IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MINE SAFETY APPLIANCES COMPANY **APPELLANT**

v. **No. 2014-CA-00009**

HUEY P. HOLMES **APPELLEE**

RESPONSE BRIEF OF APPELLEE HUEY P. HOLMES

ON APPEAL FROM THE
CIRCUIT COURT OF JEFFERSON COUNTY
NO. 2007-63

ORAL ARGUMENT NOT REQUESTED

David Neil McCarty
Miss. Bar No. 101620
DAVID NEIL MCCARTY LAW FIRM, PLLC
416 East Amite Street
Jackson, Miss. 39201
T: 601.874.0721
F: 866.236.7731
E: dnmlaw@gmail.com
W: McCartyAppeals.com

R. Allen Smith, Jr.
THE SMITH LAW FIRM, PLLC
661 Towne Center Blvd., Suite B
Ridgeland, Miss. 39157

Timothy W. Porter
Patrick C. Malouf
John T. Givens
PORTER & MALOUF, P.A.
P.O. Box 12768
Jackson, Miss. 39236

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MINE SAFETY APPLIANCES COMPANY **APPELLANT**

v. **No. 2014-CA-00009**

HUEY P. HOLMES **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Miss. R. App. P. 28(a)(1), the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Mine Safety Appliances Company, *Appellant*
2. The Honorable Lamar Pickard, *Jefferson County Circuit Court*
3. Charles R. Wilbanks, Jr., Matthew R. Dowd, Joseph A. Sclafani, G. Austin Stewart, of Brunini, Grantham, Grower & Hewes, PLLC, *Counsel for the Appellant*
4. Huey P. Holmes, *Appellee*
5. R. Allen Smith, Jr., of the Smith Law Firm, PLLC, and Timothy W. Porter, Patrick C. Malouf, and John T. Givens, of Porter & Malouf, P.A., and David Neil McCarty, of the David Neil McCarty Law Firm, PLLC, *Counsel for the Appellee*

So CERTIFIED, this the 11th day of August, 2014.

Respectfully submitted,

s/ David Neil McCarty
David Neil McCarty
Miss. Bar No. 101620
Attorney for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Sources

Statement of the Issues

The issues as restated by the Appellee pursuant to MRAP 28(b):

I. The Statute of Limitations Has Not Run on Mr. Holmes' Claims.

II. The Jury's Verdict Was Reasonable and Based on Ample Evidence.

Statement of the Case

This case is about man who worked as a construction worker for several years. He used a jackhammer to tear down huge concrete highway structures. While jackhammering to destroy the concrete, he was in an extremely dusty environment. The concrete was full of sand, and when crushed by the jackhammer the man would breathe it in. Even though he wore a respirator mask meant to protect him from the dust, he breathed in so much dust that sometimes he would spit up black phlegm.

Scientists have determined that when the sand was crushed like this, it was crushed into a fine dust that could be inhaled into the lungs. Given time, the inhalation could greatly weaken the lungs, resulting in an inevitably fatal disease called silicosis. After his years of breathing in the crushed sand while jackhammering, the man was diagnosed with silicosis. The man filed suit in a timely fashion against the makers of the respirator he used to keep him from breathing in the dust.

At trial, the company's representative admitted the company knew as far back as 1951 that filters in respirators could fail in highly humid and moisture rich conditions, like Mississippi. An expert also testified that the respirator had five flaws which could make it fail. Others testified that the jackhammering would have definitely exposed the man to dangerous levels of potentially toxic dust.

At trial, and after hearing how the respirator was so defective, the jury found in the man's favor. The company appealed.

Statement Regarding Oral Argument

This case involves a simple statute of limitations question based on well-settled law, and whether a jury's verdict was based on the evidence presented at trial. It does not merit oral argument.

Relevant Facts

This case involves two separate threads of history knotted together. The first thread is that Mine Safety Appliances knew its respirator, the Dustfoe 66, could fail to protect users from deadly harm even before the product went into production.

Wound tight with that thread is Huey Holmes, a construction worker from Fayette, who used MSA's product for years—but who was later diagnosed with damage to his lungs the respirator was supposed to guard against.

Importantly, the facts of this case are not contested, and to the extent there is any dispute, it was resolved by the factfinder and must be taken as conclusively determined.

Exposure to Silica Can Destroy the Human Lung

At trial, Dr. Vernon Rose testified as an expert on behalf of Mr. Holmes. 35:142. Dr. Rose is an industrial hygienist, a field of science "which involves recognizing, evaluating, and controlling hazards in the workplace." 35:145. A component of that field is limiting the exposure of workers to dust and gas and other dangers. 35:145. Dr. Rose described one harm in the workplace as "respirable silica"—essentially crushed sand. 36:152. "It is too small to be seen," the expert explained, "[b]ut scientific studies have shown in jackhammering, sandblasting, foundry work and so forth, that the respirable particles are there, they'll get in the lungs." 36:152-53. The particles are so tiny they are "smaller than a human hair," and can be carried in the air. 36:153.

The danger of these tiny particles is immense. Dr. Cameron Huxford also testified for Mr. Holmes at trial. 36:237. Dr. Huxford is a medical doctor and a pulmonologist, which means he focuses his area of practice on the lungs. 36:238-40. He explained that silicosis was "a lung disease caused by breathing in the dust from silica." 36:242-43. Even though silica is an extremely common element, the tiny respirable "particles are sharp and they get in the lungs and they cut and they -- the lung is a very fragile organ, and so those sand particles, they cut and then those cut forms scars, and then over time if you're exposed to enough of it, it can scar your lungs to where you're -- you're sick from it and you have shortness of breath and cough and various things like that." 36:243.

Basically, the disease prevents people who have it from being able to breathe. 36:243-44. There is no cure for silicosis. 36:244. It can also raise the risk of lung cancer. 36:244.

Dr. Huxford also explained that silicosis was a dose-response disease. 36:248. "What that means is the more you're exposed to it, the higher the likelihood you'll get the disease." 36:248. Each dose contributes to a higher risk of developing silicosis. 36:248.

Functioning Respirators Can Guard Against Silica Exposure

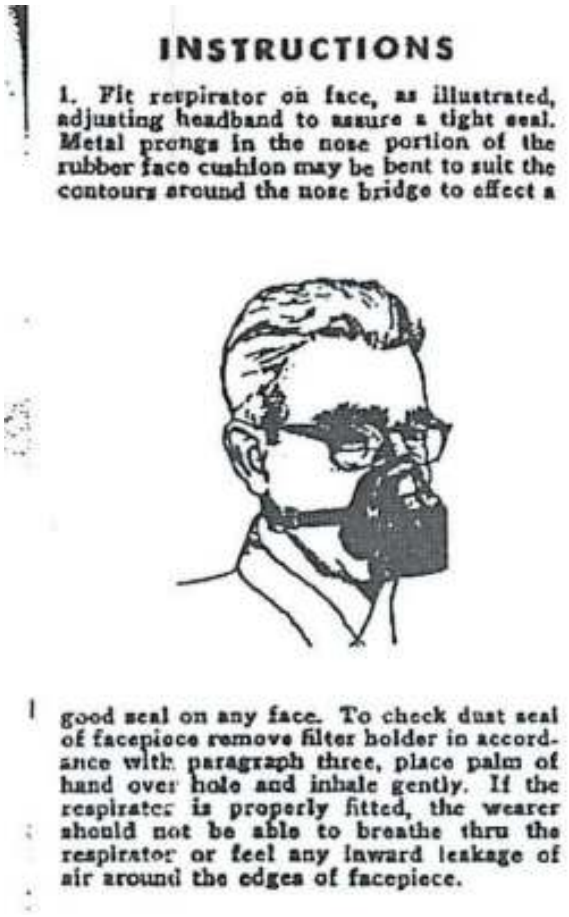
Because of tremendous danger of silica, Dr. Rose explained that there were devices meant to protect against it—respirators. 35:149. The expert had ample experience with respirators. 35:149. Dr. Rose described respirators as "the last line of defense" for a worker in a hazardous workplace. 35:149. A respirator is "like a bulletproof vest on a police officer." 35:149. The point of the device is to protect the worker from the harm.

One respirator was called the Dustfoe 66, and it was made by a company named Mine Safety Appliances. R.E. 18, P-34 at 2.[1] For purposes of trial, the manufacturer designated as its corporate representative Charles Seibel. R.E. 17, P-34 at 1. Mr. Seibel is MSA's manager of

[1] The Exhibits to the trial are located in a separately bound volume.

product safety. R.E. 17, P-34 at 1. He testified that MSA made the Dustfoe 66 from 1955 until 1998. R.E. 18, P-34 at 2. Mr. Seibel agreed that the Dustfoe 66 used a similar design throughout its 33 year life. R.E. 18, P-34 at 2.

From a set of instructions from the early days of the product, it looked like this:



INSTRUCTIONS

1. Fit respirator on face, as illustrated, adjusting headband to assure a tight seal. Metal prongs in the nose portion of the rubber face cushion may be bent to suit the contours around the nose bridge to effect a

good seal on any face. To check dust seal of facepiece remove filter holder in accordance with paragraph three, place palm of hand over hole and inhale gently. If the respirator is properly fitted, the wearer should not be able to breathe thru the respirator or feel any inward leakage of air around the edges of facepiece.

R.E. 39 (excerpted); D-11. The Dustfoe 66 only came in one size. R.E. 18, P-34 at 2.

MSA's corporate representative testified that the Dustfoe 66 was designed to shield against the deadly respirable silica. R.E. 21, P-34 at 5. Mr. Seibel also agreed with Dr. Rose that respiratory protection is the last line of defense against airborne hazards like silica. R.E. 19, P-34 at 3.

MSA Admits Its Dustfoe 66 Does Not Protect Against Silica

During his testimony, MSA's corporate representative made several admissions. Even though the Dustfoe 66 was supposed to guard against silica, the company representative admitted there were foreseeable situations where the respirator could expose the user to respirable silica. R.E. 26, P-34 at 10. Because despite the fact that it was supposed to be a "bulletproof vest" for the lungs, the Dustfoe 66 was actually designed to leak air. R.E. 18-19, P-34 at 2-3. Therefore via its inherent design, the respirator could allow in dangerous particles.

MSA also admitted it knew about studies that the filter in the Dustfoe 66 would degrade in high humidity. R.E. 29, P-34 at 13. Despite knowing that humidity could damage the filter, the company continued to sell it in Mississippi, and it did not provide a "field notice" or recall notice to users. R.E. 29-30; P-34 at 13-14. Indeed, MSA's own research department had drafted and circulated a memorandum in 1951—four years before the Dustfoe 66 went onto the marketplace—that moisture could "result in a lowered filtering efficiency." R.E. 42-43, P-5.

Despite this admitted flaw in the respirator, MSA never provided users with any instructions at all on how to deal with the weakened respirator in high humidity. R.E. 30, P-34 at 14. The company also never put a warning on the respirator to inform users to be careful with it in high humidity. 37:365.

The company even conceded that just *storing* the filter in Mississippi might damage its effectiveness, testifying that "there would be some degradation I would think." R.E. 31, P-34 at 15. MSA admitted there would be no way to visually "check" if the filter was damaged by humidity. R.E. 32, 34, P-34 at 16, 18. Nor was there any way a user of the Dustfoe 66 would know if the filter was weakened. R.E. 34, P-34 at 18. Even despite MSA's knowledge that the respirator leaked, and that its filters would degrade in humidity, in the 33 years it was on the market MSA never issued a "field notice" or recall for the Dustfoe 66. R.E. 22-23, P-34 at 6-7.

The Five Fatal Flaws of the Dustfoe 66

In addition to MSA's admission that the Dustfoe 66 leaked and could fail under humid conditions, expert testimony at the trial set out a series of other potentially deadly hazards. Industrial hygienist Darrell Bevis also testified for Mr. Holmes. 36:174. Mr. Bevis served as the manager of respiratory protection at Los Alamos National Laboratory. 36:177. The expert had worked in respiratory protection his whole career, with 52 years in the field. 36:179. This included developing programs for the federal government regarding respiratory health. 36:180.

Mr. Bevis testified that the Dustfoe 66 was "definitely" defective. 36:189. He identified five separate flaws in the design of the respirator. 36:189. First, that it was easy to damage, because the mask could be bent or distorted, causing the user to inhale tainted air. 36:190. Mr. Bevis testified that MSA was aware of this defect. 36:190. Second, the Dustfoe 66 had a faulty exhalation valve, of which MSA was also aware. 36:191-92.

Third, as admitted by MSA's own corporate representative Charles Seibel, the filter on the Dustfoe 66 could fail due to humidity. 36:193. MSA was aware of this before the respirator was even put into production, as its own internal documents from 1951 showed. 36:193, 196, R.E. 42-43, P-5.

Fourth, the inherent design of the Dustfoe 66 prevented the user from doing a face seal check to make sure the respirator was actually on their face correctly and therefore protecting them from tainted air. 36:196-98. Fifth, the suspension straps on the respirator prevented it from sitting on the face in a safe manner. 36:199-200.

Based on the five flaws, Mr. Bevis testified that the respirator was defectively designed. 36:203. He also noted that he took the Dustfoe 66 out of use at Los Alamos and would not allow people to use it there. 36:202. Mr. Bevis believed that MSA should have informed users to not

use the respirator around respirable silica, instead of actually recommending that the Dustfoe 66 could be used in that situation. 36:203.

Mr. Bevis also explained that in 1963 he was part of a publication called the Respiratory Protective Devices Manual. 36:219, R.E. 44, P-6. This "bible" of respirators was also co-authored by a MSA representative. 36:219-20, R.E. 47-48, P-6 at vii, ix. The bible showed that in 1963 the entire industry was aware that "high humidity . . . may dissipate the electrostatic charge from filter fibers." R.E. 49, P-6 at 39, 36:221-22.

By 1973, or 18 years after the Dustfoe 66 went on the market, one person in the field of respiratory health noted that while the respirator was "popular," in his opinion "it has a history of major design and approval testing problems." R.E. 50, P-16, R.E. 20. A subsequent letter described that "The Dustfoe 66 is decidedly defective in several respects . . . ." R.E. 51, P-18, R.E. 23-24. A vast amount of testimony and documents at trial showed that the Dustfoe 66 respirator could fail to protect users.

Huey Holmes Used the Dustfoe 66 in Silica-Rich Environments

Against this backdrop of deadly silica and faulty devices comes Huey Holmes. At the time of trial, Mr. Holmes was 76. 35:142. A resident of Jefferson County his whole life, Mr. Holmes only went through the first or second grade of school before leaving so he could work and support his family. 35:113-14. He worked for T.P. Groome Construction from 1958 until 1964. 35:115.

As part of the job working for the construction company, Mr. Holmes would tear up old highway culverts in preparation to put in new ones. 35:116. The crew would use jackhammers to demolish the huge concrete structures, which could be forty to sixty feet wide. 35:116. The men would work five to six days a week, and sometimes even light fires at night so they could see to keep working. 35:121.

In ripping the old concrete to pieces, heavy amounts of dust would be kicked up. 35:116. When finished with work, Mr. Holmes said there would be "Dust all over you." 35:119. Mr. Holmes testified that "it'd be so dusty you couldn't see in there." 35:117. He couldn't actually see to jackhammer—"All you do," he told the jury," was "hold on to it. Then when you feel [the concrete] break, then you put it down." 35:117. It would take weeks to break down the massive concrete structures. 35:117.

At trial, Mr. Holmes specifically identified the Dustfoe 66 as the respirator he wore while doing the jackhammer work. 35:117. The filter would "clog up kind of regular" when he wore it, and Mr. Holmes recalled how hot and humid it would be in the summertime when doing construction work. 35:118.

Mr. Holmes recalled that the Dustfoe 66 leaked terribly. 35:120. "Dust come inside of it, and come inside of you, too, because sometimes when I spit, it'd be black. Spit up black spit." 35:120.

Huey Holmes Has Silicosis As a Result of Exposure to Respirable Silica

Mr. Holmes testified that he had shortness of breath, that it was hard to breathe, and sometimes spits up black phlegm. 35:122. His trouble breathing began five or six years before trial. 35:122. At trial, Dr. Huxford testified that Huey Holmes had the deadly disease of silicosis. 36:246.

According to the lung specialist, there are four components of a silicosis diagnosis. 36:244. The four pieces were exposure to respirable silica, often shown through work history; latency, meaning that there was a sufficient time period to develop the disease; x-rays showing the damage; and last, that other causes were ruled out. 36:244-46. Dr. Huxford testified that Mr. Holmes met all four parts for a silicosis diagnosis. 36:246.

As to the amount of exposure, Dr. Huxford added that he was "for sure" Mr. Holmes had inhaled enough respirable silica to develop silicosis. 36:248. Mr. Holmes "said he did it [jackhammering] multiple hours a day, several days a week for several weeks, so there was a continuous amount of exposure." 36:248. Since every dose of respirable silica increases the risk of the disease, every minute and hour of exposure raised Mr. Holmes' risk of developing silicosis. 36:248.

In addition to the breathing problems Mr. Holmes testified he was experiencing, Dr. Huxford had tested the level of oxygen in his blood, and noticed that it dropped dramatically when the former construction worker exerted himself even in the most minute fashion, like walking down a hallway. 36:251. Mr. Holmes' breathing troubles were already so dire the physician noted he was "pretty close" to being a candidate to having an oxygen tank at his house. 36:257.

Dr. Huxford was not alone in testifying that Mr. Holmes had endured immense levels of exposure to respirable silica. Dr. Rose also calculated to a reasonable degree of scientific certainty that Mr. Holmes was overexposed to respirable silica while jackhammering, since the concrete being destroyed contained sand. 36:151-52, 158. Indeed, Dr. Rose testified that some studies showed that Mr. Holmes could have encountered respirable silica in an amount thirty times what was safe. 36:154. The expert further stated that the Dustfoe 66 respirator did not protect Mr. Holmes from the silica he encountered while jackhammering. 36:153. The respirator "would nowhere come close" to adequate protection—"It would be overwhelmed completely." 36:154-55. In similar scenarios as suffered by Mr. Holmes, the expert observed that "the exposures were extremely high." 36:159-60.

Likewise, former Los Alamos respiratory protection specialist Darrell Bevis testified that Mr. Holmes was "definitely" exposed to respirable silica while jackhammering. 36:200-01.

While the amount of silica would vary upon the conditions, the expert had tested exposure while jackhammering and there is "virtually always silica." 36:200-01.

At Trial, MSA's Experts Agree The Dustfoe 66 Could Fail

MSA put on a variety of experts to testify in its defense—all of whom repeatedly agreed that the Dustfoe 66 was riddled with problems, and that Huey Holmes was repeatedly exposed to high levels of respirable silica. MSA's corporate representative Charles Seibel admitted in his testimony the company knew the filter in the Dustfoe 66 could fail in high humidity. R.E. 29, P-34 at 13.

Additionally, MSA called Dr. James Johnson as an industrial hygienist. 37:328, 330. While he argued for the company that the Dustfoe 66 was not defective, he admitted its filter was only useful temporarily, from "days to weeks." 37:342, 352. Dr. Johnson also conceded on cross-examination that the filter storage for the Dustfoe 66 was not humidity proof, which could result in damage to the filter. 37:364. He also admitted there were no warnings that the respirator may be weakened in hot or humid locales like Mississippi. 37:365.

MSA's Experts Testify That Huey Holmes Suffered High Exposure to Respirable Silica

MSA also brought to trial another industrial hygienist, one Donald Marano. 37:374-75. When asked about Mr. Holmes' jackhammering conditions, Mr. Marano conceded that "Certainly it [the concrete] contained silica." 37:388. He also testified that sand is a "major component" of concrete. 37:389. He did not dispute Mr. Holmes' characterization of his former job as very dusty. 37:392. Mr. Marano reiterated that the danger of silicosis rises with each dose, since each dose can contribute to the damage to the body. 37:397.

Mr. Marano also agreed that Mr. Holmes suffered from "multiple doses" of respirable silica, although he protested that it was only during a six-year period. 37:397. Yet ultimately

MSA's expert Mr. Marano conceded "If he [Huey Holmes] has silicosis, he would have had enough exposure to silica to cause the disease, yes." 37:399.

MSA called a physician named Dr. Demondes Haynes to say that Mr. Holmes was not suffering from silicosis. 37:406,416. Yet Dr. Haynes admitted that Dr. Huxford—who testified for Mr. Holmes that he was suffering from the deadly disease—was a good doctor, and that doctors could disagree. 37:425. Dr. Haynes also testified that silicosis could be deadly, and that it was associated with cancer and an increased risk of lung cancer. 37:426.

Dr. Haynes admitted that he was not there to discuss whether Mr. Holmes was exposed to respirable silica. 37:426. Critically, when asked if he thought six year of exposure to respirable silica was enough to develop silicosis, Dr. Haynes testified, "That's enough to be at risk for the disease." 37:426.

Relevant Procedural History

Huey Holmes was provided a diagnosis that he had symptoms "consistent with silicosis" on December 16, 2002. 16:2321. At that point, the 3 year statute of limitations began to run on his claim. Ten days later, on December 26, 2002, he was named as a plaintiff in a mass action filed in Adams County. 16:2322, 2371. The company Mine Safety Appliances was named as a defendant. 16:2345, 2379.

At the time Mr. Holmes' case was filed, Mississippi courts allowed mass joinder of plaintiffs, but several years into the litigation the Supreme Court modified how such cases would proceed. In 2006, the Court ruled that the mass cases should be dismissed and refiled to proceed without misjoined parties, as a corrective device to obtain proper venue and single plaintiff cases. *Canadian Nat./Illinois Cent. R. Co. v. Smith*, 926 So.2d 839, 845 (Miss. 2006). The court held that "[t]his procedure should result in no prejudice to the severed plaintiffs . . . ." *Id*.

Pursuant to the ruling in *Canadian National*, the Adams County trial court dismissed Mr.

Holmes' 2002 case. R.E. 01, 14, 20:2997-3000, 21:3001-12. The order noted that the case was being dismissed "without prejudice," and that Mr. Holmes was one of the "Plaintiffs to be dismissed pursuant to *Canadian National*." R.E. 01,14, 20:2997, 21:3010. The dismissal without prejudice was on April 7, 2006. R.E. 01, 20:2997.

After that point, Mr. Holmes refiled his lawsuit in Jefferson County on May 16, 2007. 1:27. In its Answer to the Complaint, MSA claimed a whopping sixty-seven defenses to Mr. Holmes' claims. 3:301-22. Among the constellation of arguments was that MSA "pleads the applicable statutes of limitation as to Plaintiffs' cause(s) of action . . . ." 3:305. The company's Answer was docketed on September 14, 2007. 3:301.

Almost three years later, on August 10, 2010, MSA first pursued its statute of limitations argument by joining in the arguments made by another defendant. 17:2477. It took MSA 1,061 days after claiming the statute of limitations applied to seek a ruling on that procedural point. During that time period, MSA substantially litigated the case. Indeed, long after the Answer was filed, MSA filed a Motion to Compel complaining that it had not received responses to its stunningly voluminous discovery. 14:1977. MSA had demanded Mr. Holmes answer 58 Interrogatories, many of which had multiple sub-parts. 14:1998. MSA had also sought Requests for Production on 72 separate points. 14:2005.

Mr. Holmes proceeded to trial against MSA, and the jury ultimately found in his favor that the Dustfoe 66 failed to protect him. 33:4824-25. The jury held MSA liable for 90% of Mr. Holmes' damages, and his former employer, T.P. Groome Construction, 10% liable. 33:4824. The judgment against MSA was for $787,500. 33:4824.

MSA appealed.

Summary of the Argument

There are two core reasons this case must be affirmed in all respects.

First, the statute of limitations has never run in this case. MSA waived its affirmative defense of statute of limitations by waiting almost three years to argue it, and in the meantime engaging in heavy litigation against Mr. Holmes. Under Supreme Court precedent, this means the company waived its defense. Furthermore, Mr. Holmes' filed suit just days after his diagnosis of silicosis. Under likewise settled precedent, that timely filing—although later dismissed without prejudice—served to toll the statute of limitations, preserving Mr. Holmes' claims.

Second, the jury's verdict was reasonable, and based upon ample evidence presented at trial. Mr. Holmes had ample expert testimony at trial that he was exposed to respirable silica while jackhammering, and that his heavy exposure resulted in silicosis. There was also ample testimony that the Dustfoe 66 respirator made by MSA would fail to protect a user from silica because it was defectively designed. The company also admitted at trial it never warned users that the filter in the Dustfoe 66 could fail in high humidity situations, like Mississippi. The jury's verdict was reasonable based upon the vast information presented at trial through experts, testimony, and MSA's own admissions that Huey Holmes had suffered harm by using MSA's respirator.

Standards of Review

There are two standards of review in this case. For the majority of the issues in this appeal, there is an extremely deferential standard, as a jury resolved the facts and other contested issues. "The standard of review for jury verdicts in this state is well established." *Starcher v. Byrne*, 687 So.2d 737, 739 (Miss. 1997). "Once the jury has returned a verdict in a civil case, we are not at liberty to direct that judgment be entered contrary to that verdict short of a conclusion on our part that, given the evidence as a whole, taken in the light most favorable to the verdict,

no reasonable, hypothetical juror could have found as the jury found." *Id*. "Our standard for review is *de novo* in passing on questions of law." *Id*.

"It is a fundamental principle of law that a jury verdict will not be disturbed except in the most extreme of situations. Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Robinson Property Group, Ltd. Partnership v. McCalman*, 51 So.3d 946, 948 (Miss. 2011) (internal quotations and citations omitted).

For the statute of limitations issue, the review is *de novo*. "Questions of law, such as statutory interpretation, are subject to a *de novo* standard of review." *Tellus Operating Group, LLC v. Texas Petroleum Inv. Co*., 105 So.3d 274, 278 (Miss. 2012).

Argument

I. The Statute of Limitations Has Not Run on Mr. Holmes' Claims.

For two core reasons the statute of limitations was not breached in this case.

First, the affirmative defense was completely waived by Mine Safety Appliances, as it waited 1,061 days to seek summary judgment after claiming the statute of limitations applied. During that time the company substantially participated in litigation. Under clear Mississippi precedent, this results in a complete waiver of the affirmative defense.

Second, even if the defense of statute of limitations was not waived, clear Mississippi Supreme Court precedent holds that the limitations period was paused during the pendency of Mr. Holmes' first case. The Supreme Court has made utterly clear that while a person has a lawsuit pending, the statute of limitations is not running.

A. MSA Waived the Defense of Statute of Limitations.

Because MSA waited almost three years before pursuing its defense that the statute of limitations applied, and because the company engaged in significant litigation prior to asserting the defense, it was waived under Mississippi law.

In Mississippi, "[a] defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver." *MS Credit Center, Inc. v. Horton*, 926 So.2d 167, 180 (Miss. 2006).[2] The Court has enumerated three factors to be considered: first, where "there is a substantial and unreasonable delay in pursuing the right;" second, when that delay is "coupled with active participation in the litigation process;" and last, "prejudice to the party resisting [the motion to dismiss or arbitrate] is a factor to be considered." *Id*. at 180, 180 n. 7; *see also Russell v. Performance Toyota, Inc*., 826 So.2d 719, 724 (Miss. 2002) (internal citations and quotations omitted) ("to establish a waiver, the objector . . . must establish "that a party seeking arbitration substantially invokes the judicial process to the detriment or prejudice of the other party").

When these three factors are present, the Court "will not hesitate to find a waiver" of the issue. *Horton*, 926 So.2d at 180; *see also East Miss. State Hosp. v. Adams*, 947 So.2d 887, 891 (Miss. 2007) (finding waiver when a defendant "participated fully in discovery, filed and opposed various motions," and that participation took place "for over two years").

There is a compelling reason such a result is warranted: the threat of waiver conserves judicial resources and the resources of the litigating parties. To do otherwise would be to encourage needless and duplicative litigation that stretched over years—benefitting no one but

[2] While *Horton* involved the waiver of an arbitration contract, the Court was careful to add that its "holding today is not limited to assertion of the right to compel arbitration," but extended to other affirmative defenses as well. *Horton*, 926 So.2d at 180.

the parties defending the litigation and those paid to defend it.

In *Horton*, the defendants failed to pursue a right to arbitration for more than eight months while actively participating in the litigation process. *Id*. They provided no explanation for this delay. *Id*. The *Horton* Court found waiver, and that "[a] defendant's failure to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver." *Id*. at 180.

The Supreme Court further defined "pursuing the defense" to mean more than merely asserting it in a pleading, but actively bringing the defense to the court's attention by motion and requesting a hearing. *Id*. at 181 n.9. The Court declined to say how long constituted an unacceptable delay, but noted that an eight month unjustified delay coupled with active litigation would constitute waiver as a matter of law. *Id*.

1. MSA Unreasonably Delayed Pursuing its Affirmative Defense.

Because MSA unreasonably delayed their invocation of the defense of statute of limitation, waiver has attached.

In *Horton*, the Court made clear that even an 8-month delay coupled with litigation would result in waiver "*as a matter of law*." *Id*. at 181(emphasis added). In this case, it is uncontested that MSA invoked the defense of statute of limitations in an Answer on September 14, 2007. Yet they did not seek summary judgment based on their argument that the statute had run until August 10, 2010. Therefore MSA waited 1,061 days, or 2 years, 10 months, and 27 days before pursuing the defense they had asserted in their Answer. All told, this is over 34 months—over *four times* what the Supreme Court in *Horton* declared would constitute waiver "as a matter of law."

Like the defendant in *Horton* who attempted to untimely raise an affirmative defense, this substantial and unreasonable delay has resulted in a waiver of the defense of statute of limitations.

2. MSA Actively Participated in the Litigation Process.

Because MSA heavily pursued litigation for over two years, they waived the defense of statute of limitations.

The extension of the "Waiver Through Inaction" rule of *Horton* to include the affirmative defense of statute of limitations has been upheld several times in the years since *Horton* was decided, under different circumstances. In *Horton*, waiver was found when the "defendants proceeded to substantially engage the litigation process by consenting to a scheduling order, engaging in written discovery, and conducting [the plaintiff's] deposition." *Id*. at 180. In its close cousin, *East Mississippi State Hospital v. Adams*, waiver was found when a defendant "participated fully in discovery, filed and opposed various motions," and that participation took place "for over two years." 947 So.2d at 891. In a similar case at the state Court of Appeals, waiver was found where a party "engaged in written discovery and in settlement negotiations and noticed [the plaintiff's] deposition" over a two-year period. *Whitten v. Whitten*, 956 So.2d 1093, 1099 (Miss. Ct. App. 2007).

During its almost three years of delay, MSA actively engaged in the litigation process, most notably through seeking the trial court to compel discovery from Mr. Holmes. This included a request that the Plaintiff answer a mammoth **58** interrogatories and a request for production for a veritable library of **72** different types of documents. This is despite an express prohibition in the Rules of Civil Procedure against such invasive discovery. MRAP 33(a) provides that Interrogatories may be propounded "not to exceed thirty in number . . . ."

The questions ranged from the disturbingly personal (such as number 14, asking whether Mr. Holmes had ever used heroin or PCP) to the bureaucratically oppressive (number 28 asks for a signed release of 11 different documents, which were attached, spanning Social Security Records to psychotherapy notes to federal tax records and military records) to the mundane (number 52 asks for information regarding expert testimony). *See* 14:1989, 1992, 1997.

The Requests for Production ask for all imaginable data, from information about every place Mr. Holmes had ever worked, including the names of all of the 76 year old's previous co-workers over his entire work history (numbers 9 and 62) to a copy of all state and federal tax returns for the past 10 years (number 44). *See* 14:1999, 2004, 2003.

This is an open and obvious engagement in the litigation process by MSA. Over almost three years, the company demanded responses to 58 interrogatories and 72 types of documents. These actions served only one purpose: to obtain discovery from Mr. Holmes so MSA could prepare its case for trial, with the trial the ultimate goal of the litigation process.

Based on the line of cases in Mississippi since the decision in *Horton*, it is clear that that the statute of limitations defense was definitively waived as a matter of law by MSA's active engagement in the litigation process.

3. MSA's Untimely Pursuit of Waived Defenses Resulted in Prejudice.

The untimely invocation of the statute of limitations defense has resulted in prejudice to Mr. Holmes. The underlying case was filed in 2002, and 12 years later Mr. Holmes is still pursuing his claims. At the time of trial in 2013, Mr. Holmes was 76, and Dr. Huxford testified that he was nearly at the point where he would be a candidate to have an oxygen tank in his home to help him breathe. MSA's continued delay in this case with an increasingly ill party can only result in greater damage to Mr. Holmes, or even his passing. Such a delay is inherently prejudicial, and so a finding of waiver is proper.

Because MSA failed to timely raise and pursue the defense of Statute of Limitations while furthering the litigation process of this case, as a matter of law the defense has been waived.

B. The Statute of Limitations Did Not Run Because it Was Paused.

Because the statute of limitations in this case was paused by Mr. Holmes' prior suit, which resulted in a dismissal without prejudice, the trial court was correct in denying summary judgment.

It is bedrock law that a lawsuit stops a statute of limitations. As our Supreme Court has repeatedly held, "filing a complaint tolls the statute of limitations and permits a plaintiff to refile his or her case if this case is dismissed without prejudice and time remains on the statute of limitations." *Knight v. Knight*, 85 So.3d 832, 836 (Miss. 2012).

There are a multitude of cases establishing the bedrock rule that "the filing of a complaint tolls the statute of limitations" to preexisting claims. *Owens v. Mai*, 891 So.2d 220, 223 (Miss. 2005); *see also Holmes v. Coast Transit Authority*, 815 So.2d 1183, 1185 (Miss. 2002) ("Filing a complaint tolls the applicable statute of limitations" for the purpose of service, "but if the plaintiff fails to serve process . . . the statute of limitations automatically begins to run again when that period expires").

The key and most important decision on the subject that directly controls this case is the Court's ruling in the *Canadian National* joinder case, which directly impacted this matter and resulted in the dismissal without prejudice of Mr. Holmes' initial lawsuit. In that case, the Supreme Court ruled that "[t]he statute of limitations is tolled while a misjoined plaintiff's case is pending." *Canadian Nat./Illinois Cent. R. Co. v. Smith*, 926 So.2d 839, 845 (Miss. 2006) (citing to G. Gaggini, *Laches and Limitations*, in 5 Ency. of Miss. Law § 44:22 (J. Jackson & M. Miller eds. 2008)); *see also Deposit Guar. Nat. Bank v. Roberts*, 483 So.2d 348, 352 (Miss.

1986) ("when the suit to renew was dismissed," the "statute commenced to run again"); *Marshall v. Kansas City Southern Railways Co*., 7 So.3d 210, 213-14 (Miss. 2009).

In other words, in a case like this one, the filing of a lawsuit *immediately* stops a statute of limitation from running. When and if a lawsuit is dismissed without prejudice to correct a joinder error, the statute begins to run again. As the Supreme Court set out in *Canadian National*, "This procedure should result in no prejudice to the severed plaintiffs." 926 So. 2d at 845.

The procedural history of this case is uncontested. Mr. Holmes was diagnosed with silicosis on December 16, 2002. At that point his 3 year statute of limitations to file suit began. Just ten days ticked off the clock until he filed suit as part of a mass action in Adams County on December 26, 2002.

After *Canadian National*, Mr. Holmes' original case was dismissed without prejudice—indeed, the dismissal order specifically noted he was one of the "Plaintiffs to be dismissed pursuant to *Canadian National*." The dismissal without prejudice was on April 7, 2006.

At that point the statute of limitation immediately began to run again. Yet recall that only 10 days of it had run before filing suit, and under the clear language of *Canadian National* the statute was on pause during the prior suit. Mr. Holmes re-filed his claims against MSA on May 16, 2007, one year, one month, and 9 days after the *Canadian National* dismissal without prejudice.

All told, only one year, one month, and 19 days had run on Mr. Holmes' statute of limitations to file suit against MSA.[3] The statute had simply not run on his claims under the well-settled law of the Supreme Court.

[3] To be extremely precise, the 3 year statute of limitations is composed of 1,095 days. 10 days ticked off the clock between the silicosis diagnosis and the filing of the first suit. After its dismissal without

One unreported federal case has correctly understood and applied this procedure. Judge Pepper, citing *Owens*, examined a case where a woman had filed a claim, dismissed it, and then filed another. *Gray v. Mariner Health Cent., Inc*., 2006 WL 2632211, *2, 2006 U.S. Dist. LEXIS 65725 (N.D.Miss. Sept. 3, 2006). The defendant nursing home in the case plead that the statute of limitations had run, and filed a motion for summary judgment. *Id*. The Court acknowledged "that 'the filing of a complaint tolls the statute of limitations,'" and noted that "the clock stopped" when a plaintiff filed her first complaint. *Id*. "It resumed ticking when the court dismissed the first action without prejudice," and ran again until the filing of the second suit. *Id*. As a result of the tolling period, the federal district court denied the motion for summary judgment. *Id*.

The present case is a prime example of a circumstance that will "suspend" a statute of limitations. Mr. Holmes' first suit in Adams County paused the running of the statute of limitations. When it was dismissed without prejudice pursuant to *Canadian National*, it began running again.

Accordingly, because the case was paused by the prior pending suit under *Canadian National*, the statute of limitations did not run. The Court should strictly apply the language of *Canadian National* and rule that Mr. Holmes' suit was timely filed.

---

prejudice, 404 more days ticked off the clock, for a total of 414 passed days. Therefore Mr. Holmes had a minimum of 681 days remaining when he filed suit on May 16, 2007.

C. The Cases Cited by MSA Do Not Apply.

Because *Canadian National* utterly controls this case, and makes clear that the statute of limitations was paused in this case while the first suit was pending, the Court must determine that Mr. Holmes' suit was timely filed.

The Supreme Court has made completely clear that "[t]he statute of limitations is tolled while a misjoined plaintiff's case is pending." *Canadian National*, 926 So.2d at 845. MSA utterly ignores this clear and basic language. Instead, it turns to two sources to develop an argument that the statute has somehow run—a series of creaky pre-Rules cases from 1856 and 1926 and recent jurisprudence on wrongful death cases. *See* Appellant's Brief, at 14-16. None of these cases apply. The former are wholly inapplicable in the face of the modern ruling in *Canadian National*, which directly impacts this case, controls its outcome, and is why Mr. Holmes' prior case was dismissed.

Nor does this Court's more nuanced rulings in recent wrongful death cases impact the result here. All three were actions brought by family members of decedents where the Court held that statute of limitations based on derivative claims had run. *See Empire Abrasive Equip. Corp. v. Morgan*, 87 So. 3d 455, 464 (Miss. 2012); *Kinsey v. Pangborn Corp.*, 78 So. 3d 301, 308 (Miss. 2011); *Clark Sand Co., Inc. v. Kelly*, 60 So. 3d 149, 162 (Miss. 2011).

Yet in each of those cases, the reason the statute of limitations was breached was because the original party to the original suit had passed away, and later survivors were bringing untimely claims. *See Morgan*, 87 So.3d at 464. This is because "subsequently-filed, wrongful-death actions are 'separate and distinct' from previously filed, personal-injury actions." *Id*. (in a passage citing to both *Clark Sand* and *Kinsey*); *see also Clark Sand*, 60 So. 3d at 162 ("the 'survival-type' claims included in Kelley's action are time-barred"); *Kinsey*, 78 So. 3d at 308 (the "new and independent" wrongful death action was untimely filed).

Unlike that trio of cases, here Mr. Holmes has not passed away. He is still the original party in interest, and nobody is not claiming a derivative wrongful death or survival-type claim. There is no new party and no new claims. It is the same person with the same claims. *Canadian National* utterly controls the result in this case, and as a result the Court must rule that the statute of limitations has not run.

II. The Jury's Verdict Was Reasonable and Based on Ample Evidence.

Because the verdict by the factfinder in this case was reasonable, and based on ample evidence and testimony from the trial, it must be upheld.

"Once the jury has returned a verdict in a civil case, we are not at liberty to direct that judgment be entered contrary to that verdict short of a conclusion on our part that, given the evidence as a whole, taken in the light most favorable to the verdict, no reasonable, hypothetical juror could have found as the jury found." *Starcher*, 687 So.2d at 739.

In this case, MSA seeks to have this Court act as a super-jury, and re-weigh the extensive testimony and documents reviewed by the factfinders of Jefferson County. That is not the role of our appellate courts, as "It is a fundamental principle of law that a jury verdict will not be disturbed except in the most extreme of situations." *Robinson*, 51 So.3d at 948. This case is not one of those "extreme situations."

A. The Jury Heard Ample Proof That Mr. Holmes Was Exposed to Respirable Silica in Deadly Levels.

The jury factfinders heard extensive, credible proof that silica harmed Mr. Holmes—including important concessions from MSA's own experts. Causation is a question of fact for a jury to determine, and in this case the jury found that the Dustfoe 66's failure to safeguard Mr. Holmes caused his harm. As a result, the verdict must be upheld.

"We have repeatedly held that the jury is responsible for judging the credibility of witnesses and the weight that should be attached to their testimony," the Mississippi Supreme

Court held, in a case involving apportionment in a one-car accident where the driver may have been under the influence. *Jackson v. Daley*, 739 So.2d 1031, 1039 (Miss. 1999). "Indeed, a jury verdict will stand unless the verdict illustrates bias, passion, and prejudice." *Id*.

In this case, the jury was presented a wealth of credible evidence that Mr. Holmes was harmed by silica as a result of using the Dustfoe 66 while jackhammering. Importantly, the facts of this case are completely uncontested. Mr. Holmes testified he used a jackhammer to destroy huge concrete culverts from 1958 to 1964. He described the work during those six years as tremendously dusty. He reported not being able to see due to the thick clouds of dust, and spitting up dust and black gunk after working. Mr. Holmes testified that he used the Dustfoe 66 the entirety of this time, and there was not a shred of testimony that he did not use the respirator.

At trial, Dr. Huxford testified that this was "for sure" enough exposure to develop silicosis. The medical expert stressed that each dose of respirable silica increases the risk of the disease, so each second Mr. Holmes was in that dusty environment, it raised his risk of developing silicosis. Dr. Rose also noted that the environment was loaded with toxic respirable silica—and that some studies indicated it could have been thirty times over what was safe for a person to endure. Corroborating those two experts was another, Mr. Bevis of Los Alamos National Laboratory, who testified that Mr. Holmes was "definitely" exposed to respirable silica while jackhammering.

Despite MSA's arguments on appeal, at trial their own witnesses agreed that jackhammering concrete could result in toxic levels of silica exposure. MSA's industrial hygienist Donald Marano testified there was silica in the concrete, and that it was a major component of the concrete. When asked if he believed that there was silica in the concrete Mr. Holmes crushed with the jackhammer, MSA's expert testified "Certainly it [the concrete] contained silica." MSA's industrial hygienist was also certain that Mr. Holmes had been

repeatedly dosed with respirable silica over the six year period of jackhammering culverts. In addition, MSA's medical expert, Dr. Demondes Haynes, also testified he believed the six years of exposure Mr. Holmes endured while jackhammering, taken as true, was "enough to be at risk for the disease."

Therefore the jury did not just hear Mr. Holmes and his witnesses say that jackhammering concrete could release a deadly amount of respirable silica, they also heard Mine Safety Appliances *admit* to this scenario. Further, there was not one witness who disputed Mr. Holmes' testimony that he used a jackhammer, that he destroyed concrete with the jackhammer, and that he breathed in copious amounts of dust for the years he performed that work. "Undisputed testimony, which is not so unreasonable as to be unbelievable, must be taken as truth." *Reeves Royalty Co., Ltd. v. ANB Pump Truck Service*, 513 So.2d 595, 599 (Miss. 1987). For "in the absence of contradictory evidence, courts are bound to accept the only credible evidence offered in a proceeding and apply the correct law." *MSU v. PETA*, 992 So.2d 595, 607 (Miss. 2008).

This has been the rule in Mississippi for over a century. "Juries cannot arbitrarily and capriciously disregard testimony of witnesses, not only unimpeached in any of the usual modes known to the law, but supported by all the circumstances in the case." *Mobile, J. & K.C.R. Co. v. Jackson*, 92 Miss. 517, 46 So. 142, 143 (Miss. 1908). For "we must accept the testimony of [a witness] as true," when such a witness "is not contradicted either by direct evidence or by circumstances." *Stewart v. Coleman & Co*., 120 Miss. 28, 81 So. 653, 655 (Miss. 1919).

As the Court of Appeals has summarized it, "[u]ncontradicted or undisputed evidence should ordinarily be taken as true by the triers of facts." *American Nat. Ins. Co. v. Hogue*, 749 So.2d 1254, 1263 (Miss. Ct. App. 2000) (internal quotation and citation omitted). This is simply because "evidence which is not contradicted by positive testimony or circumstances, and is not

inherently improbable, incredible or unreasonable cannot be arbitrarily or capriciously discredited, disregarded, or rejected even though the witness is a party interested; and unless shown to be untrustworthy, is to be taken as conclusive, and binding on the triers of fact." *Id*. (internal quotation and citation omitted).

The jury heard vast evidence from both sides that Mr. Holmes was exposed to dangerous levels of respirable silica while at work. The testimony of a witness is for a jury to weigh. *See McClain v. State*, 625 So.2d 774, 778 (Miss. 1993) ("Matters regarding the weight and credibility of the evidence are to be resolved by the jury"). If there is a conflict or inconsistency in testimony, the Court has made clear that the jury is who determines the facts, since "[t]he jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses and determining whose testimony should be believed." *Id*. at 781; *see also McFarland v. Entergy Mississippi, Inc*., 919 So.2d 894, 908 (Miss. 2005) (Randolph, J., concurring in part and dissenting in part) ("It is clearly the jury's prerogative, indeed duty, to weigh all witness testimony, and to accept or reject all or part, in order to reach its verdict").

When there is a dispute in testimony or allegations, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the appellate courts] do not intend to invade the province and prerogative of the jury." *Hales v. State*, 933 So.2d 962, 968 (Miss. 2006) (internal quotations and citations omitted).

After days of trial and hours of testimony, the jury returned a verdict that found that Mr. Holmes was indeed exposed to deadly levels of respirable silica and that MSA's respirator failed to protect him. This is exactly why we empanel juries, and this finding was based on substantial evidence. The verdict must be upheld.

B. The Jury Had Ample Evidence of MSA's Failure to Warn.

Because MSA repeatedly conceded that it failed to warn consumers and users of the Dustfoe 66 that its filter could fail in high humidity, and expert testimony detailed how this failure hurt Mr. Holmes, the verdict must be upheld.

The law in Mississippi is that a jury is to weigh expert testimony, and "judging the expert's testimony and weight to be accorded thereto is the province of the jury." *Fleming v. Floyd*, 969 So.2d 868, 878 (Miss. 2007) (internal quotations and citations omitted). For "the jury may consider the expert testimony for what they feel that it is worth, and may discard it entirely." *Id*. (internal quotations, citations, and alterations omitted).

"This Court, of course, is not the jury . . . The weight and credibility of the witnesses, primarily experts, was for the jury, who were free to accept or reject whatever part of their testimony they chose." *Id*. (internal quotations and citations omitted); *Robinson*, 51 So.3d at 950 n.5 (internal quotations and citations omitted) ("The credibility of a witness is a question of fact for the jury to resolve").

In *Robinson*, the Court ruled that case was fully fleshed out at trial—and that it would not second guess the jury. *Id*. at 950. "This issue presents a classic battle of qualified experts—a battle that was decided by the jury, which believed and accepted the testimony of the plaintiffs' expert . . . We will not usurp the jury's role, especially in light of the substantial circumstantial evidence" contained within the case. *Id*.

In this case, the jury heard admissions by Charles Seibel, MSA's corporate representative, that the company knew the Dustfoe 66 had several flaws. Mr. Seibel admitted that the respirator was designed to leak, which could expose the user to deadly toxins. Mr. Seibel also admitted that even before the Dustfoe 66 went into production, MSA knew that the

filter it used could lose its effectiveness in high humidity environments—in other words, in places like Mississippi.

Despite knowing that humidity could damage the filter, Mr. Seibel admitted the company continued to sell it in Mississippi, and never provided a "field notice" or recall notice to users. Indeed, MSA's own research department had drafted and circulated a memorandum in 1951—four years before the Dustfoe 66 went onto the marketplace—that moisture could "result in a lowered filtering efficiency." MSA's corporate representative even conceded that just *storing* the filter in a State as humid and hot as Mississippi might damage how effective it was, admitting that "there would be some degradation I would think." MSA never provided users or buyers any specific instructions on how to deal with the weakened respirator in high humidity situations.

Additionally, in 1963 a publication called the Respiratory Protective Devices Manual was co-authored by a MSA representative. It showed that by 1963 the entire industry was aware that "high humidity . . . may dissipate the electrostatic charge from filter fibers." Nonetheless, MSA never warned users of this risk it knew about since at least 1951.

There was also evidence through the testimony of Darrell Bevis that MSA had failed to warn users of other known risks in addition to the humidity failures. Mr. Bevis noted that the Dustfoe 66 was easy to bend, which could cause it to leak, and that MSA knew of this defect. MSA was also aware of a faulty exhalation valve.

One of MSA's own experts also admitted that the company knew of the humidity failure of the filter but never issued a warning. Dr. James Johnson was called by the company as an industrial hygienist, and admitted there were no warnings that the Dustfoe 66 could fail in hot or humid locales like Mississippi.

In light of these heavy concessions by MSA itself, and the expert testimony presented at trial, the jury's verdict was based on ample and credible evidence. It must be upheld.

C. Causation and Proximate Cause is a Question of Fact for a Jury.

The jury in this case determined that there was causation, and because causation is a question of fact for the jury to resolve, the verdict must be upheld.

Mr. Holmes asserted multiple claims against MSA, including that they failed to warn him of known dangers, such as the filter's conceded weakness in high humidity environments. He also asserted claims for design defect and that the product did not work as intended. It is the role of the jury to determine if these failures by MSA caused his harm. "First, causation is question of fact to be determined by the jury." *Qualcomm Inc. v. American Wireless License Group, LLC*, 980 So.2d 261, 274 (Miss. 2007); *Thompson v. Dung Thi Hoang Nguyen*, 86 So.3d 232, 235 (Miss. 2012) ("Because causation is a question of fact for the jury, we affirm").

In *Thompson*, a defendant "admitted liability, and the jury's only task was to determine what, if any, damage was proximately caused by [her] negligence." *Id*. at 240. The jury only gave the plaintiff "four percent of [her] requested damages—and the exact amount of her physical therapy bills, $ 9,131," and rejected the claim for the other 96% of damages. *Id*. at 238. At the end of the day, while the verdict may have been harsh, the Supreme Court ruled that "[a] plaintiff has the burden of proof, and must offer evidence that persuades the jury . . . The jury is not required to believe or trust the evidence submitted by the plaintiff, and is free to accept all, part, or none of the plaintiff's evidence." *Id*. at 236-37.

There is much in this case that mirrors *Thompson*, where the jury determined that only 4% of the plaintiff's damages were caused by the defendant. In this case, the jury determined that Mr. Holmes' injuries were caused by MSA's failures. This was based on evidence presented by both sides that the Dustfoe 66 had a filter that would weaken in humid or high moisture

environments. This was also based on ample expert testimony that the respirator simply did not work as intended. Industrial hygienist Darrell Bevis testified for Mr. Holmes that the respirator had five inherent flaws—from its humidity-susceptible filter, to a suspension harness that would not keep the mask in place, the fact that the respirator could be distorted and leak air, to a faulty exhalation valve and inability to perform a face seal check.

The jury also heard testimony from MSA's corporate representative Charles Seibel that the company knew that its respirator filter could fail in high humidity environments like Mississippi, and yet never once provided a warning to users. Indeed, in the entire 33 year life of the Dustfoe 66 on the market, the company never once provided a "field notice" or warning to users.

Additionally, the jury limited its factual finding, specifically determining that MSA was only responsible for 90% of Mr. Holmes' injuries. This was the province of the factfinding body, and it cannot be disturbed on appeal.

The rule of deference to the factfinder is well-established. In the key pronouncement on respecting the finder of fact, the Supreme Court reviewed a case where a party contested that the signature on a deed was forged. *Culbreath v. Johnson*, 427 So.2d 705, 706 (Miss. 1983). The case was fraught with divisive and contradictory testimony—all of which was weighed by the chancellor as factfinder, who determined that the signature was forged. *Id*. at 707

"Appellate courts regularly admonish themselves to give substantial deference to findings of fact made by the trier of fact," the Court stated, reckoning that "[a]s a matter of common sense as well as common law, the fact finder surely must have the benefit of viewing the manner and demeanor of the witnesses." *Id*. at 708. The deference is not just a matter of judicial economy, but also judicial candor, as "[t]he trial court necessarily has an *infinitely*

superior vantage point when compared with that of this Court, which has only a cold record to read." *Id*. (emphasis added).

The Court continued in *Culbreath* to determine why the decision could not be overruled:

> The trial judge saw these witnesses testify. Not only did he have the benefit of their words, he alone among the judiciary observed their manner and demeanor. He was there on the scene. He smelled the smoke of battle. He sensed the interpersonal dynamics between the lawyers and the witnesses and himself. These are indispensable.

Id. While not perfect, "[a]llowing the . . . findings of fact a substantial measure of finality or presumptive validity is the least imperfect way we have of peaceably settling disputes such as this." *Id*. To choose any other route risked committing error "infinitely greater" than the chance the chancellor was wrong. *Id*. The risk was not worth it, as "[t]he one time in a hundred when we may be right and the trier of fact wrong cannot justify our disturbing the established practice regarding our scope of review." *Id*.

While that case involved a chancellor as factfinder, the Court "ha[s] applied *Culbreath's* reasoning in circuit court cases involving juries." *Patterson v. Liberty Associates, L.P*., 910 So.2d 1014, 1020 (Miss. 2004). This is "well established law which requires us to give great deference to the jury's verdict and the trial judge's refusal via post-trial motions to set aside the jury verdict or award a new trial." *Id*.

The jury in Jefferson County Circuit Court smelled the smoke of battle and heard the clash of sword on shield. It did not find absolutely for Mr. Holmes, but instead found a determination that MSA was 90% liable for the injuries suffered by Mr. Holmes. As the Court has repeatedly stated, causation is a question of fact for the jury, and there was ample evidence that the factfinder could have found that MSA caused 90% of Mr. Holmes' injuries. The verdict must be upheld.

D. There Was Ample Evidence of Design Defect.

Because the jury heard witness after witness testify that the Dustfoe 66 had design defects, and also that MSA knew of the design flaws, there was sufficient evidence to rest its verdict upon. The verdict must be affirmed.

Mississippi's product liability "statute requires the danger presented by a product's design be foreseeable by the manufacturer/seller." *Williams v. Bennett*, 921 So. 2d 1269, 1274 (Miss. 2006). In this case, industrial hygienist Darrell Bevis testified that the Dustfoe 66 was riddled with design defects—and that these defects were known by MSA.

One key design flaw was actually conceded by MSA corporate representative Charles Seibel. Mr. Seibel admitted that the company knew the type of filter used in respirators could falter in high humidity, and knew this as early as 1951. The Dustfoe 66 was not put onto the market for several more years, yet it carried this same flawed filter. MSA never warned. Further, the way the filters were stored could also lead them to be weakened even before they were ever used. Dr. James Johnson also testified for MSA and also admitted there were no warnings that the Dustfoe 66 could fail in hot or humid locales like Mississippi.

Mr. Bevis also detailed four other key design flaws, such as the fact that the mask could leak due to being bent. MSA's own corporate representative agreed, and admitted the mask could leak. Mr. Bevis also testified to a reasonable degree of scientific certainty that the Dustfoe 66 had a faulty exhalation valve, and the inherent design of the Dustfoe 66 prevented the user from doing a face seal check to make sure the respirator was actually on their face correctly and therefore protecting them from tainted air. Last, the suspension straps on the respirator prevented it from sitting on the face in a safe manner.

The jury heard this credible testimony and based its verdict upon it. This was in their province to do and there is nothing in the record which warrants overturning this finding, as it was based upon ample and credible testimony.

MSA also argues that it might not be liable if Mr. Holmes did not use the respirator in the way it should have been, arguing that he should carry some of the blame for his own lung disease. The jury heard this argument and rejected it.[4] This is essentially an apportionment argument. The jury did indeed apportion some of Mr. Holmes do another defendant, at the rate of 10% for his former employer. This was within its prerogative and cannot be overturned.

Conclusion

For two core reasons this case must be affirmed in all respects.

First, the statute of limitations never ran in this case. The statute of limitations was tolled during the pendency of Mr. Holmes' first lawsuit.

Second, the jury's verdict was reasonable, and based upon ample evidence presented at trial.

As a result, the verdict should be AFFIRMED.

Respectfully submitted, this the 11th day of August, 2014.

s/ David Neil McCarty
David Neil McCarty
Miss. Bar No. 101620

---

[4] The jury was given the following instructions:

> You are instructed that the defendant is not liable for all injuries that flow from the defendant's wrongful conduct, if any, *but only for those that could have been reasonably foreseen and anticipated.*
>
> The injuries suffered by the plaintiff must result from a chain of a natural and unbroken sickness from the defendant's wrongful conduct, if any. However, the defendant is not liable for damages which are remote or collateral or which result from a remote, improbable or extraordinary occurrence, although such occurrence is within the range of possibilities flowing from the defendant's wrongful conduct, if any.

38:457-58 (emphasis added).

DAVID NEIL MCCARTY LAW FIRM, PLLC
416 East Amite Street
Jackson, Miss. 39201
T: 601.874.0721
E: dnmlaw@gmail.com
W: www.McCartyAppeals.com

OF COUNSEL:

R. Allen Smith, Jr.
THE SMITH LAW FIRM, PLLC
661 Towne Center Blvd., Suite B
Ridgeland, Miss. 39157

Timothy W. Porter
Patrick C. Malouf
John T. Givens
PORTER & MALOUF, P.A.
P.O. Box 12768
Jackson, Miss. 39236

CERTIFICATE OF SERVICE

I, David McCarty, certify that I have served a copy of the above and foregoing document to the following via filing with the MEC electronic filing system:

Ms. Muriel Ellis, Clerk
MISSISSIPPI SUPREME COURT

Attorneys for Appellee

Charles R. Wilbanks, Jr., Matthew R. Dowd, Joseph Anthony Sclafani,
and G. Austin Stewart
BRUNINI, GRANTHAM, GROWER & HEWES, PLLC

And have further provided paper copies, without exhibits, via U.S. Mail to the following:

The Trial Court

Honorable Lamar Pickard
JEFFERSON COUNTY CIRCUIT COURT
P.O. Box 310
Hazlehurst, Miss. 39083

On August 11, 2014.

s/ David Neil McCarty
David Neil McCarty