No. 33892 – *Dylan Turner, Rhiannon Turner, Ronan Turner, by their next friend and parent Diane Turner, and Diane Turner, individually and on her own behalf v. Charles Turner, Sr., Charles Turner, Jr., and Laurie Turner, and City Hospital*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., dissenting:

On behalf of every lawyer who is seeking justice for a client, I dissent.

This case is about a car wreck involving infants that occurred in October 2004, the parties' efforts to get that case settled, and the parties' aborted attempt to get the settlement approved by the circuit court, in September 2007. Now, over four years after the wreck, this Court has ruled that the parties should instead venture into federal court and get a federal district judge to do what the circuit court could have already done. I refuse to condone this time-consuming, expensive procedure over justice and substance.

The tragic facts of this case are simple. Charles Turner, Jr. got drunk and took his three children for a drive. His children were seriously injured in a crash. The children's mother, Diane Turner, sued the reckless father and the owners of the vehicle, grandparents Laurie and Charles Turner, Sr.

The children's mother paid for health insurance through her employer, City Hospital. That health insurance plan paid for the children's medical care.

In the trial court below, attorneys for the mother and children and for the three defendants met in a mediation conference and agreed to settle this case for the limits of the available insurance policies. The insurance companies for the defendants agreed to pay the

money to the injured children, for their future care, medical needs, education and protection. Though not a party in the lawsuit, City Hospital and its claims administrator (a company called Infor-Med Insurance Services) were invited to participate in the mediation, but refused.

After the attorneys had done all the work necessary to finalize the settlement of this case, City Hospital intervened and demanded a huge chunk of the settlement money. City Hospital essentially insisted that it had a subrogation contract with Diane Turner – and insisted that Diane Turner had to take money out of her children's settlement and pay back the hospital for all the past medical care provided. Not only that, but City Hospital refused to pay any attorney fees or expenses for all of the work done to litigate and settle the case.

In West Virginia, the "made whole doctrine" stops an insurance company from gobbling up a plaintiff's entire settlement under the rubric of "subrogation" if the settlement is insufficient to fully compensate the plaintiff's past and future losses. The equitable principle underlying the made whole doctrine is that the burden of loss should rest on the party paid to assume the risk – usually an insurance company – and not on the party least

able to shoulder the loss.[1] There are several factors a court must consider when applying the doctrine:

> When applying the made whole doctrine it is incumbent on the circuit court to consider: 1) the ability of parties to prove liability; 2) the comparative fault of all parties involved in the accident; 3) the complexity of the legal and medical issues; 4) future medical expenses; 5) nature of injuries; and 6) the assets or lack of assets available above and beyond the insurance policy.

Syllabus Point 3, *Provident Life and Acc. Ins. Co. v. Bennett*, 199 W.Va. 236, 483 S.E.2d 819 (1997). *See also, Kittle v. Icard*, 185 W.Va. 126, 405 S.E.2d 456 (1991).

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[1]As this Court stated in *Porter v. McPherson*, 198 W.Va. 158, 162-63, 479 S.E.2d 668, 672-73 (1996):

> In insurance cases, the made-whole rule has been interpreted as meaning "[u]nder general principles of equity, in the absence of statutory law or valid contractual obligations to the contrary, an insured must be fully compensated for injuries or losses sustained (made whole) before the subrogation rights of an insurance carrier arise." *Wine v. Globe American Casualty Co.*, 917 S.W.2d 558, 562 (Ky. 1996); *see also Hill v. State Farm Mut. Auto. Ins. Co.*, 765 P.2d 864, 868 (Utah 1988) ("Where the insured settles with the tort-feasor, the settlement amount goes to the insured unless the insurer can prove that the insured has already received full compensation."); 16 George J. Couch, *Couch on Insurance 2d* § 61:64 at 145-46 (Ronald A. Anderson & Mark S. Rhodes eds., rev. ed.1983) (stating that "in absence of waiver to the contrary, . . . no right of subrogation against the insured exists upon the part of the insurer where the insured's actual loss exceeds the amount recovered from both the insurer and the wrongdoer, after deducting costs and expenses"). The equitable principle underlying the made-whole rule in insurance subrogation cases is that the burden of loss should rest on the party paid to assume the risk (the insurer) and not on the party least able to shoulder the loss (the inadequately compensated insured). *Wine*, 917 S.W.2d at 562.

Most importantly, a *per curiam* opinion from the Fourth Circuit Court of Appeals indicates that West Virginia's made whole doctrine is not preempted by ERISA. *See Martine v. Hertz Corp.*, 103 F.3d 118 (4th Cir., 1996).

But the majority opinion dryly holds that even if the plaintiff children in this case aren't being made whole by their settlement with the defendants, and even if the made whole doctrine isn't pre-empted by ERISA, that City Hospital can still muck up the whole proceedings by dragging a state law tort suit into federal court to fight over the amount of subrogation to which City Hospital *might* be entitled.

I think a federal court will – or at least should – approve the infant settlement in this case, and disapprove of City Hospital's attempt to take money away from the children under the made whole doctrine. But in the process, much time will have been spent, and much attorney and judicial time will have been wasted.[2]

I dissent because, in my 12 years on the appellate bench, I have too often seen arcane procedural decisions like this one flow forth from this Court. These decisions brilliantly and eloquently describe the trees, while failing to recognize the surrounding forest. These kinds of decisions may be technically correct, but they wholly miss the public policy waves that will ripple from the Court's decision.

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[2]If City Hospital is, essentially, wasting the parties' and the court's time by insisting that the subrogation issue be litigated to the same result in federal rather than state court, then I think another question is relevant: should City Hospital be compelled, under Rule 11 of the *Federal Rules of Civil Procedure*, to compensate the parties or otherwise be sanctioned for generating frivolous litigation?

The effect of the majority's decision is the make the resolution of a "simple" car wreck case beyond the comprehension of both the lay citizen and all but the most well-trained, experienced lawyers. A citizen injured by another's negligence can no longer call up the other's insurance company and expect a quick, fair settlement, nor can a lawyer acting on behalf of the injured citizen. Instead, citizens and lawyers must now weave through a maze of subrogation liens filed by insurance companies, hospitals and doctors, and government social agencies that administer Medicare or Medicaid. A settlement – which in years past would have been fair to both plaintiff and defendant – is today insufficient to pay for both the mass of liens and for the plaintiff's future expenses. The result is that plaintiffs – and their lawyers – are less willing to pursue cases where the plaintiffs have "lesser" damages[3], but at the same time must demand even higher settlement values from defendants where the damages are greater.

Let me put it another way: the majority's decision is one more brick in a wall designed to keep injured plaintiffs from seeking justice in the court system. The majority opinion allows company health insurers to turn a simple, state-law tort suit over a car wreck into a federal preemption case revolving around the unfathomable morass called ERISA. It

[3]I recognize that for every injured plaintiff, and for every defendant facing a lawsuit, their case is exceptionally important and "valuable." But while a case has esoteric value to the parties, a lawyer running a legal practice must sometimes think as a business-person – for their own sake and the sake of their client – and coldly view their client's case in purely economic terms.

So, for lack of a better term, I chose the exceptionally term "lesser" damages to denote cases different from those with "greater" damages.

is my belief that this Court should always work to improve access to the Courts and to simplify the administration of justice. Justice should not be determined by the size of one's checkbook, and whether one can hire the most lawyers to create or navigate an administrative maze. But that is exactly what the majority opinion encourages.

The use of the word "preemption" in today's courtroom is an obscenity – and I reach that view of today's world after 32 years on the trial and appellate bench. Parties who seek to preempt the effect of state law through the application of federal law are oftentimes not looking for justice or fairness – they are looking to avoid responsibility. I cannot accept that Congress intended for most federal laws, including ERISA, to be vessels of absolution for wrongdoers. State laws designed to stimulate responsible behavior by dependable citizens, state laws designed to punish and correct transgressions, and state laws designed to hold citizens accountable for their actions, are not supposed to be wholly suppressed merely by a litigant muttering the word "ERISA." But the majority's opinion is one step toward making such wholesale preemption of state law a reality.

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I must say one final thing, and this case is as good a place as any to say it. I have been guided these many years by a quote from Thomas Jefferson which says:

> I am not an advocate for frequent changes in laws and constitutions, but laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. **We might as well require a man to wear**

> **still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.**

I firmly believe that laws and institutions are not set in stone, but should be continuously interpreted and reformed to keep pace with the times. I have dedicated my career to tailoring the law to an ever-growing, ever-advancing society. And I hope that the words of Jefferson will continue to inspire other lawyers and judges who seek justice for their clients.

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Getting back to the case at hand: the law is generally designed to stimulate personal responsibility for one's actions, and it should always be interpreted in a way that molds existing law to modern society. The effect of the majority opinion, however, is to interpret ERISA in a way that stifles the power of the judiciary and that discourages personal responsibility.

I therefore respectfully dissent.