
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

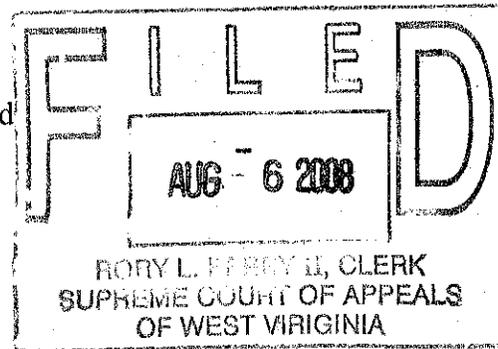
ANTIONETTE FALLS,
Appellant and Plaintiff Below,

v.

No. 33907
Appeal from the Circuit Court
of Harrison County, West Virginia

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

Appellees and Defendants Below.



**BRIEF OF APPELLEES UNION DRILLING, INC.
AND KEVIN WRIGHT**

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I. STATEMENT OF FACTS AND NATURE OF THE RULING BELOW

On or about February 4, 2005, Appellant's decedent Daniel Falls was fatally injured in a single vehicle accident that occurred while he and a co-worker, Donald Roach, were driving home from the worksite. Both driver (Roach) and passenger/decedent (Falls) were employees of the Appellee, Defendant below, Union Drilling, Inc. ("Union Drilling").¹ The previous work day, Defendant Donald Roach had worked a "double shift," adding one extra shift in addition to the five, regularly-scheduled eight-hour shifts he was scheduled to work that week.² In addition to their regular wage, Union Drilling provides each of their drilling employees with a "per diem," intended to be used by employees such as Roach and Falls for lodging near the drilling site.

On the day of the accident, Roach did not use his per diem money to secure lodging. Instead, Roach was driving the personal vehicle of his girlfriend, Linda Hall, back to his home. While the co-workers were driving home from their work at Union Drilling, Roach lost control of his vehicle. The vehicle left the roadway and Appellant's decedent, Daniel Falls, died as a result of the accident that ensued. Appellant first pursued and recovered from Roach's insurer on a negligent driving claim, and then brought this civil action in the Circuit Court of Harrison County alleging that Roach had fallen asleep at the wheel due to being overworked by his employer. Therefore, according to the Complaint, Falls' injuries were the direct and proximate result of the alleged workplace negligence of Roach and Falls' employer, Union

¹ Appellate Record, pp. 4-5, ¶¶ 8, 14.

² Appellant's claims that Mr. Roach had "been awake 31 of 32 hours, including working three shifts, two of them consecutively," is unsubstantiated and misleading. Appellant's Brief, p. 2.

Drilling.³ Appellant chose not to bring a Workers' Compensation claim, however, Appellant did assert a claim against Roach for negligent driving and recovered the \$100,000.00 policy limits on the applicable automobile insurance policy. In exchange for the policy limits, Appellant entered into a covenant not to execute on any judgment received against Roach.

In the Complaint, Appellant claims that the accident was caused because Appellee Union Drilling "negligently and recklessly" required Defendant below, Donald Roach, to "consistently work excessive hours without adequate rest or sleep."⁴ Appellant further alleges in her Complaint that Union Drilling employee and driver of the vehicle, Roach, "was acting within the scope of his employment and/or agency relationship with Union Drilling," thus permitting the application of the doctrine of *respondeat superior* and vicarious liability against Union Drilling.⁵ In short, in her Complaint below, Appellant consciously and deliberately returns to Falls' and Roach's place of work at Union Drilling in order to allege a common law tort claim for the work-related injuries sustained by Union Drilling employee, Daniel Falls.⁶ Because of the recovery already obtained from the automobile claim, Plaintiff below made no claims of driver error or negligent driving – Plaintiff alleges only that the injuries to employee Daniel Falls were the result of the workplace negligence of his employer.⁷

The Circuit Court of Harrison County correctly recognized that Appellant carefully sought to tie Union Drilling to the accident by alleging negligent conduct occurring on the work site and during work hours, and that these allegations of workplace negligence are the

³ Record, pp. 4-6, ¶¶ 11, 12, 14.

⁴ Record, p. 5, ¶ 12.

⁵ Record, p. 5, ¶ 11.

⁶ Record, pp. 4-7

⁷ Union Drilling clearly could not be held legally responsible for the driving negligence of Roach while he was not working at Union Drilling

single legal thread linking Union Drilling to the fatal accident. Because her theory of liability rests solely on the work-related activities of Daniel Falls' employer, Union Drilling, the circuit court properly found that Appellant's common law tort claims against Union Drilling were barred by the statutory immunity provided by West Virginia Code § 23-2-6.⁸

After dismissing Appellant's claims of workplace negligence against Union Drilling, the circuit court rejected Appellant's Rule 59 Motion for Reconsideration. After her original Complaint was dismissed, Appellant subsequently moved to amend her original (now dismissed) Complaint below to include only a deliberate intent cause of action. This Motion was granted by the circuit court. Appellant's case below, Civil Action No. 06-C-613, remains pending in the Circuit Court of Harrison County, West Virginia, as a statutory "deliberate intent" case.

II. WHY THIS COURT SHOULD UPHOLD THE DECISION OF THE CIRCUIT COURT

Not quite two years ago, in *Bias v. Eastern Associated Coal Corporation*, this Court addressed the issue of an employer's immunity from common law tort claims brought by an employee.⁹ In that decision, this Court affirmed the principle that, pursuant to West Virginia Code § 23-2-6, employers paying into West Virginia's Workers' Compensation fund are provided "sweeping immunity from common-law tort liability for negligently inflicted injuries."¹⁰ This Court embraced the "exclusivity doctrine" of Workers' Compensation jurisprudence, finding that "an employer who is otherwise entitled to the immunity provided by West Virginia Code § 23-2-6 may lose that immunity in only one of three ways: (1) by

⁸ See Record, pp. 83-84.

⁹ 640 S.E.2d 540 (W. Va. 2006).

¹⁰ *Id.* at 544.

defaulting in payments required by the Workers' Compensation Act or otherwise failing to be in compliance with the Act; (2) by acting with 'deliberate intention' to cause an employee's injury as set forth in W. Va. Code § 23-4-2(d); or (3) in such other circumstances where the Legislature has by statute expressly provided an employee a private remedy outside the workers' compensation system."¹¹ In embracing the exclusivity doctrine, the Court noted that the doctrine has been called the "Sacred Cow of Workers' Compensation" and that "most courts and state legislatures have vigorously protected the concept of employer immunity by aggressively promoting the exclusivity doctrine."¹² Finally, the *Bias* Court correctly chose to respect the clear intention of our State's Legislature by preserving the "sweeping immunity" provided by West Virginia Code § 23-2-6, and signaled its refusal to open a "Pandora's Box" of litigation by allowing litigants to pursue a judicially-created "exception to employer immunity not expressly provided by our legislature."¹³

Appellant did not bring a Workers' Compensation claim. Rather, Appellant made a deliberate, tactical decision to sidestep the Workers' Compensation system and instead seek relief in the Circuit Court of Harrison County, bringing a cause of action against Union Drilling based upon common law negligence and *respondeat superior* theories of liability. The circuit court reviewed the allegations of the Complaint and the claims for injuries due to allegedly work-related activity contained therein, correctly applied this Court's analysis in *Bias*, and found that Appellant's claims against Falls' employer were barred by the immunity provided by our Legislature in West Virginia Code § 23-2-6. Appellant now asks this Court to ignore the relief already obtained by Appellant in order to entertain Appellant's questionable arguments based on

¹¹ *Id.* at 546.

¹² *Id.*

¹³ *Id.* at 554, 557 (citations omitted).

the Certain Remedies Clause. From this untenable position, Appellant would have this Court reverse its recent *Bias* decision, and judicially create a new exception to Workers' Compensation immunity not enumerated by our Legislature.

Appellant is essentially asking this Court to show the way to future litigants to side-step the administrative province of the Workers' Compensation System by simply proceeding directly to circuit court, asking the trial court to provide a forum to litigate the issue of whether the injured employee *might* have received Workers' Compensation benefits had a claim been made. This way, an injured employee can avoid the administrative process altogether, ask the circuit courts to allow discovery to go forward on the question of whether an injury "resulted from" and arose "in the course of" employment, and thereby altogether avoid legislatively mandated employer immunity.

The Complaint below, which alleges that Mr. Falls' injuries are the direct and proximate result of workplace misconduct, is an attempt to open Pandora's Box. If this Court allows this suit to proceed in circuit court as a common law tort, we will see a new common law cause of action against employers in West Virginia whereby plaintiffs allege that an automobile accident occurred as the direct and proximate result of being asked by their employer to work a double shift on the day of the accident or at some point in the recent past. Or, employees will be permitted to allege that their employer did some act which later caused them to become distracted, absent-minded, or somehow produced a temporary loss of judgment, resulting in later injury. If this Court adopts Appellant's position, the effect will be to open a hole in statutory employer immunity permitting a number of creatively-pled, tort-related suits against employers based on allegations of work-related negligence. Appellant asks the Court to essentially create a conduit by which employees can siphon claims for alleged work-related negligence out of the

Workers' Compensation system and drag West Virginia employers into circuit court even where other remedies are clearly available, or already have been successfully pursued. What of the employee who is injured while hurrying to work because missing a meeting means dismissal? What of the employee talking on the phone with her boss or secretary while driving to the beach for vacation? Under Appellant's desired analysis, these injured workers could decide not to file a Workers' Compensation claim, pursue an individual negligence claim and then ask the circuit court to provide the forum for a determination of compensability under the Workers' Compensation system. Under Appellant's desired analysis, employee litigants will be *encouraged* to find creative ways to sue employers in circuit court, thereby undermining the dependability and predictability that forms the backbone of West Virginia's Workers' Compensation system. The *Bias* decision represents this Court's firm position that the exclusivity doctrine in employer statutory immunity not only preserves and protects the principle of separation of judicial and legislative powers – it represents this Court's stand with the Legislature to protect the integrity and stability of our State's Workers' Compensation system. The circuit court correctly applied the analysis of *Bias*. Its decision should not be disturbed.

III. RESOLUTION OF FACTUAL INACCURACIES STATED BY APPELLANT IN HER BRIEF TO THIS COURT

Appellant attempts to support her argument by distorting the facts, making up other facts, and setting up straw man legal theories. Accordingly, this Court needs to be fully apprised of the facts and not confounded by distortions.

A. *Plaintiff Below Has a Remedy for Her Injuries, By Which She Has Already Sought and Secured Recovery*

The very bedrock of Appellant's argument to this Court is premised on the false notion that Plaintiff below has been denied a remedy for her claims. **Simply because Plaintiff is prevented from bringing a negligence case against Daniel Falls' employer for work-related injuries, does not mean, *ipso facto*, that Plaintiff is without remedy.**

Appellant alleges that "the Circuit Court's ruling foreclosed Daniel Falls' family from ever seeking common law recovery," and removed "Plaintiff's right to seek redress by any means."¹⁴ This position is untrue. Plaintiff below has *already recovered the policy limits of \$100,000.00* on the automobile policy which covered the driver of the vehicle, Mr. Roach. This recovery was based on a claim of driver negligence on the part of Mr. Roach. In exchange for these policy limits, Plaintiff signed and executed a "Covenant Not To Execute" upon any judgment received by Plaintiff against Defendant Donald Roach. Thus, Plaintiff cannot argue that no recovery is available under the law. In light of the fact that Plaintiff *has already recovered under other legal theories*, such an argument is without merit.

B. Plaintiff Below Does Not Allege Driver Error or Negligent Driving – The Complaint Only Alleges that Mr. Falls' Injuries Were Related to the Workplace

In her Brief, Appellant claims that "Mrs. Falls brought this common-law action against Defendant Roach (driver of the vehicle) for his negligent conduct resulting in the automobile crash and her son's death."¹⁵ Appellant later postulates that "even if Donald Roach had been under the influence of drugs or alcohol, or driving one hundred miles an hour, there could be no cause of action against him since he was an employee of Union Drilling." These statements are simply misleading to this Court.

¹⁴ Appellant's Brief, pp. 3, 9.

¹⁵ Appellant's Brief, p. 5.

Nothing in the law prevents Plaintiff below from bringing a claim against Roach for negligent driving. Indeed the Plaintiff below availed herself of that remedy. Already recovering on this theory, the Complaint below deliberately does not allege negligent driving on the part of Roach. This approach is because a negligent driving claim “on the way home from work” would derail the allegation that the accident was the result of “work-related” negligence. Therefore, the Complaint below is based solely on the allegation that the workplace conduct of Falls’ employer, Union Drilling, started a chain of events that ended in the injuries and death of Appellant’s decedent. In short, in her Complaint, Appellant deliberately reaches out to the workplace and the employer and alleges that Falls’ injuries were “work related.” Appellant in her Brief argues for the first time that Falls’ injuries have only a “tangential relationship” with workplace activity.¹⁶ This position too, is disingenuous. Appellant’s unambiguous stated contention in the Complaint below is that Falls’ injuries are in the “*direct and proximate result*”¹⁷ of workplace activity. How else can the Appellant tie Union Drilling to this fatality if not through the decedent’s employment?

C. *Plaintiff’s Premise That the Estate of Falls Would Not Have Received Workers’ Compensation Benefits is a “Straw Man” Argument*

Plaintiff was never denied Workers’ Compensation benefits. Rather, Plaintiff never filed a Workers’ Compensation claim for the injuries complained of, yet alleges Mr. Falls’ fatality was the “direct and proximate result” of workplace conduct.¹⁸ Rather than be burdened with the potential “catch-22” of a decision of Workers’ Compensation Commissioner,¹⁹ Plaintiff

¹⁶ Appellant’s Brief, p. 19.

¹⁷ Record, p. 9, ¶ 19.

¹⁸ *Id.*

¹⁹ A final decision of the Workers’ Compensation Commissioner would be a catch-22 because if Plaintiff prevails and receives compensation for her injuries, the underlying civil suit would clearly be barred by the statutory

chose instead to disregard the clear teaching of this Court and the West Virginia Legislature, and forge ahead with a civil suit alleging negligence against an employer for the work-related injuries of an employee. Appellant asks this Court to accept the premise that any workers' compensation claim for Mr. Falls' injuries would have been rejected as not arising out of or in the course of employment, and bases her entire argument to this Court upon that unproven conjecture.

D. Appellee Union Drilling Provided Each Employee with a Per Diem Intended to Be Used to Secure Lodging Near the Worksite

Throughout the brief, Appellant repeatedly contends that Union Drilling "fail[ed] to take precautions to keep [dangerously fatigued] individuals from having to drive on the public highways." Appellant adds a footnote which notes that other companies provide such safety measures.²⁰ However, Union Drilling has long understood that drill sites are often in remote locations. Often workers on a drilling crew will work at one location for several weeks or months before the crew again moves to another remote site. As a result, Union Drilling provides each of its drilling employees with a "per diem," or daily stipend, to be used by the employees to secure lodging. Appellant is well aware of Union Drilling's lodging per diem or stipend.²¹

IV. STANDARD OF REVIEW

Despite Appellant's hyperbolic language regarding unsubstantiated facts of the case below, as well as her reliance on untested legal theories regarding the compensability of her

immunity provided by West Virginia Code § 23-2-6. On the other hand, if Plaintiff is denied Workers' Compensation benefits, a finding that the injuries were not "work related" would burden the subsequent civil suit. Instead, Plaintiff apparently asks the West Virginia Supreme Court of Appeals to play the role of fact finder and decide the question of compensability on its own. This catch-22 reflects the Janus-faced nature of Appellant's position in this matter, and underscores the utility of the rule of exclusivity adopted by the Court in its *Bias* decision.

²⁰ Appellant's Brief, p. 5.

²¹ In Union Drilling Responses to Plaintiff's First Set of Discovery, Plaintiff asks Union Drilling to admit or deny that it failed to provide rest facilities to its employees. Union Drilling responded by informing Plaintiff of the "per diem" and explaining its purpose.

nonexistent Workers' Compensation claim, Appellant correctly notes that the issue presented to the Court "is a pure question of law."²² Accordingly, Appellant is not entitled to a presumption, as a matter of law, that Mr. Falls' never-filed Workers' Compensation claim would have been denied. These issues are not before this Court because no Workers' Compensation claim was ever made.

Instead, what is before the Court is a single question: did the circuit court err in dismissing Appellant's Complaint alleging workplace negligence against the decedent's employer Union Drilling? That question involves only *de novo* review of the circuit court's application of the statutory immunity provided by West Virginia Code § 23-2-6.

V. ARGUMENT

A. *The Circuit Court Correctly Applied This Court's Analysis of West Virginia Code § 23-2-6 and Employer Immunity*

In this Court's recent decision in *Bias v. Eastern Associated Coal Corporation*, 640 S.E.2d 540 (2006), the Plaintiff below was asked by his employer to navigate a cross cut of an underground coal mine in order to shut down a belt which was malfunctioning and producing thick smoke. The *Bias* Plaintiff shut down the smoking belt but subsequently became lost in the thick smoke while trying to exit and find fresh air. The *Bias* Plaintiff was eventually rescued but was lost in the thick smoke for an hour and a half. As a result of this harrowing experience, the *Bias* Plaintiff experienced severe emotional distress and sued his employer in circuit court under the common-law tort theory of intentional and/or negligent infliction of emotional distress. The

²² Appellant's Brief, p. 7.

Court in *Bias* recognized that Plaintiff suffered from a “mental-mental” injury and that under a straightforward application of West Virginia Code § 23-4-1f, he was precluded from recovery under the West Virginia Compensation fund.²³

The *Bias* Court next addressed the question of whether Plaintiff’s employer was entitled to immunity from Plaintiff’s common law negligence claims.²⁴ The Court found that the immunity question was controlled by the plain language of West Virginia Code § 23-2-6. The *Bias* Court specifically rejected Appellant’s argument that “the employer-immunity provision of W. Va. Code § 23-2-6 applies only when a workplace injury is compensable and benefits may be recoverable under the Workers’ Compensation Act.”²⁵ In doing so, the Court made it clear that compensability of a claimed injury and the immunization of an employer from litigation are independent legal inquiries.

The Court stated that “[t]he Legislature intended for W. Va. Code § 23-2-6 (1991) to provide qualifying employers sweeping immunity from common-law tort liability for negligently inflicted injuries.”²⁶ West Virginia Code § 23-2-6 provides that:

[A]ny employer subject to this chapter who subscribes and pays into the workers’ compensation fund the premiums provided by this chapter or who elects to make direct payments of compensation as provided in this section is not liable to respond in damages at common law or by statute for the injury or death of any employee, *however occurring*, after so subscribing or electing, and during any period in which the employer is not in default in the

²³ See generally, *Bias v. Eastern Associated Coal Corporation*, 640 S.E.2d 540 (2006).

²⁴ *Bias*, at 546. (“Compensability of a claimed injury and immunization of an employer from litigation therefore are independent of one another.”).

²⁵ *Id.* at 542.

²⁶ *Id.* at 544.

payment of the premiums or direct payments and has complied fully with all other provisions of this chapter.²⁷

The *Bias* decision reminds us that our state Legislature has made clear “that the immunity established in sections six and six-a, article two of [chapter 23], is an essential aspect of this workers’ compensation system; that the intent of the Legislature in providing immunity from common law suit was and is to protect those so immunized from litigation outside the workers’ compensation system except as expressly provided in this chapter.”²⁸ In *Bias*, this Court made it abundantly clear that the above statute entitles employers such as Union Drilling to broad immunity from common law tort claims based on work-related conduct brought by employees. That “sweeping immunity” is appropriately offset by the antipodal force of the no-fault system of compensation for injured workers.²⁹

The *Bias* Court further noted that “the Legislature has been extremely restrictive in creating [exceptions to employers statutory immunity].”³⁰ This Court, in *Bias*, found that “[o]ur Legislature has thus instructed the Court that we are not to read into the immunity provision of W. VA. CODE § 23-2-6 an exception not ‘expressly provided [by the legislature] in this chapter.’”³¹ The *Bias* Court held that circuit courts should respect the clearly stated intent of the Legislature, apply the plain language of the immunity statute, and refrain from the dangerous and improper process of judicial creation of additional exceptions to employer immunity. The

²⁷ W. VA. CODE § 23-2-6 (2007)(emphasis supplied).

²⁸ W. VA. CODE § 23-4-2 (d)(1) (2007)(emphasis supplied).

²⁹ *Bias*, at 544.

³⁰ *Id.*

³¹ *Id.* at 546.

Court then enumerated the three single exceptions to employer immunity for “negligently caused work-related injuries.”³² The Court stated:

[a]n employer who is otherwise entitled to the immunity provided by W. Va. Code § 23-2-6 (1991) may lose that immunity in only one of three ways: (1) by defaulting in payments required by Workers’ Compensation Act or otherwise failing to be in compliance with the Act; (2) by acting with deliberate intention to cause an employee’s injury as set forth in W. Va. Code § 23-4-2(d); or (3) in such other circumstances where the West Virginia Legislature has by statute expressly provided an employee a private remedy outside the workers compensation system.³³

Appellant does not contend that the circuit court misapplied any of these three exceptions. Rather Appellant relies on her tactical decision to avoid the Workers’ Compensation system in order ask this Court revisit *Bias*, ignore the clear intent of our Legislature, and rewrite the immunity provision contained in West Virginia Code § 23-2-6.

B. *Appellant’s Workers’ Compensation Analysis is Misplaced, Conjectural, and Inaccurate*

Appellant asks this Court to address the question of employer immunity by applying principles intended to guide the compensability analysis under the Workers’ Compensation System. In other words, Appellant spends a great amount of argument in her Brief explaining the “coming and going rule” of workers’ compensation jurisprudence and

³² *Id.*

³³ *Id.*

parsing the semantics of “result from” and occur “in the course of” language of the workers’ compensation statute.³⁴

By resorting to legal principles and authority taken from workers’ compensation jurisprudence, Appellant ignores the teaching of the *Bias* decision and its affirmation of the rule of exclusivity pertaining to employment related injuries, workers’ compensation and employer immunity. The *Bias* Court found that the question of whether a work-related injury was compensable under the workers’ compensation system had no bearing on the separate issue of how circuit courts should apply the clear language of the immunity statute. The Court stated: “[c]ompensability of a claimed injury and immunization of an employer from litigation therefore are independent of one another.”³⁵ Thus, Appellant’s workers’ compensation legal arguments should have been argued to the Workers’ Compensation Commissioner, not to the circuit court, and not to this Court. The question before this Court is, as stated above, whether immunity bars the underlying suit. That question can be answered by applying the straightforward language of the immunity statute as guided by the Court’s teaching in *Bias*. The separate question of workers’ compensation compensability must be addressed in the administrative forum created by the Legislature specifically for that purpose.

In addition, Appellant’s arguments in this respect are misplaced because she asks this Court to apply these principles to a case where *no workers’ compensation claim was ever made*, as a prerequisite to her broader arguments regarding her alleged inability to seek redress

³⁴ Appellant also points out that if it were not for the statutory immunity provided by West Virginia Code § 23-2-6, Plaintiff might be able to bring a common law negligence claim against Union Drilling based on the *Robertson v. LeMasters* decision. This observation is not helpful. Recognizing that a non-employee third party might bring a common law cause of action for negligence against a company that is not his employer is not relevant to this analysis.

³⁵ *Bias*, at 546.

for Falls' injuries. However, Appellant is not before the Court appealing a final decision of the Workers' Compensation Commissioner. By proposing this theory, Appellant is asking the Court to become a fact finder, and to make an uninformed determination that Falls *would not have been eligible* for workers' compensation for his injuries, in order to set up a "straw man" argument based on the equally false premise that Appellant was denied a remedy at law. However, this Court does not have original jurisdiction to decide whether this work-related injury is compensable, and to attempt to make such a determination without the benefit of a fully developed factual record from an administrative proceeding would be improper conjecture.

Of note, there is no support for Appellant's position that Mr. Falls' never-filed Workers' Compensation claim would have necessarily been denied based upon the "coming and going" rule in the first place. In the seminal case on the "coming and going" rule in West Virginia, *Brown v. City of Wheeling*, 569 S.E.2d 197 (2002), this Court makes clear that the "coming and going rule" is not subject to rigid, bright-line interpretation.³⁶ In support of that principle, this Court found that where an employee sustains an injury while going to or coming from work, the employee is entitled to compensation where the injury is sustained within "the zone of employment."^{37 38} The Court adds that "no definite rule can be laid down as to what is the zone of employment, and each case must be decided on its own facts and circumstances."³⁹

The *Brown* Court also explained the stated purpose of the coming and going rule:

"[T]he reasoning for this rule is that the employee is being exposed to a risk identical to the

³⁶ *Brown v. City of Wheeling*, 569 S.E.2d 197, 201 (2002)(cautioning that it is merely the "general rule.").

³⁷ *Id.*

³⁸ Furthermore, Plaintiff, in her Complaint, alleges that "the acts or omissions of the Defendant Roach were within the scope of [his] employment." Record, p. 5, ¶ 11.

³⁹ *Brown*, at 201. (quoting *Carper v. Workmen's Compensation Comm'r*, 1 S.E.2d 165, 166 (W. Va. 1939)).

general public; the risk is not imposed by the employer.”⁴⁰ But in the case below, Appellant alleges the precise opposite of the stated purpose of the coming and going rule -- that is, Appellant argues that the risk was imposed by the employer and the employer alone. In this single vehicle accident, no driver error is alleged. In the case below, Plaintiff alleges that *all of the risk to be avoided was created by Plaintiff’s employer*. These allegations are entirely antithetical to the policy and purpose of the coming and going rule. Thus, the premise that Plaintiff’s hypothetical workers’ compensation claim would be denied based on the coming and going rule is speculation.⁴¹ Appellant must not be permitted to subvert the stated intent of the coming and going rule by using the rule as a means of bypassing the Workers’ Compensation system in a suit alleging workplace negligence against Plaintiff’s employer.

Lastly, this Court’s *Bias* opinion has already flatly rejected Appellant’s contention. “We conclude that the Legislature intended W. Va. Code §23-2-6 to provide sweeping immunity from common law tort liability for negligently caused work-related injuries.”⁴² There can be no question that Appellant contends that Mr. Falls’ injuries were work-related. In fact, work-relatedness is the precise legal theory Appellant alleges in this case.

⁴⁰ *Brown*, at 202.

⁴¹ In the following cases, the employee was entitled to benefits where the employer exposed its worker to the hazards of travel by requiring the employee to work unusually long hours: *Van Devander v. Heller Elec. Co.*, 405 F.2d 1108, 1110 (D.C.Cir.1968) (compensating employee pursuant to Federal Longshoremen’s and Harbor Workers’ Act, 44 Stat. 1424 [1927], as amended, 33 U.S.C. §§ 901- 950 [1957], for injuries sustained when he fell asleep while driving home after being required to work twenty-six hours without sleep because hazard of journey arose out of and in course of “extraordinary demands of employment”). See *Hed v. Brockway Glass Co.*, 309 Minn. 73, 76, 244 N.W.2d 28 (1976) (affirming compensation award to worker who fell asleep while driving home after being required to work longer hours as a bricklayer than generally required); *Snowbarger v. Tri-County Elec. Coop.*, 793 S.W.2d 348, 350 (Mo.1990) (affirming award of compensation to worker who fell asleep while driving home after being required to work “unusually long overtime hours” of manual labor, eighty-six hours in one hundred hour period). See also *Deland v. Hutchings Psychiatric Ctr.*, 203 A.D.2d 776, 778, 611 N.Y.S.2d 44 (1994) (recognizing “substantial body of authority from other States and the Federal courts” holding that fatigue-related injuries can be compensable in some circumstances).

⁴² *Bias*, at 547.

The circuit court correctly perceived that disposition of the case below involved nothing more than the straight-forward application of West Virginia Code § 23-2-6 and this Court's reasoning in *Bias*. The circuit court's dismissal was based upon the flawless application of those principles. Because there has been no mistake of law on the part of the Circuit Court of Harrison County, this Court should affirm the ruling of the circuit court.

C. *The Certain Remedies Clause Has No Application to the Facts of This Case*

Appellant asks this Court to find that the circuit court's decision, correctly applying the immunity protecting Union Drilling, represents an unconstitutional violation of West Virginia's Certain Remedies Clause. The Certain Remedies Clause found in Art. III, §17 of the West Virginia Constitution, says:

[t]he courts of this State shall be open, and every person, for an injury done to him, in his person, property or reputation, shall have remedy by due course of law; and justice shall be administered without sale, denial or delay.⁴³

As discussed *supra*, the circuit court correctly applied the plain language of the immunity statute. Nonetheless, Appellant alleges that the circuit court's decision "violated [her] right to seek redress."⁴⁴ Appellant's Certain Remedies argument then is that West Virginia Code § 23-2-6, when read in conjunction with West Virginia Code § 23-4-1 (defining to whom the fund is disbursed), has effectively denied Appellant her right to "remedy by due course of law" and requires a finding by this Court that one or both of these statutes, as written, is an unconstitutional violation of the Certain Remedies Clause. In short, Appellant asks this Court to

⁴³ ART. III, SEC. 17, W. VA. CONST.

⁴⁴ Appellant's Brief, p. 25.

find that our Workers' Compensation system in general, which removes an employee's right to sue their employers under common law tort theories of negligence and *respondeat superior*, violates our State's Certain Remedies Clause.

Initially, it is significant that Appellant has already recovered under other legal methods of redress. Appellant has recovered \$100,000.00 under a negligence claim against Donald Roach arising out of his operation of Linda Hall's vehicle.⁴⁵ Also, Appellant's case below, Civil Action No. 06-C-613, remains pending in the Circuit Court of Harrison County, West Virginia, as a "deliberate intent" case against Appellee Union Drilling. Obviously, Appellant has ample legal methods to seek redress for her injuries and has availed herself of those remedies. Appellant's claims that the circuit court's decision "remov[ed] Plaintiff's ability to seek redress by any means" is simply not true.

As explained *supra*, Appellant invokes the Certain Remedies Clause of our Constitution only by resorting to false premises regarding the compensability of Falls' injuries, and misstatements about other possible relief. However, Appellant's Brief contains little analysis of this Court's caselaw interpreting the "Certain Remedies Clause." Thus, an analysis of this provision is appropriate

It is undisputed that "[t]he legislature has the power to alter, amend, change, repudiate, or abrogate the common law."⁴⁶ However, in *Gibson v. West Virginia Dept. of Highways*, 406 S.E.2d 440 (W. Va. 1991), the Court found that although "[t]here is a presumption of constitutionality with regard to legislation....[,] when a legislative enactment

⁴⁵ There is also a negligent entrustment theory against Linda Hall, the owner of the vehicle. This theory is in place in order to obtain coverage under a homeowner's policy of insurance. Record, p. 6.

⁴⁶ *Vespa v. Ghapery*, 552 S.E.2d 406, 411 (W. Va. 2001).

either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication of cases, then the certain remedy provision of Article III, Section 17 of the West Virginia Constitution is implicated.”⁴⁷ In *Lewis v. Canaan Valley Resorts, Inc.*, the Court found that where the Certain Remedy Clause is implicated pursuant to *Gibson*, the legislation will be upheld if “first, a reasonably effective alternative remedy is provided by the legislation or, second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose.”⁴⁸

1. Appellant’s Claim Does Not Implicate the Certain Remedies Clause of Our State’s Constitution

Appellant’s Claim does not implicate the Certain Remedies Clause of our State’s Constitution because our legislatively enacted Workers’ Compensation System has not impaired Appellant’s vested rights, nor has it severely limited her existing procedural remedies permitting the court adjudication of cases. In addressing when a legislative enactment implicates the Certain Remedies Clause, the *Gibson* Court noted that “the term ‘vested right,’ as used in the certain remedy provision, means that an actual cause of action which was substantially affected *existed at the time of the legislative enactment.*”⁴⁹ There can be no question that Appellant’s cause of action had not accrued when our Workers’ Compensation system was enacted in 1913. Also, it cannot be said that these statutes, when read together, “severely limit the procedural

⁴⁷ Syl. Pt. 6, *Gibson v. West Virginia Dept. of Highways*, 406 S.E.2d 440 (W. Va. 1991).

⁴⁸ Syl. Pt. 5, *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E.2d 634 (W. Va. 1991)(finding that The West Virginia Skiing Responsibility Act, which provided immunity to ski resorts from the common-law exposure to liability for the inherent risks in the sport of skiing, did not violate the Certain Remedies Clause).

⁴⁹ *Gibson*, at 451.

remedies existing at the time [they] were enacted.” *Lewis*, at 645 (discussing the second prong of the *Gibson* test for implication of the Certain Remedies Clause). It has been often said that the Workers’ Compensation system is a *quid pro quo*, providing mutual benefits to both employer and employee.⁵⁰ Although the Workers’ Compensation system eliminated employee suits against their employers in circuit court, it provided an alternate administrative forum whereby employees are *absolved of the burden of proving fault*. Far from being a severe limitation on a procedural remedy, the Workers’ Compensation system arguably expands workers’ abilities to receive redress for work-related injuries.

2. Appellant Cannot Show That the Certain Remedies Clause Has Been Violated Under the Facts of This Case

Furthermore, even if it were true that the Certain Remedies Clause was implicated by the circuit court’s decision (which it has not), Appellant must show that the Legislature violated the Certain Remedies Clause.⁵¹ Under this Court’s analysis in *Lewis*, in order to overcome the presumption of constitutionality, the Appellant must show that (1) no reasonably effective alternative remedy is provided and/or, (2) if no reasonably effective alternative remedy is provided, that the elimination of the existing cause of action or remedy is an unreasonable means of curtailing a clear social or economic problem.⁵²

⁵⁰ See *State ex rel Abraham Linc Corp. v. Bedell*, 602 S.E.2d 542, 546 (W. Va. 2004) (“That philosophy has commonly been called a *quid pro quo* on both sides.”); *Meadows v. Lewis*, 307 S.E.2d 625, 638 (W. Va. 1983) (noting that benefits of the system accrue both to employer and employee).

⁵¹ Syl. Pt. 5, *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E.2d 634 (W. Va. 1991) (“When legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting court adjudication, thereby implicating the certain remedy provision of article III, section 17 of the Constitution of West Virginia, the legislation will be upheld under that provision if, first, a reasonably effective alternative remedy is provided by the legislation or, second, if no such alternative remedy is provided, the purpose of the alteration or repeal of the existing cause of action or remedy is to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose.”)

⁵² *Id.*

In her Brief, Appellant argues that the Legislature has left Appellant with “no other legal method to seek redress.” Thus, Appellant’s argument is that the Workers’ Compensation legislation of this State violates the first prong of the *Lewis* Court’s analysis – that the Legislature provided no reasonably effective alternative remedy. However, clearly, when the Legislature enacted West Virginia Code § 23-2-6, it provided an “alternative remedy” in the form of the Workers’ Compensation system. As previously mentioned, Appellant chose not to pursue that remedy. Appellant’s argument that the Legislature has removed “all right to redress or remedy without providing an alternative method of recovery or remedy” disregards the entire Workers’ Compensation system.

Lastly, Appellant is using her tactical decision not to seek Workers’ Compensation benefits to argue that she “has no other legal method to seek redress.”⁵³ Rather than test her legal theories regarding the compensability of a Workers’ Compensation claim in the appropriate administrative forum, Appellant has instead asked this Court to pass on the question of the compensability of Mr. Falls’ injuries, and then use that premise to undue its recent decision in *Bias*. This calculated procedural positioning simply should not form the groundwork of an argument that the Legislature has “removed all right to redress or remedy without providing an alternative method of recovery or redress.”⁵⁴

VI. CONCLUSION

⁵³ Petition, p. 25.

⁵⁴ *Id.*

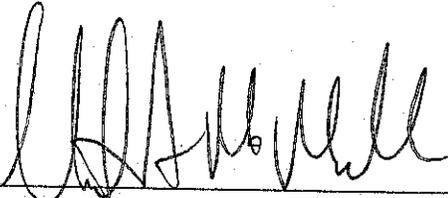
Appellant's requested relief derails the effect of the rule of exclusivity and undermines the stability of the system by "opening a Pandora's Box of litigation."⁵⁵

The circuit court correctly applied the immunity our State Legislature bestowed upon employers who are sued by employees for "negligently caused work-related injuries."⁵⁶ Undoubtedly, the facts of Appellant's case do not fall within one of the three specifically enumerated exceptions created by the Legislature and discussed in *Bias*. Appellant lacks standing to bring her allegations regarding the constitutionality of this Court's decision in *Bias* because she not only has various adequate remedies at law, but deliberately chose to forgo the Workers' Compensation claim that the Legislature provided in lieu of common law claims against employers. Instead, Appellant chose to proceed directly to circuit court on theories of workplace negligence and *respondeat superior*. In short, Appellant seeks to poke a new hole in the employer immunity upon which our Workers' Compensation system is based. Through that hole, case after case will proceed until the employer protection provisions of our Workers' Compensation system are virtually ineffectual.

Based on the plain statutory language of West Virginia Code § 23-2-6, this Court's clearly articulated analysis in *Bias*, and the sound public policy of promoting the dependability and integrity of the Workers' Compensation system in West Virginia, the circuit court correctly dismissed Appellant's common law tort claim. The circuit court did not expand employer immunity but merely correctly applied the clear analysis that our Legislature and this Court have so unequivocally insisted upon. For these reasons, Appellant's appeal for relief should be denied and the decision of circuit court upheld.

⁵⁵ *Bias*, 640 S.E.2d at 557 (Davis J., dissenting).

⁵⁶ *Id.* at 546.



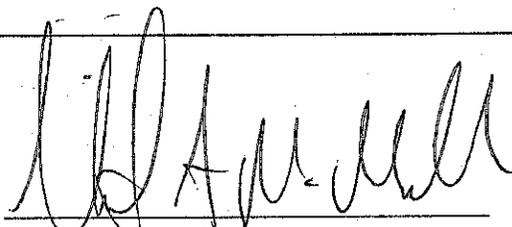
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Respectfully Submitted,
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By Counsel

CERTIFICATE OF SERVICE

I, Stuart A. McMillan, do hereby certify that a true and correct copy of the **Brief of Appellees Union Drilling, Inc. and Kevin Wright** was forwarded via U.S. Mail upon counsel of record, addressed as indicated, on the **6th day of August, 2008:**

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