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IN THE SUPREME COURT FOR THE STATE OF DELAWARE

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

APPELLANTS' REPLY BRIEF ON APPEAL FROM THE SUPERIOR COURT OF DELAWARE

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INTRODUCTION

The Appellee-Defendants' answering brief argues that Wayne West was on inquiry notice in 2016 that he had a legally cognizable mold injury claim and that he had sufficient knowledge to make such a claim and that he was not required to have a "full knowledge of the material facts."[1] The Appellee-Defendants also argues that a medical diagnosis is not required in this matter and that the asbestos cases cited by the Appellant-Plaintiffs are not persuasive.[2] Appellee-Defendants claim that because Wayne West had information that mold could be harmful he should have filed suit even though no doctor had connected his health symptoms to mold exposure. And finally, the Appellee-Defendants claim the Superior Court did not incorrectly shift the summary judgment burden from the Appellee-Defendants to the Appellant-Plaintiffs. The position of the Appellee-Defendants and the Superior Court that West was on inquiry notice in 2016 presupposes he had a mold-related disease, a step skipped by both the Appellee-Defendants and the Superior Court.

Appellee-Defendants' arguments are wrong, and for the reasons stated herein and in Appellant-Plaintiffs' opening brief, the Superior Court's decision should be reversed and remanded. As stated in Appellant-Plaintiffs' complaint, in their

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[1] Appellee-Defendant's answering brief at 14, citing *Pomeranz et al v. Museum Partners*, *L.P. et al*, 2005 Del. Ch. Lexis 10, 2005, WL 217039 (Del. Ch. Jan. 24, 2005).

[2] Appellee-Defendants' answering brief at 16-18.

response to Appellant-Defendants' summary judgment briefs, summary judgment oral argument, and their opening brief to this Court, Wayne and Cynthia West filed this action shortly after Wayne West was diagnosed with a mold-related disease. As this Court ruled in *Collins v. Pittsburgh Corning*, the statute of limitations does not begin to run until there is a "medical diagnostic support."[3] In short, mere exposure to mold does mean the plaintiff has a cause of action – that only comes with medical diagnosis. Even if the standard used in *Collins* and other asbestos cases is not followed and West was on inquiry notice earlier, that date was not until October of 2019 when mold was discovered in his office and he experienced symptoms that he connected with mold. The actions of West are distinguishable from the those of time-barred Plaintiffs cited by the Superior Court and the Appellee-Defendants.

In addition, the Superior Court incorrectly shifted the burden towards the Appellant-Plaintiffs in this matter. The facts in this matter must be held in a light most favorable to the Plaintiff, which the Superior Court did not do.

[3] *Collins v. Pittsburgh Corning Corp*, *(In Re: Asbestos Litig.*), 673 A.2d 159, 161 (Del. 1996).

CONCISE RESTATEMENT OF FACTS

Waye West worked for decades as a real estate agent associated with Patterson Schwartz. In August of 2021, for the first time, West was diagnosed with a mold related disease by a medical doctor – specifically, he was diagnosed with persistent inflammatory response syndrome by Dr. Susan Black.[4] In October of 2019 it was discovered for the first time that mold was persistent and widespread throughout the area in which he worked.[5] Testing was only done of this area after West went into the office and could not breathe.[6] West testified, " I never knew there was mold in the office until I walked in, opened the door and couldn't breathe."[7] This testimony was confirmed by his wife Cynthia West, who testified that it was not until this incident that it "really came to light to light… 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."[8] Such comments were corroborated by coworkers Carla Vicario and Nancy Husfelt-Price who testified that West had told them that his previous doctors were not sure what was wrong with him.[9]

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[4] Appellant-Plaintiffs' opening brief at 4.
[5] ESML fugal report, A296 – A297.
[6] Wayne West Dep. A227:10-21, A229:2-6.
[7] Appellant-Plaintiffs' opening brief at 10; Wayne West Dep. A218:20 – A219:2.
[8] Appellant-Plaintiffs' opening brief pg. 10; Cynthia West, Dep., at A316:4-10.
[9] Appellant's opening brief at 10-11; Carla Vicario Dep., at A281:10 – A282:14, A285:3-16.

For years West suffered from a variety health problems (cough, shortness of breath) and regularly sought medical advice. Until Dr. Black's diagnosis in August 2021, however, no doctors made any link between his health symptoms and mold.[10] West had concerns that "something" in the office might be making him sick but had no evidence or even possible evidence that something, let alone mold, was making him sick in the office. West, who had no control over the maintenance of the building, repeatedly voiced his concerns to supervisor, Chris Cashman, an employee of the Defendants.[11] Cashman repeatedly told him he was imagining things and no one else was sick.[12] West sought answers to his health problems—regularly and repeatedly going to doctors, none of whom diagnosed him with a mold related disease. West had his home repeatedly inspected and it was determined there was nothing hazardous, and particularly no mold, in it. [13] While it was determined in July of 2019 that West had a general mold allergy (to go along with other seasonal allergies such as tree and grasses), there was still no credible information that there was mold in his office.[14] From July of 2019 until October, the record is devoid of West suffering any health effects from this mold allergy. In short, it not until the

[10] Report of Dr. Susan Black, August 9, 2021. (A190).
[11] Appellee-Defendants call Cashman a "co-worker." Cashman was more than that: he was West's supervisor and responsible for putting in maintenance requests.
[12] Plaintiff's Day Timer Notes, A274.
[13] Wayne West Dep. A221:6-24.
[14] Wayne West Dep. A216:1-7; A217:1-7.

episode in October of 2019 after he could not breathe and he knew that he knew he was exposed to mold in his office that he made the connection between his health symptoms and mold. Again, the record is void of any medical link between any of his health symptoms and mold in the building until Dr. Black's report in August 2021.

ARGUMENT

I. Plaintiff Was Not And Could Not Be On Inquiry Notice For A Claim He Did Not Have.

The Appellee-Defendants incorrectly assert that Appellant-Plaintiff Wayne West was on inquiry notice in 2016 or at the latest for the July 2019 for his mold-related personal injury claim. Neither is accurate. Appellee-Defendants argue that a cause of action accrues at the time of the wrongful act, even if the Plaintiff is ignorant of the acts.[15] However, this not true when there is a gap between the wrongful acts and the injury. The cause of action for negligence accrues at the "time of the injury."[16] The question is then when did Wayne West suffer his injury? Wayne West did not suffer his injury until he sustained a diagnoseable mold-related disease and the first evidence of that was August 2021.[17] Appellee-Defendants and the Superior Court argue that Appellant-Plaintiffs' reliance upon *Collins,*[18] *Dabaldo*,[19] and others asbestos cases is not relevant because mold illnesses are not "latent diseases." While it is true that mold-related diseases are not necessarily latent, these previous asbestos cases are highly relevant for this case, and for mold

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[15] *Wal-Mart Stores, Inc. v. AIG Life Ins. Co*., 860 A.2d 312, 319 (Del. 2004).
[16] *Nardo v. Guido DeAscansis & Sons, Inc.* 254, A.2d 254, 256. (De. Super. 1969).
[17] Report of Dr. Susan Black, August 9, 2021. (A190).
[18] *Collins v. Pittsburgh Corning Corp. (In re Asbestos Litig)*, 673 A.2d 159, 161 (Del. 2006).
[19] *Dabaldo v. URS Energy & Constr.,* 85, A3d 73 (Del. 2014).

cases in general. The Appellee-Defendants fails to address *Mergenthaler v. Asbestos Corp*, in which the this Court held a person cannot file a personal injury claim for mere asbestos exposure.[20] The *Mergenthaler* Court was undoubtedly mindful that a cause of action for an asbestos claim that began to run at mere exposure would result in countless lawsuits in which individuals had suffered no real damages. Again, many of the health symptoms that individuals who suffer from asbestos-related diseases have can be associated with other health problems. The same is true with mold-related diseases. Here, the Defendants-Appellees through their own expert claim Wayne West's health symptoms are not related to mold at all. Specifically, Dr. Guzzardi stated: "I find no evidence that Mr. Wayne West's chronic sinus infections and claimed respiratory problems are related to Cladosporium mold that was present in the offices of Patterson Schwartz."[21] Under the Appellee-Defendants' argument, an individual who experiences shortness of breath, knew he or she was exposed to asbestos, but did not have a diagnosis from a doctor, would have to file a claim. In the context of mold and Appellant-Plaintiffs, Appellee-Defendants argues that a person who regular sought medical advice for his health issues, whose doctors did not make any link between mold and such health issues, did not have any substantive evidence that he was exposed to mold at his work, must

[20] *Mergenthaler v. Asbestos Corp. of America*, 480 A.2d 647 (Del. 1984).
[21] Report of Dr. Lawrence Guzzardi, October 29, 2023, at A344.

have filed suit by 2018 (even though it was not discovered until October 2019 that there was mold in the building).[22]

Here, West had concerns that there was the possibility that something in the building was making his sick (concerns which were regularly discounted by management), but had no real evidence (either medically or through a professional inspection) that he was exposed to mold at work and that his health symptoms were causally linked to it. Again, in *Collins* the plaintiff (who unlike West with mold) knew he was exposed to asbestos, had the belief that he was an asbestos-related disease, but this Court held that exposure to asbestos and health symptoms such as shortness of breath did not equate with a cause of action absent a medical diagnosis.[23]

Again, although *Dabaldo* was an asbestos-related disease case and dealt with the issue of multi-disease, it is still highly relevant to this matter. The four prong criteria that this Court addressed in *Dabaldo* ((1) plaintiff's level of knowledge and education; (2) the extent of his recourse to medical evaluation; (3) consistency of medical diagnosis; and (4) plaintiff's follow up efforts during the latency period) is instructive for this matter.[24] Here, West was not sure what was causing his health problems but regularly sought medical guidance, none of which resulted in the

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[22] *Collins v. Pittsburgh Corning Corp*. *(In re Asbestos Litig.)* 673, A2.d 159, 161 (Del. 1996).
[23] Id.
[24] *Dabaldo v. URS Energy & Constr.,* 85, A3d 73 (Del. 2014).

diagnosis of mold-related disease until he was diagnosed by Dr. Black. In addition, West had no knowledge of the mold in the office until October of 2019, but promptly took action when he received such information.[25] His actions are in keeping with the protocol addressed by this Court in *Dabaldo*.

[25] Wayne West Dep. A227:10-21; A229:2-6.

II. West's Claim Was Timely Filed Under The Standards Addressed In Prior Mold Cases.

In Appellee-Defendants' answering brief it states,

> Plaintiffs have not cited any mold-related case to support the argument that a limitations period does not begin to run until a Plaintiff receives a mold related diagnosis, concede that Plaintiff Wayne West's medical symptoms manifested almost immediately, and those same symptoms were experienced for several years.[26]

This is not accurate. Regarding West's medical symptoms, he did not have significant health problems until he could not breathe at work in October of 2019.[27]

Appellant-Plaintiffs cites asbestos cases in part because there are simply not many mold cases in Delaware and, as previously mentioned, there are numerous similarities between mold health matters and asbestos. However, the Delaware and Out of State mold cases cited by the Appellee-Defendants **help**, rather than hurt, Appellant-Plaintiffs' case. Appellee-Defendants argue that the facts in *Duncan v. O.A. Newton & Sons Co* are similar to the ones in this matter.[28] This is simply not accurate. In *Duncan*, the plaintiff suffered **hospitalizations** and **knew** that there was mold in her home: in 2001 a state health inspector did an inspection of her home and told the plaintiff that there was mold in her home.[29] There, the Superior Court

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[26] Appellee-Defendants' answering brief at 20.
[27] Wayne West Dep. A227:10-21, A229:2-6.
[28] Appellee-Defendants' answering brief at 18.
[29] *Duncan v. O.A. Newton & Sons Co*, 2006 Del. Lexis 315 (Del. Super. July 27, 2006).

noted her hospitalizations and that by 2001 the plaintiff had physical samples of the mold in the house, and had specifically been told by a doctor that toxic mold "can make me black out or pass out or syncope," that she should not live in the home, and was told by another doctor that about fungal contamination in her home.[30] Here, in August of 2021, Wes was told for the first time, by Dr. Black, that he should not work in an environment with mold.[31]

Although the Superior Court in *Duncan* declined to follow this Court's conclusions in *Collins*, the facts of *Duncan* are very different from this matter. In *Duncan*, the plaintiff in question knew very likely there was mold in her home by 2001;[32] here West did not know there was mold in his workplace until October 2019. The plaintiff in *Duncan*, when given pertinent information (mold samples from her home) and told by a doctor by that mold could make her sick, sat on her claim, even though she had been hospitalized several times.[33] West regularly and routinely sought answers to his health problems: from his doctors and by having his home tested.[34] When he could not breathe at work in October of 2019 and it was confirmed that mold was in his office, he promptly took action to remove himself from this environment.

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[30] *Id.* at * 3.
[31] Dr. Susan Black Report, dated Aug. 9, 2021. (A190).
[32] *Duncan*. at 2.
[33] Id. at 23.
[34] *See* Plaintiff's Opening Brief at 4-7.

Similarly, the out-of-state mold cases cited by Appellee-Defendants for the position that a plaintiff is on inquiry notice before he is diagnosed with a mold-related disease are helpful to Appellant-Plaintiffs' position. Again, in the Arizona case *Wycoff v. Mogollon Health All*, 307 P.3d 101 (Ariz. Ct. App. 2013), the plaintiff knew that there was mold in the unit, had been sick from the exposure, but did not file more than two years later.[35] In *Pirtle v. Kahn,* the Court of Appeals in Texas said the plaintiff was on notice when **she got sick** and it was determined there was mold in her apartment.[36] In *Marcinkowski* the plaintiff discovered mold in his home and subsequently began suffering health problems, but did not seek medical treatment for another three and a half years. [37] Finally, the Court of Appeals of New Mexico in *Gerke*, while rejecting plaintiff's argument that the statute of limitations began to run from medical diagnosis, noted that plaintiff moved into the unit in 2004 began having health problems, and was told in October of that year there was mold in the unit but did file suit until November 2007.[38] The New Mexico court held plaintiff was notice in 2004 after he developed health symptoms and received confirmation that mold was in the apartment.[39] Here, while it is the Appellant-Plaintiffs contention that the statute of limitations did not begin to run he was

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[35] *Wycoff v. Mogollon Health All,* 307 P.3d 1015, 1018 (Ariz. Ct. App. 2013).
[36] *Pirtle v. Kahn,* 177 S.W. 3d 567, 569-570, (Tex. App. 2005).
[37] *Marcinkowski v. Castle*, 870 N.Y.S. 2d, 206, 207 (N.Y. App. Div. 2008).
[38] *Gerke v. Romero*, 237 P.3d 111, 116 (N.M. App. 2010).
[39] *Id.*

diagnosed with a mold-related disease in August of 2021, under the rationale followed by these out of state cases, Plaintiff-Appellants' claim would not begin to run until October 29, 2019 when it was determined there was mold in the office building and he had suffered significant health symptoms.

Finally, it bears repeating the while West tested positive for allergies related to mold, grass, and trees in July 2019, he suffered no ill effects from any mold exposure until October of 2019. In addition, as the testimony from Wayne West, Cynthia West, and others demonstrate, it did not become known (or at least likely known) that West was exposed to mold in the building until was unable to breathe at the office in October 2019 and it was determined there was mold in the unit.[40]

[40] Wayne West Dep. A227:10-21; A229-2-6; ESML fungal report, at A296 – A297.

III. West Was Not On Inquiry Notice Based On Other Non-Mold Cases Cited By the Appellee-Defendants.

Appellee-Defendants cite several non-mold related cases that "inquiry notice starts the limitations clock when there is publicly available information about the potential connection between manifested injuries and harmful products"[41] for its argument that West was on inquiry notice several years before he was diagnosed with a mold-related disease and it was confirmed that there was mold in the building. The Appellee-Defendants cite several cases that deal with the following products: the drug Seroquel, IUD devices, pelvic mesh products, and CT equipment where courts held that the plaintiffs were on inquiry notice about their claims after information was publicly available through agencies like FDA.[42] Again, there are numerous key differences between these cases and this matter: namely in contrast to the plaintiffs in those cases who **knew** they had taken the drug, used the product, etc., West did not know he was exposed to mold at work until testing revealed this in October of 2019. In addition, the language from *McClements v. Kong*, cited by the Defendant-Appellee, is helpful for the Appellant-Plaintiffs, here. Specifically, the *McClements* Court stated that the facts before it were distinguishable from

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[41] Appellee-Defendant's answering brief at 23.

[42] *See Allen v. Bayer Healthcare Pharm*, *Inc.* 2014 U.S. Dist. LEXIS 21057; *Bredberg v. Boston Sci Corp.,* 2021 Del. Super Lexis 449 WL 2228398 (Del. Super. June 2, 2021).; *Hutchinson v. Boston Sci Corp*, 2020 U.S. Dist. LEXIS 176623, 2020 WL 5752393 (D. Del. Sept. 25, 2020).

Collins because in *McClements*, "plaintiff's injuries were a known medical fact at all relevant times."[43] Here, again, while Appellee-Defendants still dispute via their experts that Appellant-Plaintiff suffers from any mold related disease at all, and it was not until August of 2021 that any doctor (i.e. a "known medical fact") determined that West had a mold-related disease and it was related to his exposure at work.

Contrary to the Appellee-Defendants' claim, this Court's recent decision in *Baker v. Croda* is supportive of Appellant-Plaintiffs' position. As it does throughout its brief, Appellee-Defendant argues that Appellant-Plaintiff was on "inquiry notice" several years before he filed his claim. This simply is not accurate. Until Dr. Susan Black's diagnosis in August of 2021, there was no medical documentation stating that West had a mold-related disease. While West (and others) may have been at increased risk of harm from being exposed to mold at the Patterson Schwartz Newark office, it was not determined he suffered an injury until he was diagnosed by a medical doctor. As this Court said in *Baker, "*an increased risk of harm only constitutes injury once it manifests in a physical disease."[44] No other doctor besides Dr. Susan Black has made a link between Wayne West's health symptoms and mold exposure at Patterson Schwartz.[45] Under this Court's holding in *Baker* he could not

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[43] *McClements v. Kong*, 820 A.2d 377, 380 (Del. Super. 2002).
[44] *Baker v. Croda Inc.*, 304 A.3d 191, 192 (Del. 2023).
[45] Report of Dr. Susan Black, Aug. 9, 2021. (A190).

file suit as demanded by the Appellee-Defendants before then, because he had not suffered an injury.

In short, the Appellant-Plaintiff could not and was not on inquiry notice for a claim he did not have until he was diagnosed by Dr. Susan Black in August of 2021. The medical records are devoid of any doctor diagnosing him with a mold-related disease prior to Dr. Black's diagnosis in August of 2021.

IV. The Superior Court Erred When It Shifted the Burden to the Plaintiff.

It is settled law that statute of limitations is an affirmative defense, and that the defendant bears the burden to demonstrate that the statute of limitations has lapsed.[46] Here, the Superior Court failed to address Dr. Susan Black's diagnosis of West with persistent inflammatory response syndrome and confused it with a general mold allergy. The two are not the same. The diagnosis that West received in July 2019, of an allergy to a variety of substances including mold, was not the same as the diagnosis of the mold specific disease he received in August of 2021.[47] Furthermore, as previously addressed, as the earliest, West did not suffer the ill effects of the mold allergy until October 2019.[48] Again, this is no different than someone who is made aware that he or she has a peanut allergy and is then negligently served food at a restaurant and suffers a reaction.

The Superior Court failed to give the Appellant-Plaintiffs the necessary inferences. This is fatal to its opinion. Here, no medical doctor linked West's health problems to mold at work until Dr. Susan Black in August of 2021. The Superior Court and the Appellee-Defendants equate West's earlier health problems with mold exposure, but the Superior Court and Appellee-Defendants can point to no medical evidence anywhere that connects any injury to mold exposure prior to Dr. Susan

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[46] *Rumbo v. Am Med Syx*, 2021 Del. Super. Lexis 337, * 3 (Del. Super.)
[47] Dr. Susan Black Report, Aug. 9, 2021. (A190).
[48] Wayne West Dep. A227:10-21, A229:2-6.

Black's diagnosis of persistent inflammatory response syndrome (in fact Appellee-Defendant's expert denies West has such a disease).[49]

In addition, the Superior Court in its decision failed to given factual inferences towards the Appellant-Plaintiffs, and asserted that West was on "inquiry notice" as a result of a seeing a random television commercial about mold in 2016 instead of the testimony of West, his wife, and coworkers, that October of 2019 was when things "really came to light" that his health issues were possibly caused by mold.[50] At the very least, the record before the Superior Court demonstrated a question of fact: evidence presented from the Appellant-Plaintiffs in the form of testimony from many witnesses which demonstrate that West was not aware there was mold in the building until October 2019 and that it was causing his health problems. The Appellee-Defendants disputes this, which is their right, but did not submit sufficient evidence to shift the burden from them to the Appellant-Plaintiffs.

[49] Report of Dr. Lawrence Guzzardi, October 29, 2023. (A337 – A344).
[50] Superior Court decision at 18. (Ex. A to Appellant's Opening Brief.).

CONCLUSION

For the reasons set forth in above and in Appellant-Plaintiffs' opening brief, the Superior Court's ruling should be reversed.