

FILED UNDER SEAL

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 REPLY TO
PLAINTIFFS' RESPONSE TO MOTION OF DEFENDANT,
MONSANTO COMPANY, FOR SUMMARY JUDGMENT
BASED ON THE STATUTE OF LIMITATIONS

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INTRODUCTION

Defendant, Monsanto Company (hereinafter referred to as "Monsanto"), has filed a motion for summary judgment in the above-captioned matter, asserting that the claim of plaintiff, Chester A. Jeffers (hereinafter referred to as "Plaintiff") is barred by the statute of limitations. Monsanto's

motion is supported by a memorandum of law and by various exhibits, including documents from West Virginia Workers' Compensation records relating to Claim No. 13088-30 (C. A. Jeffers); transcripts of Workers' Compensation hearings held in connection with that claim; and documents from Monsanto's employee medical files and personnel records relating to C. A. Jeffers. A review of the memorandum and supporting exhibits clearly demonstrates that Monsanto met its burden on summary judgment by establishing that there is no genuine issue of any "material" fact. Regardless of whether plaintiff's right of action accrued at the time of the alleged chemical exposure or at the time the alleged injuries and their cause were, or should have been, discovered, the two-year limitations period ran before this suit was brought on July 8, 1981 and plaintiff's claim for damages is time-barred.

Plaintiff has responded to Monsanto's motion by alleging that he did not know, and by the exercise of reasonable diligence could not have known or discovered his 1981 cause of action at the time he filed a Workers' Compensation claim in 1950; that certain "misrepresentations" by Monsanto constituted "obstruction" within the meaning of W. Va. Code §55-2-17, thereby estopping Monsanto from asserting the statute of limitations as a defense; that the factual basis of plaintiff's claim is too complex to support a motion for summary judgment; and, alternatively, that the enactment of Senate Bill 585 by the West Virginia Legislature revived plaintiff's claim notwithstanding the bar of the statute of limitations. In "support" of its response, plaintiff has offered his own affidavit, the affidavit of Bernard W. Carnow, M.D., and two volumes of exhibits purportedly showing that Monsanto concealed health and safety information from plaintiff prior to 1957, when he left Monsanto's employment, and thereafter, up to and including the present time.

As demonstrated in this Reply Memorandum, the affidavits, exhibits, and supporting memorandum submitted by plaintiff do not present

specific admissible evidence that there is a genuine issue of "material" fact precluding summary judgment in favor of Monsanto on the statute of limitations issue.

II

PLAINTIFF MUST CARRY ITS BURDEN OF SHOWING A GENUINE ISSUE OF "MATERIAL" FACT

Once a moving party has met its burden under Rule 56 of the Federal Rules of Civil Procedure by showing the absence of any dispute or genuine issue of any "material" fact, and its legal entitlement to judgment, the adverse party can no longer rest upon general allegations in the pleadings, or in an attorney's memorandum of law, but must respond by presenting specific evidence showing that there is a genuine issue of "material" fact. F.R.Civ.P. 56(e); Kipps v. Ewell, 538 F.2d 564 (4th Cir. 1976); Johnson v. McKee Baking Company, 398 F.Supp. 201 (W.D.Va. 1975), aff'd, 532 F.2d 750 (4th Cir. 1976). It is not enough for the party opposing a motion for summary judgment merely to point to disputes of fact; rather, he must show that the disputed facts are "material" and properly should be decided at trial. An evidentiary difference as to an immaterial fact will not bar summary judgment. Proler Steel Corporation, Inc. v. Luri Brothers & Co., 417 F.2d 272 (9th Cir. 1969); Robbins v. Gould, 278 F.2d 116 (5th Cir. 1960).

A "material" fact is a fact which, assuming it to be true, would entitle the adverse party to judgment. First National Bank v. Cities Service Co., 391 U.S. 253 (1968); British Airways Bd. v. Boeing Co., 585 F.2d 946 (9th Cir. 1978); Bushie v. Stenocord Corporation, 460 F.2d 1116 (9th Cir. 1972). As the Ninth Circuit Court of Appeals stated in Bushie:

The showing of a 'genuine issue for trial' is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, which would entitle the party opposing the

motion (assuming the version to be true) to a judgment as a matter of law.

460 F.2d at 119. The adverse party must raise a dispute of a "material" evidentiary fact or, alternatively, a dispute as to inferences which may be drawn from "material" facts which are undisputed. See Grigsby v. Sterling Drug, Inc., 428 F.Supp. 242 (D.D.C. 1975), aff'd. without opinion, 543 F.2d 417 (D.C. Cir. 1976), cert. denied 431 U.S. 967 (1977); Hoeflich v. William S. Merrel Co., 288 F.Supp. 659 (E.D.Pa. 1968).

Where under an "asserted version of the facts" and the inferences to be drawn therefrom, there is no viable legal theory which would entitle the plaintiff, assuming those facts and inferences to be true, to judgment as a matter of law, and a court could only permit the issues to be resolved by a jury in one way, summary judgment is appropriate. In re: National Student Marketing Litigation, 445 F.Supp. 157 (D.D.C. 1978); Grigsby v. Sterling Drug, 428 F.Supp. at 243. Such rule is not avoided even if the court limits its consideration of the statute of limitations to the discovery rule requiring a determination of when the plaintiff knew, or by the exercise of due diligence should have known, of his injury and its cause. Indeed, courts have not hesitated to grant motions for summary judgment in proper cases involving both the discovery rule and the latent development of industrial or occupational diseases, O'Brien v. Eli Lilly Co., 668 F.2d 704 (3rd Cir. 1981); McDaniel v. Johns-Manville Sales Corporation, 542 F.Supp. 716 (N.D.Ill. 1982); West v. Atlas Chemical Industries, Inc., 264 F.Supp. 697 (E.D.Mo. 1966); Lambert v. Village of Summit, 104 Ill.App.3d 1034, 433 N.E.2d 1016 (1982); Olsen v. Bell Telephone Laboratories, Inc., 388 Mass. 171, 445 N.E.2d 609 (1983); Dalton v. Dow Chemical Co., 280 Minn. 147, 158 N.W.2d 480 (1968).

The reasoning of the court in West v. Atlas Chemical Industries, Inc., an action by an employee for damages allegedly sustained by inhaling toxic fumes from chemical explosives, is particularly instructive on this issue:

Plaintiffs correctly state the time of accrual of a cause of action is a question of fact. But, at issue here is whether there is a genuine issue of fact The rule . . . that the damage be sustained and capable of ascertainment is [a] rule of reason, turning on the time when the damage can reasonably be discovered or made known so that the right to commence an action arises. There can be no doubt that the record before the court on a motion for summary judgment may show conclusively that plaintiff was aware, on a given date, of such facts that the only reasonable conclusion to be reached is that the damage was sustained and capable of ascertainment at that time. In such a case, summary judgment is appropriate for there is no genuine issue of fact.

264 F.Supp. at 700 (E.D.Mo. 1966) (citations omitted) (emphasis in original).

In the instant case, as demonstrated in the discussion which follows, there is no dispute to be resolved by a fact finder. Considering all "material" facts and the inferences which can reasonably be drawn therefrom, a jury can only conclude that plaintiff, who ceased working for Monsanto in 1957, was aware of both his injury and its purported cause well before July 8, 1979, the date two years before this action was instituted, and that he was not "obstructed" by Monsanto in the prosecution of his rights.

III

PLAINTIFF'S CAUSE OF ACTION ACCRUED MORE THAN TWO YEARS BEFORE SUIT WAS INSTITUTED

Plaintiff, in his responding memorandum, has attempted to raise a genuine issue of "material" fact on the statute of limitations defense, by asserting that plaintiff's claim for Workers' Compensation disability and occupational disease benefits in 1950, and his pursuit of that claim through extensive hearings and administrative appeals until 1958, "does not raise an uncontroverted fact that he knew or had reason to know in 1950 the true

nature and extent of his claim then and certainly not the nature or existence of his claims today." A review of applicable law and an analysis of the plaintiff's supporting affidavits and "evidence", however, refutes any such conclusion.

A. Plaintiff Knew of His Injury and Its Cause

In response to interrogatories served upon plaintiff by Monsanto, requesting the nature and description of each symptom of each medical condition suffered by plaintiff, as alleged in the complaint, plaintiff stated:

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

See Answers to Defendant's Interrogatories to Plaintiff Limited to Facts and Issues Related to Defendant's Statute of Limitations Defense, Answer 3(c) (hereinafter "Statute of Limitations Interrogatories").

Although specifically requested by Monsanto in its Statute of Limitations Interrogatories, plaintiff has not yet identified "the date and manner in which each such symptom or medical condition first manifested itself, or was made to known to plaintiff or to any other person." However, a review of pertinent Workers' Compensation records and plaintiff's Monsanto medical and personnel records clearly establishes that each of these symptoms and related complaints was expressed by plaintiff during the 1940s and 1950s, and that he had then associated these symptoms with his exposure to chemicals while working at Monsanto's Nitro facility. See Monsanto's Memorandum at pgs. 18, 23-24.

In his April 22, 1983, affidavit, attached as Exhibit 1 to Plaintiff's Response, plaintiff attempts to dispute these conclusions by stating that at the time of his compensation claim he thought his health problems only related to the 1949 autoclave incident, not to continuous exposure; that after the compensation hearings he believed the physicians who testified that nothing was seriously wrong with him and did not believe Dr. Halloran, who had testified that plaintiff's health problems were work-related; and that he "only recently" discovered that long-term effects of chemical exposure had destroyed his nervous system, caused heart disease and brain damage, and had upset his immunological system.

In a further effort to raise a genuine issue of "material" fact, plaintiff offers the Affidavit of Bertram W. Carnow, M.D., attached as Exhibit 2 to Plaintiff's Response. Dr. Carnow, based on an examination of plaintiff on February 19, 1983, opines that plaintiff now suffers from liver disease, abnormal muscle metabolism, depressed thyroid, gross abnormality of his immune systems, axonal neuropathy, profuse brain damage, complete loss of libido, cardiac arrhythmia, active peripheral neuropathy, type-4 hyperprebetalipoproteinemia, cerebral damage cerebellum, and hypertension, caused by repeated exposures to dioxin, carbon disulfide, and hydrogen sulfide during the course of plaintiff's employment at Monsanto from 1936 to 1957; and that "based on the review of the defendant's exhibits and the official Workmen's Compensation file, no diagnosis was made of the conditions diagnosed by your affiant in 1983 during the time of the Workmen's Compensation hearings."

If, despite the precedent and authority of Scott v. Rinehart & Dennis Co., 116 W.Va. 319, 180 S.E. 275 (1935), the Court determines that discovery is a controlling factor in actions based on latent industrial or occupational disease, a review of relevant jurisprudence establishes that the fairest rule commences the running of the limitations period from the time the first symptoms of the disease begin to appear or from the date the injuries

were first diagnosable, without regard to any noticeable impairment to the plaintiff, whichever is first to occur. See Monsanto's Memorandum pgs. 16-17. Significantly, under the discovery rule, accrual is dependent neither upon diagnosis of the particular disease itself nor upon the plaintiff ascertaining the precise or full effect of exposure. See Allen v. United States, 527 F.Supp. 476 (D.Utah 1981) (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); Yarborough v. Louisiana Cement Company, 377 So.2d 602 (La.App.) cert. denied 373 So.2d 531 (La. 1979) (the statute of limitations began to run when the plaintiff had knowledge of his pulmonary problems and the symptoms arising from exposure first appeared, even though the precise and full effects of exposure may have been unknown); Dalton v. Dow Chemical Company, 138 N.W.2d at 582 (Minn. 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). Courts have properly recognized that "[i]f knowledge of the extent of the injury were to control the accrual of a cause of action, the fixed time period of the statute of limitations effectively would be destroyed." Olsen v. Bell Telephone Laboratories, Inc., 445 N.E.2d at 612 (Mass. 1983).

The fact of plaintiff's knowledge, more than two decades before this civil action was instituted, that he suffered from the identical medical symptoms and conditions which he has identified, in his answers to the Statute of Limitations Interrogatories, as the bases for his present complaint, is undisputed. Moreover, most significantly, neither plaintiff nor Dr. Carnow state that plaintiff's medical conditions are such that they were not, and could not have been, identified more than two years before this action was brought. Rather, plaintiff simply states that he "only recently" discovered certain medical conditions, including damage to his heart, brain, and nervous and immunological systems. Dr. Carnow merely adds that the conditions he diagnosed in 1983 were not diagnosed during the time of the

Worker's Compensation hearings in the 1950s. He does not, and cannot, deny that those alleged health problems arose out of plaintiff's employment at Monsanto. Since that is so, the alleged conditions must have grown out of and be related to the very conditions of which plaintiff was aware in 1957 or before. Clearly, plaintiff has not raised a genuine issue of "material" fact as to when he was aware of his injury.

Similarly, there is no dispute to be resolved by a fact finder concerning when plaintiff knew, or by the exercise of reasonable diligence, should have known, the cause of his injuries. As early as the 1950s, plaintiff sought Workers' Compensation disability benefits based on his subjective belief that various medical symptoms, the very symptoms he has listed as relating to his claim for damages in the instant civil action, were caused by exposure to chemicals at Monsanto's Nitro plant. His decision to seek work-related disability at that time is uncontroverted evidence that he then knew the cause of his injuries.

The fact that plaintiff's belief that his health problems were work-related was sufficiently firm to support a claim for disability compensation, and to justify pursuing that claim over a seven-year period, clearly distinguishes this case from the situation addressed by this Court in Holcomb v. Richardson-Merrill, Inc., Civil Action No. 79-23-76 CH (S.D.W.Va. 1979). In that case, the only evidence that the parents knew, or should have known, the cause of their child's injury more than two years before they filed an administrative claim for damages was the observation by one physician noting the "temporal" relationship between the DPT vaccination and the onset of illness. Significantly, the parents in Holcomb did not form a personal belief as to the cause of injury at the time of that isolated observation. In contrast, for whatever reason and based on whatever medical or legal advice, plaintiff in the instant case did form a belief that his health problems were caused by exposure to chemicals during the time he was employed by Monsanto; indeed he acted upon his "subjective knowledge" by pursuing available legal remedies.

Monsanto's denial at the time of the compensation hearings, as well as in the present action, of any causal relationship between plaintiff's medical complaints and work-related chemical exposure does not negate the consequences of plaintiff's subjective knowledge of his injury and its cause more than twenty-five years ago. The analysis of the court in Dawson v. Eli Lilly & Company, 543 F.Supp. 1330 (D.D.C. 1982), in rejecting an argument that the plaintiff's knowledge of a possible connection between DES and her injuries was not sufficient to determine as a matter of law that she had discovered the causal relationship more than three years before she brought suit, is particularly instructive:

The Court has found no case, in this jurisdiction or elsewhere, which holds that a plaintiff must have clear and certain knowledge of a causal relationship before the statute begins to run. Further, a defendant's continuing denial of the causal relationship have been found to delay the accrual of the cause of action only where the plaintiff claims to have relied on that denial If the statute of limitations did not begin to run merely because a plaintiff who knew of a possible causal relationship and did not rely on any representations to the contrary did not have certain knowledge of causation, no claim where causation could be disputed would ever accrue. This is illustrated by the instant case, where under plaintiff's argument, her cause of action has not yet accrued. She does not claim to have yet discovered certain knowledge of causation, and defendants have stated that they intend to dispute causation at the trial. As long as causation is a disputed issue, a plaintiff could claim not to have 'certain' knowledge, and the statute would never run. Obviously, this is not the intention of a discovery rule.

In the instant case, plaintiff never relied upon Monsanto's denial of causation. Rather, he filed a claim for, and spent seven years attempting to secure, permanent partial disability benefits based upon an alleged occupational disease. Under these circumstances, the fact of Monsanto's denial of a causal connection between plaintiff's alleged injury and chemical

exposure during the 1950s, and today, does not raise a dispute or genuine issue as to any "material" fact.

Apparently recognizing that he was aware of his injury, and had formed a subjective belief as to its cause, substantially more than two years before this action was instituted, plaintiff further argues that if injury and cause are known, but he has no knowledge of any wrongdoing, the action does not accrue until he discovers, or by due diligence should have discovered, the wrongdoing. There is, however, no basis or authority for extending West Virginia's discovery rule to require discovery of wrongdoing in addition to discovery of injury and cause.

As aptly stated in Pauley v. Combustion Engineering, Inc., 528 F.Supp. 759 (S.D.W.Va. 1981):

There is . . . no indication that [the West Virginia Supreme 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 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.

528 F.Supp. at 765. Roberts v. State Workmen's Compensation Commission, No. 15021 (W.Va. 1981), relied upon by plaintiff to support its argument that knowledge of legal cause or wrongdoing is part of the discovery rule in West Virginia, is clearly distinguishable. First, that decision involved an appeal from an order of the Worker's Compensation Appeal Board and interpretation of the statutory discovery rule for occupational pneumoconiosis claims, set forth in W. Va. Code §23-4-15, rather than the general discovery rule formulated by the West Virginia Supreme Court in malpractice and related cases. Moreover, Roberts merely provides that a worker must be aware of the "probable compensable character of the disease" before the statutory

limitations period runs. Such an awareness requires knowledge of injury and cause, but not of negligence or wrongdoing, since neither negligence nor wrongdoing are relevant to Workers' Compensation.

The conclusion reached by the Court in Pauley v. Combustion Engineering Co., that properly interpreted the discovery rule does not include discovery by plaintiff that his injury was negligently or wrongly inflicted, is well supported. In United States v. Kubrick, 444 U.S. 111 (1979), the United States Supreme Court reversed a lower court decision which held that the statute of limitations commenced when the plaintiff became aware of legal repercussions flowing from his injury. In rejecting that position, the Court stated: "A putative malpractice plaintiff must determine within the period of limitations whether to sue or not, which is precisely the judgment that other tort claimants must make." 444 U.S. at 123.

Similarly, in DeMartino v. Albert Einstein Medical Center, 460 A.2d 295 (Pa.Sup. 1983), the court refused to adopt "knowledge of the negligent conduct causing the injury" as an element of the discovery rule, stating:

Once the patient is aware or should reasonably have become aware that medical treatment is causing his personal injury the statute begins and the prospective plaintiff is required to begin doing those things for which the statute of limitations specifically provides time: 'An opportunity to select and consult with a lawyer, investigation, initiation of suit, discovery, joinder of additional parties, etc.' Keating v. Zemel, 281 Pa.Sup.Ct. 129, 134, n. 4. 421 A.2d 1181, 1184, n. 4 (1980). It is during this two-year period that the medical malpractice plaintiff, like any other plaintiff pursuing any other legal claim, makes the decision whether or not to pursue any legal rights he may possess.

(emphasis added). See also Monsanto's Memorandum at pp. 20-22.

Plaintiff has not worked for Monsanto since 1957. Prior to voluntarily terminating his employment, he experienced certain health problems which he associated with exposure to chemicals at the plant. His belief in a relationship between those health problems and his workplace was not casual; rather, he acted upon that belief by claiming Workers' Compensation benefits. Based on these undisputed facts, there can be no justification for allowing plaintiff, more than two decades later, to maintain an action for damages allegedly caused by an employer for whom he has not worked in almost twenty-five years.

B. Plaintiff Should Have Known of His Injury and Its Cause

Although the final decision by the Workers' Compensation Appeal Board in February, 1958, was adverse to plaintiff's claim for permanent partial disability, it is undisputed that as early as the 1950s plaintiff had formed a firm belief that his various health problems were caused by chemical exposure during the years he was employed at Monsanto's plant. Neither Monsanto's denial of a causal relationship nor the adverse administrative ruling negates plaintiff's knowledge of his injury and its putative cause. Dawson v. Eli Lilly & Company, 543 F.Supp. 1330 (D.D.C. 1982). Moreover, subsequent media coverage reporting a possible causal relationship between exposure to 2,4,5-T or dioxin and a myriad of health problems, and plaintiff's personal participation in health studies designed to address that relationship, as a matter of law, should have rekindled plaintiff's subjective knowledge more than two years before July 8, 1981, the date this action was instituted. A review of the sampling of newspaper and popular news magazine articles regarding exposure to 2,4,5-T and dioxin, and Monsanto's Nitro plant, all published prior to July 8, 1979, and attached hereto as Exhibit A, supports this conclusion.

In October, 1977, both the Charleston Gazette and the Charleston Daily Mail published articles regarding Monsanto employees' concerns that

various illnesses and diseases they were now suffering were related to exposure to chemicals at the Nitro plant during the 1940s, 50s and 60s. Although the focus of the articles was on bladder cancer and para-amino-biphenyl (PAB), allegations concerning other chemicals were also reported:

Some Monsanto workers allege there have been other health problems in the Nitro plant. One said men exposed to a weed-killer [2,4,5-T] got 'bumps as big as eggs' under their skin. He said some workers are alarmed by what they think is a high rate of heart attacks among men who worked in certain buildings

* * *

The United Steelworkers Union plans to conduct an indepth study of the health of workers in the Monsanto plant and four other Kanawha Valley chemical plants represented by the union. An organizational meeting for the studies is to be held Friday.

Charleston Gazette, October 11, 1977, at p. 1A.

Beginning in March, 1979, both Charleston-area newspapers began carrying articles which suggested a causal relationship between dioxin or 2,4,5-T and damage to the central nervous system, birth defects, liver cancer, problems with the reproductive systems, and other physical ailments. See, e.g., Charleston Gazette, March 21, 1979, at p. 1A; Charleston Daily Mail, March 21, 1979, at p. 10A.

An article in the Charleston Gazette, March 30, 1979, at p. 10A, quoted Michael Wright, an industrial hygienist with the United Steelworkers of America involved with the Mt. Sinai health study of Monsanto workers, as stating: "Dioxin is probably the most toxic chemical produced by man." The article further reported:

Wright said that evidence of the possible health effects of dioxin began to surface during the Viet Nam war, when 2,4,5-T was used extensively to destroy jungle cover and force people into populated areas. There were reports of aborted pregnancies and other health problems among Vietnamese villagers.

'Everyone at that time dismissed it as war propaganda,' he said. However, after the war, servicemen who worked with the chemical also began to report health problems, Wright said.

Concern was furthered when an accident at an Italian plant producing the same chemical forced the evacuation of the town of Seveso in 1976, Wright said.

It was also noted that more than 100 present and former Monsanto employees had attended a meeting at Nitro Junior High School, on March 29, 1979, at which union officials and representatives of Mt. Sinai had explained health concerns associated with exposure to 2,4,5-T or its dioxin contaminant. A similar article appeared in the Charleston Daily Mail, March 30, 1979, again reporting that the Mt. Sinai medical team would conduct physical examinations and take medical histories of present and former Monsanto workers at West Virginia State College on April 6-8, 1979.

A follow-up article appeared in the Charleston Daily Mail, April 11, 1979, at p. 1A, reporting that "the New York-based group of 35 health experts examined 260 plant workers and retirees last weekend at the West Virginia State College, and 'certainly found evidence that health problems exist as a result of exposure to chemicals,' said Dr. Marion Moses." The article further stated:

The target of concern for the medical team is a chemical called dioxin, which was tagged as extremely dangerous and banned from use last month by the Environmental Protection Agency. It is a highly toxic by-product in the manufacture of 2,4,5-T, a defoliant which was made at Monsanto's plant

for several years. EPA officials said one drop of dioxin, if served equally to 1,000 people, would kill them all.

Many workers say they suffered heavy exposure to 2,4,5-T and claim it is the reason some of them have bladder cancer, chloracne and other ailments today.

An article in the Charleston Gazette, May 20, 1979, included a summary of present knowledge of health problems purportedly related to the dioxin contaminant in 2,4,5-T: (1) Agent Orange, a defoliant made partly of 2,4,5-T, "may have caused a spate of birth defects of South Vietnamese infants" and "may be behind 'an explosion' in liver cancer in what was once South Viet Nam"; (2) that nearly 500 Viet Nam veterans have asked the Veterans Administration for disability benefits for problems ranging from nervous disorders to deformed children, alleging that these problems are related to exposure to Agent Orange; (3) that the Environmental Protection Agency in February, 1979, imposed a temporary ban on most uses of 2,4,5-T, believing that use of the herbicide on forests near Alsea, Oregon, may have caused a spate of miscarriages; (4) that the Environmental Protection Agency says "2,4,5-T has caused leukemia or lung, liver and other tumors in laboratory rodents"; and (5) that men exposed to 2,4,5-T suffer "respiratory irritation, muscle pains, weariness, and a skin eruption called chloracne."

On June 3, 1979, Michael Wright, the Steelworkers' industrial hygienist, was reported as stating:

Regarding the Steelworkers' ongoing study of Monsanto workers exposed to dioxin, a by-product of the herbicide, 2,4,5-T, in an explosion in 1949, Wright said that the effort is more than an exercise in academics. Production of the herbicide, which is suspected of causing a myriad of health problems, was discontinued at Monsanto several years ago.

He said the purpose of this study was to 'identify workers who deserve compensation.' In addition, he said, dioxin is a by-product of other chemical processes, and studies are needed to identify possible health effects for workers still being exposed to it.

Also, he said, 'we want to put Monsanto on notice that once an incident like this happens--even when it's 30 years old--the union is not going to ignore it. We're going to take appropriate action.'

Charleston Gazette, June 3, 1979, at p. 1B (emphasis added).

Articles published in various news magazines, as well as in the Charleston newspapers, although not directly related to Monsanto's Nitro plant, illustrate the reasonableness of requiring plaintiff to bring this civil action for personal injuries before July 8, 1981. For example, an article in the August 16, 1976, edition of Newsweek, reported an incident at a chemical factory in Seveso, Italy, resulting in the exposure of approximately 100,000 residents to dioxin, and noted the concern of the medical and scientific communities for the residents' health. Specifically, the article noted that "past medical experience in other countries show that small doses can damage human kidneys, livers, and lungs" and that dioxin may be terratogenic.

An article in U. S. News & World Report, September 25, 1978, at p. 65, reported that critics of 2,4,5-T, as used as an ingredient in Agent Orange, believe it "killed people, livestock and wild animals and caused human birth defects"; that "some Viet Nam veterans claim they have been stricken with cancer and other ailments because of exposure to the defoliant"; and that "the EPA says that tests by the National Institutes of Health found that heavy exposure to dioxin causes leukemia, liver and lung diseases, birth defects and dead fetuses in laboratory animals." In the Charleston Gazette, October 22, 1978, an article entitled "Potentially Dangerous 2,4,5-T Sprayed Across U.S. Yearly" reviewed allegations of health risks associated with 2,4,5-T, including nervous disorders, double vision, exhaustion, skin rashes, nausea and miscarriages.

These articles clearly demonstrate that more than two years before this civil action was instituted, plaintiff's prior subjective knowledge of the cause of his injuries was re-enforced not only by the similar beliefs of the at least 26 fellow workers who also had pursued disability claims during the 1950s, but by early 1979 by the concerns of veterans, government officials and others as well. If, for some reason, plaintiff had not formed a firm belief as to cause before, he certainly had sufficient information, by the fall of 1978 or spring of 1979, at the latest, to impose upon him a burden of inquiry. Surely, the commencement of the Mt. Sinai study in April, 1979, instituted by the Steelworkers for the purpose of determining persons entitled to compensation, was itself an event sufficient to commence the running of the limitations period.

Plaintiff had two years from those dates to do those things "for which the statute of limitations specifically provides time," DeMartino v. Albert Einstein Medical Center, 460 A.2d 295 (Pa.Sup. 1983), including further consultation with physicians, toxicologists, epidemiologists, and other experts and an opportunity to seek the advice of counsel. Nevertheless, plaintiff waited more than two years, until July 8, 1981, before instituting this action. If his claim had not been previously barred by the statute of limitations, based upon his knowledge of injury and cause, and his litigation, during the 1950s, it was now barred by his failure to promptly pursue his claim within two years of the time a further burden of inquiry could be opposed upon him as a matter of law.

In Plaintiff's Response reliance is placed upon the decision by the Federal District Court in Allen v. United States, 527 F.Supp. 476 (D.Utah 1981), a case involving injuries allegedly caused by radiation exposure as the result of the federal government's nuclear testing program. That case, however, supports Monsanto's, rather than plaintiff's, position. First, as previously noted, the court in Allen clearly held that in order for the statute of limitations to run, the plaintiff does not need to know the full extent of his

injury, but only sufficient knowledge to justify placing the burden of inquiry upon him. Second, while the injuries asserted in both the Allen case and here are generally "non-specific as to cause", in contrast to the plaintiffs in Allen, plaintiff in the instant case formed a personal, firm belief as to the cause of his injuries more than two decades before suit was instituted. Even if that subjective knowledge was abated following the final adverse compensation ruling in 1958, it was, or should have been, rekindled by popular media reports more than two years before the commencement of this action and by his own union's publicly expressed concerns.

IV

PLAINTIFF HAS FAILED TO SHOW A DISPUTED "MATERIAL" FACT ON THE ISSUES OF OBSTRUCTION AND FRAUDULENT CONCEALMENT

Pursuant to W. Va. Code §55-2-12(b), an action for damages for personal injuries must be brought within two years after the right to bring action shall have accrued. That mandate is qualified by W. Va. Code §55-2-17, providing that when a potential defendant "obstructs" prosecution of an action, "the time that such obstruction may have continued shall not be computed as any part of the time within which the [action] might or ought to have been prosecuted", and by the jurisprudential rule that "the doctrine of equitable estoppel may, in a proper case, be applied to prevent a fraudulent or inequitable resort to the statute of limitations." Humble Oil & Refining Co. v. Lane, 152 W.Va. 578, 165 S.E.2d 379, 382 (1969) (emphasis added).

Plaintiff, resorting to a style reminiscent of yellow journalism, has attempted to create a genuine issue of "material" fact by reference to letters from and to Monsanto management and medical personnel, reports of studies conducted on behalf of Monsanto directed towards improved corporate health and safety procedures, and miscellaneous Monsanto in-house memoranda discussing industrial hygiene problems and related public relations needs. Despite this effort by plaintiff to cloud the issue, a careful analysis

of the undisputed "material" facts and of applicable law establishes that Monsanto neither obstructed nor fraudulently concealed evidence from plaintiff concerning a possible cause of his health problems, and that even if it is assumed for purposes of this motion that there is some evidence from which misrepresentation might be inferred, plaintiff did not rely on such misrepresentation so as to toll the statute of limitations.

As stated by the West Virginia Supreme Court in Humble Oil & Refining Co. v. Lane:

Statutes of limitation are favored in the law and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. It has been widely held that such exceptions are strictly construed and are not enlarged by the courts upon considerations of apparent hardship.

165 S.E.2d at 383 (citations omitted). The burden of establishing a factual basis for tolling of the statute of limitations is upon the plaintiff by evidence that is clear, precise and convincing. See Williams v. Borden, Inc., 637 F.2d 731, 739 (10th Cir. 1980); Lukenas v. Bryce's Mountain Resort, Inc., 538 F.2d 594, 597 (4th Cir. 1976); DeMartino v. Albert Einstein Medical Center, 460 A.2d 295 (Pa.Sup. 1983). Accordingly, contrary to the argument in Plaintiff's Response that Monsanto was required to demonstrate an absence of concealment or misrepresentation, the initial burden of presenting "material" disputed facts on the issue of obstruction or concealment properly rests with plaintiff.

Central to the tolling of a statute of limitations is a showing by the plaintiff that he relied to his detriment upon some positive, affirmative action on the part of the defendant, designed to conceal the cause of action and to operate in some way upon the plaintiff to prevent or delay the bringing of the suit. See Lukenas v. Bryce's Mountain Resort, Inc., 338 F.2d at 597 (4th Cir. 1976); Bergeron v. Mansour, 152 F.2d 27, 30 (1st Cir.

1945); Duttine v. Savas, 455 F.Supp. 153 (S.D.W.Va. 1978); Hall v. Bryce's Mountain Resort, 379 F.Supp. 165, 169 (W.D.Va. 1974). Significantly, estoppel will be denied where the facts establish that the plaintiff neither believed nor relied upon statements of the defendant offered as evidence of fraudulent concealment or misrepresentation. See Peters v. Kell, 12 Wis.2d 32, 106 N.W.2d 407 (1960).

The undisputed facts in the instant case clearly establish that the element of reliance is missing. Plaintiff was not lulled into a false sense of security, but rather filed a claim for work-related disability benefits, consulted with and retained counsel, and pursued the matter through the adversary process until final administrative judgment on appeal. In connection with his efforts to show disability caused by an occupational disease, plaintiff was examined by no fewer than eight physicians. Most of these medical experts were not associated with Monsanto in any way; at least one physician was specifically retained by plaintiff and supported his claim for permanent partial disability, and three specialists were neutral members of the Special Occupational Disease Board, appointed by the Compensation Commissioner at plaintiff's insistence. Thus, the facts here are distinguishable from cases such as Pashley v. Pacific Electric Company, 153 P.2d 328 (Cal. 1944), Louisville & Nashville Railroad Co. v. Disspain, 275 F.2d 25 (6th Cir. 1970), and National Lead Co. v. Workmen's Compensation Appeals Board, 251 Cal.App.2d 673 (1967), where the only medical advice the plaintiffs were given was from physicians acting as agents of the corporate defendant.

As noted in Plaintiff's Response, when either obstruction under W. Va. Code §55-2-17 or the doctrine of equitable estoppel is at issue, the court may appropriately inquire into the relationship of the parties and the attendant facts. Duttine v. Savas, 455 F.Supp. 153 (S.D.W.Va. 1978); Culbertson v. Jonathan McCall Coal Co., Inc., 275 F.Supp. 662 (S.D.W.Va. 1967), aff'd, 495 F.2d 1403 (4th Cir.) cert. denied 419 U.S. 1033 (1974).

See also Hundley v. Martinez, 151 W.Va. 977, 158 S.E.2d 159 (1967). For example, in Culbertson, the court found that the relationship between the parties was of a fiduciary nature since the plaintiff, in the business of mining and shipping coal, had placed great confidence and trust in the business dealings of the defendant, plaintiff's exclusive agent, concluding that "where a confidential relationship exists between the parties, failure to discover the facts constituting fraud may be excused." Similarly, in Duttine v. Savas, the court noted that the defendants, members of the board of directors of the debtor corporation, were in a fiduciary relationship with the corporation and thus were estopped from asserting the defense of the statute of limitations in a subsequent action brought against them on behalf of the corporation. In both cases, the court recognized that the "law governing such a fiduciary relationship is quite different from the law governing the relationship between parties who are dealing at arm's length." Culbertson v. Jonathan McCall Coal Co., Inc., 275 F.Supp. at ____.

Until 1957, the relationship between plaintiff and Monsanto was that of employer-employee. Such a relationship does impose upon the employer certain obligations to furnish employment which is reasonably safe, to provide appropriate safety devices and safeguards, and to adopt methods and processes reasonably necessary to protect the health, safety and welfare of his employees. See W. Va. Code §21-3-1. Such a relationship, however, is a far cry from the relationship of trust and confidence present in Culbertson and Duttine v. Savas. Employers and employees generally "deal at arm's length," are frequently suspicious of each other's conduct, and are adversaries in negotiating wages, safety procedures and health care.

Specifically, in the instant case, plaintiff and Monsanto did not have a fiduciary-type relationship. Plaintiff questioned and actively opposed Monsanto's position regarding the health consequences of exposure to 2,4,5-T or related chemicals as early as the 1950s, certainly undisputed evidence that he did not rely on any "misrepresentations" by Monsanto. Moreover, in 1957

he left Monsanto, terminating the employer-employee relationship. Under these circumstances, plaintiff cannot be excused from taking appropriate steps to further "verify" the cause of his injuries.

Even assuming, for purposes of this motion, that Monsanto concealed information as to the cause of plaintiff's injuries from plaintiff or that Monsanto misrepresented to plaintiff the health hazards associated with exposure to 2,4,5-T, dioxin, or any other chemical, plaintiff's "asserted versions of the facts", plaintiff has failed to establish that such alleged concealment or misrepresentation was sufficient as a matter of law to toll the running of the statute of limitations. There has been no showing that plaintiff relied upon any alleged concealment or misrepresentation by Monsanto, an element essential to the tolling of the limitations period.

It is not reasonable, nor could a jury find it reasonable, to conclude that plaintiff was lulled into a state of acquiescence by Monsanto's alleged failure to keep him personally informed as new information on 2,4,5-T or dioxin was discovered or to apprise him of the various speculations by members of the scientific and medical communities regarding the possible health risks involved. Plaintiff, as a Monsanto employee, was of necessity aware that between 100 and 200 of his fellow workers had developed chloracne and had expressed other health problems following the 1949 autoclave incident. He personally formed a belief that his own health had been adversely affected as a result of exposure to "unknown products of decomposition" following that blow-off. Under these circumstances, plaintiff retained a burden of inquiry even after he left Monsanto in 1957. In spite of the adverse compensation ruling, his injuries, if any, remained. By diligent investigation, further consultation with physicians and other experts, and proper use of discovery devices, he could have discovered the information allegedly withheld from him by Monsanto substantially more than two years before this action was instituted.

Significantly, the information plaintiff asserts was withheld from him was never concealed by Monsanto. This is particularly true of the various studies and surveys in Monsanto's corporate knowledge prior to 1957, the year plaintiff terminated his employment with Monsanto. For example, during his testimony before the Compensation Commissioner on November 29, 1956, Dr. Raymond R. Suskind freely referred to the various medical and hygiene studies conducted by the Kettering Laboratory following the 1949 accident. Moreover, James G. Jeter, then plaintiff's attorney, was given an opportunity to, and did, cross-examine Dr. Suskind with respect to his findings. See Plaintiff's Exhibit 8, Transcript of Workmen's Compensation Hearing, November 29, 1956. On December 6, 1956, Dr. Jerome W. Conn, associated with the University of Michigan Medical School and called as an expert witness by Monsanto during the compensation proceedings, summarized for the Commissioner the reports he had been given for study, including the May 11, 1949 Report by Dr. Louis Schwartz of the United States Public Health Service (Plaintiff's Exhibit 15); an August, 1949 Report by Dr. Schwartz (Plaintiff's Exhibit 16); a December 5, 1949 Report by Drs. William S. Ashe and Raymond R. Suskind (Plaintiff's Exhibit 28); an April, 1950 Report by Drs. Ashe and Suskind (Plaintiff's Exhibit 35); and a 1953 Report of Clinical and Environmental Survey by the Kettering Laboratory. Again, James G. Jeter, plaintiff's legal representative, was present and had an opportunity to inquire further into these various reports and studies. See Plaintiff's Exhibit 10, Transcript of Workmen's Compensation Hearing, December 6, 1956, at pp. 13-14.

Throughout the 1950s, not only was plaintiff represented by retained counsel, but he was also represented by his union, the United Mine Workers of America. On behalf of plaintiff and the other Monsanto employees, the union was in frequent contact with the West Virginia State Department of Health and with Paul D. Halley, its Industrial Hygienist (Plaintiff's Exhibits 18, 36). Reports such as those by Dr. Henry F. Smyth, Jr., of the Industrial Hygiene Foundation of America, Inc. (The Mellon Institute), on the

results of tests on Monsanto samples of 2,4,5-T, the autoclave material, and other substances (Plaintiff's Exhibit 34), and by Drs. Donald J. Birmingham and Cleveland R. Denton of the United States Public Health Service, concerning the operations at the Nitro plant (Plaintiff's Exhibit 37) were in the possession of Mr. Halley and the state health department. There is not one scintilla of evidence to suggest that these reports were not available to the union or to plaintiff's counsel upon request.

The 1953 article by Drill and Hiratzka, published in Industrial Hygiene and Occupational Medicine and reporting on the toxicity of 2,4-D and 2,4,5-T in dogs (Plaintiff's Exhibit 39) was not only equally available to plaintiff, his attorney and his union, but was actually referred to by Monsanto's counsel during his examination of Dr. Suskind. See Plaintiff's Exhibit 7, Transcript of Workmen's Compensation Hearing, November 29, 1956, at p. 52. Similarly, evidence that in 1957, Monsanto had on file descriptions listing "symptoms and findings" associated with ingestion of or contact with various 2,4,5-T products (Plaintiff's Exhibit 47) does not support any reasonable inference that Monsanto was concealing that information. Indeed, the descriptions were referenced to the National Clearinghouse for Poison Centers and to a textbook by Gleason, Cosselin and Hodge, Clinical Toxicology of Commercial Products, published in 1957, sources available to plaintiff, and to his attorney, physicians and union.

The more recent "evidence" offered by plaintiff to "support" his theory that Monsanto concealed from him the cause of his injury, likewise fails to survive careful scrutiny. Rather than establishing a corporate plan of concealment and misrepresentation, these documents illustrate Monsanto's efforts to minimize the health risks to which its workers might be exposed, and to ferret out any possible medical problems in its 2,4,5-T process. The absurdness of plaintiff's "inferences" is perhaps best demonstrated by reference to the 1979 study conducted by Dr. Raymond R. Suskind.

The suggestion that the effort to include plaintiff in the 1979 Suskind study was part of some "cover-up" plan is illogical at best. Monsanto's willingness to support that study, and its efforts to include workers such as Jeffers who had not been employed by the corporation for over twenty years, negates, rather than supports, any possible inference that it intended to conceal information from plaintiff as late as 1979. Significantly, although during some preliminary negotiations with Dr. Suskind, the subject of control was discussed, the final agreement left sole responsibility for findings and conclusions with Dr. Suskind. See Plaintiff's Exhibit 65 (Affidavit of Raymond R. Suskind, M.D.) and Exhibit 67 (Monsanto's Letter to Executive Director, Medical Center Fund of Cincinnati, dated July 13, 1979). Despite concerns that a health study might cause workers to indiscriminately relate current health problems to past events, a concern which has become a reality, Monsanto determined that sponsorship of a follow-up study by Dr. Suskind was consistent with its corporate policy of social responsibility. See Plaintiff's Exhibit 76 (Memorandum from William J. McCarville, dated August 11, 1978). Significantly, the initial decision to sponsor the health study was made by Monsanto before it was informed of the Mt. Sinai study to be sponsored by the United Steelworkers of America. See Plaintiff's Exhibits 60, 76.

Management concern over the appropriate method for handling employee and union requests for health data also fails to evidence any corporate plan of concealment. The memorandum entitled "How to Handle Employee and Local Union Requests for Employee Health Data," dated November 16, 1977 (Plaintiff's Exhibit 71) addresses procedures for responding to such requests, not methods for concealing information. The memorandum clearly provides that responses should be made in all cases, and further observes:

For a plant's industrial hygiene effort to be effective, a positive approach is necessary to employee and union representatives as to what's being done, where problems are, and what

cooperation is required from employees. Plant management, with the concurrence of the operating company personnel department, should develop their own positive communications effort.

Instructions such as these clearly negate any inference that Monsanto was engaged in a "cover-up" scheme.

Plaintiff's proffered evidence on the issues of misrepresentation and concealment does not withstand scrutiny. All inferences which could reasonably be drawn from the documents submitted by plaintiff lead inexorably to the conclusion that there was no corporate scheme or plan to withhold pertinent information relating to 2,4,5-T, dioxin or associated health problems from plaintiff or other Monsanto employees. Alternatively, even assuming some evidence of the alleged misrepresentation or concealment, by the spring of 1979, at the latest, plaintiff, by the exercise of due diligence, should have discovered the information sufficient and necessary to place upon him the burden of inquiry and to commence the running of the limitations period. See Section III of this Reply Memorandum. When concealment or misrepresentation is, or should have been, discovered, an action must be brought within a reasonable time which may not exceed the period of limitation imposed by the statute. See McCoy v. Wesley Hospital & Nurse Training School, 188 Kan. 325, 362 P.2d 841 (1961); Dye v. Schieldt, 236 Ind. 101, 138 N.E.2d 891 (1956). In the instant case, plaintiff failed to act promptly within the time allowed by law.

V

PLAINTIFF'S CAUSE OF ACTION FOR
DAMAGES FOR PERSONAL INJURY WAS NOT
REVIVED BY THE ENACTMENT OF SENATE BILL 585

The final issue before this Court, as raised in plaintiff's responding memorandum, is whether the enactment of Senate Bill 585 by the 1983 West Virginia Legislature permits plaintiff to maintain this action for

damages notwithstanding his failure to commence the action within two years of the date of his injury, or alternatively within two years of the date he discovered, or by the exercise of reasonable diligence should have discovered, his injury.

As previously discussed in Monsanto's Memorandum and this Reply Memorandum, plaintiff's right of action accrued more than two years before this action was instituted. Accordingly, his right to maintain the action is barred under the provisions of W. Va. Code §55-2-12(b), the applicable statute of limitations. The action has not been and cannot be revived by the enactment of Senate Bill 585. First, it is clear from W. Va. Code §16-28-10 and the history of Senate Bill 585 that the West Virginia Legislature intended Senate Bill 585 to apply only to "veterans" who served during the Korean or Viet Nam conflicts. Second, any revival of plaintiff's right to bring an action for damages for personal injuries after the two-year period for bringing such actions has run would violate Monsanto's constitutional rights under the due process clause of the West Virginia Constitution.

A. West Virginia Code §16-28-10 Applies Only to Veterans of the Korean or Viet Nam Conflicts

The enactment of Senate Bill 585 does not extend the time within which plaintiff can bring an action for damages for personal injury caused by exposure to chemicals while employed at Monsanto's Nitro plant during the years 1937 to 1957. The language and legislative history of Senate Bill 585 clearly establishes that the West Virginia Legislature intended the extension of limitations periods to apply only to veterans exposed to certain chemicals during their military service in either Korea or Viet Nam. Plaintiff does not fall within that category. Accordingly, this action for damages for personal injury commenced more than two years after the right of action had accrued has not been revived and should be dismissed.

Senate Bill 585 was not enacted in a vacuum. The year preceding the enactment of Senate Bill 585, the West Virginia Legislature passed a bill the purpose of which was to aid veterans who had been exposed to potentially harmful chemicals during either the Korean or Vietnam Wars. That bill became Article 28, Chapter 16 of the West Virginia Code, and was entitled "Assistance to Korean and Vietnam Veterans Exposed to Certain Chemical Defoliants or Herbicides or Other Causative Agents." When Senate Bill 585 was enacted a year later, it was specifically presented and enacted as an amendment to Article 28, Chapter 16 of the West Virginia Code, an existing law which dealt with a particular group of individuals and a particular subject: veterans of either the Korean or Vietnam Wars who were exposed to chemical defoliants or herbicides during their service.

The language of Senate Bill 585 verifies that the bill and its extension of limitations periods applies only to those individuals who were the subject of Article 28, Chapter 16. As an amendment to Article 28, Chapter 16, Senate Bill 585 was codified as W. Va. Code §16-28-10 of the West Virginia Code, and provides:

An action to recover damages under the provisions of this article for personal injury caused by contact with or exposure to chemical defoliants or herbicides, including agent orange, during either the Korean or Vietnam conflict, may be commenced within two years from the date of discovery of such injury, or within two years from the date when through the exercise of reasonable diligence the cause of such injury should have been discovered, whichever is later.

Every cause of action for an injury or death caused by contact with or exposure to chemical defoliants or herbicides, including agent orange, during either the Korean or Vietnam conflict, which is barred as of the effective date of this section [June 9, 1983] because the applicable period of limitation has expired is hereby revived and an action thereon may be commenced and prosecuted provided such action is commenced within two years of the effective date of this section.

As noted above, Senate Bill 585 was passed as an amendment to existing sections 1 through 9 of Article 28, Chapter 16 of the West Virginia Code. The bill passed the year preceding Senate Bill 585, which became sections 1 through 9, began in 1982 as House Bill 1228. House Bill 1228 was introduced in the House of Delegates on January 18, 1982, and was:

A BILL to amend chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article twenty-eight, relating to reports concerning veterans who may have been exposed to certain chemical defoliants or herbicides or other causative agents and assistance to those veterans; providing definitions; reports made to West Virginia state department of health; reports by department of health; confidentiality of reports; physician or hospital to be immune from civil or criminal liability; attorney general authorized to represent veterans in class action suit; institution of assistance programs authorized if funding is available; providing dates for application by veterans; and termination of programs and duties of the department of health.

Comm. Sub. H.B. (1982) (emphasis added) (attached hereto as Exhibit B). A perusal of sections 1 through 9 of Article 28, Chapter 16, reveals that each section addresses only veterans and only the exposure of veterans to chemical defoliants or herbicides or other causative agents. See also House Judiciary Abstract, attached hereto as Exhibit C. It was that Article of the West Virginia Code and those specific sections which Senate Bill 585 was enacted to amend.

The decision to place Senate Bill 585 in the West Virginia Code at §16-28-10 was not an innocuous, insignificant decision. Instead, Senate Bill 585 was presented to the Legislature and enacted specifically to amend Article 28, Chapter 16, pertaining to exposure of veterans. The preamble of the Bill notes that it is:

A BILL to amend article twenty-eight, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section designated section ten, relating to the limitation of actions and suits for damages resulting from exposure to chemical defoliants and herbicides.

Senate Bill 585 (1983) (emphasis added) (attached hereto as Exhibit D). If Senate Bill 585 is to be read "in pari materia" and in conjunction with certain sections of the West Virginia Code as plaintiff suggests, it should be read in pari materia and in conjunction with the very section of the West Virginia Code it was enacted to amend.

Furthermore, statements by the sponsor of Senate Bill 585 also emphasize that the bill was intended to afford veterans of the Korean and Vietnam conflicts with an additional one-time opportunity to file a suit for personal injuries suffered as a result of exposure to chemicals during their service. In an article published in the Bluefield Daily Telegraph dated February 24, 1983, which reported comments made on the floor of the State Senate, Senate Majority Leader Dan Tonkovich is quoted as stating:

The bill [Senate Bill 585] was intended to allow veterans exposed to Agent Orange up to two years to file suit for damages caused by the chemical.

See Exhibit E attached hereto. Senator Tonkovich was also reported as making the following comments:

"The reason we need to pass this bill is because the Veterans Administration has turned its back on our veterans," Tonkovich said. "The VA will not promote testing of these veterans to document the fact that they might have suffered any effects from Agent Orange."

Another article published in the Charleston Daily Mail on February 25, 1983, regarding an interview with Senator Tonkovich similarly substantiates the application of Senate Bill 585 to veterans who were exposed during their service. See Exhibit E attached hereto.

Senate Bill 585 was not enacted, as plaintiffs argue, as a broad extension of limitation periods for any individual who alleges exposure to herbicides or an extensive list of other causative agents during certain periods of time, but was enacted to enable the individuals given aid in House Bill 1228 (Article 28, Chapter 16, sections 1-9) an extension of time to file any pertinent actions. The purpose of House Bill 1228 was and is to assist Korean and Vietnam veterans in making claims for exposure to certain chemicals. Senate Bill 585, enacted as §16-28-10, is a continuation of House Bill 1228 and applies to the same group of individuals: veterans exposed to certain chemicals during their military service. See Exhibit F attached hereto. Because plaintiff is not a veteran exposed under such circumstances, §16-28-10 does not revive his cause of action.

B. Plaintiff's Right to Bring an Action for Personal Injuries Cannot be Revived by Subsequent Legislation.

Even if the West Virginia Legislature did intend to include non-veterans within the scope of Senate Bill 585, its application to revive plaintiff's right of action for damages for personal injury would violate the due process clause of the Constitution of the State of West Virginia: "No person shall be deprived of life, liberty or property, without due process of law." W.Va. Const. Art. III, Section 10. The scope of this due process privilege may be broader than the protection afforded by the Fourteenth Amendment to the United States Constitution. See State ex rel. Harris v. Calendine, 233 S.E.2d 318 (W.Va. 1977).

Under the due process mandate of the West Virginia Constitution, the West Virginia Legislature is without constitutional power to revive, by enactment, an action which, when filed, is already barred by the running of the limitations period. The interest obtained by a prospective defendant upon the passage of a limitations period is a vested interest which cannot be taken away by subsequent legislation. As acknowledged by the West Virginia Supreme Court of Appeals in Lester v. State Workmen's Comp. Comm'r., 242 S.E.2d 443 (W.Va. 1978), a case involving an appeal of a denial of claimant's application for occupational pneumoconiosis benefits under a statute whose time limitations for filing a claim had been extended:

It is clear that a person has no vested right in the running at a statute of limitations unless it has completely run and barred the action.

242 S.E.2d at 452 (emphasis added).

Monsanto is not unmindful that courts interpreting the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution have generally distinguished between limitations periods which effect only the remedy and those which effect the right as well. See Defendant's Response to Plaintiffs' Second Supplemental Memorandum of Law in Opposition to Defendant's Motion to Dismiss for Failure to Commence Wrongful Death Actions Within the Statutory Period, pp. 9-17. Generally, without offending the due process mandate of the Fifth or Fourteenth Amendments, Congress or a state legislature may extend a statute of limitations even after the right of action is barred, except where a party has been vested through lapse of time with title to real or personal property; however, it may not extend a limitations period after it is expired when the limitations period is considered an integral part of the substantive right. Chase Securities Corporation v. Donaldson, 325 U.S. 304 (1945); William Danzer & Company, Inc. v. Gault & Ship Isle R. Co., 268 U.S. 633 (1925); Cambell v. Holt, 155 U.S. 620 (1885); Link v. Receivers of Seaboard Airline Ry. Co., 73 F.2d 149 (4th Cir. 1934).

The issue of whether under the due process clause of the West Virginia Constitution a barred claim can be revived by the subsequent legislative extension of the limitations period has never been resolved by the West Virginia Supreme Court of Appeals. See Lester v. State Workmen's Compensation Comm'r., 214 S.E.2d at 452, n. 15 (W.Va. 1978) where the issue was pretermitted. Under the doctrine of Erie Railroad Company v. Tompkins, 304 U.S. 64 (1938), this Court must determine how the West Virginia Supreme Court would decide this issue and apply that rule to the facts of the instant case.

A property interest protected by the West Virginia Constitution includes not only the traditional notions of real and personal property, but also extends to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings. See Evans v. West Virginia Board of Regents, 271 S.E.2d 778 (W.Va. 1980); Kiser v. Public Service Commission, 258 S.E.2d 586 (W.Va. 1979); State ex rel. McLendon v. Morton, 249 S.E.2d 919 (W.Va. 1978); Waite v. Civil Service Commission, 241 S.E.2d 164 (W.Va. 1977). Based upon this liberal interpretation of property interests, it is clear that once a right of action is barred by the passage of a period of limitations, regardless of whether the right of action has been statutorily created or is based upon common law, a prospective defendant is vested with a property interest protected by the due process clause of the West Virginia Constitution.

The test for determining whether a statute affects a property right which is "vested" is "whether the individual has changed his position in reliance upon existing law or whether the retrospective act defeats the reasonable expectations of the parties it effects." Pnakovich v. State Workmen's Comp. Comm'r., 249 S.E.2d 127, 130 (W.Va. 1979) (emphasis added). In the instant case, is it manifestly clear that to allow the revival of a right of action, more than two decades after the employer-employee relationship was terminated and many years after plaintiff knew or should

have known of his injury and its cause, "defeats the reasonable expectations" of the defendant Monsanto. Under these circumstances, the right to set up the bar of a statute of limitations as a defense to a cause of action after the statute has run is a vested right which cannot be taken away by subsequent legislation.

VI

CONCLUSION

For the foregoing reasons, and for the reasons assigned in the Memorandum of Law in Support of the Motion of Defendant, Monsanto Company, based on the Statute of Limitations, this action is barred by the two-year statute of limitations applicable to claims for damages for personal injuries. There is no genuine issue as to any "material" fact and Monsanto is entitled to summary judgment in its favor.

MONSANTO COMPANY

By Counsel

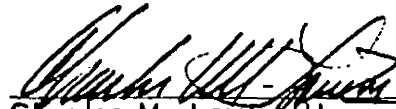


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CERTIFICATE OF SERVICE

The undersigned attorney, Charles M. Love, III, of Bowles, McDavid, Graff & Love, hereby certifies that a copy of the foregoing "Memorandum of Law in Reply to Plaintiffs' Response to Motion of Defendant, Monsanto Company, for Summary Judgment Based on the Statute of Limitations" was served upon the plaintiffs by hand delivering a true and correct copy to plaintiffs' counsel on this 9th day of September, 1983, at the following address:

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