust causes lung disease.[13] Several of his family members and friends died from black lung.[14] To protect himself from dust and black lung, he wore the "dust masks" "just about since [he's] been in the mines."[15] His 2009 or 2010 training as a dust examiner (someone who breaks down and examines the monitors miners wear to measure respirable dust) reinforced his need to protect himself from breathing dust.[16]

In 1999, Manuel was diagnosed with silicosis and sought state workers' compensation benefits.[17] He then sought governmental benefits for black lung in 2000, 2008, and 2018.[18] He was diagnosed with COPD/black lung in 2008, and the Occupational Pneumoconiosis Board notified him he had black lung in 2009.[19]

In 2018, Manuel applied for federal black lung benefits.[20] He was again diagnosed with black lung in July 2018, telling a physician he had sputum "most days"

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12 JA.000780.

13 JA.000784.

14 JA.000785.

15 JA.000784.

16 JA.000784-85.

17 JA.000782.

18 *Id.*

19 *Id.*

20 JA.000783.

and that he had suffered shortness of breath for more than 20 years.[21] The physician found his black lung was at the complicated stage, also called progressive massive fibrosis (PMF).[22] The physician told him his "lungs were pretty bad," mentioned fibrosis, and told him to become a Part 90 miner (allowing him to work under a reduced dust standard).[23] He followed that advice to work away from dust, yet concedes he did not investigate potential claims against the companies that made the "dust masks."[24]

Manuel sued Respondents on August 19, 2021. This was more than 20 years after his first diagnosis with occupational lung disease and related benefits applications, more than 10 years after his 2008/2009 diagnosis and benefits application, and more than three years after his July 2018 diagnosis and benefits application.

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

Petitioner Ricky Miller was a coal miner from 1970 to 1982.[25] From the start, he knew dust exposure causes lung disease, including black lung.[26] He reportedly wore "dust masks" throughout his career, except lunch breaks, even though most of his co-workers did not.[27] He wore them because he saw significant dust in the mines, had seen older miners coughing and spitting up dust, and wanted to protect his lungs.[28]

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21 *Id.*

22 JA.000782.

23 JA.000783.

24 JA.000783-84.

25 JA.002015.

26 JA.002018.

27 JA.002015-18.

28 JA.002018.

In 2013, Miller told his physician he had experienced a cough for many years, along with shortness of breath and nighttime wheezing.[29] When he applied for state workers' compensation benefits in 2013, the Occupational Pneumoconiosis Board found he had simple occupational pneumoconiosis and awarded him approximately $15,000.[30] He understood this award was part of a black lung recovery.[31]

After his diagnosis, Miller assumed the "dust masks" did not protect him.[32] He knew something was not right in 2013, and he considered contacting 3M because he felt like the "dust masks" should have protected him.[33] But he did not investigate a potential a claim against 3M.[34]

In 2017, Miller received another letter from the Occupational Pneumoconiosis Board, again telling him he had occupational pneumoconiosis.[35] The Board found he had had shortness of breath for nine years and chronic productive cough for 10 years.[36] In 2017, he also applied for federal black lung benefits, certifying he believed he had pneumoconiosis or other lung disease due to dust exposure.[37]

Miller says he heard about other miners suing respirator manufacturers "a couple years ago."[38] He sued Respondents on August 19, 2021. That was eight years after his

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29 JA.002016.

30 *Id.*

31 *Id.*

32 JA.002016-17.

33 *Id.*

34 JA.002017.

35 *Id.*

36 *Id.*

37 *Id.*

38 JA.002019.

2013 diagnosis, eight years after he thought about contacting 3M because its products should have protected him, and four years after his 2017 diagnosis and federal benefits application. He cannot explain his delay.[39]

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

Petitioner James Cruey worked in coal mines from 1968 to 1999.[40] He reports wearing Respondent Mine Safety Appliance's (MSA) respirators almost exclusively; he says he wore a 3M product for a few months of his 31-year career.[41] Aware of the dangers of dust, he believed the "dust masks" were "keeping out all of the dust."[42] Despite constantly wearing "dust masks," however, he was diagnosed with several dust-caused lung diseases, reported coughing up dust, and realized that "apparently the masks wasn't slowing it all down."[43] He did not investigate the "dust masks" further.[44]

In 1985, Cruey sought and received state black lung benefits.[45] In 2004, he applied for federal black lung benefits, providing x-rays that physicians found showed CWP.[46] In 2005, a federal claims examiner found he had black lung caused by his coal mine work.[47] In 2006 and 2013, he again sought federal black lung benefits.[48]

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39 *Id.*

40 JA.002515; JA.002550.

41 JA.002513-14.

42 JA.002524.

43 JA.002569.

44 JA.002556.

45 JA.002803.

46 JA.002460.

47 JA.002454.

48 *Id.*

In 2016, represented by the same counsel who later filed this lawsuit, Cruey filed a fourth application for federal benefits, and a physician diagnosed him with interstitial lung disease and impaired gas exchange.[49] At that time, his counsel told the federal government that Cruey "established that he has legal coal workers' pneumoconiosis" that "arose out of his coal mine employment," meaning dust exposure.[50] He was awarded federal benefits in 2020.[51]

Cruey sued Respondents on September 3, 2021. This was more than 30 years after his 1985 diagnosis, more than 15 years after the federal finding that he had black lung, and about five years after counsel representing him in this suit had filed his fourth federal benefits application.

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

Petitioner Gary Scott worked in coal mines from 1975 until 2020.[52] He knew dust was hazardous and wore "dust masks" to protect himself.[53] He says he wore them from 1975 to 1982, primarily products made by other manufacturers (not 3M).[54] In 1994, he was diagnosed with black lung and awarded state workers' compensation benefits.[55] In 1998, he was again diagnosed with black lung and applied for state benefits.[56] His black lung surprised him because he had "done everything [he] could to try to prevent getting

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49 *Id.*

50 JA.002465.

51 JA.002455.

52 JA.003691-93.

53 JA.003693.

54 JA.003692.

55 JA.003734-35.

56 *Id.*

it," including wearing "dust masks" that he believed would help prevent black lung.[57] He admits not investigating potential claims against "dust mask" manufacturers.[58] He filed for federal black lung benefits in 2020.[59] Scott sued Respondents on September 9, 2021. This was more than 25 years after his first diagnosis and more than 20 years after he questioned whether his "dust masks" had protected him.

II. Procedural Background

Petitioners' cases were filed separately in the Circuit Court of McDowell County. After discovery, 3M sought summary judgment on the statute of limitations. In response, Petitioners contended that despite having been diagnosed with dust-caused lung diseases more than two years before they filed these lawsuits, they were not sufficiently injured to have tort claims until their diseases progressed to more serious stages. They also asserted that 3M fraudulently concealed their claims from them.

A. The circuit court grants summary judgment.

On August 15, 2022, the circuit court heard the summary judgment motions, observing that Syllabus Point 5 of *Dunn v. Rockwell* controlled the statute of limitations issue.[60] The court recognized that "mostly we're talking about undisputed facts, and the dispute is really in the interpretation of those facts."[61] It reviewed the decisions of another circuit court granting summary judgment on similar facts in *Collins*, as well as

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57 JA.003740-41.

58 JA.003743-44.

59 JA.003733.

60 *Hardy*,JA.000093-227; *Manuel*, JA.000775-903; *Miller*, JA.002011-2143; *Cruey*, JA.002717-80 (joinder in MSA's summary judgment motion); *Gary Scott*, JA.003806-70 (joinder in MSA's and American Optical's summary judgment motions). The transcript is JA.000596-718.

61 JA.000602.

the similar decision of Judge Groh of the federal Northern District of West Virginia in *Teets*.[62] These were later affirmed by, respectively, this Court and the Fourth Circuit.

The court granted summary judgment in a comprehensive, 45-page order.[63] Each Petitioner conceded that he knew the company or companies that manufactured the respirators he wore, and the court recited the facts about when each was diagnosed and sought federal or state benefits.[64] The court concluded no genuine issues of material fact existed, and that "no rational trier of fact, based on these facts and existing West Virginia law—a two-year statute of limitations and the current Discovery Rule—could find for Plaintiffs," unless that jury "disregarded the law and decided these cases based on their sympathy for the miners' current breathing difficulties based on this injury we call black lung."[65] The court also rejected tolling based on fraudulent concealment.[66]

B. The Intermediate Court unanimously affirms.

The Intermediate Court unanimously affirmed.[67] The court first concluded that the statute of limitations was properly resolved on summary judgment. "[W]ell settled" West Virginia law instructs that the "determination of the bar for statute of limitations is not always a jury question, and when the facts are undisputed the only question left is

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62 JA.000604; *see* JA.000122-28 (*Collins v. Mine Safety Appliances*, No. CC50-2019-C-132 (Cir. Ct. Wayne Cty. July 21, 2021) (Young, J.)); JA.000129-37 (*Teets v. Mine Safety Appliances Co.*, No. 3:19-cv-195, 2021 WL 3280528 (N.D. W. Va. July 28, 2021) (Groh, J.)).

63 JA.000001-46.

64 JA.000003-15.

65 JA.000045.

66 JA.000042-43.

67 *Hardy*, 2023 WL 7402890, at *10.

purely legal."[68] As had the circuit court, the Intermediate Court determined the facts material to the statute of limitations were undisputed.[69] Petitioners knew that "coal mining dust could cause black lung."[70] Petitioners "knew the specific respirators used throughout their careers" and when they were "either diagnosed with some form of black lung, black lung itself, or when they filed for federal benefits for black lung disease."[71] Because the material facts were undisputed, as this Court concluded in *Collins*, the "only question left" was "purely legal."[72]

Answering that legal question, the court held Petitioners' claims accrued when they were diagnosed with lung disease, sought federal black lung benefits, or were awarded more than *de minimis* state black lung benefits. Under the discovery rule's objective standard, those were the dates by which a reasonably prudent coal miner who used respirators to prevent black lung would be on notice that "something was wrong"—in other words, the dates on which the miner had constructive knowledge that the "dust masks" he wore to prevent black lung might not have prevented black lung.[73]

The court rejected Petitioners' argument that a diagnosis of complicated black lung (also called PMF) created a new claim separate from an initial claim for simple black lung.[74] The disease's progression did not create a new cause of action with a new

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68 *Id.* & n.8 (citing *Coffield v. Robinson*, 245 W. Va. 55, 857 S.E.2d 495 (2021); *State ex rel. Gallagher Basset Serv. Inc. v. Webster*, 242 W. Va. 88, 829 S.E.2d 290 (2019)).

69 *Id.* at *7.

70 *Id.*

71 *Id.*

72 *Id.* & n.8 (citing *Collins*, 2022 WL 10084174).

73 *Id.*

74 *Id.* at *9.

limitations period. "*[A]ny diagnosis of something relative to a lung impairment or a dust exposure related injury* put petitioners on notice that they respirators they wore were defective."[75]

The court agreed with the circuit court's ruling that fraudulent concealment was inapplicable. "[T]here is no evidence in the record that respondents concealed facts that prevented the petitioners from discovering or pursuing their cause of action. All the petitioners knew the exact respirators they wore and that they were diagnosed with some form of lung impairment years before filing suit."[76]

SUMMARY OF ARGUMENT

Like this Court in *Collins* and the Fourth Circuit in *Teets*, the courts below correctly held Petitioners' claims were time-barred. The judgment should be affirmed. More than two years before suing Respondents, Petitioners were (1) diagnosed with black lung or other dust-caused lung disease, (2) knew 3M made the "dust masks" they claimed they wore, and (3) knew they had expected the "dust masks" to prevent them from developing lung disease caused by inhaling dust. They knew they were diagnosed with the exact injury they wore the "dust masks" to prevent. Knowing those facts, any reasonable person would have suspected a causal connection between "dust masks" and their injury, investigated further, learned that many similarly situated miners had alleged "dust masks" were defective, and brought a timely suit.

Decisions of this Court (*Collins*) and the Fourth Circuit (*Teets*) reached the same conclusion on the same material facts. Like Petitioners, those plaintiffs were coal miners

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75 *Id.* (emphasis added).

76 *Id.*

who sued "dust mask" manufacturers more than two years after being diagnosed with the dust-caused injury they expected the "dust masks" to prevent. This Court and the Fourth Circuit (applying West Virginia law on the statute of limitations) therefore affirmed summary judgments for the defendant manufacturers.

Petitioners offer this Court no persuasive reason to depart from this consensus. Petitioners mistakenly contend that an injury's progression or worsening can somehow reset the clock, ignore that courts can grant summary judgment based on constructive knowledge, and conflate tort claims' accrual with the requirements of statutory workers' compensation programs. The courts below correctly refused to rewrite tort law to embrace these arguments. Accepting them, in the name of protecting plaintiffs who delayed filing suit, would deprive all but the most seriously injured miners of personal injury claims.

The courts below also correctly rejected fraudulent concealment as a basis to toll the statute of limitations. Although Petitioners crammed the record with what they label evidence of concealment, nothing Petitioners allege 3M said or did prevented them from learning of their claims. Petitioners knew they wore 3M "dust masks" to prevent black lung, yet still developed black lung.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument is unnecessary. The consensus position of this Court, the Fourth Circuit, the Intermediate Court, and the circuit court is correct. Settled law governs the central issue (Syllabus Point 5 of *Dunn v. Rockwell*, describing how to apply the statute of limitations) and the record and briefs adequately present the cases. Argument would not significantly aid this Court's decisional process.

What is needed, however, is a precedential opinion from this Court to confirm that similar cases are meritless. Hundreds of similar cases (brought by more than 300 plaintiffs, many untimely) are pending across West Virginia. The circuit court requested appellate confirmation of how this recurring limitations issue should be resolved.[77] The recent appeal by seven more untimely plaintiffs demonstrates that, despite this Court's ruling in *Collins* and the Intermediate Court's ruling here, plaintiffs continue to pursue time-barred claims. Adjudicating these stale claims unnecessarily consumes judicial and party resources. This Court should issue a precedential opinion reinforcing the rule that these claims are subject to summary judgment. Doing so will help courts and litigants efficiently clear dockets clogged with untimely cases.

STANDARD OF REVIEW

Summary judgment "shall be rendered" when the evidence on file "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[78] A summary judgment is reviewed *de novo*.[79]

ARGUMENT

I. Petitioners' claims are untimely.

The courts below correctly concluded there was no genuine issue of material fact as to the timeliness of Petitioners' claims', and that 3M was entitled to judgment as a matter of law.

"[B]edrock precedent" holds that "the statute of limitations begins to run when a plaintiff has knowledge of the fact that something is wrong and not when he or she

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77 *See* JA.000003. The court did so without the final results of *Collins* and *Teets*.

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

79 *Dunn v. Rockwell*, 225 W. Va. 43, 50, 689 S.E.2d 255, 262 (2009).

knows of the particular nature of the injury."[80] This Court adopted a "step-by-step process" for "determin[ing] whether a cause of action is time-barred" as Syllabus Point 5 of *Dunn v. Rockwell*.[81] This original syllabus point is the applicable rule of law:

> First, the court should identify the applicable statute of limitations for each cause of action. Second, the court (or, if questions of material fact exist, the jury) should identify when the requisite elements of the cause of action occurred. Third, the discovery rule should be applied to determine when the statute of limitations began to run by determining when the plaintiff knew, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action, as set forth in Syllabus Point 3 of *Gaither v. City Hosp., Inc.*, 199 W. Va. 706, 487 S.E.2d 901 (1997). Fourth, if the plaintiff is not entitled to the benefit of the discovery rule, then determine whether the defendant fraudulently concealed facts that prevented the plaintiff from discovering or pursuing the cause of action. Whenever a plaintiff is able to show that the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action, the statute of limitation is tolled. And fifth, the court or the jury should determine if the statute of limitation period was arrested by some other tolling doctrine. Only the first step is purely a question of law; the resolution of steps two through five will generally involve questions of material fact that will need to be resolved by the trier of fact.[82]

When the material facts are not genuinely disputed, courts must resolve the statute of limitations on summary judgment.[83] Although sometimes a limitations defense may involve genuine issues of material fact to be resolved by a jury, courts should resolve those that do not.[84] *Dunn* itself affirmed an order granting summary

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80 *Goodwin v. Bayer Corp.*, 218 W. Va. 215, 221, 624 S.E.2d 562, 568 (2005) (collecting cases).

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

82 Syl. Pt. 5, *Dunn*, 225 W. Va. 43, 689 S.E.2d 255; *see also* Syl. Pt. 1, *State v. McKinley*, 234 W. Va. 143, 764 S.E.2d 303 (2014) (original syllabus points have highest precedential value).

83 *Goodwin*, 218 W. Va. at 220, 624 S.E.2d at 567 (collecting cases; rejecting plaintiff's reliance on language that statute of limitations is often a jury question). This even extends to pleadings showing claims are untimely. *Richards v. Walker*, 244 W. Va. 1, 7-8, 813 S.E.2d 923, 929-30 (2018).

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

judgment on the statute of limitations.[85] And this Court regularly "affirm[s] summary judgment in cases where the undisputed facts establish that the suit was time-barred pursuant to the applicable statute of limitations."[86] The Intermediate Court correctly termed this "well settled" law.[87]

The discovery rule tolls the two-year tort statute of limitations "until a claimant knows or by reasonable diligence should know of his claim."[88] The "statute of limitations begins to run when the plaintiff knows, or by the exercise of reasonable diligence, should know (1) that the plaintiff has been injured, (2) the identity of the entity who owed the plaintiff a duty to act with due care, and who may have engaged in conduct that breached that duty, and (3) that the conduct of that entity has a causal relation to the injury."[89] "[W]hether a plaintiff 'knows of' or 'discovered' a cause of action is an objective test. The plaintiff is charged with knowledge of the factual, rather than the legal, basis for the action. This objective test focuses upon whether a reasonable prudent person would have known, or by the exercise of reasonable diligence should have known, of the elements of a possible cause of action."[90]

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

86 *Goodwin*, 218 W. Va. at 220, 624 S.E.2d at 567; *accord Caudill v. CSX Transp., Inc.*, 231 W. Va. 650, 660 n.19, 749 S.E.2d 342, 352 n.19 (2013) ("[U]nder state law, as well as federal law, the question of the timeliness of a claim can be decided by a court through summary judgment.").

87 *Hardy*, 2023 WL 7402890, at *7 n.8.

88 *Dunn*, 225 W. Va. at 50, 689 S.E.2d at 262 (citation omitted).

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

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

In a products liability case, the plaintiff need not know a product was defectively designed or manufactured for the statute of limitations to begin running.[91] "[S]uch knowledge is often not known with legal certainty until after the jury returns its verdict."[92] Requiring actual knowledge of the alleged defect would "almost abrogate the statute of limitations in products liability claims."[93] It would also complicate accrual for plaintiffs and contradict West Virginia's notice-pleading regime.

After the circuit court's ruling here, this Court affirmed a summary judgment holding that a similarly situated miner's "dust mask" claims were time-barred.[94] As here, in *Collins* it was "undisputed that [the plaintiff] knew from the outset of his mining career that coal mine dust could cause black lung, the specific respirator he contends he used throughout his career, and the date of his black lung diagnosis," so on those undisputed facts his "diagnosis triggered his duty to investigate the cause of his injury."[95] Applying *Dunn*, the Fourth Circuit reached the same conclusion, affirming summary judgment.[96] When diagnosed, the plaintiff in *Teets* knew that dust inhalation caused black lung, that he wore respirators to prevent black lung, and that he still

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

92 *Id.*

93 *Id.*

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

95 *Id.* at *2.

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

developed black lung.[97] No later than his diagnosis, he knew or reasonably should have known of the elements of possible claims against the respirator manufacturer.[98]

A. No one disputes *Dunn* step 1.

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

B. No genuine issue of material fact exists on *Dunn* steps 2 and 3.

There is no genuine issue of material fact for *Dunn*'s second step (determining when the elements occurred) or third step (whether the discovery rule tolls the statute of limitations). The courts below correctly resolved these legal questions.

1. Petitioners' legally protected interests were invaded no later than their lung disease diagnoses. By then, they knew or reasonably should have known that the "dust masks" had not prevented lung disease.

Analyzing steps 2 and 3 requires identifying the claims' elements. Petitioners' claims all require proving the defendant caused the plaintiff's injury.[99] Analyzing the discovery rule likewise requires identifying when the plaintiff knew, (1) that he was injured, (2) who manufactured the product, and (3) that the injury *might* be causally connected to that product.[100]

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97 *Id.*

98 *Id.*

99 *E.g.*, JA.000053-71 (Hardy's complaint); *see C.C. v. Harrison Cty. Bd. of Educ.*, 245 W. Va. 594, 603, 859 S.E.2d 762, 771 (2021) (negligence); *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 188 W. Va. 468, 472, 425 S.E.2d 144, 148 (1992) (fraud); *Anderson v. Chrysler Corp.*, 184 W. Va. 641, 646-47, 403 S.E.2d 189, 194-95 (1991) (breach of warranty requires "same evidentiary showing" as strict liability); *Morningstar v. Black & Decker Mfg. Co.*, 162 W. Va. 857, 891, 253 S.E.2d 666, 684 (1979) (strict liability).

100 Syl. Pt. 5, *Dunn*, 225 W. Va. 43, 689 S.E.2d at 255; *see also* Syl. Pt. 5, *Goodwin*, 218 W. Va. 215, 624 S.E.2d 562 (discussing products liability cases).

A plaintiff is injured when any legally protected interest is invaded.[101] That is why this Court and the Fourth Circuit held that miners were injured, and their claims accrued, when they were diagnosed with black lung.[102] At that point, the plaintiffs knew they had worn "dust masks" to prevent black lung, yet still developed black lung. That is also why the courts below and Kentucky federal courts hold that a miner's application for federal black lung benefits, after wearing "dust masks" to prevent black lung, shows constructive knowledge of potential claims. To seek benefits, the applicant must certify he believes he has CWP or other lung disease due to dust exposure.[103]

The courts below correctly concluded there is no genuine dispute about when Petitioners were diagnosed with black lung/CWP or other lung diseases. Their testimony and medical records establish that each was diagnosed more than two years before filing suit:[104]

Petitioner	**Injury**
Ronald Hardy	Diagnosed with obstructive lung disease in 2018.
Ralph Manuel	Diagnosed with silicosis in 1999, with COPD/CWP in 2008, and with CWP in 2018.
Ricky Miller	Diagnosed with CWP in 2013 and 2017.
James Cruey	Diagnosed with silicosis in 1985, CWP in 2004-05, and CWP again in 2016.
Gary Scott	Diagnosed with CWP in 1994 and 1998.

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

102 *See Collins*, 2022 WL 10084174, at *2; *Teets*, 2022 WL 14365086, at *2.

103 *E.g.*, JA.000980-83 (Manuel's application); *see Hardy*, 2023 WL 7402890, at *8; *Roark v. 3M Co.*, 571 F. Supp. 3d 708, 712-13 (E.D. Ky. 2021); *Adams v. 3M Co.*, No. 12-61-ART, 2013 WL 3367134, at *3 (E.D. Ky. July 5, 2013).

104 *Hardy*, JA.000183-88; *Manuel*, JA.000782-85; *Miller*, JA.002016-17; *Cruey*, JA.002803, JA.002454, JA.002460; *Scott*, JA.003734-35.

Petitioners concede they knew 3M manufactured "dust masks" they reported using.[105] And under their allegations that those products caused their injuries, a reasonable person would have known that causal connection no later than when that person was diagnosed with the very disease the products were supposed to prevent. That was this Court's holding in *Collins* and the Fourth Circuit's in *Teets*.[106] "Any reasonable person facing these facts would at least be suspicious that the respirators he wore might not have worked as promised" and investigated further.[107]

The courts below correctly held that Petitioners' claims were untimely. Petitioners knew the "dust masks" they used were "important to protect their health" from dust-caused lung disease.[108] Petitioners knew that despite using those products, they developed black lung or another dust-caused lung disease.[109] At that point, they had "suffered an injury putting them on notice" that the respirators might not have protected them from dust-caused lung disease.[110] At that point, Petitioners could have brought claims against 3M on the same theory they now allege. They were injured, they knew they had used 3M respirators, and they knew they had used 3M respirators to prevent the injuries with which they were diagnosed. That is all they needed to know to bring their claims. Those claims accrued then, and the statute of limitations began to run.[111]

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105 Petitioners' Br. 4.

106 *Collins*, 2022 WL 10084174, at *2; *Teets*, 2022 WL 14365086, at *2.

107 *Adams*, 2013 WL 3367134, at *4.

108 *Hardy*, 2023 WL 7402890, at *8.

109 *Id.*

110 *Id.*

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

Petitioners' black lung compensation filings reinforce this conclusion by confirming that each had the disease that he says he used "dust masks" to avoid.[112] More than two years before filing their suits against 3M and other respirator manufacturers, Hardy, Manuel, Miller, and Cruey certified to the federal government their belief that they had black lung or another lung disease resulting from dust exposure.[113] The only way to interpret the certification is how the courts below and Kentucky federal courts have interpreted it: that each Petitioner knew he was injured, and that any reasonable person would have connected that injury to the "dust masks" that were supposed to prevent it.[114] Gary Scott likewise applied for and received state workers' compensation benefits for his occupational lung injury.[115] That each Petitioner asserted a compensation claim—in systems designed to compensate miners disabled by black lung or other lung disease relating to dust exposure—"shows that [each Petitioner] knew or should have known that he had suffered an invasion of his legally protected interests."[116]

The undisputed evidence confirms Petitioners' constructive knowledge and complete lack of diligence.[117] More than two years before Hardy sued 3M, he was

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112 *See Goodwin*, 218 W. Va. at 220-21, 624 S.E.2d at 567-68 (relying on plaintiff's testimony to establish date of injury).

113 *E.g.*, JA.000980-83 (Manuel's application; certifying under penalty of fine or imprisonment that he believed he was disabled "due to pneumoconiosis (Black Lung) or other respiratory or pulmonary disease resulting from coal mine employment"). Gary Scott sought federal black lung benefits in 2020.

114 *See Hardy*, 2023 WL 7402890, at *8; *Roark*, 571 F. Supp. 3d at 712-13; *Adams*, 2013 WL 3367134, at *3.

115 JA.003734-35.

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

117 *See Goodwin*, 218 W. Va. at 221, 624 S.E.2d at 568 (plaintiff is charged with affirmative duty to investigate when plaintiff knows of injury and surrounding facts place him on notice of possible breach of duty of care).

deposed and was asked whether he had sued "dust mask" manufacturers.[118] That question made the link between his black lung and the products he says he used to avoid it plain. Manuel cannot dispute that more than two years before suing 3M, his doctor told him his lungs were "pretty bad" and that he should avoid further dust exposure.[119] Yet he failed to ask his lawyer or doctors, or otherwise investigate, why he got the injury he tried to avoid. Miller testified that in 2013 he thought about contacting 3M because the "dust masks" should have protected him, yet did nothing to investigate and waited eight more years to sue 3M.[120] Cruey realized that "apparently the masks wasn't slowing" his black lung "down," yet he too failed to investigate further.[121] And Scott said his diagnosis—in the 1990s—"surprised" him because he thought respirators would help prevent disease, yet he also did nothing to investigate further.[122]

A reasonable person's investigation would have been straightforward. Petitioners had doctors and lawyers—for some the same lawyer they have now—helping with their black lung claims. They had co-workers who surely knew about dust exposure and black lung. They had family with that disease. There is no reason they could not have brought their personal injury claims within two years of learning they had the exact disease they tried to avoid. No diligence cannot be reasonable diligence. Their claims are untimely.

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118 JA.000780.

119 JA.000783.

120 JA.002016-17.

121 JA.002556.

122 JA.003740-41.

2. Petitioners' contrary arguments are baseless.

To try to excuse their years of delay, Petitioners make result-driven arguments. Accepting these arguments would upend this Court's holdings and overrule *Collins*, a precedent this Court established not even two years ago.[123] It would also close courthouse doors to all miners with "dust mask" claims *except* those who are diagnosed with the most severe form of CWP and awarded federal compensation benefits. This Court should reject Petitioners' arguments.

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

Petitioners invoke general language that limitations issues often present fact issues that a jury must resolve. But such general language says nothing about specific cases. This Court explained that in *Goodwin*, rejecting that plaintiff's reliance on the same kind of general language.[124] Instead, *Dunn*'s second step requires identifying whether genuine issues of material fact exist based on the case's record.[125] Following that case-specific analysis of the record, "summary judgment can and should be granted on the basis of an applicable statute of limitations when no genuine issue of material fact exists as to whether the statute of limitation has been violated."[126] Only if questions of material fact exist must the issue go to a jury.[127]

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123 *See State v. McKinley*, 234 W. Va. 143, 153, 764 S.E.2d 303, 313 (2014) (holding that memorandum decisions like *Collins* are "legal precedent"; they control unless they conflict with published opinions).

124 *Goodwin*, 218 W. Va. at 220, 624 S.E.2d at 568.

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

126 *Goodwin*, 218 W. Va. at 220, 624 S.E.2d at 568.

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

That is why this Court affirmed summary judgment in *Collins*. After evaluating the case's record, the Court determined there were no genuine issues of material fact.[128] And it explains why both courts below also concluded summary judgment was required. As discussed above, the record shows no genuine issue of material fact on the statute of limitations.

Engle, a Kentucky Supreme Court ruling on a writ petition on which Petitioners rely, is inapposite.[129] *Engle* was a discovery dispute, not an analysis of how to apply the discovery rule. It held that defendants (including 3M) could depose plaintiffs' counsel because the plaintiffs had made attorney-client discussions relevant to limitations issues.[130] While it included the language Petitioners quote about notice of injury as a fact question for trial, that dicta was not the case's holding and does not accurately state Kentucky law.[131] Like West Virginia, Kentucky recognizes that when the material facts are undisputed, the court must apply the statute of limitations as question of law.[132] Even if *Engle*'s dicta were Kentucky law, this Court rejected the argument that the statute of limitations always presents fact questions for trial.[133] Instead, when the facts material to the statute of limitations are not genuinely disputed, courts "can and should" resolve the statute of limitations as a legal issue on summary judgment.[134]

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

129 *3M Co. v. Engle*, 328 S.W.3d 184 (Ky. 2010).

130 *Boggs v. 3M Co.*, No. 11-57-ART, 2012 WL 3644967, at *5 (E.D. Ky. Aug. 24, 2012) (citing *Engle*, 328 S.W.3d at 189), *aff'd*, 527 F. App'x 415 (6th Cir. 2013).

131 *Id.*

132 *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)).

133 *Goodwin*, 218 W. Va. at 220, 624 S.E.2d at 567 (collecting cases).

134 *Id.*

Petitioners' references to *Hoke* are also misplaced. That writ decision concerned the threshold issue of whether the discovery rule applied to the Consumer Credit and Protection Act (CCPA) claim the Attorney General brought against respirator manufacturers.[135] Holding that it did, this Court remanded for the "parties to develop their evidence" on the discovery rule applicable to CCPA claims, "and present it anew in competing motions for summary judgment or at trial."[136] *Hoke* thus reinforces that the statute of limitations can be resolved on summary judgment.

b. A progressing disease does not reset the clock.

Petitioners also assert that they could not be injured until their black lung advanced to the complicated stage (also called PMF). That is wrong. Petitioners' claims accrued once they developed lung disease despite wearing "dust masks" to prevent that disease. At that point, they had to investigate their injuries fully. Worsening disease does not reset the clock.

Black lung is either simple or complicated, depending on the size of observed lung opacities.[137] Petitioners' medical expert says that "[c]oal mine dust lung disease is a spectrum of lung disease" including PMF.[138] Petitioners agree. Hardy, for example, told the circuit court that PMF is "also known as 'complicated pneumoconiosis or black lung.'"[139] As the Fourth Circuit helpfully summarized:

> CWP, known colloquially as "black lung," is a latent occupational disease marked by fibrosis, or scarring caused by inhalation of coal dust. It can take years of coal dust exposure for CWP to develop, and it progresses slowly

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

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

137 *See* JA.000233 (Hardy's response opposing summary judgment; discussing this).

138 JA.000029 (circuit court quoting him).

139 JA.000233.

> once it occurs. *The disease progresses through three stages of simple CWP—beginning with Category 1 and advancing to Category 3—followed by three stages of complicated CWP—beginning with Category A and ultimately becoming Category C.*[140]

Contrary to Petitioners' arguments, new legal injuries are not created whenever a disease progresses. By statute, the Legislature rejected a "two-disease" rule for claims relating to black lung.[141] Instead, under ordinary tort rules, when a plaintiff is *first* injured he must "begin investigating the *full extent* of his injuries" and sue within the limitations period for all harms related to that injury.[142] "[D]amage may be on-going and may worsen later," but that "does not alter when the limitations period begins to run."[143]

Goodwin is an example. Exposure to paint fumes injured the plaintiff, causing breathing issues. His later diagnosis with neuropsychological injury from that exposure was not a separate injury.[144] Both the breathing issues and neuropsychological injury resulted from the same legal injury (his allegedly tortious exposure to paint fumes), so "whether or when [the plaintiff] was aware of the full extent of injuries that might be manifested from the exposure(s)" to paint fumes was immaterial.[145] Once the plaintiff

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

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

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

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

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

145 *Id.*, 218 W. Va. at 223, 624 S.E.2d at 570.

was injured, "it was his duty thereafter to fully investigate the injuries that might follow that exposure."[146] Because he did not do so, his claims were untimely. One of the Kentucky "dust mask" decisions granting summary judgment applies that reasoning. The plaintiff was diagnosed with black lung in 1994, decades outside Kentucky's one-year limitations period for his 2019 claims against 3M.[147] His black lung later progressed to the complicated stage (an 11 millimeter opacity), but that was immaterial to the statute of limitations.[148] He "was aware of his injury in 1994, when he was diagnosed."[149] He did not get to file his lawsuit decades after that injury because the injury had progressed.

So too here. When Petitioners were diagnosed with a "noticeable injury," the injury was no longer latent.[150] The harm was "sufficiently pronounced" because it manifested as diagnosed lung disease caused by dust exposure.[151] Whatever dust-caused lung diseases Petitioners developed (or to whichever stages those diseases progressed), "they are all related and occur from coal mining," as the Intermediate Court correctly

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146 *Id.*

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

148 *Id.* at 713.

149 *Id.*

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

151 Petitioners read far too much into the phrase "sufficiently pronounced," used in *Jones v. Trustees of Bethany College*, 177 W. Va. 168, 170, 351 S.E.2d 183, 185 (1986). All "sufficiently pronounced" means is that claims for a latent injury do not accrue until the plaintiff knows, or reasonably should know, of the injury. *See id.* Here, the injury was latent until, at the latest, the date when each Petitioner was diagnosed. By that point, it was no longer latent. Moreover, the court correctly held that Petitioners' reasoning contradicts *Goodwin*'s rule that the "statute of limitations begins to run when a plaintiff has knowledge of the fact that something is wrong and not when he or she knows of the particular nature of the injury." JA.000028.

recognized.[152] Petitioners' injury occurred no later than their first diagnosis with dust-caused lung disease despite wearing "dust masks," not when they knew the "full extent" of injuries that might eventually manifest from their dust exposure.[153]

Petitioners' argument upends settled law. If Petitioners are right, a new statute of limitations applies each time a disease progresses or worsens. That would create a two-disease regime, contrary to West Virginia law. It would also undermine the discovery rule's purpose of preventing "the inherent unfairness of barring a claim" when a party cannot timely discover his cause of action.[154] When an injury is no longer latent, such as when a doctor tells a miner he has lung disease that the miner knows he used "dust masks" to prevent, the person has learned of his injury and has constructive notice of possible claims against the "dust mask" manufacturer. Further tolling does not serve the rule's purpose.[155]

The circuit court correctly recognized that under Petitioners' theory, "a whole group of potential product liability plaintiffs, those without debilitating complicated pneumoconiosis such as those with some impairment caused by simple pneumoconiosis, chronic obstructive pulmonary disease (COPD), or some other dust-induced lung disorder would be precluded from filing a product liability cause of

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152 *Hardy*, 2023 WL 7402890, at *9.

153 *Goodwin*, 218 W. Va. at 223, 624 S.E.2d at 570.

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

155 *See Boggs*, 2012 WL 3644967, at *4.

action."[156] After all, under Petitioners' theory diagnosed lung injury short of complicated CWP/PMF is not "sufficiently pronounced." The courts below correctly refused to rewrite tort law so that these Petitioners—who sat on their hands for years—could defeat summary judgment.[157]

c. A tort injury does not depend on the federal bureaucracy or require the plaintiff to be totally disabled.

Not content to make even a complicated black lung/PMF diagnosis the trigger for accrual, Petitioners insist that their claims could not have accrued until the federal bureaucracy found they qualified for statutory black lung benefits. Petitioners cite no authority because there is none. This Court has never held that tort claims cannot accrue until federal programs find claimants satisfy the requirements for statutory compensation benefits. *Dunn* instead holds that tort claims accrue when the plaintiff knows, or by exercising reasonable diligence should know, of the claim's elements.[158] As the courts below correctly recognized, that is the controlling law, not Petitioners' novel position.

Indeed, Petitioners' theory is fundamentally defective. It means miners would not be "injured" for tort purposes until they knew, with legal certainty from an adjudicated federal benefits claim, that they had complicated black lung/PMF.[159] That fails under *Hickman*'s reasoning that accrual does not require the plaintiff to know "with legal

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156 JA.000030.

157 *Id.*

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

159 *See* Petitioners' Br. 10.

certainty" that he has a claim.[160] As this Court held in *Collins*, the Fourth Circuit held in *Teets*, and the courts below held here, being diagnosed with a lung disease caused by inhaling dust is enough for a reasonable person to suspect that the "dust masks" he used to prevent that disease might be linked to that disease.

Petitioners' reasoning leads to illogical results. For example, they insist a jury could reasonably find Mr. Hardy was uninjured until September 2022, when he was awarded federal black lung benefits.[161] So, they argue, his September 2021 lawsuit against 3M cannot be untimely. But using that final administrative adjudication as the accrual date means his tort claims did not accrue until a year *after* he filed this lawsuit. Mr. Manuel knew in July 2018, because his doctor told him, that his "lungs were pretty bad."[162] He had a tort injury by then, regardless of what his employer later said about federal black lung benefits or how long it took the federal government to find him entitled to them. Gary Scott's employer, Petitioners say, "continues to dispute that he suffers from PMF" in federal black lung proceedings.[163] Under the reasoning Petitioners advance, his tort claims *still* have not accrued, despite his 1990s black lung diagnosis.

These nonsensical positions are not the law. And adopting them would have dramatic consequences for litigating similar claims. If Petitioners are right, a miner diagnosed with black lung or other lung disease has no tort claims until the federal system finds him entitled to statutory black lung benefits. That requires the miner to

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

161 Petitioners' Br. 23.

162 JA.000783.

163 Petitioners' Br. 44.

undergo a lengthy, complicated process and prove his disease is totally disabling.[164] Petitioners thus would impose a federal exhaustion requirement, one requiring miners have advanced lung disease and be totally disabled, before having tort claims. *Dunn* and other established law on the statute of limitations impose no such requirements.

d. Constructive knowledge counts.

Petitioners' arguments ignore the legal effect of constructive knowledge. Even if they did not actually know of injury until the federal government found they qualified for statutory benefits, a plaintiff's claim still accrues based on what he reasonably *should* have known. After using "dust masks" to prevent lung disease, Petitioners *should* have known they were injured once they were diagnosed.[165]

Assertions that Petitioners' claims did not accrue until they spoke with lawyers about possible claims are erroneous for the same reason. As the Fourth Circuit explained in *Teets*, that argument "contradicts West Virginia law" and would eliminate the "requirement of 'reasonable diligence' to discover and bring suits within a given time."[166] Once a plaintiff is injured, "and the facts surrounding that injury place him on notice of the *possible* breach of a duty of care, that plaintiff has an affirmative duty to further and fully investigate the facts surrounding that potential breach."[167] Petitioners' claims were not tolled until they had actual knowledge of the alleged defects by speaking with counsel. That would permit them to ignore all evidence of the connection between

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

165 *Collins*, 2022 WL 10084174, at *2; *Teets*, 2022 WL 14365086, at *2.

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

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

their dust-caused disease and the "dust masks" they wore to prevent it "until someone else explicitly connects the dots" for them.[168]

e. The courts below applied the correct legal standard.

Petitioners say the courts below applied an incorrect legal standard by relying on *Goodwin*, which they read as involving a different accrual rule for traumatic injuries.[169] Petitioners are wrong. As discussed above, the *Goodwin* plaintiff was exposed to occupational paint fumes for years and, at some point, experienced breathing difficulties.[170] In 1997, after again experiencing breathing difficulties, he connected his paint exposure to his breathing difficulties.[171] This Court affirmed summary judgment on the statute of limitations because he did not sue the paint manufacturer until 2001. All his claims relating to paint exposure accrued by 1997, when he knew that "something [was] wrong."[172]

Petitioners' argument about separate accrual rules for latent and traumatic injuries is inconsistent with *Dunn*. Under Syllabus Point 5 of *Dunn*, the discovery rule applies to all injuries.[173] The plaintiff's claims accrue when the plaintiff knows, or by exercising reasonable diligence should know, of his injury and that an identifiable defendant's conduct may have caused that injury.[174] Whether an injury is initially latent

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168 *Boggs*, 2012 WL 3644967, at *1-2 (rejecting argument under Kentucky's similar discovery rule).

169 Petitioners' Br. 62-68.

170 *See id.*, 218 W. Va. at 217-18, 624 S.E.2d at 564-65.

171 *Goodwin*, 218 W. Va. at 217-18, 221-22, 624 S.E.2d at 564-65, 568-69.

172 *Id.*

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

174 *Id.*

or occurs traumatically is itself immaterial: the relevant inquiry is when the injury and its possible cause become, or by exercising reasonable diligence should become, apparent. At that point, the plaintiff must investigate all claims related to that injury and bring them within the limitations period.[175]

The courts below correctly applied this standard. Petitioners' injuries were latent while, under their theory, they unwittingly inhaled dust despite wearing "dust masks." But once diagnosed with disease they wore "dust masks" to prevent, their injuries were apparent, no longer latent. By that point, as in *Goodwin*, a reasonable person would have known that something was wrong.[176] So the discovery rule stopped tolling the statute of limitations.

f. Petitioners ignore the legal effect of the complete failure to investigate their injuries.

Petitioners contend that their wearing respirators less than 100 percent of their time underground creates a genuine issue of material fact on the statute of limitations because dust exposure while *not* wearing a respirator could have caused their injuries. But this does not change when their claims accrued. Once Petitioners were injured, they had a duty to investigate *all* apparent causes of their injury within the two-year limitations period, or their claims would be barred.[177] The fact that their injuries could have been caused by unprotected exposures (or anything else) does not excuse them from timely investigating all apparent causes, including the respirators they wore to prevent those injuries.

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175 *Goodwin*, 218 W. Va. at 221-22, 624 S.E.2d at 568-69.

176 *See id.*; *accord Collins*, 2022 WL 10084174, at *3; *Teets*, 2022 WL 14365086, at *2.

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

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

Petitioners also say their claims could not have accrued because 3M denies that its respirators are defective. This Court has rejected that argument: "Defendants routinely deny the existence of facts that give rise to a plaintiff's claims; the running of the statute of limitations is unaffected by such denials."[178] Logically, the claims had to accrue before the lawsuit was brought and the defect allegations were made. Denying those allegations says nothing about when the claims accrued.

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Try as Petitioners might, the undisputed facts confirm their claims are untimely. More than two years before filing, they knew they wore "dust masks" to prevent dust-caused lung diseases and knew they still had developed those very diseases. Armed with those facts, a reasonable person would have made the logical connection between the "dust masks" and that injury and investigated potential claims. This Court should reaffirm the consensus position it adopted in *Collins*, the Fourth Circuit adopted in *Teets*, and the courts below applied here. These claims are untimely.

II. Fraudulent concealment is inapplicable.

The courts below correctly rejected tolling the statute of limitations through fraudulent concealment, the fourth step of *Dunn*. Petitioners claim 3M committed fraud by not disclosing alleged product defects. 3M denies those allegations. Regardless, this alleged non-disclosure of supposed product defects is not fraudulent concealment. 3M did not prevent Petitioners from learning that they were injured, they had worn 3M

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

respirators, and the respirators were supposed to prevent that injury. Petitioners' position equates pleading fraud with fraudulent concealment. That is not the law.

A. The plaintiff must show how the defendant prevented him from learning of a possible claim.

A fraud claim is not the equivalent of fraudulent concealment. Instead, to prove fraudulent concealment tolls the statute of limitations, the plaintiff must show that "the defendant fraudulently concealed facts which prevented the plaintiff from discovering or pursuing the potential cause of action."[179] Only concealment from the plaintiff of "relevant facts that were necessary" for the plaintiff to file a claim qualifies as fraudulent concealment.[180] Even allegedly delaying a plaintiff's attempts to investigate does not constitute fraudulent concealment when the plaintiff *already knew the facts needed to bring the cause of action*.[181] Where the alleged delay does not prevent the plaintiff from learning of the possible cause of action, it cannot toll the statute of limitations.[182]

Courts thus reject assertions that respirator manufacturers prevented plaintiffs from learning of possible claims. In *Teets*, for example, Judge Groh distinguished the plaintiff's allegations of "purported fraud" that "revolved around misleading statements and selling expired or untested respirators" from the "relevant inquiry."[183] The manufacturer's "alleged conduct in no way prevented [the plaintiff] from discovering or

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

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

181 *Id.*

182 *Id.*

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

pursuing this cause of action," so it was not fraudulent concealment.[184] Likewise, one of the Kentucky cases reasoned (under Kentucky's analogous fraudulent concealment rule) that alleged concealment of product defects did not prevent a plaintiff with black lung from investigating whether the respirators had protected him.[185] The potential causal link was apparent from the fact of injury.[186]

B. Petitioners have no evidence that 3M prevented them from learning of their claims.

The courts below correctly held that the evidence did not raise a jury question on fraudulent concealment. Nothing 3M allegedly said or did prevented Petitioners from learning the facts they needed to bring their claims. As the Intermediate Court emphasized, "[a]ll the petitioners knew the exact respirators they wore and that they were diagnosed with some form of lung impairment years before filing suit."[187] They knew they wore 3M "dust masks" to prevent dust-caused lung disease, yet they still suffered dust-caused lung disease. That is all any reasonable person needed to know to investigate and bring legal claims.[188]

The thousands of pages Petitioners crammed into the record (about 3M's and other Respondents' supposed failure to disclose alleged product defects) are of no moment. 3M denies concealing product defects. But whatever 3M allegedly failed to disclose, Petitioners knew they suffered the injury they expected 3M products to

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184 *Id.*

185 571 F. Supp. 3d at 714-15.

186 *Id.* (citing *Fluke Corp. v. LeMaster*, 306 S.W.3d 55, 65 (Ky. 2010)).

187 *Hardy*, 2023 WL 7402890, at *8.

188 *See Teets*, 2021 WL 3280528, at *3; *Roark*, 571 F. Supp. 3d at 714-15.

prevent.[189] Petitioners are just repackaging the argument that plaintiffs need actual knowledge of a product defect to sue. That is not the law; "[s]uch knowledge is often not known with legal certainty until after the jury returns its verdict."[190]

Petitioners' own briefing confirms that 3M did not fraudulently conceal their claims from them. They say they "did not learn of Respondents' fraudulent concealment of these critical facts [i.e., the alleged defects] *until after their cases were filed*."[191] Petitioners who learned of alleged concealment *after* filing their lawsuits necessarily had enough information to file *before* learning of the alleged concealment. Petitioners' failure to bring timely claims shows their lack of diligence, not concealment by 3M.

The deluge of "dust mask" lawsuits reinforces this. Contrary to Petitioners' suggestion that it was "virtually impossible" for them "or any other person to discover the facts relevant to the [alleged] defects in these respirators,"[192] many similarly situated plaintiffs brought "dust mask" claims, years before Petitioners' 2021 lawsuits. This litigation is so pervasive that Hardy was even asked—more than two years before filing this lawsuit—whether he had brought such a lawsuit.[193] None of Petitioners' "evidence" of alleged fraud "show[ed] that any alleged concealment happened during the two years immediately preceding" the filing of these lawsuits.[194] Only Plaintiffs' lack of diligence can explain their failure to sue until 2021.

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

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

191 Petitioners' Br. 82 (emphasis added).

192 *Id.* at 82.

193 JA.000100.

194 JA.000043.

III. No other tolling doctrine saves Petitioners' untimely claims.

Dunn's fifth step is to evaluate whether another tolling doctrine besides fraudulent concealment applies.[195] Petitioners never asserted that.[196] They waived any such argument.[197]

IV. Petitioners make irrelevant, unfounded assertions about mine operators buying 3M respirators.

Petitioners assert that coal mine "operators spent millions and millions of dollars purchasing these respirators from Respondents," as well as other related factual assertions about 3M allegedly defrauding operators.[198] 3M denies these assertions, and they have no bearing on the limitations issues this Court is considering. The only apparent reason for making them is that some of Petitioners' counsel represent the Attorney General in its CCPA action, which rests on such assertions. Tellingly, however, Petitioners cite no record evidence to support these statements, and they are baseless. When deposed, the Attorney General's Rule 30(b)(7) representative confirmed the Attorney General lacks evidence that a West Virginia coal mine ever bought respirators from 3M or from a distributor to which 3M sold respirators.[199] The CCPA action may result in an appeal. This Court should be aware that these statements are inaccurate.

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

196 *See* JA.000021 ("The Parties also agree under Step Five that no other tolling doctrine applies to these cases.").

197 *See Wang-Yu Lin v. Shin Yi Lin*, 224 W. Va. 620, 624, 687 S.E.2d 403, 407 (2009).

198 Petitioners' Br. 47; *see also id.* 3-4, 48-49, 61, 80.

199 *See 3M v. State of W. Va. ex rel. Morrisey*, Supreme Court of Appeals No. 23-418, Joint Appendix 01476-84.

CONCLUSION

Petitioners' claims are untimely, some by decades. This Court, the Fourth Circuit, the Intermediate Court, and the circuit court have all correctly ruled that such claims should be resolved on summary judgment. As the circuit court correctly noted, a jury could not find for Petitioners on the statute of limitations unless it disregarded the law and ruled based on sympathy for Petitioners' health conditions. The judgment should be affirmed in a precedential opinion that will help courts and litigants efficiently clear dockets of similarly untimely cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to W. Va. R. App. P. 38A, I certify that on May 28, 2024, true and accurate copies of the foregoing Brief of Respondent 3M Company were served on all counsel of record via the Court's E-Filing system.

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