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IN THE SUPREME COURT OF THE STATE OF DELAWARE

WAYNE WEST and CYNTHIA WEST, Plaintiffs Below/ Appellants, v. PATTERSON-SCHWARTZ & ASSOCIATES, INC. and WASHINGTON STREET REALTY CO., Defendants Below/ Appellees.	:	No. 212,2024 Court Below: Superior Court of the State of Delaware N21C-08-265 MAA

ANSWERING BRIEF OF APPELLEES PATTERSON-SCHWARTZ & ASSOCIATES, INC. AND WASHINGTON STREET REALTY CO.

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NATURE OF THE PROCEEDINGS

This is an appeal from the well-reasoned opinion of the Superior Court granting summary judgment to the Defendants Below/Appellees, Patterson-Schwartz & Associates, Inc. ("PSA") and Washington Street Realty Co. ("WSR") (or collectively "Defendants").

The Plaintiffs Below/Appellants Wayne West ("Plaintiff Wayne West") and Cynthia West ("Plaintiff Cynthia West") filed this action on August 30, 2021. After the close of fact discovery, full briefing on Defendants' Motion for Summary Judgment, and oral argument, the Superior Court granted summary judgment by Memorandum Opinion dated March 4, 2024. In her opinion, the Superior Court held that Plaintiffs' Complaint was time barred.

Plaintiffs submitted their Opening Brief ("O.B.") with Exhibits A-D, and Appendix ("A__") on August 13, 2024 and this is Defendants' Answering Brief and Appendix (B001-026).[1]

[1] Defendants Appendix includes their Reply Brief below.

SUMMARY OF ARGUMENT

1. Denied. The Superior Court correctly determined that Plaintiff's claim for personal injury relating to alleged mold exposure was time-barred. The Superior Court correctly held, based on undisputed facts, that Plaintiff Wayne West was on inquiry notice of a potential, not guaranteed, claim in 2016, more than two years prior to filing the underlying action in August 30, 2021.

Based on his own admissions, Plaintiff Wayne West's symptoms—sinus, coughing and shortness of breath—manifested themselves soon after his time in the office for several years prior to October 2019. As early as 2014, he suspected that the office building he worked in was making him sick and suspected mold in the office was the cause after seeing a television commercial in 2016, and then testing his home specifically for mold. He was diagnosed with a mold allergy in July of 2019, more than two years prior to filing the Complaint. These undisputed facts "undeniably" put Plaintiff Wayne West on inquiry notice of a potential claim, but he did not take timely action.

Because Plaintiff Wayne West's symptoms manifested themselves almost immediately after being in the office, and was therefore not latent or dormant, the Superior Court correctly did not follow the "unusual" asbestos and similar cases wherein a plaintiff's cause of action did not accrue until he had actual notice through a specific medical diagnosis. Accordingly, the Court applied the traditional inquiry

notice elements and rejected Plaintiffs' argument that the cause of action did not accrue until August 9, 2021 when Dr. Susan Black diagnosed Plaintiff Wayne West with persistent inflammatory response syndrome.

Finally, the Superior Court did not improperly shift the burden to Plaintiffs to produce evidence of a triable material fact or to support the application of the discovery rule tolling exception.

STATEMENT OF FACTS

A. Plaintiff Wayne West's History with the Building

Plaintiff Wayne West was affiliated with Defendant Patterson-Schwartz as an independent contractor beginning in 1986. (A 98/8: 14-24). West worked in the Patterson-Schwartz office at 680 South College Avenue in a building then owned by Defendant Washington Street Realty (the "Newark Office"). (A99/9: 7-16). He moved into the bullpen area on the second-floor addition, and in 2002 moved to a private office on that upper level. (A99/10: 6-14). Plaintiff West last regularly worked in the Newark Office in November-December, 2019. (A 100/84:7-10). The ductwork in the Newark Office was replaced in January 2020, and thereafter no further remediation was necessary. (A54/16: 13-21, 17:15-21; A75/16-24, A76/8-18).

B. Plaintiff Wayne West's History of Health Problems

Plaintiffs acknowledge that Plaintiff Wayne West had a long history of various medical issues including cough and shortness of breath during "his career as a real estate agent" [i.e. since 1986]. Plaintiffs' O.B. at 4. West has had sinus infections beginning at the latest in 2006. (A110/55: 10-24, 56: 11-15, 116/1-19). West believed that his symptoms relating to coughing, shortness of breath and sinus infections, i.e., his sickness, were experienced immediately or soon after his

presence in the Newark Office. (A129/131: 7-24, 132: 1-4). Even after January 2020, when he visited the office, including post remediation, he experienced symptoms within "two or three minutes" of being in the Newark Office, and "ended up with sinus infections". (A100/15: 1-20, 16: 14-18). There is no dispute that for "several years" prior to October 2019, he had "coughing and hacking and had trouble breathing" and believed those symptoms were caused by the building. (A126/117: 17-24, 128: 1-16).

C. Plaintiff Wayne West's Suspicions/Knowledge

Plaintiff Wayne West prepared a chronology based on notes he made in his monthly Day-Timers that reflect in his own words events beginning on April 14, 2014 (A158-161, A128/127: 11-15, A129/129: 5-15) (the "Daily Notes"). The entries were confirmed and explored further at his deposition.

Key entries include:

12/18/2014	Newark Holiday Party – coughing – mention to Cashman that something in my office was causing this and he said I was imagining it. Nobody else is sick. There is nothing in my office. (A158)
02/04/16	ENT doctor visit to see why I keep getting sinus infections. (A158)
04/07/2016	Anthony Meloro of AAA Dry Foam came to my home to see if I had any mold issues because I was constantly sick and concerned of mold issues. He

	walked through the entire property and found no evidence of mold as per our conversation. (A158)
12/15/2016	PSA Newark office Christmas party where I was coughing constantly – I mentioned to Cashman that there must be something in my office that is making me sick. He responded that there's nothing in my office and I am imagining things and nobody else is having issues. (A158)
04/10/2018	Anthony (AAA Dry Foam) came out [to his house] and said there was a slight amount of mold on the underside of the roof sheathing at the end of the attic… asked if any mold got into living area and he said No for there was no evidence of any mold on the insulation or anywhere else. (A158)
11/16/2018	PSA Newark office holiday party – I was coughing profusely as I was coming downstairs from my office. Cashman asked me if I was sick again. I said I was always sick. I replied that there is something in my office that is making me sick and again he said that there is nothing in the office making me sick, I am imagining things, nobody else was sick, explain that. (A158)
12/21/2018	I held our annual prospect/holiday party at my home which I was still coughing and feeling bad. (A159)
7/19/2019	Dr. Kim had me tested for allergies. (A159)

At deposition, Plaintiff Wayne West was asked about these and other entries in his Daily Notes. As reflected in the Notes, on April 7, 2016, at the request of West, Anthony Meloro of AAA Dry Foam ("Meloro/AAA") inspected West's home

for mold. West, given his experience in the industry, had known Meloro "for over a decade because he is one of the few mold people for realtors." (A127/123: 1-19). Because his sinus infections and breathing issues were becoming "more frequent," West asked him to "stop by and let me know whatever I owe you and evaluate my house to see if you find anything that's making me sick. The first thought is mold because that's what's on the advertisements on T.V." (A127/122: 17-24, 123: 8-13). The television commercial was about whether "your house [is] making you sick". (A127/122: 20-24). His thought process at the time was to "rule out things that could have been making me sick." (A127/123: 14-19). After eliminating mold in his house as a culprit, he would then "further pursue things." (A127/123: 20-24, 124: 1-2).

When asked about Meloro's inspection in April of 2016 wherein the home was ruled out as a cause of his symptoms and whether he was then beginning to think that there was mold in his office, Plaintiff Wayne West replied:

> A. I honestly did not actually put anything together, but when your manager – when you come to your manager and say listen, every time I'm in here something is making me sick, there's got to be something in this office and he says your imagining things, nobody else is sick, I took it verbatim that nobody else was sick and there's no issues.
> (A130/134: 12-24, 135:1)
>
> But, when questioned further …
>
> Q. But you still believed that the building was making you sick, right?

A. Well, my body responded to a lot more coughing.

Q. So the answer is yes?

A. Yeah.

Q. Okay.

A. Yes, I'm sorry. (A130/135: 1-9).

Meloro/AAA came back out to the West house in April of 2018 after Mrs. West noticed spots in the attic. (A128/125: 14-24, 126: 1-16). According to West, there was no mold in the living area and only the attic was remediated. (*Id.* and A126/120: 3-10, A127/121: 6-20).

On July 19, 2019, Dr. Kim informed Plaintiff Wayne West that he had an allergy to certain molds (A119/91: 3-7, 92: 15-16, A123/9-14).

While not reflected in the Daily Notes, West wrote an email on October 16, 2019 to Chris Cashman ("Cashman"), the office manager of the Newark office.

> "Chris. It is pouring rain! You can hear the water hitting the back of the ceiling tiles. This has been happening for many many months as I have mentioned. Please have someone correct this. My concerns are mold. Feel free to forward this to the owners of the building." (A163).

Then on October 22, 2019, at 12:59 p.m., West emailed Cashman that he had "mentioned this [ceiling tile stains] to you for several months or more. I think you should have a mold test done ASAP. I noticed that I had to exit the office during the rain due to the way I was feeling." (A164). The next day at 9:01 a.m. Cashman replies: "The roofer will be out as quickly as possible. I'll order a mold test to be

done." (A165). Cushman testified "as soon as Wayne requested a mold test, I hired AAA Dry Foam to perform some mold testing in the vicinity of his office". (A74/21: 14-23). This was the first time he had any reports of mold in the Building. (A74/19: 17-20, 20: 1-5). Cashman then arranged for Meloro/AAA to inspect and sample the indoor air and WSR paid Meloro/AAA to perform indoor air testing. (A74/21: 18-23, 22: 1-9). There were four rounds of testing and the ductwork on the upper level was found to contain mold. (A74/23: 9-24, 24: 1-16). The ductwork was replaced in January of 2020, a subsequent test revealed no abnormalities, and there were no elevated mold readings (A75/24: 14-16; 27: 12-18).

Plaintiffs contend that they did not "put it all together" until October 16, 2019 when Plaintiff Wayne West could not breathe at the office but the testimony they rely on was selectively cropped.

While Plaintiff Wayne West testified that his "symptoms were getting progressively worse and never knew that there was mold in the office until I walked in, opened the door and couldn't breathe..." on October 16, 2019. (A126/117: 17-24, 118: 1-2), the following questions and answers followed:

> Q. But you had symptoms long before that. Is that right?
>
> A. I had coughing and hacking and had trouble breathing for several years, yes.
>
> Q. And now you believe that those symptoms as they progressively got worse relate to the building?

A. It's possible, yeah, very, very possible.

Q. Isn't that your case?

A. Yes.

(A126/118: 3-16, see also, A130/134: 1-7, 135/2-9) (believed that the building was making him sick).

Similarly, Plaintiffs selectively cite a portion of Plaintiff Cynthia West's deposition testimony wherein she testified it "really came to light in October of I guess that was 2019 when he went in and couldn't breathe and came out and he came home and he said I think I figured out why I keep getting sick; I believe it's the office." (A316/9: 4-10). But she then provided the following answers:

Q. But prior to that time in October of 2019, did he express – we looked at his Day Timer—that there was some issue with the building causing sickness.

A. Yes. He kept coming home complaining about the leak in the ceiling.

Q. Going back to 2014? Is that consistent with your memory?

A. Yes. (A316/9: 11-21)

The testimony of co-workers Carla Vicario and Nancy Husfelt Price about what Plaintiff West told them about what his doctors told him is clearly hearsay and only confirms that Plaintiff West had consistent and persistent coughing and shortness of breath for years. In addition, Ms. Price testified that Plaintiff West

at some point told her he suspected there was mold on the upper level. (A320/18: 11-15).

D. The Proceedings Below

1. Complaint Filed.

Plaintiffs brought this action on August 30, 2021. (A12-19). In paragraph 6 of the Complaint, Plaintiffs assert that "[b]eginning in 2004" rain leaked through the roof "leaving water stains on the ceiling" after which and he "started to notice an increase in sinus infections" (A13). Plaintiff Wayne West also asserted that he told Cashman that "he believed the leaks were resulting in mold growing, a mold smell, and were affecting his health." *Id.* Plaintiffs assert that Defendants' negligent maintenance of the Newark Office caused them harm.

2. The Superior Court Grants Summary Judgment.

After the close of discovery, full briefing, and oral argument on March 4, 2024, the Superior Court granted summary judgment to the Defendants by Memorandum Opinion dated May 10, 2024. ("Opinion")[2] More specifically, the Superior Court held that Plaintiffs claims were time-barred based on the undisputed facts that Plaintiff Wayne West was on inquiry notice as early as 2016 and his claims therefore accrued more than two-years before the Complaint was filed.

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[2] *West v. Patterson-Schwartz, et al.*, 2024 Del. Super. LEXIS 385, 2024 WL 2106540 (May 10, 2024).

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY DETERMINED THAT PLAINTIFF'S CLAIMS WERE BARRED BY THE STATUTE OF LIMITATIONS

A. Question Presented.

Did the Superior Court correctly hold that Plaintiff's claims were time barred? This issue was raised and preserved in Defendants' Opening Brief in Support of Their Motion for Summary Judgment (A20-166).

B. Scope of Review.

This Court reviews a grant of summary judgment de novo. *Arnold v. Society for Sav. Bancorp*, 650 A2d 1270, 1276 (Del. 1994). The trial court's factual conclusions are accepted if they are "sufficiently supported by the record and are the product of an orderly and logical deductive process." *Id.* quoting *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

C. Merits of Argument.

1. Statute of Limitations in Delaware.

There is no dispute that the two-year statute of limitations applies to Plaintiffs' personal injury claims. 10 *Del. C.* §8119. That section provides that "no action for recovery of damages upon a claim for alleged personal injuries shall be brought after the expiration of 2 years from the date upon which it is claimed that

such alleged injuries were sustained." The purpose of a statute of limitations is in part to "exact diligence" in the pursuit of claims. *Brooks v. Savitch*, 576 A.2d 1329, 1334-5 (Del. Super. 1989).

In Delaware, a cause of action accrues at the time of the wrongful act, even if the plaintiff is ignorant of the cause of action. *Wal-Mart Stores, Inc. v. AIG Life Ins., Co.,* 860 A 2d 312, 319 (Del. 2004). A cause of action for negligence accrues at the "time of the injury." *Nardo v. Guido DeAscansis & Sons, Inc.*, 254 A 2d 254, 256 (Del. Super. 1969); *INS Software Corp. v. Richards, Layton & Finger*, 226 A. 3d 727, 732-33 (Del 2020) (Delaware is an "occurrence rule jurisdiction," and cause of action accrues for tort claims at the moment "an injury, although slight, is sustained in consequence of the wrongful act of another"). *See also* Opinion at p. 7, *Burrell v. Astra Zeneca, LP*, 2010 Del. Super. LEXIS 393 *18-19, 2010 WL 3706584 (Del. Super. Sep. 20, 2010) ("legion of Delaware authority stands for the proposition that an injury is sustained under §8119 when the harmful effect first manifests itself and becomes physically ascertainable" (internal quotes and citations omitted).

Plaintiff Wayne West's health symptoms occurred immediately or shortly after being in the Newark Office, and he connected his sickness with the building as early as December 18, 2014, at an office party. His claims accrued at the latest at that time and would be time-barred unless he can prove a tolling exception.

2. Tolling Exceptions.

"Under Delaware law, there are circumstances in which the running of the statute of limitations can be tolled. These exceptions include: 1) fraudulent concealment; 2) inherently unknowable injury (the "Discovery Rule") and 3) equitable tolling." Opinion at 8 (citations omitted). The Plaintiffs rely exclusively on the Discovery Rule to excuse their untimely filing. That rule will toll the running of the statute "when the injury is inherently unknowable and the claimant is blamelessly ignorant of the wrongful act and injury complained of." *Id.* If a tolling exception applies, the statute will only begin to run when 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 inquiring notice]." Opinion at 8.

The application of any tolling exception turns on the question of when Plaintiffs were on inquiry notice. *Id.*, *see also Pomeranz et al. v. Museum Partners, L.P., et al*, 2005 Del. Ch. LEXIS 10, 2005 WL 217039 (Del. Ch. Jan 24, 2005). Plaintiffs are on "inquiry notice when they have sufficient knowledge to raise their suspicions to the point where persons of ordinary intelligence and prudence would commence an investigation that, if pursued, would lead to the discovery of the injury." *Id.* at *11. Once a Plaintiff is on notice of enough facts that "ought to have

raised Plaintiffs' suspicions", she is obliged "to diligently investigate and to file within the limitations period as measured from that time." *Id.* at *48, 49, 51. In short, "Delaware law expects some initiative from Plaintiffs" when those plaintiffs suspect wrongdoing. *Id.* at *45.

Delaware courts have uniformly and consistently held that inquiry notice does not require "full knowledge of the material facts," or "all the facts relevant to their claims." *Id.* at *13. Further, inquiry notice does not require that Plaintiff know "all of the aspects of the alleged wrongful conduct" but "only facts sufficient to make it suspicious or that ought to make it suspicious." *Ocimum Biosolutions (India) Ltd. v. Astra Zeneca UK Ltd.*, 2019 Del. Super. LEXIS 640 at *22, 2019 WL 6726836 (Del. Super. Dec. 4, 2019) (internal quotations and citations omitted). In other words, inquiry notice is equated with a "red flag that would prompt a person of ordinary intelligence to further investigate a possible claim. *Id. See also,* Opinion at 20 ("red flag") *Pomeranz,* at *57 (information that should have raised plaintiff's "antenna"). *See also, Burrell v. Astra Zeneca, LP,* 2010 Del. Super. LEXIS 393 at *28, 2010 WL 3706584 (Del. Super. Sept. 20, 2010) (enough facts to provide notice of a "*potential* (as opposed to guaranteed) tort claim"); *Duncan v. O.A. Newton & Sons, Co.,* 2006 Del. Super LEXIS 315 at *20, 2006 WL 2329378 (Del. Super. July 27, 2006) (inquiry notice of "potential claim"), *Hutchinson v. Boston Sci Corp.*, 2020

U.S. Dist. LEXIS 176623 at *11, 2020 WL 5752393 (D. Del. Sept. 25, 2020) (on notice that "product might be the cause").

3. Medical Diagnosis is Not Required to Trigger Inquiry Notice.

Plaintiffs' principal argument is that the statute of limitations did not accrue until August 9, 2021, when Plaintiff Wayne West was diagnosed with persistent inflammatory response syndrome by Dr. Susan Black. In other words, the statute did not begin to run until Plaintiff Wayne West had actual notice through a mold-specific medical diagnosis. As will be demonstrated below, as the Superior Court correctly held, inquiry notice is not actual notice, and Plaintiff Wayne West had sufficient facts and suspicions to put him on inquiry notice in 2016 thus making his complaint untimely.

To support Plaintiff's theory of inquiry notice, Plaintiff relies on asbestos cases, *Collins v. Pittsburgh Corning Corp.* (In re Asbestos litigation), 673 A.2d 159 (Del. 1996) ("*Collins*") and *Dabaldo v. UR Energy & Constr.*, 85 A.3d 73 (2014) ("*Dabaldo*"). Collins, a long-time employee of duPont, suspected that some of his ailments related to his work with asbestos, and in about 1980 suspected he had asbestosis. The company doctor found no abnormality in testing and Plaintiff did not receive a medical diagnosis of asbestosis until 1992. He filed his action later that year. The Supreme Court reversed a trial court's decision granting summary judgment on statute of limitations grounds. In reversing, the Court two times

referred to the "unusual" situation before it given that "the period of limitations in asbestos exposure cases is often problematic because of the acknowledged latency period in the development of diseases associated with asbestos." *Id.* at 161, 162, 163. The time of discovery rule tolled the statute in a latent asbestos case until Plaintiff received a diagnosis because Plaintiff lacked a medically verifiable basis to ascertain the "physically ascertainable" effects until getting the diagnosis in 1992. "Our ruling that the latency/symptomology configuration in asbestos cases requires that disputes concerning a plaintiff's knowledge should be reserved to the trier of fact." *Id.* at 163.

Similarly, in *Dabaldo*, the focus was on latent asbestos-related diseases. In 1992, Plaintiff had been diagnosed with an asbestos-related pleural disease but was not diagnosed with asbestosis until 2007. He filed the complaint within two years of the asbestosis diagnosis. In a bench ruling, the trial court granted summary judgment, and the Supreme Court reversed. Initially, the Court reiterated that "[w]hen it comes to asbestos-related personal injury claims, Delaware is a multi-disease jurisdiction, which means that each distinct diagnosis attributable to asbestos exposure is a separate claim and thus is subject to its own statute of limitations," 85 A.3d at 77. The court cited and quoted with approval *Sheppard v. A.C.S. Co.*, 498 A.2d 1126 (Del. Super. 1985), affd, sub nom., *Keene Corp. v. Sheppard*, 503 A.2d 192 (Del. 1986), which held that there are divisible asbestos-related diseases with

latency periods running from 17 to 40 years, and therefore each disease has a separate statute of limitations. *Id.* at 78-79. The Supreme Court reiterated the four-part test in *Collins* in latent disease cases to determine when the statute of limitations begins to run. Focusing on Plaintiff's knowledge, the Court held that "mere exposure to asbestos combined with symptoms that resemble an asbestos-related disease, without a definitive diagnosis, is not enough to charge the plaintiff with knowledge." *Id.* at 79. Given the record reflected that Plaintiff "was on notice that he had asbestosis only after he was actually diagnosed with asbestosis by Dr. Eliassen in 2007," his action filed within two years of that date was timely. *Id.* at 80.

The Superior Court correctly found that the analysis in asbestos cases was ill-suited for mold-related cases because mold cases are not latent sickness cases. (Opinion at 14). In stark contrast to the asbestos disease cases wherein injury may not manifest injury for over twenty years (*i.e.* are hidden or dormant), the Court properly observed that his sinus and breathing symptoms manifested within minutes of being in the Building. (Opinion at 14).

The Superior Court also noted support for its holding from a mold case in Delaware and in other states wherein the courts held that inquiry notice does not wait for a specific medical diagnosis. (Opinion at 15).

The facts herein are similar to those presented in *Duncan v. O.A. Newton & Sons Co.*, 2006 Del. Super. LEXIS 315, 2006 WL 2329378 (Del. Super. July 27,

2006). There, plaintiff alleged that the original builder improperly graded the property to allow water to infiltrate the crawl space, and that an HVAC contractor negligently installed a drip line, both of which created mold which made her sick. The house was built in 1975 and the drip line was installed in 1992. Plaintiff filed suit on March 19, 2004. The court held the statute of limitations "clock" begins to run when plaintiff is on inquiry notice, i.e., "basically the time plaintiff should have discovered the injury" that may have been caused by the defendant. *Id.* at *20. The court granted summary judgment because more than two years prior to filing, Plaintiff knew she was sick, had photos of mold, was told that mold could make her sick, and had samples but never tested them. Plaintiff was put on notice that mold was a possible cause of her medical issues and "she should have began her inquiry in 2001". *Id.* at *24. The court emphasized that inquiry notice is not "when all the dots have been connected" by an expert test report, and not when "told by her doctor or lawyer, that she has a cause of action." *Id.* at *22, 23. *See also Gerke v. Romero*, 237 P.3d 111 (N.M. App. 2010). In *Gerke*, the court held that actions for mold exposure accrue when a plaintiff begins to experience "physical symptoms that would cause an ordinary person to make an inquiry about the discovery of the cause of the symptoms", rejecting plaintiff's argument that inquiry notice did not occur until he received a mold poisoning medical diagnosis. *Id.* at 116. The court further concluded that the cause of action accrued when the Plaintiff "was aware of the fact

that he was suffering from an injury [coughing and respiratory], [and] when he suspected that his injury was caused by mold." *Id.* *See also* Opinion at 15 fn.51, (collecting mold related cases for same conclusion).

These other mold-related cases cited by the Superior Court, *Marcinowski v. Castle*, 870 N.Y.S. 2d 206 (N.Y. App. Div. 2008), *Pirtle v. Khan*, 177 S.W. 3d 567 (Tx. App. 2005), and *Wycoff v. Mogollon Health All.*, 307 P.3d 1015 (Ariz. Ct. App. 2013) similarly held that inquiry notice does not require a specific medical diagnosis but is triggered by the onset of physical symptoms and when a plaintiff knew or should have known she has been injured.

Plaintiffs have not cited to any mold-related case to support the argument that a limitations period does not begin to run until a plaintiff receives a mold-related medical diagnosis, concede that Plaintiff Wayne West's medical symptoms manifested almost immediately and those same symptoms were experienced for several years. Instead, Plaintiffs attempt to distinguish the cases cited by Defendants and the Superior Court by stating that "West did not receive confirmation that there was in fact mold in his office space until October 29, 2019" when the first test was conducted by AAA/Meloro. (O.B. at 19), or West "did not have knowledge of mold in the office [until][sic] October of 2019" (O.B. at *20). These attempts to distinguish the holdings in those cases fail. Again, in Delaware, knowing all of the facts is not necessary to start inquiry notice and the running of the statute of

limitations. The undisputed facts demonstrate that Plaintiff Wayne West was aware of multiple "red flags", any one of which put him on inquiry notice of a potential claim in 2016. Plaintiff Wayne West began associating the cause of his illnesses to the Newark Office as early as December 18, 2004. In April of 2016, he had his home tested based on his concern of mold issues after seeing a television advertisement linking mold to his symptoms. He continued to get sick and for several years connected his symptoms to the building. After ruling out his home as the "culprit," he said he would inquire further but did not. He tested positive for mold allergies in July 2019. As the Superior Court correctly ruled, these facts and his own suspicions and "admissions" put him on inquiry notice of a potential claim and rejected the attempt to distinguish *Duncan* based on the contention that Plaintiff West did not know there was harmful mold until October of 2019. Opinion at 17.

Similarly, Plaintiffs attempt to discredit the fact that West was diagnosed with allergies to mold in July 2019 because he may not have suffered any physical effects at work from this allergy until October 2019 (O.B. at 25) is misplaced. That West may not have experienced symptoms during that limited time frame does not diminish in any way the fact that he experienced symptoms for many years running and he associated his sickness with the Newark Office. As the Superior Court aptly put it, the mold allergy "diagnosis coupled with Mr. West's negative home test

undeniably put Mr. West on inquiry notice at the latest in July 2019, more than two-years before the Complaint was filed." (Opinion at 18, fn. 94).

The established law on inquiry notice does not require full knowledge of all material facts, only enough that ought to make one suspicious and inquire further. Here, there were many facts known to West, and coupled with his acknowledged suspicions, to connect trigger inquiry notice.

Further, Plaintiff's argument that the fact that he complained to co-worker Cashman who disagreed that the Building was making him sick excuses his delay, was rejected by the Superior Court because Plaintiff could not "escape" his own notice and suspicions. Opinion at 18. In addition, the fact that no other doctor had linked his illness to mold is: 1. belied by the mold allergy diagnosis in July of 2019, and 2, does not evaporate the extent of knowledge and suspicion that he already had. Further, there are no medical records prior to October of 2019 wherein Plaintiff West conveyed his suspicion to his doctor that mold in his office was making him sick. The mold allergy diagnosis was yet another piece of information – added to many others – that Plaintiff Wayne West had that required him to inquire further to protect his rights. There was no reason to delay to seek out a mold injury specialist to get a mold specific diagnosis.

4. Plaintiff Wayne West Had Information That Mold Could be Harmful.

Courts in Delaware have consistently held that inquiry notice starts the limitations clock when there is publicly available information about the "potential" connection between manifested injuries and the harmful product. Again, if that information is available, a plaintiff is charged with that information even if a plaintiff does not see it. Similarly, if a plaintiff sees the information about a potential link, for example on television, that is more than enough for the clock to begin.

In *Burrell supra.* the plaintiffs alleged that the drug Seroquel® caused personal injuries related to diabetes and filed their cases more than two years after their diagnoses. Defendant moved for summary judgment asserting that the claim accrued at the latest when Plaintiffs received their diagnoses. Plaintiffs claimed that the time of discovery tolled the statute until they had notice of a potential link between the drug and diabetes from television commercials discussing Seroquel personal injury litigation. 2010 Del. Super. LEXIS 393 at*21. Then Judge Slights disagreed with the Plaintiffs and granted summary judgment. The court relied on the "legion Delaware authority" that an injury is sustained when the "harmful affect first manifests itself" to the plaintiff. *Id.* at *18-19 The standard is not "actual notice" but "inquiry notice" and inquiry notice occurs when the scientific community revealed a link between the physical condition and the exposure to the toxic

substance. *Id.* at *24. The court found there was publicly available information to support a link if plaintiffs "had looked for it" in 2003-2004.[3] *Id.* at *25.

See also Allen v. Bayer Healthcare Pharm., Inc. 2014 U.S. Dist. LEXIS 21057 at *7-8, 2014 WL 655585 (E.D. Mo. Feb 20, 2014) (relying on *Burrell* and *Duncan,* court rejected plaintiff's argument that she did not know about the connection between injury and the IUD product until she saw an advertisement by a law firm or until after a medical diagnosis, because there previously existed public information labels about the link); *Bredberg v. Boston Sci Corp.*, 2021 Del. Super. LEXIS 449, at *7, 2021, WL 2228398 (Del. Super. June 2, 2021) (inquiry notice when publicly available sources including FDA report on defects in product could have been discovered and at that point may have led the plaintiff to discover she had a potential claim); *Hutchinson v. Boston Sci. Corp.*, 2020 U.S. Dist. LEXIS 176623 at *10-11, 2020 WL 5752393 (D. Del. Sept. 25, 2020) (rejected argument that a television ad was the first time plaintiff attributed her injuries to the pelvic mesh and that no doctor

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[3] The court relied on *Duncan supra.* and *Greco v. Univ. of Delaware*, 619 A.2d 900, 906 (Del. 1993) to support its conclusion that the start of the running of the statute does not depend on when a medical diagnosis is made, but rather starts when plaintiff's injuries were ascertainable. In making its conclusions, the court specifically distinguished *In re: Asbestos Litigation*, 673, A.2d 159, 163 (Del. 1996) as involving "unusual situations" in asbestos cases wherein the injuries had long latency periods wherein no immediate injury manifests itself to alert the potential plaintiff, i.e., that was not discoverable for many years. *Id.* *20 fn. 55, *24 fn. 62 In *Burrell* plaintiffs were on notice of a potential (not guaranteed) tort claim in 2003 or 2004, and their cases were filed too late.

had told her that the product caused her injuries before that time; court held actual notice was not required and statute began to run when plaintiff noticed a "potential connection" to the injuries she was experiencing (not unknowable) and the FDA had publicly announced that the product "might be the cause"); *Rumbo v. Am. Med Syst.*, 2021 Del. Super. LEXIS 357 at *10, 2021 WL 1694733 (Del. Super. April 29, 2021) (no genuine issue of material fact as to when plaintiff was on notice of link between injuries and pelvic mesh because in part plaintiffs saw television advertisements from lawyers more than two years before filing about potential claims); *McClements v. Kong,* 820 A.2d 377, 380 (Del. Super. 2002) (statute begins to run when injury is known and even though plaintiff "may not be aware of any casual connection between the injury and the conduct of a particular potential defendant," ruling that *Collins* had no application where plaintiff's injury was a known medical fact.)

Plaintiffs' attempt to avoid this well-settled law by relying on *Brown v. E.I. duPont de Nemours & Co.*,820 A.2d 362 (Del. 2003) and *Baker v. Croda, Inc.*, 304 A.3d 191 (Del. 2023). Boiled down, Plaintiffs argue that Plaintiff West did not know he was injured ("sustained a legal injury") until he was diagnosed by Dr. Susan Black, a mold illness specialist. In *Brown*, the Supreme Court, relying on an asbestos case, held that the statute of limitations did not begin to run until "someone from the scientific community found and revealed publicly a link between the physical condition [birth defects] and the exposure to the toxic substance [Benlate]." The

Superior Court below distinguished the *Brown* case given Plaintiff West's "own admissions" that West was convinced that the Newark Office was making him sick for years, and suspected mold was the cause of his manifested symptoms after testing his own home in 2016 and seeing a television ad about the link between mold and his illness. Further, West was told he was allergic to mold in July of 2019. In other words, West's illness was not unknowable – he said he was suffering the same symptoms for several years – and he was not blamelessly ignorant. He had inquiry notice of the potential cause.

Baker v. Croda is similarly not helpful to Plaintiffs. In *Baker,* the Supreme Court held that "an increased risk of illness without physical harm is not a recognizable injury under Delaware law. 304 A.3d at 194. Plaintiffs appear to be arguing that he did not suffer a legal injury until diagnosed by Dr. Black in August of 2021. Similarly, Plaintiffs contend that none of his doctors, prior to Dr. Black, connected his illnesses to harmful mold. As stated above, that is not required for inquiry notice, and Plaintiff Wayne West testified and admitted that he was experiencing illness and symptoms for "several years" that he attributed to the building. Further, that he may not have had symptoms for the three months after he was diagnosed with mold allergies does not and cannot wipe out that diagnosis and the undisputed facts that Plaintiff West was experiencing his symptoms continually for years and he associated that sickness to the Newark Office. West speculates that

if he filed a claim before he found out there was harmful mold in the Building, such a claim would be "meritless." Again, West is missing the point about inquiry notice.

There were multiple "red flags" to alert Plaintiff Wayne West. He was immediately aware that he was getting progressively more sick when at the building and suspected the building and likely mold was making him sick. West admitted seeing a television advertisement making the connection between mold and sickness in 2016.[4] As the Superior Court correctly held, this advertisement made West aware of health risks related to mold in 2016. The ad by itself triggered a duty to inquire further. It prompted him to test his home. After ruling the home out as the cause of his symptoms, he continued to experience the same symptoms after being in the Newark Office, yet he did not continue his inquiry based on this information. (Opinion at 19-20).

In short, there was nothing to stop Plaintiff West from acting on his suspicions, confirmed in a television ad he saw in 2016, to inquire further. He could

[4] The Superior Court also correctly observed that mold's potential to be harmful was "well-known," as of 2006 and cites *Brandt v. Rokeby Realty Co.*, 2006 WL 1942314, at *23 (Del. Super. July 7, 2006) and in particular that court's reliance on guidelines developed by the New York Department of Health. *See also*, *Atwell v. Rhis, Inc.*, 2006 Del. Super LEXIS 663 at *6, 2006 WL 2686539 (Del. Super. Aug 11, 2006), wherein the court cited to four publications that discussed health concerns pertaining to mold which were obviously available at the time of briefing before it); EMSL Report at page 19 (A 310) wherein public sources of information dating back to 2011 are referenced).

have reached out to the source of the ad, call a lawyer,[5] or find a mold illness doctor to make a link at that time.[6] Further, as the Superior Court below observed, he could have requested a mold test earlier (Opinion at 18, 20) and could have himself opened up the ceiling tiles earlier. He, in fact, testified that after the ad and mold was ruled out as a cause of his known injuries, he would "further pursue things" but did not. Plaintiff West's own words, actions, and admissions precisely prove the elements of inquiry notice in Delaware. He slept on his rights and the Complaint was filed too late.

5. The Superior Court Did Not Improperly Shift the Burden of Proof.

Plaintiffs rather feebly argue that the Superior Court improperly shifted the burden to them on summary judgment. Plaintiffs devote a mere eighty-eight words to support this argument, but those words do not specify how the Superior Court erred. On summary judgment, once the moving party demonstrates there are no genuine issues of fact, the burden shifts to the non-moving party to show a genuine

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[5] Plaintiffs' counsel referred Plaintiffs to Dr. Susan Black. (A191-192).

[6] Plaintiffs attached certain mold related publications, including one from the EPA, as Exhibits B-D to the Opening Brief. Those exhibits were not part of the record below and should not be considered. If they are, it is difficult to determine the original dates of the publications. Further, on page 9 of the EPA publication, Exhibit B, the author recommends that a renter contact "local, state, or federal health or housing authorities" if a building owner is not addressing the problem. Plaintiffs certainly had that option.

issue of fact. *Ocimum*, 2019 Del. Super. LEXIS 640 at *16-17, Opinion at 7. Here, there are no material issues of fact, and Plaintiffs have pointed to none. Further, it is Plaintiff's burden to demonstrate (with facts) to demonstrate that a tolling exception applies. *Burrell,* 2010 Del. Super. LEXIS 393 at *16, Opinion at 7. The Superior Court did not err in this regard.

CONCLUSION

For the foregoing reasons, the Court should affirm the Superior Court's decision granting summary judgment to Defendants based on the statute of limitations.

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