In The

Supreme Court of Virginia

RECORD NO. 091762

MATTHEW EDWARD SIMMS,

Appellant,

v.

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

Appellees.

REPLY BRIEF OF APPELLANT

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CORRECTION TO CITATION IN BRIEF OF APPELLEE AT PAGE 43:

The correct citation is:

Texas Ind. Ins. Co. v. Dunlap,
68 S.W. 2d 664 (Tex. App.- Beaumont 9th Dist. 1934)

V I R G I N I A :

IN THE SUPREME COURT

MATTHEW EDWARD SIMMS,
Appellant,

v. RECORD NO.: 091762

RUBY TUESDAY, INC.,
and
HARTFORD INSURANCE COMPANY OF THE MIDWEST,
Appellees.

REPLY BRIEF OF APPELLANT

COMES NOW, the Appellant, Matthew Edward Simms, by counsel, and respectfully submits this Reply Brief of Appellant pursuant to Rule 5:26 of the Rules of the Supreme Court of Virginia.

I. ARGUMENT

The Employer's Brief fails to offer any legal analysis to support its claim that horseplay no longer "arises out of" employment. The Employer rests on its own simple insistence that horseplay be treated as any other assault. However, horseplay has a special place in remedial compensation law, which tort and criminal law concepts are not equipped to measure. The Brief of Appellees even acknowledges at page 26 that assault and horseplay cases have developed as separate branches of compensation law.

This Reply Brief offers legal analysis showing that for the last hundred years, horseplay has "arisen out of" employment as an "actual risk" of employment insofar as it is a reasonably expected incident of business. Horseplay continues to "arise out of" employment. Nothing in *Hilton v. Martin*, 275 Va. 176, 654 S.E.2d 572 (2008) changed that; nothing ever will.[1]

Virginia Code § 65.2-101 states that "'*Injury*' means only injury by accident arising out of and in the course of the employment…." Whether an injury is sustained in an accident arising out of and in the course of employment is a mixed question of law and fact. *American Furniture Co. v. Graves*, 141 Va. 1, 14, 126 S.E. 213, 216 (1925).

The terms "arising out of and in the course of" should be liberally construed to carry out the humane and beneficent purposes of the Workers' Compensation Act. *Norfolk & Washington Steamboat Co. v. Holladay*, 174 Va. 152, 157, 5 S.E.2d 486, 488 (1939); *Bradshaw v. Aronovitch*, 170 Va. 329, 336, 196 S.E. 684, 686 (1938); *Cohen v. Cohen's Department Store*, 171 Va. 106, 109, 110, 198 S.E. 476, 477 (1938); 99 C.J.S. *Workers' Compensation* § 366, § 368 (2000). Liberal construction does not authorize amendment, alteration or extension of the Act's

[1]There is no Reply with respect to Assignment of Error B, which was adequately addressed at pages 29-34 of the Brief of Appellant.

provisions, *Humphries v. Newport News Shipbuilding & Dry Dock Co.*, 183 Va. 466, 479, 32 S.E.2d 689, 695 (1945), but it is the duty of the Court interpret the Act to assure that its highly remedial purpose is fulfilled. *E.I. DuPont de Nemours & Co. v. Eggleston*, 264 Va. 13, 563 S.E.2d 685 (2002); *Barker v. Appalachian Power Co.*, 209 Va. 162, 163 S.E.2d 311 (1968).

"Arising out of" and "in the course of" are used conjunctively, and are not synonymous. Both conditions must be present to award compensation. *Conner v. Bragg*, 123 S.E.2d 393, 396, 203 Va. 204, 208 (1962); *Southern Motor Lines v. Alvis*, 200 Va. 168, 170, 104 S.E.2d 735, 737 (1958); *Dreyfus & Co. v. Meade*, 142 Va. 567, 569, 129 S.E. 336 (1925); 99 C.J.S. *Workers' Compensation* § 365 (2000).

"Arising out of" refers to the ***origin*** or cause of injury, while "in the course of" refers to the time, place and circumstances of the accident. *Conner v. Bragg*, 203 Va. at 208, 123 S.E.2d at 396; *Southern Motor Lines v. Alvis*, 200 Va. at 170, 104 S.E.2d at 737; *Bradshaw v. Aronovitch*, 170 Va. at 329, 196 S.E. at 686; 99 C.J.S. *Workers' Compensation* § 366, § 368 (2000).

An accident occurs "in the course of" employment when it occurs within the period of employment, at a place where the employee is

reasonably expected to be, reasonably fulfilling the duties of employment or something incidental thereto. *Conner v. Bragg*, 203 Va. at 208, 123 S.E.2d at 396; *Norfolk & Washington Steamboat Co. v. Holladay*, 174 Va. at 157, 158, 5 S.E.2d at 488; *Bradshaw v. Aronovitch*, 170 Va. at 335, 196 S.E. at 686; *Southern Motor Lines v*. *Alvis*, 200 Va. at 170, 104 S.E.2d at 737.

This Court has relied on the definition of "arising out of" set forth in *In re McNicol*, 215 Mass. 497, 102 N.E. 697, L.R.A. 1916A, 306.

> It "arises out of" employment when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises "out of" the employment. But it excludes an injury which cannot be fairly traced to the employment as a contributing proximate cause and which comes from a hazard to which the workmen would have been equally exposed apart from the employment. The causative danger must be peculiar to the work and not common to the neighborhood. It must be ***incidental to the character of the business*** and not independent of the relation of master and servant. It need not have been foreseen or expected, but after the event it must appear to have had its ***origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.***

Conner v. Bragg, 203 Va. at 208-09, 123 S.E.2d at 397, (*emphasis added*), *citing Norfolk & Washington Steamboat Co. v. Holladay*, 174 Va. at 157, 158, 5 S.E.2d at 488; *Cohen v. Cohen's Department Store,* 171 Va. At 109, 111, 198 S.E. at 477, 478; *Bradshaw v. Aronovitch*, 170 Va. at 335, 196

S.E. at 686; *Farmers Mfg. Co. v. Warfel*, 144 Va. 98, 131 S.E. 240 (1926); 99 C.J.S. *Workmen's Compensation* § 209 b., at 680, 681, 683, 684, 685.

Horseplay finds it "origin"[2] in employment when it is "incidental to the character of the business" as contemplated in *McNicol*. 99 C.J.S. § 468 (2000). Contrary to the Brief of Appellees at pages 10-16, the horseplay in Simms did not find its origin in "personal feelings of friendliness;" the origin was in the employment. Anyone in Simms's position would have been targeted by the three idle co-workers next to the ice bin.

Virginia follows the "actual risk" test, which requires only that employment expose the worker to the particular danger that caused injury, notwithstanding exposure of the public generally to like risks. *Olsten v. Leftwich*, 230 Va. 317, 336 S.E.2d 893 (1985); *Lucas v. Lucas*, 212 Va. 561, 186 S.E.2d 63 (1972); *Immer v. Brosnahan*, 207 Va. 720, 725, 152 S.E.2d 254, 257 (1967).

Since horseplay finds its "origin" in employment, it is an "actual risk" of employment within the meaning of the "actual risk" test, contrary to the Brief of Appellees at pages 27-31. It is not a mere "positional risk," as seen upon revisiting *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711 (1920).

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[2] This term is used in *McNicol.* See also page 3 of this Reply Brief concerning the meaning of "arising out of," and citations there.

In *Leonbruno v. Champlain Silk Mills*, Justice Cardozo found that injury resulting from horseplay "arises out of" employment as one of the actual "risks of the employment." In *Leonbruno*, a factory worker was struck in the eye by an apple thrown by a young co-worker in sport at another. It was unquestioned that the accident occurred "in the course of" employment. Justice Cardozo found the accident "arose out of" employment because

> [t]he claimant's presence in a factory in association with other workmen involved exposure to the risk of injury from the careless acts of those about him. He was brought by the conditions of his work "within the zone of special danger" (*Thom v. Sinclair*, 1917 A.C. 127, 142). Whatever men and boys will do, when gathered together in such surroundings, at all events if it is something reasonably to be expected, was one of the perils of his service. We think with KALISCH, J., in *Hulley v. Moosbrugger* (87 N.J. Law, 103), that it was "but natural to expect them to deport themselves as young men and boys, replete with the activities of life and health. For workmen of that age or even maturer years to indulge in a moment's diversion from work to joke with or play a prank upon a fellow workman, is a matter of common knowledge to every one who employs labor." The ***claimant was injured, not merely while he was in a factory, but because he was in a factory, in touch with associations and conditions inseparable from factory life. The risks of such associations and conditions were risks of the employment*** (*Thom v. Sinclair*, *supra; Matter of Redner v. Faber & Son*, 223 N.Y. 379) (*emphasis added*).

Our Court of Appeals reasoned similarly in *Dublin Garment Co. v. Jones*, 2 Va. App. 165, 168, 342 S.E.2d 638, 639 (1986).

> The rationale of these "horseplay" cases is that where 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.*** *Park Oil Co. v. Parham*, 1 Va. App. 166, 170-71, 336 S.E.2d 531, 534 (1985). Where coworkers mutually participate in such conduct the resulting injury is not an "injury by accident" as contemplated by Code § 65.1-7. 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.[3] *R&T Investments v. Johnson*, 228 Va. 249, 253, 321 S.E.2d 287, 289 (1984); *Continental Life Insurance Co. v. Gough*, 161 Va. 755, 760, 172 S.E. 264, 266 (1934) (*emphasis added*).

Similarly, in *Fox v. Bach*, 156 Va. 609, 158 S.E. 860 (1931) a customer's playful acts resulting in death of an employee performing his work arose out of and in the course of employment. The Employer ignores this Court's decision in *Fox v. Bach*, incorrectly stating at page 20 of the Brief of Appellees that "this Court has never issued a decision applying the holdings of *Dublin Garment* or any of the other 'horseplay' cases upon which he relies." The argument at page 22-23 of the Brief of Appellees that *stare decisis* is not implicated since the Court of Appeals is not the court of last resort also fails to acknowledge this Court's decision in *Fox v. Bach*.

[3] See note 6 in this Reply Brief.

In Simms, like *Leonbruno*, it is unquestioned that the injury occurred "in the course of" employment. The employer stipulated "to an accidental injury while the claimant was on the clock." (App. 84, 289) Simms was in the kitchen, where he was reasonably expected to be at the time of the accident (App. 30, 80-81, 97, 99-104), reasonably fulfilling his duties of employment, entering an order into the microcomputer. (App. 86) He was doing what he was supposed to be doing when three idle co-workers pelted him with bits of ice, and he was doing it at the time he was supposed to be doing it. (App. 87)

Ice throwing in the kitchen is horseplay, reasonably anticipated as a risk incidental to the character of the restaurant business. Therefore, these facts are properly analyzed as horseplay rather than assault, leading to the conclusion that the injury arose out of employment.[4]

Framed in Justice Cardozo's words, Simms's "presence in a … [restaurant kitchen] in association with other workmen involved exposure to the risk of injury from the careless acts of those about him. He was brought by the conditions of his work 'within the zone of special danger.' Whatever … [restaurant workers] will do, when gathered together in such

[4] Contrary to the Brief of Appellees at 13-16, it is not necessary to prove that horseplay furthers the employer's business. The issue is whether "the work brings the employee within its peril." *Hartford Accident & Indemnity Co. v. Cardillo*, 72 App.D.C. 52, 112 F.2d 11, 14-15 (1940).

surroundings, at all events if it is something ***reasonably to be expected***, was ***one of the perils of his service***."

It is "reasonably to be expected" that restaurant workers will goof off at work. Injury as a result thereof is "one of the perils of service." At Ruby Tuesday, they frequently indulged in "little wars across the expo center between the servers and the cooks" (App. 68), wrestling (App. 64-67), chasing (App. 76-77), putting ice down one another's shirts (App. 75), throwing bottles of chocolate syrup across the bar (App. 63-64), throwing food and ice, even in the presence of management which typically responded as if it were not "a big deal like especially if its back in the kitchen" (App. 68, 200). Once, girls were grinding on each other in the kitchen for the benefit of onlookers including a manager who stopped to watch, making no attempt to stop it (App. 72). Simms stated "it was fairly common for all of us to do that kind of thing" on a "daily" basis. (App.113-14) When management witnessed horseplay "sometimes they'd stop, shake their heads, and keep going. And if it continued too long, they would just say Stop." (App. 67) Such "associations and conditions [are] inseparable from … [restaurant] life" as contemplated by Justice Cardozo in *Leonbruno*; it is "incidental to the character of the [restaurant] business and

not independent of the relation of master and servant" as contemplated in *McNicol*. As described by Robert Simms

> [i]t's part of the culture there where people that work at a restaurant aren't really serious normally, you know. Part of being at a restaurant is having fun, and it's a culture of fun, having fun, joking around, laughing. And a lot of times you'll go out drinking with people later on. You form like your own culture, your own little club, and goofing off is just part of what you do there. (App. 79)

By contrast, the cases cited by the Employer do not involve horseplay that can be reasonably anticipated as a risk incidental to the character of the business. *City of Richmond v. Braxton*, 230 Va. 161, 335 S.E.2d 259 (1985), (Brief of Appellees at 14-15) involves sexual assault of a theater ticket seller by her boss, where the boss's boss knew he openly kept sexually explicit materials in his office. Sexual assault is not horseplay[5] such as can be reasonably anticipated as a risk incidental to the character

[5] The Brief of Appellees incorrectly states at pages 16-17 that "Simms attempts to create a demarcation between assault cases and 'horseplay' cases that this Court rejected in *Hilton*, *Richmond Newspapers*, *Butler*, and the cases cited therein." All of the cases discussed at pages 10-15 of the Brief of Appellees are sexual assault cases; horseplay was not rejected by the Court in those cases. Sexual assault does not bridge the gap between horseplay and assault. The Court and the parties never considered sexual assault to be horseplay in *Richmond Newspapers, Butler, Reamer, or Braxton*. To do so trivializes the nature of the act. Similarly, in *Hilton*, the Court and the parties never considered Martin's actions as mere horseplay, and in Simms, neither the Deputy Commissioner nor the parties elevated ice-throwing to the level of an assault. (App. 84, 289) Criminal and tort law definitions of assault are insensitive to the significant nuances of remedial compensation law, and are therefore inapplicable to compensation law.

of the theater business. Therefore, the facts were properly analyzed under the assault rubric, leading to the conclusion that the sexual assault was personal in nature, and did not arise out of the employment.

Reamer v. National Service Industries, 237 Va. 466, 377 S.E.2d 627 (1989), (Brief of Appellees at 13-14) involves a furniture store employee who was raped, robbed, (money taken from her purse) and sexually assaulted a second time by a former customer, before he stole cash and checks from the store as an after-thought, upon completion of the other acts. Rape, sexual assault and robbery are not horseplay such as can be reasonably anticipated as a risk incidental to the character of the furniture business. Therefore, the facts were properly analyzed under the assault rubric, leading to the conclusion that rape, sexual assault and robbery were personal in nature, and did not arise out of the employment.

Richmond Newspapers v. Hazelwood, 249 Va. 369, 457 S.E.2d 56 (1995), (Brief of Appellees at 10-12) involved goosing of a newspaper employee by his supervisor whose "finger penetrated Hazelwood's body." *Id.* at 371, 57. Even though goosing was prevalent in the workplace, this sexual assault was not horseplay such as can be reasonably anticipated as a risk incidental to the character of the newspaper business. Therefore, the

facts were properly analyzed as an assault, leading to the conclusion that the sexual assault was personal, and did not arise out of employment.

Butler v. Southern States, 270 Va. 459, 620 S.E.2d 768 (2005), (Brief of Appellees at 12-13) involves sexual assault of a retail agricultural supply employee by a co-worker while out on delivery. Sexual assault is not horseplay that can be reasonably anticipated as a risk incidental to the character of the retail agricultural supply business. Therefore, the facts were properly analyzed as an assault, leading to the conclusion that the sexual assault was personal in nature, and did not arise out of employment, even though the employer knew the perpetrator was a convicted rapist.

Hilton v. Martin, 275 Va. 176, 654 S.E.2d 572 (2008) involves death of an ambulance service employee whose co-worker playfully struck her with charged defibrillator paddles. Misuse of charged defibrillator paddles, a dangerous instrumentality, is not horseplay that is reasonably anticipated as a risk incidental to the character of the ambulance business. Therefore, the facts were properly analyzed under the assault rubric even though the co-worker's actions were playfully motivated, leading to the conclusion that the co-worker's acts were personal, and did not arise out of employment.

In an ***assault analysis***, as opposed to a horseplay analysis, "[i]t is immaterial whether the assailant's motivation is playful, amorous, vindictive, or hostile. An injury from an ***assault*** arises out of the injured person's employment when it is directed at the victim *as an employee.*" *Hilton v. Martin*, 275 Va. at 181, 654 S.E.2d at 574-75, (*bold emphasis added)*. *Hilton* rejects consideration of motivation ***only in the application of the assault analysis***. Motivation continues to be a factor in determining ***whether an assault analysis or horseplay analysis should be applied*** to a particular case.

Hilton v. Martin is extraordinary insofar as it establishes that a playfully motivated act may nevertheless constitute an assault. But it cannot be presumed that all playfully motivated acts should be analyzed under the assault rubric. While assault and horseplay are indistinguishable in criminal and tort law, assault and horseplay have historically been treated separately in the realm compensation law because horseplay is an anticipated risk of employment, arising inseparably from it, whereas

assaults are not an anticipated risk of employment unless directed at the employee as an employee.[6]

II. CONCLUSION

The facts are timeless. Today's restaurant workers throw ice in the kitchen, just as factory workers a century ago threw apples in the factory. Workers in the future will no doubt also engage in horseplay incident to employment. Nothing in *Hilton v. Martin* changes the legal analysis that leads to the conclusion that horseplay arises out of employment as a reasonably anticipated risk. This interpretation does not amend, alter or extend the Act's provisions, since as noted almost twenty-five years ago in *Dublin*, 2 Va. App. at 167, 342 S.E.2d at 639, "[i]t must be presumed that the legislature has been aware of, and acquiesced in, this interpretation." *Hilton* should therefore not be misapplied to the facts of this case to eliminate the common-law theory of compensability embodied in the horseplay doctrine. To do so wipes out a century of case law, and gives the

[6] Employer complains at page 33 of the Brief of Appellees that *Dublin* contains "no analysis of why it found that the consistency existed" when it stated that awarding compensation was "consistent with assaults on employees which are compensable where the attack was directed against the claimant as an employee or because of the employment." *Dublin*, 2 Va. App. at 168, 342 S.E.2d at 639. The Employer misses the point: an award of compensation in a horseplay case is consistent with an award of compensation in an assault case where the assault is directed at the claimant as an employee because in both cases, the injury arises out of employment.

Commonwealth of Virginia the dubious distinction of being the only state in the nation that does not protect victims of horseplay. It should remain for the trier of fact to determine, if and when necessary, whether an act is reasonably anticipated horseplay, or whether it constitutes an assault. Criminal cases such as *Wood v. Commonwealth*, 149 Va. 401, 140 S.E. 114 (1927) which apply for the punitive purposes of criminal law, do not apply in the remedial realm of compensation law as suggested at page 18 of the Brief of Appellees. Instead, the rich language found in compensation cases such as *In re McNicol*, *Leonbruno v. Champlain Silk Mills*, and *Dublin Garment Co. v. Jones* serves to guide the trier of fact in distinguishing horseplay from assault.

Respectfully Submitted
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CERTIFICATE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, fifteen (15) paper copies and one (1) electronic copy on CD of the foregoing Reply Brief of Appellant have been hand filed in the Office of the Clerk of the Supreme Court of Virginia on the 2nd day of April, 2010, and three (3) copies of the foregoing Reply Brief of Appellant have been mailed to Joseph F. Giordano and Kathryn Lea Harman, at Semmes, Bowen & Semmes, 1577 Spring Hill Road, Suite 200, Vienna, Virginia 22182 on this 2nd day of April, 2010.

COUNSEL FOR THE APPELLANT
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