In The

Supreme Court of Virginia

RECORD NO. 091762

MATTHEW EDWARD SIMMS,

***Appellant*,**

v.

RUBY TUESDAY, INC., *et al*.,

Appellees.

BRIEF *AMICUS CURIAE* OF THE VIRGINIA TRIAL LAWYERS ASSOCIATION

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The Virginia Trial Lawyers Association ("VTLA") respectfully submits this Brief *Amicus Curiae* in support of the appeal of Matthew Edward Simms with regard to Assignment of Error "A" granted by this Court.

NATURE OF THE CASE AND MATERIAL PROCEEDINGS

In the interest of convenience and brevity, VTLA incorporates Appellant's Statement of the Nature Of The Case and Material Proceedings from its Opening Brief.

ASSIGNMENT OF ERROR

The VTLA supports the position of the Appellant, Mathew Edward Simms ("Simms," "Appellant" or "Claimant") with respect to Assignment of Error A as set forth in his Petition for Appeal, which read:

A. The Court of Appeals erred in applying the "assault" analysis of *Hilton v. Martin*, a case where horseplay was never even mentioned, to this case involving an innocent victim of horseplay. In so doing, the Court of Appeals eviscerated mainstream law which evolved over ninety years in Virginia, which has been applied by this Court and to which the legislature has acquiesced.

QUESTIONS PRESENTED

On behalf of VTLA, this Brief addresses Question Presented A, as stated by Appellant, which read:

A. Did this Court's decision in *Hilton v. Martin* implicitly overrule established precedent and bar workers' compensation claims by the innocent victims of horseplay? (Assignment A)

STATEMENT OF FACTS

The Appellant's Statement of Facts is accurate, and is incorporated herein by reference.

ARGUMENT

I. Preliminary Statement.

The Court of Appeals of Virginia incorrectly applied this Court's holding in *Hilton v. Martin*, 275 Va. 176, 654 S.E. 2d 572, (2008), to overrule longstanding common law recognizing the compensability of injuries suffered by innocent victims of horseplay under the Virginia Workers' Compensation Act ("the Act"). *See* Virginia Code Section 65.2-100 *et seq*. Because *Hilton* did not specifically overrule the "horseplay doctrine," and the analysis therein was applicable to cases involving assault, the Court of Appeals and the full commission expanded the application of *Hilton* beyond the limits intended by this Court. Even if this Court determines the assault analysis in *Hilton* applies to injuries resulting from horseplay, the Court of Appeals incorrectly determined that such accidents do not arise out of an injured employee's employment.

II. The Court of Appeals Incorrectly Expanded the Reach of this Court's Decision in *Hilton v. Martin* to Terminate the Horseplay Doctrine.

A. The horseplay doctrine has been recognized in workers' compensation for at least ninety years.

Since at least 1920, Virginia law has held injuries sustained by an innocent victim of workplace horseplay arises out of the employment and thereby are compensable under the Workers' Compensation Act. *See e.g. Allen v. Sloane & Co*., 2 O.I.C. 240 (1920). Until this case, the Workers' Compensation Commission interpreted the horseplay doctrine to mean, "when an employee is an innocent non-participating victim of a co-worker's playful or joking actions, any resulting injuries are compensable" and thus arise out of the claimant's employment. *Hauser v. Deep Meadow Correction Center*, 60 O.I.C. 196 (1984).

This long history of the horseplay doctrine in Virginia was addressed by the Court of Appeals of Virginia in *Dublin Garment Co. v. Jones*, 2 Va. App. 165, 342 S.E.2d 638

(1986). In *Dublin*, the Court explained why horseplay cases have been deemed to arise out of the employment:

> [w]here individuals are gathered together at work, they are given to practical joking or playful acts, which at times result in injury. **Such injuries are said to be an anticipated risk of the employment and are compensable in almost every jurisdiction**, particularly where the injured employee is not a participant. [citation omitted]. Where co-workers mutually participate in such conduct, the resulting injury is not an "injured by accident" as contemplated by Code § [65.2-101]. Where, however, the injury arises from the unilateral act of a co-worker upon a nonparticipating claimant, it is an "injury by accident" insofar as that claimant is concerned. **Such result is consistent with assaults on employees which are compensable where the attack was directed against the claimant as an employee or because of the employment**. [citations omitted].

Id. at 168, 242 S.E.2d at 639.(emphasis added).

Applying the horseplay doctrine, the Court of Appeals in *Dublin* recited the horseplay occurred after an instigator had become tired from working overtime, that the instigator and the claimant had no association other than the work site,

that the claimant was the unsuspecting victim of the horseplay, and that there was no evidence of any ill will as is found in the typical assault case. *Id.* From this evidence, the Court found the claimant's injuries were casually connected to the employment and that they arose out the employment. *Id*. In *Dublin* and long before that case, the law in Virginia has been that an accident suffered by the innocent or nonparticipating victim of horseplay arises out of the employment and is compensable. *See e.g.*, *Lighty-Greene v. City of Richmond School Bd.*, V.W.C. File No. 215-38-10 (August 3, 2006).

Although recognized and upheld by decisions of the Commission for ninety years and the Court of Appeals since its inception, this Court has not directly applied the horseplay doctrine. However, this Court has by implication recognized the concept that provides the foundation for the horseplay doctrine. Seventy-nine years ago in *Fox v. Bach*, 156 Va. 609, 618, 158 S.E. 860, 864 (1931), this Court considered the case of a sandwich shop employee who died

as a result of a ruptured spleen after being playfully slapped on the back by a customer. This Court affirmed the award of compensation. Without specifically invoking the horseplay doctrine, the injury resulting from a playful slap was found to have arisen out of the claimant's employment. *Id.* at 611, 158 S.E. at 861. The Workers' Compensation Commission subsequently cited *Fox* with approval in a published case, *Sandridge v. Universal Molded Products*, 28 O.I.C 61 (1946). The Commission relied upon *Fox* in concluding a horseplay accident arose out of the employment where a claimant was injured when a co-worker picked her up and threw her over her shoulder. *Id*.

B. *Hilton v. Martin* neither explicitly nor implicitly overruled the horseplay doctrine.

In *Hilton* this Court held a civil action for wrongful death filed by the estate of an employee killed as a result of an assault committed against her by a co-worker was not barred by the exclusivity provisions of the Workers' Compensation Act because the assault was not directed at her as an employee and the conditions under which the

employer required the work to be performed were not a contributing cause of the injury. *Hilton v. Martin* 275 Va. 176, 181, 654 S.E.2d 572, 575 (2008).

In *Hilton*, this court never addressed the horseplay doctrine or cited any cases discussing horseplay. Rather, in the first sentence of its opinion, this Court described *Hilton* as having arisen "**from an assault** on the victim by a fellow employee." *Id.* at 178, 654 S.E.2d at 573. (emphasis added). In its "Analysis," this Court noted a history of having, "considered a number of cases involving **assaults** upon other employees." *Id.* at 180, 654 S.E.2d at 574.(emphasis added). The inquiry in *Hilton* was thus limited to the situation of an employee injured by an assault. *Id.* All six cases cited by this Court in footnote 2 involved instances where an employee was injured by an assault. *Id.* at 181, fn.2, 654 S.E.2d at 574.

The Court of Appeal's recognition of the horseplay in *Dublin* and the cases decided by the Commission dating back to 1920 reflected an accurate interpretation of the

Workers' Compensation Act. In the 90 years since the horseplay doctrine was first announced, the General Assembly never amended Va. Code § 65.2-101 or its precursors to remove horseplay from the definition of an injury arising out of the employment. From this, it must be presumed that the legislature accepted this interpretation. *Dublin*, 2 Va. App. at 167, 342 S.E.2d at 639.

The elementary rule of statutory interpretation is that the construction accorded a statute by public officials charged with its administration and enforcement is entitled to be given great weight by the court. The legislature is presumed to be cognizant of such construction. When it has long continued without change, the legislature will be presumed to have acquiesced therein. *Id.* (citations omitted). In this case, the Court of Appeals erred by applying the *Hilton* analysis to horseplay cases generally and holding that *Hilton* overruled *Dublin* and ninety years of preceding law.

The Court of Appeals in this case did not hold expressly that *Dublin* was overruled by this Court's decision in *Hilton*. Yet, this implication is inescapable from the court's statement that, "upon our review of *Hilton,* we believe the continued viability of the horse play doctrine as set forth in Dublin is called into serious question," combined with the refusal to follow the established precedent holding that an accident arising out unilateral horseplay does not arise out of the employment. *Simms*, 54 Va. App. at 394, 679 S.E.2d at 558.

For established precedent to be overruled, "it must be expressly overruled by the Supreme Court or by the General Assembly." *Bostic v. Commonwealth* 31 Va. App. 632, 636, 525 S.E.2d 67, 68 (2000) In *Bostic*, the Court of Appeals declined to hold that a Supreme Court decision had been, "implicitly overruled," through the repealing and revising of code sections upon which that decision had been based. *Id*. A decision by a panel of the Court of Appeals of Virginia is binding under the doctrine of s*tare decisis* upon subsequent

panels of the court. *Commonwealth v. Burns*, 240 Va. 171, 395 S.E.2d 456 (1990).

The panel of the Court of Appeals that heard this appeal was bound by the doctrine of *stare decisis.* It was required to abide by the holding in *Dublin* unless specifically overruled by either the Supreme Court or the legislature. The legislature has not specifically overruled *Dublin*. The remaining question is whether *Hilton* specifically overruled *Dublin* as implied by the Court of Appeals. Because Hilton was limited to a specific assault situation, *Dublin* and its predecessors were not overruled.

By limiting its decision in *Hilton* to cases involving assault, and by avoiding any reference or discussion of the horseplay doctrine, this Court recognized a distinction between them. The distinction by assault horseplay is found in the actual risk doctrine. An assault personal to the employee and not directed against him as an employee or because of his employment does not arise out of the employment. *Hilton*, 275 Va. at 180, fn. 2, 654 S.E.2d at

574. An injury to the innocent victim of horseplay does arise out of the employment because, "the work place creates a situation where workers, being what they are – fallible and sometimes playful human beings – will from time to time in engage in pranks, some of which are dangerous." *Park Oil v. Parham*, 1 Va. App. 166, 170-171, 336 S.E.2d 531, 534. As the Court of Appeals noted in *Park Oil*, "almost every jurisdiction now compensates an employee injured as a result of horseplay that results in injury . . . where the injured employee is not a participant in the horseplay . . . ." *Id*. (citing 1 A Larson, Workmen's Compensation Law § 23.10 (1985). *See also Dublin*, 2 Va. App. at 168, 342 S.E.2d at 639 (injuries sustained by an innocent victim of horseplay "are compensable in almost every jurisdiction").

Until this court clarifies the scope of *Hilton,* the Court of Appeals and the Workers' Compensation Commission will deny claims filed by non-participating victims of horseplay. *E.g. Brown v. Koons Ford Body Shop*, V.W.C. File No. 238-14-03 (June 3, 2009). The dissent in *Koons* reasoned this

Court had limited its opinion to instances where an assault did not arise out of the employment if it was personal in nature while not addressing, "the longstanding history of horseplay which we [the Commission] have found is not personal in that it is a part of some business environments." *Brown v. Koons Ford Body Shop*, V.W.C. File No. 238-14-03 (June 3, 2009)(Diamond, dissenting). Common sense dictates it was not this Court's intention to deny workers' compensation benefits in situations where there is horseplay. Rather, this Court made a distinction between an assault which is personal and horseplay which is not. This is consistent with *Dublin.*

C. The Court of Appeals and the Workers Compensation Commission Misinterpreted and Incorrectly Applied *Hilton* to All Horseplay Cases.

Following the hearing in this case, a Deputy Commissioner of the Commission issued an October 22, 2007 opinion which preceded *Hilton*. This found Simms' claim to be compensable based on the horseplay doctrine set forth in *Dublin*, *supra*. App. 294-95. Both Simms and

the defendants sought review of the deputy commissioner's decision. App. 355. Prior to a review opinion from the Commission, this Court isued *Hilton* on January 11, 2008. Thereafter, the Commission reversed the Deputy Commissioner's determination that the case was compensable. The Commission expanded the holding of *Hilton* to effectively reverse the horseplay doctrine and the compensability of accidents where an innocent victim of horseplay suffers an injury in the course of employment. App. 358. Specifically, the Commission noted while at the time of the deputy's opinion *Dublin* "**was** the applicable case law," the subsequent *Hilton* decision "**materially changed . . . the 'innocent victim of horseplay' law**" *Id*.(emphasis added).

The Court of Appeals affirmed the Commission's decision, "because there was no causal connection between the injury and the conditions under which employer required the work to be done." *Simms*, 54 Va. App. at 392, 679 S.E.2d at 557. The Court of Appeals' analysis left little

doubt about the perceived effect of *Hilton* had on the horseplay doctrine:

> **Upon our review of *Hilton,* we believe the continued viability of the horseplay doctrine as set forth in *Dublin* is called into serious question.**

Id. at 394, 679 S.E.2d at 558.(emphasis added).

To conclude Simms' injury did not arise out of his employment, the Court of Appeals conflated the holding in *Hilton* related to assaults with the case law applicable to the horseplay doctrine. The Court of Appeals mis-characterized the cause of the claimant's death in *Hilton* as a "playful act" and, "[n]otwithstanding the fact that ***Hilton* involved an innocent victim of horseplay** the Supreme Court concluded that such an injury did not arise out of employment." *Id.* (emphasis added). In rejecting Simms' argument that the holding in *Hilton* was limited to assault cases, the Court of Appeals stated, "**there was no adjudication that the employees' acts [in *Hilton*] that caused the injury constituted an assault as a matter of**

law;" rather, according to its interpretation, this Court only "**generally characterized** the acts causing the injury in *Hilton* as an 'assault.'" *Id.* at 394-95, 679 S.E.2d at 559.(emphasis added).

The Court of Appeals mischaracterized this Court's holding in *Hilton.* In *Hilton* this Court did not state either that the decedent was the victim of horseplay or that the act that resulted in her death constituted mere horseplay. In fact, the term horseplay cannot be found anywhere in this Court's opinion in *Hilton*. Instead, the Court cited as, "undisputed" facts that the instigator/tortfeasor had a tendency to "harass" female co-workers; threatened the decedent by telling her, "I'm going to get you" shortly before causing her death; and, after having been physically repelled and ordered to stop following an initial attempt to shock her with the defibrillator, pretended to put the paddles away before "suddenly" advancing on her, striking her in the breast and shoulder with the energized paddles, and then

shocking her to such a degree as to result in death. *Hilton*, 275 Va. 178-79, 654 S.E.2d at 574.

There is no support in *Hilton* for the Court of Appeals' conclusion that this Court only, "generally characterized" the instigator's actions as an assault or that there was no adjudication finding that his actions constituted an assault "as a matter of law." The Court of Appeals failed to explain what type of adjudication would be necessary to find an assault versus horseplay. Very few of the published opinions addressing workplace horseplay focus on or determine whether an assault has occurred. In *Hilton*, published accounts indicated the instigator was convicted of involuntary manslaughter. The Court of Appeals' mischaracterized the evidence in *Hilton*. According to the "Facts and Proceedings" in *Hilton*, the decedent's estate characterized the actions of the tortfeasor in the original complaint as an "assault and battery." *Id*. at 179, 654 S.E.2d at 574.

At the outset of the "Analysis" in the *Hilton* opinion, this Court indicated it was, "presented solely with a question of law concerning the trial court's application of the law **to essentially undisputed facts.**" *Id.* at 180, 654 S.E.2d at 574 (emphasis added). Because this Court characterized the incident in *Hilton* as an assault and the decision was based on, "essentially undisputed facts," there was sufficient evidence of "adjudication" that the tortfeasor's acts constituted an assault. *Id*.

The Court of Appeals overreached in concluding every instance of horseplay represents an assault that, according to *Hilton*, does not arise out of the employment. By their very nature, playful or joking actions would not directed at a claimant because of his status as an employee. Even if this were the case, proving it would be an insurmountable burden. The case law has recognized that not all instances of horseplay constitute an assault.

> However, we do not believe this case is an assault in the most technical sense of the term. **First, to commit an assault, one must either: (1) attempt to**

> **commit a battery; or (2) put another person in reasonable fear of receiving bodily hurt.** *Merritt v. Commonwealth* 164 Va. 653, 658, 180 S.E. 395, 397 (1935). One may commit an assault even though the victim is not aware of any acts directed at him, provided the specific attempt to commit a battery is present (according to the first definition); **it cannot be done by accident or even as a result of negligence.** In this case [the instigator] did not have the specific intent to commit a battery. Also since [the claimant] was not aware of the danger of being hit, he therefore could not have reasonably feared receiving bodily hurt. Thus, there was no assault in the criminal sense, merely an unintentional battery -- a civil wrong.

Park Oil, 1 Va. App. at 170, 336 S.E.2d at 534(emphasis added).

In the present case, there was no factual finding by the Commission that the employees who threw ice at Simms either possessed the intent necessary to have attempted to commit a battery or put Simms in reasonable fear of receiving bodily hurt. Instead, the evidence established Simms' injury resulted from joking and playful actions by individuals he considered his friends. App. 290. The Court

of Appeals lacked a sufficient foundation or evidentiary basis to classify the horseplay that resulted in Simms' injury as "an assault." No reasonable interpretation of the evidence in *Hilton* permitted the Court of Appeals to conclude that the assault perpetrated on the decedent in *Hilton* was marked by the, "practical jokes or playful acts" that define horseplay. *See Dublin*, 2 Va. App. at 168, 342 S.E.2d at 639. From the recitation of evidence in *Hilton*, it is impossible to conclude that the decedent was not in reasonable fear of receiving bodily harm. Common sense dictates a reasonable person would be in fear of bodily harm when threatened with electrocution from charged defibrillator paddles. The facts likewise give rise to the inference that the instigator in *Hilton* possessed the intent necessary for his actions to rise to the level of a battery.

III. Assuming That *Hilton* Does Apply to Horseplay Cases, Simms' Injury Arose out of His Employment.

The Court of Appeals rejected Simms' argument that the evidence demonstrated horseplay was part of the everyday culture of employment at Ruby Tuesdays. At hearing, a witness Robert L. Simms, III ("R. Simms"), testified in his work at two different Ruby Tuesdays locations, horseplay was an everyday occurrence. It included activities such as throwing bottles of chocolate syrup, wrestling, food fights, throwing food, throwing ice, chasing one another, and putting ice down one another's shirts. App. 72, 75-77. Occurrences of horseplay were so common that R. Simms could not name all of the forms of horseplay he witnessed. *Id*.

The Court of Appeals rejected this evidence in favor of evidence suggesting that the supervisors and management staff discouraged such horseplay. *Simms*, 54 Va. App. at 395-96, 679 S.E.2d at 559. According to the Court of Appeals, the full commission "implicitly rejected" this

evidence and instead "accepted employer's evidence." *Id*. However, these two forms of evidence are not contradictory or mutually exclusive. Neither of the employer's two managers at hearing testified that horseplay did not regularly occur at Ruby Tuesdays. *Id*. They did not deny it was an everyday occurrence. They only indicated they did not condone or take a permissive attitude towards horseplay. *Id.*

Managerial discouragement of horseplay does not mean it does not regularly occur or is not part of the "culture" of the employment. Rather, it is the very nature of horseplay as part of the "culture" of a place of employment that elevates it to an actual risk of the employment such that an injury caused by horseplay arises out of the employment. *Dublin, supra*; *Park Oil, supra*.

On the facts of this case, Simms was the unwitting victim of and act of horseplay. This occurred in a work environment where a culture of horseplay persisted. Ineffective discipline by management was a condition of the

workplace which permitted horseplay to continue. This was a condition unique to the employment and Simms' resulting injuries arose out of the employment.

Horseplay is something unique to the workplace, whether encouraged or not. In this case, the evidence established a culture of horseplay which was frequent among workers. This was an actual risk of the employment.

IV. Judicial Elimination of the Horseplay Doctrine Is Contrary to the Purposes of the Workers' Compensation Act.

The purposes of the Workers' Compensation Act are well known to this Court. The Act was crafted in the nature of a great compromise under which both the employer and employee surrendered rights and gained certain advantages. *Fauver v. Bell*, 192 Va. 518, 521-522, 65 S.E.2d 575, 577 (1951). While the employee must forego his right to bring a personal injury claim with the promise of a full award of damages including pain and suffering, he is in exchange theoretically offered the opportunity for a known level of compensation without the risk posed by affirmative defenses

such as contributory negligence, assumption of risk or the fellow servant rule. *Id*.; *Feitig v. Chalkley*, 185 Va. 96, 38 S.E.2d 73 (1946).

The Workers' Compensation Act was created for the beneficent purpose of attaining a humanitarian end for injured employees which had previously been frustrated by certain rules inherent in the common law, including the aforementioned defenses. *See Fauver*, *supra*. The intent of the Act is to require employers to bear the pecuniary loss of all accidental injuries to employees. *Id.* This Court long has recognized Virginia's workers' compensation laws were adopted for the benefit of employees and should be liberally construed in order to attain the desired result of actually benefiting those employees. *Byrd v. Stonega Coke & Coal Co*., 182 Va. 212, 28 S.E.2d 725 (1944). The Workers' Compensation Act itself is highly remedial and should be liberally construed in favor of the injured employee. *Id*. *Also Barker v. Appalachian Power Co*., 209 Va. 162, 163 S.E.2d 311 (1968).

These oft-cited and high minded principles are undermined when compensation for workplace accidents, beyond the control of an individual, are stripped away by judicial interpretation. The compromise intended by the General Assembly becomes unbalanced.

In this case, the Court of Appeals adopted an interpretation which is so strained that it offends the remedial and beneficent purposes of the Workers' Compensation Act. Employees injured by unilateral acts of horseplay have been award workers' compensation benefits for more than ninety years. Without a single change or amendment to the Act by the General Assembly, the Court of Appeals' ruling in this case deprives future employees of the same rights granted to their forbearers since at least 1920. Should this Court affirm the Court of Appeals, an entire class of injured employees will be left without the benefit of the compromise that created the Workers' Compensation Act. To cast the burden of workplace horseplay upon the civil justice system is illogical and

unworkable. This decision consigns employers and poorly funded individual employees to personal injury suits in civil court. Given the availability of affirmative defenses in that venue and the likely lack of liability coverage for the intentional acts of employees, many injured employees will be left without a practical remedy or source of recovery.

Although one of the specific purposes of the Act is to require employers to bear the burden of pecuniary loss associated with workplace injuries, denying compensation to innocent victims of horseplay will shift those costs to society at large. The costs associated with medical treatment and lost wages will not be borne by employers through premiums paid for workers' compensation insurance. Injured employees will be forced to depend upon of public assistance. The costs of public assistance are satisfied by general tax revenues. The decision of the Court of Appeals in this case will shift the costs for workplace horseplay injuries from the employer to society at large. This occurs

at the very moment when the prospects for continued public assistance are bleak.

Elimination of coverage under the Workers' Compensation Act for innocent victims of horseplay is untenable. It is an attack on the compromise upon which the Workers' Compensation Act is based. Denying compensation to the innocent victims of horseplay is contrary to the Workers' Compensation Act's role as remedial legislation. The Act should be construed liberally to affect coverage for all injured employees.

CONCLUSION

For the foregoing reasons, VTLA respectfully urges the Court to reverse the decision of the Court of Appeals holding that the claimant's injury did not arise out of his employment and clarifying that the Court's decision in Hilton was not intended to apply to otherwise compensable cases involving the innocent victims of horseplay.

Respectfully submitted,

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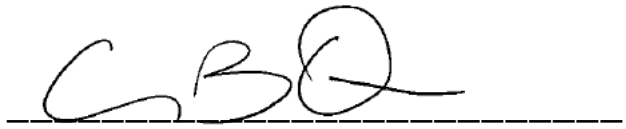
CERTIFICATE OF SERVICE

This is to certify that undersigned counsel has complied with the requirements of Rule 5:26(d), and that on February 23, 2010, fifteen bound copies and one electronic copy on CD of the foregoing Brief *Amicus Curiae* were hand-delivered to the Clerk of the Supreme Court of Virginia and three bound copies of the same were mailed, First Class U.S. Mail, postage prepaid, to counsel for all parties, specifically to Kathryn Lea Harman, Semmes, Bowen and Semmes, 1577 Springhill Road, Suite 200, Vienna, Virginia 22182, counsel for Appellee, Ruby Tuesdays, Inc. and Harford Insurance Company of the Midwest; and to Diane C. H. McNamara, 8713 Plantation Lane, Manassas, Virginia 20110, counsel for Appellant, Matthew Edward Simms.



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