

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF GLOUCESTER

GREGORY JOSEPH GAGNON,

Plaintiffs,

v.

Case no: CL08-572

**TRAVIS BURNS,
JAMES S. NEWSOME, JR., and
CHRISTINE D. NEWSOME,**

Defendants.

FINAL JUDGMENT ORDER

This action was tried with a jury on August 16, 17, 18, 19, 20, 23, 24, 26, and 27, 2010. On August 16, 2010, seven jurors, namely, Charles R. Gardner, Barbara Goldstrom, Michael D. Moran, Donna J. Stolz, Jean E. Thomas, Ruth S. Mangum, and Katherine Hubbard, and two alternate jurors, Mary J. Mattson and Annette L. Kenon, were selected and duly sworn.

On August 17, 2010, Plaintiff's Emergency Motion for Reconsideration re SPECT Evidence from Dr. O'Shanick by Defense Waiver through Dr. Carroll on Cross-Exam and for Designations of Dr. Carroll and Mr. Diaz was heard outside the presence of the jury. Regarding the videotaped deposition testimony of Dr. Carroll, the Court DENIED IN PART the Motion, and ordered pages 51.2-52.18, 83.24-85.8, and 118.1-128.7 to be redacted out; and GRANTED IN PART the Motion, and ordered pages 49.11-50.25, 52.19-53.18, 94.8-100.6 and 115.6-16 not to be redacted. Regarding pages 5.7-17.18, 24.14-25.13, 32.7-9, and 41.1-43.15 of the deposition of Shannon Diaz offered by Plaintiff, the Court OVERRULED Defendant Burns' objection to pages 8.7-9, 18, 17.4-17, and 12.22-14.7 (except for part of 13.22 and all of 13.23), and SUSTAINED

Defendant Burns' objections to pages 7.18-24, 13.22 (part), 13.23, and 14.8-15, and ordered them redacted out. All references to the Shannon Diaz deposition being conducted on October 31, 2008 are corrected to December 31, 2008. Moreover, on August 17, 2010, counsel for Defendant Burns again objected to the introduction of the Shannon Diaz deposition on the grounds previously stated in the motions, briefs, and other pleadings of Defendant Burns, as well as in oral argument during hearings before the Court. Counsel for Defendant Burns introduced no portions of the Diaz deposition in order to preserve his objections to the deposition under Rule 4:7 of the Rules of the Virginia Supreme Court and made the additional objections to the introduction of the Diaz deposition, as stated in the record.

The jurors were given the Preliminary Instructions by this Court; and, the parties presented their Opening Statements to the jury.

Plaintiff introduced his evidence and then rested.

At the conclusion of Plaintiff's evidence on August 23, 2010, Defendant Burns noted his exceptions to the rulings on all de bene esse depositions introduced by the Plaintiff at trial, as stated in the record; moved the Court to strike Plaintiff's evidence and enter judgment in favor of Travis Burns, for the reasons previously stated in his Plea In Bar, Motion For Reconsideration Of Plea In Bar, Reply To Plaintiff's Amended Motion For Reconsideration Of Plea In Bar and in all other briefs filed by Defendant Burns in this action, and for the reasons stated in the record; all of which pleas, motions, and exceptions were denied by the Court.

At the conclusion of Plaintiff's evidence, Plaintiff moved the Court to preserve his position, taking issue with having to re-litigate "negligence" at trial, for the reasons stated in the record.

On August 24, 2010, outside the presence of the jury, the Court reviewed reports, heard arguments, and heard proffer of Dr. Peck about the nature and extent of defense medical expert testimony; and ruled that there would be no testimony about “malingering,” and observed it was inclined but not deciding to allow Plaintiff to introduce rebuttal expert testimony about a 3.0 Tesla MRI and Diffusion Tensor Imaging tests, all as stated in the record. Whereupon after recess, Defendant Burns excused Dr. Peck and Dr. Khawaja as witnesses at trial.

Defendant Burns introduced his evidence and rested.

At the conclusion of the evidence presented by Defendant Burns, Plaintiff moved to strike the evidence of Defendant Burns and enter judgment in favor of Plaintiff as a matter of law, for the reasons stated in the record.

At the conclusion of the evidence introduced by Defendant Burns, Defendant Burns renewed his motion to strike the evidence and his motion to enter summary judgment in favor of Defendant Burns, renewed his Plea In Bar, and stated his exceptions to certain prior evidentiary rulings of the Court, for the reasons stated in the record; and Plaintiff re-averted his opposition to re-litigating “negligence” at trial; all of which pleas, motions, and exceptions were denied by the Court.

The parties offered jury instructions, the Court ruled upon all instructions of law, and the parties noted objections for the reasons stated in the record. Whereupon, Defendant Burns renewed all of his pleas, motions, and exceptions to certain evidentiary rulings of the Court previously made at the conclusion of the Plaintiff’s evidence, and renewed his Motion For Reconsideration Of Plea In Bar, previously filed with the Court, as well as his motion to strike Diaz deposition and objections to the introduction of the employment contract and depositions, for the reasons stated in the record, and the

Plaintiff renewed his objection to re-litigating “negligence” at trial; all of which pleas, motions, and exceptions were denied.

The Court read the instructions of law to the jury.

The parties submitted final arguments to the jury.

The two alternative jurors were excused from further service.

On August 27, 2010, the jury retired to deliberate and returned three separate verdicts in favor of Plaintiff, Gregory Joseph Gagnon, and against Defendant James S. Newsome, Jr., only, in the principal amount of \$3,250,000.00; against Defendant Travis Burns, only, in the additional principal amount of \$1,250,000.00; and against Defendant Christine D. Newsome, only, in the additional principal amount of \$500,000.00; with pre-judgment interest on each judgment amount at the judgment interest rate of 6% *per annum* from December 14, 2006, until paid in full.

WHEREUPON, the Court allowed Defendant Burns leave to file his Motion For Reconsideration Of Plea In Bar, Motion For Entry Of Judgment In Favor Of Defendant Burns Notwithstanding Verdict, and allowed Plaintiff leave to file his Motion For Judgment Of Joint And Several Liability and Motion For Recovery Of Costs.

Defendant Burns’ Motion for Reconsideration Of Plea In Bar, Motion For Entry Of Judgment In Favor Of Defendant Burns Notwithstanding Verdict, Corrected Brief In Support Of Motion To Reconsider Plea In Bar, and all briefs in support and in opposition thereto were read and considered by the Court at or before the hearing on October 4, 2010, and in consideration thereof Defendant Burns’ Motion For Reconsideration Of Plea In Bar and Motion For Entry Of Judgment In Favor Of Defendant Burns Notwithstanding Verdict are hereby ORDERED DENIED.

After considering Plaintiff's Motion For Judgment Of Joint And Several Liability Against Joint Tortfeasor Defendants and Motion For Recovery Of Costs, all briefs filed in support and in opposition and all oral argument at hearing on October 4, 2010, it is hereby ORDERED that Plaintiff's Motion For Judgment Of Joint And Several Liability Against Joint Tortfeasor Defendants is DENIED; that Plaintiff's Motion For Recovery Of Costs is DENIED IN PART and SUSTAINED IN PART, all for the reasons stated in the record, and it is ORDERED that the recoverable costs of Plaintiff are \$4,856.99, to which ruling the exceptions of Plaintiff and Defendant Burns, for the reasons stated in the record, are noted.

On October 1, 2010, Defendant Christine D. Newsome filed a Chapter 7 Petition in Bankruptcy Court. On October 14, 2010, Defendant James S. Newsome, Jr. also filed a Chapter 7 Petition in Bankruptcy Court. Moreover, on or about December 10, 2010, the U. S. Bankruptcy Court entered Orders in these two actions allowing the entry of this Order. In consideration thereof, it is ORDERED that judgment is hereby entered in favor of the Plaintiff, Gregory Joseph Gagnon, against Defendant, Christine D. Newsome, only, in the principal amount of \$500,000.00, and against Defendant, James S. Newsome, Jr., only, in the principal amount of \$3,250,000.00.

It is FURTHER ORDERED that judgment is hereby entered in favor of Plaintiff, Gregory Joseph Gagnon, against Defendant, Travis Burns, only, in the principal amount of \$1,250,000.00.

It is FURTHER ORDERED that the each of these judgments against Defendants, Travis Burns, James S. Newsome, Jr. and Christine D. Newsome, shall include interest on the principal amount at the judgment rate of 6% *per annum* from December 14, 2006,

until paid in full, plus costs in the additional amount of \$4,856.99 which remains unpaid by any of the Defendants.

It is FURTHER ORDERED pursuant to the Court's denial of Plaintiff's Motion for Joint and Several Liability Against Joint Tortfeasors that the aforesaid judgment against Defendant Travis Burns and any future judgments entered herein against the Defendants, James S. Newsome, Jr. and Christine D. Newsome, if any, are and shall be sole and separate and not joint and several.

It is FURTHER ORDERED, pursuant to Va. Code Ann. § 8.01-676.1, that the appeal bond for Defendant, Travis Burns, shall be in the amount of \$1,700,000.00; that the appeal bond for Defendant, Christine D. Newsome, shall be in the amount of \$750,000.00; and that the appeal bond for Defendant, James S. Newsome, Jr. shall be in the amount of \$4,000,000.00.

It is FURTHER ORDERED, pursuant to Va Code § 8.01-676.1(J)(1), that the Motion For Modification Of Form for the Appeal Bond of Defendant Burns is GRANTED, and that the Appeal Bond For Suspension And Costs filed with this Court by Defendant Travis Burns, and the monetary payment of \$1,700,000.00, paid by VML Insurance Programs as Surety on behalf of Defendant Travis Burns, is hereby approved and accepted by this Court as security for the Appeal Bond in lieu of a letter of credit or other security.

It is FURTHER ORDERED, in consideration of the aforesaid Appeal Bond and security, that any and all executions of the aforesaid judgment against Defendant Travis Burns are hereby suspended during the appeal by Defendant Travis Burns.

It is FURTHER ORDERED that Plaintiff's Motion For Reconsideration Of Joint And Several Liability, argued at the hearing on November 9, 2010, and Plaintiff's

Supplemental Motion For Joint And Several Liability and Motion To Reset Appeal

Bonds, argued at the hearing on January 25, 2011, are DENIED.

It is FURTHER ORDERED that the endorsements of the *pro se* Defendants, James S. Newsome, Jr. and Christine D. Newsome, are hereby WAIVED.

It is FURTHER ORDERED that this action is ended and the Clerk of Court shall provide a copy *teste* of the Judgment to undersigned counsel and *pro se* Defendants upon entry.

ENTERED on this 25th day of January, 2011, at Gloucester, Virginia.



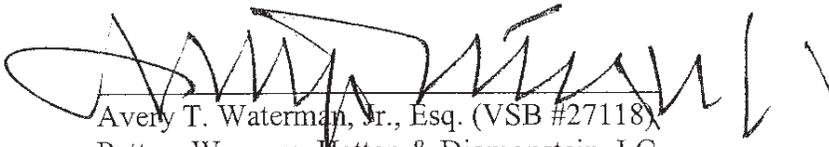
The Honorable R. Bruce Long
Circuit Court Judge

SEEN AND OBJECTED TO AS FOLLOWS:

1. THE COURT FINDING NO GROSS NEGLIGENCE ON EVIDENTIARY PLEA IN BAR;
2. THE COURT NOT INSTRUCTING THE JURY AND NOT SUBMITTING IT A SPECIAL INTERROGATORY ON GROSS NEGLIGENCE AT TRIAL;
3. THE COURT NOT FINDING GROSS NEGLIGENCE POST-TRIAL;
4. THE COURT NOT GIVING THE JURY THE UNITARY DAMAGES INSTRUCTION REQUESTED BY PLAINTIFF AT TRIAL;
5. THE COURT 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 PRE-JUDGMENT INTEREST AND ALL COSTS;
6. ALTERNATIVELY, THE COURT 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 PRE-

JUDGMENT INTEREST AND ALL COSTS;

7. IN THE ALTERNATIVE, THE COURT 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 PRE-JUDGMENT INTEREST AND ALL COSTS;
8. IN THE FURTHER ALTERNATIVE, THE COURT 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 PRE-JUDGMENT AND COSTS; AND
9. FOR ALL OTHER EXCEPTIONS, GROUNDS AND/OR REASONS STATED:
 - A. IN ANY MEMORANDUM FILED BY PLAINTIFF;
 - B. AT ANY PRE-TRIAL OR POST-TRIAL HEARING BY PLAINTIFF;
 - C. AT TRIAL BY PLAINTIFF; AND/OR
 - D. IN ANY PRIOR ORDER OF THE COURT BY PLAINTIFF.

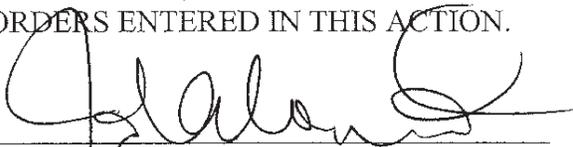


Avery T. Waterman, Sr., Esq. (VSB #27118)
Patten, Wornom, Matten & Diamonstein, LC
12350 Jefferson Avenue, Suite 300
Newport News, VA 23602
757-223-4567 (phone)
757-223-4499 (fax)
Counsel for Plaintiff

SEEN AND OBJECTED ON THE GROUNDS THAT THE JURY VERDICT RETURNED AGAINST THE DEFENDANT, BURNS, AND ALL OF THE COURT'S DECISIONS, JUDGMENTS, AND ORDERS ARE CONTRARY TO THE LAW, THE JURY INSTRUCTIONS OF LAW, AND/OR THE EVIDENCE INTRODUCED AT TRIAL; THAT BASED UPON THE APPLICABLE LAW, THE JURY INSTRUCTIONS OF LAW, AND/OR THE EVIDENCE INTRODUCED AT TRIAL THE DEFENDANT, BURNS, OWED NO COMMON LAW OR OTHER LEGAL DUTIES TO THE PLAINTIFF FOR THE ACTIONS OR OMISSIONS TO ACT OF THE DEFENDANTS, JAMES NEWSOME AND/OR CHRISTINE NEWSOME, FOR

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HIS OWN ACTIONS AND/OR OMISSIONS TO ACT, AND/OR ON ANY OTHER GROUNDS; THAT THE DEFENDANT , BURNS, IS IMMUNE TO LIABILITY TO THE PLAINTIFF FOR THE CLAIMS ASSERTED IN THE AMENDED COMPLAINT ON THE GROUNDS OF COMMON LAW SOVEREIGN IMMUNITY, VIRGINIA CODE SECTION 8.01-220.1:2, AND/OR VIRGINIA CODE SECTION 8.01 -47; THAT THE INTRODUCTION INTO EVIDENCE OF THE DEPOSITION OF SHANNON DIAZ AT THE HEARING ON THE PLEA IN BAR HELD ON DECMEBER 16, 2009 AND AT THE TRIAL OF THIS ACTION VIOLATED THE RULES OF THE SUPREME COURT OF VIRGINIA , INCLUDING BUT NOT LIMITED TO RULE 4:7 AND PREJUDICED DEFENDANT, BURNS, BECAUSE THIS DEPOSITION WAS TAKEN IN A DIFFERENT LAWSUIT INVOLVING DIFFERENT PARTIES AND/OR THE GROUNDS FOR THE USE AND INTRODUCTION OF DIAZ' DEPOSITION WAS NOT PROPERLY INTRODUCED INTO EVIDENCE; THAT THE COURT'S DECISIONS CONCERNING THE ASSESSMENT OF COSTS IS CONTRARY TO THE LAW AND THE EVIDENCE; AND THAT THE JURY VERDICT RENDERED IN FAVOR OF THE PLAINTIFF AND AGANIST THE DEFENDANT , BURNS, IS CONTRARY TO APPLICABLE VIRGINIA LAW, THE JURY INSTRUCTIONS, AND/OR THE EVIDENCE INTRODUCED AT TRIAL FOR ALL OF THE REASONS STATED BY COUNSEL FOR DEFENDANT BURNS IN HIS ANSWER, PLEA IN BAR, DEMURRER, MOTION FOR RECONSIDERATION OF PLEA IN BAR, BURNS' REPLY TO PLAINTIFF'S AMENDED MOTION FOR RECONSIDERATION OF PLEA IN BAR, BURNS'RENEWED PLEA IN BAR , BURNS' MOTION FOR RECONSIDERATION OF PLEA IN BAR AND MOTION FOR ENTRY OF JUDGMENT IN FAVOR OF BURNS NOTWITHSTANDING VERDICT, AS WELL AS ALL OTHER REASONS SET FORTH IN ALL OTHER MOTIONS, PLEADINGS, BRIEFS, AND/OR MEMORANDA, FILED BY DEFENDANT BURNS, FOR ALL REASONS STATED ORALLY BY COUNSEL FOR DEFENDANT BURNS DURING ALL HEARINGS AND AT THE TRIAL OF THIS ACTION; AND FOR ALL REASONS STATED IN WRITNG IN ALL PRIOR ORDERS ENTERED IN THIS ACTION.



John A. Conrad (VSB # 17640)

The Conrad Firm

1520 W. Main Street, Suite 204

Richmond, Virginia 23220

(804) 359-6062 (phone)

(804) 359-6064 (fax)

Counsel for Defendant Burns

Travis Burns, Appellant/Cross-Appellee

v.

Gregory Joseph Gagnon, et al., Appellees/Cross-Appellants

Assignments of Error

1. The trial court erred in denying Appellant Burns' Demurrer because the allegations of the Amended Complaint were insufficient to establish that Burns had a legal duty to Gagnon, and because under the facts pled, Burns was entitled to sovereign immunity under the common law and under Va. Code Ann. § 8.01-220.1:2.
2. The trial court erred in denying Appellant Burns' Plea in Bar and Motion for Reconsideration of Plea in Bar, dated December 18, 2009, because pursuant to the evidence taken at the hearing on the Plea in Bar, the evidence was insufficient to establish that Burns had a legal duty to Gagnon, and because the evidence established that Burns was entitled to the protections of sovereign immunity under the common law and under Va. Code Ann. § 8.01-220.1:2.
3. The trial court erred in denying Appellant Burns' Motion to Strike the Plaintiff's Evidence made at the trial of this action and the Motion for Reconsideration of Plea in Bar And Motion for Entry of Judgment in Favor of Defendant Burns Notwithstanding Verdict, dated September 29, 2010, because Burns had no legal duty to protect Appellee Gagnon and/or Appellant Burns was immune from liability on the grounds of common law sovereign and/or statutory immunity under Va. Code Ann. § 8.01-220.1:2.
4. The trial court erred in denying the Motion in Limine and the objections of Appellant Burns to the admission of the deposition transcript of witness, Shannon Diaz, as evidence at the trial of this matter and at the evidentiary hearing held on the Plea in Bar because this deposition was admitted in violation of R. Sup. Ct. Va. Rule 4:7(a)(7) and Rule 4:7(a)(4) and the deposition testimony included hearsay and ex parte statements in violation of Va. Code Ann. § 8.01-404.

Assignments of Cross-Error

1. Trial court erred in finding no gross negligence on Burns' evidentiary Plea.
2. Trial court erred in not instructing the jury and not submitting it a special verdict on Burns' gross negligence.