IN THE

SUPREME COURT OF VIRGINIA

RECORD No. 110754

TRAVIS BURNS, JAMES NEWSOME and CHRISTINE NEWSOME,

Appellants/Cross-Appellees,

v.

GREGORY JOSEPH GAGNON,

***Appellee/Cross-Appellant*.**

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PETITION FOR REHEARING OF APPELLEE/CROSS-APPELLANT

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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 errors of law.

First, Burns assumed a duty of care as a matter of law based on Burns' unequivocal admissions, Diaz' uncontroverted reliance, and no contrary evidence. Second, Burns' obligation/omission was ministerial under the facts of this case, including Burns assuring "I will alert my security and we'll make sure this problem gets taken care of," needing only "two seconds" to do so by their walkie-talkie radios, and omitting what he had assured and the reporter had relied. Third, Burns' negligence was gross as a matter of law since he omitted what he had assured, despite it being relied upon and taking only "two seconds," *i.e.*, utterly disregarded, completely neglected, and showed no diligence or care toward Gagnon.

STATEMENT OF FACTS

"On the morning of the fight, [Burns] received a report that the fight would occur sometime that day." *Id*. *2. "Upon receiving Diaz' report, Burns wrote down Gagnon's name and said that he would 'alert security,' that 'he would look into it,' and that he would 'take care of it'." *Id*. *31.

Burns "**assured**…I will alert my security and we'll **make sure** this problem gets taken care of."! Appendix ["A"]1031 (emphasis added). Diaz specifically testified that he **relied** Burns was "going to do that". A1021.

Burns admitted he could alert his 10-person security in just "two seconds" – 2 seconds! – by the walkie-talkies they and he carried and used daily "quite frequently," including to get students from class. A1077-A1080.

> Q. And all it would have taken was push a [walkie-talkie radio] button and say something in it –
>
> A. Yes.
>
> Q. – like, get Greg Gagnon out of class for me.
>
> A. Yes.
>
> Q. You did not see a need to take two seconds to do that, right?
>
> A. No, Sir.

A1079 (emphasis added). But Burns omitted what was assured and relied.

Burns repeatedly evinced "consciousness of guilt" over his omission to do what he had assured and Diaz had relied upon him doing: (1) Burns attempted to intimidate Diaz, asserting Diaz had not told him Gagnon's name, A825-825A, 829, 1023-1024 and 1030; (2) Burns subsequently apologized to Diaz for "dropping the ball," A826 & 1025; (3) Burns admitted to [a] GHS' Sergeant Shuster he "made a big mistake," [b] GHS' Deputy Carwell he "screwed up," and [c] Mr. and Mrs. Gagnon he "dropped the

ball," A715-717, 721-724, 733, 1006-1008, 1177-1178 & 1181-1183; (4) Burns destroyed his personal school appointment calendar for December, A628 & 1085-1090; (5) Burns inexplicably "lost" his handwritten note about Gagnon, A639 & 1107-1108; (6) Burns fabricated and repeatedly revised a threatening "gun" email/posting he alone attributed to Gagnon, A1049-1069, 1164-1166, 1173-1175 & 1679; (7) Burns tried to tamper with Deputy Carwell's upcoming deposition testimony against him; and (8) Burns' counsel tried to influence Deputy Carwell's upcoming testimony. A721.

ARGUMENT AND AUTHORITIES

"We view the evidence and all reasonable inferences fairly deducible from it in the light most favorable to the prevailing party at trial [Gagnon]." *Banks v. Mario Indus*., 274 Va. 438, 451 (2007)(emphasis added). Gagnon incorporates his 11/21/11 Brief in Opposition and in Support.

I. BURNS ASSUMED A DUTY OF CARE AS A MATTER OF LAW

Burns "**assured**…I will alert my security and we'll **make sure** this problem gets taken care of," A1031; and Diaz testified he **relied** that Burns was going to "alert security" as assured. A1021. By law, that satisfied Section (c) of Restatement (Second) of Torts §324A. *Burns*, *20.

By Burns' unequivocal admissions and Diaz' uncontroverted reliance, Burns assumed a duty as a matter of law. There being no evidence to the contrary, reasonable minds could not disagree Burns assumed a duty.

II. BURNS' OBLIGATION WAS MINISTERIAL UNDER THE FACTS OF THIS CASE

The majority asserts, "Burns' response (or lack thereof) to Diaz' report involved the exercise of judgment and discretion," noting Burns "had to make several decisions". *Id*. *28. However, 21 years ago this Court held that despite having to "make myriad decisions, in ordinary driving situations the duty of care is a ministerial obligation". *Heider v. Clemons*, 241 Va. 143, 144 (1991)(emphasis added). *Friday-Spivey v. Collier*, 268 Va. 384, 388, 390 (2004)("the facts of this case do not support the conclusion that [Burns' omission] involved the exercise of judgment and discretion")(emphasis added).

First, the majority asserts "Burns had to decide whether to respond" and supposedly "there was reason to doubt the report's veracity."[1] But Burns writing Gagnon's name and assuring to "alert security," to "look into it," and to "take care of it" (as the majority also notes) evinces that Burns really did not "doubt the report's veracity". Hence Burns really did not have

[1] Contrary to *Banks v. Mario Indus., supra*, the majority opinion erroneously accepts Burns' dubious controverted account, instead of viewing the facts and inferences in a light most favorable to Gagnon as prevailing party.

to “decide whether to respond” at all – at that point, Burns had to respond and not to mislead a reporting student who reasonably had relied on him.

Second, the majority asserts “Burns had to decide when to respond” and supposedly “there was no reason to think that an immediate response was required”.[2] However, since Burns did not know (or even ask) the “specific time” of day the physical altercation would occur, he instead actually had no assurance – “no reason to think” – it would not occur sooner versus later and perhaps even immediately that day. Hence Burns really did not have to “decide when to respond” – he had good reason for not putting off the requisite “two second” walkie-talkie radio response to the impending physical altercation as he already had assured to Diaz.

Third, the majority asserts “Burns had to decide how to respond” and supposedly the “type of response was not readily apparent”.[3] Since Burns admittedly wrote Gagnon’s name, “assured…I will alert my security and we’ll make sure this problem gets taken care of,” and knew from experience he could alert his 10-person security in just “two seconds” by their walkie-talkies they used daily “quite frequently,” including to get students; the type of response needed not only was “readily apparent,” but actually was specifically assured. Hence Burns really did not have to

[2] *See*, n.1, *supra*.
[3] *See*, n.1, *supra*.

"decide how to respond" – Burns actually knew how to respond, already had assured how to respond, and (ministerially) just had to do it.[4]

Most fundamentally, even assuming *arguendo* that Burns' assurance "I will alert security and we'll make sure this problem taken care of" evinces judgment and discretion, that simply is not the "act" complained by Gagnon. Gagnon solely complains about Burns' subsequent **omission** – Burns' utter failure to do exactly what he had assured to do and Diaz had relied upon.[5]

As Justice Mims dissents re Burns' omission being "ministerial": "All that remained was to put the course of action he had decided upon into

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[4] The fact that "Diaz did not reveal the identity of the other student who would be involved," *Burns* *29, is irrelevant: Burns simply did not need it to do what he had assured to take care of the problem, *i.e.*, to "alert security" by walkie-talkie radio in "two seconds". Likewise, the fact "Diaz did not…say where the fight would occur," *id*., is a red herring: the necessary inference is the fight would be on school premises – which Burns irrefutably understood per his assurance "I will alert my security and we'll make sure this problem gets taken care of". Justice Goodwyn querying at oral argument whether hypothetically Burns could have decided upon another response besides alerting his security, respectfully misses the point: Burns in fact decided on a certain response with which Gagnon takes no issue – Gagnon narrowly complains about Burns' subsequent omission to do what he had assured to do and Diaz therefore had relied upon Burns doing.

[5] As the majority recounts: "Upon receiving Diaz' report, Burns wrote down Gagnon's name and said that he would 'alert security,' that 'he would look into it,' and that he would 'take care of it'." *Id*. *31. Even assuming *arguendo* "myriad decisions" up to that point, at that point it was (as the trial court agreed) a "no brainer" that Burns promptly take the requisite "two seconds" to radio security to avert the impending "physical altercation" as Burns already had assured to do and Diaz had relied upon Burns doing – and it is only that omission about which Gagnon complains.

execution. Consequently, the discretionary portion of his response had been fully discharged and his failure to execute the decision he had made was as much a failure to perform a ministerial act as if he delegated it to a subordinate who thereafter disobeyed the order." *Id*., *41-42 (emphasis added).

III. BURNS' NEGLIGENCE WAS GROSS AS MATTER OF LAW

"Gross negligence…is the utter disregard of prudence amounting to complete neglect of the safety of another. It is a needless and palpable violation of legal duty respecting the rights of others which amounts to the absence of slight diligence, or the want of even scant care." *Id*., 30-31.

Burns: (1) was reported an impending "physical altercation" at school; (2) "assured…I will alert my security and we'll make sure this problem gets taken care of"; (3) was relied upon by the reporting student to do so; (4) had no assurance the altercation would be later versus sooner; (5) could have radioed for security in "two seconds," as he had previously to get students out of class; (6) omitted to do what he had assured and was relied upon to do, for 2 hours; and (7) evinced numerous instances of "consciousness of guilt" vis-a-vis his omission. Burns doing nothing under those circumstances constitutes gross negligence as matter of law.

CONCLUSION

WHEREFORE Gagnon prays the Court grant him rehearing as Appellee on assumed duty and on ministerial obligation and as Cross-Appellant on gross negligence; affirm the denial of sovereign immunity; and modify and render the Judgment to one of joint and several liability against all Defendants for all awards.

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CERTIFICATE

I hereby certify that a true copy of the foregoing Petition for Rehearing of Appellee/Cross-Appellant 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/
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