No. 31538 – State of West Virginia ex rel. Abraham Linc Corporation v. The Honorable Thomas A. Bedell, Judge of the Circuit Court of Harrison County; and John Edens

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Starcher, J., concurring:

"[S]tanding is a complex doctrine, defying generalizations and analytical structuring." Martha Colhoun and Timothy Hamill, "Environmental Standing in the Ninth Circuit: Wading through the Quagmire," 15 Pub. Land L. Rev. 249, 279 (1994).

I concur in the Court's *per curiam* opinion. I write separately to express another perspective on the issue of standing that is raised in the concurring opinion filed by Justice Davis.

In certain factual situations, the kind of tripartite analytic formulation set forth in *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) may be useful to a court in dealing with a standing issue. But there are several strong reasons not to use this analysis in the instant case, and not to adopt this approach as a black-letter principle of West Virginia law. I will briefly discuss those reasons.

The first reason is specific to the instant case – the fact that the issue of standing was not raised or briefed by either of the parties.

The concurrence is correct in stating that this Court can reach such an issue *sua sponte*. In some cases – particularly where there is settled law to apply – *sua sponte* action is appropriate. But what this Court almost never should do is to take up an issue that has not

been briefed or argued, and then proceed to alter the basic law of the State – without the opportunity for either the litigants or the many members of the Bar and public who follow this Court's work to weigh in on the subject.

It is almost always the case that the competing voices and arguments of well-prepared, zealous advocates on all sides of an issue that has been raised in a concrete case permit this Court to craft decisions (and especially syllabus points) that will be enduringly useful. (That is one reason that we eschew advisory opinions.) To put forth a new "rule" without the benefit of advocacy or input from the public or the legal profession – especially a rule that would apply to a substantively wide range of cases – is not how the common law should be built.

Moreover – again focusing on the specific case that is before this Court – the *Powers* standing analysis, that focuses on "when one person can assert 'rights' belonging to another person," does not fit the facts of the instant case.

The plaintiff in the instant case argues that he was injured in a workplace where the worker's compensation laws were not being followed; and he also argues that there is a clear penalty prescribed by the Legislature for employers who do not follow the law – the loss of statutory immunity from suit.

The plaintiff is not attempting to get a right or benefit for or belonging to a "third party" (that party, in the instant case, would be the worker who injured the plaintiff and who was not listed with Worker's Compensation). Rather, the plaintiff is seeking a right

or benefit *for himself* – namely, the ability to take advantage of the legislative penalty of the employer's loss of immunity.

In short, the facts of the instant case do not fit the "third party" standing situation that *Powers* addresses.

Next, going beyond the circumstances of the instant case, the adoption of the specific *Powers* formulation as a black-letter rule would likely be inappropriate and unhelpful for the development of our West Virginia law.

This is because *Powers* is a federal case, and its "third-party" prudential standing formulation is tied into the larger framework of federal court jurisdiction, a jurisdiction that is quite limited under the *United States Constitution* – and is quite different from the general jurisdiction of the sovereign States and their courts. Adopting the *Powers* formulation would tend to tie the development of our standing law to past and future standing decisions of the federal court decisions that are grounded in a fundamentally different jurisprudential soil.

Moreover, without going into an in-depth discussion of this complex area of law, suffice it to say that the recent federal decisions in the standing area have been seriously questioned by many scholars. For examples of such criticism, *see* Mendelson, Joseph, "Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act," 24 B. C. Envtl. Aff. L. Rev. 795 (1997) (criticizing federal cases denying standing to persons seeking to prevent animal abuse); Milani, Adam, "Wheelchair Users Who Lack Standing:

Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA," 39 Wake Forest L.Rev. 69, notes 61-83 (2004) (criticizing federal cases denying standing to persons challenging disability discrimination); Sheldon, Karin, "*Steel Company v. Citizens for a Better Environment*: Citizens Can't Get No Psychic Satisfaction," 12 Tul.Envtl.L.J.1 (1998) (criticizing Supreme Court denial of standing to citizens challenging failure of company to file toxic chemical reports); King, Jason, "Standing in Garbage: Flow Control and the Problem of Consumer Standing," 32 Ga.L.Rev. 1227 (1998) (criticizing federal cases denying citizens standing to challenge garbage importation); Levy, Johnathan, "In Response to *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.: Employment Testers Do Have a Leg to Stand On*," 80 Minn. L. Rev. 123 (1995) (criticizing federal cases that undercut private enforcement of fair employment laws); Myriam E., "Representational Standing: *U.S. ex rel Stevens* and the Future of Public Law Litigation," 89 Cal.L.Rev. 315 (2001) (discussing the sharp cutback in public law litigation created by the Supreme Court's standing jurisprudence in the past 30 years); Kelso, Charles D. and R. Randall, "Standing to Sue: Transformations in Supreme Court Methodology, Doctrine, and Results," 28 U.Tol.L.Rev. 93 (1996) (describing the shifting and inconsistent standing rationales used by the Supreme Court in the 20th Century); Driesen, David, "Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication," 89 Cornell L.Rev. 808, 876 (2004) ("[S]tanding doctrine has never been applied consistently, as many critics have frequently noted.").

West Virginia has wrestled with standing issues in many contexts. We have come up with some sound decisions and principles of law that our courts have applied without noticeable trauma or drama to evaluate the often-competing concerns in this area. *See, e.g.*, the discussion and cases cited in *State ex rel. Leung v. Sanders*, 213 W.Va. 569, 584 S.E.2d 203 (2003) (*per curiam*). The concurrence lists some of our other decisions in this area; and notably, the concurrence identifies no error, inconsistency, or inadequacy in any of our past rulings or analytical formulations.

Simply put, no evidence or argument supports any need by this Court to adopt an additional Procrustean formulation to address standing issues.

Accordingly, I concur.