

IN THE
SUPREME COURT OF VIRGINIA

RECORD No. 110767

GREGORY JOSEPH GAGNON,

Appellant,

v.

**TRAVIS BURNS,
JAMES NEWSOME and
CHRISTINE NEWSOME,**

Appellees.

=====

APPELLANT'S PETITION FOR REHEARING

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Taboada v. Daly Seven, Inc., 273 Va. 269, 641 SE.2d 68 (2007).....5

NATURE OF CASE

Burns v. Gagnon, 2012 Va. LEXIS 93 (Apr. 20, 2012) decided this case. Gagnon timely filed Notice of Intent to petition for rehearing as Appellant/Appellee/Cross-Appellant under the consolidated case captions on April 30, 2012. Gagnon petitions to correct manifest error of law and because of his 5/21/12 Petition for Rehearing as Appellee/Cross-Appellant.

First, if Gagnon's Petition for Rehearing of Appellee/Cross-Appellant is granted, then this Court necessarily may reach questions of joint and several liability of Burns raised by this appeal. Second, even if his Petition for Rehearing of Appellee/Cross-Appellant is denied, this Court still must reach questions of joint and several liability of James Newsome now, which otherwise will be final and unappealable.

STATEMENT OF FACTS

Gagnon's Assignment of Error ["AOE"] #1 raises the joint and several liability of, and the Judgment against, all Defendants – Burns (negligent tortfeasor), James Newsome (intentional tortfeasor), and Christine Newsome (negligent tortfeasor). "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.”

Redundantly, AOE #2 specifically raises the joint and several liability of, and the Judgment against, Burns (negligent tortfeasor) and James Newsome (intentional tortfeasor) for \$4,500,000.00 plus interest and costs. “[T]he 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.”

Significantly, Gagnon as Appellant has named and proceeded against James Newsome and Christine Newsome in addition to Burns as Appellees in this appeal. Gagnon still seeks the Judgment of purely several liability at issue be modified to one of joint and several liability: [1] against Burns (negligent tortfeasor) for the awards for him, for James Newsome (intentional tortfeasor), and for Christine Newsome (negligent tortfeasor); and [2] against James Newsome (intentional tortfeasor) for the awards for

him, for Burns (negligent tortfeasor), and for Christine Newsome (negligent tortfeasor).¹

Burns reverses and remands only the Judgment against Burns. *Burns* affirms the purely several Judgment against James Newsome and against Christine Newsome. *Id.*, *40.

Burns summarily dismisses all appeal of joint and several liability by Gagnon, including particularly as to James Newsome and Christine Newsome. “In light of this decision [reversing the denial of sovereign immunity and remanding for retrial of gross negligence re Burns alone], we do not reach the question raised by Gagnon’s cross-appeal [*sic*]², namely, whether intentional and negligent tortfeasors can be held jointly and severally liable.” *Id.*

Burns’ affirmance and dismissal as to James Newsome and Christine Newsome on the purely several Judgment is final and unappealable, unless this Court grants rehearing. Hence, without grant of rehearing, this Court forever forecloses the question of James Newsome being jointly and severally liable for Christine Newsome and/or for Burns, *i.e.*, forever

¹ Since Christine Newsome was discharged in Bankruptcy, Gagnon cannot collect against her, only against Burns and/or James Newsome.

² Gagnon’s appeal of joint and several liability is his direct appeal as Appellant in this Record No. 110767, not his “cross-appeal” of gross negligence as Cross-Appellant in companion Record No. 110754.

precludes Gagnon obtaining any Judgment of joint and several liability against James Newsome (regardless of any against Burns).

ARGUMENT AND AUTHORITIES

Gagnon incorporates his 10/25/11 Brief of Appellant and 12/5/11 Reply Brief.

I. RESPONSIBILITY OF NEGLIGENT TORTFEASOR (BURNS) FOR INTENTIONAL TORTFEASOR AND NEGLIGENT TORTFEASOR

Gagnon as Appellee seeks rehearing of Burns' simple negligence in the performance of ministerial duty as an exception to sovereign immunity and of Burns' assumption of duty. Also, Gagnon as Cross-Appellant seeks rehearing of Burns being guilty of gross negligence as a matter of law.

5/21/12 Petition for Rehearing of Appellee/Cross-Appellant.

Burns dismissed Gagnon's appeal on the joint and several liability of Burns as negligent tortfeasor for James Newsome as intentional tortfeasor and for Christine Newsome as negligent tortfeasor based on it reversing the denial of sovereign immunity to Burns. *40. Hence, if the Court grants rehearing to Gagnon as Appellee and/or as Cross-Appellant, then the Court also must grant rehearing to Gagnon as Appellant on the foregoing issues of joint and several liability.³

³ Re the merits of joint and several liability against Burns, as Gagnon stated at oral argument, this Court recognizes the liability of a negligent tortfeasor

II. RESPONSIBILITY OF INTENTIONAL TORTFEASOR (JAMES NEWSOME) FOR NEGLIGENT TORTFEASORS

Gagnon's appeal also raises the joint and several liability of the intentional tortfeasor for the negligent tortfeasors, *i.e.*, of James Newsome for Burns and for Christine Newsome. See, AOE #1 & #2. Despite this appeal in general and oral argument in particular having emphasis on the joint and several liability of Burns for James Newsome and Christine Newsome (due as a practical matter to Burns' \$6,000,000 insurance coverage), the joint and several liability of James Newsome for Burns and, at the least, for bankrupt Christine Newsome still may be important – indeed, potentially the only avenue of collection – to Gagnon.

The Court **must** grant rehearing to Gagnon as Appellant on the joint and several liability of James Newsome for Burns and for Christine Newsome **regardless** whether the Court grants rehearing to Gagnon as Appellee and/or as Cross-Appellee. This necessarily is so because the

for the intentional torts of third-parties. See, *e.g.*, *Taboada v. Daly Seven, Inc.*, 273 Va. 269 (2007)(negligent innkeeper liable for criminal assault by third-party passerby); *J... v. Victory Tabernacle Baptist Church*, 236 Va. 206 (1988)(negligent employer directly liable for criminal assault by employee). Hence a negligent tortfeasor's liability "for the whole" of an intentional tort should not turn inequitably on the fortuity of whether the negligent tortfeasor is sued alone versus along with the intentional tortfeasor. Such would be an unprincipled distinction on the basis of form over substance.

Judgment as to James Newsome vis-a-vis Christine Newsome and Burns is final and unappealable and cannot be relitigated by Gagnon (even if Gagnon prevails against Burns on remand and retrial).

CONCLUSION

WHEREFORE Gagnon prays the Court grant him rehearing as Appellant on the foregoing grounds, and: (I) find Burns jointly and severally liable for James Newsome and for Christine Newsome and modify the Judgment accordingly; and (II) find James Newsome jointly and severally liable for Christine Newsome and for Burns and modify the Judgment accordingly or, alternatively, find James Newsome jointly and severally liable for Christine Newsome, modify the Judgment accordingly, and remand the joint and several liability of James Newsome for Burns.

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By: _____ /s/_____
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CERTIFICATE

I hereby certify that a true copy of the foregoing Appellant's Petition for Rehearing was mailed and emailed to the following counsel of record this 21st day of May, 2012:

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I further certify pursuant to Rule 5:37(D) that this Petition for Rehearing is 10 pages excluding the cover page, table of contents, table of authorities, and certificate and complies with this Court's requirement that it "not exceed the longer of 10 pages or 1,750 words."

/s/
Avery T. Waterman, Jr., Esq. VSB 27118