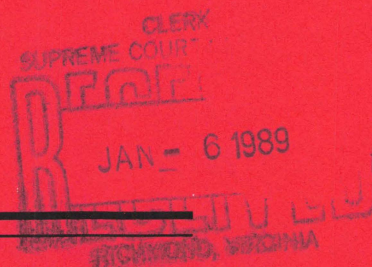


238 Va 196



IN THE

Supreme Court of Virginia

AT RICHMOND

RECORD NO. 871390

ROYCE L. PAINTER, JR.,

Appellant,

v.

DAVID L. SIMMONS,

Appellee.

APPENDIX

F. Guthrie Gordon, III
Janice L. Redinger
GORDON & WYATT
416 Park Street
Charlottesville, Virginia 22901
(804) 296-4130

Counsel for Appellant

TABLE OF CONTENTS

	<u>Appendix Page</u>
Motion for Judgment filed 7/21/87	1
Defendant's Memorandum in Support of Plea in Bar dated 9/2/87	3
Plaintiff's Memorandum in Opposition to Plea in Bar dated 9/4/87	14
Stipulation filed 9/9/87	16
Final Order entered 9/17/87	18
Assignment of Error	20

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF STAUNTON

ROYCE L. PAINTER, JR.,

Plaintiff,

v.

DAVID L. SIMMONS,
818 Fisher Circle
Staunton, Virginia 24401

Serve: United States Fidelity and Guaranty Company
A. James Kauffman, Registered Agent
700 East Main Street
P. O. Box 1-P
Richmond, Virginia 23202

Defendant

MOTION FOR JUDGMENT

TO THE HONORABLE JUDGE OF SAID COURT:

Now comes your Plaintiff, Royce L. Painter, Jr., by counsel,
and represents unto the Court as follows:

- 1) The parties hereto are over the age of eighteen (18)
years and citizens of Virginia.
- 2) On or about March 11, 1986, your Plaintiff was a
pedestrian along an alleyway in the City of Staunton, Virginia.
- 3) At the same time and place, the Defendant was operating
a motor vehicle in a reckless and negligent manner and struck
your Plaintiff, causing him severe and permanent personal injury.
- 4) The Defendant was negligent in the following regards:
 - A) Failure to keep a proper lookout;
 - B) Driving at an excessive rate of speed;
 - C) Reckless driving;
 - D) Improper driving.


5) As a direct and proximate result of the negligence of the Defendant as detailed above, your Plaintiff has suffered severe and permanent personal injury, inconvenience, pain and suffering, hospital, medical and related bills, wage loss, and other grievous losses.

6) As a direct and proximate result of the negligence of the Defendant as detailed above, your Plaintiff will in the future suffer severe and permanent personal injury, inconvenience, pain and suffering, hospital, medical and related bills, wage loss, and other grievous losses.

WHEREFORE, your Plaintiff prays for judgment against the Defendant in the amount of One Hundred Fifty Thousand Dollars (\$150,000.00) in that the negligence of the Defendant proximately caused the injuries and suffering of your Plaintiff as detailed above. And your Plaintiff further prays for such other and further relief as may be appropriate including attorney's fees, costs and interest.

ROYCE L. PAINTER, JR.

By Counsel


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Gordon & Wyatt
416 Park Street
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Filed in the Clerk's office the 21 day of July, 1987
WRIT TAX \$ 25.00 TESTE:
FEE 50.00 _____, CLERK
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LAW LIBRARY 2.00 James O. Whitton D.C.
TOTAL PAID \$ 77.00

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF STAUNTON

ROYCE L. PAINTER, JR.,
Plaintiff

vs.

DEFENDANT'S MEMORANDUM IN
SUPPORT OF PLEA IN BAR

DAVID L. SIMMONS,
Defendant

STATEMENT OF FACTS

This case arises out of an accident of March 11, 1986 on a roadway known as VanFossen Lane in the City of Staunton. Essentially, at the time of the accident, the plaintiff was walking north on VanFossen Lane, and the defendant was operating an automobile in the same direction. Although the specific facts relating to the manner in which the accident occurred are disputed, it is undisputed that the plaintiff was struck by the automobile operated by the defendant.

VanFossen Lane is not a part of the public street system of the City of Staunton. Rather, VanFossen Lane serves as an access road to the VanFossen property, located on both sides of VanFossen Lane. The road provides access for employees or persons having business at the business facilities located along VanFossen Lane, including facilities operated by Fenco, Inc.

Both the plaintiff and the defendant were, at the time of the accident, employees of Fenco, Inc., a business with facilities, and access thereto, along the west side of VanFossen Lane. At the time of the accident, the plaintiff was

on the job, and was walking from one building to another, by utilizing VanFossen Lane. The defendant had not actually started to work, but was within approximately 100 yards of a parking area, provided by Fenco, Inc., in which the defendant intended to park in order to go to work.

As a result of injuries sustained in the accident, the plaintiff has applied for and received workers compensation benefits through the employer, Fenco, Inc. The plaintiff has filed this action against the defendant, his co-employee. The workers compensation insurance carrier for the employer has asserted a right of subrogation and lien against any proceeds derived from a claim against the defendant David L. Simmons.

ARGUMENT AND CITATION OF AUTHORITIES

It is the position of the defendant that this case is barred by the exclusive remedy provisions of the Virginia Workers Compensation Act, and the Virginia case authorities which have interpreted the workers compensation statutes.

It is undisputed that the plaintiff has applied for and received benefits under the Virginia Workers Compensation Act for injuries sustained in the accident of March 11, 1986. These benefits were provided through his employment with Fenco, Inc. In order to receive compensation benefits, the applicant must sustain an "injury by accident ... arising out of and in

the course of the employment". Section 65.1-7, Code of Virginia, 1950, as amended.

It has long been established that injuries caused by the negligence of a fellow servant fall within the field of industrial accidents covered by the Workers Compensation Act. This issue was essentially decided in the case of Feitig vs. Chalkley, 185 Va. 96, 38 S.E. 2d 73 (1946), wherein the status of a co-employee is clearly distinguished from an "other party", being a stranger to the employment, against whom an injured employee and his subrogated employer may assert a claim. See Section 65.1-41, Code of Virginia, 1950, as amended. See also Fouts vs. Anderson, 219 Va. 666, 250 S.E. 2d 746 (1979), stating that where "an employee subject to the Act is injured by a fellow employee, an award under the Act is his exclusive remedy."

It appears that plaintiff in this case is relying on the fact that his fellow employee, the defendant, had not actually reported to work when the accident occurred. While the general rule is to the effect that an employee is not in the scope of his employment while going to or from work, these cases typically focus on the status of the injured party to determine whether such circumstances exist as to indicate that the injured employee is within the scope of employment. In this case, the status of the plaintiff is not in question because he

was, in fact, on the job at the time of the accident, with the result that he has applied for and received compensation benefits.

The closest analogy to the facts of this case can be found in the Virginia cases arising where one employee has injured another in a parking area provided by the employer. In these cases, the Virginia Supreme Court has held the Workers Compensation exclusive remedy to be applicable, even though neither the injured party nor his co-employee were actually on the job. These cases recognize that activities necessary for reporting to work or departing the premises after work are to be considered as being within the employment, even though the employees are not actually "on the clock".

In Brown vs. Reed, 209 Va. 562, 165 S.E. 2d 392 (1969), the plaintiff was injured while crossing a parking lot in order to punch the time clock to begin his work day. The defendant had concluded his shift, punched the time clock, changed into street clothes, and was backing his vehicle in the parking lot when he struck and injured the plaintiff. The plaintiff conceded that he was in the scope of his employment even though he had not reported to work, but contended that he should be able to maintain an action against his co-employee, the defendant, on the ground that the defendant was not acting in pursuance of any demand of his employment. The Virginia

Supreme Court rejected this argument, and affirmed the action of the trial court in sustaining the defendant's plea in bar based on the exclusive remedy of the Virginia Workers Compensation Act.

In Brown vs. Reed, supra, the court viewed the parties as being in essentially "reverse" positions, and concluded that "if plaintiff was within the course of his employment at the time of the collision, so was the defendant." Brown vs. Reed at 209 Va. 565. The court went on to quote from the case of Bountiful Brick Co. vs. Giles, 276 U.S. 154, 158, 48 Sup. Ct. 221, 222, 66 A.L.R. 1402, 1404 (1928), as follows:

" 'And employment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another in such proximity and relation as to be in practical effect a part of the employer's premises, the injury is one arising out of and in the course of the employment as much as though it had happened while the employee was engaged in his work at the place of its performance. In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached.' "

While the parties in the instant case cannot be stated to be in "reverse" positions, this is only because the plaintiff in this

case was, in fact, on the clock at the time of the accident, unlike the plaintiff in Brown vs. Reed.

The language of Bountiful Brick Co. vs. Giles, supra, quoted with approval by the Supreme Court, indicates that the scope of the holding is not narrowly confined to a parking lot owned by the employer. Rather, the rule applies where an accident occurs over premises of another in such proximity and relation to the premises of the employer as to be in practical effect a part of the employer's premises. In this case, the defendant, while he was not actually in the parking area provided by the employer, was within approximately 100 yards of the parking lot, on a private road which was the only access to the parking lot. Although this road is used by non-employees of Fenco, Inc. for access to other facilities on the VanFossen property along VanFossen Lane, the court in Brown vs. Reed, supra, in no way required exclusive use of the premises. In fact, the accident site in Brown vs. Reed was a road adjacent to the parking area utilized by employees and others having business on the premises. Further, the court in Brown vs. Reed cited with approval from Larson, the Law of Workman's Compensation, Vol. I, p. 208 (1966), stating that an accident on a "public road" between two portions of the employer's premises is generally regarded to be a compensable injury. In the present case, the plaintiff was, at the time of the

accident, proceeding from one portion of the employer's premises to another on the road in question.

The decision in Brown vs. Reed has recently been reaffirmed in the case of Barnes vs. Stokes, 3 VLR 2332, 233 Va _____, 355 S.E. 2d 330 (1987). In Barnes vs. Stokes, the plaintiff was struck by a motor vehicle operated by a fellow employee in a parking lot adjacent to their place of employment, while both were departing from work after completing their work day. The parking lot was privately owned. However, it was neither owned nor maintained by the employer of the parties, although the employer was allocated a portion of the lot for its employees. The issue before the Virginia Supreme Court was whether the trial court correctly ruled that the plaintiff's exclusive remedy was under the Workers Compensation Act.

In affirming the dismissal of the case by the trial court, the Virginia Supreme Court cited its decision in Brown vs. Reed, supra. In Barnes vs. Stokes, the plaintiff argued that Brown vs. Reed should be distinguished because Barnes's employer neither owned or maintained the parking lot where the injury occurred. The Virginia Supreme Court refused to distinguish Brown vs. Reed, and again referred back to Bountiful Brick Co. vs. Giles, supra, for the proposition that employment includes a reasonable margin of time and space in

passing to and from the place where the work is to be done, including premises "of another in such proximity and relation as to be in practical effect a part of the employer's premises." The court in Barnes v. Stokes further cited the philosophy of workers compensation to charge industry with the expense of injuries which occur at a time "when employees reasonably can be expected to use the designated area, even though the specific location is not owned or maintained by the employer." 3 VLR at 2336 This rationale clearly applies to the instant case wherein the injury occurred on a roadway connecting facilities of the employer, and providing the access to the portions of the employer's premises to be utilized by the parties in their employment.

The facts of this case can be distinguished from the situation in which proximity, in space or time to the employment, is broken. For example in Fouts vs. Anderson, 219 Va. 666, 250 S.E. 2d 746 (1979), the plaintiff was injured by a co-employee while in the parking lot provided by the employer of the parties. The evidence indicated that the plaintiff had departed the employer's premises, but returned a few minutes later to conduct some personal business unrelated to the employment. On those facts, the Virginia Supreme Court reversed the trial court's dismissal of the case on grounds of

the workers compensation exclusive remedy. The Supreme Court clearly distinguished Brown vs. Reed, supra, on the facts.

It is noted that the analysis in Fouts vs. Anderson focuses on the conduct of the plaintiff whose activities were deemed to have no causal connection to the employment. The case does not discuss the question of whether such conduct by a co-employee defendant can ever take a case outside of the exclusive remedy provisions of the Workers Compensation Act, where the plaintiff is clearly within the scope of employment. However, in Brown vs. Reed, supra, at 209 Va. 565, the court states that "if plaintiff was within the course of his employment at the time of the collision, so was defendant".

It is apparent in the policy underlying the Workers Compensation Act that a co-employee, being a person who conducts the business of the employer (see Section 65.1-103, Code of Virginia, 1950, as amended), should not be a stranger or "other party" referred to in Section 65.1-41, relating to subrogation rights of the employer for benefits paid to an injured employee. See discussion in Feitig vs. Chalkley, supra, at 185 Va. 96, 103-104. A significant element in the decision of the Virginia Supreme Court in Feitig vs. Chalkley, supra, to bring negligent acts of co-employees within the Act was to avoid attempts by employers, and their insurance

carriers, to pursue subrogation claims against the wages of their own employees. In view of this policy, any action for negligence by an injured employee against a co-employee, where the injured party receives compensation benefits by reason of being within the scope of his employment at the time of the accident, would subject the wages of the co-employee to subrogation by the employer.

In summary, it is the position of the defendant that the facts of this suit are directly analogous to the facts presented in Brown vs. Reed, supra and Barnes vs. Stokes, supra. If anything, the facts in the instant case more strongly compel application of the exclusive remedy provisions of the Compensation Act because here the plaintiff was actually on the job, whereas the plaintiffs in the two above-cited cases were not actually "on the clock". The presence of the defendant in this case on a private access road, in close proximity in time and space to his employment, compels application of the workers compensation bar under the rationale of Brown vs. Reed and Barnes vs. Stokes. Further, the real focus in these cases must be on the conduct and status of the plaintiff, to determine whether the plaintiff is within the scope of employment at the time of the accident. Because the plaintiff in this case is clearly within the scope of employment, as indicated by his application for and receipt of

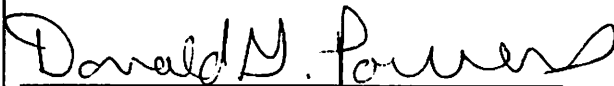
compensation benefits, there is no logical reason to cast a co-employee into the role of a stranger to the business, thereby subjecting the co-employee to the subrogation claims of the employer and the employer's insurance carrier. To do so is to cast the risk of work related accidents upon a co-employee rather than the employer as is intended by the Worker's Compensation Act.

Based on the foregoing, it is respectfully requested by the defendant that this action be dismissed with prejudice.

Respectfully submitted,

DAVID L. SIMMONS

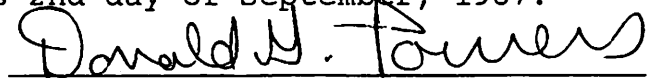
BY COUNSEL



Donald G. Powers
BLACK, MENK, NOLAND & POWERS
P. O. Box 1206
Staunton, Virginia 24401
Counsel for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum of Law was mailed to F. Guthrie Gordon, III, Esquire, 416 Park Street, Charlottesville, Virginia 22901, counsel for plaintiff, this 2nd day of September, 1987.



Donald G. Powers

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF STAUNTON

ROYCE L. PAINTER, JR.,

Plaintiff

v.

DAVID L. SIMMONS,

Defendant

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO PLEA IN BAR

Plaintiff is in agreement with the Statement of Facts provided by the Defendant in his Memorandum in Support of Plea in Bar. However, Plaintiff asserts that said facts plainly dispose of Defendant's plea adversely to Defendant's position.

Simply put, the Defendant had not yet reached the parking lot. This simple fact is dispositive of the case. Plaintiff was in the course of his employment, but the Defendant had not yet reached his employer's parking lot, but, rather, was on his way to the parking lot from home. He had not yet arrived at his employer's parking lot, and thus falls within the "going and coming rule". The main cases relied upon by the Defendant, to wit: Brown v. Reed, 209 Va. 562 (1969) and Barnes v. Stokes, 3 VLR 2332, 233 Va. ____, 355 S.E. 2d 330 (1987) are both parking lot cases. However, the Supreme Court of Virginia has not, nor should it, extend the "parking lot rule" to the road that leads to the parking lot.

The rationale for the "parking lot rule" is that the parking lot is effectively a part of the work place. Once the worker has reached the designated parking lot (whether owned by the employer, leased by the employer, or specifically appointed for

the employer's benefit) he is within a physical area contemplated by the employer as part of the work place. However, the roadway (or other land) outside the parking lot is not within the same zone of protection.

Professor Larsen goes to great length to discuss the conceptual difficulties of extending the zone of protection beyond the parking lot by even as much as a foot in his authoritative treatise Larson, the Law of Workman's Compensation, Vol. 1, §§ 15.11 and 15.12.

Quite simply, the Defendant had not yet reached his employer's parking lot on his way to work that morning at the time of the subject accident, and thus he falls within the "going and coming" rule, and cannot avail himself of the parking lot exception.

Defendant's Plea in Bar should be overruled and Defendant required to answer on the merits.

ROYCE L. PAINTER, JR.

By Counsel

F. Guthrie Gordon, III
Gordon & Wyatt
416 Park Street
Charlottesville, Virginia 22901
(804) 296-4130

Mailing Certificate

I hereby certify that on or before this 4th day of September, 1987, I mailed or delivered a true copy of the foregoing to Donald G. Powers, Esquire, of Black, Menk, Noland & Powers, P. O. Box 1206, Staunton, Virginia 24401.

Filed in the Clerk's Office of the
Circuit Court of the City of Staunton
Date: 9-8-87 Time: 8:30 AM

Judith O. Whittemore Dep
Clerk

F. Guthrie Gordon, III

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF STAUNTON

ROYCE L. PAINTER, JR.,
Plaintiff

vs.

STIPULATION

DAVID L. SIMMONS,
Defendant

The plaintiff and the defendant, by counsel, hereby agree to and stipulate the following facts:

1. That the plaintiff and the defendant were involved in an accident on VanFossen Lane in the City of Staunton on March 11, 1986.

2. That VanFossen Lane, at all places relevant to this case, is a private road providing access to various businesses, including facilities of Fenco, Inc., located on the VanFossen property along VanFossen Lane.

3. That the plaintiff Royce L. Painter, Jr. was an employee of Fenco, Inc. on March 11, 1986.

4. That the plaintiff Royce L. Painter, Jr. has applied for and received workers compensation benefits through his employer Fenco, Inc., pursuant to the Virginia Workers Compensation Act, by reason of injuries sustained in the accident of March 11, 1986.

5. That the defendant David L. Simmons was an employee of Fenco, Inc. on March 11, 1986.

6. That the defendant David L. Simmons, at the time and place of the accident of March 11, 1986, was driving his

automobile to his employment at Fenco, Inc., and was within approximately 100 yards of the parking area in which he intended to park his vehicle in order to begin his work at Fenco, Inc. on March 11, 1986.

F. Guthrie Gordon, III, Esquire
416 Park Street
Charlottesville, Virginia 22901
Counsel for Plaintiff

Donald G. Powers
Donald G. Powers, Esquire
BLACK, MENK, NOLAND & POWERS
P. O. Box 1206
Staunton, Virginia 24401
Counsel for Defendant

Filed in the Clerk's Office of the
Circuit Court of the City of Staunton
Date: 9-9-87 Time: _____

~~Post-~~

Judge Whitelinger Dep
Clerk

VIRGINIA: IN THE CIRCUIT COURT FOR THE CITY OF STAUNTON

ROYCE L. PAINTER, JR.,
Plaintiff

vs.

FINAL ORDER

DAVID L. SIMMONS,
Defendant

This cause came to be heard on plaintiff's Motion for Judgment and defendant's Plea in Bar thereto, based upon the exclusive remedy of the Virginia Workers Compensation Act and was argued by counsel.

Upon consideration whereof, it appearing to the Court that defendant's Plea in Bar on the ground of the exclusive remedy of the Virginia Workers Compensation Act is a valid defense to the whole of plaintiff's action as set forth in his Motion for Judgment filed herein, it is accordingly,

ORDERED that defendant's Plea in Bar on the grounds of the exclusive remedy of the Virginia Workers Compensation Act be, and is hereby, sustained; and it is further ORDERED that this action be, and it is hereby, dismissed, to which action of the Court the plaintiff by counsel duly excepted.

ENTER: 
Judge

DATE: SEP 17 1987

I Ask For This:

Donald S. Powers p.d.

Seen and Objected To:

J. H. H. p.q.

Entered 9-17-87

Common Law Order Book No. 40

Page 500

ASSIGNMENT OF ERROR

The trial court erred in ruling that Simmons was an employee acting in furtherance of his employer's business at the time of the accident in question, and thus that the Worker's Compensation Act was the sole and exclusive remedy available to Painter.