IN THE

Supreme Court of Virginia

RECORD NO. 110767

GREGORY JOSEPH GAGNON,

Appellant,

V.

TRAVIS BURNS, *et al.,*

Appellees

REPLY BRIEF OF APPELLANT, GREGORY JOSEPH GAGNON

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ARGUMENT AND STANDARD OF REVIEW

"We review matters of law *de novo*." *Banks v. Mario Indus. of Va., Inc.*, 274 Va. 438, 451 (2007). Judge not finding joint and several liability and not entering judgment jointly and severally are errors of law, but also are "plainly wrong" even if that were the appellate review standard.

"[C]ourts have the duty to correct a verdict that plainly appears to be unfair or would result in a miscarriage of justice." *Norfolk Bev. Co., Inc. v. Cho*, 259 Va. 348, 353 (2000). Courts have modified and rendered against tortfeasors jointly, *Richmond v. Coca-Cola Bottling Works, Inc. v. Andrews*, 173 Va. 240, 252-252 (1939); and to "fix the damages" on indisputable evidence. *Apperson-Lee Motor Co. v. Ring*, 50 Va. 283, 288-289 (1928).

A. GAGNON'S LEGAL AUTHORITIES ARE CORRECT

Burns claims "Black's Law Dictionary, Restatement (Third) of Torts: Apportionment of Liability §14, Va. Code Ann. § 8.01-443,... Sullivan v. Robertson Drug Co., Inc., 273 Va. 84 (2007), Torloni v. Commonwealth, 274 Va. 261 (2007), Pulliam v. Coastal Emergency Servs. of Richmond, Inc., 257 Va. 1 (1999), and Etheridge v. Med. Ctr. Hosps., 237 Va. 87 (1989) are all inapposite...because Gagnon never requested or submitted this case to the jury based upon instructions of concurrent negligence ...." Brief of Appellee ["BOE"] at 3. That is false! A298, 1219 & 1310; B(1).

Burns misquotes *Strahin v. Cleavinger*, 216 W.Va. 175, 184 and n.7 (2004), which found defendant "owed a duty to protect," just declined to predicate it on special relationship due to the victim "being a minor," where that "was not fully developed either here or in the court below". BOE at 4. Moreover, Burns citing *Strahin* on that topic is a complete misdirection: *Strahin* is leading precedent on point of a sister, pure contributory negligence jurisdiction holding negligent and intentional tortfeasors jointly and severally liable despite jury apportionment of damages. *Id.* at 187-189.

Despite Burns' assertions to the contrary, BOE at 4, *Garlock Sealing Techs, Inc. v. Little*, 270 Va. 381, 387-388 (2005) reached joint and several liability by *dicta* and *sub rosa*, supporting Gagnon and estopping Burns for him attempting inconsistent positions. Brief of Appellant ["BOA"] at 15 & 20-21. At trial Burns sought apportionment of damages by claiming liability "for the whole" was not "the law," A1230-1231, by objecting to battery damages instruction applying to Burns, A1231, and by submitting a competing jury verdict form that Judge reworked, A1278-1279 & 1296; yet on appeal Burns decries the legal effect of Jury's 3 aggregative awards against joint tortfeasors – so cannot "approbate and reprobate – invite error…[and] take advantage of the situation created by his own wrong." 270 Va. at 387-388.

B. GAGNON'S DID NOT FAIL TO IDENTIFY OR TO REQUEST

Burns cites *Scialdone v. Commonwealth*, 279 Va. 422, 437 (2010) for: (1) "objections [must be] stated with reasonable certainty at the time of the ruling"; (2) judge must have "opportunity to rule intelligently on the issues presented"; (3) judge must "understand the precise question"; and (4) judge must be "in a position, not only to consider the asserted error, but also to rectify the effect of the asserted error". BOE at 5-6. But Gagnon satisfied all 4 points: (1) Gagnon clearly objected Burns was liable "for the whole," A1229-1234, *Sullivan v. Robertson Drug Co.*, 273 Va. 84, 92 (2007), *i.e.*, jointly and severally liable; (2) Judge actually ruled, A1231-1234, multiple times, A330-332, 572-580, 1295-1295 &1304; (3) Judge understood, just rejected, the precise question, *id.*; and (4) Judge could have rectified the error's effect before and after Jury verdict. *Id.*

Burns attempts focusing the Court myopically: "Gagnon bases these assignments of error on the comments of his counsel to the trial court, during a discussion which occurred when Gagnon offered his damages jury instruction, that Burns should be liable for all damages". BOE at 6. Although that alone suffices, Burns ignores Gagnon <u>also</u> bases joint and several liability on: (1) his unitary Jury Verdict form; (2) the issue, negligence, concurrent negligence, causation, and finding instructions given; and (3) his post-trial motions, memoranda, and arguments.

Burns likewise claims Gagnon's exception during jury instructions was "inconsistent with, inadequate [for], and completely contrary to Gagnon's contentions on appeal". *Id.* That too is false. BOA at 21-24.

1. <u>The jury instructions offered were sufficient</u>.

First, Burns asserts, "Gagnon never offered any jury instruction, or requested the court to consider or rule upon instructions which instructed the jury to make factual findings that Burns should be found jointly liable with the other two defendants, or liable for all damages flowing from any and all negligence and batteries by all defendants." BOE at 7. But in fact: (1) sufficient issue, negligence, concurrent negligence, causation, and finding instructions were given, A1307-1312; (2) Jury finding Defendants liable to Gagnon as "proximate cause" necessarily rendered them all "joint tortfeasors" as matter of law on indisputable facts;[1] and (3) Gagnon offered a unitary Jury Verdict form with a single damage award. BOA at 18-19.

Instruction Number 1 stated case "issues":

The issues in this case are, number one, was the defendant, Travis

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[1] . Indisputably, Gagnon experienced a single traumatic event: he was victim of one altercation; there were not multiple distinct incidents. Indisputably, Gagnon suffered a single indivisible injury: he suffered a sole brain injury; there were not multiple different injuries. Indisputably, as jury found, each Defendant was a proximate cause of the single traumatic event resulting in a single indivisible injury: James Newsome sucker-punched, Christine Newsome encouraged, and Travis Burns failed to intervene; but for the conduct of all Defendants, Gagnon would not be injured.

Burns, negligent? Number two, if he was negligent was his negligence a proximate cause of the incident on December 14, 2006? Number three, was the defendant, Christine Newsome, negligent? Number four, if she was negligent, was her negligence a proximate cause of the incident which occurred on December 14, 2006? Number five, did the defendant, James Newsome, commit a battery on the plaintiff on December 14, 2006? On these issues the plaintiff has the burden of proof.

A1307. A295. Instruction Number 2 was the "finding" one:

> You shall find your verdict for the plaintiff and against Travis Burns if the plaintiff has proved by the greater weight of the evidence that, number one, Travis Burns was negligent, and number two, that his negligence was a proximate cause of the incident which occurred on December 14, 2006. You shall find your verdict for plaintiff and against James Newsome if the plaintiff has proved by the greater weight of the evidence that James Newsome committed a battery on December 14, 2006. You shall find your verdict for the plaintiff and against Christine Newsome if the plaintiff has proved by the greater weight of the evidence that, number one, Christine Newsome was negligent, and number two, Christine Newsome's negligence was a proximate cause of the incident which occurred on December 14, 2006.

A1308-1309. A296. Instruction 3 defined "negligence":

> I instruct you that negligence is the failure to use ordinary care. Ordinary case is the care a reasonable person would have used under the circumstances of the case.

A1309-1310. A297. Instruction 4 was "concurring negligence":

> I instruct you that if two or more persons are negligent and if the negligence of each proximately caused the plaintiff's injury, then each is liable to plaintiff for his injury. This is true even if the negligence of the one is greater that the negligence of the other.

A1310. A298 & 1219. Instruction 12 defined "proximate cause":

> I instruct you that a proximate cause of an incident, injury, or damage is a cause which in natural and continuous sequence produces the incident, injury or damage. It is a cause without which the incident, injury or damage would not have occurred.

A1311-1312. A306. Burns even got "superceding negligence" instruction, Virginia Model Jury Instruction ("VMJI") 5.010. A324, 1241-1247 & 1317.

Burns also complains Gagnon's unitary damages instruction referred to "negligence," not "battery" too.[2] BOE at 7. But: (1) Gagnon did add "and battery" in part – "there's a slight modification. Line 3 says, caused by the defendant's negligence, and I put 'and battery' because we've got both things," A1229[3] – but that really was not the issue at trial; (2) at trial, Burns did not complain about any lack of reference to "battery" – which readily was correctible – but rather about Burns being liable "for the whole," so is barred from complaining anew on appeal, *Rose v. Jacques*, 268 Va. 137, 158 (2004); *Oden v. Salch*, 237 Va. 525, 531 (1989); *Va. Sup. Ct. Rule 5:25*; (3) even if *arguendo* Gagnon's proffered instruction were deficient, Gagnon is not assigning error to and appealing the instruction not being given; (4) Judge ruled Gagnon's exception on joint and several liability was

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[2] Burns further complains that Gagnon's instruction referred to "defendant". But that generic reference thereby applies to each and every defendant.

[3] Transcript-instruction inconsistency is explained by the "8/27/10" telefax stamp at top of A327. A327 was telefaxed by undersigned counsel's office to Chambers 8/27/10 and obviously was not the iteration annotated "and battery" discussed during jury instruction argument the prior day, 8/26/10.

"preserved," which is the issue on appeal; and under the damages instruction given at Burns' inducement, all Defendants still were and should have been joint tortfeasors; and (5) Burns at trial agreed to the Concurring Negligence instruction not referencing "and battery," A1219 &1310; so is being opportunistically inconsistent on appeal impermissibly.[4] *Garlock*.

Burns repeatedly complains Gagnon did not request Single Indivisible Injury [VMJI 4.025] instruction. BOE *passim*. But that rings hollow: (1) the Proximate Cause [VMJI 5.000] and Concurring Negligence [VMJI 4.020] instructions given were sufficient alone; (2) it was not mandatory – indeed, probably would have been reversible error – to give Single Indivisible Injury instruction, as indisputably on the facts there was a single indivisible injury; (3) Single Indivisible Injury instruction only references "negligence," not "battery," about which Burns complains re Gagnon's unitary damages instruction; and (4) Burns failed to offer Single Indivisible Injury instruction, so cannot complain about it on appeal anew. *Rose*; *Oden*; *Rule 5:25*.

More fundamentally, Burns twice cites *Dickenson v. Tabb*, 208 Va. 184, 192 (1969) as authority for Gagnon supposedly having to "instruct the

[4] Even if *arguendo* Gagnon's proffered damages instruction inadvertently omitting "and battery" were problematic on appeal (which is denied); at worst, it still is consistent with joint and several liability of the "negligence" tortfeasors, Burns and Christine Newsome, for $1,750,000 principal.

jury to make factual findings of concurrent negligence for one indivisible injury, or any other grounds for joint liability, or to find or determine damages against all three defendants, jointly and severally, as required by Virginia." BOE at 7, 10 (emphasis added). But *Dickenson* does not require Jury to be instructed "to make factual findings" like that – indeed, in *Dickerson*, the judge perempted factual finding on Single Indivisible Injury, directing the jury that the injuries were "indivisible". 208 Va. at 192 .

Moreover, Burns claims Gagnon "did not preserve and, in fact, conceded and waived any legal issues" about joint and several liability by stating it did not matter if "negligence" [VMJI 9.000] and "battery" [VMJI 36.090] damages instructions were given consecutively. BOE at 8 (citing A1230). But Burns takes that out of context, temporally and substantively: (1) consecutive instructions were not the problem; (2) the problem was Burns and Judge subsequently declaring Burns not liable "for the whole" under Virginia law – as consecutive instructions with Gagnon's unitary Jury Verdict form still would have been consistent with joint and several liability.

Judge's express pronouncement on joint and several liability – **"Your exception is noted and preserved."** A1233 (emphasis added) – is dispositive. *General Ins. of Roanoke Inc. v. Page*, 250 Va. 409, 412 (1995)(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."). If a litigant cannot rely on a judge at his unequivocal word, then trial devolves to judicial ambush.

Given Judge's explicit declaration Gagnon had "preserved" the issue, Gagnon did not need do anything further, *Va. Code Ann. §8.01-384(A)*; yet cemented joint and several liability by offering a unitary Jury Verdict form. A1281, 1339, 1352, 1368, 1415 & 1452. Burns fails to bear his burden of proving waiver "by clear and convincing evidence," *Baumann v. Capozio*, 269 Va. 356, 361 (2005), including particularly that Gagnon's position supposedly was "expressly withdrawn or waived". *§8.01-384(A)*. *Brown v. Commonwealth*, 279 Va. 210, 217, *cert. denied*, 131 S.Ct. 217 (2010).

2. There was no inconsistency, inadequacy, or contrariness.

Second, Burns claims supposed inconsistency, inadequacy, and contrariness on Gagnon's argument over "issues" instructions that the elements of proof for liability on "negligence" and "battery" were "apples and oranges". BOE at 9 (citing A1211-1219). But Burns takes the "apples and oranges" out of context: (1) Burns juxtaposes the fact that different elements were required to prove liability of the "negligence" and "battery" Defendants, *i.e.*, the "apples and oranges"; with the fact that once liability was found, all Defendants necessarily were joint tortfeasors for the

indisputable single indivisible injury, *i.e.*, not "apples and oranges"; and (2) re "issues" and "finding" instructions, Burns not Gagnon "was successful in persuading the trial court" to join them together. A1211-1214 & 1282-1292.

3. There are sufficient grounds for holding Burns jointly liable.

Third, Burns asserts "under the circumstances of this case there are insufficient grounds as a matter of law for any factual finding or other verdict by the jury that Burns was liable for the actions of the other defendants or jointly liable with them in causing any or all of the damages awarded to Gagnon...." BOE at 10. But that is false.

Burns claims: "Under Virginia law, in order to return a joint verdict, the jury must be instructed to do so." Kellerman v. McDonough, et al., 278 Va. 478, 493, 684 S.E.2d 786, 794 (2009), citing Maroulis v Elliott, 207 Va. 503, 511, 151 S.E.2d 339, 345 (1966)." BOE at 10. But: (1) *Kellerman* does not state that at 493, or elsewhere; (2) *Kellerman* does not cite *Maroulis* at 493; (3) *Kellerman* only cites *Maroulis* at 494; (4) *Kellerman* and *Maroulis* only define "superceding cause"; and (5) Burns got "superceding cause". A1317.

Burns also cites *Kellerman* for "factual determinations of negligence and proximate causation are questions of fact for the jury's determination"; complaining Jury supposedly was not instructed sufficiently. BOE at 10. But Jury was instructed appropriately on both of those points. A1307-1312.

Burns misleads the Court that Gagnon's entire "theory of the case" supposedly was: "did defendant, James Newsome, commit a battery...on the plaintiff, and... it ends there. That's all I have to prove...." BOE at 11. That sound bite was solely argument over James Newsome and in the context of the combined negligence-battery "issue-finding" instructions that Burns successfully was pushing. *Compare* A1282-1293 *with* A1307-1308.

Burns then rehashes the predicate "apples and oranges" sound bite. BOE at 11-12. Again, although the proof elements for "negligence" and "battery" were "apples and oranges"; once liability was proved, damages necessarily were joint and several, not "apples and oranges". B(2) at 9-10.

Burns takes out of context, temporarily and substantively, Gagnon stating "that's fine" when shown Judge's jury verdict form. BOE at 12-13. *McMinn v. Rounds*, 267 Va. 277, 280-281 (2004)(plaintiff counsel replying, "That's fine, Your Honor," when disputed instruction was amended after point had been lost did not waive underlying objection)(emphasis added). Burns ignores that previously: (1) Judge noted Gagnon's exception on joint and several liability was "preserved," A1233; and (2) Gagnon offered and Judge rejected unitary Jury Verdict form with single damage award for all Defendants, A1281 – rendering further objection by Gagnon vain and useless, unnecessary by law. *§8.01-384(A)*; *Scialdone; Brown; Bauman.*

Finally, Burns claims Gagnon is "not only false, but misleading" that "Burns got the damages instruction that he asked and the verdict form that he induced the judge to give". BOE at 15. But it is indisputable Burns got Judge to limit the battery damage instruction to James Newsome, A1231; and Burns did not accept Gagnon's unitary Jury Verdict form and instead advanced a competing one that Judge reworked with Burns. A1278-1279.[5]

C. GAGNON DID NOT WAIVE JOINT AND SEVERAL LIABILITY.

Even if Gagnon did not pray explicitly in the alternative for joint and several liability of Burns and James Newsome for $4,500,000, that is subsumed under him moving for joint and several liability of all Defendants for $5,000,000, if the Court finds Bankruptcy completely extinguished Christine Newsome's award for $500,000. But in fact her Bankruptcy

[5] Burns' reliance on *Hilton v. Fayen*, 196 Va. 860 (1955), BOE at 13, 15, 17 & 20, is misplaced. *Hilton* holds "a party cannot complain of an instruction given at his instance," and cannot question a verdict where he "asked for and...induced the court to give an instruction upon a given theory of the law," *id.* at 866-867; which actually undercuts Burns. Burns got the damages instructions and verdict form he sought, so is estopped from complaining about their legal operation, *i.e.*, his joint and several liability for all damages awarded. *Hilton* is not the facts as to Gagnon. At bar: (1) Judge's verdict form was not given at Gagnon's instance; (2) Judge rejected Gagnon's unitary damages instruction and unitary Jury Verdict form; (3) Gagnon repeatedly asserted joint and several liability; (4) Judge acknowledged Gagnon had preserved his exception on joint and several liability; and (5) Gagnon objected to the jury directing collection.

discharge did not affect the joint liability of Burns and James Newsome for the continuing debt. *In re Mosby*, 244 B.R. 79, 87 (Bankr. E.D.Va. 2000).

Also, Gagnon did not waive all or any issues by not moving for a new trial, not moving to set aside the jury awards, or otherwise. Neither *Va. Sup. Ct. Rule 5:25* in general, nor *Hilton* in particular, required that of Gagnon.

Indeed, Gagnon accepts the $5,000,000 in damages awards and does not seek re-trial. Gagnon only claims Judge erred in not finding and entering joint and several liability as a matter of law on the indisputable facts and, per Judge, "preserved" the issue (against any *Rule 5:25* bar).

Gagnon preferred and sought Gagnon's unitary Jury Verdict form with its single damages award for all Defendants, BOE at 17-18; but Judge gave his own form that apportioned damages by Defendant, A330-332, and after Jury verdict, refused to recognize joint and several liability on it:

> It's clear to me that they rendered separate verdicts. I don't think there's any way in the world – I certainly wouldn't rule that your client [Burns] is responsible for anything other than this [$1,250,000 plus interest]. I don't know what the appellate court is going to do.

A1323. Then entertaining no verdict error, Judge discharged Jury. A1328.

Hence, at hearing of his post-trial Motions, Gagnon certainly took issue with Judge not finding joint and several liability and not entering Final Judgment jointly and severally on the verdict, *Garlock*, 270 Va. at 387-388;

under the circumstances, Gagnon should not have to suffer retrial. "What we take issue with is what you make of the verdict form." A1340-1345.

D. "SEPARATE VERDICTS" IMPORTED JOINT LIABILITY.

Burns takes out of context Gagnon's comment about the jury returning "separate verdicts". BOE at 18-19. The point of Gagnon's observation was that the principal awards of $3,250,000, $1,250,000 and $500,000 were aggregative, which Jury confirmed, A1324-1328; not simply duplicative of or otherwise subsumed by and within one another.

Gagnon's comment was not a concession the awards constituted only several liability, as Mr. Conrad understood readily: "jury has rendered separate verdicts, and I'm sure Mr. Waterman is going to claim that Mr. Burns is liable for the aggregate amount". A1322-1323. Gagnon continued to assert the verdicts' "legal effect," *i.e.*, joint and several liability. A1323.

Jury had authority to assess Gagnon's amount of damages, *i.e.,* fact; but not to dictate Gagnon's remedies of collection, *i.e.*, law. Jury finding Defendants liable rendered them joint tortfeasors and, by operation of law, jointly and severally liable on the indisputable case facts. BOA at 12-16.

Burns also cites *Va. Code Ann. §8.01-443* and *Smith v. Kim*, 277 Va. 486, 492 n.7 (2009) out of context. BOE at 19-20. Gagnon did not sue Defendants serially for several satisfaction; he sued all Defendants

collectively at once, expressly pleading for joint and several liability, A1-5 & 76-80, and there was no suggestion of misjoinder unto their trial together.

Additionally, Burns misapplies "law of the case" doctrine, citing *Hilton* and *Miller-Jenkins v. Miller-Jenkins*, 276 Va. 19 (2008). BOE at 20. *Hilton* actually cuts against Burns on the doctrine, B(3) at 12 n.5, *supra*; and *Miller-Jenkins* is inapposite for being about "two appeals". 276 Va. at 26.

E. BURNS IS LIABLE TO GAGNON AS PROPERLY FOUND.

Burns reavers assignments. They are baseless. Brief in Opposition.

CONCLUSION

Jury found against all Defendants, who thereby are joint tortfeasors jointly and severally liable for Gagnon's single indivisible injury and all damages awarded. Gagnon preserved his assignments of error.

WHEREFORE Appellant prays the Court modify the Final Judgment Order for joint and several liability of all Defendants for $5,000,000, alternatively Burns and James Newsome for $4,500,000, alternatively all Defendants for $3,500,000, or alternatively Burns and Christine Newsome for $1,750,000, all with prejudgment interest; and render final judgment.

Respectfully submitted,

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VA. SUP. CT. RULE 5:29 CERTIFICATE

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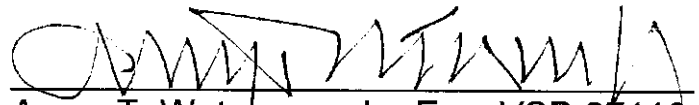
2. I hereby certify that 15 copies of the foregoing Reply Brief of Appellant, Gregory Joseph Gagnon, and an electronic copy, were hand filed with the Clerk of the Supreme Court of Virginia and a true copy of the foregoing Reply Brief of Appellant, and an electronic copy, was mailed first class, postage prepaid, the 5th of December, 2011, to all opposing counsel and all parties not represented by counsel.



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