No. 33907 – *Antoinette Falls v. Union Drilling, Inc., a Delaware corporation, Kevin Wright, Donald Roach, Linda Hall, and W.Va. Insurance Company*

Starcher, J., dissenting:

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I dissent because the majority opinion is built on shaky, shifting factual sand.

Admittedly, the majority's opinion repeatedly states that its holding is limited to the "special circumstances" created by the case's specific facts – and future courts reading this opinion should keep that in mind. Any slight change in the facts might – and I stress *might* – have lead the Court to a different conclusion.

For example, the majority opinion makes it clear that both the decedent, Daniel Falls, and his supervisor, Donald Roach, had both been compelled by their employer to work excessive hours without adequate rest. The vehicle accident that killed Mr. Falls occurred almost immediately after Mr. Falls and Mr. Roach left their employer's job site. But if the circumstances had been different – for instance, if the accident had happened further from the job site, or had occurred while the workers were traveling *to* work, or if Mr. Roach hadn't been a supervisor, or even if Mr. Falls had been rested and unaware of his supervisor's stupor, then a different result might have been reached by the Court.

Another example of narrow facts in this case rests in the majority opinion's focus on the specificity of the cause of action pled by the plaintiff. The plaintiff's complaint in this case pled that employer Union Drilling was liable under a theory of *respondeat*

superior or vicarious liability. But if Union Drilling had been sued under a theory of simple negligence – on the theory that the company carelessly loosed a dangerously instrumentality onto a state highway – then a different result might have been reached by the Court. Certainly, as this Court found in Syllabus Point 1 of *Robertson v. LeMaster*, 171 W.Va. 607, 301 S.E.2d 563 (1983):

> One who engages in affirmative conduct, and thereafter realizes or should realize that such conduct has created an unreasonable risk of harm to another, is under a duty to exercise reasonable care to prevent the threatened harm.

The majority opinion criticizes the plaintiff in the instant case for not pursuing a workers' compensation claim. It should be noted, however, that in the past this Court has cruelly said that if a working decedent is young, unmarried and without children – as was Mr. Falls – then his mother is entitled to nothing more from the workers' compensation system than payment of a *portion* of his funeral costs. *See Zelenka v. City of Weirton*, 208 W.Va. 243, 539 S.E.2d 750 (2000) (after decedent was crushed on the job by a garbage truck, and decedent's family received $5,000.00 in funeral expenses from workers' compensation, decedent's family could be prohibited from suing municipal employer). So to criticize Mr. Falls's mother for attempting to recover reasonable compensation for his death by way of a lawsuit is to add insult to injury.

I therefore respectfully dissent because future litigants, and trial judges, are left by the majority's opinion guessing whether the litigants are entitled to file a workers'

compensation claim, or whether they have a cause of action in the court system. As the majority opinion says, each case will have to be litigated on its peculiar facts.