IN THE

Supreme Court of Virginia

RECORD NO. 110767

GREGORY JOSEPH GAGNON,

Appellant,

V.

TRAVIS BURNS, et al.,

Appellees.

BRIEF OF APPELLANT, GREGORY JOSEPH GAGNON

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ASSIGNMENTS OF ERROR

1. The Court erred in not finding joint and several liability of all Defendants for all awards against all Defendants and not entering judgment against all Defendants jointly and severally for the aggregate principal amount of $5,000,000.00, plus prejudgment interest and all costs. [Assignment of Error 1 is preserved by Joint Appendix ("A") 333-337; 474-475; 485-486; 566-580; 1229-1234; 1322-1324; 1336-1369, 1370 & 1371; 1373-1378; 1408-1464.]

2. Alternatively, the Court erred in not finding joint and several liability between Defendant Travis Burns and Defendant James S. Newsome, Jr., and not entering judgment against Defendant Travis Burns and Defendant James S. Newsome, Jr. jointly and severally for the aggregate principal amounts awarded against them, $4,500,000.00, plus prejudgment interest and all costs. [Assignment of Error 2 is preserved by A333-337; 474-475; 485-486; 566-580; 1229-1234; 1322-1324; 1336-1369, 1370 & 1371; 1373-1378; 1408-1464.]

3. In the alternative, the Court erred in not finding joint and several liability against all Defendants and not entering judgment against all Defendants jointly and severally or at least Defendant Travis Burns for the highest principal amount awarded, $3,250,000.00, plus prejudgment interest and all costs. [Assignment of Error 3 is preserved by A333-337; 474-475; 485-486; 566-580; 1229-1234; 1322-1324; 1336-1369, 1370 & 1371; 1373-1378; 1408-1464.]

4. In the further alternative, the Court erred in not finding joint and several liability between Defendant Travis Burns and Defendant Christine Newsome and not entering judgment against Defendant Travis Burns and Defendant Christine Newsome jointly and severally for the aggregate principal amounts awarded against them, $1,750,000.00, plus prejudgment thereon and costs. [Assignment of Error 4 is preserved by A333-337; 474-475; 485-486; 566-580; 1229-1234; 1322-1324; 1336-1369, 1370 & 1371; 1373-1378; 1408-1464.]

QUESTIONS PRESENTED

1. Whether the Court erred in not finding joint and several liability of all Defendants for all awards against all Defendants and not entering

judgment against all Defendants jointly and severally for the aggregate principal amount of $5,000,000.00, plus prejudgment interest thereon and all costs. [Assignment of Error 1]

2. Alternatively, whether the Court erred in not finding joint and several liability between Defendant Travis Burns and Defendant James S. Newsome, Jr., and not entering judgment against Defendant Travis Burns and Defendant James S. Newsome, Jr. jointly and severally for the aggregate principal amounts awarded against them, $4,500,000.00, plus prejudgment interest thereon and all costs. [Assignment of Error 2]

3. In the alternative, whether the Court erred in not finding joint and several liability against all Defendants and not entering judgment against all Defendants jointly and severally or at least Defendant Travis Burns for the highest principal amount awarded, $3,250,000.00, plus prejudgment interest thereon and all costs. [Assignment of Error 3]

4. In the further alternative, whether the Court erred in not finding joint and several liability between Defendant Travis Burns and Defendant Christine Newsome and not entering judgment against Defendant Travis Burns and Defendant Christine Newsome jointly and severally for the aggregate principal amounts awarded against them, $1,750,000.00, plus prejudgment thereon and all costs. [Assignment of Error 4]

STATEMENT OF THE CASE AND MATERIAL PROCEEDINGS

Gagnon pleaded joint and several liability of all Defendants, who were tried together. Gagnon preserved his objection that Defendants were liable "for the whole," that any damages awarded were joint and several. A1233.

Judge refused Gagnon's unitary damages jury instruction, despite Gagnon repeatedly arguing and objecting all Defendants were liable for all damages. A1229-1234, 1314 & 1317-1318. Judge opined Burns and

James Newsome were not joint tortfeasors for indivisible brain injury damages because James was an intentional tortfeasor and Burns was a negligent tortfeasor. A1231-1233

Significantly, Judge stated Gagnon had preserved the point: "Your exception is noted and preserved." A1233 (emphasis added). Without waiving joint and several liability, Gagnon dutifully obeyed judge in redrafting the disputed jury instructions; and thereafter, the Judge rejected Gagnon's 1-page unitary Jury Verdict form for all Defendants, A1281; considered an alternate form from Burns, A1278-1279 & 1296; and based thereon created another 3-page form providing an award for each Defendant, A330-332, that he had the parties review *pro forma.* A1304.

Jury awarded Gagnon $5,000,000 in damages, apportioned $3,250,000 against James, $1,250,000 against Burns, and $500,000 against Christine Newsome; plus prejudgment interest. A1321-1328. Recognizing it was joint and several liability, Burns immediately tried to have the awards made separate liability by judge questioning the jury about its desires for collection, and Gagnon again objected, A1322-1324; and Gagnon reiterated that post-trial. A1428-1429.

Judge denied Gagnon's three post-trial motions seeking to have all amounts awarded entered as judgment for joint and several liability of all

Defendants. Judge reiterated Burns could not be jointly and severally liable for intentional tort of James; but never gave any reason for not holding Burns jointly and severally liable with negligent tortfeasor, Christine – plus, the Judge had reservation about Burns' $6,000,000 insurance policy having to cover the $500,000 award against Christine.

Newsomes filed Chapter 7 Petitions, but Bankruptcy Court ordered leave of stay for entry of judgment. Final Judgment Order was entered January 25, 2011; and Gagnon filed Notice of Appeal April 25, 2011.

Judgment is final and unappealable against James for $3,250,000 and Christine for $500,000. Gagnon has not collected anything.

STATEMENT OF THE FACTS

Assistant Principal Burns admitted to his Superintendent and at trial that Gloucester High School ("GHS") student Shannon Diaz warned him of impending physical altercation involving Gagnon. A645, 655, 984, 1101-1102 & 1112-1113. Burns admitted that he verified Gagnon's name with Diaz, wrote himself a note about it, and assured Diaz he would investigate and notify security: "I told him I would look into it and take care of it, yes, I did." A638-639, 646, 655, 661, 1101-1102, 1104-1106 & 1113 (emphasis added).

Burns also admitted that he was School Security Contact for 2 Resource Officers and 8 Security Officers onsite, all of whom always were linked by walkie-talkies for regular immediate communication. A610-614, 624-626 & 1071-1081. Despite claiming he was too busy, Burns admitted further that in 2 seconds he could have radioed for security to get Gagnon out of class, which he had done before, A647-649 & 1078-1080; and that security would have gotten Gagnon within 5-10 minutes, A726-728 & 1012 – but Burns did nothing, even though he claimed having no assurance the physical altercation would not occur that day. A692-693 & 1113-1115.

At evidentiary sovereign immunity hearing, Burns claimed further that he would have "dropped everything" to "prohibit the physical altercation" if only Diaz had indicated it might happen that day, *i.e.*, if Burns "had a sense that it was immediate," A690-691 (emphasis added); thereby pitting himself against Diaz. But Burns lost the pivotal credibility battle on that "ministerial act" before the Judge at hearing, so at trial Burns began testifying for the first time the legal buzzwords "judgment and discretion," A1104, 1115, 1155-1156 & 1163-1164; and along with him, so did Superintendent Kiser.

Diaz testified by *de bene esse* deposition on October 31, 2008, because he was a new airborne enlistedman home on leave from his Georgia station and set to deploy for the Middle East in January-February,

2009, on his 5-year military hitch, *i.e.*, because he was going to be unavailable for hearing, A817-818 & 1015-1016. Diaz testified with Superintendent Kiser present and with Burns sitting only 5-10 feet from him, A825A & 1024; and was cross-examined by Burns' lawyer.

To avoid retaliation while still a senior at GHS, Diaz waited until June 14, 2007, to give Gagnon's undersigned counsel an Affidavit. Diaz reviewed and refreshed with his Affidavit in preparation for his deposition, though he still had an independent recollection of the "big deal" involving his friend, Gagnon. A819-821 & 1017-1019.

Early on December 14, 2006, Diaz heard there was going to be an altercation between James Newsome and Gagnon and that it was "going to actually happen that day". So Diaz reported it to Burns because Burns was in charge of discipline at GHS then and Diaz was already in the office with him. A821-822 & 1019-1020.

Diaz told Burns he "heard that Greg was going to get into something today and he was going to get into a fight today". In response to cross-examination by Burns' lawyer, Diaz was unwavering: "I told him it was going to happen today." A828 & 1029.

Diaz told Burns that he "did not want anything to happen to Greg [Gagnon]." A829-830 & 1030-1031. Burns replied, "I will alert my security

and we'll make sure this problem gets taken care of," A830-831 & 1031-1032; and Diaz relied on that. A822 & 1020.

Burns asked for the spelling of Gagnon's name, and Diaz spelled it out for him. A822 & 1020. Significantly, Burns never asked Diaz for the name of the impending attacker or any other detail, though Diaz would have told Burns if asked, A830-831 & 1031-1032; Burns really needed only Gagnon's name, as Burns admitted he readily could locate students for intervention using GHS' software system. A646-648 and 1105-1106.

Diaz warned Burns about the impending altercation 2 hours before it happened, A829 & 1030; but Burns did absolutely nothing. Hence with GHS in session, student James sucker-punched Gagnon in the face, knocking his head into a brick pillar and causing a single indivisible brain injury, permanent and increasingly debilitating; while his sister and fellow student Christine goaded him. Trial Transcript ("T") 797-798 & 850.

Contemporaneous statements of James and 2 eyewitnesses corroborated the unprovoked attack against defenseless Gagnon. A1680 & 1684. James pleaded guilty to criminal "unlawful wounding". A1042-1043.

Immediately after the attack, Diaz went to the cafeteria where it occurred, told GHS Hall Monitor that he previously had warned Burns about the impending altercation, and was escorted by the Hall Monitor to Principal

Beverage; whereupon Diaz told Principal Beverage he previously had warned Burns about the impending altercation and was assured Burns "was going to get security on it before the fight". A823-825 & 1021-1023. Principal Beverage's testimony corroborated that Diaz approached him shortly after the attack, was with a Hall Monitor, and told him something that he just could not understand. A696-705 & 1035-1041.

Early the next morning, on Friday, December 15, 2006, Burns stopped and confronted Diaz in front of the GHS office and repeatedly asserted that Diaz had not told him the name of Gagnon, but finally relented after Diaz stood firm. A825-825A & 1023-1024. Burns was trying to intimidate Diaz by that confrontation. A829 & 1030.

Three days later, on Monday, December 18, 2006, Burns pulled Diaz out of his R.O.T.C. class; took Diaz into his office alone; and apologized to Diaz for "dropping the ball," and said he wanted Diaz to "trust him". A826 & 1025. Notably, Burns also admitted to GHS' Sergeant Shuster that he "made a big mistake;" to GHS' Deputy Carwell that he "screwed up;" and to Mr. Gagnon and to Mrs. Gagnon that he "dropped the ball." A715-716, 717, 722-724, 733, 1006-1008, 1177-1178, 1181-1183.

But later, Burns denied his 5 early admissions of fault, destroyed his personal calendar, "lost" his handwritten note, and fabricated and

repeatedly revised on his GHS computer a threatening "gun" email/posting that he alone attributed to Gagnon. A1049-1069, 1085-1090, 1107-1108, 1119-1123, 1164-1166, 1173-1175 & 1679. Burns' school computer was seized and tested, with Burns' forensic expert, James Brogan (a GHS co-employee), admitting that Gagnon's expert, Jason Holbrook, had superior computer credentials and even proved Brogan wrong on a core opinion point. A926, 930-947, 955-961 & 1674-1678; T1153-1154 & 1177-1183.

Two days before Deputy Carwell's deposition, Burns pulled Deputy Carwell aside privately and tried to influence his impending testimony against him. Deputy Carwell recounted that Burns said he "didn't screw up" and it was "just miscommunication or I might have misunderstood what he meant to say," A718-720 (emphasis added); that Burns said "there might have been a miscommunication of what his intent was to tell me about the case and that he didn't screw up." A1179-1181 (emphasis added).

Further, Deputy Carwell testified that shortly before his deposition Burns' counsel of record telephoned him, disputed his impending testimony about Burns having admitted that he "screwed up," and directed Deputy Carwell to "rethink" it. "Mr. Conrad said that it's not what happened, you know; I have to rethink my memory." A721 (emphasis added).

Defendants waged a scortched-earth smear defense, claiming victim Gagnon sent 2 threatening profane MySpace.com messages to James. But: [1] computer forensics proved them irregular on the face, inconsistent with account usage records, and not on Gagnon's computer, A924-947 & 955-961 and T1153-1154, 1158-1159, 1167-1170 & 1203; [2] Mr. Gagnon, Mrs. Gagnon, Ronnie Miller, and Shelby Warren corroborated that Gagnon remained incapacitated on his first-floor living room couch, and was not on his second-floor bedroom computer messaging, when the ostensible myspace.com message supposedly was sent, shortly after Gagnon returned from the Emergency Room disoriented from the blow and medication, T732-736, 1213-1218, 1220-1222, 1313-1316 & 1383-1387 and 12/16/09 Hearing Transcript ("H") 229-232, 296-297 & 315-317; and [3] Gagnon exposed that Newsome's mother fabricated the purported Myspace.com messages as Word documents that actually never were sent on or printed off the internet. A1192-1196.

Displeased with Gagnon's healthcare providers uniformly attesting his serious brain injury, Burns hired 6 experts who performed 4 Court-ordered defense medical examinations replete with multiple testings of Gagnon, A253-256; and were poised to style Gagnon a liar and malingerer. But the Judge ruled Gagnon likely would be allowed to rebut such dubious opinion

with new 3.0 Tesla MRI, cutting-edge objective diagnostic imaging that conclusively proved his structural brain injury, T1614-1645 & A1190-1191; so Burns withdrew all experts, A1190-1191, called none, and told jury he thereby just was "saving time". A1319.

SUMMARY OF ARGUMENT

Jury found all Defendants liable in tort for Gagnon's single indivisible brain injury. Burns and Newsomes are joint tortfeasors for the whole.

Negligent tortfeasors Burns and Christine are jointly and severally liable under Virginia law. Judge's reservation about Burns' $6,000,000 insurance policy covering Christine's $500,000 award is impertinent.

Burns' answerablility for James' intentional tort is Virginia first impression. But all authority and sound policy mandate joint liability.

There is no waiver. Gagnon preserved his claim of joint liability before, at and after jury awards; and Burns cannot complain about the legal consequences of jury instructions and verdict form he sought.

ARGUMENT AND STANDARD OF REVIEW

Gagnon's appeal raises questions of law. Hence it is hornbook that he is entitled *de novo* review on the law, with all facts and inferences construed most favorably to him as prevailing party on liability.

I. TORTFEASORS ARE JOINTLY AND SEVERALLY LIABLE.

Joint and several liability of negligent tortfeasor Burns for intentional tortfeasor James is first impression in Virginia. But the joint and several liability of negligent tortfeasors Burns and Christine is well settled.[1]

A. ***Sullivan v. Robertson Drug Co.***

"If separate and independent acts of negligence of two parties directly cause a single indivisible injury to a third person, either or both wrongdoers are responsible for the whole injury." *Sullivan v. Robertson Drug Co., Inc.*, 273 Va. 84, 92 (2007). The jury cannot "apportion damages based on the joint tortfeasors' relative degrees of negligence". *Id.* at 93.[2]

Both Burns and Christine were alleged by Gagnon and found by the jury to be negligent tortfeasors – Burns for not intervening with James, and Christine for goading on James. The Judge and counsel lumped them together as the "negligence Defendants," including particularly for purposes of jury instructions, A1233, 1280 & 1314.

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[1] Gagnon avers that there is joint and several liability of all Defendants for $5,000,000, the aggregate principal; alternatively, of Burns and James for $4,500,000 (assuming Christine's Bankruptcy extinguishes all liability for her principal of $500,000, which is denied); in the alternative, of all Defendants for $3,250,000, the highest single principal award; and in the further alternative, of Burns and Christine for $1,750,000, their principal amounts alone – all with prejudgment interest from December 14, 2006.

[2] *Sullivan* instructions affected liability, so required retrial. *Id.* at 94-95. But at bar, instructions and verdict forms only affect "remedy"; damage amounts are final and unappealable; and Gagnon seeks this Court only to modify and render for joint and several liability – so retrial is unnecessary.

Nonetheless the Judge summarily rejected the joint and several liability of negligent tortfeasors, Burns and Christine, argued by Gagnon, A1336-1344; troubled that Burns' $6,000,000 insurance was liable for Christine. A1345-1348. But under *Sullivan*, Burns and Christine clearly are jointly and severally liable for Gagnon's single indivisible brain injury caused by their respective negligence.

Christine's Bankruptcy discharge on her $500,000 jury award is irrelevant too: "The effect of a discharge is to prohibit collection of the discharged debt 'as a personal liability of the debtor'," *In re Mosby*, 244 B.R. 79, 87 (Bankr. E.D. Va. 2000). "It does not, however, affect the liability of any other person or entity for the debt." *Id.*

B. Black's, *Restatement of Torts*, and West Virginia.

Black's Law Dictionary states "accepted definition of a 'tort-feasor,' one who is guilty of a tort." *Thurston Metals & Supply Co., Inc. v. Taylor*, 230 Va. 475, 484 (1986). It does not distinguish between negligent tortfeasors and intentional tortfeasors like Burns and James, respectively; all "concurrent" and "consecutive" tortfeasors are "jointly and severally liable". Black's (9th ed. 2009) at 926 and 1497.

Restatement (Third) of Torts: Apportionment of Liability §14 at 117-121 (Cumm. 2010) is authoritative and on point re Burns' joint and several

liability for James' tort: "Tortfeasors Liable for Failure to Protect the Plaintiff from the Specific Risk of an Intentional Tort – A person who is liable to another based on a failure to protect the other from the specific risk of an intentional tort is jointly and severally liable for the share of comparative responsibility assigned to the intentional tortfeasor in addition to the share of comparative responsibility assigned to that person." *Id.* at 117 (emphasis added). Its rule discourages negligence and compensates victims, *id.* at 120, which is sound Virginia public policy: Burns as negligent tortfeasor, not Gagnon as victim, more appropriately should bear James' insolvency.

The Virginias are rare pure joint and several liability states. Resolving the first impression issue now before this Court, the Supreme Court of West Virginia: [1] cited Black's for "joint tortfeasors"; [2] followed *Restatement (Third) of Torts §14*; [3] held on point "tortfeasors whose wrongful acts or omissions, whether committed intentionally or negligently, concur to cause injury are joint tortfeasors who are jointly and severally liable for the damages which result from the wrong so committed"; and [4] upheld joint and several liability for the whole award despite the jury apportioning between negligent and intentional joint tortfeasors, *Strahin v. Cleavenger*, 216 W.Va. 175, 188-190 (2004)(emphasis added) – which opinion is the appropriate analysis and treatment of Burns and James as

joint tortfeasors. *Cf., Garlock Sealing Techs., Inc. v. Little*, 270 Va. 381, 387-388 (2005)(holding "serious reservations whether [joint and several liability] principles permit a court to enter judgment reflecting a jury's apportionment of damages").

C. Virginia statute, jurisprudence, and *stare decisis*.

The Code of Virginia mandates joint and several liability for all joint tortfeasors. *Va. Code Ann. §8.01-443* ("joint wrongdoers"). A jury has no authority to dictate separate liability for awards: "limitations on recovery are matters of remedy," the legal purview of the Court, which it alone must resolve by proper entry of final judgment. *Torloni v. Commonwealth*, 274 Va. 261, 266 (2007). *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 257 Va. 1, 10-16 (1999); *Etheridge v. Med Ctr. Hosps.*, 237 Va. 87, 95-98 (1989). *Cf.*, *Sullivan, supra*; *Garlock Sealing, supra*.

Etheridge delineated the jury's sole function as fact-finder "extends to the assessment of damages," not to "the legal consequences of its assessment"; party rights and remedies are "a matter of law, not a matter of fact"; and courts are obliged to apply the law to the facts found by the jury. *Id.* at 96-98 (citations and quotations omitted)(emphasis added). *Pulliam* reaffirmed *Etheridge*, emphasizing *stare decisis*, 257 Va. at 10-11 & 14-15;

which indicates joint and several liability for tortfeasors, Burns and James, regardless the jury's wishes about collection.

In *Etheridge*, *Va. Code Ann. §8.01-581.15* limited the jury's award desires, 237 Va. at 92; and at bar, *§8.01-443* and Virginia common law limit the jury's award desires. Once the jury assessed Defendants' liability for Gagnon's damages at $5,000,000 principal plus prejudgment interest, A1321-1328, its function and authority ended; final judgment should have been, and still should be, for joint and several liability of Burns and James.

II. THERE IS NO WAIVER BY GAGNON

Gagnon tendered a unitary damages instruction, combining Virginia Model Jury Instruction ("VMJI") 9.000 [negligence] and VMJI 36.090 [assault and battery] on award of damages for all Defendants. Gagnon argued that "to the extent Travis Burns is liable he is liable for the whole," that Burns "is liable for all of the damages that flow from the battery," and that "it's inappropriate to delineate and say only James Newsome can be liable for shame, humiliation et cetera...because I could then get less than full compensation and we could have some dichotomy," because "again, I believe Travis Burns is liable for the whole," *i.e.*, jointly and severally liable, A327 & 1229-1234 – responsibility "for the whole" being the joint and several liability language of *Sullivan*. 273 Va. at 92.

But Burns objected to Gagnon's unitary damages instruction, arguing "I don't think that's true" and "I don't believe that's the law". A1230-1231. The Judge agreed with and ruled for Burns, directing separate damages instructions be given and particularized to the "negligence" tortfeasors (Burns and Christine) and the "intentional" tortfeasor (James). A1231-1234, 1314 & 1317-1318.

Significantly, Gagnon objected repeatedly and noted his exception, A1231-1234; and the Judge stated that Gagnon had preserved the point. "Your exception is noted and preserved.". A1233 (emphasis added).

Gagnon tendered his Jury Verdict form to the Judge. A1281. The Judge accepted a competing verdict form from Burns, A1278-1279; and ultimately created and used own verdict form.[3] A1295-1296 & 1304. Consistent with his prior ruling against Burns being liable "for the whole," *i.e.*, jointly and severally liable, the Judge's verdict form provided an award blank for each Defendant. A330-332.

Inexplicably, the Jury Verdict form undisputably proffered to the Judge by Gagnon went missing from the trial record, apparently destroyed,

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[3] Initially, the Judge norminally stated he did not have a problem with the "general format" of Gagnon's unitary Jury Verdict form, A1282; but he considered Burns' verdict form, A1278-1279 & 1296; and then abandoned Gagnon's 1-page unitary Jury Verdict form. A330-332, 1296 & 1304.

discarded or lost. Gagnon proffered a duplicate for the record on appeal, Addendum; but this Court denied his Motion for Writ of Certiorari.

Nonetheless, Gagnon's 1-page Jury Verdict form repeatedly is described sufficiently in the record on appeal, and contrasted therein with the Judge's 3-page form that went to the jury. Specifically, Gagnon's unitary Jury Verdict form clearly provided only 1 blank for a single dollar award as to all Defendants found liable, while the variant created by the Judge instead provided 3 blanks for dollar awards against each Defendant.

Gagnon's undersigned counsel discussed the specifics of Gagnon's unitary Jury Verdict form with the Judge re Gagnon's post-trial Motion and Memorandum for Judgment of Joint and Several Liability against Joint Tortfeasor Defendants at hearing on October 4, 2010, "which was to ask the jury to find separately whether or not each defendant was liable and then make a single unitary award as to all three [defendants]." A1339 (emphasis added). "Whereas Your Honor put blanks for separate amounts against the defendant [sic], in [*VEPCO v. Clark*] one of the joint tortfeasors wanted there to be separate amounts and they put in the kind of verdict form I wanted, do you find Defendant A liable, do you find Defendant B liable, and they then put in a single amount...," A1352 (emphasis added);

and "the verdict form that I had prepared which after the jury finding each one liable called for a single dollar amount." A1368 (emphasis added).

Further, Gagnon's undersigned counsel reiterated his unitary Jury Verdict form in discussion with the Judge re Gagnon's post-trial Plaintiff's Supplemental Motion and Memorandum for Joint and Several Liability at final hearing on January 25, 2011. "I emphasize the plaintiff – plaintiff didn't request that things be separated or apportioned. Plaintiff's position was...to give a unitary damage instruction as proffered and a unitary verdict form as proffered and that wasn't done." A1415 (emphasis added). Finally, "it's contradictory to the verdict form that I gave to you that you rejected that had $1 [sic] amount at the bottom." A1452 (emphasis added).

As soon as the jury's verdict was read, Burns tried to have the amounts awarded on the Judge's verdict form made separate liability by having the Judge question the jury about its desires for collection, A1322-1324; thereby tacitly acknowledging the $5,000,000 in awards were subject to joint and several liability by operation of law. Gagnon again objected, plus reiterated his position post-trial numerous times and ways.

A. Burns is estopped by his own conduct.

At trial, Burns got the damages instructions that he asked and the verdict form that he induced the Judge to give. On appeal, Burns is

estopped from complaining about the legal consequences; Burns cannot be permitted to "approbate and reprobate – to invite error…and then to take advantage of the situation created by his own wrong." *Garlock Sealing*, 270 Va. 387-388 (upholding "joint and several liability" where the judge permitted the jury to apportion damages).

Analogously, at trial in *Garlock Sealing*, the defense "convinced the circuit court to permit the jury to apportion fault" for purposes of damages apportionment. *Id.* at 387. On appeal, Garlock Sealing complained it was error to apply "principles of joint and several liability" to require that it pay plaintiff for damages apportioned to insolvents, but this Court refused to consider its contentions: "We will not permit Garlock Sealing to obtain an apportionment of liability…and then complain about the method [consequences] of apportionment." *Id.* at 387-388.

"The [United States] Supreme Court has held that the principle of joint and several liability is applicable in admiralty jurisdiction and that principle was not abrogated by the proportionate share approach rule," continued this Court in *Garlock Sealing*. "And we note that the Supreme Court stated that this principle can result in 'one defendant's paying more than its apportioned share of liability when the plaintiff's recovery from other

defendants is limited by factors beyond the plaintiff's control, such as a defendant's insolvency'." *Id.* at 388.

B. Apportioned awards do not abrogate joint liability.

Jury awarded damages against all Defendants as instructed and provided on the Judge's verdict form. But even if Gagnon did not object to award apportionment, that does not abrogate joint and several liability. *Strahin, supra*; *Sullivan, supra*; and *Garlock Sealing, supra.*

C. Gagnon preserved his claim for joint and several liability.

Burns must, but fails to, "prove the elements of such waiver by clear and convincing evidence," *Baumann v. Capozio,* 269 Va. 356, 361 (2005) (emphasis added); based on Gagnon's actions "when considered together," *Shelton v. Commonwealth,* 274 Va. 121, 127 (2007)(motion and qualified endorsement of final order preserved) and "taken in context". *Wright v. Norfolk and W. Ry. Co.*, 245 Va. 160, 168 (1993)(lawyer voicing no objection to the "form" did not waive). Rule 5:25 focus is whether judge had "opportunity to rule intelligently on the issue," *Scialdone v. Commonwealth,* 279 Va. 422, 437 (2010); Gagnon need only put judge "on notice of his position," not use a certain phrase, *id.* at 438; and judge ruling on issue evinces opportunity. *Id.* at 439 (and all cases therein).

Since 1992, it is "sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objections to the action the court therefore." *Va. Code Ann. §8.01-384 (A)*. "No party, after having made an objection or motion known to the court, shall be required to make such objection or motion again to preserve his right to appeal, challenge, or more for reconsideration of, a ruling, order, or action of the court. Arguments made at trial via written pleading, memorandum, recital of objections in a final order, oral argument reduced to transcript, or agreed written statements of facts shall, unless expressly withdrawn or waived, be deemed preserved therein for assertion on appeal." *Id.* (emphasis added).

"Code §8.01-384(A)...is controlling of Rule 5:25, and we must apply the statutory provision." *Helms v. Manspile*, 277 Va. 1, 7 (2009) (memo preserved). *Brown v. Commonwealth*, 279 Va. 210, 217, *cert. denied*, 131 S. Ct. 217 (2010)(oral argument preserved). "Under Code §8.01-384(A) and our analysis in Helms, if a trial court is aware of a litigant's legal position and the litigant did not expressly waive such arguments, the arguments remain preserved for appeal." *Id.* (emphasis added).

"While the doctrine of invited error remains good law, it simply has no application where, as here, the record shows that a party clearly objected

to a specific ruling of the trial court to which error is assigned on appeal, even if the party failed to object to instructions applying or implementing the trial court's prior ruling." *King v. Commonwealth*, 264 Va. 576, 582 (2002). "The undeniable purpose of Code §8.01-384(A) is to relieve counsel of the burden of making repeated further objections to each subsequent action of the trial court that applies or implements a prior ruling to which an objection has already been noted." *Id.* at 581 (not objecting to instruction not waiver).

Negligence issue was not waived by not objecting to jury submission, where before and after the judge was "fully apprised," denied motion, and stated: "The objections to this ruling are preserved." *General Ins. of Roanoke, Inc. v. Page*, 250 Va. 409, 412 (1995)(emphasis added). There also was no waiver of underlying evidentiary objection maintained post-trial, even though plaintiff's counsel replied, "'That's fine, Your Honor,' when [disputed] tendered instruction was amended". *McMinn v. Rounds*, 267 Va. 277, 280-281 (2004)(emphasis added)(and instruction cases cited therein).

In 10 different ways, Gagnon gave ample "notice" of, provided "opportunity to rule intelligently" on, and "preserved" his position on joint and several liability by: [1] suing together and pleading joint and several liability of all Defendants, A1-5 & 76-80; [2] tendering a unitary damages jury instruction, A327 & 1229; [3] arguing liability "for the whole" for jury

instructions, A1229-1233; [4] objecting and excepting to separate damages instructions, A1231-1234; [5] having the Judge declare "your exception is noted and preserved," A1233 (emphasis added); [6] tendering a unitary Jury Verdict form, Addendum and A1281, 1329, 1352, 1368, 1415 & 1452; [7] objecting to the jury directing collection remedies, A1323; [8] filing 3 post-trial motions and 3 post-trial memoranda, A333-337, 474-480, 485-508 & 566-571; [9] arguing at 3 post-trial hearings, A1336-1378 & 1408-1464; and [10] noting objections on Final Judgment Order. A572-580. When considered together and taken in context with that, under *§8.01-384(A)* and jurisprudence Gagnon not specifically objecting to the Judge's verdict form merely went to Judge "applying or implementing prior ruling" that Defendants were not liable "for the whole," and was not waiver or invited error by "clear and convincing evidence" as Burns must prove.

CONCLUSION

Jury found against all Defendants, who thereby are joint tortfeasors jointly and severally liable for Plaintiff's single indivisible injury and all damages awarded. It is irrelevant James was an intentional tortfeasor and Burns' $6,000,000 insurance policy has to cover Christine and James.

WHEREFORE Appellant, Gregory Joseph Gagnon, prays the Court modify the Final Judgment Order for joint and several liability of all and render final judgment.

Respectfully submitted,

GREGORY JOSEPH GAGNON,

By: _____
Of Counsel

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VA. SUP. CT. RULE 5:26(e) CERTIFICATE

1. The name of the Appellant is Gregory Joseph Gagnon. Counsel for Appellant Gagnon is as follows:

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The name of the Appellees are Travis Burns, James S. Newsome, Jr., and Christine D. Newsome.

Counsel for Travis Burns is as follows:

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James S. Newsome, Jr., and Christine D. Newsome are *pro se*.

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(757)232-2968

Christine Newsome
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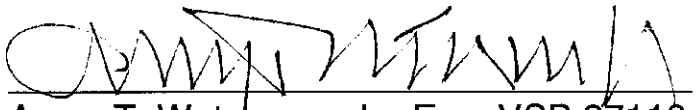
Newport News, VA 23602
(757)806-0541

2. I hereby certify that 15 copies of the foregoing Brief of Appellant were hand filed with the Clerk of the Supreme Court of Virginia and a true copy of the foregoing Brief of Appellant was mailed first class, postage prepaid, the 25th of October, 2011, to all opposing counsel and all parties not represented by counsel.



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ADDENDUM

VIRGINA: IN THE CIRCUIT COURT FOR GLOUCESTER COUNTY

GREGORY JOSEPH GAGNON,

PLAINTIFF,

v.

NO. CL08-572
JURY TRIAL DEMANDED

TRAVIS BURNS,
JAMES S. NEWSOME, JR., AND
CHRISTINE D. NEWSOME,

DEFENDANTS.

JURY VERDICT

COME NOW, we the Jury, and at trial on the merits find as follows:

1. We the Jury find in favor of Plaintiff, Gregory Joseph Gagnon, against Defendant, Travis Burns.

_____ YES _____ NO

2. We the Jury find in favor of Plaintiff, Gregory Joseph Gagnon, against Defendant, James S. Newsome, Jr.

_____ YES _____ NO

3. We the Jury find in favor of Plaintiff, Gregory Joseph Gagnon, against Defendant, Christine D. Newsome.

_____ YES _____ NO

4. We the Jury award the Plaintiff, Gregory Joseph Gagnon, damages in the principal amount of $_____.

5. We the Jury also award interest at the judgment rate of 6% per annum from December 14, 2006. _____ YES _____ NO

_____ _____

DATE FOREPERSON