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OF WEST VIRGINIA

Maynard, Justice, dissenting:

I dissent in this case because there was no evidence presented that would permit a reasonable jury to conclude that the employer's failure to comply with the OSHA forklift training regulation was a proximate cause of the appellant's work place injury. The majority's decision presents yet another example of how this Court will strain to reach a favorable outcome for plaintiffs in deliberate intention actions. The end result is that these plaintiffs get a double recovery - workers' compensation benefits and civil damages.

In *Mayles v. Shoney's Inc.*, 185 W.Va. 88, 92, 405 S.E.2d 15, 19 (1990), this Court recognized that the Legislature amended the deliberate intention statute, W.Va. Code § 23-4-2, in an attempt to "make it more difficult for an employer to lose the immunity provided to him by the Workers' Compensation Act." However, beginning with *Mayles*, this Court has ignored the Legislature's intent by consistently weakening the five-part test of W.Va. Code § 23-4-2(d)(2)(ii) and making it easier for creative plaintiffs to defeat the immunity the Legislature intended to afford employers who participate in the Workers' Compensation system. In this case, the majority has done so by lowering the standard for proving proximate causation as set forth in W.Va. Code § 23-4-2(d)(2)(ii)(E).

Contrary to the majority, I do not believe that the fact that the employer failed to comply with the OSHA forklift training regulation and the fact that the appellant was injured while operating a forklift automatically created a triable issue concerning proximate causation. The appellant had the burden of presenting credible evidence that his injuries were proximately caused by his employer's failure to offer such training. However, the appellant was only able to speculate that the warnings which might have been included in such training may have prevented him from being injured. Such speculation is certainly not proof of proximate causation. As this Court explained in *Tolley v. ACF Industries, Inc.*, 212 W.Va. 548, 558, 575 S.E.2d 158, 168 (2002), "the law is clear that a mere possibility of causation is not sufficient to allow a reasonable juror to find causation."

The majority seizes upon an incident report prepared by an employee of the employer which indicated that the appellant might have had his foot outside of the forklift cab when the accident occurred and finds that this evidence permits the conclusion that the accident arose as a result of conduct that the omitted training sought to reduce or avert. To me, not sticking one's foot outside of a moving vehicle is a matter of common sense. It should not be necessary for an employer to tell a forklift driver that his foot might be crushed if he places it outside of the cab of his forklift while he is driving down narrow aisles. Some things are simply so obvious that no instruction should be necessary. To hold this employer liable in this deliberate intention case for failing to train the appellant to use basic common

sense is patently unfair and unjust. Obviously, the West Virginia disability machine is still well-oiled and running smoothly. Accordingly, I respectfully dissent.

I am authorized to state that Justice Benjamin joins in this dissent.