No. 31776 – *William K. Stern, et al., Franklin Stump, Danny Gunnoe and Teddy Joe Hoosier v. Chemtall Incorporated, a Georgia Corporation, et al.*

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OF WEST VIRGINIA

Albright, Chief Justice, concurring:

I concur in the result reached by the majority opinion. I write separately only to state that while I did not have the opportunity to participate in this Court's original determination regarding the medical monitoring issue in *Bower v. Westinghouse Electric Corp*., 206 W.Va. 133, 522 S.E.2d 424 (1999), I do not believe that medical monitoring should be regarded as a separate, independent *cause of action*. Rather, it should be utilized as a potential *remedy* available to an injured individual.

The Supreme Court of Nevada recently struggled with the question of whether common law recognizes medical monitoring as a separate cause of action or simply a remedy and concluded that Nevada common law recognizes medical monitoring as a remedy. *Badillo v. American Brands, Inc.*, 16 P.3d 435 (Nev. 2001). The court reasoned that "[w]hen recognized as a remedy, medical monitoring is usually tied to a cause of action in trespass, nuisance, strict liability, or negligence." 16 P.3d at 440 (citaions omitted).

> In the tobacco litigation context, we note that claims for medical monitoring relief have been tied to causes of action in torts and contracts, including fraud, failure to warn, misrepresentation, strict liability, deceptive trade practices, breach of express warranty, breach of implied warranty of merchantability, breach of implied warranty of fitness for a

> particular purpose, negligence, conspiracy, intentional infliction of emotional distress, intentional exposure to a hazardous substance, and violation of consumer protection statutes.

Id. (citations omitted).

As Justice Starcher clearly expressed in his concurrence to *Carter v. Monsanto Co.*, 212 W.Va. 732, 575 S.E.2d 342 (2002), "property monitoring (like medical monitoring, under my understanding) is not – repeat, IS NOT – a separate cause of action. In my view, monitoring and the cost thereof are simply a remedy or an element of damages that are available to a court to award or order against a culpable party." 212 W.Va. at 738, 575 S.E.2d at 348 (Starcher, concurring). I believe that the standards articulated by this Court in *Bower* provide sound guidelines informing the courts of the parameters of the remedy of medical monitoring, but characterizing the medical monitoring remedy as a separate, independent cause of action is a misnomer.