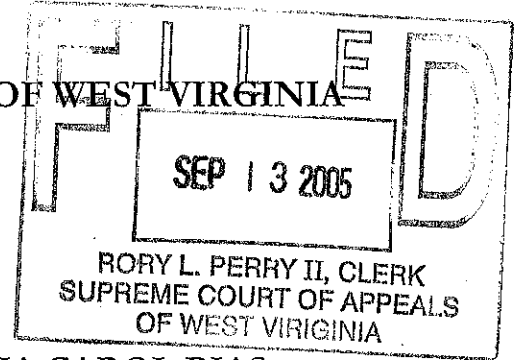


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 32778



BERCHIE EUGENE BIAS and PATRICIA CAROL BIAS,
Plaintiffs Below, Appellees

vs.

EASTERN ASSOCIATED COAL CORPORATION,
Defendant Below, Appellants

REPLY BRIEF

Counsel for Petitioner

Ancil G. Ramey, Esq.
WV State Bar ID No. 3013
H. Toney Stroud, Esq.
WV State Bar ID No. 7800
Scott E. Johnson, Esq.
W. Va. State Bar No. 6335
Steptoe & Johnson, PLLC
P.O. Box 1588
Charleston, WV 25326-1588
Telephone (304) 353-8112

Counsel for Respondents

Norman W. White, Esq.
WV State Bar ID No. 4668
Brian L. Ooten, Esq.
WV State Bar ID No. 9358
Shaffer & Shaffer
P.O. Box 38
Madison, WV 25130-0038
Telephone (304) 369-0511

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I. INTRODUCTION

The issue the certified question presents is simple — did the Legislature intend to protect employers from “mental-mental” claims by rendering such claims non-compensable only to subject employers to greater liability under the tort system? Surely, it cannot be seriously contended that legislators who voted to abolish mental-mental workers’ compensation claims intended to expose West Virginia employers to even greater liability under the common law tort system when, for example, an employee is distressed after being exposed to smoke as a result of a workplace fire. Thus, unless it is to abandon the cardinal rule of statutory construction, i.e., statutes are to be construed to effectuate legislative intent, this Court should rule that there is no common law cause of action for negligent infliction of emotional distress arising from a workplace accident in which an employee suffers no bodily injury, but solely emotional distress.

II. ARGUMENT

In their brief, the Biases basically make three intertwined arguments: (1) the decisions in *Jones v. Rinehart & Dennis Co.*, 113 W. Va. 414, 168 S.E. 482 (1933) and *Ball v. Joy Manufacturing Co.*, 755 F. Supp. 1344 (S. D. W. Va. 1990) are dispositive of the effect of W. Va. Code § 23-4-1f; (2) the abolition of “mental-mental” claims in the worker’s compensation field without a corresponding common law right of suit impinges on the quid pro quo nature of workers’ compensation laws; and (3) the Legislature could not have intended to leave “mental-mental” claimants without a remedy. None of these arguments is remotely compelling. First, both *Jones* and *Ball* were predicated not upon legislative action, but upon a void created by legislative inaction. Second, not every legislative limitation on workers’ compensation necessitates some corresponding benefit in order to replicate the common law tort system. Finally, the context of

the abolition of mental/mental claims makes clear that the Legislature did not intend by its abolition to allow common law claims.

A. BECAUSE W. VA. CODE § 23-4-1f PREDATES BOTH *JONES* AND *BALL* AND BECAUSE IT SUBSTANTIALLY ALTERED THE STATUTORY WORKERS' COMPENSATION SCHEME, NEITHER *JONES* NOR *BALL* SUPPORT A CONCLUSION THAT THE LEGISLATURE INTENDED TO ALLOW COMMON LAW CLAIMS FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

In *Jones*, the plaintiff's decedent contracted silicosis and the plaintiff sued the mining company. The company defended on the ground that the exclusivity provision of the workers' compensation act protected them from liability. The court found that the exclusivity provision did not apply because the Act did not cover occupation diseases not attributable to "a definite, isolated, fortuitous occurrence." Syl. pt. 3, in part, *Jones*. However, in *Jones*, the Legislature had not spoken as to whether silicosis was covered by the Act, *id.* at 423, 168 S.E. at 486, and that is a critically distinguishing point between *Jones* and this case.

Jones' rationale (and that of similar cases) was best described by the Utah Supreme Court in *Masich v. U.S. Smelting, Refining & Min. Co.*, 191 P.2d 612, 623 (Utah 1948), in observing that "the cases hold that when the legislature has not occupied the occupational disease field, the employee suffering from a disease contracted or aggravated by the employer's negligence is not precluded from bringing his common law action." *Jones* was thus premised upon legislative inaction, not as here, legislative action.

Similarly, legislative intent was crucial to the decision in *Ball*, *supra* at 1355, where the court said it could "find no evidence that the legislature has disapproved of the reasoning of the

West Virginia Supreme Court of Appeals in the *Jones* line of cases.” Here, though, such evidence is clearly manifest since the Legislature in W. Va. Code § 23-4-1f has repudiated “the *Jones* line of cases.”

If *Jones* has any applicability here it is in its that in dealing with the interpretation of the immunity provision of the Act,

[c]onsideration must be given to the background and purpose of compensation acts, to the evils sought to be corrected and the objects to be attained; to the rules of the common law with relation to right of action for industrial injuries and diseases, both occupational and otherwise; to the legislative history of our own act; and to all portions of the act which may be of assistance in determining the legislative intent with respect to the said phraseology of [the immunity section].

Jones, supra at 419, 168 S.E. at 484. Applying these criteria establish that W. Va. Code § 23-4-1f has abolished all mental-mental claims from actionability in West Virginia – be it in the workers’ compensation system or in tort.

“That an injury is not compensable under the Act does not necessarily mean that it is not within the purview of the Act for purposes of the exclusivity provisions.” *Zaytzeff v. Safety-Kleen Corp.*, 473 S.E.2d 565, 567 (Ga. Ct. App. 1996). *Accord Rathbun v. Starr Commonwealth*, 377 N.W.2d 872, 876 (Mich. Ct. App. 1985)(“The fact that a plaintiff may not actually be entitled to receive compensation benefits does not give her the right to maintain a common-law action.”). “[I]n determining whether a cause of action is barred by the exclusivity provision, the appropriate question is whether the act is applicable to the injury at issue. In such a case, the ultimate question is one of legislative intent.” *DeOliveira v. Liberty Mut. Ins. Co.*, 870 A.2d 1066, 1072 (Conn. 2005).

W. Va. Code § 23-4-1(a) requires the workers' compensation system to provide payments from the workers' compensation fund to covered employees who suffer personal injuries in the course of and resulting from covered employment. W. Va. Code § 23-2-6 provides that contributing employers to the workers' compensation fund are "not liable to respond in damages at common law or by statute for the injury or death of any employee, however occurring[.]" W. Va. Code § 23-4-1f provides, "[f]or the purposes of this chapter, 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. It is the purpose of this section to clarify that so-called mental-mental claims are not compensable under this chapter."

Here, W. Va. Code § 23-4-1(a) provides that "no alleged injury or disease shall be recognized as a compensable injury or disease[.]" The Legislature's first use of the terms "injury or disease" stand alone, while the second occurrence of terms "injury or disease" are modified by the word "compensable." The first use of the terms "injury or disease" refer to the use of those terms in W. Va. Code § 23-4-1(a)—injuries or diseases incurred in the course of and resulting from the employment, which are injuries "however occurring" for purposes of the exclusivity provision of the act, W. Va. Code § 23-2-6. The use of the term compensable simply means that the Legislature has determined that an award of benefits in a case where there is no physical aspect is not warranted, a result consistent with *Jones* when it recognized that the Legislature had the power to revoke rights of action under the workers' compensation act. 113 W. Va. at 425, 168 S.E. at 487. See, e.g., Cathy M. Jackson & Shane Crase, *A Survey of Kentucky*

Workers' Compensation Law, 30 N. Ky. L. Rev. 31, 61 (2003) (“Exclusivity should not turn on the type, amount or duration of benefits in effect at the time of the injury but rather whether the injury happened in the course and scope of employment.”); Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 Tenn. L. Rev. 405, 460 (1988) (“The coverage formula test for the purpose of the exclusivity principle should focus on whether the cause of the injury was work related (i.e., arose out of and in the course of employment.”).¹

Moreover, even looking beyond the plain language of West Virginia Code § 23-4-1f, the context of the statute clearly demonstrates that infliction of emotion distress in the course of and resulting from the employment is not actionable in either compensation or common law. The Legislature enacted W. Va. Code § 23-4-1f to abrogate the decision of this Court in *Breeden v. Workmen's Compensation Commissioner*, 168 W. Va. 573, 285 S.E.2d 398 (1981), which found mental-mental claims compensable. *Messer v. Huntington Anesthesia Grp.*, No. 31739, slip op. at 15, n.6 (W. Va. July 7, 2005). The Biases attempt to circumvent W. Va. Code § 23-4-1f by arguing that in making mental-mental claims non-compensable the Legislature intended to subject employers to common law negligent infliction cases. Such a reading “would fly in the face of clearly expressed legislative intent, as well as common sense.” *Mt. State Bit Service, Inc. v.*

¹Requiring a physical injury (either causative or resulting) in order to trigger compensability is very similar to requiring a certain threshold of impairment before a claim is compensable, i.e., W. Va. Code § 23-4-1f simply provides that the threshold for benefits is a physical impact or result. See King, *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 Tenn. L. Rev. at 460 (“Indeed, denials of coverage for work-related mental injuries could more frequently be explained not by the coverage formula idea, but on grounds that such harms did not produce a compensable result under the particular workers' compensation statute and circumstances in question.”).

State, Dept. of Tax and Rev., No. 31735 (W. Va. Feb. 10, 2005)(Starcher, J., concurring) (concurring opinion filed July 14, 2005). In this regard, the Massachusetts experience is extremely helpful because Massachusetts faced a situation uncannily similar situation to the one at bar and the reasoning of its judiciary (as well as the federal judiciary interpreting state law) is compelling.

In *Kelby's Case*, 477 N.E.2d 582 (Mass. 1985), the Supreme Judicial Court permitted an employee to recover for emotional distress associated with a threatened layoff and transfer. In response, the Massachusetts General Assembly provided in Mass. Gen. L. Ann. ch. 152, § 1(7A)) that an injury under the workers compensation act did not include “mental or emotional disability arising principally out of a bona fide personnel action including a transfer, promotion, demotion, or termination except such action which is the intentional infliction of emotional harm.” “The intent of the amendment was to reverse the result in *Kelby's Case*, 394 Mass. 684, 477 N.E.2d 582 (1985)[.]” *Green v. Wyman-Gordon*, 664 N.E.2d 808, 814 (Mass. 1996). See also *Clarke v. Kentucky Fried Chicken*, 57 F.3d 21, 28 (1st Cir. 1995) (“The ensuing uproar from the Massachusetts business community over the implications of *Kelby's Case* prompted the Legislature to amend the ‘personal injury’ definition in chapter 152[.]”).

Several plaintiffs then attempted, as the Biases do here, to circumvent the broad preemption provision in the workers’ compensation act, asserting that because negligent infliction of emotional distress was rendered non-compensable, they were entitled to maintain common law negligent infliction cases. See *Clarke*, *supra* at 28; *Green*, *supra* at 813 (1996). The courts involved, both state and federal, were in unanimous agreement that they could not. See

also King, *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 Tenn. L. Rev. at 460 (noting that such reasoning “probably represents too rigid an application of the coverage formula idea in the context of mental injuries.”).

The federal court followed dicta in *Catalano v. First Essex Savings Bank*, 639 N.E.2d 1113 (Mass. Ct. App. 1994), agreeing that “it would strain credulity and common sense to presume that the Legislature chose to limit employers’ collective liability under the workers’ compensation scheme, only to expose individual employers to greater liability in common law negligence suits[.]” *Clarke, supra* at 29. The Massachusetts Supreme Judicial Court then elevated this exact conclusion to binding precedent in *Green*.

In *Green*, an employee sued in common law claiming that “the language of the amendment . . . somehow revives common law common law actions resulting in emotional distress[.]” *Id.* at 813. The employee argued that if the employer inflicted negligent distress, “then those injuries are not ‘compensable’ under the workers’ compensation act, the exclusivity provision does not apply, and the plaintiff can bring a common law action for negligent infliction of emotional distress.” *Id.* The Supreme Judicial Court disagreed. *Id.*

Green noted that the intent of the amendment was to reverse the result in *Kelly’s Case*. *Green, supra* at 814. “The Plaintiff purports to turn this intention on its head, presuming that the Legislature, in cutting off an avenue of recovery for employees under the workers’ compensation act, intended to open up a previously closed common law route.” *Id.* The Supreme Judicial Court found, “no reason to attribute such paradoxical intentions to the Legislature[.]” *id.*, and followed both *Clarke* and *Catalano* for the observation that such an attribution would “strain

credulity and common sense[.]” *Green, supra* at 814 (*quoting Clarke, supra* at 29). *See* Syl. pt. 1, *State v. Myers*, 74 W. Va. 488, 82 S.E. 270 (1914) (“In construing statutes the legislative intent is the controlling consideration, and to arrive at such intention it is some times necessary to exclude from the operation of a statute things included within its letter.”)

“[S]tatutes should be interpreted to avoid untenable distinctions and unreasonable results[.]” *Pristavec v. Westfield Ins. Co.*, 184 W. Va. 331, 337, 400 S.E.2d 575, 581 (1990). In other words, “[c]ourts must read statutes with common sense in order to accomplish a reasonable result.” SUTHERLAND ON STATUTORY CONSTRUCTION § 57.3 (6th ed.) (footnote omitted). “It seems a paradox to eliminate nonintentional infliction of emotional harm . . . as a workers’ compensation claim but to allow such a claim through another door as a common law action.” *Mullen v. Ludlow Hosp. Soc.*, 592 N.E.2d 1342, 1345 (Mass. Ct. App. Ct. 1992) (*dicta*). “[I]f Judge Marmaduke Dent (West Virginia Supreme Court 1893-1904) were on this Court today,”² he would agree that “ “[t]he Legislature never intended to enact such an absurd paradox.” *Mosser v. Moore*, 56 W. Va. 478, 494, 49 S.E. 537, 543 (1904) (Dent, J., concurring).

Further, the Court in *Jones* partially based its decision on the difficulty in perceiving “a satisfactory and reasonable basis for exemption of employers from liability for disease caused by their negligence, such disease being non-compensable under the compensation statute.” 113 W. Va. at 425, 168 S.E. at 487. Here, however, “a satisfactory and reasonable basis for

²*State v. Arbaugh*, 215 W. Va. 132, 150, 595 S.E.2d 289, 307 (2004) (*per curiam*) (Starcher, J., concurring).

exemption of employers from liability” for the negligent infliction of emotional distress is easily found in the nature of mental-mental injuries.

Because the etiology of emotional disturbance is usually not as readily apparent as that of a broken bone following an automobile accident, courts have been concerned ... that recognition of a cause of action for [emotional] injury when not related to any physical trauma may inundate judicial resources with a flood of relatively trivial claims, many of which may be imagined or falsified, and that liability may be imposed for highly remote consequences of a negligent act.”

Consolidated Rail Corp. v. Gottshall, 512 U.S. 532, 545 (1994)(quoting *Maloney v. Conroy*, 545 A.2d 1059, 1061 (1988)). Donald T. DeCarlo & Martin Minkowitz, *Workers' Compensation and Employers' Liability Law: National Developments and Trends*, 25 Tort & Ins. L. J. 521, 527 (1990)(“most state courts have given some recognition to fears that mental-mental claims, with no physical corroboration for either the stress or the disability, create an opportunity for dubious claims.”). “The incidence and severity of emotional injuries are also more difficult to predict than those of typical physical injuries because they depend on psychological factors that ordinarily are not apparent to potential tortfeasors.” *Gottshall*, *supra* at 546.

Moreover, the common law narrowly circumscribed the tort of negligent infliction of emotional distress based upon “the recognized possibility of genuine claims from the essentially infinite number of persons, in an infinite variety of situations, who might suffer real emotional harm as a result of a single instance of negligent conduct.” *Id.* at 551 (emphasis deleted). Hence, “courts have realized that recognition of a cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for

defendants.” *Id.* Importantly, even an ultimately victorious employer must bare the expense, burden, and vexation of defending such suits.

Over ninety years ago, “[i]t [wa]s common knowledge that litigation is expensive to the parties and to the public[.]” *Blodgett v. Park*, 84 A. 42, 43 (N.H. 1912). And, of course, the more things change, the more they stay the same. “Modern litigation is expensive[.]” *Haralambopoulos v. Reuter*, 1992 WL 37467, *1 (N.D. Ill. 1992), “for the innocent as well as the wrongdoer[.]” *Reno v. Baird*, 957 P.2d 1333, 1347 (Cal.1998), and “the taxpayers as well.” *Reid v. Harbison Dev. Corp.*, 345 S.E.2d 492, 494 (S.C. 1986) (Littlejohn, J., concurring in part and dissenting in part), majority opinion overruled by *O’Neal v. Bowles*, 431 S.E.2d 555 (S.C. 1993). While the Biases assert that “causes of action like the one at bar will arise on only a few occasions[.]” Appellees’ Brief at 12, the experience of other jurisdictions refute such a prediction. As one commentator noted, “[s]uch liability could conceivably be based on the most simple and unqualified form of vicarious liability, covering isolated tortious acts by employees that did not represent considered expressions of company policy or authority.” King, *The Exclusiveness of an Employee’s Workers’ Compensation Remedy Against His Employer*, 55 Tenn. L. Rev. at 459.

Indeed, any number of cases have been brought asserting emotional distress from workplace conduct potentially attributable to the employer: arguments or confrontations with co-workers; arguments or confrontations with employers or supervisors; delayed rescue from an industrial accident, actual or possible disclosure of personal information; mistreatment by school administrators; explosions in the workplace; exposure to chemicals or toxic materials; objects falling in the workplace; fear of work related diseases or infirmity; fear of losing pension

benefits; fire occurring in the workplace; fear of almost being involved in a workplace accident; becoming lost in a mine; horseplay by the employees supervisor; vermin in the workplace; slip and fall accidents. *See generally* Emanuel S. Tipon, *Right to Workers' Compensation for Emotional Distress or like Injury Suffered by Claimant as Result of Sudden Stimuli Involving Nonpersonnel Action—Compensability under Particular Circumstances*, 84 A.L.R.5th 249 § 2[a]. While employers may ultimately prevail in such suits, they will still have to absorb the expense, burden, and aggravation in defending such cases, perhaps a significant number with a significant number of plaintiffs.

B. PRECLUDING COMMON LAW LIABILITY ON EMPLOYERS IN LIGHT OF W. VA. CODE § 23-4-1F ADVANCES LEGISLATIVE INTENT AND DOES NOT IMPINGE UPON THE QUID PRO QUO NATURE OF THE WORKERS COMPENSATION ACT.

The workers' compensation system is a trade-off, but there is no constitutional, statutory, regulatory, or decisional basis for concluding that every limitation on the availability of workers' compensation must be counterbalanced by a corresponding benefit. The common law scheme for providing a remedy for workplace injuries has been replaced by a statutory scheme. There is nothing in our jurisprudence to support the premise that every common law cause of action, element of damages, or defense must find a counterpart in the workers' compensation system. Indeed, there is no cause of action for loss of consortium under the workers' compensation system. Yet, the spouse of an injured worker whose claim is barred by the exclusivity provisions of the Workers' Compensation Act is also barred from asserting the derivative claim for loss of consortium. The common law tort system recognizes the availability of punitive damages. Yet, the workers' compensation system provides no punitive damages. The common law tort system

provides damages for loss of enjoyment of life, but not the workers' compensation system. The common law tort system allows a defendant to assert comparative contributory negligence, failure to mitigate, and a number of other defenses that are not available under the workers' compensation system.

The common law system for providing a remedy to workers injured during the course and scope of their employment has been supplanted by a statutory system. The Legislature is free to choose what claims, damages, and defenses are available under its statutory compensation system and is not required to provide for every common law claim, damage, or defense. The relevant "quid pro quos" are employer immunity, the fellow servant rule, the unavailability of the defenses of comparative contributory negligence, comparative assumption of risk, and other common law defenses, not a workers' compensation system that provides all of the elements of the common law system for injured workers.

"Employers are shielded from common law liability by the Workers' Compensation Act. The quid pro quo for the employees is the guarantee that they will be afforded due process, and proper restitution for injuries they receive in their line of work." *Javins v. Workers' Comp. Comm'r*, 173 W. Va. 747, 758, 320 S.E.2d 119, 131 (1984). "The delicately balanced quid pro quo imposing no-fault liability in exchange for immunity from tort claims and limits on the amount of workers' compensation liability becomes illusory without a viable exclusive remedy rule." King, *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 Tenn. L. Rev. at 411-12. "The exclusivity provision is the bedrock of the workers' compensation system." *Solis v. Lamb*, 534 S.E.2d 582, 584 (Ga. Ct. App. 2000). Allowing the Biases to pursue

their cause of action for negligent infliction of emotional distress “would seem to defeat the exclusive remedy principle central to the workers’ compensation purpose.” Thomas R. Head, III, Comment, *Crochiere v. Board of Education of Enfield: Workers’ Compensation for Job-Related Mental Disease Claims – Stress Reliever or Judicial Headache?* 21 Am. J. Trial Advoc. 131, 131 (1997).

Indeed, nothing in the quid pro quo nature of workers’ compensation is affected by W. Va. Code § 23-4-1f.

In exchange for the right to recover scheduled compensation without proof of negligence on the part of the employer in those cases in which a right of recovery is granted, the employee forgoes other rights and remedies which he might otherwise have had, but if he accepts the terms of the Act he as well as the employer is limited to those things for which the [A]ct makes provision.

Lewis v. Northside Hospital, Inc., 599 S.E.2d 267, 269 (Ga. Ct. App. 2004) (citation omitted). “Courts, then, have interpreted the quid pro quo very broadly: workers have given up all claims, even those for which no remedy is available through workers’ compensation, in exchange for speedy and certain compensation for loss of earning ability.” Deborah A. Ballam, *The Workers’ Compensation Exclusivity Doctrine: A Threat to Workers’ Rights under State Employment Discrimination Statutes*, 27 Am. Bus. L. J. 95, 109 (1989). In short, “[t]he inability of workers to obtain compensation for certain types of injuries is simply part of the quid pro quo for their guarantee of quick compensation for other injuries.” *Id.*

This Court has itself held that “[t]he failure of the workers’ compensation system to provide compensation for ‘elements of damages, such as pain and suffering, total lost wages, and mental anguish’ [does not mean] that a claim was not ‘covered’ by workers’ compensation[.]” *Brooks v. City of Weirton*, 202 W. Va. 246, 252, 503 S.E.2d 814, 820 (1998) (quoting *O’Dell v. Town*

of *Ganley Bridge*, 188 W. Va. 596, 425 S.E.2d 551 (1992)). Again, nothing requires the workers' compensation system to be a mirror-image of the common law tort system.

The California Supreme Court has explained, employing reasoning similar to that in *Brooks*, that "the workers' compensation plan imposes reciprocal concessions upon employer and employee alike, withdrawing from each certain rights and defenses available at common law; the employer assumes liability without fault, receiving relief from some elements of damage available at common law; the employee gains relatively unconditional protection for impairment of his earning capacity, surrendering his common law right to elements of damage unrelated to earning capacity[.]" *Livitsanos v. Superior Court*, 828 P.2d 1195, 1202 (Cal. 1992)(citation omitted). "[T]he work-connected injury engenders a single remedy against the employer, exclusively cognizable by the compensation agency and not divisible into separate elements of damage available from separate tribunals[.]" *Id.* (citation omitted).

Indeed, as *Jones* made clear, the Legislature can remove common law causes of action from the tort system without a corresponding workers' compensation right if, "the statutory language is clear and concise and not subject to any other reasonable construction." *Jones, supra* at 425, 168 S.E. at 487. In fact, "[c]ourts have consistently rejected the argument that the failure of the workers' compensation scheme to pay benefits for a specific injury opens the door to common law recovery." Deborah A. Ballam, *The Workers' Compensation Exclusivity Doctrine: A Threat to Workers' Rights under State Employment Discrimination Statutes*, 27 Am. Bus. L. J. 95, 108-09 (1989).

Thus, in order to prevail, the Appellees must show that in enacting W. Va. Code § 23-4-

If the Legislature intended to disallow workers compensation benefits and as an “offsetting form of relief, to save their common law tort remedies from preemption under [West Virginia Code § 23-2-6].” *Clarke*, 57 F.3d at 28. As shown above, there is no way to reasonably read W. Va. Code § 23-4-1f to obtain such a result.

C. THE LEGISLATIVE INTENT IN W. VA. CODE § 23-4-1f IS CLEAR – MENTAL-MENTAL CLAIMS ARE NOT ACTIONABLE IN WEST VIRGINIA.

As shown above, the Appellees’ argument that precluding a cause of action for the negligent infliction of emotional distress would violate the rules of statutory construction is simply indefensible. The Appellees also argue that there is no right without a remedy. Appellees’ Brief at 15. The premise of this argument is that there is a right to recover. Here, as shown repeatedly, the Legislature has abrogated any right of action (in the compensation system and the tort system) relating to mental-mental claims.

“It is beyond dispute that 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) (per curiam). When the Legislature acted in W. Va. Code § 23-4-1f to abolish causes of action for negligent infliction of emotional distress (in both the worker’s compensation system and the common law tort system) resulting from, and in the course of, their covered employment, it acted “permissibly within its legislative powers that entitle it to create and repeal causes of action.” *Robinson v. Charleston Area Med. Ctr., Inc.*, 186 W. Va. 720, 731, 414 S.E.2d 877, 888 (1991) (citation omitted). Because “[t]he right to workers’ compensation benefits is wholly a creature of statute[,]” *Boyd v. Merritt*, 177 W. Va. 472, 474, 354 S.E.2d 106, 108 (1986), the

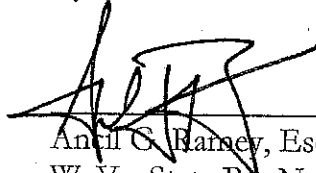
Appellees cannot prevail as “[a]lleged rights and remedies, not provided by the workmen’s compensation statutes, can not be recognized or granted by the courts.” *Ferguson v. State Workmen’s Comp. Comm’r*, 152 W. Va. 366, 371, 163 S.E.2d 465, 468 (1968), *overruled on other grounds by Martin v. Workers’ Comp. Div.*, 210 W. Va. 270, 557 S.E.2d 324 (2001). *See Makarenko v. Scott*, 132 W. Va. 430, 450, 55 S.E.2d 88, 89 (1949), *overruled on other grounds by Jones v. Laird, Inc.*, 156 W. Va. 479, 195 S.E.2d 821 (1973) and *Thornton v. Charleston Area Med. Ctr.*, 158 W. Va. 504, 213 S.E.2d 102 (1975) (“The power to classify disabilities and specify rates of compensation and to limit them to schedules is legislative, not judicial.”).

III. CONCLUSION

The Appellees assert that in enacting W. Va. Code § 23-4-1f the Legislature intend to protect employers from “mental-mental” claims by rendering such claims non-compensable only to subject employers to greater liability in response to a potential flood of both feigned and genuine claims of infliction of emotional distress. The Legislative intent of W. Va. Code § 23-4-1f is plain, both in its term and context-mental-mental claims are not actionable in this State. “As can readily be seen, [the Appellees’] paradoxical interpretation would make very little sense.” *Sierra Club v. Secretary of Army*, 820 F.2d 513, 523 (1st Cir. 1987) (citation omitted). Thus, “[s]ince [this Court] honors the rule that a statute should be construed so as to avoid unjust or absurd results, [it should] correspondingly discount the appellants’ reading of the law.” *Id.* The ruling of the circuit court should be reversed and the certified question answered in the affirmative.

**EASTERN ASSOCIATED COAL
CORPORATION**

By Counsel

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Ancil G. Ranney, Esq.
W. Va. State Bar No. 3013
H. Toney Stroud, Esq.
W. Va. State Bar No. 7800
Scott E. Johnson, Esq.
W. Va. State Bar No. 6335
Steptoe & Johnson PLLC
Post Office Box. 1588
Charleston, West Virginia 25326-1588
Telephone: (304) 353-8112

CERTIFICATE OF SERVICE

I, Ancil G. Ramey, Esq., do hereby certify that on September 14, 2005, I served the foregoing "REPLY BRIEF" upon all counsel of record by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

Norman W. White, Esq.
Brian Ooten, Esq.
Shaffer & Shaffer
Post Office Box 38
Madison, WV 25130-0038

A handwritten signature in black ink, appearing to read "A.G. Ramey", is written over a horizontal line. The signature is stylized and somewhat cursive.