
IN THE
Supreme Court of Virginia

RECORD NO. 091378

WINTERGREEN PARTNERS, INC.,
d/b/a WINTERGREEN RESORT,

Appellant,

V.

MCGUIREWOODS, LLP,

Appellee.

REPLY BRIEF OF APPELLANT

Wyatt B. Durette, Jr. (VSB No. 04719)
Barrett E. Pope (VSB No. 20574)
J. Buckley Warden, IV (VSB No. 79183)
DURRETTEBRADSHAW PLC
600 East Main Street, 20th Floor
Richmond, Virginia 23219
(804) 775-6900
wdurette@durettebradshaw.com

Patrick M. Regan (VSB No. 19743)
Amy S. Gurgle (VSB No. 65515)
REGAN ZAMBRI & LONG, PLLC
1919 M Street, NW, Suite 350
Washington, DC 20036
(202) 463-3030
agurgle@reganfirm.com

Counsel for Appellant

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Appellant, Wintergreen Partners, Inc. (“Wintergreen”), by counsel, submits this Reply Brief in accordance with Rule 5:29 of this Court.

I. SUMMARY OF ARGUMENT

McGuireWoods, LLP (“McGuireWoods”) makes four main arguments: (1) the verdict at trial was consistent, (2) the appeal is not a challenge of inconsistency but rather sufficiency of the evidence, (3) any appeal of the verdict was not preserved, and (4) Wintergreen cannot meet the standard for causation in a legal malpractice case under *Goldstein v. Kaestner*, 243 Va. 169, 413 S.E.2d 347 (1992). Each argument fails to appreciate the importance of context. Placed in the context of the *Grigg v. Wintergreen Partners, Inc.* (“*Grigg*”) trial and verdict, both law and logic yield the conclusion that the trial court erred when it granted summary judgment to McGuireWoods.

First, the verdict is legally and logically inconsistent given the context of what actually harmed Ms. Grigg. Unquestionably, the cause of her injuries is the movement of the snow groomer up Eagles Swoop consistent with Wintergreen’s policies on January 20, 2003, with all the allegedly hazardous conditions existing at that moment. In that context, a jury found for Brett Henyon (“Henyon”) and Jeffrey Eimutus (“Eimutus”), the employees who moved the groomer with knowledge of the policies and all

conditions. Finding Wintergreen liable required a basis independent of those policies and slope conditions. There was none. Thus, the verdict against Wintergreen is inconsistent.

Second, the verdict is inconsistent precisely **because** there was no evidence sufficient to support the necessary independent basis.

Third, the appeal of this inconsistency was preserved in the specific context of the *Grigg* trial. The issue is not the quantum of evidence presented at trial, the theory of liability (premises vs. *respondeat superior*), or the accuracy of the jury instructions as McGuireWoods frames it. (Br. of Appellee 20–36). As such, any failure to object prior to the tendering of the inconsistent verdicts is immaterial. It is the verdict itself which ripened the motion to set it aside. The trial court’s erroneous ruling on that motion is the sole substantive basis of this appeal. Wintergreen promptly moved to set aside the verdict and presented the trial court the opportunity to return the jury to deliberations with the proper legal framework. Thus, the trial court had the opportunity **at the trial** to rule on the precise issue now before the Court.

Fourth, McGuireWoods’ reliance on *Goldstein* does not fit the context of the *Grigg* case. Even if this Court applies McGuireWoods’ interpretation of *Goldstein*, Wintergreen can prove causation because reversal of the trial

court judgment and entry of final judgment in Wintergreen's favor would have occurred but for McGuireWoods' malpractice.

II. ARGUMENT

A. Considered in the Context of the Jury's Findings, the Verdict Against Wintergreen Is Legally Inconsistent.

McGuireWoods offers one argument to justify the jury's inconsistent verdict: "Wintergreen has a [potential] liability separate and apart from that of Henyon and Eimutus because of the conditions of the premises and/or negligence of other employees." (Br. of Appellee 14 n.4). With ***Wintergreen's added*** qualifier "potential," this statement correctly captures the issue. However, the potential liability never materializes because McGuireWoods ignores the effect that necessarily flows from the verdict in favor of Henyon and Eimutus. That verdict governs the context of the evidence and forces a legal and logical inconsistency in the verdict against Wintergreen because there is no "liability separate and apart from that of Henyon and Eimutus" bringing the snow groomer up the slope.

Every argument McGuireWoods advances depends on an inaccurate usage of the word "negligent," which McGuireWoods equates with "liable."¹

¹ McGuireWoods equates negligence to liability: "a policy that permitted employees (not just Henyon and Eimutus) to have a groomer on Eagles Swoop at any time skiers were descending was ***negligent***. Thus, despite Wintergreen's contrary contentions, ***liability*** against Wintergreen was not

“Negligent” does not equal “liability” until it is placed in the context of causation and damages. “Negligent,” by definition means only that a party has breached a duty. *Gossett v. Jackson*, 249 Va. 549, 554, 457 S.E.2d 97, 100 (1995) (recognizing that a plaintiff must prove causation in addition to negligence in order to succeed). McGuireWoods does not point to a causal connection between any breach of duty and Ms. Grigg’s injuries, as required for liability, that is “separate and apart from that of Henyon and Eimutus” bringing the groomer up the slope.

Wintergreen concedes that if Grigg’s evidence, including her expert’s testimony, is believed, then Wintergreen could be liable **so long as** Henyon and Eimutus were also liable. The fallacy in McGuireWoods’ argument is that when the jury, with full knowledge of the policy and all the slope conditions, found that Henyon and Eimutus did nothing wrong, it also found nothing was wrong with the policies and the slope conditions.²

Therefore, for Wintergreen to be liable there must be evidence of some **other** policy or conduct independent from moving the snow groomer up Eagles Swoop that **caused** Ms. Grigg’s injuries. However, there was but one proximate cause of Ms. Grigg’s injuries—the movement of the

solely based on the operation of the groomer on the slope on the specific night in question.” (Br. of Appellee 16) (emphasis added).

² Henyon even had the authority to judge the conditions of the slope and shut it down if he wanted. (JA at 1160). Yet the jury judged him not liable.

snow groomer. In this case, identical facts cannot sustain one verdict of liability and one of no liability. Therefore, the verdict is inconsistent.

Further, McGuireWoods attempts to distinguish Wintergreen's liability from Henyon and Eimutus's with the argument that the employees lacked culpability because they were just following orders. (e.g., Br. of Appellee 16) ("It was Wintergreen—not Henyon and Eimutus—that made the determination that the groomer be on Eagles Swoop at all."). This Nuremberg-type defense is not valid in Virginia when the employees, as with Henyon and Eimutus, know of the hazardous conditions and perform the task anyway. (JA at 1122–68); see *McLaughlin v. Siegel*, 166 Va. 374, 377, 185 S.E. 873, 874 (1936) (agents must be "blamelessly ignorant" of the hazards in order to avoid liability); *Travis v. Claiborne*, 19 Va. (5 Munf.) 435 (1817); Restatement (Third) of Agency, § 7.01, Illust. 10 (2006).

Finally, McGuireWoods relies on *Virginia State Fair Ass'n v. Burton*, 182 Va. 365, 372, 28 S.E.2d 716, 719 (1944), further illustrating its myopic focus on the duty and breach elements of liability, without any consideration of causation. In *Burton*, the exonerated driver **did not know** about the conditions which actually **caused** the harm suffered—the inability to cope with the surging crowd and the loose nails on the track. *Id.* at 370–71, 28 S.E.2d at 718–19. If the driver had known of the hazards and driven

anyway, then *Burton* would match the context in *Grigg*, and a verdict in favor of the driver, but against the Fair, would have been inconsistent.

This rule applies to both premises liability ***and respondeat superior*** theories. As to *respondeat superior*, *Burton* explicitly recognizes that the verdict in favor of the driver “necessarily exonerated the Fair Association of any liability arising out of his alleged negligence.” *Id.* at 372, 28 S.E.2d at 719. As to the premises liability theory, the only reason the *Burton* opinion upheld the verdict against the Fair Association is because “the evidence was sufficient to warrant the jury in finding that the Fair Association, ***independent of any act of [the driver]***, was guilty of negligence ***which proximately caused the accident.***” *Id.* (emphasis added). Applying this standard here, the search for evidence of Wintergreen’s negligence “independent of any act of [Henyon and Eimutus]” is futile.

B. Wintergreen Properly Preserved the Issue It Appeals.

1. Wintergreen Does Not Advance a “New” Argument Because its Appeal of the Inconsistent Verdict Necessarily Questioned the Sufficiency of the Evidence.

“McGuireWoods has not alleged that Wintergreen failed to preserve for appeal the inconsistent verdict issue.” (Br. of Appellee 20 n.8). Yet, McGuireWoods contends that Wintergreen failed to preserve insufficiency of the evidence for appeal, which it argues is “new.” (Br. of Appellee 21).

McGuireWoods asserts a distinction between a motion to set aside the verdict for inconsistency and a motion to set aside the verdict for lack of sufficient evidence. This distinction contains no difference in the context of the Wintergreen appeal. The verdict against Wintergreen alone is not supported by the evidence because of its inconsistency—the identical slope conditions, policies, etc., that, according to the jury, did not create liability for Henyon and Eimutus, created liability for Wintergreen.

McGuireWoods' assertion that Wintergreen is now making a "new" argument is based on semantics. (JA at 21). The words used by Wintergreen's counsel in response to Judge Peatross's question concerning **premises liability**, (JA at 828), present an **identical** argument to the one advanced in this appeal:

given the totality of circumstances, which includes terrain, the visibility, the danger was putting the snowplow where it was put. And it is still inconsistent in logic and law to say that the individuals who were charged with the public duty of operating that equipment under the totality of the circumstances were not negligent, but Wintergreen was.

(JA at 829). The arguments at that hearing precisely match the arguments advanced by Wintergreen up to the time of this writing. (JA at 828–40).³

³ Duncan Getchell, the McGuireWoods attorney representing Wintergreen at this hearing, addressed both theories of liability (*respondeat superior* and premises liability) as Judge Peatross specifically asked Getchell about instruction 16, dangerous conditions, and the policy to which Getchell

Furthermore, the issue of inconsistent verdicts **requires** an examination of the context—the sufficiency of the evidence—to determine if the verdicts, in any trial, are actually inconsistent.⁴ By raising the inconsistent verdict issue at trial and in the original *Grigg* petition, Wintergreen did “identify with some degree of specificity the error committed by the trial court” as required by the authorities McGuireWoods cites. (Br. of Appellee 24) (citing *Taylor v. Worrel Enter., Inc.*, 242 Va. 219, 227, 409 S.E.2d 136, 141 (1991) (Hassell, J., dissenting); Virginia Supreme Court Rule 5:17(c)).

2. Wintergreen Did Not Invite the Inconsistent Verdict.

Given that McGuireWoods does not contest the preservation of the inconsistent verdict issue (Br. of Appellee 20 n.8), which necessarily involves a sufficiency of the evidence determination, that should end any

responded with the **exact same arguments** that have been advanced at every stage of this appeal. *Id.* McGuireWoods’ current position that “Wintergreen’s counsel” did “not contend that the evidence was insufficient to support such a finding,” (Br. of Appellee 23), is an assertion based solely on the lack of the words “sufficiency of the evidence” in Getchell’s arguments, not a substantive change in position. (JA at 828–40). Getchell’s argument stressed that there was no evidence separate and apart from Henryon and Eimutus’s implementation of the policy. To say that the evidence was insufficient to support the inconsistent verdicts is just another way of stating the same argument.

⁴ The *sine qua non* for determining whether the necessary independent basis exists to support a consistent verdict against Wintergreen is to inquire whether the evidence is sufficient to support it.

inquiry as to preservation of error. However, McGuireWoods also contends that Wintergreen invited the inconsistent verdict by failing to object to the jury instructions, the Verdict Form, or the closing argument. (Br. of Appelle 20 n.8). Invited error is but a rationale for making objections. Invited error is thus subsumed in McGuireWoods' concession that the inconsistent verdict argument is preserved.

Wintergreen relies upon its arguments in Part V.C of its Opening Brief to rebut this assertion and re-emphasizes that this appeal does not contest the legal accuracy of any jury instruction or Verdict Form used in the *Grigg* trial. Therefore, *Wolfe v. Commonwealth*, 265 Va. 193, 222, 576 S.E.2d 471, 488 (2003), which McGuireWoods cites for the proposition that an appellant cannot "raise objections to the [closing] argument for the first time on appeal," (JA at 35), is inapplicable because it focuses on an objection to a closing argument. Wintergreen had no objection to Ms. Grigg's closing argument at trial. Ms. Grigg's counsel voiced his opinion ("I think . . .") of the law and facts in his argument, which he is entitled to do. (JA at 1267). That his opinion was wrong does not require an objection.

Even if an objection had been required, Wintergreen again refers the Court to its Opening Brief discussion of *King v. Commonwealth*, 264 Va. 576, 570 S.E.2d 863 (2002) and Virginia Code § 8.01-384(A) that its two

motions to strike and its objections during jury instructions made an objection during closing arguments unnecessary.

McGuireWoods also asserts that “Instruction 16 provided the basis for the jury’s verdict” and that trial counsel had a “duty to object to instructions for which there is no evidentiary support.” (Br. of Appellee 30). Wintergreen was not required to object to the premises liability instruction because the evidence supported it. The jury could have determined that Wintergreen was liable on a premises liability theory up to the moment when it returned the verdict for Henyon and Eimutus. **Only then**, did this appellate issue arise. Wintergreen’s counsel could not have invited error by failing to object to an acceptable jury instruction.⁵

This same point applies to the other jury instructions McGuireWoods claims Wintergreen should have objected to—none of the instructions were either (a) unsupported by the evidence or (b) legally inaccurate **at the time they were offered**. Thus, McGuireWoods misinterprets Wintergreen’s position when it writes “[Wintergreen] say[s] there was no evidence to support those instructions.” (Br. of Appellee 22).

⁵ Furthermore, Wintergreen did object to Instruction 16 and cited to its Motions to Strike as the basis. This included counsel’s specific assertion in the Motion to Strike at the conclusion of the evidence that Grigg “failed to make out a prima facie case of negligence on the part of Wintergreen.” (JA at 1221–22.) If an objection was required, this was sufficient.

The *Grigg* context is similar to what occurred in *SuperValu, Inc. v. Johnson*, 276 Va. 356, 666 S.E.2d 335 (2008) and *Smith v. Combined Ins. Co.*, 202 Va. 758, 120 S.E.2d 267 (1961).⁶ In each case the trial court submitted legally accurate jury instructions and a verdict form without objection. See *SuperValu*, 276 Va. at 366–69; 666 S.E.2d at 341–43; *Smith*, 202 Va. at 762–63, 120 S.E.2d at 269–70. In each case, the losing party made the same argument that McGuireWoods makes here—that because the jury instructions (and, presumably, the verdict form and closing arguments) allowed the jury verdict, it should stand. *Id.* In both cases this Court held that a motion to set aside the verdict preserved an appeal on the validity of the verdict based on its legal accuracy. *Id.*

In *SuperValu*, the jury’s verdict clearly indicated that it did not understand the law as to the claim for constructive fraud and the verdict was overturned. 276 Va. at 368–69, 666 S.E.2d at 342. In *Smith*, the jury did not understand and properly apply the legal definition of “accident.” 202 Va. at 761–62, 120 S.E.2d at 269. While this Court recognized specifically that the jury verdict was consistent with the jury instructions, which were not objected to, the verdict could still be set aside because the instructions ultimately “mislead” the jury. *Id.* at 762, 120 S.E.2d at 269–70.

⁶ Wintergreen thoroughly discusses *SuperValu* and *Smith* in its Opening Brief at pages 31–38.

In *Grigg*, the jury failed to properly determine proximate cause and rendered a verdict that lacked an independent basis for finding Wintergreen liable apart from the facts and policies underlying the actions of Henyon and Eimutus, which were cleared from liability by the verdict. As in *SuperValu* and *Smith*, this Court may review a trial court ruling on a motion to set aside the verdict **even if** the jury instructions, resulting verdict form and closing arguments allowed the jury to reach an erroneous verdict.

Finally, Wintergreen twice gave the trial court the opportunity to resolve the verdict's inconsistency **before the jury was dismissed**. (JA at 1273–80). Prior to the verdict for Henyon and Eimutus, Wintergreen's counsel pleaded with Judge Peatross that "the jury should be instructed to return for further deliberations and deliver a consistent verdict." (JA at 1273). ***There is no logical way Wintergreen could have invited an error to which it was stringently objecting before it even happened!*** The basis of Wintergreen's objection is the same exact issue on appeal—the inconsistency of the verdict: "you can't have the employer be liable but not the employees ***under these circumstances***." (JA at 1273–79) (emphasis added). Despite Wintergreen's continued effort to give the jury the opportunity to render a consistent verdict, the trial court left Wintergreen no choice but "to file and argue after [Judge Peatross] discharge[d] the jury"

the motion to set aside the verdict as inconsistent. (See JA at 1279–80). When the jury made a legal mistake, Wintergreen took the only course of action the trial judge permitted, and subsequently assigned as error the ruling on the inconsistent verdicts, (JA at 867), thereby properly preserving this appeal.

C. McGuireWoods Misstates the Standard for Causation in a Malpractice Action, and Reversal of the Judgment Against Wintergreen and Entry of Judgment in Its Favor Would Have Been the Appropriate Remedy.

McGuireWoods argues that under the standard in *Goldstein v. Kaestner*, 243 Va. 169, 413 S.E.2d 347 (1992), for the element of causation in a malpractice action, Wintergreen must prove that this Court would have reversed the judgment against Wintergreen and entered a judgment of not liable. This argument misstates the rule.⁷ Furthermore, McGuireWoods argues that this Court would not have entered judgment in favor of Wintergreen on appeal because Ms. Grigg appealed the judgment against Henyon and Eimutus. However, she did not properly do so.

If this Court agrees with Wintergreen that the verdicts are legally inconsistent, then according to the rule articulated in *Roughton Pontiac Corp. v. Alston*, 236 Va. 152, 156, 372 S.E.2d 147, 150 (1998), this Court

⁷ Wintergreen refers the Court to the thorough analysis of *Goldstein* in its Opening Brief at 41–48.

must enter final judgment for Wintergreen. There are no remaining factual issues because the jury spoke with finality that the actions which caused Ms. Grigg harm were not a basis for liability under either a premises liability or *respondeat superior* theory. The verdict in favor of Henyon and Eimutus cannot be disturbed at this point, leaving only one way for this Court to make the verdicts legally consistent—enter final judgment for Wintergreen.

Even by the standard for a legally sufficient cross-error cited by McGuireWoods, Ms. Grigg’s appeal fails. Ms. Grigg’s cross-error asserts that the “trial court erred in granting judgment in favor of Defendants Henyon and Eimutus, and a new trial should include the individual defendants.” (JA at 918A). This assertion fails to satisfy the requirement that the appellee “clearly attacks the trial court’s [decision], and plainly states the ground upon which reliance is had for a reversal” and “[n]o doubt is left to the question presented for consideration.” (Br. of Appellee 39) (citing *Fisher v. Harrison*, 165 Va. 323, 329, 182 S.E. 543, 545 (1935)).⁸

Ms. Grigg’s assignment of error does not “plainly state” the ground upon which it relies for reversal, but instead merely seeks reversal. In fact,

⁸ Moreover, Grigg never gave the trial court an opportunity to rule on a question of not entering judgment in favor of Henyon and Eimutus and her counsel opined in closing argument that the jury could return a verdict for them. While McGuireWoods’ preservation arguments have no merit to preclude Wintergreen’s appeal, they would preclude Grigg’s cross appeal because Grigg’s counsel ***affirmatively asked*** for the inconsistent verdict.

Ms. Grigg acknowledges that she only assigns a cross-error “as a purely protective measure” to avoid the rule laid down in *Roughton Pontiac Corp. v. Alston*, 236 Va. 152, 372 S.E.2d 147 (1988). (JA at 918A–919). Simply asking for reversal, without stating a single reason as a basis for that reversal, except that there “should” be a new trial, is legally insufficient.

IV. Conclusion

For the reasons stated above, and all reasons stated in the Opening Brief of Appellant, Wintergreen asks this Court to reverse the Circuit’s Courts Summary Judgment Order in favor of McGuireWoods and enter final judgment for Wintergreen, or, in the alternative, remand the case to the Circuit Court for the City of Richmond.

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Patrick M. Regan
Amy S. Gurgle
Regan Zambri & Long PLLC
1919 M Street, NW, Suite 350
Washington, DC 20036-3521
(202) 463-3030

Respectfully submitted,



Wyatt B. Durette, Jr.
Barrett E. Pope
J. Buckley Warden IV
DuretteBradshaw PLC
600 East Main Street, 20th Fl.
Richmond, Virginia 23219
(804) 775-6900
Counsel for Plaintiff-Appellant

V. Certificate of Service

I hereby certify that on this 19th day of January, 2010, fifteen copies of this Reply Brief of Appellant have been filed with the Clerk's Office of the Supreme Court of Virginia, and three copies have been mailed or delivered to opposing counsel at the following address:

James W. Morris, III
Michael R. Ward
Sandra S. Gregor
Melissa Y. York
MORRIS & MORRIS, P.C.
700 East Main Street, Suite 1100
Post Office Box 30
Richmond, VA 23218

A digital copy (via email) of this brief was also delivered to the Clerk's Office of the Supreme Court of Virginia this same date.


Wyatt B. Durette, Jr.