No. 24003 - Michael L. Harmon v. Elkay Mining Company, A West Virginia Corporation; Coal Carriers, Inc., A West Virginia Corporation; CLM Trucking, Inc., A West Virginia Corporation; and Circle Transport, Inc., A West Virginia Corporation.

Maynard, Justice, dissenting:

I dissent in this case insofar as the majority reverses the circuit court's granting of summary judgment on behalf of the appellant's two possible employers, Coal Carriers, Inc., and Circle Transport, Inc. In finding that the appellant has shown sufficient evidence to circumvent Workers' Compensation immunity, this Court has *yet again* disregarded the plain language of W.Va. Code § 23-4-2(c)(2)(ii) concerning the elements necessary to bring a *Mandolidis* action.

The majority's decision here is consistent with this Court's recent history of ignoring statutory language and allowing employees to

sue employers when they allege nothing more than mere negligence. In *Costilow v. Elkay Min. Co.*, 200 W.Va. 131, 488 S.E.2d 406 (1997), this Court reversed summary judgment on behalf of the employer. In *Costilow,* a bulldozer operator with seventeen years of experience lost control of his vehicle while scalping a slope. This accident resulted in his death. It was undisputed that the employee enjoyed a great deal of independent judgment regarding his work, and that he was not requested by his employer to scalp the slope on which the accident occurred. Nevertheless, the majority concluded 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 [the employee's] safety, in spite of the obvious hazards." *Costilow,* W.Va. at ___, 488 S.E.2d at 411. I dissented in *Costilow,* stating that "[s]uch 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." *Id.*, 488 S.E.2d at 413.

In *Blake v. Skidmore*, ___ W.Va. ___, ___ S.E.2d ___ (No. 23400, July 17, 1997), the employee of a convenience store in Braxton County, West Virginia was stabbed by a robber. The employee sued the owner of the convenience store under the deliberate intention exception to the Workers' Compensation Act. The employee basically alleged there was a total lack of security in the convenience store, and this lack of security caused her injuries. The circuit court directed a verdict for the employer. This Court reversed, concluding that the appellant produced sufficient evidence to prevent a directed verdict under the five-part test of W.Va. Code § 23-4-2(c)(2)(ii). I dissented in *Blake* based on the fact, once again, that the appellant had alleged nothing more than negligence, and stated that "[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."

Likewise, in the instant case, the appellant seeks to hold his employer liable on the ground that Coal Carriers, Inc. failed to provide

for the regular inspection and maintenance of the truck, and did not provide him with appropriate training for operating the truck. Again, this is simply nothing more than an allegation of negligence on the part of the employer and comes nowhere near meeting the requirements of W.Va. Code § 23-4-2(c)(2)(ii).

In my joint dissent in *Costilow* and *Blake*, I emphasized the fact that the Legislature of this State made clear the purpose of the Workers' Compensation system when it stated,

> 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), in part, (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(c)(1), in part:

> [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

[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.

> 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[.]

I believe that, in the instant case, the circuit court, in granting summary judgment on behalf of the employer, complied with both the letter and the spirit of the workers' compensation provisions concerning immunity. The circuit court's action was apparently based on its conclusion that the appellant could not show "a violation of a state or federal safety statute, rule or regulation" as is required by W.Va. Code § 23-4-2(c)(2)(ii)(C). I believe, in addition, that the evidence fails to show that the employer had "a subjective realization and an appreciation of the existence of . . . [a] specific unsafe working condition" as required by W.Va. Code § 23-4-2(c)(2)(ii)(B). Instead, the allegations and supporting evidence set forth by the appellant indicate that his employer may have been negligent in maintaining its trucks. Again, simple negligence, gross negligence, and even *willful, wanton and reckless misconduct* fall short

of the very narrow and specific mandatory elements required by W.Va. Code § 23-4-2(c)(2)(ii).

As I stated in my joint dissent in *Costilow* and *Blake*, I suspect that the majority's decision here is motivated, at least in part, by historical antagonism to the immunity provision of the Workers' Compensation Act. This immunity, however, was created by the Legislature and is an integral part of this State's carefully crafted workers' compensation system. By consistently disregarding the language of the immunity provision, this Court is, in effect, engaging in judicial legislation. The Legislature has made itself perfectly clear on the issue of immunity, and this Court should reconcile itself to that fact. Because I believe that the circuit court properly granted summary judgment on behalf of the employer in this case, I respectfully dissent.