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OF WEST VIRGINIA

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No. 25338 -- Wanda Sue Bower, Patricia E. Hawkins, Bobbie Jo Hardesty, Tom Jay Hardesty, Kent Norman Huffman, and Brenda Kay Spencer v. Westinghouse Electric Corporation, a Pennsylvania corporation, and North American Philips Corporation, a Delaware corporation

Maynard, Justice, dissenting:

I dissent in this case because I believe that West Virginia law does not permit an independent cause of action to recover future medical monitoring costs absent physical injury, and this Court has no authority to create such a cause of action.

Several things about this decision trouble me. The first is the way in which the majority goes beyond the narrow question presented by the District Court in order to decide this case. I do not dispute the Court's authority under our Uniform Certification of Questions of Law Act to reformulate a question submitted by a certifying court. I do dispute, however, the necessity of doing so in the instant case. The District Court set forth a clear, concise and limited question:

> In a case of negligent infliction of emotional distress absent a physical injury, may a party assert a claim for expenses related to future medical monitoring necessitated solely by fear of contracting a disease from exposure to toxic chemicals.

This question is applicable to the facts of the case before the District Court. It is also pertinent in light of this Court's recent holding in *Marlin v. Bill Rich Const., Inc.*, 198 W.Va. 635, 482 S.E.2d 620 (1996), concerning the availability of recovery for negligent infliction of emotional distress based solely upon the fear of contracting a disease. This modest issue, however, was not suitable for the majority's grand designs. Consequently, the majority transformed the issue into "whether West Virginia law permits an independent cause of action to recover future medical monitoring costs absent physical injury." The majority's determination to make new law despite the specific issue before it is further illustrated by its summary rejection of settled tort law and the previous decisions of this Court.

The second and obviously most troubling aspect of this decision is the majority's violation of the constitutional separation of powers doctrine by usurping the Legislature's authority to enact laws. Article V, Section 1 of the Constitution of West Virginia provides that "[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others[.]" According to Article VI, Section 1 of the Constitution, the legislative power is vested in the Senate and House of Delegates. This Court has described the legislative power as "the power of the law-making bodies to frame and enact laws." *State v. Huber*, 129 W.Va. 198, 207, 40 S.E.2d 11, 18 (1946). This is in contrast to the judicial power which is,

> the power which a regularly constituted court exercises in matters which are brought before it, in the manner prescribed by statute, or established rules of practice of

> courts, and which matters do not come within the powers granted to the executive, or vested in the legislative department of the Government.

Id., 129 W.Va. at 208, 40 S.E.2d at 18. This Court's jurisdiction is prescribed and limited by the constitutional provisions which create it, *see Deitz Colliery Co. v. Ott*, 99 W.Va. 663, 129 S.E. 708 (1925), and nowhere in the Constitution is this Court granted the power to create causes of action. *See* Art. VIII, § 3, *W.Va. Const.* This Court recognized long ago that "[t]he legislature has the right to create new causes of action for the recovery of money." *Norfolk & W. Ry. Co. v. Pinnacle Coal Co.*, 44 W.Va. 574, 577, 30 S.E. 196, 197 (1898). We reiterated more recently that the creation, augmentation, repeal or abolishment of complete causes of action is a legislative power. *See Robinson v. Charleston Area Medical Center, Inc.*, 186 W.Va. 720, 414 S.E.2d 877 (1991). Up until approximately the last twenty-five years, the Court respected that fact. This decision shows just how far this Court has moved from its constitutional underpinnings and its proper role.

Finally, even if this Court did have the power to create causes of action, I would not agree with the one created by this decision. The majority rejects the fundamental 200 year old tort law principle that a plaintiff may not recover damages unless he or she has a present injury, and replaces it with the speculative and amorphous showing of "increased risk." The majority admits that "the plaintiff is not required to show that a particular disease is certain or even likely to occur as a result of exposure" (citation omitted). Because of this decision, plaintiffs will now be compensated when there is no injury, thus providing a

windfall for plaintiffs. As one commentator has recently suggested, lawyers can now advertise, "Don't wait until you're hurt, call now."[1] In fact, the practical effect of this decision is to make almost every West Virginian a potential plaintiff in a medical monitoring cause of action. Those who work in heavy industries such as coal, oil, gas, timber, steel, and chemicals as well as those who work in older office buildings, or handle ink in newspaper offices, or launder the linens in hotels have, no doubt, come into contact with hazardous substances. Now all of these people may be able to collect money as victorious plaintiffs without any showing of injury at all.

We recently stated, "[t]he one area, above all, where a court should exercise caution is when it is deciding its own power." *SER Affiliated Construction Trades Council v. Vieweg*, ___ W.Va. ___, ___ S.E.2d ___, slip op. at 15, (No. 26364, July 14, 1999). The majority exercised no caution whatsoever in this case. Consequently, it exceeded its legitimate powers and usurped the function of the Legislature. As a result, its holding here is not only judge-made law, it is bad law. For these reasons, I respectfully dissent.

[1]Victor Schwartz, *Some lawyers ask, why wait for injury? Sue now!*, USA TODAY, July 15, 1999, at 17A.