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SUPREME COURT OF APPEALS  
OF WEST VIRGINIA

Davis, C.J., concurring:

In this proceeding, the majority opinion has held that the immunity afforded employers under W. Va. Code § 23-2-6 (2003), precludes an employee from bringing a so-called mental-mental cause of action against an employer. I concur fully in the decision of the majority opinion. I have chosen to write separately to underscore the limitations of the Certain Remedy Clause of our State Constitution. I want to be clear. The decision reached in this case is supported by precedents in other jurisdictions. Moreover, this Court can no longer apply the rule of liberality to workers' compensation statutes.

***A. The Rights Conveyed by the Certain Remedy Clause  
of Our State Constitution Are Not Absolute***

Prior to 1981, a mental-mental injury claim was not recognized in workers' compensation. As the majority opinion points out, this Court created a mental-mental claim against employers in *Breeden v. Workmen's Compensation Comm'r*, 168 W. Va. 573, 285 S.E.2d 398 (1981). The decision in *Breeden* allowed such a claim only in the context of workers' compensation litigation. Over a decade after the *Breeden* opinion, our legislature overruled that decision through enactment of W. Va. Code § 23-4-1f (1993). The statute provides, in part, that "no alleged injury or disease shall be recognized as a compensable

injury or disease which was solely caused by nonphysical means and which did not result in any physical injury or disease to the person claiming benefits.”

In this proceeding, the plaintiff contends that the effect of this statute leaves him and “others similarly situated, without any remedy whatsoever to redress his damages.” Although this argument was not sufficiently briefed, it implicated the Certain Remedy Clause of Art. III, § 17 of our State Constitution.<sup>1</sup>

Our Court has recognized that “[a] severe limitation on a procedural remedy permitting court adjudication of cases implicates the certain remedy provision of Article III, Section 17 of the West Virginia Constitution.” *State ex rel. West Virginia State Police v. Taylor*, 201 W. Va. 554, 565, 499 S.E.2d 283, 294 (1997). Article III, § 17 states “[t]he courts of this State shall be open, and every person for an injury done to him . . . shall have remedy by due course of law[.]” In the a recent decision of this Court, Justice Starcher pointed out that “[w]hile access to courts is a recognized fundamental right, it is also a commonly recognized principle that such right of access is not without limitations.” *Mathena v. Haines*, \_\_\_ W. Va. \_\_\_, \_\_\_, \_\_\_ S.E.2d \_\_\_, \_\_\_ (No. 32769; 6/26/06). That is, our prior decisions interpreting the Certain Remedy Clause make clear that the Clause does not

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<sup>1</sup>“This state constitutional provision has sometimes been called the ‘open courts’ or ‘access-to-courts’ provision.” *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 694 n.13, 408 S.E.2d 634, 644 n.13 (1991).

provide an absolute right to a remedy for an injury. *See Marcus v. Holley*, 217 W. Va. 508, 618 S.E.2d 517 (2005) (upholding statute giving part-time employees lower temporary total disability benefits, or permanent partial disability benefits or permanent total disability benefits); *O'Dell v. Town of Gauley Bridge*, 188 W. Va. 596, 425 S.E.2d 551 (1992) (upholding statute immunizing political subdivision from liability if claim is covered by workers' compensation); *Robinson v. Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 414 S.E.2d 877 (1992) (upholding statute that limited damages in medical malpractice actions); *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 408 S.E.2d 634 (1991) (upholding statute barring action against ski resort operators); *Randall v. Fairmont City Police Dept.*, 186 W. Va. 336, 412 S.E.2d 737 (1991) (upholding statute granting qualified tort immunity to political subdivisions).

“The legislature has the power to alter, amend, change, repudiate, or abrogate the common law.” *Verba v. Ghaphery*, 210 W. Va. 30, 35, 552 S.E.2d 406, 411 (2001).<sup>2</sup>

This Court has developed a two-part test for determining whether the Certain Remedy Clause is violated:

When legislation either substantially impairs vested rights or severely limits existing procedural remedies permitting

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<sup>2</sup>“[T]he general authority of the legislature to alter or repeal the common law is expressly conferred by article VIII, section 13 of the Constitution of West Virginia.” *Robinson v. Charleston Area Medical Center, Inc.*, 186 W. Va. 720, 727, 414 S.E.2d 877, 884 (1992).

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.

Syl. pt. 5, *Lewis v. Canaan Valley Resorts, Inc.*, 185 W. Va. 684, 408 S.E.2d 634 (1991).

Under the *Lewis* test, a statute which deprives a person of a previously recognized remedy for an injury will be sustained if the intent of the statute is to eliminate an economic problem, and repeal of the existing remedy is a reasonable method of achieving that purpose. Our prior decisions support finding that W. Va. Code § 23-4-1f was enacted to address an economic problem facing the workers' compensation system and that its enactment was a reasonable method for obtaining that purpose.<sup>3</sup> See, e.g., *State ex rel. Beirne v. Smith*, 214 W. Va. 771, 591 S.E.2d 329 (2003) (addressing permanent total disability changes); *State ex rel. ACF Industries, Inc. v. Vieweg*, 204 W. Va. 525, 514 S.E.2d 176 (1999) (addressing permanent total disability changes); *Bush v. Richardson*, 199 W. Va. 374, 484 S.E.2d 490 (1997) (addressing subrogation statute); *Hardy v. Richardson*, 198

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<sup>3</sup>The legislature enacted a number of statutes during the 1990's designed to address the financial crisis facing the workers' compensation system. See generally, Robin Jean Davis & Louis J. Palmer, Jr., "Worker's Compensation Litigation in West Virginia: Assessing the Impact of the Rule of Liberality and the Need for Fiscal Reform," 107 W. Va. L. Rev. 43 (2004).

W. Va. 11, 479 S.E.2d 310 (1996) (addressing changes for reopening a claim); *State ex rel. Blankenship v. Richardson*, 196 W. Va. 726, 474 S.E.2d 906 (1996) (addressing permanent total disability changes). In fact, this Court has previously upheld W. Va. Code § 23-4-1f on nonconstitutional grounds. *See Conley v. Workers' Compensation Division*, 199 W. Va. 196, 483 S.E.2d 542 (1997) (requiring statute to be applied prospectively).

Obviously, this Court is deeply concerned with the fact that the legislature took away the mental-mental claim from the workers' compensation system and failed to provide an alternative remedy against employers in the courts of this state. "However, the . . . legislature has granted employers broad immunity from common law liability in favor of defined statutory liability under the . . . Work[ers'] Compensation Act. What remedies are available under the Act in lieu of common law remedies is up to the . . . legislature." *Building & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1494 (10<sup>th</sup> Cir. 1993). This Court has long held that "[i]t is not the province of the courts to make or supervise legislation[.]" *State v. General Daniel Morgan Post No. 548*, 144 W. Va. 137, 145, 107 S.E.2d 353, 358 (1959) (citation omitted). We "may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations[.]" *Lewis*, 185 W. Va. at 692, 408 S.E.2d at 642.

***B. Other Jurisdictions Do Not Permit a Common Law Action Against Employers for Claims Not Covered under Workers' Compensation***

In the instant case, the plaintiffs sought to have this Court recognize a common law mental-mental claim against an employer. This claim is essentially a negligent tort cause of action against an employer. We have previously pointed out that the exclusivity provision of W. Va. Code § 23-2-6 “only contemplates an exemption of contributing employers from liability for ‘damages at common law or by statute for the injury or death of any employee’ arising out of a *negligently-inflicted injury* of an employee.” *Persinger v. Peabody Coal Co.*, 196 W. Va. 707, 717, 474 S.E.2d 887, 897 (1996) (emphasis added).<sup>4</sup> Insofar as the plaintiffs sought to bring a negligent tort action against the employer, sound legal and policy reasons supported the majority decision in refusing “to open a Pandora’s box of litigation[.]” *Persinger*, 196 W. Va. at 717, 474 S.E.2d at 897.<sup>5</sup> See also Joseph H. King, Jr., “The Exclusiveness of an Employee’s Workers’ Compensation Remedy Against His Employer,” 55 Tenn. L. Rev. 405, 408 (1988) (pointing out that the exclusivity “rule should not be subverted with so many exceptions that the protection it offers becomes illusory.”).

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<sup>4</sup>The decision in *Persinger* recognized that, initially by case law and subsequently by statute, an employer is not immune from action by an employee for an intentional tort. See *Mandolidis v. Elkins Indus. Inc.*, 161 W. Va. 695, 246 S.E.2d 907 (1978), superseded by statute, W. Va. Code § 23-4-2(d) (2005). In *Persinger* we recognized a common law cause of action against “an employer for damages as a result of the employer *knowingly and intentionally* fraudulently misrepresenting facts to the Workers Compensation Fund that are not only in opposition to the employee claim, but are made with the intention of depriving the employee of benefits rightfully due him.” Syl. pt. 1, in part, *Persinger* (emphasis added).

<sup>5</sup>It should be noted that the plaintiffs may not be without a remedy to the extent they are able to satisfy the requirements of their alternative deliberate intent cause of action.

Although there is persuasive authority by a majority of courts holding that if an injury is not covered by workers' compensation, a common law action may be maintained against an employer,<sup>6</sup> there is equally persuasive authority from a minority of courts holding "that the workers' compensation [exclusivity] bar applies even if an employee suffers losses which are not compensable under the Workers' Compensation Law." *Maas v. Cornell University*, 683 N.Y.S.2d 634, 636 (1999) (citations omitted). *See also Clarke v. Kentucky Fried Chicken of California, Inc.*, 57 F.3d 21, 28-29 (1<sup>st</sup> Cir. 1995) (holding that under Massachusetts law an employee cannot bring an action for negligent infliction of emotional distress arising out of bona fide personnel actions even though no coverage provided by workers' compensation); *Building & Constr. Dep't v. Rockwell Int'l Corp.*, 7 F.3d 1487, 1494 (holding that under Colorado law an employee cannot bring an action for medical monitoring against an employer even though no coverage provided by workers' compensation); *Ogden v. Keystone Residence*, 226 F. Supp. 2d 588, 604 (M.D. Pa. 2002) (holding that under Pennsylvania law an employee cannot bring an action for negligent or intentional infliction of emotional distress against an employer); *Gilbert v. Essex Group, Inc.*, 930 F. Supp. 683, 688-689 (D.N.H. 1993) (observing that New Hampshire's "workers' compensation law . . . bars an employee's common law action for personal injuries including emotional distress arising out of an employment relationship."); *Zaytzeff v. Safety-Kleen Corp.*, 473 S.E.2d 565, 568 (Ga. Ct. App. 1996) (even though claim not covered by workers'

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<sup>6</sup>See Arthur Larson, *Larson's Workers' Compensation Law*, § 100.04 (2005) (citing cases).

compensation, the exclusivity provision still bars cause of action); *Cole v. Chandler*, 752 A.2d 1189, 1196 (Me. 2000) (holding that no common law cause action allowed against employer for mental injuries). The justification for not permitting a negligent common law cause of action against an employer by an employee was succinctly stated in *Doss v. Food Lion, Inc.*

The exclusivity provision is the bedrock of the workers' compensation system. The legislature has determined that it is the quid pro quo for workers receiving a guarantee of prompt benefits for work-related injuries without regard to fault or common-law defenses and without the delay inherent in tort litigation. Workers' compensation has never been intended to make the employee whole--it excludes benefits for pain and suffering, for loss of consortium, and it provides a cap on wage benefits.

Thus, the exclusion of an independent tort action . . . is not contrary to public policy or the statutory scheme. Any enlargement of benefits and remedies must originate with the legislature.

477 S.E.2d 577, 578 (Ga. 1996). *See also Ex parte Shelby County Health Care Auth.*, 850 So. 2d 332, 338 (Ala. 2003) (“[T]his Court does not have the authority to judicially engraft exceptions into the immunity provisions applicable to the employer[.]” (internal quotations and citation omitted)); *Building & Constr. Dep’t v. Rockwell Int’l Corp.*, 7 F.3d 1487, 1494 (‘We reject plaintiffs’ further argument that due process concerns prohibit applying the Acts exclusivity provisions where the Act would not provide a remedy. It has long been recognized that legislatures have broad power to adjust relations between employers and employees under workers’ compensation principles.’”).

The issue of a common law negligent action against an employer was presented squarely to this Court in the recent decision of *State ex rel. City of Martinsburg v. Sanders*, \_\_\_ W. Va. \_\_\_, \_\_\_ S.E.2d \_\_\_ (No. 32868; 6/29/06). In *Sanders* we were called upon to decide whether municipal employees could maintain common law theories of liability for medical monitoring against their municipal employer. Justice Albright, writing for the majority of the Court, rejected such claims. In clear language Justice Albright stated in *Sanders* that “[t]he immunity from liability afforded all employers participating in the Workers’ Compensation system through West Virginia Code § 23-2-6 (2003) protects a political subdivision against awards of medical monitoring damages based on common law tort theories.” Syl. pt. 4, *Sanders*.

The decision in *Sanders*, as articulated by Justice Albright, illustrates this Court’s commitment to refrain from judicial activism, by encroaching upon the authority of the legislature to bar negligent claims by employees against their employers. See *Boyd v. Merritt*, 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986) (“This Court does not sit as a superlegislature. . . . It is the duty of the legislature to consider facts, establish policy, and embody that policy in legislation.”).

***C. The Rule of Liberality Cannot Be Applied to  
Workers’ Compensation Statutes***

When this Court decided the cases of *Jones v. Rinehart & Dennis Co., Inc.*, 113

W. Va. 414, 168 S.E. 482 (1933) (making the disease of silicosis compensable) and *Breeden v. Workmen's Compensation Commissioner*, 168 W. Va. 573, 285 S.E.2d 398 (1981) (making mental-mental claims compensable), the rule of liberality was fully applicable to the interpretation of workers' compensation statutes. The rule of liberality mandates that workers' compensation statutes be construed in favor of employees. See Davis & Palmer, "Worker's Compensation Litigation in West Virginia," 107 W. Va. L. Rev. at 90 ("Under the rule of liberality whenever there is any ambiguity in a workers' compensation statute or evidentiary uncertainty, doubt is resolved in favor of the employee."). As a result of the presence of the rule of liberality, the decisions in *Jones* and *Breeden* were able to construe the workers' compensation statutes in favor of employees and provide the relief requested. However, in 2003 the legislature abolished the rule of liberality. W. Va. Code § 23-1-1(b) (2005) provides that "the Legislature hereby declares that any remedial component of the workers' compensation laws is not to cause the workers' compensation laws to receive liberal construction[.]" See also, W. Va. Code § 23-4-1g(b) (2003).

In the instant case, the rule of liberality could not be applied by this Court to grant the relief sought by the plaintiffs. Consequently, the exclusivity provision had to be examined strictly according to the rules of statutory construction. Under the rules of statutory construction "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syl. pt. 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).

*Accord DeVane v. Kennedy*, 205 W. Va. 519, 529, 519 S.E.2d 622, 632 (1999) (“Where the language of a statutory provision is plain, its terms should be applied as written and not construed.”).

The exclusivity provision contained in W. Va. Code § 23-2-6 states, in part, that “[a]ny employer subject to this chapter who subscribes and pays into the workers’ compensation fund . . . is not liable to respond in damages at common law or by statute for the injury or death of any employee[.]” There is nothing ambiguous in this provision. Under the statute a common law mental-mental claim simply cannot be brought against an employer. *See* Syl. pt. 2, *Cricket v. Andrews*, 153 W. Va. 714, 172 S.E.2d 384 (1970) (“Where the language of a statute is free from ambiguity, its plain meaning is to be accepted and applied without resort to interpretation.”).

In the final analysis, I believe a remedy should be provided for *legitimate* mental-mental claims. However, this Court is not the branch of government empowered to create a common law negligence claim against employers. This type of remedy can come only from the legislative branch of government.

In view of the foregoing, I respectfully concur. I am authorized to state that Justice Maynard joins me in this concurring opinion.