Maynard, J., Dissenting Opinion, Case No.23570 Sue Ellen Costilow v. Elkay Mining Company, et al.

No. 23570 - Sue Ellen Costilow, Administratrix of the Estate of David Lee Jett v. Elkay Mining Company, a West Virginia corporation; Cecil I. Walker Machinery Co., a West Virginia corporation; Caterpillar Tractor Co., a California corporation; and Indiana Mills & Manufacturing, Inc., an Indiana corporation

and

No. 23400 - Thelma Lea Blake and Jerry Lane Blake, her husband v. John Skidmore Truck Stop, Inc., a West Virginia corporation

Maynard, Justice, dissenting:

The great white shark named "Mandolidis" is alive and well and on the prowl again in the sea of commerce in West Virginia. Just when you thought it was safe to go back in the water! Such is the result of the majority opinions in Costilow v. Elkay Mining, No. 23570 (March 14, 1997) and Blake v. Skidmore, No. 23400 (July 16, 1997).

In Costilow I dissent because I believe a reasonable jury could not come close to inferring from the evidence presented below that Elkay had a subjective realization of any unsafe working condition, or that Elkay made a deliberate

and conscious management decision to expose Mr. Jett to that condition. While it is generally a judgment call whether or not a set of facts constitutes deliberate intention under W.Va. Code § 23-4-2(c)(2)(ii), the facts presented in this case clearly do not. Obviously, this Court's decision to reverse the granting of summary judgment by the court below is based on its own preferences; the decision has nothing to do with the applicable law found in W.Va. Code § 23-4-2(c)(2)(ii). In short, the Court is determined to utilize its own preferred standard of gross negligence, and not that of deliberate intention as articulated by the Legislature.

The Legislature has made clear the purpose of the Workers' Compensation system clear by declaring:

the establishment of the workers' compensation system . . . is intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as herein expressly provided . . . the immunity established in sections six and six-a [§§ 23-2-6 and 23-2-6a], article two of this chapter, is an essential aspect of this workers' compensation system[.]

W.Va. Code § 23-4-2(c)(1) (Emphasis added). In response to this Court's holding in *Mandolidis v. Elkins Indus., Inc.,* 161 W.Va. 695, 246 S.E.2d 907 (1978), the Legislature narrowed the standard of deliberate intention by amending W.Va. Code § 23-4-2 (1994) in order to make it more difficult to prove a cause of action under W.Va. Code § 23-4-2.[(1)] According to W.Va. Code § 23-4-2(e)(1):

[T]he Legislature intended to create a legislative standard for loss of that immunity of more narrow application and containing more specific mandatory elements than the common law tort system concept and standard of willful, wanton and reckless misconduct . . .it was and is the legislative intent to promote prompt judicial resolution of the question of whether a suit prosecuted under the asserted authority of this section is or is not prohibited by the immunity granted under this chapter.

Further, W.Va. Code § 23-4-2(c)(2)(iii)(B) states in part:

Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under this chapter, the court shall dismiss the action upon motion for summary judgment if it finds, pursuant to Rule 56 of the Rules of Civil Procedure that one or more of the facts required to be proved by the provisions of subparagraphs (A) through (E) of the preceding paragraph (ii) do not exist[.]

In light of the fact that the appellant failed completely to present sufficient evidence with respect to the subjective realization and intentional exposure elements of a deliberate intention action, the circuit court correctly granted summary judgment on behalf of Elkay. In reversing the circuit court, this Court disregards all of the statutory language quoted above.

The facts of this case reveal that Mr. Jett was a competent and knowledgeable employee, and that Elkay allowed him to exercise a great deal of independent judgment regarding his work. Also, it is undisputed that Mr. Jett was not requested by anyone at Elkay to scalp the slope on which the accident occurred, nor did he inform anyone that he was intending to scalp that area.

W.Va. Code § 23-4-2(c)(2)(ii)(B) and (D) clearly mandate that an employer have a subjective realization of the unsafe working condition, and expose an employee to the unsafe working condition intentionally before losing the immunity to suit afforded by the Workers' Compensation system. Further, as

stated in Syllabus Point 3 of the majority opinion, the requirement of subjective realization "is not satisfied merely by evidence that the employer reasonably should have known of the specific unsafe working condition and of the strong probability of serious injury or death presented by that condition. Instead, it must be shown that the employer actually possessed such knowledge." (Citation omitted) (Emphasis added). The majority inexplicably concludes, however, that "under the circumstances of this action, the appellant should be permitted to include, as part of her 'deliberate intention' theory, an argument to a jury that Elkay, through a pattern of acquiescence, failed to account for Jett's safety, in spite of the obvious hazards." Such reasoning ignores the fact that a jury would be much less apt to creatively evade the statutory language than this Court. Such reasoning disregards W.Va. Code § 23-4-2(c)(2)(iii)(B), concerning the appropriateness of summary judgment when the five elements of deliberate intention are not present. Such reasoning frustrates judicial economy by mandating the time and expense of a trial when, plainly, one is not merited.

Similarly, this Court's decision in Skidmore guarantees that another meritless action, rightfully dismissed by the circuit court, will now go to trial. I dissent because I believe that the appellants failed to produce sufficient evidence to establish that the appellee acted with deliberate intention to defeat the appellee's motion for a directed verdict.

A lack of security measures in a convenience store in rural West Virginia, which has the lowest crime rate in the nation, simply does not constitute a specific unsafe working condition with a high degree of risk and a strong probability of serious injury or death. This is especially so in light of the apparent lack of evidence that the convenience store has a history of being robbed. The evidence presented by the appellant below, while not proving deliberate intention, does show two things. First, it shows that the appellee may have violated the standard of care for security measures in the convenience store industry, which might make him guilty of mere negligence. Second, the evidence shows that a plaintiff can get anyone to testify that the five elements constituting deliberate intention is present in any particular set of circumstances. In the majority opinion, the Court manages to take evidence of poor security and turn it into full-blown deliberate intention, and expects

that a reasonable jury may be able to do the same. The Court forgets, however, that the average jury may not be as skilled at bootstrapping.

Perhaps the majority here is motivated by the brutal set of facts in this case and disturbed that an innocent pregnant woman could be so victimized by violent crime and not receive compensation. I am likewise troubled and very sympathetic to the sad fact that crimes such as this one happen thousands of times a year and the victims receive no compensation. The old saw that "hard cases make bad law" is still true, and the Court's effort to fit the circumstances of this case into the deliberate intention exception is a perfect example.

I suspect that the majority is also motivated here by its historical antagonism to the immunity provision of the Workers' Compensation Act. This Court, like most other courts, seems to be plagued by the notion that somewhere, someone actually enjoys immunity to tort liability. Nevertheless, this immunity was created by the Legislature and is an integral part of this state's carefully crafted workers' compensation system, therefore, this Court should learn to live with it. Because I believe that in the above-mentioned opinions the Court improperly invokes the deliberate intention exception, I respectfully dissent.

1. In Mayles v. Shoney's, Inc. 185 W.Va. 88, 405 S.E.2d 15 (1990), however, this Court commented that the Legislature's effort to narrow the parameters of civil liability in W.Va. Code § 23-4-2(c)(2)(ii) had actually broadened the concept of such liability. I take issue with this characterization because I think the Legislature did, in fact, narrow liability.