



IN THE SUPREME COURT FOR THE STATE OF DELAWARE

Wayne West and Cynthia West,	:	
	:	
Plaintiffs Below/	:	
Appellants,	:	No. 212,2024
	:	
v.	:	Court Below:
	:	Superior Court of the State
Patterson-Schwartz and Associates,	:	of Delaware
and Washington Street Realty Co.,	:	N21C-08-265 MAA
	:	
Defendants Below/	:	
Appellees.	:	

APPELLANT’S OPENING BRIEF ON APPEAL FROM THE SUPERIOR COURT OF DELAWARE

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NATURE OF THE PROCEEDINGS

On August 30, 2021, the Appellants-Plaintiffs, Wayne and Cynthia West, Delaware residents, filed a lawsuit against Patterson Schwartz & Associates and Washington Street Realty (“the Defendants” or “PSA”). Appellants-Plaintiffs alleged Wayne West suffered from negative health related effects because of being exposed to mold on Defendants’ property.¹ Cynthia West has a loss of consortium claim, derivative of her husband. The Plaintiffs alleged in their complaint that the Defendants were negligent and reckless in their failure to warn Wayne West of mold in the building and properly remediate the building and that this caused his mold-related disease. Defendants argued they were not negligent or reckless and that Wayne West did not have a mold related disease. At the conclusion of fact discovery, Defendants filed a motion for summary judgment alleging that Plaintiffs’ claim began to run at the latest by April of 2016, and thus was time barred.² On March 4, 2024, oral argument was heard before Judge Adams, and on May 10, 2024, the Superior Court entered an order granting Defendants’ motion for summary judgment, holding that Appellants-Plaintiffs’ claim was barred by statute of limitations.³ The Superior Court concluded that the Appellants-Plaintiffs

¹ See Plaintiffs’ Compl. Aug. 30, 2021. (A12 – A19.)

² Opening Brief in Support of Defendants’ Motion for Summary Judgment (A20-A39).

³ *West v. Patterson Schwartz & Associates and Washington Street Realty Co*, Del Super. C.A. No. N21 C-08-265, Adams, J. (May 10, 2024), Ex. A.

were on inquiry notice in 2016 and failed to take follow up steps, but did not deal with whether not Wayne West actually had a mold-related disease. Appellants-Plaintiffs filed a timely notice on May 28, 2024. This is Appellants-Plaintiffs' Opening Brief.

SUMMARY OF ARGUMENT

The Trial Court erred when it ruled Appellants-Plaintiffs' claim was time-barred by the statute of limitations even though Wayne West was not diagnosed with a mold related disease until August of 2021 and subsequently filed suit later that month. The Trial Court also erred when it held that the Appellants-Plaintiffs were on inquiry notice in 2016, as opposed to October 2019, when it was first determined there was mold in Wayne West's workspace.

STATEMENT OF FACTS

On August 9, 2021, Appellant-Plaintiff Wayne West, for the first time, was diagnosed with a mold related disease, persistent inflammatory response syndrome, by Dr. Susan Black.⁴ Before this date, there was no diagnosis made by any doctor that West had a mold related disease. The Defendants' doctor argues that West does not have mold related disease, yet the Defendants claim West should have filed suit for an injury it claims he does not have.⁵

Appellant-Plaintiff Wayne West is a real estate agent who, from 1986 until 2023, worked for PSA/Defendants-Appellees.⁶ He worked at PSA's Newark office, specifically in the "bull pen area" on the upper floor of the building.⁷ This office, which was located under the air conditioning unit on the roof above, was plagued by leaks.⁸

A. Asking Questions in the Work Area

Throughout his career as a real estate agent, West had a history of various medical issues including a cough, shortness of breath, and fatigue, which were

⁴ See report of Dr. Susan Black, August 9, 2021, Ex. A to Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Summary Judgment (A190).

⁵ Report of Dr. Lawrence Guzzardi, Oct. 29, 2023, Ex. P to Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Summary Judgment (A337 – A344).

⁶ Wayne West Dep. June 6, 2023, Ex. D to Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Summary Judgment, A211:7-16.

⁷ Id.

⁸ Nancy Colligan Dep. June 28, 2023, Ex. E to Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Summary Judgment, A237:20 – A238:17.

noted to be multifactorial by his doctors. He dealt with periodic flare-ups of sinus infections and prolonged bronchitis and pneumonia.⁹ Although he did not know what the cause(s) were, if any, for his medical issues, he regularly sought medical advice and help.

In addition to seeking medical advice, Wayne West sought to address concerns he had about his work area. For example, in April 2014 he reported to his colleague Nancy Colligan that there were water stains in his office.¹⁰ Colligan recalled that Wayne came to her about these stains in the office, and she subsequently contacted either the roofing company or the company that maintained their AC unit, which was located above Wayne's office, as both were potential sources of leaks.¹¹ In addition to reporting to Colligan, Wayne told his office manager, Chris Cashman, that he was worried something in the office (he did not what) was causing his health problems.¹² Over the years he continued to report water stains to both Colligan and Cashman.¹³

Wayne's concerns were dismissed by his supervisors. For example, at the office Christmas parties in December 2014 and December 2016, West was told by

⁹ See Plaintiff's medical records, Ex. F to Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Summary Judgment, A241 – A254, A66 – A272.

¹⁰ Plaintiff's Day Timer Notes, Ex. G to Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Summary Judgment, A274.

¹¹ Nancy Colligan Dep. June 28, 2023, A237:20 – A239:20.

¹² Plaintiff's Day Timer Notes, A274.

¹³ Id.

Cashman that he was “imagining it” and “nobody else was sick.”¹⁴ Wayne testified that he “took it verbatim that nobody else was sick.”¹⁵

B. Investigating His Home

Lacking authority or control over his work and trusting his management, Wayne took steps to inspect his own home because, as he stated in his deposition, “I was trying to rule things that could have made me sick.”¹⁶ In April of 2016 he hired a company called AAA Dry Foam to examine his home. He did so, he said, because “mold is what is advertisements on TV.”¹⁷ No mold or other potential hazards materials were found.¹⁸ In April 2018 his wife Cynthia noticed some spots in the attic of their home and as a result the Plaintiffs again had their home inspected by AAA Dry Foam. It was determined that they “had the beginning of mold” in their attic but there was “no way” it had gotten into the living area of their home.¹⁹

C. Seeking Continual Answers at Work

Again, it was unclear to West or anyone else what was making him sick, so in November of 2018, West had another conversation with Cashman and expressed

¹⁴ Id; Wayne West Dep. at A244:4-15.

¹⁵ Id. at A225:18-24.

¹⁶ Id. at A222:8-19.

¹⁷ Id.

¹⁸ Id. at A223:7-16; Plaintiff’s Day Timer Notes, A274.

¹⁹ West Dep. at A221:6-24.

concerns that something was wrong with the building.²⁰ As his day timer notes demonstrate, there was no mention of mold. He was again told by Cashman that he was imagining things and no one else was sick.²¹ Again, it was not medically known what was causing West's health problems at that time.

West had complained of symptoms including cough, shortness of breath, and fatigue to his primary care doctor for several years but received no diagnosis.²² It was not until June 2019 that he was referred to an allergist for an evaluation for asthma.²³ Until this professional evaluation, Appellant-Plaintiff in part attributed his symptoms to other potential causes like seasonal allergies, as he would get yearly sinus infections with the change of seasons.²⁴ His primary care doctor attributed these infections to bacterial infections.²⁵

²⁰ Plaintiff's Day Timer Notes, A274.

²¹ *Id.*

²² *See generally* Plaintiff's medical records and Day Timer Notes, A241 – A272 and A274 – A275.

²³ *See* Plaintiff's medical records at A245. In February 2016, Appellant-Plaintiff had been evaluated by Dr. Jagdeep Hundal of First State ENT, who evaluated Plaintiff for sinus problems, but did not attribute a cause to his symptoms. Dr. Hundall diagnosed Plaintiff with chronic sinusitis, deviated septum, nasal congestion, laryngopharyngeal reflux, and obstructive sleep apnea. (Ex. N to Plaintiffs' Answering Brief in Opposition to Defendants' Motion for Summary Judgment, A322 – A325)

²⁴ Wayne West Dep. at A213:1 – A214:13, A215:8-17.

²⁵ Plaintiff's medical records, A255 – A261.

On July 19, 2019, Dr. David Kim tested Appellant-Plaintiff for potential allergies.²⁶ He tested positive for a variety of allergies including to some tree, molds, and grasses. West testified this was the first time he was told he had asthma and the first time he was told he had a general allergy to mold.²⁷ There was still no link or evidence of mold in his building as his managers had denied there was any mold in the building, but he also was not suffering from symptoms and was not suffering from a specific injury.

More importantly, Appellant-Plaintiff's day timer notes show there was no incidents of leaks in his office between July 19, 2019 and the incident of October 16, 2019.²⁸ In addition, Appellant-Plaintiff's day timer notes show no physical problems during this time.²⁹ This is consistent with Appellees-Defendants' own records, which demonstrate that repairs were done for water damage in October 2018 (repair of the water damaged wall on the top floor and replacing ceiling tiles); November 2018 (repair of water damaged drywall on main floor and water damaged ceiling tiles throughout); February 2019 (repair of roof membrane seam at corner of air conditioning unit above upstairs office, with the roof leak specifically noted to affect Wayne's office); and April 2019 (repairs to rooftop unit with leaking evaporator coil and inspection of roof and removal of standing water

²⁶ Plaintiff's medical records, A262 – A265.

²⁷ Wayne West Dep., A216:1-7, A217:1-7.

²⁸ Plaintiff's Day Timer Notes, A275.

²⁹ Id.

from the basement after rain event).³⁰ In early July 2019, repairs were needed to fix open seams on the first and second floor roofs, which were causing leaks.³¹ The next noted repair was in October 2019, after Wayne reported the leak in his office.³²

D. October 2019 – Mold is Discovered in the Office for the First Time

On October 16, 2019, a day on which it was pouring rain, Wayne West arrived at his office. As soon as he walked into his office, he could not breathe.³³ Alarmed, he asked a colleague, Mike Dutt, if he smelled anything odd in the office. Dutt responded that it “smelled like a wet baseball glove” and then West pulled out a ceiling tile and saw that “water was dripping from foil wrapped tile.”³⁴ West then left the office, and emailed Cashman photographs of the tile and pleaded with him to get the office tested.³⁵ Specifically, he emailed him, “My concerns are mold.” He again wrote to Cashman on October 22, 2019 to insist that “I think you should have a mold test done asap.”³⁶ It was only after he explicitly insisted for a mold test to occur that Cashman relented and said in a reply on October 23, 2019,

³⁰ Ex. O to Plaintiffs’ Answering Brief in Opposition to Defendants’ Motion for Summary Judgment at A327 – A332.

³¹ Id. at A333 – A334.

³² Id. at A335.

³³ Wayne West Dep., A227:10-21, A229:2-6.

³⁴ Id., A229:7-16, A230:1-14.

³⁵ Plaintiff’s emails, Ex. J to Plaintiffs’ Answering Brief in Opposition to Defendants’ Motion for Summary Judgment, A289 – A290.

³⁶ Id. at A290.

that he would do so.³⁷ The results were provided to West and others on October 29, 2019. This testing found that there was more than six times as many fungi in Wayne’s office as elsewhere on the upper level of the Newark office.³⁸

Cynthia West provided further context about this October 2019 incident, testifying this is **“when it really came to light”** and “when he went in and couldn’t breathe and came out he came home and he said I think I figured out why I keep getting sick; I believe it’s the office.”³⁹ Wayne West echoed his wife’s testimony, stating, “my symptoms were progressively getting worse and **I never knew there was mold in the office** until I walked in, opened the door and couldn’t breathe.”⁴⁰

Plaintiff’s coworker, Carla Vicario, noticed changes in West’s health, specifically that he had a persistent cough, but she testified that it only became noticeable in the fall of 2019.⁴¹ She testified that West told her that “his doctors were trying to figure out what was wrong” but did not know the cause.⁴² Another colleague, Nancy Husfelt-Price, also testified Wayne had a persistent cough and

³⁷ Id. at A289.

³⁸ ESML fungal report, Ex. K to Plaintiffs’ Answering Brief in Opposition to Defendants’ Motion for Summary Judgment, at A296 – A297.

³⁹ Cynthia West Dep. June 6, 2023, Ex. L to Plaintiffs’ Answering Brief in Opposition to Defendants’ Motion for Summary Judgment, at A316:4-10.

⁴⁰ Wayne West Dep., A218:20 – A219:2.

⁴¹ Carla Vicario Dep. November 8, 2023, Ex. H to Plaintiffs’ Answering Brief in Opposition to Defendants’ Motion for Summary Judgment, at A281:10 – A282:14, A285:3-16.

⁴² Id. at A282:15 – A283:3, A284:1-4.

she recalled he told her his doctors could not figure out what was wrong with him.⁴³

At that time, Plaintiff would not learn about the true root cause of his persistent inflammatory response syndrome, until after he was evaluated by Dr. Susan Black on July 19, 2021.⁴⁴ By this date he knew clearly that had been exposed to mold and was on notice to investigate if his injuries were caused by the mold. Dr. Black was the first doctor to instruct Plaintiff-Appellant not only to avoid mold, but any “Water Damaged Building” due to additional compounds besides the fungi itself that could trigger his illness.⁴⁵ Her report dated August 9, 2021, stated Appellant-Plaintiff West was suffering from persistent inflammatory response syndrome as a result of his workplace exposure.

In summary, it was not until he was diagnosed by Dr. Black that it was determined that Wayne West had a mold-related illness. Then, for the first time, he was presented with concrete medical information that he was ill because of mold in his workplace, and as a result he promptly filed suit. At the earliest it was not until October of 2019 that it became clear that his health symptoms were possibly caused by mold.

⁴³ Husfelt-Price Dep. May 23, 2023, Ex. M to Plaintiffs’ Answering Brief in Opposition to Defendants’ Motion for Summary Judgment, at A319:1-13, A320:1-10 .

⁴⁴ See Dr. Susan Black Report, dated Aug. 9, 2021, A190.

⁴⁵ Id.

ARGUMENT

I. The Trial Court Erred When Held Plaintiff-Appellant's Suit Was Time-Barred Before He Was Diagnosed with a Mold Related Disease.

A. Questions Presented. Did the Trial Court below err in granting the Defendants' motions for summary judgment when it found that the Plaintiff's suit was time barred? This issue was preserved below by Plaintiffs in its Memorandum In Opposition to Defendant's Motion For Summary Judgment, and in Oral Argument during Summary Judgment Motion.

B. Scope of Review. The Trial Court below made an error of law in granting Defendant's motion to grant summary judgment. Therefore, the standard of review on appeal is *de novo*. *Stifel Financial Corp. v. Cochran*, 809 A.2d 555, 557 (Del. 2002); *Malone v. Brincatt*, 722 A.2d 5, 9 (Del. 1998).

C. Merits of the Argument.

In its ruling, the Trial Court ruled that Wayne West was on inquiry notice as "early as April 7, 2016" and that therefore West should have filed suit against the Defendants by 2018. The Court made this determination although 1) there had been no diagnosis by any doctor that Wayne West had suffered a mold-related illness until August 2021, and 2) there was no mold discovered in Appellant-Plaintiff's workplace until October 29, 2019.

As the Superior Court addressed, there are circumstances in which the running of the statute of limitations can toll, namely “1) fraudulent concealment, 2) inherently unknowable injury (the “discovery rule”) and equitable tolling.⁴⁶ The Discovery Rule tolls the statute of limitations “when the injury is inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and injury complained of.” If the Discovery rule applies, the statute of limitations tolls until the Plaintiff discovers the facts “constituting the basis of the cause of action [considered ‘actual notice’] or the existence of facts sufficient to put a person of ordinary intelligence and prudence on inquiry, which, if pursued, would lead to the discovery’ of such ‘facts [, also called inquiry notice’].”⁴⁷

Here, the Trial Court held the Wayne West was on notice that that he had a claim as early as 2016.⁴⁸ In actuality, Plaintiff was not on notice until a doctor diagnosed him with mold related disease in August of 2021 or the very earliest after mold was discovered at his workplace in October of 2019.

1. Mold allergy v. Persistent Inflammatory Response Syndrome

⁴⁶ *Krahmer v. Christie’s Inc.* 911 A.2d 399, 407 9 (Del.Ch. 2006).

⁴⁷ *Lehman Brothers Hldgs., Inc. v. Kee*, 268 A.3d, 178, 186 (Del. 2021) (quoting *Wal-Mart Stores, Inc.*, 860 A.2d at 319) (emphasis in original). *See also See Burrell v. AstraZeneca LP*, 2010 WL 3706584, at * 6 (Del. Super. Sept. 20, 2010).

⁴⁸ *West v. Patterson Schwartz & Associates and Washington Street Realty Co*, Del Super. C.A. No. N21 C-08-265, Adams, J. (May 10, 2024), Ex. A, at 19.

In the Court's opinion, it confused/combined West's mold allergy diagnosis of July 2019 with the 2021 diagnosis of persistent inflammatory response syndrome. While West tested positive for a mold allergy in July of 2021, the record reflects that West suffered no ill effects from this allergy at work from the time of that diagnosis until October 2021. It was not determined that his allergy to mold was caused by his workplace exposure, only that he had one. If Plaintiffs' claim was merely as a result of an injury Wayne West suffered as a result of mold allergy, Plaintiffs' cause of action would not begin to run until October of 2019, when the record demonstrates Wayne West had trouble breathing at work. As a comparison, had West been diagnosed with a peanut allergy in July 2019 and had an allergic reaction to food that was negligently served to him at work in October of 2019, his cause of action would not begin to run until he suffered the ill effects of the allergy. Here, the record reflects that West did not suffer any ill effects at work from his mold allergy until October 2019. Furthermore, Plaintiff was not diagnosed with persistent inflammatory response syndrome until 2021. If the date of injury is either October 2019 or August 2021, Plaintiffs' complaint was timely filed.

2. Comparison Between Asbestos and Mold

The Superior Court granted summary judgment in this matter stating in part that the "Plaintiffs' use of asbestos cases is unsuitable for mold-related cases

because of different latency periods for each sickness” and “mold, in comparison, has not been recognized by courts as having any latency period at all.”⁴⁹

While it is true that mold-related diseases are not necessarily latent diseases, there are many similarities between asbestos diseases and mold diseases and the exposure associated with each substance. For example, not everyone who works with or around asbestos develops an asbestos-related disease, and not everyone who works around mold develops a mold-related disease. In Delaware, under the Supreme Court’s decision in *Mergenthaler v. Asbestos Corp. of America*, a person cannot file a personal injury claim for mere asbestos exposure.⁵⁰ In addition, mold, even more so than asbestos, often can be located anywhere.⁵¹ Many of the health symptoms associated with an asbestos-related disease like asbestosis (e.g. shortness of breath) can be associated with other health problems.⁵² Similarly, many of the health problems associated with mold exposure can contribute to other health problems.⁵³

⁴⁹ *Id.* at 14.

⁵⁰ *Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647 (Del. 1984).

⁵¹ See generally, “A Brief Guide to Mold, Moisture and Your Home.”

<https://www.epa.gov/mold/brief-guide-mold-moisture-and-your-home> (Ex. B)

⁵² See “Shortness of Breath” <https://www.mayoclinic.org/symptoms/shortness-of-breath/basics/causes/sym-20050890> (Ex. C)

⁵³ Among the common symptoms from mold exposure are sneezing, shortness of breath. See, “Mold and Your Health” National Institute of Environmental Health Sciences”

The statute of limitations surrounding asbestos-related diseases as addressed by this Court in *Dabaldo v. URS* and in this matter, are, contrary to the Superior Court's ruling, similar and pertinent. In *Dabaldo* this Court held specifically regarding the statute of limitations that the Court looks at the "(1) the Plaintiff's level of knowledge and education; 2) the extent of his recourse to medical evaluation; (3) the consistency of the medical diagnosis; and (4) plaintiff's follow up efforts during the period of latency following initial recourse to medical evaluation."⁵⁴

In *Dabaldo*, the plaintiff (unlike Appellant-West with mold) knew for a fact that he worked with asbestos, had other colleagues that had asbestos-related diseases, and was already diagnosed with another asbestos-related disease (asbestos-related pleural disease).⁵⁵ Both *Dabaldo* and West continually sought answers to their medical issues. West, because it was not clear what was making him sick, was diligent in determining if there was something making him sick in his home and also sought continual guidance from his doctors.⁵⁶ While West had concerns about his office, those concerns, which he addressed repeatedly to his

https://www.niehs.nih.gov/sites/default/files/health/materials/mold_508.pdf (Ex. D)

⁵⁴ *Dabaldo v. URS Energy & Constr.* 85, A3d 73 (Del. 2014).

⁵⁵ *Id.*

⁵⁶ *See* Wayne West Dep., A220:11-15, A221:6-21, A222:1 – A223:5; Plaintiff's Day Timer Notes at A274.

management, were ignored.⁵⁷ Like the plaintiff in *Dabaldo*, who filed suit after he was diagnosed asbestosis, West filed his suit after he diagnosed by Dr. Susan Black.

The Superior Court failed to address *Collins v. Pittsburg Corning*, another asbestos case involving statute of limitations, which is also pertinent to this case. There, the plaintiff (unlike West, who had no confirmation of mold in his office until October 2019) knew he had worked with asbestos.⁵⁸ He also believed he had an asbestos-related disease and consulted with numerous doctors about it. However, he was not diagnosed with an asbestos related disease until many years later (1992) and then filed suit.⁵⁹ Defendants filed a motion for summary judgment arguing that “Collins’ persistent belief that he had an asbestos-related ailment in 1980 required him to assert his claim within the ensuing two-year period.” The Superior Court agreed with the defendants, but this Court disagreed stating that Collins (regardless of whether or not he thought he had an asbestos-related disease) was not responsible for filing suit absent “medical diagnostic support.”⁶⁰

Here, although West had concerns that the building was making him sick (concerns which were discounted by management), for many years none of his

⁵⁷ See Wayne West Dep., A224:6 – A226:1.
120, 133.

⁵⁸ *Collins v. Pittsburgh Corning Corp. (In re Asbestos Litig)*, 673 A.2d 159, 161.

⁵⁹ *Id.* at 162.

⁶⁰ *Id.*

doctors were able to make the link between his health symptoms and mold. It was only after Dr. Black's diagnosis that a medical link was made. Using *Collins* as a guide, West could not file a claim for a mold related illness in 2016, 2017 or 2018 because no medical diagnosis had then been made.

In summary, while there are differences between mold-related diseases and asbestos-related diseases, the case law developed by this Court regarding the statute of limitations and asbestos is highly relevant to this matter; namely mere exposure (known or unknown) does not trigger the statute of limitations, and a claim cannot be filed without a diagnosis that a medical link has been made.

3. West's Claims Are Distinguishable from Other Mold Related Cases Cited by the Defendant.

Defendants and the Superior Court mention one other Delaware case, *Duncan v. O.A. Newton & Sons Co*, for the argument that West's claim is time barred.⁶¹ In *Duncan*, the plaintiff who had suffered hospitalizations, knew that there was mold in her home: specifically in 2001 a state health inspector did an inspection at her home and as the plaintiff testified told her "that the toxic mold can make me black out or pass out or syncope, which is here as well."⁶² The inspector told her she should move out of the home.⁶³ In October of 2001 one of

⁶¹ *Duncan v. O.A. Newton & Sons Co*, 2006 Del. Super. Lexis 315 (Del. Super. July 27, 2006)* 3.

⁶² *Id.*

her doctors noted she was exposed to mold in her home.⁶⁴ The Plaintiff filed suit in 2004.⁶⁵ The Court held that the plaintiff was on inquiry notice in 2001 because she was aware of the very likelihood of mold in her home, her doctor's concerns about it, and the fact she had physical samples of mold from her home.⁶⁶

Here, in contrast to the plaintiff in *Duncan*, West took repeated steps to determine the cause of his health problems. He made repeated inquiries to management that were ignored and was provided with no actual information about mold in the building until October of 2019. It was only years after being ignored by the Appellees-Defendants that testing was finally conducted which demonstrated that there was mold in the office, and this was after West suffered an incident during which he could not breathe.⁶⁷

The Superior Court's decision cites several out-of-state cases in footnote 81 of its opinion. These cases are either distinguishable or helpful to the Plaintiffs-Appellants' case. In *Wycoff v. Mogollon Health All*, 307 P.3d 1015 (Ariz. Ct. App. 2013), the plaintiff knew about the presence of mold in the unit but did file suit until two years after the fact.⁶⁸ Here, West did not receive confirmation that there was in fact mold in his office space until October 29, 2019, and he subsequently

⁶³ Id.

⁶⁴ Id.

⁶⁵ *7.

⁶⁶ Id.

⁶⁷ ESML fungal report, A292 – A313; Wayne West Dep. at A227:10-21.

⁶⁸ *Wycoff v. Mogollon Health All*, 307 P.3d 1015, 1018 (Ariz. Ct. App. 2013).

filed suit. In *Pirtle v. Kahn*, the Court of Appeals in Texas the held the plaintiff was on notice when she got sick and determined there was mold in her apartment.⁶⁹ Again, it was not determined there was mold in Newark office until October 29, 2019.

Similarly, in *Marcinkowski* the plaintiff discovered mold in his home in October of 1998 and then began to experience health problems but did not seek medical treatment for three and half years later.⁷⁰ Here, in contrast, again West did not have knowledge of mold in the office October of 2019, and in contrast to the plaintiff in *Marcinkowski* he took active steps to determine what was causing his health problems.⁷¹

In *Gerke* the Court of Appeals of New Mexico rejected that the plaintiff's claim that the statute of limitations began to run from the medical diagnosis, but instead "when the claimant in toxic mold case experiences symptoms that would cause an ordinary person to make an inquiry about the discovery of the causes of his symptoms."⁷² Specifically in that matter, the tenant began to experience health problems shortly after moving into the unit.⁷³ The plaintiff subsequently had the unit inspected by the EPA in October of 2004, which concluded that there was

⁶⁹ *Pirtle v. Kahn*, 177 S.W. 3d 567, 569-570 (Tex. App. 2005).

⁷⁰ *Marcinkowski v. Castle*, 870 N.Y.S. 2d, 206, 207 (N.Y. App. Div. 2008)

⁷¹ *Id.*

⁷² *Gerke v. Romero*, 237 P.3d 111, 116 (N.M. App. 2010)

⁷³ *Id.* at 1.

mold growing in the building.⁷⁴ The inspector told the plaintiff that “sometimes mold can be very dangerous to humans.”⁷⁵ The plaintiff then had the samples analyzed which confirmed that the samples had mold that same month. The plaintiff filed a complaint in November of 2007 arguing that he was not sure that his ailments were caused by the mold until that year.⁷⁶ The New Mexico court concluded the plaintiff was on notice in 2004 after he developed health symptoms and received confirmation that mold was in the apartment.⁷⁷ While here it is Plaintiffs-Appellants’ contention that he was not on notice of his claim until after his diagnosis by Dr. Black, under the rationale of the *Gerke* Court, his claim would not begin to run until October 29, 2019, when results demonstrated that mold was present in the office building.

4. Non-Asbestos and Non-Mold Cases That Demonstrate Plaintiffs-Appellants’ Claim was Timely.

i. Brown v. E.I. Dupont de Nemours and Co. Inc.

Contrary to the Superior Court’s assertion, *Brown v. E.I. Dupont de Nemours and Co. Inc.*, supports Plaintiffs-Appellants’ claim that West sustained a legal injury. In that case, the minor plaintiffs were born with eye conditions that were later determined by a medical expert to be linked to a chemical produced by

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id.

the Defendant.⁷⁸ The plaintiffs in question were born with these conditions in 1984, 1985, 1990, 1992, 1993, but the lawsuits were not filed until 1997: a range of four to thirteen years after the plaintiffs had suffered their injuries.⁷⁹ The Superior Court referenced *Brown* stating, “the statute of limitations did not begin to run until the Plaintiffs had knowledge that they had sustained a legal injury—until the scientific evidence linked the birth defects to the toxic exposure.”⁸⁰ Here, West did not know he had sustained legal injury until he was diagnosed by a Dr. Susan Black in 2021, and at the very earliest he was on inquiry notice in October of 2019 when it was determined mold was in his office.

While West had concerns about his office, those concerns were shot down and rejected by his management.⁸¹ Contrary to the Superior Court’s assertion, the harmful effects of mold are not universally well known: if they were—why did no doctor make the link between West’s health problems and his mold exposure? It is because many of the health problems West experienced are commonly associated with other causes.⁸²

⁷⁸ *Brown v. E.I. Dupont de Nemours & Co*, 820 A.2d 362 (Del. 2003)

⁷⁹ *Id.* at 365.

⁸⁰ *West v. Patterson Schwartz & Associates and Washington Street Realty Co.*, Del Super. C.A. No. N21 C-08-265, Adams, J. (May 10, 2024), Ex. A, at 17.

⁸¹ Wayne West Dep. at A224:6-14.

⁸² *See generally*, “A Brief Guide to Mold, Moisture and Your Home.” <https://www.epa.gov/mold/brief-guide-mold-moisture-and-your-home> (Ex. B)

The Superior Court’s reliance on *Burrell* is equally misplaced. The Superior Court argued that “similar to *Burrell*, Mr. West was on potential notice in 2016 when he saw an ad warning of molds risk and tested his home. Unlike *Burrell*, Mr. West saw the television ad and it prompted Mr. West to act, but Mr. West failed to continue his inquiry.”⁸³ This is not accurate. In *Burrell* the plaintiffs failed to act on public information regarding the links between *Seroquel* and diabetes. The plaintiffs knew that they had taken the drug in question.⁸⁴ While West had concerns that something in the building was making him sick, he had no proof that there was mold in the building until October 29, 2019.⁸⁵

Wayne West took active steps to investigate what was causing his health problems. He continued to make inquiries with his supervisors. His inquiries were not just rebuffed, but he was essentially told he was crazy.⁸⁶ He investigated his home and got negative results. He continued to seek medical help, but no doctor made the link between his health symptoms and mold.

In October 2019, only after West had severe trouble breathing at work, did it, in the words of his wife, “really [come] to light” what was causing West’s health problems.⁸⁷ Wayne West further testified that “my symptoms were progressively

⁸³ Ex. A at 19.

⁸⁴ *Burrell v. AstraZeneca LP*, 2010 WL 3706584 (Del. Super. Sept. 20, 2010) at *3.

⁸⁵ ESML fungal report, A292 – A313.

⁸⁶ Wayne West Dep. at A224:7-12; Plaintiff’s Day Timer Notes, A274.

getting worse, and I never knew that there was mold in the office until I walked, in open the door and couldn't breathe.”⁸⁸

Again, although West tested positive for a mold allergy in July of that year, he did not suffer ill effects from that allergy until that October.⁸⁹ An allergy itself does not mean he had a cause of action from that allergy alone. The Delaware Supreme Court's decision in *Baker v. Croda, Inc.* demonstrates this.⁹⁰ In that case residents who lived near the Atlas Point chemical plant in New Castle filed a claim saying they were entitled to medical monitoring although they had not suffered ill effects from living near the Plant.⁹¹ This Court said the Plaintiffs did not have a cause of action, ruling:

We answer the certified question as follows, an increased risk of illness without physical harm is not a cognizable injury under Delaware law. Stated differently, an increased risk of harm only constitutes injury once it manifests in a physical disease. It is axiomatic that all tort claims require an injury. Under Delaware law, an “injury in fact” is defined as “an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. An increased risk of illness, without more, is not ‘actual or imminent,’ and thus does not constitute an injury.”⁹²

Here, at again, Plaintiffs-Appellants' cause of action did not begin to run until

⁸⁷ Cynthia West Dep. June 6, 2023 at A316:4-10.

⁸⁸ Wayne West Dep. At A218:17 – A219:2.

⁸⁹ Plaintiff's Day Timer Notes, A275.

⁹⁰ *Baker v. Croda Inc*, 304 A.3d 191 (Del. 2023).

⁹¹ *Id.* at 193.

⁹² *Id.* at 194.

Wayne West was diagnosed by Dr. Susan Black in August of 2021⁹³ or at the earliest that he was on inquiry notice on October 29, 2019.⁹⁴ Furthermore, the determination in July 2019 that he had a mold allergy was not linked to his worksite nor did he suffer any physical affects at work from this allergy until October 2019.⁹⁵

The Defendants and the Superior Court's decision argue that Appellants-Plaintiffs should have filed a cause of action by 2018 against the Defendants even though no doctor had then made a link between Wayne's health symptoms and mold exposure and the Appellants-Plaintiffs had no proof that there was mold in the building. Such a claim would be meritless. Plaintiff-Appellant Wayne West took continual steps to investigate what was making him sick – making requests to his employer; inspecting his home, and regularly seeking medical help, and when it was finally determined mold was making him sick and how, he filed suit.

5. The Superior Court Incorrectly Shifted the Burden the Burden to the Plaintiff.

The defense of statute of limitations is an affirmative dense and the Defendants bears the burden to demonstrate that the statute of limitations has lapsed.⁹⁶ The Superior Court's decision incorrectly shifts the burden throughout its

⁹³ Report of Dr. Susan Black, Aug. 9. 2021, A190.

⁹⁴ ESML fungal report at A296 – A297.

⁹⁵ Wayne West Dep. at A227:13-23, A228:24 – A229:5.

opinion to the Appellants-Plaintiffs. Summary Judgment is to be awarded when the record shows no genuine issue of material fact.⁹⁷ Here, at the very least there are questions about when and how Wayne West came to a determination that he had suffered a legal injury. A determination that is the province of the jury.

⁹⁶ *Rumbo v. Am Med Sys*, 2021 Del. Super. Lexis 357 *3. (Del. Supr.)

⁹⁷ *Const'l Cas. Co. v. Ocean Accident & Guarantee Corp*, 209 A.2d 743 (Del. Supr. 1965).

CONCLUSION

Wherefore, the Plaintiffs/Appellants ask this Court to reverse the Trial Court's ruling.

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