

No. 33907

**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
At Charleston**

ANTIONETTE FALLS,

Appellant and Plaintiff below,

v.

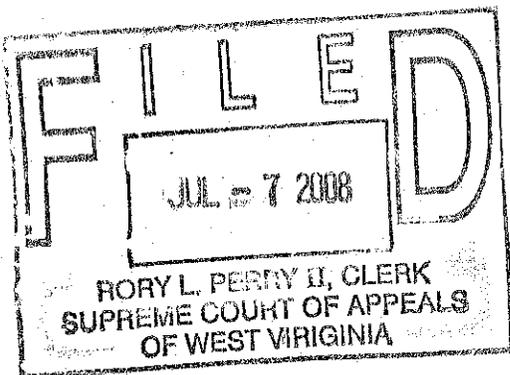
// No. 33907

UNION DRILLING INC., a Delaware corporation,
**KEVIN WRIGHT, DONALD ROACH, LINDA
HALL,** and **W. Va. INSURANCE COMPANY**

Appellees and Defendants below.

**FROM THE CIRCUIT COURT OF
HARRISON COUNTY, WEST VIRGINIA
CIVIL ACTION NO. 06-C-613**

APPELLANT ANTIONETTE FALLS' BRIEF ON APPEAL



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APPELLANT ANTIONETTE FALLS' BRIEF ON APPEAL

I. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This Court is being asked to reverse the Circuit Court's order [**Record 81-85 hereinafter "R."**]¹ dismissing Mrs. Falls' common-law negligence claims against Union Drilling, Inc., and its employees, Donald Roach and Kevin Wright (collectively the "Defendants"), for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, and to remand this case to the Circuit Court for trial. The Defendants were dismissed based upon the Circuit Court's conclusion that they were entitled to immunity from common-law liability, pursuant to the

¹ A copy of the Index as prepared by the Circuit Clerk is attached hereto as the original Record will be referenced for purposes of this Appeal.

West Virginia Workers' Compensation Act, W. Va. Code § 23-1-1, et seq. (the "Act"), for the wrongful death of Plaintiff's son, Daniel Falls, which occurred on a public highway after Daniel had left the Union Drilling premises after his work shift had concluded.

Mrs. Falls filed her complaint against the Defendants in the Circuit Court of Harrison County, West Virginia, on December 14, 2006, seeking damages for her son's wrongful death. Mrs Falls allegations included a claim for negligence alleging that Defendant Donald Roach had fallen asleep while driving on a public highway after having been awake for 31 hours in the preceding 32 hours including working three shifts, two of them consecutively. The Complaint also alleged that Defendant Union and its supervisors, including Defendants Roach and Wright, negligently, recklessly, intentionally and in conscious disregard for the safety of the public, routinely required Union Drilling's employees to regularly and consistently work excessive hours, which coupled with other factors, caused or contributed to their being sleep deprived and fatigued, without allowing for adequate rest or taking other precautions.² [R. 1-8]. Defendant Roach filed a Motion to Dismiss pursuant to Rule 12(b)(6) on April 17, 2007 [R. 15-20], and Defendants Union Drilling and Wright joined by filing a Motion to Dismiss or In the Alternative for Summary Judgment on May 7, 2007 [R. 43-52]. On June 21, 2007, without permitting discovery, the Circuit Court granted the Defendants' Motions to Dismiss after concluding that they were entitled to complete immunity under W. Va. Code §§ 23-2-6 and 6a (collectively, the "employer immunity provisions"), which grant immunity to subscribing employers and their employees from common-law liability for injuries which "result from" and occur "in the course of" employment. [R. 81-85]. The Circuit Court granted the dismissal, notwithstanding the undisputed fact that Daniel Falls' death did not "result from" and occur "in the course of" his employment as those terms have traditionally been interpreted and

² Mrs. Falls also named Linda Hall and the West Virginia Insurance Company as defendants. These defendants were not dismissed and the issues relating to this appeal do not directly involve them.

applied by this Court. See Brown v. City of Wheeling, 569 S.E.2d 197 (W. Va. 2002).

On June 27, 2007, Mrs. Falls filed a Motion for Reconsideration pursuant to Rule 59(e) of the West Virginia Rules of Civil Procedure [R. 86-89], as well as a Motion to Amend her complaint to allege that the Defendants violated the deliberate intent statute, set forth in W. Va. Code § 23-4-2 [R. 90-95]. By order dated August 13, 2007, the Circuit Court denied Mrs. Falls' Motion for Reconsideration, but granted the Motion to Amend.³ [R. 133-135]. The Circuit Court's ruling foreclosed Daniel Falls' family from ever seeking any common law recovery and it may be the only recovery available to them. Mrs. Falls appeals from the order dismissing her common-law negligence claims against the Defendants.

II. CIRCUIT COURTS HAVE MISINTERPRETED THE BIAS AND DARLING CASES

It is very important that this Court limit the contours regarding the breadth of immunity provided by the Act, not only because it is critically important to Mrs. Falls' attempts to recover for her son's wrongful death, but because circuit courts throughout the State have misinterpreted this Court's holding in Bias and Darling.⁴ Some circuit courts have failed to realize that the employer immunity provisions do not apply unless the conduct comes within the four corners of the Act. Moreover, the potential constitutional confrontations of denying a claimant a certain remedy or jury trial when granting immunity but otherwise providing no alternate means of redress, have been given short shrift or

³ Mrs. Falls filed a Motion for Certification of Question of Law to the Supreme Court of Appeals of West Virginia on August 16, 2007. [R. 136-145]. The Defendants objected on the basis that the August 13, 2007 Order was a final appealable order and that certification was therefore an inappropriate procedural mechanism. [R. 153-156]. The Circuit Court denied the Motion for Certification on that basis by Order dated September 18, 2007 and in that Order found that the dismissal was a final appealable order. [R. 193-195].

⁴ Bias v. Eastern Associated Coal Corp., 640 S.E.2d 540 (W. Va. 2006); State ex rel Darling v. McGraw, 647 S.E.2d 758 (W. Va. 2007).

totally ignored. This Court needs to set the parameters of the Bias and Darling opinions so that trial judges will have clear direction that it is the rare exception, rather than the rule, when an employer may be granted immunity and yet still have no obligation under the Act to pay damages for an employees injuries. The specific legislative action regarding mental-mental injuries recognized in Bias does not have broad application and should be very narrowly construed. It will take further guidance from this Court to provide such boundaries for the circuit judges. This case is of great importance and significance throughout the State as well as for the Appellant Antionette Falls.

III. STATEMENT OF FACTS

Daniel Falls was twenty-four years old at the time of his death on February 4, 2005. Daniel was killed in a single vehicle crash when the driver of the car in which he was riding, Defendant Donald Roach, fell asleep at the wheel. Roach had been awake for thirty-one of the preceding thirty-two hours, during which time he was required to work three eight-hour shifts (two of them consecutively) for his employer, Defendant Union Drilling.⁵ Union Drilling's Job Description for the Defendant Roach's position, of driller, required "work seven days a week, eight hours a day, including holidays....must be able to work an additional tour if the crew following is short handed." [See Union Drilling's "Statement of Company Policy on Employee Transportation To and From the Work Sites and Transportation of Company Property" attached as "Exhibit 1 to Petition for Appeal] It is undisputed that the crash occurred on U.S. Route 250, a public highway, several miles from the job site, [R. 61-78], and neither Defendant Roach nor Daniel Falls were performing any tasks "in furtherance of their employer's business" at the time of the

⁵ Defendant Roach did not have a valid driver's license at the time of accident. His license had been suspended after he was convicted on a charge of driving under the influence of alcohol. The Plaintiff also alleged that Union Drilling was aware that Defendant Roach was driving without a valid driver's license.

accident. Consequently, Daniel's death did not "result from" and occur "in the course of" his employment, but instead, occurred while he was going home from work.

Guided by the longstanding precedent in this State that death or injury to an employee that occurs while going to or coming from work has traditionally been excluded from coverage under the Act and the immunity provisions contained therein, Mrs. Falls brought this common-law action against Defendant Roach for his negligent conduct resulting in the automobile crash and her son's death. Mrs. Falls also named as a Defendant Kevin Wright, who was Defendant Roach's supervisor at Union Drilling and who was responsible for requiring employees to work excessive hours without adequate rest. Mrs. Falls also alleged that Defendant Union Drilling was liable for the acts of Defendants Roach and Wright based on respondeat superior principles, as well as for its own acts in failing to take affirmative action when it knew that there was a foreseeable risk of harm created by individuals who had become dangerously fatigued for various reasons, and then failing to take precautions to keep those individuals from having to drive on the public highways.⁶

Plaintiff's Complaint alleged that Union Drilling was aware that its employees suffered fatigue from traveling several hours each day to remote well sites and working multiple shifts in order to keep drilling rigs continuously operating which was a business necessity for Union Drilling dictated by economics and profit maximization. **[R. 1-8].** Union Drilling had adopted a written policy requiring its employees to work multiple shifts as necessary, and to be responsible for driving to and from work. **[See Exhibit 1 attached to Petition for Appeal].** The Transportation policy explicitly provides that transportation to and from the drilling sites was outside the course of employment, and Union Drilling

⁶ Many companies provide rest areas, transportation or other precautions rather than have employees drive in a dangerously fatigued condition. CSX has long had such a safety policy.

attempted to absolve itself of any responsibility, including any liability for workers' compensation benefits, for any accidents or injuries occurring while employees were driving to and from work. In spite of its awareness (demonstrated in part by Union's attempt to protect itself through the written Transportation policy) of the fatigue level of its employees and the potential harm driving fatigued could cause, Union Drilling nevertheless continued to require its employees to work multiple shifts and to travel long distances to and from the drilling sites without adequate rest, transportation, or sleeping facilities. It is believed that discovery, when permitted, will disclose that Union Drilling was aware of other automobile crashes involving fatigued employees which occurred on the public highways and which posed significant risks of injury or death to its off duty employees and the traveling public, but it took no action to prevent such occurrences.

Although Daniel Falls did not receive workers' compensation benefits (for which Union Drilling expressly denied responsibility by its written Transportation policy), the Defendants nonetheless asserted in the Circuit Court that they were immune from common-law negligence claims under the Act. The Circuit Court agreed with the Defendants, and dismissed Mrs. Falls' common law claims against them based on the employer immunity provisions of the Act, even though there was no *quid pro quo* receipt of benefits for Daniel's death, and notwithstanding long standing precedent in this State excluding from the Act's coverage, any injury or death which occurs while going to and from work. This erroneous ruling must be reversed, or else Mrs. Falls may never be able to submit her claims for jury determination.

IV. STANDARD OF REVIEW

The standard of review applicable to an appeal from a circuit court's order granting a motion to dismiss a complaint is *de novo*, and review of a lower court's refusal

to grant a motion to alter or amend a judgment under Rule 59(e) of the West Virginia Rules of Civil Procedure is also *de novo* as the same standard that would apply to the underlying judgment upon which the motion is based and from which the appeal to this Court is premised. See Bowers v. Wurzburg, 519 S.E.2d 148, 154-55 (W. Va. 1999).

The question presented by this appeal is purely a question of law: whether the employer immunity provisions immunize employers and co-employees from common-law liability for injuries which do not "result from" and occur "in the course of" employment. The Circuit Court's overly-broad application of the employer immunity provisions immunizing the Defendants from common-law liability in this case, which indisputably did not "result from" and occur "in the course of" employment, disregards judicial precedent, violates the right to a jury trial and certain remedy provisions of the West Virginia Constitution, and flouts the public policy of this State.

V. DISCUSSION OF LAW

The Circuit Court erred in ruling that the employer immunity provisions of the Act apply in this case as the Act provides an exclusive remedy only in situations where an employee is suing his employer and co-employees for an injury which "results from" and occurs "in the course of" his employment. Because Daniel Falls was killed after his work shift had ended, and after leaving Union Drilling's work premises, his death did not "result from" and occur "in the course of" his employment. Thus, Appellant, Antionette Falls, is entitled to pursue her common law wrongful death claim and have any disputed facts decided by a jury.

West Virginia Code § 23-2-6 provides that "[a]ny employer subject to this chapter who shall subscribe and pay into the workers' compensation fund the premiums provided by this chapter or who shall elect to make direct payments of compensation as

herein provided shall not be liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring." This Court has defined the term "however occurring," as used in this section, to mean "an employee who is injured in the course of, and as a result of his employment, and one who, under the common law principles of master and servant, could have maintained an action against his employer." But such immunity is triggered only when the employee is acting in furtherance of his employer's business, to wit: "on the job". Cox v. United States Coal & Coke Co., 92 S.E. 559, 561 (W. Va. 1917) (emphasis added). W. Va. Code § 23-2-6a extends that immunity to "every officer, manager, agent, representative or employee of such employer when he is acting in the furtherance of the employer's business." (emphasis added)

Although this Court has observed that the Legislature intended for the employer immunity provision to provide qualifying employers "sweeping immunity from common-law tort liability for negligently inflicted injuries," Bias v. Eastern Associated Coal Corp., 640 S.E.2d 540, 544 (W. Va. 2006), that immunity is not unlimited, see Brown v. City of Wheeling, 569 S.E.2d 197 (W. Va. 2002). Brown confirmed the long-established rule in this State that an employee injured off-duty by the negligence of an employer has a right of action against the employer at common law, as established by this Court in Cox v. United States Coal & Coke Co., 92 S.E. 559 (W. Va. 1917). In addition to being at odds with Brown and Cox, the Circuit Court's conclusion that the Union Drilling Defendants are entitled to immunity is also inconsistent with the Court's recognition that an employer may be liable for injuries occurring off the job caused by an over-fatigued employee if the employer could have reasonably foreseen that the employee would pose a risk of harm to others. See Robertson v. Lemaster, 301 S.E.2d 563, 568-69 (W. Va. 1983). The Circuit Court failed to apply these long-standing precedents, including the traditional going and coming rule, and instead misapplied this Court's decision in Bias, even though Bias involved injuries, which as admitted by Mr. Bias himself, "resulted from" and occurred "in

the course of" his employment. Bias at 640 S.E.2d 540. Additionally, the Circuit Court's conclusion that the Union Drilling Defendants are entitled to immunity cannot be squared with the Court's precedent relating to principles of respondeat superior, which recognizes different applications of the "going and coming rule" in the context of respondeat superior and workers' compensation. West Virginia law requires a fully developed factual record before determining whether an employee acted within the scope of his employment for purposes of respondeat superior. See Courtless v. Jolliffe, 507 S.E.2d 136, 142 (W. Va. 1998). Thus, the Circuit Court's holding in the case at Bar is inconsistent with the long-established judicial precedent of this Court.

Moreover, the Circuit Court's ruling as applied in this case would be an unconstitutional application of W.Va. Code §§ 23-2-6 and 6a, because it violates the Plaintiff's right to a jury trial, as guaranteed by Article III, Section 13 of the West Virginia Constitution, and her right to a certain remedy, as guaranteed by Article III, Section 17 of the West Virginia Constitution. Because there is no critical social or economic problem identified by the Circuit Court's Order [R. 81-85;133-35], such sweeping application of the employer immunity provisions would be unconstitutional. Removing the Plaintiff's ability to seek redress by any means is unreasonable. Providing common-law immunity to the Union Drilling Defendants, notwithstanding the fact that the Plaintiff is unable to seek redress from the workers' compensation system, fails to pass the test for determining whether the Certain Remedy Clause and right to jury trial have been violated. Lewis v. Canaan Valley Resorts, Inc., 408 S.E.2d 634 (W. Va. 1991). See also Bias, supra and Darling, supra, (concurring and dissenting opinions).

Finally, the Circuit Court's determination that the employer immunity provisions of the Act extends to employee's injuries which do not "result from" and occur "in the course of" his or her employment is against the longstanding and strong public policy of this State, which cautions against expansively shielding wrongful conduct from

accountability, as the public policy of this State encourages recovery in tort by persons suffering injury due to the negligence of others. See Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, 547 S.E.2d 256, 265 n.6 (W. Va. 2001); Paul v. National Life, 352 S.E.2d 550, 556 (W. Va. 1986); see also, Cox v. United States Coal & Coke Co., *supra*. As set forth in more detail below, Mrs. Falls respectfully requests the Court to reverse the Circuit Court's Order [R. 81-85;133-35] dismissing her common-law negligence claims against the Defendants and remand this matter for reinstatement of Plaintiff's common law claims against these Defendants.

- I. **The Circuit Court's conclusion that the Union Drilling Defendants are shielded from common-law liability by the immunity provisions of the West Virginia Workers' Compensation Act is incompatible with long-standing precedent of the West Virginia Supreme Court of Appeals.**

The Circuit Court below based its decision entirely on this Court's recent decision in Bias v. Eastern Associated Coal Corp., 640 S.E.2d 540 (W. Va. 2006). The Circuit Court did so notwithstanding four important facts: (1) that the long-standing case law of this State preserves a common-law action against employers for injuries which do not "result from" and occur "in the course of" employment; (2) that this Court has previously recognized that employers may be liable for foreseeable injuries caused by over-fatigued employees; (3) that Bias is only tangentially related to the case at hand because the question presented there was entirely different from the one presented in this case; and (4) that Mrs. Falls' claim that the Defendants are not entitled to immunity under the Act is consistent with established principles of respondeat superior.

- A. **The Circuit Court disregarded long standing precedent regarding the coming and going rule relating to Worker's Compensation coverage and consequently the application of common law immunity**

This Court has long held that West Virginia recognizes the "going and coming rule," which precludes Workers' Compensation coverage, when an employee is injured while going to and coming from work, because absent special circumstances, that employee is not considered to be "in the course of" his or her employment at the time. De Constantin v. Public Service Comm'n, 83 S.E. 88 (W. Va. 1914)); accord Brown v. City of Wheeling, 569 S.E.2d 197, 201 (W. Va. 2002); Harris v. State Comp. Comm'r, 208 S.E.2d 291 (W. Va. 1974); Bilchak v. State Comp. Comm'r, 168 S.E.2d 723 (W. Va. 1969); Miller v. State Comp. Comm'r, 27 S.E.2d 586 (W. Va. 1942); Williams v. State Comp. Comm'r, 20 S.E.2d 116 (W. Va. 1942); Carper v. State Comp. Comm'r, 1 S.E.2d 165 (W. Va. 1939); Taylor v. State Comp. Comm'r, 178 S.E. 71 (W. Va. 1935); Buckland v. State Comp. Comm'r, 175 S.E. 785 (W. Va. 1934).

This Court has determined that when an employee is injured while going to or coming from work, such employee is generally not considered to be "in the course of" his or her employment, and the employer is not liable for Worker's Compensation benefits nor is he shielded from common-law liability by the immunity provisions of the Workers' Compensation Act. See Brown v. City of Wheeling, 569 S.E.2d 197, 201 (W. Va. 2002). In Brown, an employee who was a passenger in a vehicle driven by a co-employee was killed in an automobile accident when the two were returning from a required out-of-town work-related training session. Id. at 199. Her husband's request for benefits under the Act was denied on the basis that the employee's death had not occurred "in the course of" her employment. Id. at 200. The husband then brought a common-law negligence claim against the employer. Id. The employer claimed that it was entitled to immunity under the Act, and the circuit court agreed and entered summary judgment in favor of the employer. Id. This Court affirmed the circuit court's order because the employee was "indisputably acting within the course of her employment" at the time of her death as the out of town training trip was for the employers benefit and thus was an exception to the general rule.

Id. at 201. Having found that the wrongful death suit could not go forward, the Court directed that the employer immediately process benefits under the Act for payment. Id. at 203 n.4.

In its decision, the Brown Court reiterated several longstanding principles of workers compensation law. First, the Court observed that the employer immunity provision of the Act entitled employers to immunity if the employee's injury "results from" and occurred "in the course of" the employment. Id. at 201 ("The . . . Act states that if an employee is injured or dies in the course of and as a result of his or her employment, and the employer subscribes to the Workers' Compensation Fund, then the employer is immune from most lawsuits arising from the injury or death." (emphasis added)).

Second, the Court observed that one of the recognized exceptions to the "going and coming rule," was the special errand exception which requires that: "any injuries that occur on the highway are compensable under the Act" when the evidence establishes the injuries occurred during "an employee's 'off-premises journey,' which required the use of a highway to perform his or her duties for the employer." Brown, 569 S.E.2d at 202-203.

Finally, the Court expressly recognized the implications of the "going and coming rule" for employer immunity: that, absent some exception, when going to and coming from work, an "employee may not recover workers' compensation benefits, and the employer is not immune from a negligence action." Id. at 201 (emphasis added).

The Brown Court thus recognized two very important fundamental principles of West Virginia's workers compensation law applicable to the case at Bar: (1) that the employer immunity provisions of the Act only apply if the employee is injured or dies in the course of and as a result of his or her employment; and (2) that when an employee is injured while going to and coming from work, and does not meet one of the exceptions of the "going and coming rule," the employer is not entitled to immunity from a negligence

action. Id. at 201.⁷ See also State ex rel. Frazier v. Hrko, 510 S.E.2d 486, 493 n.11 (W. Va. 1998) ("[W. Va. Code § 23-2-6] . . . makes workers' compensation benefits the exclusive remedy for personal injuries sustained by an employee injured in the course of and resulting from his or her covered employment." (emphasis added)).

The Brown Court's recognition that the employer immunity provision does not apply to injuries that do not "result from" and occur "in the course of" employment was not a novel proposition. This Court has long recognized that employees who suffer injuries or death that do not "result from" and occur "in the course of" employment caused by the negligence of their employer or co-employees have a common-law right of action against their employer, notwithstanding the employer immunity provisions. See Cox v. United States Coal & Coke Co., supra. In Cox, the plaintiff voluntarily went to his employer's premises to explain to his supervisor why he missed his shift that morning. Id. at 559. On his way home, while still on his employer's premises, but not while acting in the course of his employment, the plaintiff was struck on the head by an object thrown by a co-employee who was working in a nearby railroad car. Id. at 559-60. The plaintiff was awarded judgment in a personal injury action against the employer, and the employer appealed, claiming it was entitled to immunity under the Act. Id. at 559.⁸ This Court rejected the employer's claim of immunity, observing:

[A] very important purpose the legislature had in view in passing the act was to relieve the employer from personal liability to the injured employee in those cases wherein he would have been liable at the common law on the

⁷ An employer may be vicariously liable for injuries occurring on a public highway when an employee is performing work benefitting his employer but has a passenger who is not. The mere fact that the passenger may be an off the job employee provides no comfort to the employer by way of immunity. Cox, supra.

⁸ The language of the employer immunity provision in effect at the time Cox was decided is not identical to the current version of the statute, but the earlier version is substantially the same in all material respects as the current version. Compare Cox, 92 S.E. at 561 (citing employer immunity provision in effect at time of decision) with W. Va. Code § 23-2-6.

ground of negligence in the performance of his duty to his servant. It is clear plaintiff was not injured in the course of his employment, and, therefore, he has no right to demand compensation out of the workmen's compensation fund. But it was surely not the purpose of the legislature to relieve an employer from liability for a negligent act causing injury to one of his employees who happens not at that particular moment to be engaged in performing labor for him.

Id. at 561 (emphasis added). This Court ruled the employer was not entitled to immunity from a common-law suit, and affirmed the plaintiff's personal injury award. Id. at 561-62.

Brown and Cox remain good law in West Virginia, and when applied to the facts of this case, compel a determination that the Defendants Union Drilling, Wright and Roach are not entitled to immunity from common-law liability under the Act. Daniel Fall's death clearly did not occur "in the course of" his employment nor was it the result of his employment as he was an innocent passenger in a vehicle on a public highway and could as well have been someone with absolutely no connection to Union Drilling. Daniel died on his journey home from work. There is no evidence, or even a suggestion, that Daniel's journey home falls within the "special errand" or other exception of the "going and coming rule." The employer immunity provisions of the Act just do not apply to Daniel Fall's death because it did not "result from" and occur "in the course of" his employment: Daniel Falls was killed on a public highway after his work shift while going home from work, and the Defendants are not entitled to immunity from the common law wrongful death suit brought by Mrs. Falls.

In Ex parte Shelby County Health Care Auth., the Alabama Supreme Court considered this same issue with a very similar set of facts and concluded that the employee was not barred by the immunity provisions of the Alabama workers' compensation act from pursuing a common-law negligence action against her employer. See 850 So.2d 332 (Ala. 2003). In Shelby, the plaintiff was a respiratory technician employed by a hospital which had required her to work two sixteen-hour shifts with only an

eight hour break between shifts. Id. at 335. On her return home from her second shift, she fell asleep at the wheel and was seriously injured. Id. The plaintiff filed both a workers' compensation claim and a civil negligence claim, alleging that the hospital negligently failed to maintain a safe workplace by requiring her to work the two sixteen-hour shifts. See id. The trial court summarily dismissed her negligence claim based on immunity provided by the Alabama workers' compensation act, and after a bench trial ruled that her injury was not compensable under the Alabama workers' compensation act as it did not occur in the course of employment. Id. The intermediate appellate court affirmed the lower court's determination that the plaintiff's injuries were not covered by the Alabama workers' compensation act, but reversed the summary judgment ruling in the hospital's favor on the negligence claim. Id.

The Supreme Court of Alabama affirmed the intermediate court's conclusion that the plaintiff had a right to pursue a common-law action for her injury. Id. In so ruling, the court relied on the longstanding principle in Alabama's workers' compensation law that an employee who sustains an injury while traveling to and from work is not covered under the workers' compensation system because such an injury does not arise out of and occur "in the course of" the employment. Id. at 336. The Alabama Supreme Court found that the plaintiff's injuries did not occur at her place of employment or while she was engaged in the duties of her employment, and that no exceptions to the coming and going rule applied to her circumstances. Id. at 336-37. The Court concluded she was thus not precluded from bringing a tort claim against the hospital, and rejected the hospital's contention that it was entitled to immunity under the employer immunity provisions of the workers' compensation act. Id. at 337. In so holding, the Alabama Supreme Court observed that the plain language of the statute, which provided for immunity from common-law actions for injuries sustained by an employee "engaged in the actual performance of the duties of his or her employment," compelled that conclusion. Id. The Court reasoned

that it "does not have the authority to judicially engraft exceptions into the immunity provisions applicable to the employer, but neither should it expand the immunity into areas not covered by the Act." Id. at 338.⁹

While the language of the employer immunity provisions in W. Va. Code § 23-2-6 and 6a is not exactly phrased as the language contained in Alabama's employer immunity provision, it is substantially similar to this Court's numerous pronouncements interpreting the Act's (West Virginia) immunity provisions to include only those claims "resulting from" and occurring "in the course of" one's employment. The Shelby case thus provides an instructive and compelling basis for this Court's determination that employers are not entitled to claim immunity for injuries occurring off the job while traveling home, especially where such application would deprive the victim, who coincidentally in this case also happened to be an employee of Union Drilling, of any relief or compensation. Such a ruling would encourage employers to disregard safety principles affecting both employees and the traveling public with impunity due to the expansion of the immunity provisions of the Act. This Court should not expand the immunity provisions of the Act into areas not covered by the Act, any more than it should limit them. See State v. General Daniel Morgan Post No. 548, 107 S.E.2d 353, 358 (W. Va. 1959) ("It is not the province

⁹ After concluding that the employer was not entitled to immunity from common law suit, the Shelby court addressed whether the plaintiff had demonstrated that the hospital had breached any duty it may have owed her to provide a safe workplace. See 850 So.2d at 338-39. The Court concluded that, under Alabama law, an employer's duty to provide a safe workplace did not extend to scheduling work hours for employees. Id. The Shelby court's affirmance of the summary judgment on that basis has no persuasive value for this case. First, Mrs. Falls' case was dismissed on a Rule 12(b)(6) motion and never reached the summary judgment stage, where she would have been given an opportunity to develop facts to support duty and breach. Second, in West Virginia, employers may be liable for promulgating and implementing policies which place individuals at risk of injury which occurs off the work site, if the conduct creates a foreseeable risk of harm. See Robertson v. LeMaster, 301 S.E.2d 563, 568-69 (W. Va. 1983) (holding that whether employer could have reasonably foreseen employee required to work extended hours without rest would pose risk of harm to others while driving home from work site was jury question, not question of law).

of the courts to make or supervise legislation." (internal quotation marks omitted)). This Court should thus reverse the Circuit Court of Harrison County's expansion of the employer immunity provisions into areas never covered by the Act, and reaffirm the longstanding precedent of this Court that preserves a common-law right of action against employers for injuries not "resulting from" and occurring "in the course of" employment.

B. The Circuit Court's conclusion ignores this Court's longstanding precedent recognizing that an employer may be liable for injuries caused by an over-fatigued employee if the employer could have reasonably foreseen that the employee would pose a risk of harm to others.

The Circuit Court's conclusion that the Defendants were entitled to immunity under the Act ignores this Court's recognition that an employer may have a duty to third parties for injuries caused or contributed by an overly-fatigued employee after the employee leaves work if such harm was foreseeable. See Robertson v. LeMaster, 301 S.E.2d 563 (W. Va. 1983). Even though the Circuit Court did not reach this issue in granting dismissal the Robertson case should have guided the Circuit Court to conclude that the Act's immunity provisions were limited under such circumstances. In Robertson, this Court held that an employer may be liable to others for injuries sustained in an automobile accident caused by an employee who fell asleep while traveling home from work after his shift where the employer had required him to work for twenty-seven straight hours. Id. at 569. In so holding, the Court recognized that "the issue presented by the facts of this case . . . is not the [employer's] failure to control [the employee] while driving on the highway; rather it is whether the [employer's] conduct prior to the accident created a foreseeable risk of harm." Id. at 567. The Court observed that determining whether the employer owed a duty to those traveling the public highways turned on whether the harm was foreseeable -- a jury question, not a question of law. See Id. The Court then

concluded that the jury's determination that the employer could have reasonably foreseen that the employee would pose a risk of harm was not unreasonable, and that the employer was therefore not entitled to a directed verdict. Id. at 569. Such a conclusion is wholly logical as any employer would risk liability if it permitted conduct off the job site which could endanger others, such as allowing employees to travel with explosives or dangerous materials.

The Circuit Court dismissed by its June 21, 2007 Order, the Plaintiff's causes of action against Defendants Wright and Roach as well as Union Drilling. [R. 81-85]. Thus, the Trial Court has dismissed the Plaintiff's common law wrongful death claims against Defendant Roach, including those negligence claims resulting from his failure to maintain control of his vehicle while driving on the public highway. Thus, Antionette Falls can seek no relief from Mr. Roach or the other Union Drilling Defendants even though clearly Donald Roach is responsible for his own negligent driving and other negligent conduct which contributed to the death of Daniel Falls. Under the Trial Court's ruling in this case, even if Donald Roach had been under the influence of drugs or alcohol, or driving one hundred miles an hour, there would be no cause of action against him since he was an employee of Union Drilling and the co-employee of Daniel Falls. Thus, the error of the Trial Court's ruling is readily highlighted in this case. Defendant Donald Roach's conduct in driving his vehicle off the road and crashing into a wall was negligent in and of itself and that negligence may have been caused or contributed to in some manner by the wrongful conduct of Defendants Union Drilling and Wright. However, merely because there is contributory fault by the employer, the same does not grant immunity from common law tort actions for either of them when the injuries occurred off the job site and thus did not occur in the course of employment and as a result of that employment. This is especially true when it leaves the victim without any redress whatsoever, as in this case.

Just as in Robertson, one of the allegations in this case is that Union Drilling

failed to take affirmative action when it knew that there was a foreseeable risk of harm created when workers were being required to stay awake for extremely long periods of time to work multiple shifts at remote well sites. Knowing this Union Drilling failed to provide those workers with transportation or rest facilities or other precautions before sending them on the public highways endangering all who encountered them. It is no different than placing such worker behind the wheel in an impaired state caused by alcohol or drugs. The Circuit Court's dismissal of Mrs. Falls claims against Union Drilling, Wright and Roach based on the employer immunity provision disregards the cause of action permitted by Robertson, and erroneously prohibits any chance of proving entitlement to recovery by Daniel Falls' beneficiaries, or for jury determination of any disputed issues. The Circuit Court erred, and Mrs. Falls should be given an opportunity to develop the facts and have a jury determine whether Union Drilling, Wright and/or Roach breached its duty to Daniel Falls, that is, whether all or any of them were negligent under the circumstances of this case.

- C. The Circuit Court misinterpreted the recent Bias and Darling cases, which cases did not expand the immunity provisions of the Act to include injuries occurring outside one's "course of employment" as that term has been applied by this Court in numerous prior cases.**

The Circuit Court below misapplied this Court's recent decisions in Bias v. Eastern Associated Coal Corp., 640 S.E.2d 540, 544 (W. Va. 2006) and State ex rel Darling v. McGraw, 647 S.E.2d 758 (W.Va. 2007). The question presented in this case is entirely different. To wit: Whether the Act's employer immunity provisions immunize employers and fellow employees from common-law liability for injuries which have some tangential relationship to work-related activities but do not "result from" and occur "in the course of" employment. Because the issue in Bias and Darling were entirely different than

that presented in the case at Bar, this Court's decisions in Bias and Darling simply do not compel the conclusion reached by the Circuit Court that the Defendants are totally immune from all common-law liability under W. Va. Code §§ 23-2-6 and 6a.

There was no dispute in either Bias or Darling of whether the injuries sustained by the employees in those cases "resulted from" and "occurred in the course of" their employment. Both employees sought to pursue common law claims against their employer for what is known as mental-mental injuries (emotional injuries "solely caused by non-physical means and which did not result in any physical injury or disease"). There are two significant differences between the facts in this case and those in Bias and Darling. First, the wrongful death of Daniel Falls was by no means a non-physical injury without physical manifestations; he was killed which is the ultimate physical injury. Second, there was no issue in either Bias or Darling whether the alleged mental-mental injury occurred in the course of employment and was a result of that employment. In other words, both of the employees in those cases admitted that it was conduct occurring on the job while working which caused their mental-mental injuries. Finally, this Court was construing a specific legislative pronouncement on the perceived problem relating to mental-mental work place injuries as set forth in W.Va. Code §23-4-1f (1993). This specific legislative pronouncement had to be reconciled and construed with the immunity provisions of the Act and this Court's prior cases interpreting those immunity provisions. However, nothing in those two cases signaled any attempt by the Legislature, or this Court to expand employer immunity and shield from common law actions matters occurring off the job while going to or coming home from work, nor could it in view of the serious constitutional implications of denying such victims a right to compensation under the Certain Remedy Clause and the right to a jury trial. This Court had significant discussion in both Bias and Darling about the potential implication of the Certain Remedy Clause when an employee is denied Workers' Compensation benefits and also denied the right to seek redress by a common law claim.

The Justices of this Court recognized the potential constitutional dilemma presented when an individual who is injured on the job receives neither worker's compensation benefits nor the right to maintain a common law action. The concurrences and dissents by members of this Court concerning the lack of *quid pro quo* required for no fault Workers' Compensation benefits in lieu of the right to file common law claims is glaringly apparent if the lower Court's ruling is upheld in this case.¹⁰

The Trial Court's extension of the Act's immunity provisions to eliminate a common law cause of action for wrongful death occurring on a public highway while going home from work is an unnecessary and unconstitutional expansion of the Act's immunity provisions. Such legislation, if enacted by the Legislature, would compel this Court to declare it unconstitutional under the Certain Remedy and right to jury trial provisions of our State Constitution. However, such a constitutional confrontation is unnecessary as neither the Bias or Darling cases contemplated such an expansion of the Act's immunity provisions.

If this Court were to extend its holding in the Bias and Darling cases as suggested by the Appellants, it would have to specifically overrule the long line of precedent begun with Cox, supra and De Constantin, supra. Surely such would be unnecessary and fraught with danger, and not implicated, or compelled by the decisions in Bias or Darling.

¹⁰ Justice Albright noted in his concurring and dissenting opinion in Darling that the well recognized treatise "Larson's Workers' Compensation Law" has observed that "it ought logically to follow that the employer should be spared damage liability only when compensation liability has actually been provided in its place, or, to state the matter from the employees point of view, rights of action for damages should not be deemed taken away except when something of value has been put in their place." Id. at §100.04, 100-23 (2006), other citations omitted.

- D. **The Circuit Court confused the application of the respondeat superior doctrine in a tort context with the requirement that Workers' Compensation immunity is triggered only if the injuries "result from" and occur "in the course of" the injured worker's employment.**

Reversal of the Circuit Court's dismissal order [R. 81-85] is not only mandated by this Court's prior decisions relating to the employer immunity provisions, but it is entirely consistent with the Court's precedent relating to principles of respondeat superior. Mrs. Falls' reliance on a respondeat superior theory of liability for some of Donald Roach's conduct does not trigger that Defendant's entitlement to immunity under the Act, nor does it affect her right to proceed with a wrongful death action against the Union Drilling Defendants. Mrs. Falls' contention that her son's death did not "result from" and occur "in the course of" his employment is not undermined by her allegation that Defendant Roach's negligent conduct resulting in Daniel's death was related to the scope of his employment.

First, the application of the "going and coming rule" in the context of workers' compensation cases is not identical to the rule's application in the tort context. See Courtless v. Jolliffe, 507 S.E.2d 136, 142 (W. Va. 1998). An employer may not be liable for Workers' Compensation benefits or protected by the immunity provisions of the Act because the injury did not occur on the job, yet that same employer may have some degree of comparative fault in tort if its conduct was negligent and the harm foreseeable.

In Courtless, a bicyclist sued the driver who struck him, as well as the driver's employer, alleging that the driver, who was on his way to work, was acting within the scope of his employment at the time of the accident. Id. at 138. The circuit court granted summary judgment to the employer, concluding that the doctrine of respondeat superior is not typically applicable while the employee is coming from or going to work. Id. This Court reversed the circuit court's grant of summary judgment to the defendant, finding that

a genuine issue of material fact existed as to whether the driver was acting within the scope of his employment. Id. at 143. In so holding, the Court observed that:

Commentators have cautioned against unbridled application of the same "going and coming" principles to workers compensation cases and tort matters. Workers' compensation law takes a different approach to exceptions to the going-and-coming rule in cases involving respondeat superior Workers' compensation and respondeat superior law are driven in opposite directions based on differing policy considerations. Workers' compensation has been defined as a type of social insurance designed to protect employees from occupational hazards, while respondeat superior imputes liability to an employer based on an employee's fault because of the special relationship.

Id. (internal quotation marks omitted). The Court also observed in Courtless the importance of a fully developed factual record to determine whether a claim based on a respondeat superior theory of liability can be sustained:

We have not previously had occasion to wander extensively through the vicissitudes of the "going and coming rule," nor to delineate whether the rule as it has been interpreted in the workers' compensation context is equally applicable to the tort context [W]here this Court may be compelled to render judgment on an evolving area of law in this state, complete development of an underlying factual record must be undertaken.

Id. at 142-43. Thus, Courtless set forth two important principles which are relevant to the case at hand: (1) that the "going and coming rule" does not operate in an identical manner in the context of workers' compensation cases as it does in the context of tort cases; and (2) that a fully developed factual record is appropriate to determine whether a claim based on a respondeat superior theory of liability can be sustained. See id. Thus, whether Daniel Fall's death "resulted from" and occurred "in the course of" his employment for purposes of Workers' Compensation benefits is immaterial to a determination of whether Defendant Roach and Kevin Wright were, at any time during the chain of events, acting within the scope of their employment at the time of the crash.

Most importantly, Plaintiff's allegations of negligent conduct by the Union

Drilling Defendants is distinct from Defendant Roach's negligent conduct on the public highway which resulted in the death of Daniel Falls. It is the independent negligence of Defendant Union Drilling, and that of its supervisors Defendants Kevin Wright and Donald Roach, in failing to act reasonably by taking adequate precautions or implementing proper safety rules when knowing some of its personnel were extremely fatigued but being unleashed on public highways. The Union Drilling Defendants' negligent conduct which contributed to Roach's reckless driving which ultimately killed Daniel Falls after his work shift and while off the job site premises, relates to the two Union Drilling supervisors, Defendants Wright and Roach, and other unknown Union Drilling personnel who knowingly implemented policies that would induce extreme fatigue in some of its employees which could foreseeably cause harm to the traveling public or anyone else, including a passenger co-employee. However the crash occurred off the job site and not during work time, and thus, was not covered by the Act's immunity provisions. Merely because contributing conduct occurred at the job site does not provide immunity for Union Drilling and its supervisors. Daniel Falls could have been a hitchhiker, or a driver or another vehicle as in Robertson, and surely in either instance there would be no question that his personal representative could file a common law action against Union Drilling and its culpable supervisors. His status as a employee of Defendant Union Drilling should not penalize him when he is killed off the job site while traveling home, or even if killed on the job site but not while working. Cox, supra.

It may be that Union Drilling can defend its conduct as having no relationship to Defendant Roach's reckless driving, but that is a jury question and not one to be decided as a matter of law for Rule 12(b) decision by the Trial Court. As this Court stated in Courtless:

("the issue to be decided) is not necessarily an abstract point of law or a pure a question of statutory construction that might be answerable without exacting scrutiny of the facts of the

case...(and) might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity...In short, the question...may not be susceptible to an all inclusive 'yes' or 'no' answer. As in other areas of the law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand." Id. at 143.

The facts in this case yet to be developed may very well demonstrate that Union Drilling was aware of numerous fatigue related accidents occurring off the job and not covered by the Act, but substantially contributed to by the fatigue induced under Union Drilling's unsafe policies and practices. Plaintiffs have not been permitted to develop this evidence and to submit the same to a jury if a disputed material issue of fact is created therefrom. The Circuit Court erred in dismissing the Defendants contrary to the law set forth by this Court in Brown, Cox, and Robertson; by misreading and misapplying the Court's decision in Bias, and by failing to apply established principles relating to the going and coming rule. For these reasons and the reasons set forth below, Mrs. Falls respectfully requests that this Court reverse the Circuit Court's order of dismissal and remand this case for trial on the merits.

II. The Circuit Court's ruling creates an unnecessary constitutional confrontation between Plaintiff's right to a certain remedy and jury trial and the immunity provisions of the West Virginia Workers' Compensation Act.

The Circuit Court's ruling that the Union Drilling Defendants including Union Drilling, Wright and Roach are all entitled to immunity from Plaintiff's common law wrongful death claim creates an unnecessary constitutional confrontation that should have been avoided by the Circuit Court. By holding that Plaintiff has no right to proceed with her common law wrongful death claim against any of the Union Drilling Defendants, the Circuit Court violated Antionette Falls' right to seek redress for a recognized common law cause

of action all of which is granted by the Certain Remedy Clause as contained in Article III, Section 17 of the West Virginia Constitution. That constitutional provision provides that "every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law." This Court has often recognized that any "severe limitation on a procedural remedy permitting court adjudication of cases implicates the certain remedy provision." State ex rel West Virginia State Police v. Taylor, 499 S.E.2d 283, 294 (W.Va. 1997). This was one of the central issues discussed by members of this Court in both the Bias and Darling cases. A free people are entitled to seek remedies and justice in their courts less they be relegated to fist fights and dueling in the streets due to having no other legal method to seek redress. This Court recognized this potential dilemma in the concurrences and dissents in Bias. Although Bias was forging new ground with regard to interpreting the statutory elimination of worker's compensation for mental-mental injury, this Court denied a common law remedy because the exclusive immunity provision of the Act was premised upon the clear legislative intent to deny a common law cause of action even though the employee received no *quid pro quo* as generally required under the Act.

There is no such direct legislative pronouncement at issue in this case and therefore prior precedent of this Court should control. Jones v. Rinehart & Dennis Co., 168 S.E.2d 482 (W.Va. 1933); See also, Messer v. Huntington Anesthesia Group, Inc., 620 S.E.2d 144 (W.Va. 2005). This Court in Jones, under an earlier provision of the Workers' Compensation Act, held that contraction of silicosis while on the job, could result in a common law action claim since it was not compensable under the Act. Thus, finding that the immunity provision did not apply because there was no *quid pro quo*. Whether or not Jones was overruled by Bias *sub silentio* remains unclear, but the better analysis would be to distinguish Bias based on the specific legislative directive. However, even though the Legislature is permitted to change the common law, it cannot change the Constitution of our State. Accordingly, the Certain Remedy Provision is rather clear when it states that the

"courts of this State shall be open, and every person for any injury done to him...shall have a remedy by due course of law(.)" W.Va. Const. Article III, Section 17. Those words have meaning and even the Legislature cannot remove all right to redress or remedy without providing an alternative method of recovery or remedy except under the most exceptional circumstances. Surely, merely because one segment of our society's ox is getting gored, the Legislature does not have the power to kill the opposing party's ox. Perhaps hobble it, but not kill it.

However, in the case at Bar, this Court need not decide such sticky issues of constitutional law. This Court can easily distinguish the Bias and Darling cases from the facts of this case as it is clear that Daniel Falls was not on the job when he was killed and therefore, his injuries did not occur in the course of his employment and did not result from work involving his employment. A significant degree of fault rests with the reckless driving of his supervisor, Defendant Donald Roach. Surely, the most appropriate approach to the Circuit Court's 12(b) ruling is to reverse it and remand this case for full discovery and jury trial on the issues of negligence and reckless conduct, including that of the Union Drilling Defendants. To hold otherwise will implicate grave constitutional issues unnecessary to decide in this case, and which could deprive individuals seriously injured or killed of any relief or remedy whatsoever.

The Circuit Court's conclusion that the Defendants are entitled to immunity in this case also presents another serious constitutional issue. By taking away the Plaintiff's ability to pursue a common law remedy against the Defendants Union Drilling, Wright, and Roach, the Circuit Court's ruling also denies Plaintiff her jury trial guarantee contained in the West Virginia Constitution, which gives an absolute right to a jury trial in actions at law when the matter in controversy exceeds \$20.00. See W. Va. Const. Art. 3, § 13. However, neither of these constitutional issues need to be addressed if the Circuit Court had recognized the distinguishing factors in this case from those in Bias and Darling.

This Court should make such recognition and avoid such constitutional issues.

iii. The Circuit Court's conclusion that the Union Drilling Defendants are shielded from common-law liability by the immunity provisions of the West Virginia Workers' Compensation Act violates the public policy of this State.

Extending immunity from common-law liability for injuries which do not "result from" and occur "in the course of" employment violates the longstanding and strong public policy concerns of this State, which such public policy cautions against expansively shielding wrongful conduct from accountability and also encourages recovery in tort by persons suffering injury due to the negligence of others. See Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, 547 S.E.2d 256, 265 n.6 (W. Va. 2001); Paul v. National Life, 352 S.E.2d 550, 556 (W. Va. 1986). This Court recognized as much in Cox, where it observed that extending employer immunity for such common law injuries although occurring on the job but not while in the course of employment, would be "unwise in policy, as tending to promote carelessness among employers, and repugnant to justice." 92 S.E. 550, 561 (W. Va. 1917). Allowing the Circuit Court's ruling to stand would permit the absurd result of immunizing businesses for conduct for which they would normally be liable because of the risk of injury or death posed to the general public and for which they can easily insure against with a commercial general liability policy. For example, under the Circuit Court's reasoning, an employee of a grocery store who, after completing work, stays at the store to shop, and is run over by a fork-lift driven by a co-employee, may be denied a remedy for his or her injuries due to the unreasonable extension of immunity provided by the Act. Such employee would have no remedy under the workers' compensation scheme because his injury did not "result from" and occur "in the course of" his employment. Yet the employer could nonetheless claim immunity from a common-law action by the employee under the Circuit Court's interpretation of W. Va. Code § 23-2-6. Likewise, had Daniel Falls

not been working on the day of his death, but still driving on Route 250 in Cameron, West Virginia when his co-employee Defendant Roach fell asleep at the wheel, and had the two vehicles collided and Daniel been killed, the Defendants, under the Circuit Court's ruling, could assert immunity from common-law liability claiming an employment relationship between Daniel Falls and his co-employee Donald Roach even though neither was "on the job" at the time of the crash. Such broad application of the Act's immunity provisions could effectively foreclose numerous valid claims for relief where no compensation is provided by the Act.

These absurd results violate the "strong public policy of this State that persons injured by the negligence of another should be able to recover in tort," see Paul, 352 S.E.2d at 556, and the serious concern against expansively shielding wrongful conduct from accountability, (See Sheetz, 547 S.E.2d at 265 n.6), without serving any of the countervailing policies which justify providing immunity to employers for work-related injuries. On the other hand, should similar circumstances permit recovery of worker's compensation benefits, while going to and from work, the Fund would be financially jeopardized. The more rational interpretation is that such conduct is not immunized by the Act but common law claims are preserved. The Circuit Court's ruling must therefore be reversed as a matter of public policy.

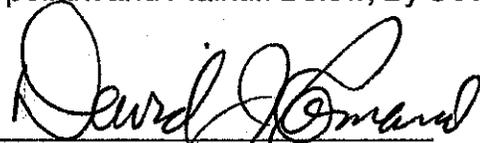
VI. PRAYER FOR RELIEF

It is respectfully requested that this Court grant Appellant, Antionette Fall's request that the Circuit Court's Order dismissing her common-law negligence action against the Defendants [R. 81-85] and denying her Motion for Reconsideration of the same [R. 133-135] be reversed and this case be remanded for trial by jury. The employer immunity provisions shielding employers and co-employees from common-law liability only

apply in situations where an employee sustains an injury which "results from" and occurs "in the course of" his employment. Any other construction or application of the immunity provisions is inconsistent with established judicial precedent in this State, is an unconstitutional infringement of Mrs. Falls' right to a jury trial and to a certain remedy, and violates the strong public policy of this State, which weighs against expansively shielding wrongful conduct from accountability, but rather encourages tort recovery for injuries caused by the negligence of others. Because Daniel Falls' death did not "result from" and occur "in the course of" his employment, the Union Drilling Defendants are not immune under the Act from common-law liability for their negligent conduct which contributed to Daniels Fall's death, and the Circuit Court's Order must be reversed. [R. 81-85; 133-35].

Oral Argument is requested.

Respectfully submitted,
Appellant and Plaintiff Below, By Counsel



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Final

Antionette Falls, Individually and
in her capacity as Administratrix of
the Estate of Daniel E. Falls,

vs. 06-C-613-2

Union Drilling Inc. a Delaware Corp.
Kevin Wright, Donald Roach, Linda Hall
and W.Va Insurance Company.

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CERTIFICATE OF SERVICE

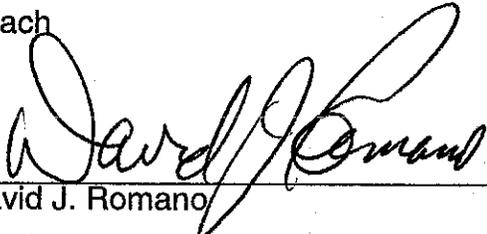
I, David J. Romano, do hereby certify that on the 7th day of July, 2008, I served the foregoing "Appellant Antionette Falls' Brief on Appeal" upon the below listed counsel of record **by facsimile** to them at their office addresses:

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