

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

WOODROW W. BROWN, ET AL,

Plaintiffs,

v.

CIVIL ACTION NO. 81-2239

MONSANTO COMPANY, a
Delaware corporation,

Defendant.

CHESTER A. JEFFERS,

Plaintiff,

v.

DOCKET NO. 225

MONSANTO COMPANY, a
Delaware corporation,

Defendant.

MEMORANDUM OF LAW IN SUPPORT
OF THE MOTION OF DEFENDANT, MONSANTO COMPANY,
FOR SUMMARY JUDGMENT BASED ON STATUTES OF LIMITATIONS

Charles M. Love, III, Esq.
Roger W. Tompkins, II, Esq.
Phyllis M. Potterfield, Esq.
BOWLES, McDAVID, GRAFF & LOVE
P. O. Box 1386
Charleston, West Virginia 25325-1386
(304)347-1100

TABLE OF CONTENTS

	<u>Pages</u>
Statement of the Case	1-2
Statement of the Facts	2-7
Discussion	7-24
1. Standards for Granting Motion for Summary Judgment	7-9
11. The Claim of Plaintiff Chester A. Jeffers Is Barred by the Statute of Limitations	9-24
Conclusion	24

TABLE OF AUTHORITIES

CASES

Allen v. United States, 527 F.Supp. 476 (D. Utah 1981)

Armour & Co. v. Mitchell, 262 F.2d 580 (6th Cir. 1958)

Brown v. Tennessee Consolidated Coal Co., 19 Tenn.App. 123, 83 S.W.2d 568 (1935)

Cartwright v. Chrysler Corp., 255 La. 598, 232 S2.2d 235 (1970)

Clutter v. Johns-Manville Sales Corporation, 646 F.2d 1151 (6th Cir. 1981)

Dalrymple v. Brunswick Coca-Cola Bottling Co., 51 Ga. App. 754, 181 S.E. 597 (1935)

Dalton v. Dow Chemical Co., 280 Minn. 147, 158 N.W.2d 580 (1968)

Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)

Field v. Gazette Publishing Co., 187 Ark. 253, 59 S.W.2d 19 (1933)

First National Bank v. Maryland Casualty Co., 354 F.Supp. 189 (S.D. W.Va. 1973)

Fusco v. Johns-Manville Products Corporation, 643 F.2d 1181 (5th Cir. 1981)

Garbowski v. Turner & Newall, 516 F.Supp. 114 (E.D. Pa. 1980), aff'd DaMato v. Turner & Newall, Ltd., 651 F.2d 908 (3rd Cir. 1981)

Garrett v. Raytheon Co., 368 So.2d 516 (Ala. 1979)

Guaranty Trust Company of New York v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945)

Harig v. Johns-Manville Products Corp., 284 Md. 70, 394 A.2d 299 (1978)

Harrison v. Seltzer, ___ W.Va. ___, 268 S.E.2d 312 (1980)

Hughes v. Eureka Flint & Spar Co., 20 N.J. Misc. 314,
26 A.2d 567 (1939)

In Re Matter of Johns-Manville Asbestos Cases, 511 F.Supp.
1235 (N.D. Ill. 1981)

Karjala v. Johns-Manville Products Corp., 528 F.2d 135
(8th Cir. 1975)

Kipps v. Ewell, 538 F.2d 564 (4th Cir. 1976)

Lewis v. Coleman, 257 F.Supp. 38 (S.D. W.Va. 1966)

Louisville Trust Co. v. Johns-Manville Products Corp.,
580 S.W.2d 497 (Ky. 1979)

McDaniel v. Johns-Manville Sales Corp., 542 F.Supp.
716 (N.D. Ill. 1982)

Miller v. Beech Aircraft Corp., 204 Ka. 184, 460 P.2d
535 (1969)

Morgan v. Grace Hospital, Inc., 149 W.Va. 783, 144 S.E.2d
156 (1965)

Neubauer v. Owens-Corning Fiberglass Corp., 504 F.Supp. 1210
(E.D. Wis. 1981), remanded Newbauer v. Owens-Corning Fiberglass
Corp., 686 F.2d 370 (7th Cir. 1982)

Neubauer v. Owens-Corning Fiberglass Corp., 686 F.2d 570
(7th Cir. 1982)

Nolan v. Johns-Manville Asbestos, 85 Ill.2d 161, 421 N.E.2d
364 (1981)

Pauley v. Combustion Engineering, Inc., 528 F.Supp. 759
(S.D. W.Va. 1981)

Petrelli v. West-Virginia Pittsburgh Coal Company, 86 W.Va.
607, 104 S.E. 103 (1920)

Phoenix Savings & Loan, Inc. v. Aetna Casualty and Surety
Co., 381 F.2d 245 (4th Cir. 1967)

Prince v. Pittston Co., 63 F.R.D. 28 (S.D. W.Va. 1974)

Railing v. United Mine Workers of America, 429 F.2d 780
(4th Cir. 1970), vacated on other grounds 401 U.S. 486, 91 S.Ct. 991,
28 L.Ed.2d 171, (1971)

Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977)

Renner v. Asli, ____ W.Va. ____, 230 S.E.2d 240 (1981)

Ricciuti v. Voltare Tubes, Inc., 277 F.2d 809 (2d Cir. 1960)

Rowe v. Gatke Corp., 126 F.2d 61 (7th Cir.), cert. dismissed
317 U.S. 702, 63 S.Ct. 81, 97 L.Ed. 561 (1942)

Rypkema v. Bowers, 66 F.R.D. 564 (N.D. W.Va. 1974)

Schiele v. Hobart Corp., 284 Or. 483, 587 P.2d 1010 (1973)

Scott v. Rinehart & Dennis Co., 116 W.Va. 319, 180 S.E.
276 (1935)

Sharpe v. Seaboard Coastline Railway Co., 528 F.2d 546
(5th Cir. 1976)

Spickes v. Medtronic, Inc., 631 S.W.2d 5 (Ark. 1982)

Sword v. Fox, 317 F.Supp. 1055 (W.D. Va. 1970), rev'd on other
grounds, 446 F.2d 1091 (4th Cir.), cert. denied, 404 U.S. 994,
92 S.Ct. 534, 302 L.Ed.2d 547 (1971)

Taylor v. Cheasapeake & Ohio Railway, 518 F.2d 536 (4th Cir. 1975)

United States v. Ball, 326 F.2d 898 (4th Cir. 1964)

United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352,
62 L.Ed.2d 259 (1979)

Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1015, 93 L.Ed. 1282 (1949)

Velasquez v. Fiberboard Paper Products, 97 Cal.App. 851,
159 Cal. Rptr. 113 (1st Dist. 1979)

West v. Atlas Chemical Industries, Inc., 264 F.Supp. 697
(E.D. Mo. 1966)

White v. Boyle, 538 F.2d 1077 (4th Cir. 1976)

Williams v. Borden, Inc., 637 F.2d 731 (10th Cir. 1980)

Wilson v. Hartzman, 373 So.2d 204 (La. App.) cert. denied,
376 So.2d 961 (La. 1979)

Yarbrough v. Louisiana Cement Co., 370 So.2d 602 (La. App.),
cert. denied, 373 So.2d 531 (La. 1979)

STATUTES

Federal Rules of Civil Procedure, Rule 12(b)(6)

Federal Rules of Civil Procedure, Rule 56

28 U.S.C. §1332

West Virginia Code §55-2-12(b)

OTHERS

McGovern, Toxic Substances Litigation in the Fourth Circuit, 16 U. Rich. L. Rev. 247 (1932)

6 Moore's Federal Practice ¶56.16 (2d Ed. 1982)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON

WOODROW W. BROWN, et al,

Plaintiffs,

v.

CIVIL ACTION NO. 81-2239

MONSANTO COMPANY, a
Delaware corporation,

Defendant.

CHESTER A. JEFFERS,

Plaintiff,

v.

Docket No. 225

MONSANTO COMPANY, a
Delaware corporation,

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF THE MOTION
OF DEFENDANT, MONSANTO COMPANY, FOR SUMMARY
JUDGMENT BASED UPON THE STATUTE OF LIMITATIONS

STATEMENT OF THE CASE

By complaint filed on July 8, 1981, and amended on November 16, 1982, plaintiff Chester A. Jeffers (hereinafter referred to as "plaintiff"), a resident of the State of Ohio, instituted this action against Monsanto Company (hereinafter referred to as "Monsanto"), a Delaware corporation registered to do business and doing business in Nitro, Putnam County, West Virginia. Jurisdiction is based upon 28 U.S.C. §1332, which extends the authority of federal courts to controversies between citizens of different states when the amount in dispute exceeds \$10,000.00.

Plaintiff, a former Monsanto employee, seeks damages for personal injuries allegedly occasioned by acts or omissions committed by Monsanto during the years 1936 through 1957. The personal injuries alleged are "severe and permanent injuries to [plaintiff's] body, resulting in disability and disfigurement...pain and mental anguish." In lieu of an answer, Monsanto moved to dismiss the complaint on the grounds, inter alia, that plaintiff's claim is barred by the statute of limitations. Recognizing that it would be necessary to conduct discovery prior to briefing the statute of limitations issue, Monsanto requested that this Court treat the motion to dismiss as a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, as provided in Federal Rules of Civil Procedure, Rule 12(b)(6).

The parties hereto have engaged, and continue to engage, in discovery by way of interrogatories, requests for production of documents, and otherwise. Based upon the pleadings, answers to interrogatories, documents produced in lieu of answers to interrogatories, and West Virginia Workmen's Compensation records, Monsanto now moves for summary judgment in its favor. This memorandum of law is submitted on behalf of Monsanto in support of its motion.

STATEMENT OF FACTS

Plaintiff worked for Monsanto at its Nitro facilities for twenty (20) years, from February 9, 1937 until December 6, 1957 when he voluntarily resigned [Complaint ¶3; Plaintiff's Answers to Defendant's Interrogatories to Plaintiff Limited to Facts and Issues Related to Defendant's Statute of Limitations Defense (hereinafter referred to as "S/L Interrogatories"), Answers 1, 2; Monsanto's Personnel Records Relating to C. A. Jeffers Produced by Monsanto to Plaintiff [Attached in part as Exhibit E to the Motion of Defendant, Monsanto Company, for Summary Judgment Based on the Statute of Limitations) (hereinafter "Personnel Records/Exhibit E")].

At the time of his resignation in 1957, plaintiff was employed by Monsanto as a pipefitter [Personnel Records/Exhibit E]. Following his resignation, and until 1981, plaintiff continued to work in that occupation on a contractual basis through the hiring halls of Pipefitter's Local 624, Charleston, West Virginia, and Pipefitter's Local 189, Columbus, Ohio [Amended Answers to Defendant's First Set of Interrogatories to Plaintiffs (hereinafter referred to as "Amended Answers") Answer 8(a) through 8(d)]. In 1981, at approximately sixty-four (64) years of age, plaintiff ceased his work as a pipefitter and is apparently now retired [Amended Answers, Answers 5, 8(a) through 8(d)].

During the twenty (20) years he was employed by Monsanto, all prior to 1958, plaintiff filed various claims pursuant to the West Virginia Workman's Compensation Law. Significantly, on February 21, 1950, plaintiff filed a claim for occupational disease benefits believing his physical problems to be caused by exposure to chemicals while working at Monsanto's Nitro plant. References in the discussion which follows, unless otherwise indicated, are to workmen's compensation records relating to this claim, copies of which are attached to the Motion of Defendant, Monsanto Company, for Summary Judgment Based on the Statute of Limitations attached as Exhibits A, B and C.

Plaintiff's application filed with the State Compensation Commissioner described his complaint as "chemical rash on face." On May 3, 1950, the matter was referred by the Commissioner to the Occupational Disease Medical Board, which on June 15, 1950, reported:

"(a) The claimant has suffered from a dermatitis of the face and body resulting from an unexpected chemical reaction; (b) this condition was contracted on or about July 31, 1949; (c) this dermatitis is peculiar to the industrial process in which the claimant was employed; (d) the dermatitis was incurred in the course of and did result from his regular employment; (e) the dermatitis was not disabling to the claimant."

The Medical Board expressed its opinion that the plaintiff was suffering from an occupational disease. On July 6, 1950, the Commissioner affirmed the Medical Board's findings, ordered that all proper medical bills be paid, but concluded that "in as much as there was no lost time in excess of seven (7) days, there will be no payments made on a total temporary disability basis."

Following this ruling, plaintiff, along with other Monsanto employees complaining of symptoms similar to those expressed by plaintiff, continued to seek permanent partial disability benefits. In connection therewith, plaintiff was examined by at least nine physicians who submitted reports to the State Compensation Commissioner and/or testified at a hearing before a trial examiner. On February 27, 1958, the Workman's Compensation Appeal Board affirmed an earlier ruling by the Commissioner denying an award of permanent partial disability. The physicians' reports and testimony, as well as testimony by plaintiff himself regarding his asserted occupational disease, however, are instructive when considering the statute of limitations issue presently before this Court.

Following an industrial accident at the Nitro plant in 1949, plaintiff along with other Monsanto employees complained of various physical problems. In response to these complaints, plaintiff was treated by Dr. M. L. Bonar, a Charleston dermatologist. On May 18, 1950, Dr. Bonar reported to the Workman's Compensation Fund that he had examined plaintiff on March 22, 1950, and thereafter; that plaintiff "had on trunk and buttocks an itching pustular folliculitis with considerable miliaria present"; and that the diagnosis was "an industrial dermatitis of the chloracne group: EARLY type"(Emphasis added). Similarly, the Complete Medical Report submitted by the Occupational Disease Medical Board on June 15, 1950, stated the opinion of the Board that "claimant has suffered from an occupational disease diagnosed as chemical dermatitis of the face, trunk and buttocks resulting from an unexpected chemical reaction."

Later that year plaintiff complained of "secretion in the eyes together with burning and redness." He was referred to Dr. C. F.

Breisacher, who reported to the State Compensation Commissioner on October 4, 1950, that an examination of plaintiff, revealed "a mild chronic conjunctivitis and meibomitis." Dr. Breisacher specifically noted that this was "similar to the condition of several other workmen at the same plant, who were involved in the same explosion."

On October 9, 1953, plaintiff was examined by a special medical examining board, consisting of two qualified internists and a qualified dermatologist, chosen by the Commissioner, from a list submitted at the request of the attorneys then representing plaintiff. This special examining board reported as follows:

"The patient states he works as a pipefitter for Monsanto Chemical Company for seventeen years and that he worked in the explosion area for approximately three weeks, beginning about two weeks after the explosion. Following his transfer from the explosion area, he broke out all over his body....he further states that since the beginning of the skin eruption he has been bothered with vague aches, burning sensations, and weakness of his arms and legs and associated headaches.... He states his legs draw at night. He has been able to continue his work in spite of these complaints and can perform his work until interferred only occasionally by episodes in which he states his breath is 'cut off'.

The complainant states that along with his other complaints, he is bothered with considerable nervousness, startled reactions and loss of libido to a degree precluding (sic) sexual intercourse to twice weekly...."

The members of the special medical examining board were cross-examined by plaintiff's attorney at a hearing held on April 15, 1954; their testimony at that hearing confirmed the nature of plaintiff's asserted symptoms as set forth in their report [Transcript April 15, 1954 Hearing, pp. 22-63 (Exhibit B)].

Dr. Harry A. Carney, at the request of the State Compensation Commissioner, examined plaintiff in the summer of 1953 and treated plaintiff for some years thereafter. On March 6, 1954, he reported to the Commissioner that a March 2, 1954 examination revealed "numerous papulopustular chloracne type cysts about the arms, chest and back, moderately severe." Dr. Carney also noted that plaintiff complained of "weakness, severe pains of the arms and legs and nervousness."

On April 15, 1955, a hearing was held before a trial examiner, relative to plaintiff's claim for permanent partial disability. Dr. R. O. Holloran, stating that he had examined plaintiff on April 2, 1955, testified as follows:

"This thirty-eight year old man came in contact with 245-T in 1950.... The first thing he noticed was itching and burning all over body, breaking out on the back and legs; not too much eruption came on face; then legs began to ache, ached like toothache from the heels on up; feet began to get weak; began to have headaches, which he still has. Did not have any dizzy spells, but his eyes blur. He gets weak spells from it, very nervous and can't sleep.... He takes nervous spells at times and feels like his nerves are gripping him. His sexual ability is greatly impaired.... Knee joints and ankle joints crack and pop going up and down stairs; gets winded easily.... good bit of soreness across upper part of abdomen in past year, seems to be getting worse; takes spells he would like to lie down from extreme exhaustion; has paresthesia in the calves of the legs; states he sits down after the evening meal and doesn't feel like doing anything. He states he has trouble getting legs comfortable after going to bed, cold sweats pop out on him when he gets nervous spells; he has feeling of ants crawling in his skin; can't sit still, is restless, has to keep moving. He complains of shooting pains around his heart."

[Transcript, April 15, 1955 Hearing, pp. 5-7 (Exhibit C)]. Plaintiff confirmed these symptoms and complaints during his testimony at that same hearing [Transcript, April 15, 1955 Hearing, pp. 20-39 (Exhibit C)].

Thereafter, on or about July 25, 1955, plaintiff was examined by Dr. R.H. Nestmann. In his report, Dr. Nestmann listed plaintiff's chief complaints as follows: 1) headache, back of head and top of head for two weeks; 2) stomach seems like it is a little weak for two weeks; 3) shortness of breath for one year; 4) ankles pop and crack; 5) eye trouble due to dermatitis; 6) still has trouble with the dermatitis; 7) admits that he is nervous; 8) legs ache a lot; heels and calves of legs to knees; 9) has a lot of earaches; 10) soreness in lower abdomen. He further reported complaints from the plaintiff regarding constipation, hemorrhoids and "urine seems strong" [Monsanto's Employee Medical Files Relating to C. A. Jeffers (Attached in part as Exhibit D to the Motion of Defendant, Monsanto Company, for Summary Judgment Based on the Statute of Limitations) (hereinafter "Medical Files/Exhibit D")].

Other physical examination reports not related to plaintiff's claim for a permanent partial disability rating establish that he claimed the existence of various physical problems, some of which he believed resulted from his work at Monsanto and others which did not, but which involved symptoms similar to those which were claimed to be work-related [Medical File/Exhibit D]. For example, plaintiff's pre-employment medical history and physical examination, dated April 10, 1937, reveals that he was suffering from pyorrhea, an infection of the gums; subsequent reexamination reports for the years 1939 through 1944 establish that this pre-employment condition continued until dentures were prescribed. Prior to 1957, when he resigned from Monsanto, plaintiff had complained, and filed workmen's compensation claims for most, if not all, of the physical symptoms for which he now brings this action.

DISCUSSION

I

STANDARDS FOR GRANTING MOTION FOR SUMMARY JUDGMENT

Rule 56 of the Federal Rules of Civil Procedure sets forth the standards which this Court must utilize in determining whether Monsanto's motion for summary judgment is proper and the burden which Monsanto must meet in order to show an entitlement to summary judgment:

"The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

Thus, the prerequisites for summary judgment are two-fold: (1) the absence of any genuine issue as to any material fact and (2) the legal entitlement of the moving party to judgment. The moving party has the initial burden of proving both of these prerequisites. Phoenix Savings and Loan, Inc. v. Aetna Casualty and Surety Co., 381 F.2d 245 (4th Cir. 1967); United States v. Ball, 326 F.2d 898 (4th Cir. 1964); Lewis v. Coleman, 257 F.Supp. 38 (S.D. W.Va. 1966); Prince v. Pittston Co., 63 F.R.D. 28 (S.D. W.Va. 1974).

When a motion for summary judgment is properly supported by the pleadings, affidavits, and other evidence, and the moving party has met its burden under Rule 56, the adverse party cannot rest upon general allegations in the pleadings, but has the burden of coming forward and presenting evidence which is admissible at trial. F. R. Civ. P. 56(e); Kipps v. Ewell, 538 F.2d 564 (4th Cir. 1976); Sword v. Fox, 317 F.Supp. 1055 (W.D. Va. 1970), rev'd on other grounds, 446 F.2d 1091 (4th Cir.), cert denied, 404 U.S. 994, 92 S.Ct. 534, 302 L.Ed.2d 547 (1971). The adverse party's response must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment should be entered against him. F.R. Civ. P. 56(e); Kipps v. Ewell, supra; White v. Boyle, 538 F.2d 1077, 1079 (4th Cir. 1976).

Although summary judgment is not proper when inquiry into facts is necessary to clarify the application of the law, Rypkema v. Bowers, 66 F.R.D. 564 (N.D. W.Va. 1974), the presence of an important, difficult, or

complicated question of law is not a bar to summary judgment where there is indeed no genuine issue of a material fact. Lewis v. Coleman, supra. As stated in Lewis v. Coleman, supra, "[r]esolution of the legal issues will not be rendered easier by going through the trial when there is no issue of fact to be tried." See also 6 Moore's Federal Procedure, ¶156.16 (2d Ed. 1982).

The complaint filed herein purports to set forth a cause of action based on alleged misconduct by Monsanto during the years 1936 to 1957. A review of the pleadings, affidavits and other evidence in the light most favorable to plaintiff, as required on motion for summary judgment, see Taylor v. Chesapeake & Ohio Railway, 518 F.2d 536 (4th Cir. 1975); First National Bank v. Maryland Casualty Co., 354 F. Supp. 189 (S.D. W.Va. 1973), clearly establishes that any right to bring an action relating to the asserted misconduct accrued more than two years prior to the filing of the instant case, that plaintiff's claim is thus barred by the statute of limitations, and that Monsanto is entitled to summary judgment.

II

THE CLAIM OF PLAINTIFF CHESTER A. JEFFERS IS BARRED BY THE STATUTE OF LIMITATIONS

A. The Statute of Limitations

Under the doctrine first espoused in Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 83 L.Ed. 1188 (1938), West Virginia law governs the statute of limitations to be applied in this diversity action. See Guaranty Trust Company of New York v. York, 326 U.S. 99, 65 S.Ct. 1464, 89 L.E.D. 2079 (1945); In Re Matter of Johns-Manville Asbestos Cases, 511 F.Supp. 1235 (N.D. Ill. 1981). Under applicable West Virginia law, an action for damages for personal injuries, such as that instituted here, must be brought within two years after the right to bring the action has accrued. Specifically, West Virginia Code §55-2-12(b) provides that every personal action for which no limitation is otherwise prescribed shall be brought "within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries." (Emphasis added).

Although it is clear that the limitations period to be applied in the instant case is two years, a determination of when that period commences is more difficult. Under West Virginia Code §55-2-12(b), the two-year period begins to run at the accrual of the right of action. Accrual, however, has been variously defined by courts, depending on the nature of the cause. See McGovern, Toxic Substances Litigation in the Fourth Circuit, 16 U. Rich. L. Rev. 247, 255 (1982). Specifically, in the context of actions arising from an occupational or industrial disease, there is a conflict between the accrual rule enunciated by the West Virginia Supreme Court of Appeals in Scott v. Rinehart & Dennis Co., 116 W.Va. 319, 180 S.E. 276 (1935), and the rule applied by the federal district court in Pauley v. Combustion Engineering, Inc., 528 F.Supp. 759 (S.D. W.Va. 1981), a diversity case involving application of West Virginia law.

To assist the court in resolving the conflict between the Scott and Pauley cases, and in determining when the statute of limitations began to run in this case, the four principal rules applied by various courts in latent industrial or occupational disease cases are set forth below. These include:

(1) the limitations period runs from the time of the negligent act or wrong, the rule as stated by the West Virginia Supreme Court in Scott v. Rinehart & Dennis Co., supra;

(2) the limitations period runs from the date of last exposure or termination of employment;

(3) the limitations period runs from the time when the injury might reasonably be discovered; and

(4) the limitations period runs from the time when the injury and its cause might reasonably be discovered, the rule applied in Pauley v. Combustion Engineering, Inc., supra.

Significantly, in the instant case, regardless of which theory of accrual may be applied by this Court, the conclusion reached will be the same; namely, that the two-year limitations period ran before this action was brought on July 8, 1981, and that plaintiff's claim for damages for personal injuries is thus barred.

B. Accrual of the Right of Action

(1) Limitations Period Runs from Time of Negligent or Wrongful Act: With reference to a cause of action to recover damages purportedly resulting from the development of a latent industrial or occupational disease, courts in some jurisdictions have held that the applicable statute of limitations begins to run from the time of the negligent or wrongful conduct on the part of the defendant. Field v. Gazette Publishing Co., 187 Ark. 253, 59 S.W.2d 19 (1933); Dalrymple v. Brunswick Coca-Cola Bottling Co., 51 Ga.App. 754, 181 S.E. 597 (1935); Brown v. Tennessee Consolidated Coal Co., 19 Tenn.App. 123, 83 S.W.2d 568 (1935). Cf. Sharpe v. Seaboard Coastline Railway Co., 528 F.2d 546 (5th Cir. 1976) (applying Georgia law). Viewing the substance of the action as the negligence or breach of duty, the courts adopting this rule have held that the statute of limitations attaches and begins to run from the time when the injury is first inflicted, and not from the time when the full extent of any damages sustained is ascertained. See Spickes v. Medtronic, Inc., 631 S.W.2d 5 (Ark. 1982) (products liability case); Field v. Gazette Publishing Co., supra.

The rule that the limitations period commences at the time of the negligent or wrongful act was applied by the West Virginia Supreme Court in Scott v. Rinehart & Dennis Co., supra, an action for damages brought by an employee who had contracted silicosis. Expressly refusing to adopt a rule that in occupational disease cases the limitations period is tolled until the injured party knows, or by the use of reasonable care can ascertain, that he has the disease, the West Virginia Supreme Court held that a right of action accrues "when the wrong is committed and in the absence of some act of concealment by the wrongdoer, the mere ignorance of the injured party of the actionable

wrong will not suspend the statute." 116 W.Va. at 320, 180 S.E. at 276. The court particularly noted that both the language of the limitations statute and the judicial construction thereof had remained constant since 1819:

"For more than a century, Legislatures, presumed to know the judicial construction of the statute, have ratified the construction by not amending the statute. That construction became in effect a component part of the statute.... Any change in statute as it has been judicially constructed is a legislative matter. It would be unwarranted for us at this late date to introduce by construction any innovation not authorized by the legislature."

116 W.Va. at 320, 180 S.E. at 276 (citations omitted). Since 1933, the West Virginia legislature has remained just as constant in not amending the statute, even in light of the Scott case, and the West Virginia Supreme Court of Appeals has never overruled that decision.

Statutes of limitation "represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that 'the right to be free of stale claims in time comes to prevail over the right to prosecute them.'" United States v. Kubrick, 444 U.S. 111, 117, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) (citations omitted). In adopting West Virginia Code §55-2-12(b), the legislature made a "legislative judgment" that in personal injury cases the limitations period begins to run when a right of action accrues. In Scott v. Rinehart & Dennis Co., supra, the West Virginia Supreme Court interpreted that statute to provide for the accrual of common law occupational disease actions at the time of the negligent or wrongful act rather than on the date of discovery. Since Scott has never been overruled, and the legislature has not amended the statutory language upon which that decision was based, this Court is required by Erie R. Co. v. Tompkins, supra, and Guaranty Trust Company of New York v. York, supra to apply that rule to the facts of the instant case.

In his amended complaint, plaintiff asserts that his cause of action arose from certain acts or omissions committed by Monsanto during the years 1937 through 1957, while plaintiff was employed at the Nitro facility. Based on this allegation, and viewing the facts in the light most favorable to plaintiff, this Court can only conclude that any misconduct by Monsanto resulting in injury or harm to plaintiff was committed at some time prior to December 6, 1957, the effective date of plaintiff's resignation from Monsanto, and that the misconduct possibly occurred as early as 1949 when plaintiff was involved in a chemical exposure following an industrial accident at the Nitro facility, an exposure which prompted him to file for work-related compensation or occupational disease benefits on February 21, 1950. Thus, under the rule of Scott v. Rinehart & Dennis Co., *supra*, that a right of action accrues at the time of the negligent or wrongful act, the two-year limitations period applicable to plaintiff's personal injury claim against Monsanto commenced as early as 1949 and not later than 1957, twenty-three to thirty-two years prior to July 8, 1981, the date this action was instituted. Accordingly, the claim is now barred and Monsanto is entitled to summary judgment.

(2) Limitations Period Runs From Date of Last Exposure or Termination of Employment: Courts in some jurisdictions, viewing the alleged negligent or wrongful conduct involved in occupational or industrial disease cases as continuing in nature, have held that the applicable statute of limitations begins to run from the date of last exposure to the substance causing the disease or from termination of employment. Garrett v. Raytheon Co., 368 So.2d 516 (Ala. 1979); Rowe v. Gatke Corp., 126 F.2d 61 (7th Cir.), *cert. dismissed*, 317 U.S. 702, 63 S.Ct. 81, 97 L.Ed. 561 (1942) (applying Indiana law); Wilson v. Hartzman, 373 So.2d 204 (La. App.), *cert. denied*, 376 So.2d 961 (La. 1979); Hughes v. Eureka Flint & Spar Co., 20 N.J. Misc. 314, 26 A.2d 567 (1939); Armour & Co. v. Mitchell, 262 F.2d 580 (6th Cir. 1958) (applying Tennessee law).

Courts which have adopted this rule have generally limited its application to situations where there is no coincidence of a wrongful act and manifestation of injury and when the precise time the wrongful act, if any,

occurred cannot be ascertained. See Garrett v. Raytheon Co., *supra*; Rowe v. Gatke Corp., *supra*. Since the tort is purported to be the continuous failure of the employer to provide the employee with a safe place to work, see Wilson v. Hartzman, *supra*, the date of last exposure or termination of employment, whichever is first to occur, is presumed to be the date of the wrongful act for purposes of the statute of limitations. See Neubauer v. Owens-Corning Fiberglass Corp., 504 F.Supp. 1210 (E.D. Wis. 1981), *remanded*, 686 F.2d 570 (7th Cir. 1982).

The West Virginia Supreme Court of Appeals has never expressly held that a right of action for a latent occupational disease accrues on the date of last exposure or termination of employment. Such a rule might arguably be implied from the holding in Scott v. Rinehart & Dennis Co., *supra*, in that the court ruled that the limitations period begins to run "when the wrong is committed." 116 W.Va. at 320, 180 S.E. at 276. Applying a similar rule that a right of action accrues at the time of the wrongful act, the Supreme Court of Alabama recognized a continuous tort theory in a radiation exposure case and held that the statute of limitations "began to run when plaintiff was last exposed to radiation and plaintiff's ignorance of the tort or injury, there being no fraudulent concealment, does not postpone the running of the statute until the tort or injury is discovered." Garrett v. Raytheon Co., Inc., 368 So.2d at 519; cf. Railing v. United Mine Workers of America, 429 F.2d 780 (4th Cir. 1970), *vacated on other grounds*, 401 U.S. 486, 91 S.Ct. 991, 28 L.Ed.2d 272 (1971), (where a federal court of appeals held that under the West Virginia statute of limitations "the cause of action accrues on the last date of continuing illegal conduct....") Arguably, such an approach preserves the purpose of the statute of limitations by balancing the interests of both parties: plaintiffs are afforded a reasonable time within which to ascertain, investigate and present any claims relating to exposure or employment, and defendants are put on notice within a fixed period of time of any claims which employees or former employees may assert against them.

In the instant case, plaintiff filed for workmen's compensation and occupational disease benefits on February 21, 1950, less than one year

after an industrial accident at the Nitro facility, asserting that his exposure to chemicals following that accident caused various physical problems, including most, if not all, of the symptoms of which he is complaining in this present action. Accordingly, since the time of the alleged wrongful act can be identified, application of a continuing tort theory is justified in this case. Nevertheless, even if such a theory is applied, the right of action accrued on the date of last exposure or termination of employment, and plaintiff's claim is now barred. Plaintiff's last exposure, as stated by him in answers to interrogatories, was on November 12, 1957 [S/L Interrogatories, Answer 2(b)] and the effective date of his termination of employment was December 8, 1957, more than twenty-three (23) years before this action was instituted. The statute of limitations had clearly run prior to the filing of the complaint on July 8, 1981. and Monsanto is entitled to summary judgment.

(3) Limitations Period Runs From the Time When the Injury Might Reasonably be Discovered: The statute of limitations applicable to a cause of action to recover damages for the development of a latent industrial or occupational disease also has been held to begin to run from the date of discovery or diagnosis of the disease, or from the date when the disease should have been discovered or diagnosed. Urie v. Thompson, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949) (Federal Employers' Liability Act); Ricciuti v. Voltare Tubes, Inc., 277 F.2d 809 (2d Cir. 1960) (applying Connecticut law); Louisville Trust Co. v. Johns-Manville Products Corp., 580 S.W.2d 497 (Ky. 1979); West v. Atlas Chemical Industries, Inc., 264 F.Supp. 697 (E.D. Mo. 1966) (applying Missouri law); Clutter v. Johns-Manville Sales Corporation, 646 F.2d 1151 (6th Cir. 1981) (applying Ohio law); Fusco v. Johns-Manville Products Corporation, 643 F.2d 1181 (5th Cir. 1981) (applying Texas law).

Significantly, either actual or constructive knowledge will commence the running of the limitations period under this so-called discovery rule. Thus, while discovery will certainly be found to have occurred when the disease has been diagnosed by a physician, see, e.g. Velasquez v. Fiberboard Paper Products, 97 Cal.App.3d 881, 159 Cal. Rptr. 113 (1st Dist.

1979), a positive medical diagnosis of the particular disease itself is not essential. See, e.g. Schiele v. Hobart Corp., 284 Or. 483, 587 P.2d 1010 (1978). ("A plaintiff whose condition has not yet been diagnosed by a physician can have or, in the exercise of reasonable care, could have access to information which requires or would require a reasonable person to conclude [he] is being seriously or permanently injured.") As stated in Yarbrough v. Louisiana Cement Co., 370 So.2d 602 (La. App.), cert. denied, 373 So.2d 531 (La. 1979), "[w]hatever is notice enough to excite attention...and call for inquiry is tantamount to knowledge or notice of everything to which inquiry may lead and such information or knowledge as ought to reasonably put the [plaintiff] on inquiry is sufficient to start the running of [the statute of limitations]." 370 So.2d at 603, quoting Cartwright v. Chrysler Corp., 255 La. 598, 232 So.2d 235, 287 (1970).

Although the West Virginia Supreme Court of Appeals has held that discovery is a controlling factor in the accrual of rights of action for malpractice and subterranean trespass, see Renner v. Asli, ___ W.Va. ___, 280 S.E.2d 240 (1981); Harrison v. Seltzer, ___ W.Va. ___, 268 S.E.2d 312 (1980); Morgan v. Grace Hospital, Inc., 149 W.Va.783, 144 S.E.2d 156 (1965); Petrelli v. West Virginia-Pittsburgh Coal Company, 86 W.Va.607, 104 S.E. 103 (1920), the court has refused to adopt a discovery rule in regard to the accrual of common law actions based on latent industrial or occupational diseases. Scott v. Rinehart & Dennis Co., *supra*. Under the doctrine of Erie R. Co. v. Tompkins, *supra*, and Guaranty Trust Company of New York v. York, *supra*, this Court must follow the West Virginia limitations rule, as set forth in the Scott decision, and refuse to apply a discovery rule in this diversity case.

If, notwithstanding the precedent and authority of Scott, a discovery-type rule is adopted for latent industrial or occupational disease cases, a review of relevant jurisprudence establishes that the fairest rule commences the running of the limitations period from either the time when the first symptoms begin to appear, even though the full extent of injury may be unknown, or alternatively, when the injury is first diagnosable, without

regard for any noticeable impairment to the plaintiff, whichever is first to occur. See Dalton v. Dow Chemical Co., 280 Minn. 147, 158 N.W.2d 580 (1968) (the statute of limitations began to run when the plaintiff had knowledge of an illness even though the ultimate damage was unknown or unpredictable); Yarbrough v. Louisiana Cement Co., supra (the period began to run when the plaintiff had knowledge of his pulmonary problems and the symptoms arising from exposure to noxious elements first appeared, even though the precise and full effects of the exposure may have been unknown); Allen v. United States, 527 F.Supp 476 (D.Utah 1981) (under the Federal Tort Claims Act the plaintiff need not know the full extent of his injury before the limitations period begins to run, but only sufficient knowledge to justify placing the burden of inquiry upon him); Valasquez v. Fiberboard Paper Products, supra (discovery of a latent or progressive disease may occur prior to observable or noticeable harm when a physician has diagnosed the disease, explained the findings and prognosis to the plaintiff and the plaintiff has reasonable knowledge that manifestations are likely to occur in the future). See also Neubauer v. Owens-Corning Fiberglass Corp., 586 F.2d 570 (7th Cir. 1982), applying the Wisconsin rule that "the limitations period begins when the injury was diagnosable without regard to any noticeable impairment to the plaintiff."

If a discovery rule is to be applied, providing that the right of action accrues when the first symptoms become manifest, or alternatively, when the disease becomes diagnosable fairly balances the responsibilities and risks between plaintiffs and defendants. In some cases there may be considerable delay between the alleged wrongful act and the accrual of the right of action. Plaintiffs on the other hand have an obligation to minimize the delay and any prejudice to defendants by being attentive to their health. By weighing and balancing the interests of both parties such a standard promotes the underlying purpose of the statute of limitations, namely, to require the prosecution of a cause of action within a reasonable time to prevent loss or impairment of available evidence and to discourage delay in the assertion of claims. See United States v. Kubrick, 444 U.S. at 117; Allen v. United States, supra; Nolan v. Johns-Manville Asbestos, 85 Ill.2d 161, 421 N.E.2d 864, 868 (1981).

A review of the undisputed facts in the instant case establishes that even if a discovery rule is adopted. In preparation for the present motion for summary judgment, Monsanto served plaintiff with interrogatories limited to facts and issues related to the statute of limitations defense. Interrogatory No. 3 specifically requested the nature and description of each symptom of each medical condition suffered by plaintiff, as alleged in the complaint. In response to that interrogatory, plaintiff stated:

"Chloracne; nausea; dizziness; feeling of sleeplessness or exhaustion; face red and burnt; numbness of face; shortness of breath; runny nose; lumps on arms and legs; watery eyes; loss of vision; headache; aching joints; skin rash; nervousness and anxiety; earache; problems with kidneys; numbness in fingers; light headedness; dental pain; fatigue and hearing loss.

Each of these symptoms and related complaints were expressed by plaintiff during the 1940's and 1950's, primarily in connection with his claim for permanent partial disability under the West Virginia Workman's Compensation Law. Various physicians who examined plaintiff during that period noted a skin rash, chloracne, and cysts on his back, arms and legs. Plaintiff contemporaneously complained of headaches, earaches, pains in his arms and legs, aching or cracking joints, shortness of breath, "secretion of the eyes with burning and redness", and blurred vision. Complaints of nervousness, extreme exhaustion, weak spells and problems with sleep were similarly noted. During the 1940's, plaintiff suffered from pyorrhea, an infection of the gums, and by 1944 had been fitted with dentures. Complaints with respect to his urine and his stomach were also expressed during the early and mid-1950's.

These facts, viewed in the light most favorable to plaintiff, clearly establish that during the 1950's, plaintiff was aware of his health problems and the symptoms allegedly arising from exposure to various chemicals first appeared. At that time, approximately twenty five (25) years before this action was instituted on July 8, 1981, plaintiff had "discovered" his injuries, and the two-year limitations period began to run. Accordingly,

under the discovery rule, plaintiff's claim is now barred by the statute of limitations and Monsanto is entitled to summary judgment.

(4) Limitations Period Runs From Time When the Injury and Its Cause Might Reasonably be Discovered: In cases involving the latent development of an industrial or occupational disease, some courts have held that a cause of action will not accrue until the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, not only that he was injured but also the cause of his injury. Nolan v. Johns-Manville Asbestos, 85 Ill.2d 161, 421 N.E.2d 864 (1981); Miller v. Beech Aircraft Corp., 204 Kan. 184, 460 P.2d 535 (1969); Harig v. Johns-Manville Products Corp., 284 Md. 70, 394 A.2d 299 (1978); Dalton v. Dow Chemical Co., 280 Minn. 147, 158 N.W.2d 580 (1968); Raymond v. Eli Lilly & Co., 117 N.H. 164, 371 A.2d 170 (1977); Williams v. Borden, Inc., 637 F.2d 731 (10th Cir. 1980) (applying Oklahoma law); Garbowski v. Turner & Newall, 516 F.Supp. 114 (E.D. Pa. 1980), aff'd DaMato v. Turner & Newall, Ltd., 651 F.2d 908 (3rd Cir. 1981) (applying Pennsylvania law). See also United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979) (medical malpractice case applying Federal Torts Claim Act's statute of limitations).

As previously discussed, the West Virginia Supreme Court of Appeals in Scott v. Rinehart & Dennis Co., supra, refused to hold that the statute of limitations in latent industrial or occupational diseases cases is tolled pending discovery. Despite this precedent, Judge Staker in Pauley v. Combustion Engineering, Inc., supra, a diversity case involving application of West Virginia law to an asbestos-related injury, adopted a discovery rule for purposes of determining when the cause of action accrued: "Plaintiff's cause of action accrued when he knew, or by the exercise of reasonable diligence should have known, of the existence of his injury and its cause." It is Monsanto's belief that the Pauley case was incorrectly decided. Rather, the Scott decision, requiring the running of the limitations period from the time of the alleged wrongful act or, alternatively, from the date of last exposure or termination of employment, should have been followed in Pauley and must be followed in the instant case.

If this Court nevertheless concludes that a causal discovery rule is proper, it must carefully consider the degree of actual or constructive knowledge sufficient to commence the running of the limitations period. A review of case law pertinent to this issue clearly establishes that an objective rather than a subjective test must be applied. See, e.g. Dalton v. Dow Chemical Company, *supra*; Garbowski v. Turner & Newall, *supra*. When a plaintiff knows or reasonably should know both that an injury has occurred and that it was caused by the acts of others, the statute of limitations begins to run and the plaintiff is under an obligation to inquire further to determine the proper defendant and whether an actionable wrong was committed. McDaniel v. Johns-Manville Sales Corporation, 542 F.Supp. 716, 719 (N.D. Ill. 1982); Nolan v. Johns-Manville Asbestos, *supra*. Significantly, the courts adopting a causal discovery rule have refused to toll the statute of limitations until a plaintiff positively knows of a causal relationship between his symptoms and exposure; rather, these courts have concluded that "[i]t is when the disease manifests itself in a way which supplies some evidence of causal relationship...that the public interest in limiting the time for asserting a claim attached and the statute of limitations will begin to run." Karjala v. Johns-Manville Products Corp., 523 F.2d 135 (8th Cir. 1975) (applying Minnesota law); see also Dalton v. Dow Chemical Co., *supra*. An extension of the rule to plaintiffs who possess the salient facts concerning the occurrence and cause of their injury, but who fail to investigate and pursue their claims, would nullify the legitimate purpose of the statute of limitations and permit the prosecution of stale claims. Garbowski v. Turner & Newall, 516 F.Supp. at 119; Nolan v. Johns-Manville Asbestos, 521 N.E.2d at 868. See also United States v. Kubrick, 444 U.S. at 123.

It has been occasionally and inventively argued that under a causal discovery rule the statute of limitations should be tolled until a plaintiff is aware of legal causation. This argument was soundly rejected by the United States Supreme Court in United States v. Kubrick, *supra*:

"A plaintiff such as Kubrick, armed with the facts about the harm done to him, can protect himself by seeking advice in the medical and legal community.... If advised that he has been wronged,

he may promptly bring suit. If competently advised to the contrary, he may be dissuaded, as he should be, from pressing a baseless claim. Of course, he may be incompetently advised or the medical community may be divided on the crucial issue of negligence, as the experts proved to be on the trial of this case. But however or even whether he is advised, the... plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make. If he fails to bring suit because he is incompetently or mistakenly told that he does not have a case, we discern no sound reason for visiting the consequences of such error on the defendant by delaying the accrual of the claim until the plaintiff is otherwise informed or himself determines to bring suit, even though more than two years have passed from the plaintiff's discovery of the relevant facts about injury."

444 U.S. at 123 (Emphasis added).

Judge Staker in Pauley v. Combustion Engineering, Inc., *supra*, recognized the soundness of Kubrick when he refused to hold that in addition to knowledge of his injury and its cause, a plaintiff must also know that the acts inflicting the injury might constitute negligent conduct:

"Given the West Virginia cases discussed heretofore wherein the court has applied the discovery rule, this court must determine what interpretation of the rule the West Virginia court would adopt in the present case. The state court's decisions to extend the use of the discovery rule to determine when a cause of action accrues have focused on the question of what point in time is it realistic, fair and just to expect a plaintiff to discover the injury that has been inflicted upon him. There is, however, no indication that the court would extend the rationale to hold that plaintiff must also be allowed a reasonable opportunity to discover and establish a legal causation between his injury and the defendant's conduct. As stated by the [United States Supreme] Court in [United States v.] Kubrick, [444 U.S. 11, 100 S.Ct. 352, 62 L.Ed.2d 239 (1979)], such a position would undermine the purpose of the statute of limitations by allowing an

injured person to be non-diligent in the pursuit of his cause of action."

See also Harrison v. Seltzer, 268 S.E.2d at 315, where the West Virginia Supreme Court applying the discovery rule in a medical malpractice case noted that "[t]here are cases where the adverse results of medical treatment are so extraordinary that the patient is immediately aware that something went wrong, such that the statute of limitations will begin to run once the extraordinary result is known to the plaintiff even though he may not be aware of the precise act of malpractice." (Emphasis added)

Similarly, the Illinois Supreme Court, in Nolan v. Johns-Manville Asbestos, supra, qualified the scope of the Illinois discovery rule, that in cases involving asbestos-related injuries "the cause of action accrues when the plaintiff knows or reasonably should know of an injury and also knows or reasonably should know that the injury was caused by the wrongful acts of another," by carefully noting as follows:

"We wish to emphasize that the rule we announce is not the same as a rule which states that a cause of action accrues when a person knows or should know of both the injury and the defendants' negligent conduct. Not only is such a standard beyond the comprehension of the ordinary lay person to recognize, but it assumes a conclusion which must properly await legal determination. Moreover, if knowledge of negligent conduct were a standard, a party could wait to bring an action far beyond a reasonable time when sufficient notice has been received of a possible invasion of one's legally protected interests....

"We hold, therefore, that when a party knows or reasonably should know both that an injury has occurred and that it was wrongfully caused, the statute begins to run and the party is under an obligation to inquire further to determine whether an actionable wrong was committed. In that way an injured person is not held to a standard of knowing the inherently unknowable, yet once it reasonably appears that an injury was wrongfully caused, the party may not slumber on his rights."

421 N.E.2d at 868 (Citations omitted) (Emphasis added).

In applying the rule announced in the Nolan v. Johns-Manville Asbestos case, a federal district court in McDaniel v. Johns-Manville Sales Corp., 542 F.Supp. 716 (N.D. Ill. 1982), held that worker's compensation claims filed by the plaintiffs for an occupational disease allegedly resulting from exposure on the job, demonstrated an awareness of both injury and causation for statute of limitations purposes:

"At some time before October 17, 1976, each of the decedents filed a worker's compensation claim before the Illinois Industrial Commission. On the portion of the claim form that requested a description of the accident all of the claims had an almost identical version of the following symptoms: 'Occupational disease claimed as a result of exposure on the job.' Thus as a threshold matter, this court must determine whether that statement alone indicates awareness sufficient to start the statute of limitations running.

It is true worker's compensation claims are a no-fault proceeding. Employees are compensated for any injury arising during the course of their employment. But even a layman ought to realize if the sort of serious illnesses suffered by plaintiffs were caused by some occupation-related exposure, wrongful conduct was involved. This court therefore finds that the worker's compensation claims filed by plaintiffs demonstrate an awareness both of injury and of wrongful causation."

542 F.Supp. at 718 (Emphasis added).

In the instant case, during the 1950's, plaintiff not only possessed the salient facts concerning his injury, but also the pertinent facts concerning the cause of those injuries. As his workmen's compensation claim for occupational disease benefits and for a permanent partial disability rating clearly demonstrates, plaintiff had associated his symptoms, including chloracne, eye problems, earaches, exhaustion, headaches, and various other pains and physical problems, with his exposure to chemicals while working at Monsanto's Nitro facility. His belief in that regard was shared by Dr. R. O.

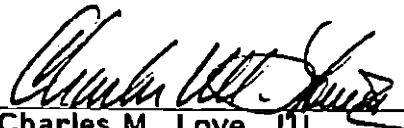
Halloran, who testified to that effect during the 1955 workmen's compensation hearing. Thus, plaintiff had knowledge of the relationship between his health problems and his place of work, which mandates the running of the statute of limitations from, at the latest, the date of Dr. Halloran's testimony on April 15, 1955, more than twenty-six (26) years before this action was instituted. Accordingly, under even the liberal causal discovery rule plaintiff's claim is barred by the statute of limitations and Monsanto is entitled to summary judgment in its favor.

III.

CONCLUSION

For the foregoing reasons, this action is barred by the two-year statute of limitations applicable to claims for personal injuries. There is no genuine as to any material fact and Monsanto is entitled to summary judgment in its favor.

MONSANTO COMPANY
By Counsel

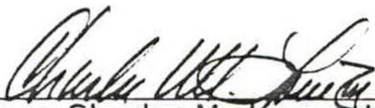


Charles M. Love, III
Bowles, McDavid, Graff & Love
1200 Commerce Square
P. O. Box 1386
Charleston, West Virginia 25325-1386
(304)347-1100

CERTIFICATE OF SERVICE

I, CHARLES M. LOVE, III, of Bowles, McDavid, Graff & Love, counsel for Monsanto Company, do hereby certify that I have served a copy of the foregoing "Memorandum of Law in Support of the Motion of Defendant, Monsanto Company, for Summary Judgment Based on Statutes of Limitations" upon plaintiffs by causing a true and exact copy thereof to be mailed by United States mail, postage prepaid to plaintiffs' counsel on this 18th day of March, 1983, at the following address:

Paul L. Pratt, Esq.
W. Stuart Calwell, Jr., Esq.
Calwell, McCormick & Peyton
1126 Charleston National Plaza
Charleston, West Virginia 25325-1126


Charles M. Love, III