In The

Supreme Court of Virginia

RECORD NO. 091762

MATTHEW EDWARD SIMMS,

Appellant,

v.

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

Appellees.

BRIEF OF APPELLEES

Kathryn Lea Harman (VSB No. 73724)
SEMMES, BOWEN & SEMMES
1577 Spring Hill Road, Suite 200
Vienna, Virginia 22182
(703) 288-2532 (Telephone)
(703) 356-6989 (Facsimile)
KHarman@semmes.com

Counsel for Appellees

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦www.thelexgroup.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

I. STATEMENT OF THE QUESTIONS PRESENTED 1

II. STATEMENT OF THE FACTS 2

III. ARGUMENT AND AUTHORITIES 6

A. THE COURT OF APPEALS, IN ACCORDANCE WITH THE REASONING OF HILTON V. MARTIN, CORRECTLY DETERMINED THAT SIMMS'S JUNE 2006 INJURY DID NOT ARISE OUT OF HIS EMPLOYMENT 6

1. The Court of Appeals Correctly Held That the Assault Was Personal in Nature and Not Because of Simms's Employment 6

2. Simms's Injury Occurred as the Result of an "Assault" under Virginia Law 16

3. This Court's decision in Hilton v. Martin established that the "horseplay doctrine" has no place in Virginia Workers' Compensation law 20

a. *Stare Decisis* Does Not Mandate Upholding Dublin Garment 20

b. The Hilton Decision Rested Not on "Extraordinary Facts", but on this Court's Holdings 23

c. The Horseplay Doctrine, Which Relies on the Subjective Feelings and Intentions of Employees, Does Not Comport with Virginia's "Actual Risk of Employment" Test 27

1. Virginia Applies the "Actual Risk" Rather than "Positional Risk" Test in Determining Whether an Injury "Arose out Of" Employment 27

2. The Dublin Garment Decision Improperly Relied on an Assessment of Co-employees' Feelings Toward Each Other 31

3. Simms' Argument That a Purported Innocent Victim of Horseplay Establishes by His Innocence That His Injury Arose out of Employment Does Not Comport with Virginia Law 35

d. Simms' Public Policy Arguments Should Be Unavailing 38

1. This Court Has Repeatedly Held That it Is the Legislature's Province to Set the Public Policy of Virginia 38

2. Simms' Predictions of Dire Consequences Are Speculative 39

3. Simms' Argument That Other States May Follow Simms Is an Argument That Simms Was a Correct Interpretation of the Law of Workers' Compensation 41

B. THE COURT OF APPEALS CORRECTLY AFFIRMED THE COMMISSION'S HOLDING THAT SIMMS FAILED TO MEET HIS BURDEN OF PROVING A PERIOD OF DISABILITY BEYOND JUNE 7, 2006 OR A CAUSAL RELATION BETWEEN HIS JULY 20, 2006 SURGERY AND THE INCIDENT OF JUNE 3, 2006 43

IV STATEMENT OF THE RELIEF SOUGHT 46

V . CONCLUSION 47

VI. CERTIFICATE 48

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. Sloane & Company,
2 O.I.C. 240 (1920) 20, 21, 22

A.N. Campbell & Co. v. Messenger,
171 Va. 374, 199 S.E. 511 (1938) 11, 23, 24

Baker v. Poolservice Co.,
272 Va. 677, 636 S.E.2d 360 (2006) 22

Board of Supvrs. v. Martin,
3 Va. App. 139, 348 S.E.2d 540 (1986) 44

Bowie v Murphy,
271 Va. 127, 624 S.E.2d 74 (2006) 18

Brown v. United Tech. Corp.,
112 Conn. App. 492, 963 A.2d 1027 (2009) 30

Butler v. Southern States Coop., Inc.,
270 Va. 459, 620 S.E.2d 768 (2005) . . . . . passim

Carter v. Commonwealth,
269 Va. 44, 606 S.E.2d 839 (2005) 18

Caskey v. Dan River Mills, Inc.,
225 Va. 405, 302 S.E.2d 507 (1983) 46

City of Richmond v. Braxton,
230 Va. 161, 335 S.E.2d 259 (1985) . . . . . passim

City of Waynesboro v. Griffin,
51 Va. App. 308, 657 S.E.2d 782 (2008) 44, 45

Clinchfield Coal Co. v. Reed,
40 Va. App. 69, 577 S.E.2d 538 (2003) 44

Combs v. Virginia Electric & Power Co.,
259 Va. 503, 525 S.E.2d 278 (2000) 27

Continental Life Ins. Co. v. Gough,
161 Va. 755, 172 S.E. 264 (1934) 11, 23, 24, 26

Corken v. Corken Steel Prods., Inc.,
35 S.W.2d 949 (Ky. 1964) 28-29

Courser v. Darby School Dist. No. 1,
692 P.2d 417 (Mont. 1984) 30

Dennis v. Department of Labor & Indus.,
745 P.2d 1295 (Wash. 1987) 30

Dionne v. Southeast Foam Converting & Packaging,
240 Va. 297, 397 S.E.2d 110 (1990) 38

Dublin Garment Company v. Jones,
2 Va. App. 165, 342 S.E.2d 638 (1986) . . . . . passim

Etherton v. Doc,
268 Va 200, 597 S.E.2d 87 (2004) 18

Grayson v. District of Columbia Dept. of Employment Servs.,
516 A.2d 909 (D.C. 1986) 28

Guillory v. Interstate Gas Station,
653 So.2d 1152 (La. 1995) 29

Harmon v. Sadjadi,
273 Va. 184, 639 S.E.2d 294 (2007) 22

Harris v. Peach County Bd. of Comm'ers,
296 Ga. App. 225, 674 S.E.2d 36 (Ga. Ct. App. 2009) 28

Hauser v. Deep Meadow Correctional Center,
60 O.I.C. 196 (1984) 22, 34

Hercules, Inc. v. Gunther,
13 Va. App. 357, 412 S.E.2d 185 (1991) 43

Heritage Mut. Ins. Co. v. Larsen,
624 N.W.2d 129 (Wis. 2001) 30

Hilton v. Martin,
275 Va. 176, 654 S.E.2d 572 (2008) . . . . . passim

Hopson v. Hungerford Coal Co.,
187 Va. 299, 46 S.E.2d 392 (1948) . . . . . passim

Horodyskj v. Karanian,
32 P.3d 470 (Colo. 2001) 28

Husvar v. Engineered Products, Inc.,
755 A.2d 498 (Me. 2000) 30

Hypl v. Indus. Comm'n of Arizona,
111 P.3d 423 (Ariz. Ct. App. 2005) 28

Infants v. Virginia Hous. Dev. Auth.,
221 Va. 659, 272 S.E.2d 649 (1980) 38

K & K Repairs & Constr. v. Endicott,
47 Va. App. 1, 622 S.E.2d 227 (2005) 45

Koffman v. Garnett,
265 Va. 12, 574 S.E.2d 258 (2003) 7, 17

LaTourette v. Workers' Comp. Appeals Bd.,
951 P.2d 1184 (Cal.1998) 28

Livering v. Richardson's Rest.,
823 A.2d 687 (Md. Ct. App. 2003) 29

Logdson v. ISCO Co.,
618 N.W.2d 667 (Neb. 2000) 29

Lucas v. Lucas,
212 Va. 561, 186 S.E.2d 63 (1972) 27

Manassas Ice & Fuel Co. v. Farrar,
13 Va. App. 277, 409 S.E.2d 824 (1991) 45

Marcus v. Arlington County Bd. Of Supvrs.,
15 Va. App. 544, 425 S.E.2d 525 (1993) 46

Mayo v. Safeway Stores, Inc.,
457 P.2d 400 (Idaho 1969) 28

Metcalf v. A.M. Express Moving Sys.,
230 Va. 464, 339 S.E.2d 177 (1986) 11, 23, 24

Marshall Erdman & Assocs., Inc v. Loehr,
24 Va. App. 679, 485 S.E.2d 145 (1997) 44

Milledge v. The Oaks,
784 N.E.2d 926 (Ind. 2003) 28

Moi v. State,
188 P.3d 753 (Haw. Ct. App. 2008) 28

North River v. Purdy,
733 S.W.2d 630 (Tex. 1987) 29

Nunnally v. Artis,
254 Va. 247, 492 S.E.2d 126 (1997) 22

Odyssey/Americare of Okla. v. Worden,
548 P.2d 309 (Okla. 1997) 30

Park Oil v. Parham,
1 Va. App. 166, 336 S.E.2d 531 (1985) 19, 22

Patterson v. O'Sullivan Rubber Corp.,
45 O.I.C. 184 (1963) 22

Reamer v. National Service Indus.,
237 Va. 466, 377 S.E.2d 627 (1989) . . . . . passim

Redman Indus., Inc. v. Lang,
943 P.2d 208 (Or. 1997) 29

Richmond Newspapers, Inc. v. Hazelwood,
249 Va. 369, 457 S.E.2d 56 (1995) . . . . . passim

Ruckman v. Cubby Drilling, Inc.,
689 N.E.2d 917 (Ohio 1998) 30

Ruthruff v. Tower Holding Corp.,
261 Mich. App. 613, 684 N.W.2d 888 (2004) 30

Sandrich v. Universal Molded Prods.,
28 O.I.C. 61 (1946) 22

Sexton v. County of Cumberland,
962 A.2d 1114 (N.J. 2009) 29

Shaw v. Dutton Berry Farm,
632 A.2d 18 (Vt. 1993) 29-30

Simms v Ruby Tuesday,
54 Va. App. 388, 679 S.E.2d 555 (2009) . . . . . passim

Southall v. Eldridge Reams, Inc.,
198 Va. 545, 95 S.E.2d 145 (1956) 44

Steinberg v. South Dakota Dept. of Military,
607 N.W.2d 596 (S.D. 2000) 29

Taylor v. Celanese Corp. of America,
30 O.I.C. 257 (1948) 23

United Fire & Cas. Co. v. Maw,
510 N.W.2d 241 (Minn. 1994) 29

Virginia Dep't of Transp. v. Mosebrook,
13 Va. App. 536, 413 S.E.2d 350 (1992) 44

Wagner Enters., Inc. v. Brooks,
12 Va. App. 890, 407 S.E.2d 32 (1991) 44

Western Elec. Co. v. Gilliam,
229 Va. 245, 329 S.E.2d 13(1985) 39

Westman v. North Dakota Workers Comp. Bureau,
459 N.W.2d 540 (N.D. 1990) 29

Wiggins v. Knox Glass, Inc.,
219 So.2d 154 (Miss. 1969) 29

Wood v. Bd. of Supervisors of Halifax County,
236 Va. 104, 372 S.E.2d 611 (1988) 38

Wood v. Commonwealth,
149 Va. 401, 140 S.E. 114 (1927) 18

STATUTE

Va. Code § 65.2-101 7

RULE

Va. Sup. Ct. R. 26 1

OTHER AUTHORITIES

1 Larson, The Law of Workers' Compensation § 6.50 28

Friend, Charles E., Personal Injury Law in Virginia (2d ed. 1998) 7

Harper, Fowler V., et al., The Law of Torts (3d ed. Cum. Supp. 2003) . . . 7

Restatement (Second) of Torts § 21 (1965) 7

V I R G I N I A:

IN THE SUPREME COURT OF VIRGINIA

MATTHEW EDWARD SIMMS,

Appellant,

v.

RECORD NUMBER: 091762

RUBY TUESDAY, INC.,

and

HARTFORD INSURANCE COMPANY OF THE MIDWEST,

Appellees.

BRIEF OF APPELLEES

COME NOW, the Appellees, Ruby Tuesday, Inc. and Hartford Insurance Company of the Midwest (collectively "the Employer), and submit this Brief of Appellees pursuant to Rule 5:26 of the Rules of The Supreme Court of Virginia, and in support thereof, respectfully state as follows:

I. STATEMENT OF THE QUESTIONS PRESENTED

A. DID THE VIRGINIA COURT OF APPEALS CORRECTLY DETERMINE THAT, IN ACCORDANCE WITH THE REASONING OF HILTON V. MARTIN, SIMMS'S JUNE 2006 INJURY DID NOT ARISE OUT OF HIS EMPLOYMENT?

B. DID THE WORKERS' COMPENSATION COMMISSION CORRECTLY FIND THAT SIMMS FAILED TO MEET HIS BURDEN OF PROVING A CAUSAL CONNECTION BETWEEN THE INCIDENT OF JUNE 3, 2006 AND SIMMS'S ALLEGED DISABILITY?

II. STATEMENT OF THE FACTS

When Simms filed the claim for Workers' Compensation Benefits, he alleged that the accident for which he claimed benefits occurred "when co-workers were throwing ice at me and I put my arm up to protect myself." (App. at 10). In his June 7, 2007 deposition, Simms testified that he told his manager that Simms "was having ice thrown at my face, and I put my left shoulder up to block it - - my left hand up to block it." (App. at 34). Simms further testified that the injury occurred when was injured when "I moved my left shoulder and took my left hand, put it in front of my face to block the ice that was being thrown at me." (App. at 30). He further testified that "I moved my left shoulder and took my left hand, put it in front of my face to block the ice that was being thrown at me." (App. at 30).

At the Commission hearing, Matthew Simms testified that he turned around after a piece of ice hit him in the back of the head, at which point he saw that his co-workers were throwing ice at him. (App. at 109). He

testified that he saw pieces of ice flying toward him. (App. at 110). According to his testimony, three co-workers, Ron, Karen, and Angela, were all throwing ice at him at the same time. (App. at 110). He testified that ice hit him in the chest and that before he was able to block his face, a piece of ice hit him in the face. (App. at 111; 113). He testified that he threw his left arm up to block his face. (App. at 126). Simms repeatedly reiterated that he was injured by dislocating his shoulder when he tried to block his face, or prevent an unwanted contact from the ice being thrown by co-workers. (App. at 111-12; 114). Simms testified that the workers who threw ice at him were standing very close to him, only about three feet away, at the time they were throwing the ice. (App. at 128).

Simms not only testified that he was injured while trying to protect himself from ice being thrown at him by co-workers, but after the incident he told others that he was hurt while trying to fend off ice being thrown by co-workers. He testified that he told his physician, Dr. Hosick, that his injury occurred because his co-workers were throwing ice at him, and that he threw up his left arm to block his face. (App. at 126). He testified that he told Mr. Davis that his injury occurred when his co-workers threw ice at him. (App. at 130-132). Simms' brother, Robert Lee Simms, III (hereinafter "Robert Simms"), testified that Matthew Simms told him he had

been injured when “someone was throwing ice at him, and he had kind of a knee-jerk reaction, and moved his arm up to protect his face because he had his service book in his hand, and figured that would probably give him more protection to his face.” (App. at 61).

Robert Simms testified in deposition that he had worked for Ruby Tuesday at two different locations. (App. at 53-54; 70-71). Robert Simms was never employed by Ruby Tuesday at the same time as Matthew Simms. (App. at 57). Robert Simms testified that during his employment with Ruby Tuesday, management members would tell employees to stop when members of management saw employees engage in activities such as horseplay or wrestling. (App. at 66).

Robert Simms testified that if Ruby Tuesday employees threw ice at one another, and “it got out of hand, they’d [referring to management] say “stop.” (App. at 70). Greg Davis, a manager at Ruby Tuesday, testified that he had never approved of any employees throwing ice. (App. at 191-92). He testified that if he caught someone throwing ice, he would initially tell the person not to do it again, and if the person threw ice again, the person would be subject to disciplinary measures. (App. at 192). He testified that if employees were throwing ice, he would expect a non-participant in the ice throwing to report the ice throwing to him. (App. at

195). Joseph Higgins, general manager with Ruby Tuesday, testified that he did not condone ice throwing in the restaurant. (App. at 200-01).

In his written statement for his request for review, Simms again stated that he threw his left arm up in front of his face to block ice thrown at him by co-workers. (App. at 304; 306). He reiterated his testimony that a piece of ice hit him in the back of the head, and that when he turned, more pieces of ice were thrown at him, hitting him in the face and chest, so he threw his arm up to block his face. (App. at 306).

Simms testified at his deposition that he returned to work four days after the ice throwing incident. (App. at 36). At the hearing before Deputy Commissioner Colville, Simms testified that his physician, Dr. Hosick, released him to work on June 8, 2006. (App. at 120). Simms testified that after his July 20, 2006 surgery, no doctor told him that he was unable to work. (App. at 39). He admitted that he did not consult a physician about his ability to work after the July 2006 surgery. (App. at 39).

Although Simms had a period of total work incapacity causally related to the surgery, Dr. Hosick's records failed to reflect that the surgery itself was causally related to the June 3, 2006 dislocation or that the June 3, 2006 dislocation was in any manner the aggravation of a pre-existing condition. (App. at 263-78). In addition, as of October 1, 2006, Dr. Hosick

considered Simms to be disabled only from the date of surgery, and not from June 3, 2006. (App. at 270-71). Dr. Hosick's notes reflect that Simms was both totally unable to work and able to work with lifting restrictions. (App. at 270). The surgery was because of recurrent dislocations dating back to when Simms was fifteen years old, rather than to any specific accident or injury. (App. at 263-64)

The Review Opinion dated March 31, 2008 noted that the deputy commissioner found no causal link between Simms' injury and his medical treatment. (App. at 357). Rather, the deputy commissioner found that the medical evidence did not connect the treatment after June 8, 2006 to the dislocation on June 2, 2006, but instead connected treatment, including surgery, to the dislocations Simms suffered over time. (App. at 358).

III. ARGUMENT AND AUTHORITIES

A. THE COURT OF APPEALS, IN ACCORDANCE WITH THE REASONING OF HILTON V. MARTIN, CORRECTLY DETERMINED THAT SIMMS'S JUNE 2006 INJURY DID NOT ARISE OUT OF HIS EMPLOYMENT

1. The Court of Appeals Correctly Held That the Assault Was Personal in Nature and Not Because of Simms's Employment

The Employer submits that this Court should affirm the decision of the Court of Appeals in Simms v. Ruby Tuesday, 54 Va. App. 388, 679

S.E.2d 555 (2009). The Simms decision adheres to this Court's precedents with respect to workplace assaults, and complies with Virginia law.

Virginia's Workers' Compensation Act (hereinafter "the Act") applies to injuries "by accident arising out of and in the course of the employment . . ." Code § 65.2-101. Under Virginia law, an "assault consists of an act intended to cause either harmful or offensive contact with another person or apprehension of such contact, and that creates in that other person's mind a reasonable apprehension of an imminent battery." Koffman v. Garnett, 265 Va. 12, 16, 574 S.E.2d 258, 261 (2003), (citing Restatement (Second) of Torts § 21 (1965); Charles E. Friend, Personal Injury Law in Virginia (2d ed. 1998); Fowler V. Harper, et al., The Law of Torts (3d ed. Cum. Supp. 2003).) According to this Court, an assault can only be considered "an 'accident' within the meaning of the Act when it appears that it was the result of an actual risk arising out of the employment." Butler v. Southern States Coop., Inc., 270 Va. 459, 465, 620 S.E.2d 768, 772 (2005) (quoting Reamer v. National Service Indus., 237 Va. 466, 377 S.E.2d 627 (1989)). The Butler Court stated that it "ha[d] consistently held that when an assault 'is personal to the employee and not directed against [her] as an employee or because of [her] employment, the injury does not

arise out of the employment.'" Butler at 466, 772 (citations omitted). The circumstances of Simms' injury constituted an assault personal to Simms, and therefore did not constitute as an 'accident' under the Act.

In deciding the recent workplace assault case of Hilton v. Martin, this Court noted that in determining whether an injury arises out of employment, the Court "do[es] not apply the 'positional risk' test, whereby simply sustaining an injury at work is sufficient to establish compensability. Rather [the Court] adhere[s] to the 'actual risk' test, under which the injury comes within the purview of the Act only if there is a causal connection between the employee's injury and the conditions under which the employer requires the work to be done." Hilton v. Martin, 275 Va. 176, 180, 654 S.E.2d 572, 574 (2008).

Simms argues that in deciding Simms, the Court of Appeals wrongly applied this Court's decision in Hilton. In so doing, Simms ignores both the reasoning set forth in Hilton and the precedents upon which this Court based its decision in Hilton.

In Hilton, the defendant employer asserted the Act as a bar to a civil action, much as Simms avers that the Act applies to the circumstances of his injury. See Hilton 275 Va. at 178, 654 S.E.2d at 573. The Hilton plaintiff's decedent received her fatal injuries when a co-employee

activated defibrillator paddles and placed them on her. See id at 178-79, 573. Prior to the contact, the co-employee, described in the complaint as "a 'kid in an adult's body' . . .[who] had a tendency to 'harass his female co-workers' and . . . 'exhibited childish and immature behavior', told [plaintiff's decedent], 'I'm going to get you.'" Id. The Hilton employer's plea in bar contended that the plaintiff was limited to the recovery provided by the Act. See id. at 179, 574.

This Court rejected the employer's claim, stating that according to its precedent, in instances of "assaults upon employees"[,] . . . [a]ll adhere to a common principle: 'If the assault is personal to the employee and not directed against him as an employee or because of his employment, the [resulting] injury does not arise out of the employment.'" Hilton, 275 Va. at 179, 654 S.E.2d at 574 (citing Richmond Newspapers, Inc. v. Hazelwood, 249 Va. 369, 457 S.E.2d 56 (1995)). This Court explicitly rejected consideration of the assailant employee's intentions in taking the action that caused the injury. This Court stated, "It is immaterial whether the assailant's subjective motivation is playful, amorous, vindictive, or hostile. An injury resulting from an assault arises out of the injured person's employment when it is directed at the victim *as an employee*." Hilton, 275 Va. at 181, 654 S.E.2d at 574-75 (emphasis in original).

Under this Court's reasoning, Simms's injury would arise out of his employment only if the co-employees threw ice at him because of his status as an employee, or because throwing ice at employees furthered the employer's business. The evidence presented showed that far from furthering the employer's business, ice-throwing was discouraged by the employer. Employees who threw ice were subject to discipline, and incidents of ice-throwing were curtailed by management. No evidence indicated that Simms was targeted because of his status as an employee. To the contrary, the evidence showed that the ice was thrown at Simms because of the personal feelings of friendliness the ice-throwers felt for Simms.

In 1995, this Court upheld an employee's right to redress in a civil action for injuries sustained at the workplace after a co-employee goosed him. See Richmond Newspapers v. Hazelwood, 249 Va. 369, 457 S.E.2d 56. In Richmond Newspapers, the employer contended that the plaintiff employee's suit was barred by the Act. The employer argued, much as Simms argued to the Court of Appeals and to this Court, that the activity that resulted in the employee's injuries was "an actual risk of [the plaintiff's] employment." See Id. At 373, 58. The employer attempted to show that the prevalence of goosing in the particular workplace was "'an activity

engaged in by pressmen, perhaps as a means to break the tension . . .'" Id. In the same way, Simms has sought to argue that ice-throwing was so prevalent in Simms' workplace as to constitute an actual risk of employment. This Court rejected the argument in Richmond Newspapers, pointing out that the Court's prior decisions had held that "[i]f an assault is personal to the employee and not directed at him as an employee or because of his employment, the injury does not arise out of the employment." Id. (citing Reamer v. Nat'l Serv. Indust., 237 Va. 466, 377 S.E.2d 627 (1989); Metcalf v. A.M. Express Moving Sys., 230 Va. 464, 339 S.E.2d 177 (1986); City of Richmond v. Braxton, 230 Va. 161, 335 S.E.2d 259 (1985); Hopson v. Hungerford Coal Co., 187 Va. 299, 46 S.E.2d 392 (1948); A.N. Campbell & Co. v. Messenger, 171 Va. 374, 199 S.E. 511 (1938); Continental Life Ins. Co. v. Gough, 161 Va. 755, 172 S.E. 264 (1934)). Simms's argument that ice throwing constituted an actual risk of his employment should also be rejected because all the evidence, including Simms's own testimony, established that the ice throwing was not directed at him as an employee.

Specifically noting in Richmond Newspapers that the evidence showed that the workplace goosing occurred in the atmosphere of "'a big locker room, a bunch of guys working together.'" this Court stated that "the

goosing . . . was of a personal nature and not directed against the recipients as employees or in furtherance of the employer's business." Richmond Newspapers, 249 Va. at 375, 457 S.E.2d at 59. This Court therefore considered, and rejected, the argument that the contact at issue occurred on a regular basis in the workplace. The Richmond Newspapers Court affirmed the denial of the employer's motion to set aside the jury verdict. See Id. In the matter before this Court, Simms contends that activities such as throwing ice were part of the atmosphere of his workplace, and were thus an actual risk of his employment. Simms's argument is nearly identical to the argument advanced by the employer in Richmond Newspapers, an argument this Court rejected.

In Butler, a case cited by this Court in Hilton, the plaintiff filed a civil suit against her employer and a fellow employee who had subjected her to unwanted touching and threats of touching. See Butler, at 463, 770. The defendants pleaded the exclusivity provision of the Act as a bar to the suit. See id. at 463,770-71. This Court held that the plaintiff's injuries were not within the purview of the Act because the co-employee had directed his assault at the plaintiff personally and not "as an employee or because of her employment." Id. at 466, 772. The Butler court noted that the co-

employee's "actions were in no way in furtherance of [the employer's] business . . ." Butler, 270 Va. at 466, 820 S.E.2d at 772.

Just as in Butler, nothing in the evidence in the instant case supports a finding that the actions of Simms' co-employees in throwing ice furthered Ruby Tuesday's business in any way. To the contrary, Ruby Tuesday's position was that such ice throwing was detrimental to its business, as evidenced by the fact that repeat ice throwers faced discipline. The evidence showed that the other employees targeted Simms because of their friendly feelings toward him, not because of his status as an employee. Nothing in the record shows that the ice was thrown at Simms because he was an employee.

In Reamer, this Court held that sexual assaults of an employee did not arise out of her employment, despite the fact that after she was assaulted at her workplace, her assailant, a customer, robbed her employer. See Reamer, 237 Va. at 471-72, 377 S.E.2d at 630. This Court noting that the assailant-customer and the employee knew each other and had talked on previous occasions, held that the assaults were "personal in nature . . ." and that the employee's injuries did not arise out of employment. Id. at 471, 630. In this case, it is undisputed that Simms and those who threw ice at him knew each other. It is also undisputed that

Simms's co-employees threw ice at Simms because they were friends with him. Nothing shows that Simms was targeted in furtherance of his employer's business, or because of his status as an employee. Therefore, under the reasoning of Reamer, Simms's injuries did not arise out of his employment.

In City of Richmond v. Braxton, an employee filed for Workers' Compensation benefits for an injury resulting from a sexual assault by her supervisor. See Braxton, 230 Va. at 162, 335 S.E.2d at 260. The Commission awarded benefits, finding that prior to the assault, the supervisor had "'exhibited a proclivity to engage in aberrant behavior . . . [that] the risk of assault to the claimant was increased by the continued presence of [the supervisor] on the scene . . .[and that] the management of the business . . . permitted an exaggerated risk to become part of day-to-day activity in the workplace . . . '" Id. at 163, 261 (quoting from the Commission's written opinion). This Court reversed the Commission's award, agreeing with the dissenting Commissioner that "'[i]t is not sufficient to find that the employment is what brought the parties into close proximity[;] . . . there must be a causal connection between the conditions under which the work is required to be performed and the resulting injury.'" Id. at 164, 261-62.

Just as in Braxton, Simms produced evidence only that he and the co-employees who threw ice at him were together in the workplace. He failed to produce evidence that the ice throwing was a condition under which the work was required to be performed. He therefore failed to produce evidence of a causal connection between his injury and his employment.

The Braxton Court stated that "the necessary causal connection may be established if the evidence shows that the attack was directed against the claimant as an employee or because of employment . . . [but not if] "'the assault was of a personal nature . . . not directed against the employee as part of the employment relationship and was in no way in furtherance of the employer's business.'" Braxton, 230 Va. at 165, 335 S.E.2d at 262 (quoting from the dissenting Commission opinion). Simms failed to establish that the ice throwing furthered Ruby Tuesday's business in any way. To the contrary, the evidence showed that Ruby Tuesday management actively discouraged ice throwing, disciplining employees who were caught throwing ice.

Simms himself established that the assault was directed at him as a person, and not as an employee. Simms repeatedly testified out that the ice-throwing co-employees had no intent to hurt him. His own evidence

showed that their actions were motivated by playfulness and an attempt to tease him. In other words, their actions were motivated by their feelings about Simms as a person, and were not directed at him as an employee of Ruby Tuesday.

Simms's argument that the ice throwing was a part of the conditions of the workplace should be unavailing. Simms cannot establish that ice throwing was a condition under which the employer required the work to be done, or that ice throwing furthered the employer's business. Simms's brother's testimony, as well as the uncontradicted testimony of the managers of Ruby Tuesday, established that ice throwing was not condoned or tolerated by the employer. It follows therefore that ice throwing was neither a condition of employment nor an activity undertaken in furtherance of the employer's business, as this Court has required that an assault be for the assault to be compensable under Virginia's Workers' Compensation Act.

2. Simms's Injury Occurred as the Result of an "Assault" under Virginia Law

Simms attempts to distinguish the assault perpetrated on him by his coworkers from assault cases decided by this Court. In so doing, 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. Simms essentially asks this Court, as he asked the Court of Appeals, to ignore or alter the definition of assault in Virginia and create a separate "workplace horseplay" definition of assault, which fits the definition of assault, but that limits injured employees to redress under the Act. Contrary to Simms' urging, the circumstances of his injury fell well within the definition of assault as established in Virginia law.

The undisputed facts, that Simms feared contact with the ice, that he did not want to be touched by the ice, and that he attributed his injury to his attempt to ward off the unwanted contact with the ice, established that the injury occurred as a result of a workplace assault. See Koffman, *supra*.

As this Court has stated:

> To prove assault, a plaintiff must show that the defendant 'performed 'an act intended to cause either harmful or offensive contact with another person or apprehension of such contact, and that creates in the other person's mind a reasonable apprehension of an imminent battery.' There is no requirement hat the victim of such acts be physically touched.' [Furthermore] an assault, 'whether a crime or tort, occurs when an assailant engages in an overt act intended to inflict bodily harm and has the present ability to inflict such harm or engages in an overt act intended to inflict such harm or engages in an overt act intended to place the victim in fear or apprehension of bodily harm and creates such reasonable fear or apprehension in the victim.

Bowie v Murphy, 271 Va. 127, 136, 624 S.E.2d 74, 80 (2006) (quoting Etherton v. Doc, 268 Va 200, 597 S.E.2d 87 (2004) and Carter v. Commonwealth, 269 Va. 44, 606 S.E.2d 839 (2005)).

As this Court has also noted, "'[t]he slightest unlawful touching of the person of another is a battery, for the law cannot draw the line between different degrees of violence . . .'" Wood v. Commonwealth, 149 Va. 401 at 404, 140 S.E. 114, 115 (1927) (quoting 2 R.C.L. 526).

The ice-throwing incident met the definitionMarch 22, 2010 of assault under Virginia law. Simms testified that his injury occurred because he held up his arm in an attempt to ward off the ice being thrown at him. Simms further testified that ice actually hit him. By his testimony, Simms established that he did not want the ice to strike him, and that he tried to avoid the unwanted contact with the ice. The evidence showed that Simms did not want to be struck by the ice that was thrown at him, he was apprehensive that he would be hit, and he actually was hit. Simms' testimony, as well as that of his brother, established that the ice throwing caused Simms to fear an imminent battery. Under Virginia law, that fear constitutes an assault. The Workers' Compensation Commission found, and the Court of Appeals implicitly agreed, that the threatened contact from

the ice was offensive to Simms, and unwanted by him. Simms's own evidence established all the elements of assault.

Simms' reliance on Park Oil v. Parham is misplaced. See Park Oil v. Parham, 1 Va. App. 166, 336 S.E.2d 531 (1985). In Park Oil, the Court noted that "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 . . ." Id. at 170, 534. As noted above, Simms *was* aware of the danger of being hit. Simms *did* reasonably fear receiving bodily hurt. The circumstances as described by Simms himself met the definition of assault. Simms fails to address how his awareness of the danger of being hit, or his fear of receiving bodily hurt, *to which he testified in deposition and at hearing*, did not meet the definition of assault.

This Court characterized Hilton as a workplace assault case. The instant matter similarly meets the definition of an assault that occurred in the workplace, i.e., a workplace assault case. The reasoning of Hilton, that injuries from a workplace assault fall within the purview of the Act only if the assault was directed at the injured employee as an employee, applies in this case. The Court of Appeals properly applied this Court's reasoning in Hilton to find that Simms' injury did not arise out of his employment.

3. This Court's decision in Hilton v. Martin established that the "horseplay doctrine" has no place in Virginia Workers' Compensation law

a. *Stare Decisis* Does Not Mandate Upholding Dublin Garment

The Court of Appeals properly followed this Court's rulings in determining that Simms' injury did not arise out of his employment. As the court of last resort in the Commonwealth of Virginia, this Court is the final arbiter and interpreter of Virginia law. Simms bases his argument to this Court, as he did before the Court of Appeals, on his assertion that this Court's decisions in Hilton, Butler, Richmond Newspapers, and, presumably, the cases upon which this Court based its decisions in Hilton, Butler, and Richmond Newspapers, were improperly at odds with the decision by the Court of Appeals in Dublin Garment Company v. Jones, 2 Va. App. 165, 342 S.E.2d 638 (1986). Simms contends that in deciding Simms, the Court of Appeals impermissibly ignored the line of "horseplay" cases that began with Allen v. Sloane & Company, 2 O.I.C. 240 (1920).

Simms himself ignores the fact 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. This Court has consistently held that an injury resulting from an assault by a co-employee does not fall within the purview of the Act unless the assault is directed at the injured

employee *because of his status as an employee* or *"because of his employment* . . ." Hilton, 275 Va. at 180, 654 S.E.2d at 574 (emphasis added). See also Butler, 270 Va. at 465-66, 620 S.E.2d at 772, Richmond Newspapers, 249 Va. at 373, 457 S.E.2d at 58, and the cases cited therein.

Simms argues that this Court should overrule Simms because to affirm the Court of Appeals' decision in Simms would overturn a line of cases, from Allen to Dublin Garment, that applied the "horseplay doctrine". A reading of Hilton and Richmond Newspapers would show Simms that this Court has not relied on the horseplay doctrine in determining whether a workplace injury arose out of employment. Simms's argument ignores the fact that In Dublin Garment, and other horseplay cases upon which he relies, the focus was on whether the injury occurred because of "playful acts. . . ." and whether the injured employee participated in the acts. Dublin Garment, 168, 639. This Court's decision in Hilton explicitly held that whether an act was intended in a playful manner has *no bearing* on the determination of whether the injury falls within the purview of the Act.

To the extent that Simms's argument can be interpreted as urging that *stare decisis* requires this Court to uphold Dublin Garment, that argument should be unavailing. This Court has stated that "'adherence to

the doctrine of *stare decisis* does not . . . compel us to perpetuate what we believe to be an incorrect application of the law . . .'" Harmon v. Sadjadi, 273 Va. 184, 197, 639 S.E.2d 294, 301 (2007) (quoting Nunnally v. Artis, 254 Va. 247, 492 S.E.2d 126 (1997)). This Court's decisions in Hilton, Butler, Hazelwood, and the cases that came before them illustrate that Dublin Garment and the other cases relied upon by Simms were an incorrect application of the law. The Dublin Garment Court made no determination as to whether the contact at issue between employees was directed at the injured employee in her status as an employee, or whether the contact was in furtherance of the employer's business. Therefore, Dublin Garment incorrectly applied the law. This Court has never held itself bound to abide by precedent founded on incorrect application of law.

In addition, *stare decisis* is not implicated in overruling Dublin Garment. *Stare decisis* applies "when a court of *last resort* has established a precedent . . ." Baker v. Poolservice Co., 272 Va. 677, 688, 636 S.E.2d 360, 367 (2006) (emphasis added). This Court, the court of last resort of the Commonwealth of Virginia, did not decide Dublin Garment, Allen, Park Oil v. Parham, *supra*, Hauser v. Deep Meadow Correctional Center, 60 O.I.C. 196 (1984), Patterson v. O'Sullivan Rubber Corp., 45 O.I.C. 184 (1963), Sandrich v. Universal Molded Products, 28 O.I.C. 61 (1946), or

Taylor v. Celanese Corp. of America, 30 O.I.C. 257 (1948), the cases upon which Simms bases his argument that this Court should not overturn precedent. In urging that this Court uphold Dublin Garment and the "horseplay" cases, Simms essentially asks this Court *not* to adhere to *stare decisis*. Simms instead asks this Court to ignore, if not overturn, its own decisions involving assaults committed by coworkers.

In addition to asking this Court to adhere to precedent it did not set, Simms would also require this Court to overturn its own decisions in workplace assault cases such as Hilton, Richmond Newspapers, Butler, Reamer, Metcalf, Braxton, Hopson, Campbell, and Gough, *supra*. In each decision, the Court made the determination of whether an injury *arose out of* employment based on whether the assault was directed at the employee as an employee, or whether it was instead personal.

The facts in this case show that Simms was the victim of a workplace assault directed at him as a person and not as an employee. Therefore, under this Court's precedents, his injury is not compensable under the Act.

b. The Hilton Decision Rested Not on "Extraordinary Facts", but on this Court's Holdings

Simms argues that in deciding Hilton, this Court failed to consider the "horseplay doctrine" only because of the "extraordinary facts" (or "peculiar

facts") before it. Simms attempts to distinguish Hilton on the grounds that the Court's ruling, that the workplace assault did not arise out of the decedent's employment, was an endeavor to give the decedent's survivors "the broadest possible range of remedies."

In making this argument, Simms, as noted *supra*, disregards the reasoning in this Court's precedents in Butler, Richmond Newspapers, Reamer, Metcalf, Braxton, Hopson, Campbell, and Gough, the cases upon which the Court based its Hilton decision. Moreover, Simms implies that this Court tailors its decisions to the pre-selected outcome for litigants the Court would prefer, and not to the law. To imply that this Court's decisions are influenced by the Court's desire to achieve a certain outcome for any party disregards the Court's careful reasoning and attention to statutory law and precedent in rendering Hilton.

In addition, to the extent that Simms argues that the Court's Hilton decision is to be read as applying only in fatality cases, as a way to provide the greatest possible compensation to a deceased employee's survivors, Simms ignores the fact that, like Hilton, both Richmond Newspapers and Butler arose out of tort actions defended on the ground that the actions were barred by the Act. See Butler, 270 Va. at 462, 770; Richmond Newspapers, 249 Va. at 369, 457 S.E.2d at 57. Neither Richmond

Newspapers nor Butler involved workplace injuries that resulted in fatality. See Butler at 462, 770; Richmond Newspapers at 371, 57. In both Richmond Newspapers and Butler, just as in Hilton, plaintiffs sought to pursue a civil cause of action based on a workplace injury. This Court's analysis was precisely the same in all three cases: that the Act did not apply because the circumstances of the assault showed that the assault was personal to the employee, and was neither directed at the injured employee because of his or her status as an employee, nor done in furtherance of the employer's business.

This Court's reasoning in Hilton, as in the cases cited by Hilton, that the subjective motivations of a workplace assailant are irrelevant to the determination of whether the resulting injury arose out of employment, applies to *all* cases of workplace assault. In making the argument that Hilton was different because it involved a fatality, Simms disregards this Court's decision in Hopson, a case cited by the Court in Hilton. The Hopson Court denied a claim for benefits by the survivors of an employee who was fatally shot while driving his employer's truck to deliver coal. See Hopson, 187 Va. at 301-02, 308, 46 S.E.2d at 393, 396. In Hopson, this Court reiterated that "'if the assault was personal to the employee and was not directed against him as an employee, or because of his employment,

then the injury is not compensable . . . [S]imply because the employee sustains injury from an assault made on him by a third party does not entitle him to compensation; he must . . .prove that the assault was directed against him as an employee, or because of his employment . . .'" Id. at 305-06, 395 (quoting Gough, 161 Va. 755, 172 S.E. 264).

Any reading of the Court's Hilton decision would confirm that this Court's holding was based solely on whether the employer's defense, that the claim came within the parameters of the Act, was consistent with Virginia law. Any reading of Hilton would confirm that this Court's determination was based on strict adherence to precedent such as its 1948 decision in Hopson.

Simms seeks to create a distinction between Hilton and other workplace assault cases, a distinction that does not exist. This Court's Hilton decision was in accordance with the Court's reasoning in prior cases involving claims of workplace assaults. In deciding Hilton, this Court followed a line of cases dating back to 1934. Nothing in Hilton supports Simms' argument that this Court tailored its decision to achieve a preferred outcome for the plaintiff before it. The decision of the Court of Appeals in Simms, based as it was on this Court's decision in Hilton, is squarely within this Court's jurisprudence.

c. The Horseplay Doctrine, Which Relies on the Subjective Feelings and Intentions of Employees, Does Not Comport with Virginia's "Actual Risk of Employment" Test

1. Virginia Applies the "Actual Risk" Rather than "Positional Risk" Test in Determining Whether an Injury "Arose out Of" Employment

In determining whether an injury is within the purview of the Act, Virginia "appl[ies] an 'actual risk test,' meaning that the employment must expose the employee to the particular danger causing the injury, notwithstanding the public's exposure generally to similar risks." Combs v. Virginia Elec.. & Power Co., 259 Va. 503, 510, 525 S.E.2d 278, 282 (2000) (citing Lucas v. Lucas, 212 Va. 561, 186 S.E.2d 63 (1972)). Thus, the Combs plaintiff was required to prove that there was no "causal connection between [her] injury and the conditions of her employment . . ." to establish that the injury was not under the purview of the Act. Combs, 259 Va. at 510, 525 S.E.2d at 282. This Court found that a causal connection existed because the plaintiff's injury resulted from inadequate medical treatment provided by the Employee Health Service, a service to which only employees had access. See id. at 506, 512, 280, 283.

Other states, rather than following the "actual risk" doctrine, have adopted the "positional risk" doctrine, which requires little more than that

an injury occurred at the place of employment while the employee was engaged in employment tasks. Under the positional risk doctrine, "'[a]n injury arises out of the employment if it would not have occurred *but for* the fact that conditions and obligations of the employment placed claimant in a position where he was injured.'" Grayson v. District of Columbia Dept. of Employment Servs., 516 A.2d 909, 911 (D.C. 1986) (quoting 1 Larson, The Law of Workers' Compensation § 6.50) (emphasis in original) (applying positional risk standard).

States adhering to the "positional risk" doctrine include Arizona (Hypl v. Indus. Comm'n of Arizona, 111 P.3d 423 (Ariz. Ct. App. 2005)); California (LaTourette v. Workers' Comp. Appeals Bd., 951 P.2d 1184 (Cal.1998)); Colorado (Horodyskj v. Karanian, 32 P.3d 470 (Colo. 2001)); Georgia (using a hybrid of increased risk, actual risk, and positional risk) (Harris v. Peach County Bd. of Comm'ers, 296 Ga. App. 225, 674 S.E.2d 36 (Ga. Ct. App. 2009)); Hawaii (using a "unitary test", which does not include a causal relationship between the worker's employment and the injury) (Moi v. State, 188 P.3d 753, 756 (Haw. Ct. App. 2008)); Idaho (Mayo v. Safeway Stores, Inc., 457 P.2d 400, 402 (Idaho 1969)); Indiana, with respect to neutral risks (Milledge v. The Oaks, 784 N.E.2d 926 (Ind. 2003)); Kentucky (Corken v. Corken Steel Prods., Inc., 35 S.W.2d 949 (Ky.

1964)); Louisiana (Guillory v. Interstate Gas Station, 653 So.2d 1152 (La. 1995)); Maryland (Livering v. Richardson's Rest., 823 A.2d 687 (Md. Ct. App. 2003)); Minnesota (United Fire & Cas. Co. v. Maw, 510 N.W.2d 241 (Minn. 1994)); Mississippi (An injury is considered to "aris[e] out of [an employee's] employment when the employee is injured at the place where he is required to be engaged in the employer's business . . . and where the employer's business required the employee to be at the place of the accident at the time it occurred." Wiggins v. Knox Glass, Inc., 219 So. 2d 154, 158 (Miss.1969)); Nebraska, with respect to neutral risks (Logdson v. ISCO Co., 618 N.W.2d 667 (Neb. 2000)); New Jersey (requiring a two-step positional-risk test (Sexton v. County of Cumberland, 962 A.2d 1114 (N.J. 2009)); North Dakota (compensable if an injury "occurred within the period of employment at a place where the employee may reasonably be, and while he was engaged in performing the duties of his contract or is engaged in something incident thereto and contemplated thereby." Westman v. N.D. Workers Comp. Bureau, 459 N.W.2d 540, 545 (N.D.1990) (internal quotation marks omitted)); Oregon (Redman Indus., Inc. v. Lang, 943 P.2d 208 (Or. 1997)); South Dakota (Steinberg v. South Dakota Dept. of Military, 607 N.W.2d 596 (S.D. 2000)); Texas (North River v. Purdy, 733 S.W.2d 630 (Tex. 1987)); Vermont (Shaw v. Dutton Berry

Farm, 632 A.2d 18 (Vt. 1993)); and Wisconsin (Heritage Mut. Ins. Co. v. Larsen, 624 N.W.2d 129 (Wis. 2001)).

With respect to other states, Michigan presumes that on-premises injuries arise in the course of the employment. (Ruthruff v. Tower Holding Corp., 261 Mich. App. 613, 684 N.W.2d 888, 891 (2004)). Oklahoma used the positional risk test until 1986. (Odyssey/Americare of Okla. v. Worden, 548 P.2d 309 (Okla. 1997). Connecticut holds that "an injury arises out of an employment when it occurs in the course of the employment *and* as a *proximate cause* of it." Brown v. United Tech. Corp., 112 Conn. App. 492, 499, 963 A.2d 1027, 1032 (2009) (emphasis in original). Maine uses its own eight-factor test. See Husvar v. Engineered Products, Inc., 755 A.2d 498, 500 (Me. 2000). Montana uses its own four-factor test. See Courser v. Darby School Dist. No. 1, 692 P.2d 417 (Mont.1984). Ohio uses a three-part "totality of the circumstances" test, with numerous exceptions. See Ruckman v. Cubby Drilling, Inc., 689 N.E.2d 917 (Ohio 1998). Washington omits the "arising out of employment" requirement entirely. See Dennis v. Department of Labor and Indust., 745 P.2d 1295, 1302 (Wash.1987).

In support of his contention that because other states allow compensation for "innocent victims of horseplay" Virginia must follow their lead, Simms cites cases from Arizona, California, Connecticut, the District

of Columbia, Georgia, Hawaii, Idaho, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Montana, Nebraska, New Jersey, Ohio, North Dakota, Oregon, South Dakota, Texas, Vermont, Washington, and Wisconsin. All those jurisdictions, twenty-five of the fifty-one jurisdictions cited by Simms, either adhere to the positional, rather than actual, risk doctrine, or use some analysis peculiar to their jurisdiction. Simms fails to explain why Virginia should follow those jurisdictions with respect to the horseplay doctrine even though Virginia does not follow them with respect to the test for determining whether any injury arose out of employment.

The decision by the Court of Appeals in Simms comported fully with this Court's holding in Hilton, Butler, Richmond Newspapers, Reamer, Hopson, and the cases cited therein. Dublin Garment did not discuss whether the claimant's injury resulted from contact between employees that occurred because of the injured employee's employment or in furtherance of the employer's business. Therefore, Dublin Garment did not comport with this Court's decisions.

2. The Dublin Garment Decision Improperly Relied on an Assessment of Co-employees' Feelings Toward Each Other

The Dublin Garment claimant was injured when a co-employee "push[ed] her forward and jerk[ed] her back with sufficient force to buckle

her knees." 2 Va. App. at 166, 342 S.E.2d at 638. The Commission (and subsequently the Court of Appeals) noted that the claimant and her co-worker agreed that the touching was "intended to be a friendly gesture." Id. at 166, 638. The Commission awarded compensation benefits, "[holding] that 'when an employee is an innocent nonparticipating victim of a co-worker's playful or joking actions, any resulting injuries are compensable.'" Id. at 167, 638 (quoting Commission opinion).

In affirming the Commission, the Court of Appeals made a specific note that "[t]here had been no previous ill will or disagreement between the two [employees]." Id. at 166, 368. The Court of Appeals noted that the Commission determined that the "'case [was] analogous to such 'horseplay' cases in that the unsuspecting nonparticipating claimant was injured by the unilateral act of the co-worker with common employment being the motivation for such activities,' and accordingly that the injury arose out of the employment . . ." Dublin Garment, 2 Va. App. at 168, 342 S.E.2d at 639 (quoting the Commission's opinion).

In its affirmation, the Court of Appeals stated that the reasoning underlying "horseplay" decisions was that employees "are given to practical joking or playful acts which at times result in an injury." Dublin Garment, 2 Va. App. at 167, 342 S.E.2d at 639. The Court of Appeals further stated

that "[s]uch injures are said to be an anticipated risk of the employment . . ." According to the Court of Appeals, awarding compensation in such claims 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." Id. (citations omitted).

The Dublin Garment Court, beyond stating that injuries resulting from playful contact between employees was "consistent" with those resulting from contact directed at the employee as an employee, provided no analysis of why it found that the consistency existed. The Dublin Garment decision discusses the relationships between employees, but contains no discussion of whether the contact initiated by the claimant's co-employee was directed at the claimant because of her status as an employee, or whether the contact was in furtherance of the employer's business.

In arguing that horseplay is "impersonal", and involves no determination of personal relationships, Simms ignores the fact that the very cases upon which he founds his arguments, Dublin Garment and the cases decided by the Commission, involved highly fact-specific determinations of whether the injured co-worker participated in horseplay and the state of the personal relationship between injured employee and

co-employee-assailant. See, e.g., Dublin Garment, 2 Va. App. at 166, 342 S.E.2d at 638; Hauser v. Deep Meadow Corr. Ctr., 60 O.I.C. 196.

In Hilton, this Court unequivocally stated that the "assailant's subjective motivation . . ." was irrelevant to the determination of whether an injury arose out of a victim's employment. Hilton, 275 Va. at 181, 654 S.E.2d at 574-75. In contrast, the assailant's subjective motivation is essential In a horseplay case. In horseplay cases, the key factors to determine are the nature of the contact between employees, i.e., whether the contact was playful, teasing, lighthearted, or not intended to cause harm, and whether the employees felt animosity toward one another prior to the incident. In addition, as Simms himself notes, horseplay cases require a determination of whether the injured employee was an active participant, or an "innocent" bystander. Those determinations require intensive investigation into circumstances and relationships that are unnecessary to determine the simple issue of whether the contact was directed at the injured employee in his status as an employee or in furtherance of the employer's business.

In Hilton, this Court specifically stated that "[i]t is immaterial whether the assailant's subjective motivation is playful, amorous, vindictive, or hostile. An injury resulting from an assault arises out of the injured

person's employment when it is directed at the victim *as an employee*." Hilton, 181, 574-75 (emphasis in original). According to this reasoning, the "horseplay" doctrine is not viable in Virginia. Determining whether an incident qualifies as "horseplay" requires delving into the relationship between assailant and victim, and into the state of mind of the assailant.

In Hilton, Butler, Hazelwood, and the cases cited upon which those decisions relied, the assailant's feelings about the victim were immaterial. In fact, as noted *supra*, this Court's Hilton decision directs courts *not* to consider the feelings of assailant and assaulted toward each other. This Court has emphasized repeatedly that the sole pertinent question is whether the assault was directed at the victim because of his or her employment or conditions imposed by the employer. Under that reasoning, Simms's injury did not arise out of his employment, and the Court of Appeals made the correct ruling.

3. Simms' Argument That a Purported Innocent Victim of Horseplay Establishes by His Innocence That His Injury Arose out of Employment Does Not Comport with Virginia Law

Simms argues that merely by establishing that he was an innocent victim of horseplay, an injured employee somehow simultaneously establishes that his injury arose out of his employment. Ruby Tuesday

notes that Simms neglected to cite any decisions of this Court that would bolster this argument. Simms fails to explain how showing that he was an innocent victim of horseplay would show, as this Court's decisions require, that the contact that resulted in his injury was directed at him because of his employment or in furtherance of his employer's business.

Contrary to Simms' argument, proving "[h]is innocence [of participating in horseplay], without more . . ." does *not* provide the proof that his injury arose out of his employment. Simms' circular argument fails to explain in what way not being an active participant in horseplay resolves the issue of whether an injury arose out of employment. The decisions of this Court require that an employee prove that the contact that resulted in his injury was directed at him *as an employee*. Merely proving himself to have been an innocent bystander would fail to meet that burden.

Simms also misconstrues this Court's directive that an employee must prove that "conditions under which the employer requires the work to be done [were] a contributing cause of the injury." Hilton at 181, 575. Contrary to Simms' assertion, an employee would *not* be required to prove negligence, i.e., duty, knowledge of the duty, and breach of that duty, on the part of the employer. The employee would merely have to prove either that the physical contact was initiated because of her status as an

employee, or that some aspect of the job's requirements *as set by the employer for the furtherance of the employer's business* led to the employee's injury.

Simms' argument that this Court's decision in Hilton or the Court of Appeals' decision in Simms erroneously extended a burden on employees that did not previously exist is misplaced. As this Court's decisions show, Virginia has always required an employee to prove that an injury that occurred during the course of employment arose out of employment. To meet that burden of proof, the Court has required an employee injured because of physical contact with another person to prove that his injury resulted from his status as an employee or in furtherance of his employer's business, rather than being directed at the employee as a person.

Simms' argument that it was error for the Court of Appeals to find that the viability of the horseplay doctrine in Virginia is questionable is not supported by this Court's decisions, and thus is not based in Virginia law.

d. Simms' Public Policy Arguments Should Be Unavailing

1. This Court Has Repeatedly Held That it Is the Legislature's Province to Set the Public Policy of Virginia

Simms urges this Court not to overturn the horseplay doctrine set forth in Dublin Garment, arguing that such a decision would violate public policy. In making this argument, Simms ignores this Court's often-stated view of the discrete roles of the courts and the legislature. Simms' argument ignores this Court's repeated stricture that considerations of public policy are within the legislature's exclusive province. See Dionne v. Southeast Foam Converting & Packaging, 240 Va. 297, 397 S.E.2d 110 (1990); Wood v. Bd. of Supervisors of Halifax County, 236 Va. 104, 372 S.E.2d 611 (1988); Infants v. Virginia Hous. Dev. Auth., 221 Va. 659, 272 S.E.2d 649 (1980).

According to this Court's precedent, the Court does not allow considerations of public policy to influence the Court's application of the law. It is this Court's province to determine whether laws pass constitutional muster, not whether they advance public policy. It is the legislature's province to consider public policy and formulate laws that carry out public policy.

Simms contends that overruling Dublin Garment would violate public policy by reason of its projected deleterious economic effect. In addition to being speculative, as discussed *infra*, this argument ignores this Court's precedents, which establish that the Court has long declined to interject itself into public policy considerations. In Western Electric Company v. Gilliam, the Court stated that the consideration of "economic and social values[] is a matter of public policy reserved to the original and exclusive jurisdiction of the General Assembly, and we will not trespass upon its domain." Western Elec. Co. v. Gilliam, 229 Va. 245, 248, 329 S.E.2d 13, 15 (1985).

To the extent that Simms argues that Hilton and Simms violate public policy, that issue is for Virginia's legislature to decide.

2. Simms' Predictions of Dire Consequences Are Speculative

Simms predicts that dire consequences will result if this Court holds that the horseplay doctrine is not viable in Virginia. He contends that if use of the horseplay doctrine is not viable in Virginia, employers, employees, or both will inundate the legislature with demands to change the law. In advancing this argument, Simms cites no precedent and no study to support his contention. He offers, in fact, nothing more than speculation.

Even were this Court to see its role as formulating public policy, public policy decisions should not be made based on unsupported speculations.

To the extent that Simms argues that adherence to this Court's long line of precedents would result in business bankruptcies, Simms again offers nothing more than speculation. The Court, as discussed *supra*, has long held that an injured employee must prove that physical contact from another person was directed at the employee as an employee to prove that an injury is under the purview of the Act, without apparent disastrous repercussions for businesses. The Employer also asks this Court to take judicial notice that Virginia businesses currently defend themselves against claims of personal injury, among various other causes of action, without widespread business failures.

In addition, if employees were no longer bound by the horseplay doctrine, they would be able to pursue remedies against those whose behavior directly caused their injuries: the co-employees who engaged in horseplay. Employees, who could be held liable in a subsequent civil action would have added incentive to refrain frm engaging in horseplay in the workplace.

Simms' public policy arguments, which are based on speculation and conjecture, fail as a matter of common sense.

3. Simms' Argument That Other States May Follow Simms Is an Argument That Simms Was a Correct Interpretation of the Law of Workers' Compensation

Simms argues in part that if this Court finds that the innocent victim of horseplay doctrine has no validity under Virginia law, other states may follow suit, thereby frustrating the goals of public policy. According to Simms, this would somehow destabilize workers' compensation law nationwide.

This argument ignores the fact that although Virginia applies the actual risk test in determining whether a workplace injury arose out of employment, nearly half the states have not followed Virginia's lead. Simms does not explain why states that have not followed Virginia in the most basic test for compensability would abandon their own rationales in determining whether the horseplay doctrine applies in their states.

Simms may be implying that other states would be persuaded by the reasoning behind Virginia's decisions, i.e., that an injury by physical contact between an employee and another person is compensable only if the contact was directed at the employee because of her status as an employee. Simms appears to imply that other states would find Virginia's rationale compelling to the point that they would follow Virginia's lead. Simms thus seems to imply that the Court of Appeals' statement in Simms,

that the horseplay doctrine had been called into question, would cause other states to realize that abandoning the horseplay doctrine would carry out public policy goals. Simms would appear to fear not that the Court of Appeals got it wrong in Simms, but that it got it right, and that Simms, Hilton, Butler, Richmond Newspapers, and the cases upon which they were based, state the law only too correctly. Simms' argument would thus appear to be that the Simms decision fit squarely within the framework of workers' compensation laws.

Simms's argument that to affirm Simms would violate public policy because other states would also determine that the horseplay doctrine is not valid under their workers' compensation laws fails because he in essence argues that the reasoning in Simms makes such a compelling case for abandoning the horseplay doctrine that other states will adopt it. That argument would seem to bolster the conclusion that the Simms decision was a correct application of public policy.

Simms' arguments that public policy mandates the upholding of Dublin Garment should be unavailing because they have no merit.

B. THE COURT OF APPEALS CORRECTLY AFFIRMED THE COMMISSION'S HOLDING THAT SIMMS FAILED TO MEET HIS BURDEN OF PROVING A PERIOD OF DISABILITY BEYOND JUNE 7, 2006 OR A CAUSAL RELATION BETWEEN HIS JULY 20, 2006 SURGERY AND THE INCIDENT OF JUNE 3, 2006

The Court of Appeals correctly determined that Simms' injury did not arise out of his employment. Therefore, issues of disability and causation are moot. Even supposing *arguendo* that the issues are not moot, Simms did not meet his burden of proving a period of disability after June 7,2006, or of proving a causal relationship between his June 3, 2006 injury and his July 20, 2006 surgery.

Simms argues that the Commission is unsupported by the evidence, and that the Commission's finding is in conflict with the evidence. Causation is a factual determination to be made by the Commission. Hercules, Inc. v. Gunther, 13 Va. App. 357, 361, 412 S.E.2d 185, 187 (1991). In the instant action, the Deputy Commissioner found that Simms had failed to prove a causal connection between his July 20, 2006 surgery and a workplace injury. Because the full Commission held that Simms's injury did not arise out of his employment, it did not consider the issue of causation. Therefore, the Deputy Commissioner's finding of fact with respect to causation is the relevant finding.

An employee seeking compensation bears the burden of proving his or her disability, and the periods of that disability, by a preponderance of the evidence. Marshall Erdman & Assocs., Inc v. Loehr, 24 Va. App. 679, 679, 485 S.E.2d 145, 149-50 (1997); Virginia Dep't of Transp. v. Mosebrook, 13 Va. App. 536, 537, 413 S.E.2d 350, 351 (1992). If the evidence shows that it is just as probable that the disability resulted from a non-compensable cause as that it resulted from a compensable cause, the claimant has not sustained the burden of proof. Southall v. Eldridge Reams, Inc., 198 Va. 545, 548, 95 S.E.2d 145, 147-148 (1956). Moreover, appellate courts are to draw all inferences in the light most favorable to the party prevailing at the Commission level. See Clinchfield Coal Co. v. Reed, 40 Va. App. 69, 577 S.E.2d 538 (2003). Appellate courts do not reweigh the evidence or retry the facts. See Wagner Enters., Inc. v. Brooks, 12 Va. App. 890, 407 S.E.2d 32 (1991).

Although Workers' Compensation law should be construed liberally in favor of the worker, the facts should not. Board of Supvrs. v. Martin, 3 Va. App. 139, 348 S.E.2d 540 (1986), cert. denied, 234 Va. 573, 363 S.E.2d 703 (1988). Furthermore, "[b]y statute, the commission's factual findings are conclusive and binding on [an appellate] Court when those findings are based on credible evidence." City of Waynesboro v. Griffin, 51 Va. App.

308, 657 S.E.2d 782, 784 (2008) (citing K & K Repairs & Constr. v. Endicott, 47 Va. App. 1, 622 S.E.2d 227 (2005)). As the Griffin Court noted, "the existence of 'contrary evidence . . . in the record is of no consequence if credible evidence supports the commission's finding.'" Griffin, at 784 (quoting Manassas Ice & Fuel Co. v. Farrar, 13 Va. App. 277, 409 S.E.2d 824 (1991)). In the instant case, the Deputy Commissioner considered the evidence pertaining to causation, and found that Simms had failed to meet his burden of proving a causal connection between his surgery and the work incident.

Simms asserts that the Commission based its findings on "unreasonable inferences," which are "plainly wrong" and "not supported by credible evidence." Beyond his bald assertions, Simms has offered nothing to show that the evidence considered by the Deputy Commissioner was not credible. As the person seeking Workers' Compensation benefits, Simms has the burden establishing his eligibility. Contrary to his assertions, an absence of evidence in support of his claim constitutes evidence that he has not met his burden.

Simms argues that this Court should disregard the opinion of a physician who treated Simms in the immediate aftermath of the June 3, 2006 incident in favor of an Independent Medical Examination ("IME") done

over a year after the work incident. The IME report does not reflect whether the examiner made a review of Simms's complete medical history. The report is void of any description of the incident on June 3, 2006, and does not even indicate whether the incident occurred at work.

The Deputy Commissioner made a factual finding that Simms had failed to meet his burden of proving a causal connection. Under Virginia law, "'If there is evidence or [a] reasonable inference that can be drawn from the evidence to support the Commission's findings, they will not be disturbed . . . on appeal, even though there is evidence in the record to support contrary findings of fact.'" Marcus v. Arlington County Bd. Of Supvrs., 15 Va. App. 544, 547-48, 425 S.E.2d 525, 528 (1993) (quoting Caskey v. Dan River Mills, Inc., 225 Va. 405, 302 S.E.2d 507 (1983)). Simms has failed to show that the inference drawn by the Deputy Commissioner was unreasonable. Therefore, this Court should not disturb the finding that there is a lack of causal connection.

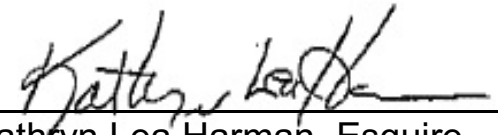
IV. STATEMENT OF THE RELIEF SOUGHT

Ruby Tuesday respectfully requests that this Court affirm the Court of Appeals decision in Simms.

V. CONCLUSION

Based on the foregoing, the Court of Appeals correctly determined Simms failed to prove that his alleged work accident arose out of his employment. The Workers' Compensation Commission correctly found that Simms failed to prove a period of temporary total disability in relation to the alleged work accident of June 3, 2006, or that his surgery of July 20, 2006 was related to the alleged work incident. Ruby Tuesday respectfully requests that this Court affirm the decision of the Court of Appeals.

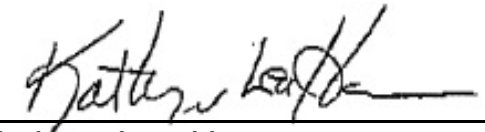
Ruby Tuesday, Inc.
By Counsel:



Kathryn Lea Harman, Esquire
(VSB No. 73724)
SEMMES, BOWEN & SEMMES
1577 Spring Hill Road, Suite 200
Vienna, VA 22182
Telephone: (703) 288-2532
Facsimile: (703) 356-6989
KHarman@semmes.com
Attorney for Employer

VI. CERTIFICATE

Pursuant to Rule 5:26(d) of the Rules of the Supreme Court of Virginia, fifteen (15) bound copies of the foregoing Brief of Appellees, and one (1) electronic copy on CD have been hand-filed in the Office of the Clerk of the Supreme Court of Virginia on the 22nd day of March, 2010, and three (3) bound copies of the foregoing Brief of Appellee and have been mailed, first class postage prepaid, to Diane C. H. McNamara, at Diane C.H. McNamara, Esquire, 8713 Plantation Lane, Manassas, Virginia 20110 the 22nd day of March, 2010 and the Virginia Trial Lawyers Association at Craig B. Davis, Emroch & Kilduff, LLP, Post Office Box 6856, Richmond, Virginia 23230 and Wesley G. Marshall, Law Offices of Wesley G. Marshall PLC, 600 Westwood Office Park, Fredericksburg, Virginia 22401.



Kathryn Lea Harman
Semmes, Bowen & Semmes
1577 Spring Hill Road, Suite 200
Vienna, Virginia 22182
(703) 288-2532