In The

Supreme Court of Virginia

RECORD NO. 091762

MATTHEW EDWARD SIMMS,

Appellant,

v.

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

Appellees.

BRIEF OF APPELLANT

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V I R G I N I A :

IN THE SUPRERME COURT

MATTHEW EDWARD SIMMS,

Appellant,

v. RECORD NO.: 091762

RUBY TUESDAY, INC.,
and

HARTFORD INSURANCE COMPANY
OF THE MIDWEST,

Appellees.

BRIEF OF APPELLANT

COMES NOW, the Appellant, Matthew Edward Simms, by counsel, and submits this Brief of Appellant pursuant to Rule 5:26 of the Rules of the Supreme Court of Virginia, and in support thereof, respectfully states as follows:

I. STATEMENT OF THE CASE

On April 16, 2007, Matthew Simms filed a Claim for Benefits alleging a June 3, 2006 injury arising out of and in the course of his employment with Ruby Tuesday, Inc., seeking temporary total disability from June 4, 2006 through November 1, 2006 and medical

expenses. The claim was denied by the Employer/Insurer ("the Employer").

This claim was heard before a deputy commissioner on September 21, 2007. The Employer stipulated to an accidental injury on June 3, 2006 while Simms was on the clock, resulting in disability from June 3, 2006 to June 8, 2006. The Employer defended the claim, inter alia on grounds that Simms participated in horseplay resulting in his injury and therefore the accident did not arise out of the employment. The main issue before the Commission was whether Simms was the innocent victim of horseplay, or whether he was a participant. The Employer did not defend the claim on the grounds that it was an assault as opposed to horseplay.

In an opinion dated October 22, 2007, the deputy commissioner concluded that Simms suffered a compensable injury by accident because he was the innocent, non-participating victim of horseplay, and awarded benefits from June 4, 2006 through June 7, 2006. The deputy commissioner denied further benefits because she found that causation after June 7, 2006 was not supported by the evidence.

Simms appealed the denial of medical and wage loss benefits after June 7, 2006. (App. 298-301) The Employer appealed findings

that Simms was an innocent, non-participating victim of horseplay and that the injury arose out of the employment. (App. 302-303)

In a March 31, 2008 opinion, the full Commission reversed the deputy's conclusion that the injury arose out of the employment based upon this Court's decision in *Hilton v. Martin*, 275 Va. 176, 654 S.E.2d 572 (2008). The Commission found the conduct of Simms's co-workers constituted horseplay, and by implication, accepted the deputy's finding that Simms was not a participant. However, the Commission found that *Hilton* "materially changed the 'innocent victim of horseplay' law" by abolishing the distinction between horseplay and assault. The Commission denied benefits because there was "no connection between the conditions under which the employer required the work to be performed and the assault by the co-workers." (App. 358-359) Simms appealed.

The Court of Appeals affirmed. In a July 28, 2009 opinion, it found that although this Court generally characterized the acts causing injury and death in *Hilton* as an "assault," that characterization did not distinguish the assault in *Hilton* from the horseplay in the present case. The Court of Appeals did not decide whether disability and medical care were related to the injury after

June 7, 2006. Simms appealed. (App. 378-381) This Court granted his Petition.

II. ASSIGNMENT OF ERRORS

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

b. The factual finding with respect to causal relationship after June 7, 2006 was based on unreasonable inferences, rather than positive, direct evidence, and was plainly wrong.

III. QUESTIONS PRESENTED

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

b. Did the Court of Appeals erroneously conclude that causation after June 7, 2006 was lacking where it was based upon unreasonable inferences rather than uncontradicted, positive, direct evidence? (Assignment b)

IV. STATEMENT OF FACTS

Matthew Simms was a twenty-two year old server working at Ruby Tuesday, Inc. when he was injured on June 3, 2006. Simms was putting an order into the microcomputer in the kitchen at a Ruby Tuesday restaurant in Manassas when three idle co-workers started

throwing ice at him. Simms was holding the checkbook where he kept customer checks in his left hand as he entered the order by touch screen into the computer with his right hand. He turned around when a piece of ice hit him in the back of the head. As he threw his left arm up to shield his face, his shoulder dislocated. The Commission's finding that Simms was the innocent victim of horseplay is an established fact of this case. (App. 358)

Testimony and a diagram drawn by witnesses at the hearing showed that the kitchen where Simms used the microcomputer was a private enclosed area. Customers could not see in, and it was separate from the public dining area and bar. Simms had not experienced prior problems with the co-workers who were throwing ice at him. He socialized with them outside of work and characterized them as friends. After the accident, one of the co-workers who threw ice apologized for not being able to get his shoulder back in place. Simms was reluctant to report the names of the co-workers who threw ice at him because he did not want to get them in trouble.

The deposition of Robert Simms, the employee's brother, was taken on August 30, 2007. He worked at Ruby Tuesday in Charlottesville from November 2000 to January 2001, and he worked

at Ruby Tuesday in Manassas Mall from 2001 to approximately March 2003. He visited the restaurant and staff thereafter. He had witnessed many instances of horseplay at Ruby Tuesday, including but not limited to ice throwing. In his experience, people threw food and ice at each other in the presence of management, and "[n]ormally it wasn't a big deal like especially if it's back in the kitchen … they'd normally just let it go unless it got way out of hand." (App. 68-69) Robert Simms stated "[I]t's just the way the culture is there in a restaurant." (App. 68) Robert Simms testified horseplay happened every day at Ruby Tuesday; there were too many instances of horseplay for him to name them all. He explained:

> It'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)

The medical evidence shows that while Simms's shoulder dislocated on multiple occasions before, there was no medical treatment prior to June 3, 2006 other than May 5, 2000 when non-surgical reduction was performed at the Emergency Room. Simms was able to work without limitation in a variety of positions, including

but not limited to working as a server for two years at Ruby Tuesday, and performing the heavy duties associated with moving office furniture after his first dislocation in May 2000. (App. 26-29, 92-94) In October 2005 Manager Craig Davis successfully put his arm back in the socket after a dislocation at work, and Simms continued to work full duty as a server at Ruby Tuesday without missing any time. However, after the June 3, 2006 accident, no one could get the arm back in the socket, Simms had to go to the hospital to get it back in the socket, and once it was restored, his arm was very sore and he did not have full use of it. On June 5, 2006, Simms was seen by Dr. Bartley Hosick, who stated:

> This certainly is a surgical problem. He likely needs a Bankart and some degree of capsular shifting. His main concern is getting back to work at this point. I explained that he would need several months off work as a server, probably three, and at this time he is not interested in taking any time off work. He does not need any mobilization as that will not help. I release him to work on Thursday to give him a couple days to get over the soreness, as he was still uncomfortable today. Any further decisions are up to the patient, but I would encourage him to consider surgical repair if he wants the problem to resolve. (App. 264)

Simms returned to work thinking his arm would resolve on its own, as it had before. But this time, he could not lift things, he could not move his shoulder around, and he could not assist with activities

at home. (App. 117-118) When he did return to work, the employer prohibited him from lifting trays, sweeping or doing other activities he used to perform prior to the accident. (App. 123-124) The condition did not resolve as Simms had hoped, and on July 20, 2006, less than seven weeks after the injury, he underwent the surgery recommended on June 5, 2006 by Dr. Hosick.

There are no office notes from Dr. Hosick after Simms was originally seen on June 5, 2006. However, the Pre-Operative History and Physical taken on July 18, 2006 reflects no change in history since Simms was last seen on June 5, 2006. (App. 274-275) On July 3, 2007, Simms consulted with Dr. Jeffrey Phillips who noted no accidents or injuries after June 3, 2006. Dr. Phillips stated that Simms sustained a twenty-one percent permanent impairment of the arm, and that "[t]he incident of 06-03-06 was an aggravating incident superimposed on his pre-existing multiple shoulder dislocations." (App. 287)

V. PRINCIPLES OF LAW AND ARGUMENT

A. The Court of Appeals erroneously ruled that *Hilton v. Martin* wiped out nearly a century of case law on horseplay.

1. Limited Application of *Hilton v. Martin*

In *Hilton v. Martin*, an employee of an ambulance company electrocuted a non-participating co-worker with charged defibrillator paddles. She died three days later. Martin was charged with involuntary manslaughter, to which he pleaded no contest, and was sentenced to prison.

Unlike the present case, *Hilton* arose out of a civil action wherein the trial court addressed the defendants' pleas in bar, seeking the dismissal of the civil claim that would have the effect of giving the estate only a workers' compensation remedy, if there were any qualified death beneficiaries. This Court reversed the trial court and remanded the case for further civil proceedings, giving the decedent's estate the broadest possible range of remedies.

Given the extraordinary facts of *Hilton*, this Court did not consider the long-accepted horseplay doctrine in workers' compensation law. The first sentence of this Court's opinion in *Hilton v. Martin* confirms that it was an assault case, not a horseplay case.

The opinion states "[t]his action to recover damages for personal injury and resulting death arose from an assault on the victim by a fellow employee 'in the course of' their mutual employment." *Hilton v. Martin*, 275 Va. 176, 654 S.E.2d at 573 (emphasis added).

This Court relied solely upon assault cases, stating:

> We have considered a number of cases involving assaults upon employees and it is unnecessary to revisit them in detail. All 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." *Richmond Newspapers v. Hazelwood*, 249 Va. 369, 373, 457 S.E.2d 56, 58 (1995) (citations omitted). That principle controls the present case. (Footnote omitted).

Since it was an established fact that *Hilton* was an assault case, the cases relied upon were relegated to a footnote at the end of the opinion. None of the cases cited involved horseplay.

Hilton, a unique case in light of the extraordinary facts, brought in a negligence forum, was not intended to extend into the workers' compensation forum to eliminate protection historically afforded to injured workers by the common-law horseplay doctrine.

In *Hilton v. Martin*, this Court did not expressly overrule ninety years of accepted law holding the innocent victim of horseplay is entitled to benefits. In matters of statutory construction, the common

law is not to be considered as altered or changed by a statute unless the legislative intent is plainly manifested. *Hannabass v.* Ryan, 164 Va. 519, 180 S.E. 416 (1935); *Hyman v.* Glover, 232 Va. 140, 348 S.E.2d 269 (1986); *Boyd v. Commonwealth*, 236 Va. 346, 374 S.E.2d 301 (1988). Similarly, if longstanding precedent is to be overruled, "it must be expressly overruled by the Supreme Court or by the General Assembly." *Bostic v. Commonwealth*, 31 Va. App. 632, 636, 525 S.E.2d 67, 67 (2000). The logical conclusion is, therefore, that *Hilton* was not intended to overrule ninety years of common law accepted in Virginia, and in most other states.

2. "Anticipated Risk of Employment"

Virtually every state in the United States compensates the innocent victim of horseplay. Protection to the innocent victim of horseplay is also afforded by Federal law, and under the Longshore Act.[1] Aside from Virginia, the only exception is Nevada, where no authority can be found one way or the other.

It is universally recognized that when people are gathered together at work, they can be expected to engage in playful acts that sometimes result in injury. Common law in Virginia and nationwide

[1] For a list of citations, see Digest at the end of this Brief.

recognizes that these playful acts are an "anticipated risk of employment," "inseparable" from the "associations and conditions of employment," and that "common employment is the motivation" for such activities. *Dublin Garment Co. v. Jones*, 2 Va. App. 165, 168, 342 S.E.2d 638, 639 (1986) *citing Park Oil Co. v. Parham*, 1 Va. App. 166, 170-71, 336 S.E.2d 531, 534 (1985); *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 472, 128 N.E. 711 (1920).

a. <u>In Virginia</u>

The common law that has evolved in Virginia over the last ninety years reflects that when an injury arises from the unilateral act of a co-worker upon a nonparticipating employee, the resulting injury is an injury by accident arising out of employment. *Dublin Garment Co. v. Jones*, 2 Va. App. 165, 342 S.E.2d 638 (1986). The "horseplay" doctrine was first applied in Virginia in *Allen v. Sloane & Co.*, 2 O.I.C. 240 (1920). In *Sloane*, it was held an employee's injury arose out of employment where a co-worker playfully came up behind her and threw an arm around her waist saying "I am going to squeeze you." The pair slipped and fell, resulting in a compensable injury to the non-participating employee.

This Court applied the horseplay doctrine in *Fox v. Bach*, 156 Va. 609, 158 S.E. 860 (1931). In *Fox*, an employee of a sandwich shop received a playful blow to the back from a customer, and died of a ruptured spleen. This Court found that the "injury arose out of and in the course of his employment…" and awarded benefits.

Fox v. Bach was cited as authority in 1946, when the Industrial Commission decided *Sandridge v. Universal Molded Products*, 28 O.I.C. 61 (1946). In *Sandridge*, the Industrial Commission (now the Workers' Compensation Commission) held a non-participating employee's injury arose out of employment where a co-worker slipped up behind her, grabbed her up and threw her over her shoulder.

In *Taylor v. Celanese Corp. of America*, 30 O.I.C. 257 (1948) the Commission held that injury arose out of employment where a worker "goosed" a fellow employee who in turn struck the non-participating claimant in the back, causing injury.

In *Patterson v. O'Sullivan Rubber Corp.*, 45 O.I.C. 184 (1963) it was held that the employee's injury arose out of employment where a co-worker playfully blocked a narrow aisle into the men's room and

threw his hip out as the non-participating claimant passed, causing the wall to collapse and resulting in injury to the claimant.

In *Hauser v. Deep Meadow Correctional Center*, 60 O.I.C. 196 (1984), it was held a non-participating claimant suffered a compensable injury when he was sitting with his feet up on a table and a co-worker seated across from him pushed his feet back as a joke, causing him to fall on the floor.

In *Park Oil Co. v. Parham*, 1 Va. App. 166, 336 S.E.2d 531 (1985) a service station employee was injured when an intoxicated friend gunned his truck, intending to scare him. The employee was pinned by the truck and seriously injured. The Court of Appeals affirmed that the incident "fits best" with the horseplay line of cases, as opposed to assault cases, and found that injuries to the innocent victim were compensable. *Id.* at 170, 336 S.E.2d at 534. The Court of Appeals also came to the same conclusion assuming for the sake of argument that the incident was an assault by application of the "actual risk test."

As illustrated by the above cases, injuries to the innocent victim of horseplay have been historically compensable in Virginia. In

Dublin Garment Co. v. Jones, 2 Va. App. 165, 342 S.E.2d 638 (1986) the Court of Appeals explained that:

> [t]he rationale of the "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 an 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 *[now 65.2- 101]*. Where, however, the injury arises from the unilateral act of a coworker upon a non-participating claimant, it is an "injury by accident" insofar as that claimant is concerned. *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).

Id. at 168, 342 S.E.2d at 639 (emphasis added).

With respect to non-participating victims of horseplay, the Court of Appeals in *Dublin* cited the full Commission opinion, which reasoned that "'[t]he unsuspecting nonparticipating claimant was injured by the unilateral act of the co-worker with common employment being the motivation for such activities,' and accordingly … the injury arose out of the employment and was compensable." *Dublin*, 2 Va. App. at 168, 342 S.E.2d at 639 (emphasis added).

The Court of Appeals of Virginia recognized in *Dublin* that:

> [i]t must be presumed that the legislature has been aware of, and acquiesced in, this interpretation. … The elementary rule of statutory interpretation is that the construction accorded a statute by public officials charged with its administration and enforcement is entitled to be given weight by the court. When it has long continued without change, the legislature will be presumed to have acquiesced therein.

Dublin, 2 Va. App. at 167, 342 S.E.2d at 639, *citing Peyton v. Williams*, 206 Va. 595, 600, 145 S.E.2d 147, 151 (1965); *Baskerville v. Saunders Oil Co.*, 1 Va. App. 188, 193, 336 S.E.2d 512, 514 (1985).

b. <u>Nationwide</u>

Until recently, the evolution of the common-law in Virginia was consistent with the law with respect to innocent victims of horseplay that evolved nationwide. According to 2 Lex K. Larson*, Larson's Workers' Compensation* § 23.02 (Matthew Bender, Rev. Ed.):

> It is now clearly established that the non-participating victim of horseplay may recover compensation. (Footnote in original omitted) The modern observer may find it hard to believe that such claims were uniformly denied in early compensation law; this can only be understood by reconstructing the narrow conception of industrial injury which colored all early interpretations of the Act. Aberrations in machines could qualify as accidents, but aberrations in fellow-employees could not. Just as malicious assaults by co-employees were ruled out as intentional and personal, so sportive assaults were

> treated as something foreign to the inherent risks of employment.

As explained in *Larson's Workers' Compensation* treatise, Justice Cardozo is generally credited with ushering in the modern rule in *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 472, 128 N.E. 711 (1920), wherein he stated

> [w]hatever 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 … The claimant was injured, not merely while he was in the factory, in touch with <u>associations and conditions inseparable from factory life</u>. The risks of such associations and conditions were <u>risks of the employment</u>. (emphasis added).

Id., § 23.02 at 23-3.

The "rationale of the horseplay cases" in Virginia as explained in *Dublin* clearly draws on the "associations and conditions inseparable from factory life" vein of thought emanating from Justice Cardozo. The facts of the Simms case, where three idle servers next to the ice bin throw ice at the only busy server in the seclusion of the kitchen are "associations and conditions inseparable from" restaurant life, exactly as contemplated by Justice Cardozo, and by the Court of Appeals of Virginia in *Dublin*.

The “associations and conditions inseparable” from work are exactly what Matt Simms’ brother Robert was referring to when he described the culture in the restaurant workplace:

> [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, joking around, laughing. And a lot of times you’ll go out drinking with people later on. You form like your own culture, your on little club, and goofing off is just part of what you do there. (App. 79)

Any server who came into the kitchen to enter an order into the microcomputer would likely have been pelted with ice by the three idle co-workers standing in close proximity, next to the ice bin, by virtue of the fact that they share “common employment,” and the “inseparable associations and conditions” that arise inextricably from the “culture” of the restaurant business. Horseplay by its very nature is impersonal, and arises from the employment.

A century ago, liability to non-participants was the “exception” to the general rule of non-liability in horseplay cases. Today, it has become the general rule that the employer is liable for injury to the innocent victim of horseplay because horseplay is an anticipated risk of employment that arises from common employment. The “exceptions” that are litigated usually concern liability to the

participant. 2 Lex K. Larson, *supra* § 23.02, at 23-3, 23-4. Thus the Court of Appeals' perception that there is some question as to the "continued viability of the horseplay doctrine" is clearly out of step with the evolution of the law in Virginia, and nationwide.

3. Error to Apply Assault Analysis to Horseplay Case

The Court of Appeals erred in finding upon their review of *Hilton* that "the continued viability of the horseplay doctrine as set forth in *Dublin* is called into serious question," (App. 374) and that under *Hilton*, the innocent victim of horseplay must prove that which is required in an assault case: that the acts were directed at him "as an employee," or that the "conditions under which the employer requires the work to be done are a contributing cause of the injury." *Hilton*, 275 Va. at 180-81, 654 S.E.2d at 574-75.

First, the innocent victim of horseplay need not prove that the acts were directed at him as an employee because, as shown above, it is historically accepted that horseplay, unlike assault, is an anticipated risk of employment. Horseplay is motivated by "common employment." It is "inseparable" from the "associations and conditions" of the work environment, and as such, arises directly out of the employment insofar as the innocent victim is concerned,

without proof of more. Assault, by contrast, is not always motivated by common employment, and therefore it is necessary to establish in assault cases that the assault was not personal in nature, but rather, that it was directed at the worker "as an employee." In essence, horseplay is impersonal, whereas assaults may be either personal or impersonal.

To require the innocent victim of horseplay to prove anything more than that he was a non-participant places a double burden on the injured worker, who has already established through his innocence, that his injury arose out of the employment. Simms prevailed in the hard-fought battle to establish that he was the innocent victim of horseplay. He was performing the duties of his employment at the time he was injured. His innocence, without more, establishes the necessary proof that his injury "arose out of" his employment, as is recognized in nearly every state, by Federal law, and under the Longshore Act.

Secondly, if *Hilton v. Martin* is misconstrued to require the innocent victim of horseplay to prove that "conditions under which the employer requires the work to be done" contributed to the injury, this

would require proof of negligence on the part of the employer.[2] However, this Court has held that workers' compensation is provided in the nature of insurance without regard to fault. *Fauver v. Bell*, 192 Va. 518, 65 S.E.2d 575 (1951). The statutory scheme of the Workers' Compensation Act is such that the injured worker is relieved of the burden of proving negligence, proximate cause, contributory negligence and assumption of the risk. In exchange, the law shelters the employer from costly actions at law by injured employees. *Whalen v. Dean Steel Co.*, 229 Va. 164, 327 S.E.2d 102 (1985). The Workers' Compensation Act is based upon a societal exchange wherein employees are provided a purely statutory form of compensation for industrial injuries. The remedy is modest, but is supposed to be relatively certain. *Roller v. Basic Constr. Co.*, 238 Va. 321, 384 S.E.2d 323 (1989). Negligence on the part of the employer or the employee does not play a part in the statutory

[2] See 2 Lex K. Larson, *supra* § 23.02, at 23-8, 23-9. "[T]o require actual knowledge and acquiescence would be to import into the coverage test the kind of personal elements – personal knowledge, personal acquiescence, personal failure to prevent recurrence – that have no place in compensation law. Cardozo's statement in the *Leonbruno* case is still good here: 'The test of liability under the statute is not the master's dereliction, whether his own or that of his representatives acting within the scope of their authority. The test of liability is the relation of the service to the injury, of the employment to the risk.'"

formula for workers' compensation. Negligence on the part of the employer with regard to providing a safe work environment is not a basis for an award of workers' compensation. *Shumate v. Marion Diner*, 70 O.I.C. 100 (1991). If the injured worker must go to the trouble of proving negligence, he will find a more lucrative forum to proceed in.

4. <u>Public Policy</u>

The effect of affirming the Court of Appeals' opinion in the present case is contrary to public policy. It has long been recognized that the Virginia Workers' Compensation Act is highly remedial and should be liberally construed to provide coverage to injured workers. *Barker v. Appalachian Power Co.*, 209 Va. 162, 163 S.E.2d 311 (1968). The Court of Appeals' decision excludes an entire class of injured employees who sustain injuries through no fault or responsibility of their own while they are working. They are left with only the remedy of a civil suit, which can be a poor remedy for a variety of reasons in many cases. The burden of wage loss and medical expenses resulting from work related injury then falls upon the injured worker, who is least able to bear it.

If the innocent victim of horseplay cannot recover, protection will also be denied to participants in horseplay, who have also historically recovered, and rightfully should recover, where the employer condones the activity. *Gragano v. Virginia Opera Ass'n*, 77 O.W.C. 127 (1998), *Jackness v. National Automobile Dealers, Corp.*, 60 O.I.C. 224 (1981), *Mabe v. Visador Co.*, 59 O.I.C. 178 (1980), *Gobble v. Booher Auto Auction, Inc.*, 59 O.I.C. 108 (1980). The mainstream view nationwide supports protection, even to participants.

> The current tendency is to treat the question, when an instigator is involved, as a primarily course of employment rather than "arising-out-of-employment" problem; thus, minor acts of horseplay do not automatically constitute departures from employment but may here, as in other fields, be found insubstantial.

2 Lex K. Larson*, supra* § 23.01, at 23-2.

If innocent victims of horseplay, and those participants whose employers condone horseplay cannot recover under the Workers' Compensation Act, the *quid pro quo* societal exchange that protects employees <u>and shelters employers</u> will be eviscerated. The floodgates will open for negligence suits against employers. Inevitably, someone will approach the legislature to correct the imbalance.

It will not be representatives of employees that will approach the legislature, as they will profit from the additional benefit of recovering pain and suffering, full wage loss, and treatment with their doctor of choice in those cases which can be brought in the negligence forum. It will be representatives of employers, already weakened in a crippling economy, that will prevail upon the legislature to provide shelter from expensive tort claims brought by the innocent victims of horseplay as well as participants, who are injured as a result of negligent supervision in the workplace, negligent hiring and retention, negligent management of workplace injuries, and any other negligent acts the employer could be guilty of. It can further be anticipated that some businesses as well as individuals already struggling in the present economy, will go under if this Court denies protection to the innocent victim of horseplay in this case.

This is exactly the type of case and scenario workers' compensation was meant to cover, in Virginia, and nationwide. The Court of Appeals' misinterpretation of *Hilton v. Martin* clearly constitutes devolution, rather than evolution of the law, throwing back to the antiquated pre-Cardozo era when sportive assaults were considered foreign to the inherent risks of employment.

In *Hilton v. Martin*, this Court neither expressed an intent to "materially change the 'innocent victim of horseplay' law," (App. 358) nor is any reason for such change express or implied. The state of the law with respect to the innocent victim of horseplay is stable,[3] nationwide, and any change upsets the *quid pro quo* societal exchange that has been forged over the past century.

Other states have looked to Virginia as a model of stability to follow in reevaluating the wisdom of their own outdated laws. In *Coleman v. Armour Swift-Eckrich*, 130 P.3d 111 (Kan. 2006), the Supreme Court of Kansas cited Virginia's *Dublin Garment Co. v. Jones*, 2 Va. App. at 165, when it expressly abandoned outdated law in favor of the current view that protects the innocent victim of horseplay. From a public policy standpoint, it must be recognized that destabilization of the *quid pro quo* societal exchange in Virginia, could have a ripple effect nationwide.

It is therefore incumbent upon this Court to correct this problem now, rather than to leave it for the legislature, which acquiesced to the law as set forth in *Dublin*, to remedy it in the wake of destruction.

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[3] 2 Lex K. Larson, *supra* § 23.02, at 23-4.

5. <u>Alternative</u>

In the alternative, should it be found that *Hilton* is controlling, it must still be concluded that Simms's injury arose out of employment. In *Hilton*, the assault was not directed at the employee because of, or in connection with, her employment. The assault was purely personal. This Court found, "[i]f 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 v. Martin*, 275 Va. 176, 180-181, 654 S.E.2d 572, 574 (*citing Richmond Newspapers v. Hazelwood*, 249 Va. at 373, 457 S.E.2d at 58 (1995)). It concluded, "Martin's assault had no relationship with Courtney's status as an employee." *Id.* at 181, 654 S.E.2d at 575.

In the present case, the Court of Appeals failed to analyze the facts correctly. The Court of Appeals' conclusion that "the commission could properly find that the incident was personal in nature to the claimant, and was not directed at him in his status as an employee or because of employment," (App. 374) was in error and not supported by the facts. There was no credible evidence in the record to establish that the co-workers' horseplay in this case was

directed at Simms for any reason other than his status as an employee working in the kitchen. (App. 34, 62-70, 71-72, 74-77, 78-79) The hearing record proved that employees engaged in a "culture" of playful misconduct that was expected in this workplace. It was a risk unique to this workplace, not one independent of the relationship between the employee and the employer.

The Court of Appeals erred in adopting the Commission's conclusion that, "there is no connection between the conditions under which the employer required the work to be performed and the assault by the co-workers." Neither the Commission nor the Court of Appeals analyzed this case under the theory that the conduct of employees in this workplace was peculiar and unique to it and constituted an actual risk of the employment to which Simms was exposed.

The Court of Appeals painted the import of *Hilton* with too broad a brush. The Court held, "we conclude *Hilton* requires that we find claimant, who was an innocent victim of horseplay, did not sustain an injury that arises out of employment." (App. 374) But in *Hilton*, this Court did not eliminate workplace horseplay from the protection of the Workers' Compensation Act. The Court of Appeals overstated the

breadth of *Hilton*, which was a unique case in light of the extraordinary facts. As a matter of policy, innocent victims of work-related horseplay, directed at them in connection with their status as employees, should still be covered under the Workers' Compensation Act even if *Hilton* is controlling. The Court of Appeals and the Commission erred in failing to consider whether horseplay was so endemic to the Simms's workplace that his resulting injury arose out of the employment.

Should it be found that the existing facts do not support this conclusion, it is the Petitioner's request that this matter be remanded for further evidence on the conditions of employment at Ruby Tuesday. Full evidence was not offered on that issue at hearing because Simms was proceeding on the theory that he was the innocent victim of horseplay, and the condition of horseplay as part of the everyday culture in the work environment was not relevant at the time the case was heard, but has become relevant since then because of this unexpected misinterpretation of the law. (App. 84, 204-205)

B. The Court of Appeals erred in affirming the Workers' Compensation Commission's conclusion that causation after June 7, 2006 was lacking where it was based upon unreasonable inferences rather than uncontradicted, positive, direct evidence.

The Court of Appeals erred as a matter of law in adopting the Commission's conclusion with respect to causation after June 7, 2006. The aggravation or acceleration of a pre-existing condition by a work related accident is compensable under the Virginia Workers' Compensation Act. *Ohio Valley Construction Co. v. Jackson*, 230 Va. 56, 58, 334 S.E.2d 554, 555 (1985). The deputy commissioner inferred that proof of causation after June 7, 2006 was lacking because "Dr. Hosick's records fail to reflect that the surgery was causally related to the June 3, 2006 dislocation or that the June 3, 2006 dislocation was in any manner the material aggravation of a pre-existing condition resulting in the necessity for the surgery and its resulting disability." (App. 296) A finding of fact is binding on appeal unless plainly wrong. *Id.* at 59, 334 S.E.2d at 556. The deputy's finding is plainly wrong because Dr. Phillips positively and directly states in his July 3, 2007 report that "[t]he incident of 06-03-06 was an aggravating incident superimposed on his pre-existing multiple shoulder dislocations." (App. 287)

Dr. Phillips' opinion that the June 3, 2006 accident aggravated Simms' pre-existing condition is supported by the evidence. The evidence shows that there was no medical treatment for six years after the first dislocation in May 2000, and that Simms was able to work without limitation in a variety of positions, including but not limited to working as a server for two years at Ruby Tuesday, and performing the heavy duties associated with moving office furniture after his first dislocation in May 2000. (App. 26-29, 91-94) However, after the June 3, 2006 injury, surgery was necessary despite Simms' best efforts to resume regular activities because this time he found he could not lift things, he could not move his shoulder around, and he could not assist with activities around the home. (App. 117-118) Even the Employer prohibited Simms from heavy lifting, carrying trays of food or drink, changing heavy soda boxes, sweeping or working more than a couple hours per shift after the June 3, 2006 accident. (App. 123-124) Therefore the evidence supports the conclusion that Simms' pre-existing condition was materially aggravated by the accident of June 3, 2006. Simms's claim for three months of disability after surgery is consistent with Dr. Hosick's projection on June 5, 2006. (App. 264)

The Commission may not arbitrarily disregard uncontradicted evidence of an unimpeached witness that is not inherently incredible and not inconsistent with facts in the record. *Hankerson v. Moody*, 229 Va. 270, 274, 329 S.E.2d 791, 794 (1985) (citations omitted). Therefore, the uncontradicted opinion of Dr. Phillips may not be arbitrarily disregarded. Factual findings are binding on appeal only when there is a conflict in the evidence. *Morris v. Pulaski Veneer Corp.*, 183 Va. 748, 33 S.E.2d 190 (1945). Where there is "no conflict in the evidence, the question of sufficiency thereof is one of law." *VEPCO v. Kremposky*, 227 Va. 265, 315 S.E.2d 231 (1984) *citing City of Norfolk v. Bennett*, 205 Va. 877, 880, 140 S.E.2d 655, 657 (1965). Where there is no credible evidence to support the Commission's findings of fact, the Court is not bound by such findings. *Goodyear Tire & Rubber Co. v. Watson*, 219 Va. 830, 252 S.E.2d 310 (1979).

While it is permissible to draw inferences, such inferences must be reasonable. *Caskey v. Dan River Mills, Inc.*, 225 Va. 405, 411, 302 S.E.2d 507, 510 (1983); see *Eccon Construction Co. v. Lucas*, 221 Va. 786, 790, 273 S.E.2d 797, 799 (1981). The deputy inferred from the <u>absence</u> of any statement of causation in Dr. Hosick's

records that there is no causal relationship after June 7, 2006. (App. 296) However, the deputy overlooked the fact that Dr. Phillips' report provides positive, direct, and uncontradicted evidence on this issue. Furthermore, the Pre-Operative History and Physical performed on July 18, 2006 reflected no change in history. (App. 274-275) The deputy commissioner's finding of no causal connection after June 7, 2006 is therefore based on unreasonable inferences that conflict with the uncontradicted, positive and direct medical evidence.

VI. CONCLUSION

The Court of Appeals erroneously concluded that "the continued viability of the horseplay doctrine as set forth in *Dublin* is called into serious question" by this Court's decision in *Hilton v. Martin*. (App. 374) The scope of *Hilton* is limited to the extraordinary circumstances associated with that case. The *quid pro quo* of the Workers' Compensation Act established by longstanding common-law precedent (*Fox v. Bach*) cannot be presumed to be implicitly overruled in a negligence forum. No intent to do so was expressed by this Court, and no reason for change is expressed or implied.

Nearly every state in the nation protects the innocent victim of horseplay, as does Federal law and the Longshore Act. The change

contemplated by the Court of Appeals is out of step with history, and the rest of the nation. It places a double burden on the innocent victim of horseplay to prove that the accident arose out of employment. It brings negligence into the equation, when negligence has no place in the statutory scheme of workers' compensation. It is contrary to the remedial nature of the Workers' Compensation Act.

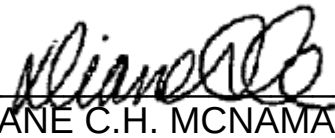
Denial of protection to this class of people upsets the *quid pro quo* societal exchange embodied in the Act. It can be anticipated that injured workers will bring costly negligence claims against their employers. Representatives of employers will eventually prevail upon the legislature to provide the shelter that the Workers' Compensation Act has provided for nearly a century if this case does not clarify the scope of *Hilton v. Martin*, and reaffirm the vitality of the horseplay doctrine in Virginia. This Court should therefore correct the Court of Appeals' misapplication of *Hilton* to immediately restore the equilibrium, particularly in light of legislative acquiescence to the common law as expressed in *Dublin*.

The factual finding that there is no causal relationship between treatment and disability after June 7, 2006 was based on unreasonable inferences, and is plainly wrong since it is not

supported by credible evidence. The uncontradicted, positive and direct evidence shows that Simms' pre-existing condition was materially aggravated by the accident of June 3, 2006, and that the treatment and associated disability thereafter are the responsibility of the workers' compensation carrier.

WHEREFORE, it is respectfully requested that the opinion of the Court of Appeals be reversed, and that compensation be awarded to Matthew Simms beginning June 4, 2006 through June 9, 2006, and beginning June 14, 2006 until November 1, 2006, with medical expenses for as long as necessary.

Respectfully Submitted
Matthew Edward Simms
By Counsel



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VII. DIGEST OF CASES

FEDERAL: Federal Employees Compensation Act (5 USC §§ 8101 *et.seq.*) covers all federal civilian employees, whether or not the employee is the initiator or an "innocent victim." *Eric J. Koke*, 43 ECAB 638 (1992); *Barry v. Himmelstein*, 42 ECAB 423 (1991); *Morris Preminger*, 18 ECAB 341 (1967).

1. ***ALBAMA***: *Gilbert v. Tyson's Foods, Inc.*, 782 S.2d 786 (Ala. Civ. App., 1999). Employee struck in back in incident that may have been either horseplay or harassment. There was no evidence to support a finding that the injured worker was voluntarily engaged in horseplay at the time of the injury, and benefits were therefore awarded.

2. ***ALASKA***: *Employer's Liability Assurance Corp. v. Dull*, 416 P2d 821 (Alaska 1996). Police officer was killed when fellow officer drew and fired his pistol. It was common for officers to engage in "fake draw practice." Officer did not intend to draw and fire when decedent motioned to him as if to draw his pistol. Held that employment exposed decedent to the risk, and death was compensable, citing *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 552 (1920).

3. ***ARIZONA***: *City Products Corp. v. Industrial Commission*, 533 P.2d 573, 574, 23 Ariz. App. 362, 363 (Ariz. App. 1975). Recognized that non-participating victim of horseplay not precluded from compensability.

Jaimes v. Industrial Comm'n of Arizona, 787 P.2d 1103, 1107, 163 Ariz. 307, 311 (1990). "…claimant did not substantially deviate from the course of his employment and consequently … his injury is compensable even though the result of horseplay."

4. ***ARKANSAS***: Arkansas Code 11-9-102(B)(i) provides that injuries to innocent victims of horseplay shall be considered compensable injuries.

Southern Cotton Oil Division v. Childress, 377 S.W. 2d 167, 237 Ark. 909 (1964). Court specifically overruled prior cases and held that injuries received in assaults, sportive or malicious, are not by reason

of such fact alone beyond the realm of compensability. Injury to participant in horseplay held to be compensable.

5. ***CALIFORNIA***: *Oliva v. Heath*, 41 Cal. Reptr. 2d 613, 616, 35 Cal.App. 4th 926, 932 (Cal.App. 4 Dist., 1995). "…injuries to a non-participating employee resulting from a co-worker's horseplay are compensable…."

6. ***COLORADO***: *Lori's Family Dining, Inc., v. Industrial Claim Appeals Office of State of Colorado*, 907 P.2d 715, 718 (Colo. App. 1995). "Under the modern view, horseplay that has become a regular incident of employment, as distinguished from an isolated act, may constitute an insubstantial deviation from employment and may, therefore, not preclude an award of compensation to a participant who is injured during the conduct."

Miller v. Denver Post, Inc., 322 P.2d 661, 665 (Colo., 1958) (Frantz, J., dissenting) *citing Industrial Commission v. Pueblo Auto Co.*, 71 Colo. 424, 207 P. 479, 23 A.L.R. 348. "An injury may be an 'accidental injury' within the meaning of the Act, although resulting from horseplay of co-employees, from the viewpoint of the employer and the injured employee."

7. ***CONNECTICUT***: *Mascika v. Conn. Tool*, 109 Conn. 473 (1929). Claimant was hit by a stick playfully thrown by a co-worker. Innocent victim of horseplay injured by other employees was entitled to compensation.

8. ***DELAWARE***: *General Foods Corp. v. Twilley*, 341 A2d. 711, 712 (Del. Supr., 1975). "A non-participating victim of 'horseplay' may recover compensation."

9. ***DISTRICT OF COLUMBIA (AND LONGSHORE ACT)***: *Evening Star Newspaper v. Kemp*, 533 F.2d 1224 (D.C. Cir. 1976). Petitioner's death caused by fellow employee's accidental discharge of a pistol that petitioner carried for protection while delivering in potentially dangerous neighborhoods was compensable. Accident occurred during an enforced lull in employment.

10. ***FLORIDA***: *Ivy H. Smith Co. v. Kates*, 395 So.2d 263, 264 (Fla.App. 1 Dist., 1981). "Florida allows compensation to instigators and participants as well as victims of horseplay depending on the circumstances…."

11. ***GEORGIA***: *American Mutual Liability Insurance Co. v. Benford*, 77 Ga.App. 93, 47 S.E.2d 673 (1948).

12. ***HAWAII***: *Solaria v. KSL Grand Wailea Resort*, AB 2000-202 (7-99-03551)(2001) *citing* 2 Larson WC Law Sec. 23.02 (2001).

13. ***IDAHO***: "In *Colson v. Steele*, 73 Idaho 348, 252 P.2d 1049 (1953), the Court refused to follow those jurisdictions which had created an automatic exclusion for accidents resulting from on-the-job horseplay. The worker, who was injured by a ricocheting bullet while rabbit shooting during lunchtime, was awarded compensation…" *Clark v. Daniel Morine Construction Co.,* 98 Idaho 114, 121, 559 P.2d 293, 300 (Idaho 1977) (Bistline, J., dissenting).

14. ***ILLINOIS***: *Murray v. Industrial Commn. of Illinois*, 516 N.E.2d 1039, 1041, 163 Ill.App. 3d 841, 843 (Ill.App. 3 Dist., 1987). "Illinois permits the non-participating victim of horseplay to recover workers' compensation benefits."

15. ***INDIANA***: *Pepka Spring Co. v. Jones*, 371 N.E.2d 389, 391, 175 Ind.App. 285, 288 (Ind.App. 2 Dist., 1978). "…injuries resulting from horseplay are caused by the employment so long as the injured person was an innocent victim." *See also* White, J., dissenting, *id.* at 393, 175 Ind.App. at 291. "Horseplay cases and fighting cases have in common the rule that the injured workman cannot recover compensation unless he is an innocent victim."

16. ***IOWA***: *Wittmer v. Dexter Mfg.*, 204 Iowa 180, 214 N.W. 700 (1927). Race to time clock not compensable because of employee's participation. *Vegors v. Xenia Rural Water Dist.*, File No. 5018220 (March 28, 2008). "Generally, non-participating victims of horseplay will be compensated. Lawyer & Higgs Iowa Practice, Workers' Compensation, sections 6-8, page 59 (2008)."

17. ***KANSAS***: *Coleman v. Armour Swift-Eckrich*, 130 P.3d 111 (Kan. 2006). The Supreme Court of Kansas reevaluated its horseplay rule, and adopted, for the first time, the modern rule that injuries to a non-participating victim of horseplay are compensable. Virginia's *Dublin Garment Co. v. Jones*, 2 Va. App. 165, 342 S.E.2d 638 (1986) was among the nationwide precedents relied upon in arriving at the decision to abandon the outdated rule that did not afford protection to the innocent victim of horseplay.

18. ***KENTUCKY***: *Hayes Freight Lines, Inc. v. Burns*, 290 S.W.2d 836, 838 (Ky. 1956). Recognized that the innocent victim of horseplay is entitled to compensation.

19. ***LOUISIANA***: *Regan v. Eunice Superette, Inc.*, 2004-227 (La.App. 3 Cir. 9/29/04), 884 So.2d 1209, *writ denied*, 894 So.2d 1145 (La. 2005). Unsuspecting claimant was injured when a co-worker, engaged in horseplay, unexpectedly slapped him. Since claimant was not engaged in horseplay when injured, his injury was compensable.

20. ***MAINE***: *Easler v. Dodge*, 1999 ME 140, 738 A.2d 837. Co-worker pulled a chair away from under another co-worker as she sat down for lunch. This was held to be an insubstantial deviation that did not cause the injuries to be sustained outside the course and scope of employment. Tort action accordingly barred.

21. ***MARYLAND***: *County Comm'rs of Anne Arundel County v. Cole*, 206 A.2d 553, 555, 237 Md. 362, 365 (Md., 1965). Even instigators of horseplay may be covered because "minor acts of horseplay do not automatically constitute 'departure' from employment if the acts are found to be insubstantial. ..."

22. ***MASSACHUSETTES***: *Mailloux' Case*, 105 N.E.2d 222, 223, 328, Mass. 592, 594 (Mass., 1952). Employee injured while changing a 500-pound flywheel as a joke on the maintenance man, who had left to get a crane to change it. Recognized that compensability is afforded to the non-participating employee injured by the horseplay of others as an exception to the rule, stating "This is not a case where a non-participating employee is injured by the 'fooling' or 'horseplay' of others…."

23. ***MICHIGAN***: *Petrie v. General Motors Corp.,* 466 N.W.2d 714, 716, 187 Mich.App., 198, 202 (1991). "…minor acts of horseplay do not automatically constitute departures from employment but may here, as in other fields, be found insubstantial."

24. ***MINNESOTA***: *Meintsma v. Loram Maintenance of Way, Inc.*, No. A03-416 (MN 7/29/2004)(MN. 2004) *citing Walsh v. Chas. Olson & Sons, Inc.*, 285 Minn. 260, 262 172 N.W.2d 745, 747 (1969), more fully cited here. Recognized "that [horseplay] and resulting injuries are incidental to modern-day employment and thus consistent with the policy of the compensation act, designed as it is to shift the burden of work injuries to the cost of industrial production as well as to eliminate the concept of fault and common-law defenses." Therefore injuries from horseplay are compensable under the Workers' Compensation Act.

McKenzie v. Railway Express Agency, Inc., 205 Minn. 231, 285 N.W. 529 (1939).

25. ***MISSISSIPPI***: *Joe N. Miles & Sons v. Myatt*, 215 Miss. 589, 61 So.2d 390 (1952). Compensation awarded where friend bear-hugged claimant, who tripped and broke his leg.

26. ***MISSOURI***: *Peet v. Garner Oil Co.*, 492 S.W.2d 103 (Mo.App., 1973) held that horseplay became an incident of employment and, therefore, a risk or hazard thereof, citing *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 552 (1920). *See also McMillan v. Payless Cashways, Inc.*, 897 S.W.2d 661 (Mo.App.W.D., 1995).

27. ***MONTANA***: *Richardson v. J. Neils Lumber Co.*, 341 P.2d 900, 904,136 Mont. 601, 608 (1959). Employee's foot was crushed while he was riding conveyor belt back to his work-station during lull in employment. The claim was held compensable because "[c]laimant was subjected to the actual risk which injured him. The risks inherent in this employment were not risks common to people generally. That the injury occurred 'in the course of' the employment strengthens the presumption that it 'arose out of' the employment. Moreover, where there is doubt it shall be resolved in favor of the injured workman or

his dependent family." Citing *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 552 (1920).

28. ***NEBRASKA***: *Varela v. Fisher Roofing Co., Inc.*, 572 N.W.2d 780, 781, 253 Neb. 667 at 667 (Neb., 1998). Participants in horseplay are even covered. "Injuries resulting from horseplay may be within the scope of employment; such injuries are within the scope of employment and compensable if (1) the deviation is insubstantial and (2) the deviation does not measurably detract from the work."

29. ***NEVADA***: No authority found, one way or the other.

30. ***NEW HAMPSHIRE***: *Bernier v. Greenville Mills, Inc.*, 93 N.H. 165, 37 A.2d 5 (1944).

31. ***NEW JERSEY***: N.J.S.A. 34:15-7.1 provides that accident resulting in injury to a non-participating employee as a result of horseplay by another employee shall be construed to arise out of the employment, and shall be compensable.

Diaz v. Newark Indus. Spraying, Inc., 35 N.J. 588, 590, 174 A2d 478, 479 (1961) citing *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 552 (1920). This "case requires the application of a realistic view of reasonable human reactions to working conditions and associations with people encountered in the course of employment. … An employee is not an automaton, and, even when he is highly efficient, he will to some extent deviate from the uninterrupted performance of his work."

32. ***NEW MEXICO***: *Woods v. Asaplundh Tree Expert Co.*, 114 N.M. 162, 836 P.2d 81 (N.M. App., 1992), citing *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711, 13 A.L.R. 552 (1920). Court recognized both the New York Rule and the course of employment tests in determining compensability where injured worker participated, from which it can be inferred non-participants are protected by workers' compensation.

33. ***NEW YORK***: *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711 (1920). *Kotlarich v. Inc. Village of Greenwood Lake*, 476 NYS 2d 23, 101 A.D.2d 673 (N.Y.A.D. 3 Dept., 1984).

"It is well settled that frivolous activities or horseplay 'although involving intentional acts, are natural diversions between co-employees during lulls in work activities and injuries sustained during them are compensable [under the provisions of the Workers' Compensation Law] as an incident of the work.'" *Briger v. Toys R Us*, 653 N.Y.S.2d 199, 200, 236 A.D.2d 683 at 683 (N.Y.A.D. 3 Dept., 1997), citing *Christey v. Gelyon*, 88 A.D.2d 769, 770, 451 N.Y.S.2d 947, 948 (N.Y.A.D. 4 Dept., 1982).

34. ***NORTH CAROLINA***: *Chambers v. Union Oil Co.*, 199 N.C. 28, 153 S.E. 594 (1930). Where the injured employee did not participate in the sportive acts of his fellow employee, the injury is compensable.

35. ***NORTH DAKOTA***: *Mitchell v. Sanborn*, 536 N.W.2d 678 (N.D., 1995) cites Larson for the proposition that even the instigator of horseplay may be entitled to benefits for injuries incurred in horseplay if the instigator's conduct does not amount to a "substantial deviation" from employment. Suit barred by exclusivity provision of Workers' Compensation Act where fellow officer bumped claimant's knees from behind.

36. ***OHIO***: *Saldana v. Erickson Landscaping & Constr.*, 2005 Ohio 142 at 8 (OH 1/14/2005), 2005. "…two general requirements must be met for an injury resulting from 'horseplay' to be compensable. First, the claimant must not have instigated the horseplay." *See also Caygill v. Jablonski*, 78 Ohio App.3d 807, 817, 605 N.E.2d 1352, 1357-58 (Ohio App. 6 Dist., 1992).

37. ***OKLAHOMA***: *Darco Transp. v. Dulen*, 922 P.2d 591, 599 (Okla., 1996). "…where a worker is injured during a prank or horseplay in which the worker did not actively participate, the injury is deemed to have arisen out of the employment so as to be compensable. *J.C. Hamilton Co. v. Bickel*, 174 Okla. 32, 49 P.2d 1065 (1935)."

38. ***OREGON***: *State Assoc. Ins. Fund v. Noffsinger*, 723 P.2d. 358, 364, 80 Or.App. 640, 649 (Or.App. 1986). "The majority rule in the Unites States is that a non-participating victim who suffers an injury at the hands of his fellow employee's horseplay is entitled to compensation. 1A Larson, Workmen's Compensation Law 5-159—5-163, § 23.10 (1985)."

Liberty Northwest Insurance Corp. v. Johnson, 142 Or.App. 21, 919 P.2d 529 (1996). Claimant's playful remark precipitated playful attack. Injury held to be compesable.

Kammerer v. United Parcel Service, 136 Or. App. 200, 901 P.2d 860 (1995). Innocent victim of horseplay receives compensation.

39. ***PENNSYLVANIA***: *Sysco Food v. W.C.A.B. (Sebastiano)*, 940 A.2d 1270 (Pa.Commw. Ct. 2008).

Sinko v. Bethlehem Steel Co., 104 Pa.Super. 357, 159 A. 230 (1932).

40. ***RHODE ISLAND***: *Carvalho v. Decorative Fabrics, Co.*, 366 A.2d 157, 159-160, 117 R.I. 231, 235 (R.I., 1976). Claimant was injured when co-worker was playfully removing lint from claimant's clothing. "In the case of the victim who does not participate in the 'horseplay' and is innocent of any wrongful conduct, we need no extended justification to hold that the injuries received are compensable." Case remanded for additional findings as to whether claimant was an innocent victim of horseplay. Citing *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711 (1920).

41. ***SOUTH CAROLINA***: *Floyd v. City of Charleston*, 287 S.C. 474, 478, 339 S.E.2d 166, 168 (S.C. App., 1985). "Our Supreme Court has sustained an award of compensation to an innocent victim of horseplay i.e. to one who was 'engaged in the performance of his duties and had not departed from them in the slightest when the apparently playful [act] of his fellow employee resulted in the fall and injury.'"

42. ***SOUTH DAKOTA***: *Fair v. Nash Finch Co.*, 728 N.W.2d 623, 631, 2007 SD 16 (S.D., 2007). Even the participant in horseplay may sometimes recover because "…when an employee engages in minor acts of horseplay it does not 'automatically constitute departures from employment, but may, as here, as in other fields, be found insubstantial.'"

43. ***TENNESSEE***: *Borden Mills v. McGaha*, 161 Tenn. 376, 32 S/W.2d 1039 (1930). Claimant, sitting on a box, pushed by co-worker, in fun, recovered compensation.

44. ***TEXAS***: *Texas Ind. Ins. Co. v. Dunlap*, 685 S.W.2d 664 (Tex.App. – Beaumont 9th Dist. 1934). "It is the law of this state that an employee is entitled to compensation for an injury received in horseplay where he does not willingly participate therein."

45. ***UTAH***: *Prows v. Industrial Commission of Utah*, 610 P.2d 1362 (Utah, 1980). Utah allows compensation even to participants.

Stroud v. Industrial Commission, 2 Utah 2d 270, 274, 272 P.2d 187, 190 (1954). "To hold that Stroud (deceased), during the waiting time, must do only those things which would promote his employer's business or be held to have stepped outside of his employment would in effect, overrule the accepted doctrine of the so-called 'horseplay cases…."

46. ***VERMONT***: *Clodgo v. Rentavision, Inc.*, 701 A.2d 1044, 166 Vt. 548 (Vt., 1997).

47. ***VIRGINIA***: *Simms v. Ruby Tuesday*, 54 Va. App. 388, 679 S.E.2d 555 (2008). Appeal pending.

48. ***WASHINGTON***: *In re Vince Polmanteer*, BIIA Docket No. 88,0362 (1989); *In re Thomas Rowe*, BIIA Docket No. 43,694 (1974). "A worker injured as a result of friendly horseplay may be entitled to workers' compensation benefits. Horseplay is typically not deemed an unreasonable deviation from the course of employment to destroy entitlement to benefits."

Tilly v. Department of Labor and Industries, 324 P.2d 432, 52 Wn.2d 148 (W*ash., 1958).*

49. ***WEST VIRGINIA***: *Sizemore v. State Workmen's Compensation Comr.,* 235 S.E.2d 473, 474, 160 W.Va. 407, 410 (W.Va., 1977). Claimant sustained neck injuries when co-worker playfully hit him on the hard hat with a hammer handle. Co-worker termed it as a friendly prank. Court held incident was not an assault; it was horseplay. "The more enlightened view is that an innocent victim of a horseplay incident is entitled to obtain compensation for his injuries." Compensation awarded. Citing *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711 (1920).

50. ***WISCONSIN***: *Bruns Volkswagen, Inc. v. Dept. of Industry, Labor and Human Relations*, 328 N.W.2d 886, 110 Wis.2d 886, 110 Wis.2d 319 (Wis.App., 1982). Protection extends even to the participant in horseplay.

51. ***WYOMING***: *WCD v. Espinoza*, 924 P.2d 979 (1996). Citing *Leonbruno v. Champlain Silk Mills*, 229 N.Y. 470, 128 N.E. 711 (1920).

VIII. 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 Brief of Appellant and Appendix have been hand filed in the Office of the Clerk of the Supreme Court of Virginia on the 23rd day of February, 2010, and three (3) copies of the foregoing Brief of Appellant and Appendix 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 23rd day of February 2010.

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REQUESTS ORAL ARGUMENT.

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