

Maynard, Justice, concurring in part; dissenting in part:

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DEBORAH L. McHENRY, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

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I concur with Justice Davis' dissent, but I write separately to reiterate a crucial point. Even though I cannot say it any better than Justice Davis did in footnote 2, let me be perfectly clear that this Court cannot and should not *sua sponte* create a new cause of action and simultaneously decide the merits of the new cause of action against the defendant.

Justice Davis mentions the only two ways this Court can constitutionally recognize a new cause of action. Because I believe this is so important, let me say it again: (1) a party may advocate a new theory at the trial level and prevail; on appeal, this Court may recognize the new cause of action, or (2) a party may advocate a new cause of action at the trial level but be prevented from litigating the matter; on appeal, this Court may recognize the unlitigated new cause of action and remand for trial. That did not happen here.

By creating a new cause of action and turning the decision on this new cause of action, the majority denies this defendant due process. The defendant has not had and will not have the opportunity to rebut a cause of action under W.Va. Code § 5-11-9(7)(A) and the collateral victim doctrine because no such evidence was presented in this case.

Because I believe in the Constitution of the United States and the Constitution of the State of West Virginia, I dissent. I am authorized to state that Justice Davis joins me in this dissent.