

203 Va 472

Record No. 5407

In the
Supreme Court of Appeals of Virginia
at Richmond

WILLIAM H. FERRELL

v.

RODNEY W. BEDDOW

FROM THE CIRCUIT COURT OF HENRICO COUNTY

RULE 5:12—BRIEFS.

§5. NUMBER OF COPIES. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. SIZE AND TYPE. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND.

Record No. 5407

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 5th day of October, 1961.

WILLIAM H. FERRELL,

Plaintiff in Error,

against

RODNEY W. BEDDOW,

Defendant in Error.

From the Circuit Court of Henrico County

Upon the petition of William H. Ferrell a writ of error is awarded him to a judgment rendered by the Circuit Court of Henrico County on the 23rd day of March, 1961, in a certain motion for judgment then therein depending wherein the said petitioner was plaintiff and Rodney W. Beddow was defendant; upon the petitioner, or some one for him, entering into bond with sufficient security before the clerk of the said circuit court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

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FACTS STIPULATED:

Comes now the plaintiff, William H. Ferrell, and the defendant, Rodney W. Beddow, both by Counsel and stipulated the following facts:

1. The plaintiff, William H. Ferrell, and the defendant, Rodney W. Beddow, are now and were on or about August 22, 1960, employed by Somers M. Wilton, Incorporated and on August 22, 1960 assigned to work for Somers M. Wilton, Incorporated on a residence in the subdivision known as Pinedale Farms, located in Henrico County, Virginia.

2. The plat of the subdivision known as Pinedale Farms, Tuckahoe District, Henrico County, Virginia was recorded in the Clerk's Office, Circuit Court of Henrico County, Virginia, October 1, 1955, said plat having been approved by the County of Henrico, Virginia on July 3, 1956. The County had not on August 22, 1960 accepted all the roads in this subdivision for maintenance, particularly Ledbury Road.

3. The plaintiff, William H. Ferrell, was injured by an automobile owned and operated by the defendant, Rodney W. Beddow, on Ledbury Road, which is a part of the aforementioned subdivision, on August 22, 1960.

EDWARD S. HIRSCHLER
Attorney for the Plaintiff.

TRAVIS W. POOLE
Attorney for the Defendant.

Filed January 13, 1961.

E. W. HENNING, JR., Judge.

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March 15, 1961.

Mr. Edward Hirschler
Attorney at Law
Central National Bank Building

Mr. Travis W. Poole
Attorney at Law
Mutual Building

Re: William Ferrell v. Rodney W. Beddow.

Gentlemen:

This case is now before the Court on the plaintiff's Motion for Judgment, the defendant's plea in abatement to the jurisdiction of the Court and the plaintiff's reply to the Plea in Abatement, upon the Facts Stipulated on January 13, 1961, upon Stipulation of Facts filed January 23, 1961, upon the evidence heard *ore tenus* on January 23, 1961, in support of the Plea in Abatement, and upon the written memoranda and oral argument of counsel for the parties.

The basic question that arises is whether or not the plaintiff can assert his common law action for personal injuries occurring on August 22, 1960, when struck by the defendant's car, or whether the said accident and the resulting injuries come exclusively within the jurisdiction of the Workmen's Compensation Act.

The facts presented indicate that plaintiff and defendant had been employed as carpenters for the same local contractor and subdivision developer (Somers Wilton, Inc.) for seven and five years respectively; that the accident to the plaintiff occurred on August 22, 1960, at approximately 7:15 A. M.; that the regular time of employment for all employees was 7:30 A. M. to 4:00 P. M.; that the defendant, Beddow, had additional part time duties, shared with other employees, of picking up and delivering ice to the project for the employees prior to the regular starting time.

page 17 } The place where the accident occurred is referred to as Ledberry Road in Pinedale Subdivision located in Henrico County. This plat was admitted to record on July 13, 1956, the surveyor laid out the streets for the developer in November 1959, and work commenced in the subdivision in January 1960. Maintenance of these roads has never been undertaken by the County of Henrico. The plaintiff had parked his personally owned station wagon on the

street mentioned at a distance of approximately thirty-to thirty-five feet from the house being constructed.

At the above stated time and place both the plaintiff and the defendant were "regularly dressed," not having put on working clothes; the plaintiff had taken into the house his overalls and lunch and the hand saw belonging to another worker for whom he had sharpened same; plaintiff had returned from the house to his station wagon in which was located an electric saw, an electric extension cord and a tool box belonging to his employer; the plaintiff was bending over the tail gate of his station wagon when struck by the defendant's vehicle. Both the employer Wilton and the plaintiff Ferrell admitted that Ferrell was carpenter foreman for the job which included taking care of the employer's tools which could have been placed in the attic of the house or could have been taken to Ferrell's home where he sometimes used them on outside jobs so long as they were on the job when needed.

The employer likewise testified that 7:30 A. M. was the starting time for both employees and that he did not pay them wages any time prior to 7:30 A. M.

Where the issue is raised as to the applicability of the Workmen's Compensation Act the burden is upon the person so asserting to prove by a preponderance of the evidence that the accident arose out of and in the course of employment. *Humphries v. Newport News Ship Building Co.*, 183 Va. 466; *Norfolk Steamboat Co. v. Holladay*, 174 Va. 152.

The test of compensability is whether the general character of the undertaking in which the employee was engaged at the time of the accident arose out of and in the course of his employment. *Kent v. Virginia-Carolina Chem. Co.*, 143 Va. 62. The expression "arose out of" and "in the course of" are not synonymous; the words "arising out of" are construed to refer to the origin or cause of the injury, and the words "in the course of" to refer to the time, place, and circumstances under which it occurred. *Bradshaw v. Aronovitch*, 170 Va. 329, 335. An accident occurs "in the course of the employment" when it takes place within the period of the employment, at a place where the employee may reasonably be, and while he is reasonably fulfilling duties of his employment or engaged in doing something incidental thereto. *Bradshaw v. Aronovitch, supra*; *Norfolk, etc., Steamboat Co. v. Holladay*, 174 Va. 152.

page 18 } It is established that the circumstances of each particular case control the question of the compensability of the injury. *Honaker v. Hartley*, 140 Va. 1; *Railway*

Express Agency v. Lewis, 156 Va. 800; *Sullivan v. Suffolk Peanut Co.*, 171 Va. 439.

Generally speaking, injuries on public streets are not compensable and an employee going to and from his place of work is not normally engaged in performing any service growing out of or incidental to his employment. *Dreyfus & Co. v. Meade*, 142 Va. 567; *Kent v. Virginia-Carolina Chem. Co.*, 143 Va. 62; *Campbell & Co. v. Messenger*, 171 Va. 374. A similar type of non-compensable case is the so called "going to and from lunch" case. *Taylor v. Binswanger & Co.*, 130 Va. 545.

However, the above cases indicate that there are three recognized exceptions to this general rule: (1) Where in going to and from work the means of transportation is provided by the employer or the time consumed is paid for or included in the wages. (2) Where the way used is the sole and exclusive way of ingress and egress, with no other way, or where the way of ingress and egress is constructed by the employer. (3) Where the employee on his way to or from work is still charged with some duty or task in connection with his employment.

For a summary of a number of these cases see the annotations in 85 A. L. R. 97 entitled *Workmen's Compensation: Injuries to Employees while in street in front of employer's premises when going to or coming from work*, and 82 A. L. R. 1043 entitled *Workmen's Compensation: Injuries while entering or leaving place of employment as arising out of and in course of the employment*. One principal that prevails is that "course of employment" is a broader term than "hours of employment." Activities at or near the place of employment preparatory to beginning work or to departing therefrom are within the Act. *Wilson v. Laburnum Construction Co.*, 30 O. I. C. 620; *Sisco v. C. H. Lawson*, 30 O. I. C. 33; *Kelley v. Friedman-Marks Clothing Co., Inc.* 27 O. I. C. 100.

In view of the above authorities the Court is of the opinion from the facts in this case that both the plaintiff and the defendant were employees of the subdivider Wilton charged with some duty or task in connection with their employment within a reasonable time prior to actually going to work and that the plaintiff Ferrell sustained an accident arising out of and in the course of his employment so as to be covered by the Virginia Workmen's Compensation Act. Accordingly, the Plea in Abatement is sustained and the action dismissed.

Counsel are requested to prepare, endorse and present an appropriate order in conformity with this ruling.

Very truly yours,

EDMUND W. HENING, JR., Judge.

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* * * * *

The Court, having considered the Plea in Abatement filed by the Defendant, Rodney W. Beddow, and being of the opinion for reasons set forth in a written opinion dated March 15, 1961 and hereby filed and made a part of the record herein, that the Plea in Abatement should be sustained, it is Ordered that the said Plea in Abatement be, and the same is hereby, sustained and this action is hereby dismissed and removed from the docket of this Court.

Enter 3/23/61.

EDMUND W. HENING, JR., Judge.

I have seen this:

TRAVIS W. POOLE, p. d.

Seen and objected to:

EDWARD S. HIRSCHLER

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NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To the Clerk of the Circuit Court of Henrico County:

Comes now Plaintiff, by counsel, and hereby gives notice of appeal from the order entered in this case on March 15, 1961, wherein the Court sustained the Plea in Abatement filed by the Defendant.

The Court erred as a matter of law and fact in holding upon the evidence presented:

Rodney W. Beddow.

(1) That the Plaintiff's accident and injuries arose out of his employment.

(2) That the Plaintiff's accident and injuries occurred in the course of his employment.

(3) That the accident arose out of Defendant's employment.

(4) That the accident occurred in the course of Defendant's employment.

(5) That the Defendant had additional part time duties for which he was compensated, which were performed prior to the commencement of his work day.

(6) That the Plaintiff was charged with any duty or task in connection with his employment for which he was compensated prior to the commencement of his work day.

(7) That the Plaintiff sustained his injuries from an accident arising out of and in the course of his employment thereby making the Virginia Workman's Compensation Act the Plaintiff's exclusive remedy.

WILLIAM H. FERRELL
By EDW S. HIRSCHLER
Counsel.

Received and filed in Office April 26, 1961.

HELEN D. CLEVINGER, Clerk.

* * * * *

page 6 } RODNEY W. BEDDOW,
the defendant, first being duly sworn, testified as
follows:

DIRECT EXAMINATION.

By Mr. Poole:

* * * * *

Q. Were you involved in an accident on August 22nd, 1960?

A. Yes, I was.

Q. The other party was Mr. Ferrell you understand?

A. Yes.

Q. What time did the accident happen?

A. About 7:15.

Rodney W. Beddow.

page 7 }

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Q. This accident happened on the street in front of the house in which you were to work?

A. Yes.

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page 8 }

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A. Well, I went to Roxbury where the ice was brought and picked it up, and I brought it back to Pinedale and stopped in Pinedale and gave the painter his ice, and then I got back in my car, and the car was cut off and I released the handbrake and let it coast down the hill behind Bill Ferrell's wagon, station wagon, at which he was standing behind, and when I went to apply my brakes, I accidentally hit the clutch instead of the brake and ran into him, and then the impact jarred his car forward a little, and Ray Wax, the bricklayer foreman, and I took him from between the two cars and laid him down until the rescue squad came.

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Q. The ice detail was one of your extra duties, was it?

A. Yes.

Q. Do you do that in the winter time also?

A. No.

page 10 }

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A. Well, sometimes Mr. Ferrell would help me. He would get there and he would start to taking some of the tools out. I don't believe he had gotten any of the tools out that morning.

Rodney W. Beddow.

* * * * *

page 11 } Q. Who usually hauls the tools?
A. Mr. Ferrell.

* * * * *

A. Well, sometimes he will help me get out the tools, or usually he does.

Q. You two work together as I understand it?

A. Yes.

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page 12 }

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Q. Did you have any other ice in your automobile when you started to coast down the hill?

A. Yes, I had the ice for Mr. Ferrell and I.

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page 13 }

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Q. Does anyone else distribute the ice?

A. George Clem brings it to where the frame men work, and the laborer on the job fixes the ice water for the frame gang.

* * * * *

Q. What time were you to go to work?

A. When the rest of them did.

Q. What time was that?

A. At the time it was 7:30, but now it would be 8 o'clock because we changed time.

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Rodney W. Beddow.

A. Well, as I would regularly go to work, but I didn't have on my carpenter overalls.

Q. When do you put those on?

A. Anywhere from quarter past 7 to 7:30.

Q. Do you ever wear your overalls in your extra chores?

A. No.

* * * *

Q. Actually at the time of the accident do you know what Mr. Ferrell was doing? Now don't guess. If you know, you can tell us. Do you know what he was doing actually when he was actually hit?

A. He was standing in back of his wagon bending over in it for something.

Q. Do you know what he was bending over for?

A. No.

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CROSS EXAMINATION.

By Mr. Hirschler:

Q. Mr. Beddow, according to one of the two accident reports you filed, this accident occurred on Ledbury Road, is that correct? Does that refresh your memory as to the name of the street?

A. Yes, I believe it was.

Q. So it did occur on Ledbury?

A. Yes.

Q. Have you ever measured the distance from where this station wagon was parked, or where the accident occurred, to the house you were working on, or was that 30 feet your estimate?

A. I have never measured it, but I think those houses have a 30 foot frontage.

Q. You don't know? You are just guessing?

A. Yes.

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Rodney W. Beddow.

Q. How much were you paid to distribute this ice? How much were you paid per day to distribute the ice?

A. A dollar a day.

Q. You were paid a dollar a day?

A. Yes.

* * * * *

Q. How many hours a day were you working at the time that the accident occurred?

A. Eight.

Q. Eight hours a day, and how much were you being paid an hour?

A. \$2.50.

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Q. You say you were working an 8-hour day at \$2.50 an hour. In addition to that you say you got \$1.00 each day for distributing the ice?

A. Yes.

Q. Are you sure of that ?

A. Yes, \$5.00 a week.

Q. \$5.00 a week over and above the 8 hours a day?

A. Yes—no—

Q. It's not right? What is right?

A. Now, I said—it's not over and above \$2.50 an hour. It's included in the \$2.50 an hour.

* * * * *

Q. Isn't it a fact that you were paid \$2.50 an hour for an 8-hour day, and if you worked any more than that
page 19 } you got overtime?

A. No.

Q. That is not so?

A. If I worked after 4 o'clock I got paid extra.

Q. But if you worked earlier before 7:30, you didn't get paid?

A. No.

* * * * *

Rodney W. Beddow.

Q. You did not get paid extra if you worked before 7:30?

A. That is right.

Q. It was just in your \$2.50 an hour that you got paid for working an 8-hour day?

A. Yes, sir.

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Q. So you were getting \$2.30 an hour?

A. Yes, sir.

Q. And about a month before you were raised to \$2.50 an hour—

A. That is right.

Q. —was anything said about paying you extra to distribute this ice at that time?

A. No.

Q. It was not?

A. No.

page 21 } Q. When the ice was brought out there by Mr. Clem, were you always the one who went and got the ice and distributed it all around the job? Did you do that every day?

A. Not every day.

Q. You didn't?

A. Because I will tell you; because, for instance, a painter that worked in Pinedale was living in Roxbury and instead of me having to go all the way over there and get the ice, he would bring it over for me.

Q. So you didn't do it every day?

A. No.

Q. Did you do it every day when you did do it before you came to work at 7:30, or some days did you do it after 7:30?

A. Some days after 7:30.

* * * * *

Q. Did sometimes someone who was on the gang you were working with get it instead of you if you happened to be busy at the time? Did Mr. Ferrell ever get the ice?

Rodney W. Beddow.

A. When in Pinedale, but I don't remember at page 22 } Roxbury.

Q. In other words, if you came in late he would?

A. Yes, sir.

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RE-DIRECT EXAMINATION.

By Mr. Poole:

* * * * *

page 23 } Q. What happened when you didn't go? Why didn't you go all the time?

A. Well, sometimes I would come in late and that would be about the only reason I wouldn't go, unless somebody had gotten the ice when I got there.

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RE-CROSS EXAMINATION.

By Mr. Hirschler:

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A. Yes, I went to the store at lunch time.

Q. Did anybody pay you for doing that?

A. Yes.

Q. How were you paid for doing that?

A. That, I left 15 minutes before time to eat and I would bring things.

Q. But you didn't get any extra pay for doing that?

A. (Shaking head).

Q. You were just allowed to knock off earlier and go to the store and get pop or whatever the men in the area wanted?

A. Yes.

Rodney W. Beddow.

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page 25 }

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RE-RE-DIRECT EXAMINATION.

By Mr. Poole:

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page 26 }

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Q. Was that another one of your chores to go for the sandwiches or the pop or whatever the men wanted at the store?

A. Yes.

Q. Who assigned that to you?

A. Let's see. I don't remember who assigned those.

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page 27 }

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By the Court:

Q. These so-called extra or additional duties or chores, who assigned them to you?

A. Mr. Wilton.

Q. You seem to make a distinction between when you first went there approximately 5 years ago, and then about a month prior to August 22nd, when this accident happened, you were thinking about leaving Mr. Wilton?

A. Yes.

Q. Before you left him is it correct that you were making \$2.30 an hour?

A. Yes.

Q. Then you all sat down and talked about it, and he agreed to pay you \$2.50 an hour?

A. Yes, he agreed to give me 20 cents increase per hour.

William H. Ferrell.

Q. Were you supposed to have the same duties at \$2.50 an hour that you had at \$2.30 an hour?

A. He didn't mention it, so I just assumed that it was.

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Q. Is it not a fact that prior to this so-called resignation when your pay rate went from \$2.30 to \$2.50 an hour, that you had done these things you testified about prior to getting the \$2.50 rate?

A. Yes.

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page 29 }

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WILLIAM H. FERRELL,
called as a witness by Mr. Poole, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Poole:

* * * * *

page 31 } Q. What time do you normally go to work Mr. Ferrell?

A. My pay time starts at exactly 7:30, the same as Mr. Beddow's.

Q. Do you know when Mr. Beddow's time starts? Do you actually know that?

A. He is supposed to start at 7:30, the same time that I do.

Q. Did you know anything about his extra duties concerning the ice and the tools or anything else?

A. As far as my knowledge, he wasn't assigned to either one. My boss never told me that he had to get them out at no certain time just before working time.

William H. Ferrell.

Q. For some time, Mr. Ferrell, Mr. Beddow has been picking up the ice and then distributing it, hasn't he?

A. At times he had and at times others had.

* * * * *

Q. What time do you actually arrive on the job?

A. I have no certain time to get on that job. I have been out there as high as 6 o'clock in the morning. Mr. Wilton just specified me to go to work at 7:30.

Q. And you have no particular time to go to page 32 } work?

A. Yes, I have a certain time to go to work, but what I mean to arrive on the project, he don't tell me that I have to be here at 7 o'clock or what time. I go there sometimes I imagine quarter to 7 and sometimes it's 6:30.

* * * * *

Q. You are also designated as the custodian of Mr. Wilton's tools, aren't you?

A. No, he don't dedicate me to take care of them. He told me to put them in the attic if I didn't want to take care of them. He didn't pay me to take care of them.

* * * * *

Q. I believe it was customary for you to take them home in your station wagon for safe keeping?

A. No, I took them home mostly because I was doing extra jobs, extra work, and I had my own tools and when I was doing extra work I used his tools, as well as my tools.

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A. I was reaching after my skill saw. I hadn't reached, put my hand on my tool box whatsoever, because I had been away on the week-end doing a job in Chester and I had merely laid my own tools up in there on the tools that we use in our daily using, which I was going to straighten them and put them around on the front of the seat, because I don't use my skill saw on Mr. Wilton's job.

William H. Ferrell.

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The Court: Insofar as I can rule on anything in advance, if it's considered to be ruled on in advance, since it's before the Court now on this plea in abatement and since the statute carries the language "as to facts or circumstances attending the wrongful act or neglect complained of," the page 46 } Court thinks that relates to any particular matter relating to how the accident happened if we were trying it on the merits, but insofar as hearing it on the plea in abatement and trying to arrive at whether there is any inconsistent statement that has any probative value in any way relating to whether he was employed or not employed or what his duties were, the Court will overrule your objection to that extent.

Mr. Hirschler: I note an exception to your ruling.

By Mr. Poole: (Continuing)

A. No, I was reaching for the electric saw. I page 47 } hadn't touched it. I was reaching for my own personal electric saw now.

page 48 } A. There is a correction on that. I would like to bring this up. Now he didn't do that steady all the time. It was times that others on the job done it, and it was times that that ice laid up until 8 or 9 o'clock in the day before ice water was made.

Q. But he did get the ice at times?

A. Yes, and at times I have stopped and picked up the ice and sometimes I have gone over there and got it and brought it over my own self.

Q. Also, you knew that he had been assigned the details to go to the store at lunch time.

A. He was granted a 15 minute time to go to the store for the ones in the trim gang.

William H. Ferrell.

Q. Was that 15 minutes going and 15 minutes coming, Mr. Ferrell?

A. It was 15 minutes in all, and if he was late in getting back I took it on my own self. We would take an extra 5 minutes or an extra 10 minutes sometimes if it run into that. Sometimes we have taken longer.

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Q. How often did he carry the tools in?

A. Well, I would say he carried the tools in right regular.

Q. And you helped him, of course?

A. At times I would help him and at times he would come there and I would have everything out.

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CROSS EXAMINATION.

By Mr. Hirschler:

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Q. You said you took your tools home because you had extra work to do. Was that Mr. Wilton's work or—

A. No, sir, that was my own personal work.

Q. What do you mean?

A. Well, I was adding a room on my house at the time and I hadn't completed it, and I think Mr. Beddow will verify it, that while I was in the hospital I got him to stop by and put a lock on it, which I hadn't finished.

Somers M. Wilton.

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page 52 } A. No, I don't. I do it on my own time and I charged a dollar for filing it.

Q. Did you ever do any other extra jobs?

A. Yes, I done some in Highland Park and other places. I got extra money for that. The only time I got paid through Mr. Wilton was on extra jobs for him, and if he says, "I got a job for you to do," and he said, "You keep the time on it and I will pay it," that is the only time I got paid extra for him.

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SOMERS M. WILTON,
a witness introduced on behalf of the plaintiff, first being
duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hirschler:

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page 55 }

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Q. Directing your attention now to both Mr. Ferrell and Mr. Beddow, what time did their work day start on August 22, 1960?

A. 7:30 A. M. in the morning.

Q. Did you pay Mr. Beddow for doing any work prior to 7:30 in the morning?

A. No, sir.

Q. Did you on the 22nd or at any time prior
page 56 } thereto?

A. No, sir.

Q. Did you pay Mr. Ferrell for doing any work on the 22nd or prior thereto before 7:30?

Somers M. Wilton.

A. No, sir.

Q. How much on August 22 were you paying Mr. Beddow?

A. I think the pay records will show \$2.30 an hour—no, \$2.50. I raised him a couple of months prior to that to \$2.50 an hour.

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Knowing that he was going to leave in two weeks after he came to me, I got lined up to get another carpenter to put in his place, and I would say 2 or 3 days before this time for him to leave and go somewhere else to work, he came to me on the side one day and asked me could he come over to my home and talk to me that particular night, which he did, and then and there is when we got together and I agreed to pay him \$2.50 an hour from then on working for me under a new contract agreement. This was approximately I would say somewhere around April.

Q. Around or about the time of this accident, with which you are familiar, were you paying Mr. Beddow to bring the ice out to the project?

A. No, sir.

page 58 } Q. To all of your projects?

A. No, sir.

Q. Were you paying anyone to bring ice from the ice house or wherever out to the projects?

A. Mr. George Clem is the one that goes by and picks up my ice early in the morning, and I think that he gets some additional money for stopping by the ice house. I am not sure. You can check by the pay records, etc. on it, just to bring it on the job and have it on the job for the different men to get ice water and make it if they want ice water, but I do not pay Ronny for making ice water.

Q. You do not pay who for making ice water?

A. Rodney Beddow.

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Q. Do you pay Mr. Beddow for distributing ice around the premises?

A. No, sir.

Somers M. Wilton.

Q. Do you pay Mr. Beddow for bringing tools
page 59 } into the job where he is to work?

A. No, sir.

Q. Do you pay Mr. Beddow for bringing cords into the job
where he is to work?

A. No, sir.

Q. Do you pay Mr. Ferrell for bringing tools into the job
where he is supposed to work?

A. No, sir.

Q. Do you pay Mr. Ferrell for taking any tools home at
night?

A. No, sir.

Q. Do you pay Mr. Ferrell for bringing any cords into the
job where he works?

A. No, sir.

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CROSS EXAMINATION.

By Mr. Poole:

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Q. I believe that you and he married sisters?

A. Yes, sir, half-sisters.

Q. He probably felt a little more privileged to come over
and talk to you than most other employees because of that
connection?

A. That is right.

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Q. I just said, Mr. Wilton, do you ever recall having talked
to Mr. Beddow here sometime in the past about another
raise where he came to you and asked you for a raise and
when he first started working with you, and you told him that
you thought you were paying him all he was worth?

A. (Nodding head).

Q. But in order to help him out, if he wanted to get another
extra \$5.00 a week, then he would get there 15 minutes early,

Somers M. Wilton.

get the tools out and get the ice? Do you recall anything such as that?

A. Yes, sir, this was about a year after he first came to work for me. I think he came to work I would say September, 1955 and it was a year later, and the reason I didn't want to go ahead and increase his salary is because I had other carpenters on the job and he just going to work for
page 69 } me, I would go ahead and give him a raise, that if I did, they would want it, and I believe I recall meeting with him and telling him I would give him \$5.00 a week, which was so much money per hour, to get his salary up to make up the ice water and also put the cords up.

Q. And to do other little chores like that?

A. That is right.

Q. He and Mr. Ferrell worked together as a team, did they not?

A. Yes, sir.

Q. And they worked together pretty good as a team, did they not?

A. Yes, sir.

Q. Did Mr. Beddow take care of the tools and the ice to your knowledge?

A. The only thing Ronny did was get the cords out early in the morning and take care of the ice. I don't think he took care of the tools at all. I think Mr. Ferrell took care of the planers, etc.

Q. So to your knowledge he was doing those, we will say, incidental jobs or chores before he would start to work?

A. Yes, sir, this was about three years ago.

Q. It was your understanding that he would get there 15 minutes or so early to do those chores?

page 70 } A. Yes, sir.

Q. So you wouldn't be saying you are giving him a raise? You are just paying him extra for these chores?

A. That is right.

Q. The chores included getting the cords out, as you say, taking care of the ice, and you say you didn't mention anything about any tools?

A. No, I don't think I did. I might be wrong.

Q. Well, that is all right. You have designated Mr. Ferrell as the custodian of your tools? Was he the keeper of the tools?

A. Yes, sir.

Q. What, if any, instructions did you give him concerning your tools?

Somers M. Wilton.

A. I just told him that I wanted him to take care of my tools and to look after them, etc., and that he could either put them up in the attic or carry them home or do what he chooses with the tools.

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RE-DIRECT EXAMINATION.

By Mr. Hirschler:

Q. Let me get one little point straight I am not too clear on. You originally hired Mr. Beddow when he was 16 years old?

A. He was young; he had just gotten married.

Q. It was right after he got married, is that right?

A. Yes, sir.

Q. I understand that he came to you and said he needed some more money to live on, and you didn't want to raise him because then you would have to raise all of the other carpenters. Is that what you said?

A. You can't push a man too quick. If you go ahead and give it to him, then the other carpenters who have been with you 2 or 3 years, they would want more money. I have some carpenters with me that were making as much, or not making any more than he was making, and if they knew he was making that much more money, then the others would want to fight for it and want it. That is the reason this cord deal or the ice water, I told Rodney, we talked about this new pay scale this past April and no cords or ice water or anything was mentioned then. It was just strictly our basis that he would come back to work for me on.

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Q. Going back of April between the time you gave him this first little \$5.00 deal and approximately April, did he get any raises between those periods?

A. Yes, sir.

Q. Did the other carpenters get raises?

A. Yes, sir.

Somers M. Wilton.

Q. Was he getting paid then the same as the other carpenters?

A. He wasn't getting paid the same as the other carpenters, but he was getting a raise maybe every 6, 8 or 10 months.

A. I would say 2 other carpenters getting as much as Rodney per hour.

Q. But you do have 2 others that are getting as page 74 } much as Rodney?

A. Yes, sir.

Q. Are you paying him anything extra at this time for these other duties?

A. No, sir.

RE-CROSS EXAMINATION.

By Mr. Poole:

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A. No, sir, the ice water never came up until I heard of this accident, until 3 or 4 years ago.

Q. But he had been doing those things and you never told him he didn't have to do them, did you?

A. I never told him he did or didn't. If they wanted ice water, they would make it. If it was a cool day in the summer time, I have seen ice lay on the road or on the back of Mr. Clem's car.

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RE-RE-DIRECT EXAMINATION.

By Mr. Hirschler:

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A. If they want ice water, they can make it. During the summer, like I have said, I have seen ice just sitting around and haven't even been made for all 3 gangs at times, but

Somers M. Wilton.

when it is hot you make ice water and you make it on your own.

By the Court:

Q. Let me understand this, Mr. Wilton. I want to see if my mathematics are correct. When you raised the defendant from \$2.30 an hour to \$2.50 an hour sometime in April, 1960—

A. Yes, sir.

Q. —that was equivalent to 20 cents times 8 hours, or \$1.60 more per day, or 5 times \$1.60, which is \$8.00 a week more?

A. Yes, sir.

Q. Then whatever happened to the so-called \$5.00 a week that he may have made prior to that time for doing these so-called chores in connection with ice or cords, in other words, one approach is did the \$8.00 per week raise that you mentioned in April, 1960, when he went from \$2.30 to \$2.50 an hour, did that do away with the \$5.00 a week extra that he was getting before?

A. Well, he was never getting no \$5.00 a week for cords.

Like I say, the only reason I told him or it came up, page 76 } I can remember talking to him was because I didn't

want the other men to know that I was paying—let's put it this way—that I was paying an apprentice carpenter say \$1.75 an hour after he has worked for you 6 months. In other words, the normal pay for an apprentice carpenter just starting is around a dollar an hour, and I wanted to help him and that is the reason I gave him this additional money.

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Q. I don't know how much significance it's going to have, or any at this stage, Mr. Wilton, but I still don't understand exactly the significance of the so-called \$5.00?

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A. Just like I say, in other words, if you come to work for me, etc. and say you have been working as a carpenter a year or a year and a half, it's just not normal to get \$1.75

an hour, and I just wanted to put his pay raise up a page 77 } little more to help him. Like I say, he was married

to my wife's half-sister and I told him to get there earlier in the morning and maybe to get the cords out and maybe ice water and this and that, and the reason I told him that, I didn't want the other men on the job to know he was getting this much money. In fact, he was getting more

Somers M. Wilton.

money than maybe some men who had been working for me 2 years, and that is the reason I brought up this cord business and ice water.

Q. Did you keep a separate entry on the books for this?

A. No, sir, I just went ahead—I don't know whether it was \$5.00 or what it was I gave him to be honest with you. In other words, if he goes ahead and say he makes \$2.00 an hour and works 2 days a week and misses 3 days, that is \$32.00 for that week. If it's a dollar a day, or \$5.00 a week, it looks to me like the pay record would show \$32.00 a week, or \$5.00 for ice water, or something for ice water, but he gets paid for the extra amount of hours he works regardless.

Q. Then do you recall whether in computing his hourly rate you put into the computation any extra 15 minutes or whatever it was?

A. No, sir; no, sir, I don't know where the \$5.00 came from, but I do recall stating that I would give him the extra money for helping me in the morning. I don't
page 78 } know where the \$5.00 rate came from, and the pay record would never show it, and I have just never paid him \$5.00 that I know of. All I did was just give him a raise. I don't know whether it was from \$1.50 to \$1.75 an hour. I just gave him a raise for getting there earlier in the morning and helping me.

Q. In effect, did you intend it to be a 25 cents an hour, an hourly rate?

A. No, sir, to be honest with you, I don't know what raise it was, but I have never paid him the \$5.00 a week for ice water on the side, or whatever it was.

Q. Is it correct then to say that you weren't showing it as a book entry as \$5.00 per week separately for doing these duties?

A. That is right, I did not. I just wanted to give him some more money, and I was afraid if I went ahead and said I would give him a quarter of a dollar raise an hour for the time he had been with me, it would upset all of the other carpenters, and at that time I may have had 35 carpenters and it would really push the costs up on the houses, and that is the reason I say I do remember talking about the ice water, helping me with the ice water and the cords.

Q. One last thing. When you got around to changing this pay rate in April, 1960 from \$2.30 an hour to \$2.50, what
page 79 } was your understanding as to what his duties were?

A. To come to work at 7:30 in the summertime

Archie H. Hagen.

and 8 o'clock in the winter and work on an hourly basis. There was nothing said about ice water. I didn't know nothing about it until this came up. Whatever hours it was would be multiplied by \$2.50.

Q. What is your understanding about whether or not he still had any of these other duties?

A. He just comes to work at 7:30 in the morning and works by the hour and just ready to go to work, and that is what he gets paid for.

• • • • •

Q. Specifically, did you consider whether he did or not have any duties relating to ice water or cord after you raised him from \$2.30 to \$2.50 an hour?

A. He didn't have any duties at all. All I wanted him to do was have a saw and a hammer and be ready to start hammering or sawing at 7:30 in the morning.

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page 80 }

ARCHIE H. HAGEN,

a witness introduced on behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hirschler:

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Q. To your knowledge did Mr. Beddow get paid for doing anything before 7:30 in the morning?

A. To my knowledge, no.

Q. Did you require him to do anything before 7:30 in the morning?

A. No, sir.

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CROSS EXAMINATION.

By Mr. Poole:

George H. Clem.

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Q. Mr. Ferrell was designated as the custodian of the tools, in other words, to take care of them?

A. He would either leave them in the house and lock them up or he could put them in his car and carry them home.

Q. But he was the person who had been designated to be responsible to see that the tools were safe?

A. No, if he didn't want to do it, I would have to get there as soon as I could after work and see that they were safe.

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RE-DIRECT EXAMINATION.

By Mr. Hirschler:

Q. Did other people get this ice from where Mr. Clem left it?

A. Yes, sir, the bricklayer would come up or send somebody. If Mr. Beddow didn't come up that morning, the painter would come up and get his. It was just a volunteer thing that you would do before going to work.

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GEORGE H. CLEM,

a witness introduced on behalf of the plaintiff, first being duly sworn, testified as follows:

DIRECT EXAMINATION.

By Mr. Hirschler:

George H. Clem.

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Q. As part of your job are you supposed to go and get some ice and bring it to the jobs?

A. Yes, sir.

Q. What time did you get that ice to bring it on page 85 } the jobs?

A. Well, in the summer time we go to work at 7:30. I pick it up about quarter after 6.

Q. And you bring it out to the job?

A. Yes, sir.

Q. Do you get paid for doing that?

A. Yes, sir.

Q. How much time do you get for that?

A. I get an extra half-hour for getting it and putting it out for the men.

CROSS EXAMINATION.

By Mr. Poole:

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Q. When you are working over at Roxbury, Mr. Beddow comes by Roxbury and picks up the ice and brings it over to Pinedale, doesn't he?

A. Sometimes he do and sometime I go by there and carry it.

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page 87 } RE-DIRECT EXAMINATION.

By Mr. Hirschler:

Q. If you pass by any of the crews, whether it's Mr. Beddow's or somebody else's, do you stop?

A. Do what?

Q. Suppose you pass by Mr. Ferrell's crew, do you stop so they can get the ice out?

A. Yes, I stop and give the ice out to him.

Q. Mr. Beddow doesn't come every morning and get it, does he?

A. No, sir, not every morning, no.

By the Court:

George H. Clem.

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Q. Did I understand that sometimes you would take the ice from one project to the other?

A. Yes, if it's nearer for me.

Q. What?

page 88 } A. If it's nearer on my way I do. If it's nearer for Rodney, he comes by there.

Q. Insofar as your being paid for picking up this ice at this place where you got it and taking it to the project, did you get a separate kind of pay for that or was it just an extra half-hour that you were allowed to get that done?

A. That is an extra half-hour allowed to get that done and the electric line cord and saws, etc.

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A Copy—Teste:

H. G. TURNER, Clerk.

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