IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

Comprehensive discussion of "Horseplay"

STEVEN J. GRABOWSKI, JR., and CONNIE GRABOWSKI, his wife,	)	
Plaintiffs,	)	
v.	)	C.A. No. 02C-10-118 PLA
WILLIAM MANGLER, DAVID SMITH, and JOSEPH ZIEMBA,	)	
Defendants.	)	

Submitted: November 15, 2007
Decided: December 10, 2007

UPON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT
GRANTED

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ABLEMAN, JUDGE

I. Introduction

This case stems from a horseplay incident at a job site in which Defendants William Mangler ("Mangler"), David Smith ("Smith), and Joseph Ziemba ("Ziemba") (collectively "Defendants") detained Plaintiff Stephen J. Grabowksi, Jr. ("Grabowski") in a bathroom, brought him to the ground, and wrapped him in duct tape from his ankles to his shoulders. Grabowski suffered physical and mental injuries as a result. After claiming and receiving Worker's Compensation Benefits, Grabowski filed a third party negligence action against Defendants. This Court granted summary judgment on behalf of Defendants, holding that Grabowski could not recover in tort and that Grabowski's exclusive means of recovery was Delaware's Worker's Compensation Act (the "Act").[1]

On appeal, the Delaware Supreme Court held that this Court failed to determine whether the horseplay was outside the scope and course of employment and remanded the case with instructions to apply the newly-adopted "Larson test."[2] Defendants have now filed separate motions for summary judgment in which they have applied the Larson Test and have argued that the horseplay at issue occurred within the scope of employment.

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[1] *Grabowski v. Mangler*, 2007 WL 121845 (Del. Super. Ct. Jan. 17, 2007) [hereinafter *Grabowski I*].

[2] *Grabowski v. Mangler*, ___ A.2d ___, 2007 WL 1969671 (Del. Jul. 9, 2007) [hereinafter *Grabowski II*].

As a result, Defendants ask this Court to find that the "exclusivity" provision under DEL. CODE ANN. tit. 19, § 2304 ("Section 2304") of the Act is Grabowski's sole remedy to recover for his injuries that resulted from the horseplay. For the reasons that follow, Defendants' Motions for Summary Judgment are **GRANTED**.

II. Statement of Facts

In October 2000, Grabowksi and Defendants were employed as pipe fitters and welders by J.J. White, Inc. When working at their job site, the employees were not permitted to leave. Because of the nature of their work, however, Grabowski and Defendants had extended periods of down-time in which they had little to do. During these periods, Grabowksi and Defendants often engaged in practical jokes and pranks with one another.

On October 16, 2000, Defendants caught Grabowski in a bathroom at a job site and wrapped him from his ankles to his shoulders in duct tape in an effort to get him back for his prank of putting water in Smith's hard hat. Grabowski suffered physical injuries, requiring surgery on his lower back and right knee, as well as post-traumatic stress, requiring counseling.

Grabowski filed for, and collected, over $300,000 in worker's compensation benefits. Grabowksi then filed a complaint in Superior Court against Defendants alleging negligence and seeking compensatory damages

for the injuries they allegedly caused.[3] Ziemba moved for summary judgment, and Mangler and Smith joined in the motion.

The Superior Court granted Defendants' motion for summary judgment. The Court determined that, as a "non-participating victim" of the horseplay, Grabowski's exclusive remedy was Worker's Compensation benefits, and he could not maintain a third party negligence action.[4] Grabowski then appealed to the Delaware Supreme Court.

On appeal, the Delaware Supreme Court remanded the case to this Court with instructions to apply the newly-adopted Larson test to determine whether Defendants' horseplay occurred within the course and scope of employment. Should this Court determine that Defendants' conduct occurred outside of the course and scope of employment, the Court may permit Grabowski to bring an action against Defendants.[5] In contrast, should this Court determine that Defendants' conduct occurred during the course and scope of employment, Grabowski may not bring a third party action against Defendants, and Grabowksi's sole remedy is the Act.[6]

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[3] Grabowski also filed a complaint against other entities, but those entities have been dismissed.

[4] *Grabowski I* at *3.

[5] *Grabowski II* at *4.

[6] *Id.*

III. Parties' Contentions

Defendants have each moved for summary judgment, arguing that their conduct occurred within the course and scope of employment.[7] Applying the four factors of the Larson test, Defendants argue (1) that they did not deviate from their work when they engaged in horseplay because there were no job duties at that time; (2) that, because there were no job duties, they did not abandon their duties; (3) that horseplay had become an accepted part of their employment; and (4) that the nature of their job, involving periods of intense labor followed by periods of extended down-time, necessarily included some horseplay. As a result, Defendants argue that Grabowski's exclusive remedy is the Act.

In response, Grabowksi claims that, under the Larson test, Defendants' conduct falls outside the course and scope of employment and, thus, Grabowski may maintain a third party action.[8] Grabowski argues that the first factor weighs in his favor because the horseplay at issue was a serious deviation from Defendants' pipefitting and welding jobs. Grabowski

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[7] Defendants each have filed separate motions for summary judgment. Because they argue the same points, however, the Court will address their motions together.

[8] The Court notes that Grabowski, by recovering worker's compensation benefits from his employer, has admitted that his injuries "ar[ose] out of and in the course and scope of employment." 19 *Del. C.* § 2304. By filing a third party action, however, Grabowski is now arguing that his injures did not arise out of and in the course and scope of his employment. Grabowski cannot have it both ways.

stresses that, under the second factor, Defendants' prank involved an abandonment of their duties because a pipe fitter and welder would not be reasonably expected to wrap a co-worker in duct tape. Under the third factor, Grabowski argues that horseplay had not become an accepted part of Defendants' employment because J.J. White, Inc. did not condone horseplay, had rules against it, and issued a disciplinary warning against Defendants. Finally, Grabowski argues that the fourth factor weighs in his favor because the horseplay that was customary was minor and not of the type that Defendants engaged in here. As a result, Grabowski asks this Court to deny Defendants' motion and find that the Defendants' conduct occurred outside the scope of employment.

IV. Standard of Review

When considering a motion for summary judgment, the Court's function is to examine the record to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law.[9] The court must "view the evidence in the light most favorable to the non-moving party."[10] "The moving party bears the initial burden of demonstrating that the undisputed facts support his legal

[9] Super Ct. Civ. R. 56(c).

[10] *Storm v. NSL Rockland Place, LLC*, 898 A.2d 874, 880 (Del. Super. Ct. 2005).

claims."[11] If the proponent properly supports his claims, the burden "shifts to the non-moving party to demonstrate that there are material issues of fact for resolution by the ultimate fact-finder."[12]

Summary judgment will not be granted if, after viewing the record in a light most favorable to the non-moving party, there are material facts in dispute or if judgment as a matter of law is not appropriate.[13] If, however, the record reveals that there are no material facts in dispute and judgment as a matter of law is appropriate, then summary judgment will be granted.[14] Where there are no material facts at issue, and the dispute focuses on a question of law, summary judgment is appropriate.[15]

V. Analysis

The Court notes at the outset that the material facts are not in dispute. Because the Supreme Court has instructed this Court to apply the Larson

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[11] *Id.* at 879.

[12] *Id.* at 880.

[13] *Id.* at 879.

[14] *Id.*

[15] *Sierra Club v. Del. Dep't of Natural Res. and Envtl. Control*, 919 A.2d 547, 555 (Del. Mar. 9, 2007) (App. II), *aff'g Sierra Club v. DNREC*, C.A. No. 1724-N (Del. Ch. Jun. 19, 2006).

test, the only issue to be addressed is a question of law. Thus, summary judgment is appropriate at this stage.[16]

Where an employee is injured on the job from conduct "arising out of and in the course and scope of employment[,]" the Act serves as the exclusive remedy for the employee to recover compensation for his injuries against his employer, and bars any additional claims.[17] The Act also bars third party claims against an injured employee's co-employees "if the act complained of was one which the defendant might reasonably do, or be expected to do, within a time during which he was employed and at a place where he could reasonably be during that time – even through outside his regular duties."[18] The Act, however, permits the injured employee to bring a claim against a third party tortfeasor where that third party is "other than a natural person in the same employ" from the injured employee.[19] Specifically, a co-employee may be liable in tort to the injured employee if his actions are "so unreasonable and so unexpected that it is not within the

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[16] *Id.*

[17] 19 *Del. C.* § 2304; *Konstantopoulos v. Westvaco Corp.*, 690 A.2d 936, 938-939 (Del. 1996); *Grabowski II* at *2.

[18] *Grabowski II* at *2 (citing *Groves v. Marvel,* 213 A.2d 853, 855-56 (Del. 1965)).

[19] 19 *Del. C.* § 2363(a).

co-employees' course and scope of employment."[20] As a result, to determine whether an injured employee's sole remedy is the Act, the trial judge must determine on the record before her whether the co-employees conduct fell within the scope of employment, or was so unreasonable that it went beyond the scope of employment.[21]

To determine "whether co-employees' conduct constituted horseplay of such a character that it was outside the course and scope of employment[,]"[22] the Delaware Supreme Court has adopted Professor Larson's test (the "Larson test"). Under the Larson test, a judge must consider four factors:

> (1) [T]he extent and seriousness of the deviation;
> (2) the completeness of the deviation (i.e., whether it was co-mingled with the performance of duty or involved an abandonment of duty);
> (3) the extent to which the practice of horseplay had become an accepted part of the employment; and
> (4) the extent to which the nature of the employment may be expected to include some horseplay.[23]

The theory guiding this test, as explained by Professor Larson, is that "horseplay participation . . . should have the benefit of the general rule that

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[20] *Grabowski II* at *3.

[21] *Id.*

[22] *Id.*

[23] *Id.* (citing 1A Arthur Larson, The Law of Workmen's Compensation, §§ 23.00 & 23.01).

trifling and insubstantial deviations, which do not measurably detract from the work, should not be treated as departures from the scope of employment."[24] As a result, the Court must apply the Larson test to determine whether an instigator's conduct is a "substantial deviation" from the normal course and scope of employment.

As noted by the Delaware Supreme Court, Professor Larson has provided guidance for the first two elements:

> If the primary test in horseplay cases is deviation from the employment, the question whether the horseplay involved the dropping of active duties calling for claimant's attention as distinguished from the mere killing of time while claimant had nothing to do assumes considerable importance. There are two reasons for this: first, if there were no duties to be performed, there were none to be abandoned; and second, it is common knowledge, embodied in more than old saw, that idleness breeds mischief, so that if idleness is a fixture of the employment, its handmaiden is mischief also.[25]

Further, "the third and fourth parts of the test may be viewed merely as specific methods of proving that a claimant's actions became part of the employment."[26]

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[24] *Varela v. Fisher Roofing Co., Inc.*, 572 N.W.2d 780, 782-83 (Neb. 1998) (quoting 1A Arthur Larson & Lex K. Larson, The Law of Workmen's Compensation § 23.66 at 5-233 (1996)).

[25] *Grabowski II* at *3 (citing Larson , *supra*, at §23.60).

[26] *Panera Bread, LLC v. IAB Claims Office of Colo.*, 141 P.3d 970, 973 (Colo. Ct. App. 2006).

Other courts applying the Larson test have provided further guidance. For example, in *Mitchell v. Sanborn*,[27] the Supreme Court of North Dakota, in a similar situation, addressed a claim by Mitchell, a police officer, who sustained serious injuries when Sanborn, his co-employee, intentionally bumped his knees out from under him in an act of horseplay. Mitchell received worker's compensation benefits and then filed a third party suit against Sanborn to recover additional compensation. The *Mitchell* Court analyzed the Larson test at length and provided further guidance to determine whether an act of horseplay occurred within the scope of employment:

> Although this horseplay produced serious consequences, the nature of a horseplay deviation should not be judged with hindsight; instead, the deviation should be measured by the extent of the work-departure regardless of the seriousness of its consequences. 1A Larson § 23.61 at 5-200-5-201. The extent of Sanborn's work-departure was slight and insubstantial. Larson explains:
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> [T]he particular act of horseplay is entitled to be judged according to the same standards of extent and duration of deviation that are accepted in other fields, such as resting, seeking personal comfort, or indulging in incidental personal errands. If an employee momentarily walks over to a co-employee to engage in a friendly word or two, this would nowadays be called an insubstantial deviation. If he accompanies this friendly word with a playful jab in the ribs, surely it cannot be said that an entirely new set of principles has come into play. The incident remains a simple human diversion

[27] 536 N.W.2d 678 (N.D. 1995).

> subject to the same tests of extent of departure from the employment as if the playful gesture had been omitted.
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> At the other extreme, there are cases in which the prankster undertakes a practical joke which necessitates the complete abandonment of the employment and the concentration of all his energies for a substantial part of his working time on the horseplay enterprise. When this abandonment is sufficiently complete and extensive, it can only be treated the same as abandonment of the employment for any other personal purpose, such as an extended personal errand or an intentional four-hour nap. 1A Larson § 23.61 at 5-200-5-201.[28]

The Supreme Court of North Dakota concluded that Sanborn's intentional bumping of Mitchell's knee was not a substantial deviation from his work:

> Sanborn did not intend to injure Mitchell, and the record reflects that the act of horseplay was a brief, insubstantial, and momentary departure from his employment with no elaborate or advance planning. Sanborn's momentary act of horseplay was commingled with his duties, and the extent and duration of the horseplay did not constitute an abandonment of his work duties. Although Sanborn's act of horseplay produced serious consequences, it was not done with an intent to injure Mitchell, and we decline to magnify the slight departure from his duties into a complete abandonment of employment.[29]

Accordingly, the Supreme Court of North Dakota dismissed the action.

Similarly, the Supreme Court of South Dakota applied the Larson test in *Phillips v. John Morrell & Co.*, holding that the focus of the inquiry must

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[28] *Mitchell*, 536 N.W.2d at 685.

[29] *Id.*

be the "seriousness of the deviation from [defendant's] duties."[30] In that case, Phillips' duty involved cutting sperm cords on an assembly line. In an act of horseplay, Phillips threw the cords at a co-worker, seriously injuring him. In applying the Larson test, the Court held that the deviation was not substantial because: (1) Phillips was not reprimanded; (2) Phillips could not foresee that his horseplay would result in serious injury; (3) Phillips continued to work while throwing the cords because the horseplay act was commingled with his duties; (4) Phillips' company tolerated horseplay even though it was not permitted; and (5) the monotony of Phillips' job "provide[d] such a constant pattern of repetition that some new stimulus becomes necessary to relieve the tedium."[31] The Supreme Court of South Dakota therefore concluded that the horseplay occurred in the course of Phillips' employment.[32]

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[30] 484 N.W.2d 527, 531 (S.D. 1992).

[31] *Phillips*, 484 N.W.2d at 530-31.

[32] *Id.* at 531. Other courts are in agreement, holding that horseplay that occurs on a job site where employees have a lot of down-time is to be expected and, thus, is within the course and scope of employment. *See, e.g., Teffler v. Twin Falls Sch. Dist. No. 411*, 631 P.2d 610, 613 (Idaho 1981) (Bistline, J., dissenting) (quoting Larson, *supra*, at § 23.65 (1979)) ("(The majority of courts have) recognized that workmen whose jobs call for vigorous physical activity cannot be expected, during idle periods, to sit with folded hands in an attitude of contemplation. They must do something, and the most natural thing in the world to do is to joke, scuffle, spar, and play with the equipment and apparatus of the plant. . . ."); *Meigel v. Gen. Foods Corp.*, 2 A.D.2d 945, 945 (N.Y. Sup. Ct. 1956) (finding that an injury arising from a job site accident where employees attempted to "engage in a test of strength" by bending a steel bar was a "risk of the

With the foregoing Larson factors and decisions applying them in mind, the Court now turns to a consideration of each element with respect to the horseplay at issue in this case.

(1) The Extent and Seriousness of the Deviation, and
(2) The Completeness of the Deviation

Despite Grabowski's argument that this Court should consider the two factors separately, both Professor Larson and the Delaware Supreme Court have suggested that this Court analyze both factors together because of their relatedness.[33] Thus, the Court will consider these factors together.

In analyzing the first two factors – (1) the extent and seriousness of the deviation, and (2) the completeness of the deviation – the Court concludes the first two factors weigh towards finding that Defendants' horseplay occurred in the course and scope of employment, since the deviation from Defendants' work was not serious. As explained by

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employment" because "[y]oung lads whose jobs call for expenditure of physical energy cannot be expected, during slack period, to sit in idleness and gossip[]"); *Mitchell*, 536 N.W.2d at 685-86 ("Although we do not condone horseplay, given the stressful nature of a police officer's duties, we believe that they cannot be expected to attend strictly to their duties every minute they are on duty. Horseplay that counters the tensions and that does not substantially deviate from work can be expected in this type of work environment."); *Indus. Commission of Ohio v. Weigandt*, 130 N.E. 38, 40 (Ohio 1921) (finding that a scuffle in a factory was "an event of the sort that is of frequent occurrence between workmen[]"); *Dublin Garment Co. v. Jones*, 342 S.E.2d 638, 639 (Va. Ct. App. 1986) ("The rationale of these 'horseplay' cases is that where individuals are gathered together at work, they are given to practical joking or playful acts which at times result in an injury. Such injuries are said to be an anticipated risk of the employment . . . .").

[33] *See Grabowski II* at *3 (quoting Larson, *supra*, at § 23.60).

Professor Larson, the Court must focus on whether the parties involved dropped active duties or whether the Defendants were merely killing time. In this case, all of the Defendants testified that they were on "down time" when they instigated the horseplay against Grabowski.[34] Moreover, all parties admit that there was no work to be done during the time in question, even though they were required to remain at the job site.[35] Because there were no active duties to abandon, Defendants' act of horseplay was not a deviation from work.

Importantly, as noted by the Supreme Court of North Dakota in *Mitchell*, and the Supreme Court of South Dakota in *Phillips*, this Court must look to the seriousness of the work-departure, rather than the seriousness of the consequences. It is undisputed that Defendants had no duties to be performed at the time of their prank. Though Larson recognizes that pranks which require "the complete abandonment of the employment and the concentration of all his energies for a substantial part of his working time on the horseplay enterprise" are outside the scope of employment, the employee who instigated the prank must abandon his duties "sufficiently

[34] *See* Docket 90, Ex. A.

[35] *Id.*

complete[ly] and extensive[ly.]"[36] Because Defendants and Grabowski were, in essence, killing time, there were no duties to abandon, and thus any abandonment by Defendants was not "sufficiently complete and extensive" to place the horseplay outside the scope of employment.

Moreover, even though *Mitchell* is factually distinguishable from this case, this Court's holding – that Defendants' horseplay did not involve an abandonment of their job duties – is in accord with the Supreme Court of North Dakota's well-reasoned analysis. Unlike the facts in *Mitchell*, in which the defendants' act of horseplay was "brief, insubstantial, and [a] momentary departure from his employment with no elaborate or advance planning," it is undisputed that Defendants had planned this prank and were waiting for Grabowksi in the bathroom.[37] Although Grabowksi argues that the horseplay was similar to "an extended personal errand or an intentional

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[36] *Mitchell*, 536 N.W.2d at 685.

[37] Ziemba testified at his deposition as follows:

> Q: Okay. This duct-taping incident with Mr. Grabowski, did someone approach you, did you approach one of the gentlemen? How did this all start?
> A: I was approached by Dave [Smith] and Bill [Mangler] to help out with the incident.
> Q: All right. And were you approached that same day?
> A: Yeah, minutes before.
> Q: And you would agree with me that you and Mr. Smith went to the trailer bathroom to wait for Mr. Grabowski to be brought in?
> A: That's correct.

Docket 90, Ex. A (Ziemba Deposition), 5:4-16.

four-hour nap," thereby constituting an abandonment of Defendants' duties, the fact remains that Defendants and Grabowski had no active duties to abandon. As recognized by the *Mitchell* Court and Professor Larson, the important fact is "the extent and duration of the horseplay did not constitute an *abandonment* of his work duties."[38] Had Defendants and Grabowski been on a job and engaged in this prank, this conduct would be similar to an intentional nap or an extended errand and, hence, outside the course of employment. In this case, however, Defendants had no other work to do except sit at their site and wait for a new job.

In addition, although Grabowski sustained serious injuries, Defendants' act was "not done with an intent to injure . . . ."[39] Defendants all testified that they were merely playing a prank on Grabowski, just like the countless other pranks both Grabowski and Defendants had frequently played on each other. As a result, this Court "decline[s] to magnify the slight departure from [Defendants'] duties into a complete abandonment of employment."[40]

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[38] *Mitchell*, 536 N.W.2d at 685 (emphasis added).

[39] *Id.*

[40] *Id.*

Grabowski relies on *Groves v. Marvel*[41] in asserting that Defendants were not acting within the scope of employment. In *Groves*, the defendant, a car salesman, drove a car into his company's service bay, accidentally left the car in gear, and turned the car on, sending the car forward, injuring the plaintiff, a mechanic. The plaintiff recovered worker's compensation benefits and then sued the defendant for negligence.

To determine whether the defendant in *Groves* was a "person in the same employ" as the plaintiff and thus immune from a third party claim, the Delaware Supreme Court defined "in the course of employment" under the Act to include any act "which the defendant might reasonably do, or be expected to do, within a time during which he was employed and at a place where he could reasonably be during that time – even though outside his regular duties."[42] Finding that the defendant, by driving a car into his company's service bay, supported the business's line of work and promoted customer good will, the Supreme Court held that the defendant was working in the course of his employment and barred the negligence action under the exclusivity provision of the Act.

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[41] 213 A.2d 853 (Del. 1965).

[42] *Groves*, 213 A.2d at 856.

Applying this rationale, Grabowski argues that wrapping an employee in duct tape is not something that an employee may reasonably be expected to do within the time he is employed. Thus, Defendants' conduct is outside the scope of employment. To support this argument, Grabowski notes that Defendants admitted that wrapping an employee in duct tape did not further the business of the employer. Moreover, Grabowski argues that the specific act of wrapping a person in duct tape is "so far removed from the normal 'downtime' occurrences that the actions were an abandonment of the job duties of a pipe fitter."[43]

Under the broad definition of "in the course of employment" established by the Supreme Court in *Groves*, the only possible conclusion that this Court can draw from the record is that Defendants engaged in horseplay on the job on a regular basis. Like the defendant in *Groves*, whose job description did not include work in the service area, Defendants had a job description that clearly did not include horseplay. Nonetheless, it is undisputed that all parties had down-time and that all parties engaged in horseplay. Moreover, Defendants and Ben Nyce, a neutral observer, testified about all sorts of different acts of horseplay that occurred at the job site, including putting cardboard between the glass of a welding mask to

[43] Docket 95, p. 4.

prevent the wearer from seeing, placing rocks in a worker's lunch box, placing water in hardhats, taping lunch boxes shut, lighting a co-worker's pants on fire while he was napping, placing Never-Seez[44] in a co-worker's gloves so that the wearer would be covered in the chemical, and messing with chair wheels.[45] Although horseplay did not generate good will for J.J. White, Inc. nor did it promote its business, it was, for better or for worse, a natural part of these pipe fitters' and welders' jobs. And, despite Grabowski's attempts to characterize this horseplay as beyond the typical carousing in which employees engaged, the record reflects that all employees engaged in various types of horseplay, from minor acts to more aggressive conduct. Thus, wrapping a co-worker in duct tape as a prank is not "so far removed" from the typical horseplay of employees at this job site.

Thus, in applying the first two Larson test factors, the Court finds that the Defendants' did not deviate from their work, that any deviation was insubstantial, and that Defendants did not abandon any duties when they

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[44] "Never-Seez is a family of anti-seize and lubricating compounds that includes 11 different product formulations, each compounded to solve specific industrial problems associated with metal wear, corrosion and seizure." *See http://www.bostik-us.com/TDS/TDSFiles/NS_QA.pdf.*

[45] Deposition of Ben Nyce, at 7:22-8:6; Deposition of Joseph Ziemba, at 5:19-7:10; Deposition of David Smith, at 10:4-11:11; Deposition of William Mangler, at 14:11-15:24.

engaged in horseplay. Analysis of these two factors therefore weighs in favor of finding that Defendants' prank occurred during the course and scope of employment.

(3) The Extent to which the Practice of Horseplay had become an Accepted Part of the Employment

The third factor – the extent to which the horseplay had become accepted at the workplace – also weighs in favor of finding that the horseplay at issue occurred during the course and scope of Defendants' employment. Though Grabowski notes that J.J. White, Inc., like most employers, had rules against horseplay and did not condone it, the Court's focus is not on whether the horseplay was "officially" accepted by the employer, but rather whether horseplay had become so pervasive in this company that it had become an "informally" accepted part of employment.

In this case, Defendants all testified at their depositions that horseplay occurred at the job site frequently. Not only was such horseplay commonplace, but Grabowski himself participated in the horseplay on countless occasions. As recognized by the *Mitchell* Court, although horseplay at the job site is not condoned, Defendants' horseplay "that

counters the tensions and that does not substantially deviate from work can be expected in this type of work environment."[46]

More importantly, it is undisputed that employees at J.J. White, Inc. had substantial downtime between jobs in which they would have nothing to do, leading them to engage in horseplay.[47] As recognized by Professor Larson, "idleness breeds mischief, so that if idleness is a fixture of the employment, its handmaiden is mischief also."[48] In this case, all employees, Defendants and Grabowski included, engaged in pranks and "mischief" to kill time when there was no work to be done.[49] Like the job in *Phillips* that was repetitive, Defendants' boredom during down time caused them to seek

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[46] *Mitchell*, 536 N.W.2d at 686.

[47] At his deposition, Smith testified as follows:

> Q: And is it fair to say that when you were on down time, that that's when pranks would take place?
> A: Would, yeah. I mean, yeah. You can only play cards for so long and you get tired of that, so you get up and stretch up, you know, you walk out and you can't sit in the trailer all, you know, all day. I guess idle time, you know, you find something to do.
> Q: And so pranks were commonplace on this job also?
> A: Yes, they were.

Deposition of David Smith, at 17:15-24.

[48] *Grabowski II* at *3 (citing Larson , *supra*, at §23.60).

[49] For example, Ziemba testified that horseplay at the job sit was "frequent." Deposition of Joseph Ziemba, at 11:15-17.

"some new stimulus necessary to relieve the tedium."[50] Though Defendants received a disciplinary warning from their employer, they could not foresee that this act of horseplay would result in the serious injury that occurred here. Defendants' company tolerated horseplay even though it was not officially permitted, and the down-time at J.J. White, Inc. is similar to the monotony of the job in *Phillips*.[51] As a result, the Court finds that horseplay had become an informally accepted part of Grabowski's and Defendants' employment.

(4) The Extent to which the Nature of the Employment may be Expected to include Some Horseplay

The final factor – the extent to which the nature of the employment may be expected to include some horseplay – weighs in favor of finding that the horseplay at issue occurred in the course and scope of employment. In this case, all of the parties worked as pipe fitters and welders at a black coal plant.[52] As part of their job, they had to maintain a large, experimental machine, which involved periods of labor and then periods of down-time.[53] The employees were not permitted, however, to leave their job site, even

[50] *Phillips*, 484 N.W.2d at 530-31.

[51] *Id.*

[52] Deposition of Joseph Ziemba, 6:2-5.

[53] Deposition of Ben Nyce, 6:17-7:6.

when they were not working. As noted by Professor Larson, employees who work at jobs that require vigorous activity, followed by periods of downtime, are expected "to joke, scuffle, spar, and play with the equipment and apparatus of the plant."[54] All of the Defendants testified at deposition that the employees engage in horseplay to kill the down-time. In this case, Defendants, on their extensive period of down-time, used duct tape – equipment available at their job site – and played a prank on Grabowski that unfortunately and unpredictably resulted in a serious injury. Though Grabowski urges this Court to consider this prank as out of the ordinary from the typical horseplay that generally occurred, the record reflects that the employees engaged in various types of horseplay, ranging from simple pranks, such as placing water in a hard hat, to more serious pranks, such as lighting a co-worker's pants on fire during a nap.[55] More importantly, Ben Nyce, the neutral observer upon which Plaintiff relies heavily, testified that this incident was the type of horseplay to be expected.[56] As a result, the

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[54] *Teffler*, 631 P.2d at 613 (Bistline, J., dissenting) (quoting Larson, *supra*, at § 23.65 (1979)).

[55] Deposition of Ben Nyce, at 7:22-8:6; Deposition of Joseph Ziemba, at 5:19-7:10; Deposition of David Smith, at 10:4-11:11; Deposition of William Mangler, at 14:11-15:24.

[56] In fact, Ben Nyce testified as follows:

Court finds that the nature of Grabowski's and Defendants' employment was such that horseplay of the type at issue here was to be expected.

VI. Conclusion

For the foregoing reasons, the Court concludes that the four factors of the Larson test justify a finding that Defendants' act of horseplay occurred in the course and scope of their employment. Accordingly, Defendants' Motions for Summary Judgment are hereby **GRANTED.**

IT IS SO ORDERED.

Peggy L. Ableman, Judge

Original to Prothonotary

> Q: Okay. Do you think that what happened with Grabowski in terms of the duct tape, based upon your experience, was something that was out of the ordinary in terms of horseplay?
> A: No, not terribly so, no.
> Q: Okay. Can you tell me why you feel that way?
> A: Because I can remember an incident when I, when I was an apprentice and another fellow was an apprentice and the guy, the other apprentice was somewhat of a loud-mouth, and this guy picked him up and put him in the gang box and locked him and left him in there for a few hours. So I don't think that would be any worse than duct taping him.

Deposition of Ben Nyce, at 10:9-21.