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IN THE  
**Supreme Court of Virginia**

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RECORD NO. 110767

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GREGORY JOSEPH GAGNON,

*Appellant,*

v.

TRAVIS BURNS, et al.,

*Appellees.*

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**BRIEF OF APPELLEE,  
TRAVIS BURNS**

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## **STATEMENT OF THE CASE**

Gagnon filed a Petition for Appeal of the final judgment of the Gloucester County Circuit Court, entered on January 25, 2011, and arising out of his Amended Complaint seeking monetary damages for bodily injuries which was tried before a jury in the Gloucester Circuit Court, on August 16 through August 27, 2010.

## **STATEMENT OF FACTS**

This lawsuit arises out of a December 14, 2006 altercation between two high school students attending Gloucester High School in Gloucester County, Virginia. (App. 77.) Gagnon filed an Amended Complaint against Gloucester High School Vice Principal Travis Burns as well as Gagnon's combatant, James S. Newsome, Jr., and Newsome's sister, Christine D. Newsome. At the time of trial, there were three defendants in this matter, Burns, Christine Newsome and James Newsome. Final judgment was entered on January 25, 2011 in the Gloucester County Circuit Court in favor of Gagnon and against Burns, for \$1,250,000.00, plus interest at the judgment rate from December 14, 2006. (App. 330.) Separate verdicts were also entered in favor of Gagnon against James Newsome and Christine Newsome in the amounts of \$3,250,000 and \$500,000, respectively. (App. 331-332.) After the trial of this matter, Gagnon filed

three motions requesting the trial court to enter judgment against all three defendants jointly and severally. However, three separate verdicts were entered by the jury foreman, Jean E. Thomas. (App. 330-332.) These three jury verdicts rendered by the jury were separate, different, individual verdicts against Burns, James Newsome and Christine Newsome, not one joint and several verdict.

### **STANDARD OF REVIEW, AUTHORITIES AND ARGUMENT CONCERNING GAGNONS ASSIGNMENTS OF ERROR**

- I. The trial court did not err in refusing to find joint and several liability and in refusing to enter judgment against all Defendants jointly and severally for Five Million Dollars (\$5,000,000.00).**
- II. The trial court did not err in refusing to find joint and several liability and in refusing to enter judgment against Burns and James Newsome for the sum of \$4.5 million and/or prejudgment interest and/or costs.**
- III. The trial court did not err in refusing to find Burns was not jointly and severally liable with James Newsome and/or Christine Newsome and in refusing to enter judgment against all Defendants, jointly and severally, or solely against Burns for the highest individual jury verdict awarded at trial of \$3.25 million and/or prejudgment interest and/or costs.**
- IV. The trial court did not err in finding Burns was not jointly and severally liable with Christine Newsome and in refusing to enter judgment against Burns and Christine Newsome for the sum of the individual jury verdicts awarded against them for \$1.75 million and/or prejudgment interest and/or costs.**

## **Standard of Review**

The standard of review for all of the Assignments of Error numbers 1 through 4 stated in Gagnon's Petition For Appeal pursuant to VA. CODE ANN. § 8.01-680 (Michie's 2011) is that Gagnon must prove that the judgment of the trial court was plainly wrong or contrary to the law or without evidence to support it. Banks v. Mario, 274 Va. 438, 650 S.E.2d 687 (2007).

## **Authorities and Argument**

### **A. Gagnon's' Legal Authorities**

Gagnon's citations of Black's Law Dictionary, Restatement (Third), Apportionment of Liability, §14, VA. CODE ANN. § 8.01-443, and this Court's decisions in Sullivan v. Robertson Drug Co., Inc., et al, 273 Va. 84, 88, 639 S.E.2d 250, 253 (2007); Torloni v. Commonwealth, 274 Va. 261, 266, 645 S.E.2d 487, 490 (2007); Pulliam v. Coastal Emergency Services of Richmond, Inc., 257 Va. 1, 10-16, 509 S.E.2d 307, 312-316 (1999); and Etheridge v. Medical Center Hospitals, 237 Va. 87, 95-98, 376 S.E.2d 525, 528-530 (1989) are all inapposite to the present action because Gagnon never requested or submitted this case to the jury based upon instructions of concurrent negligence or single indivisible injury. Moreover, Virginia jurisprudence has been sufficiently well developed by this Court. This Court

needs no invitation to consider the decisions of the West Virginia Supreme Court in which it “decline(d) the invitation to decide the case in question on the basis of special relationships doctrine and the minor status of the plaintiff,” Strahin, et al. v. Cleavinger, 216 W.Va.175, 184, 603 S.E.2d 197, 206 (2004). In addition, this Court’s decision in Garlock Sealing Techs, Inc. v. Little, 270 Va. 381, 387-388, 620 S.E.2d 773, 776-777 (2005), cited by Gagnon, does not support Gagnon’s argument. This decision supports Burns’ argument. This Court’s decision in Garlock was not based on the doctrine of joint and several liability as contended by Gagnon, but upon the doctrine of judicial estoppel or inconsistent positions. Id.

**B. Gagnon’s Assignments of Error Nos. 1, 2, 3 and 4 should be dismissed because Gagnon failed to identify the legal issues with certainty in the trial court proceedings, failed to request the trial court to rule on the legal issues in a timely manner, failed to comply with Rule 5:25, and failed to request the trial court to consider jury instructions which were adequate under Virginia in order to create jury issues and factual findings of negligence, causation, liability, and adequate grounds for joint liability by Burns and a joint verdict.**

In Garlock, the defendant requested the jury to apportion fault among entities that were not parties to the litigation. Id. at 387-388, 620 S.E.2d at 776-777. This Court held: “We will not permit Garlock Sealing to obtain an apportionment of liability among itself and 10 entities that were not parties to this litigation and then complain about the method of apportionment.” Id.

More recently, this Court has held that a litigant is not permitted to request, agree to, or fail to object to address, or object to a jury instruction, and then successfully complain about the same jury instruction or jury issue. As this Court has previously stated: “Error will not be sustained to any ruling of the trial court unless the objections was stated with reasonable certainty at the time of the ruling.” Scialdone v. Commonwealth of Virginia, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010) (citing Rule 5:25 and Rule 5A:18.) The purpose of the rule is to “afford the trial court an opportunity to rule intelligently on the issues presented, thus avoiding unnecessary appeals and reversals.” Scialdone, 279 Va. at 437, 689 S.E.2d at 724 (2010) (citing Weidman v. Babcock, 241 Va. 40, 44, 400 S.E.2d 164, 167 (1991).)

A party must state the grounds for an objection “so that the trial judge may understand the precise question or questions he is called upon to decide. . . . Thus, the provisions of Rule 5:25 protect the trial court from appeals based upon undisclosed grounds.” Scialdone, 279 Va. at 437, 689 S.E.2d at 724 (citing Jackson v. Chesapeake & Ohio Ry. Co., 179 Va. 642, 651, 20 S.E.2d 489, 492 (1942) and Fisher v. Commonwealth, 236 Va. 403, 414, 374 S.E.2d 46, 52 (1988).) To satisfy the rule,

An objection must be made . . . at a point in the proceeding when the trial court is in a position, not only to consider the

asserted error, but also to rectify the effect of the asserted error.” . . . The rule is . . . intended . . . to put the record in such shape that the case may be heard in this [C]ourt upon the same record upon which it was heard in the trial court.

Scialdone, 279 Va. at 437, 689 S.E.2d at 724 (citing Johnson v. Ranotta, 264 Va. 27, 33, 563 S.E.2d 727, 731 (2002) and Kercher v. Richmond, Fredericksburg & Potomac R.R. Co., 150 Va. 108, 115, 142 S.E.393, 395 (1928).)

In all four of his Assignments of Error No.'s 1-4, Gagnon assigns error to the trial court "...in refusing to find joint and several liability by Burns..." and Christine Newsome and/or James Newsome for all damages awarded to Gagnon for the actions of all three defendants and in refusing to enter a joint judgment. 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 damage jury instruction, that Burns should be liable for all damages that flowed from the negligent acts of Christine Newsome or the intentional acts of James Newsome. (App. 313, 326-327, 1229-1234.) However, a complete and objective view of the trial court record reveals that for numerous reasons Gagnon's comments during the jury instruction phases of the trial were inconsistent with, inadequate, and completely contrary to Gagnon's contentions on appeal that he requested the trial court erred to make a finding of joint liability or to enter joint verdicts. (App. 1205-1296, 1304.)

First, although Gagnon’s counsel commented, during consideration of Gagnon’s proposed damage instruction, that Burns should be liable for all damages flowing from the actions of all defendants, Gagnon never offered any jury instructions, or requested the trial 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 the actions of the other two defendants, or liable for all damages flowing from any and all negligence and batteries by the all defendants. In fact, the jury instruction offered by Gagnon, entitled “General Personal Injury and Property Damage,” did not preserve the issue of joint and several liability by all three defendants because it instructs the jury to determine damages “caused by the negligence of the Defendant” or “sustained as a result of the Defendant’s negligence”. (App. 327, 1229-1230.) This instruction instructed to jury to find damages caused by the negligence of a sole unidentified defendant, not by a battery, and it does not instruct the 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 law. See generally, C. H. Dickenson, Administrator, etc. v. John Prosser Tabb, IV, et al., 208 Va. 184, 192 186 S.E.2d 795, 801 (1969). Thus, Gagnon’s jury

instruction was inadequate to identify the legal issues or request the trial court to consider or intelligently rule upon any issues of joint liability or a joint verdict or judgment.

Moreover, Gagnon's counsel did not preserve, and, in fact, conceded and waived any legal issues related to his comments and this instruction. His counsel stated to the trial court: "it really matters not to me whether we give, you know, two in a row, that is, that we must give [Instruction] No. 9 for negligence and then, the other . . ." (for the intentional tort of battery). (App. 1230.) In addition, the trial court's separation of Instructions Nos. 36.090 and 9.000 as Jury Instruction No. 19 in this case does not constitute reversible error because it was an appropriate instruction, given the law of the case established in the issues and findings instructions, Instructions Nos. 1 and 2, and the separate verdict forms, agreed to by Gagnon and all other parties, and the fact that Gagnon never requested the court to instruct the jury on concurrent negligence for a single indivisible injury, or any other grounds for finding joint liability. (App. 1211-1219, 1289-1295, 1304.) Moreover, Gagnon has not assigned error to the trial court's rejection of Gagnon's jury instruction on damages, to the trial court's instructions to the jury to identify separate liability issues, to make separate factual findings of

negligence and causation as to each defendant, or to the submittal of separate verdict forms.

Secondly, all of Gagnon's prior and later arguments on the jury instructions were not only completely inconsistent with, and inadequate, but completely contrary to any request that the jury be instructed on a grounds for concurrent negligence for a single indivisible injury, or any other grounds for joint liability by Burns with the other two defendants in causing all of Gagnon's damages, or to return a joint verdict. Indeed, Gagnon was successful in persuading the trial court to instruct the jury on the issues and findings instructions exactly as Gagnon requested, as completely separate issues, as separate as "apples and oranges." (App. 1211-1219) Gagnon's argument to the trial court was that Burns was liable for all damages flowing from any acts of negligence or intentional torts of any of the three defendants, with absolutely no jury instruction for the jury to make any factual determinations finding that Burns was concurrently negligent with the Newsomes in causing a single indivisible injury, that Burns was jointly liable with the Newsomes, that causation was joint or concurrent, or that the jury should consider determining any grounds for a joint verdict.(App. 1211-1219.)

Third, as a matter of Virginia law under the circumstances of this case there are insufficient grounds as a matter of law for any factual finding or 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 under the verdicts returned against the two Newsomes. 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). In this case it was not. (App. 295, 296, 330, 331, 332.) In addition, the jury must be instructed to make a factual finding that the concurrent negligence of Burns and Christine Newsome caused a single indivisible injury to Gagnon, or that some other grounds of liability by Burns concurred with the negligence of Christine Newsome and/or the battery by James Newsome in causing Gagnon's injuries, or that the liability of all defendants was joint and several. See, Dickenson, 208 Va. at 192 186 S.E.2d at 801 (1969). "The factual determinations of negligence and proximate causation are questions of fact for the jury's determination. . . . A subsequent proximate cause may or may not relieve a defendant of liability for his negligence." Kellerman, 278 Va. at 493, 684 S.E.2d at 794. Moreover, this Court has "consistently held that generally a

person does not have a duty to protect another from the conduct of third persons. . . .” Id. at 492, 684 S.E.2d at 793. Gagnon never requested the necessary instructions requesting the jury to identify any factual issue or make any factual findings of any grounds for joint liability or a single indivisible injury or concurrent negligence. (App. 1204-1305.)

Gagnon argued to the trial court that he could obtain joint liability, a joint verdict, and joint judgment against all three defendants based upon the jury instructions he requested, with separate jury instructions of the fact findings of negligence, battery, and causation as to each defendant, as well as the use of three separate jury verdicts. Gagnon’s counsel announced his theory of the case during the arguments on the jury instructions: “Here, it seems to me it’s [d]id defendant, James Newsome, commit a battery . . . on the plaintiff, and . . . it ends there. That’s all I have to prove because like you say it’s the incident, or none of these instructions are going to the injuries.” (App. 1289-1291.) With regard to the “issues” and “findings” and “causation” instructions, Gagnon requested the trial court to instruct the jury on the liability issues of negligence and assault and battery and causation separately as to each defendant, or to use his words, like “apples and oranges.” (App. 1211-1219.)

THE COURT: We’ll get to the other one in due course.  
Negligence issues and allocation of burdens of proof.

MR. WATERMAN: This is a significant point, Your Honor. This is something that truly is a significant difference. Probably this instruction and a finding instruction after it are probably the most significant disparities we have. Plaintiff's position is that you've got two different kinds of – you have two different kinds of actions here. We have a negligence action against Mr. Burns, of course, and Christine Newsome and then you have a distinct from that an intentional tort, assault and battery. Your Honor, is to, you know, put in this generic negligence instruction and later as we'll see the Model Jury Instructions regarding assault and battery which, of course, are different. It's apples and oranges. The defense has basically merged those things. They have taken this thing, 3.000 and correspondingly 3.060 and shuffled in the assault and battery stuff of Mr. Newsome. I don't think that's appropriate because, again, this is a negligence instruction, and as we'll see if we were to go through the defendant's instruction . . . .

What is the Court's approach going to be, is it going to be negligence instructions and assault and battery or are we going to shuffle them altogether? And I would say also that the defense ... (is)... shuffling the assault and battery in with the negligence . . . .

(App. 1211-1219.)

This is the awkwardness, the incongruence of putting a battery defendant in a negligence formulation. Here it seems to me it's, did the Defendant, James Newsome, commit a battery of the Plaintiff or I would say on the Plaintiff, and . . . it ends there.

(App. 1291.)

The jury verdict forms were presented to counsel to review prior to submittal to the jury. Counsel was provided the opportunity to determine whether or not the jury verdict forms were acceptable and/or to present any

objections to the jury verdict forms. Gagnon agreed to the forms and made no objections to these jury verdict forms, which clearly directed the jury to return separate verdicts. (App.1304.)

Gagnon is estopped after the jury returned its verdicts from asserting that the trial court erred in refusing to declare the defendants' liability to be joint and several or the three separate verdicts somehow to be joint and several. See, Scialdone, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010); R. SUP. CT. VA. 5:25. A party cannot complain of a jury instruction given at his instance. Hilton v. Fayen, 196 Va. 860, 866-867, 86 S.E.2d 40, 43 (1955). In Hilton, the defendant, Fayen, appealed on the grounds that the lawsuit was against her as an individual for the debt of a partnership. Id. This Court held that Fayen was estopped from her appeal on those grounds because she agreed to the proceeding against her alone, made no proper objection or exception to the subsequent rulings of the court, and, thus, waived all prior objections by joining in the request for the findings instruction against her, only requested the instruction, and never made a motion to set the verdict aside as contrary to the law or the evidence. Id. As a result, this Court held that the finding instruction on liability became the law of the case and binding on the parties to the action. Id.

Similarly in the present case, the trial court was never afforded the opportunity to rule intelligently on the issue of joint liability and the related issues set forth above because Gagnon never requested the trial court to consider or rule upon instructions which instructed the jury to find joint liability or a joint verdict by the defendants. Instead, Gagnon requested jury instructions and verdicts instructing the jury to make separate factual findings as to each defendant with respect to negligence, battery, and causation, and separate verdicts, because Gagnon wanted to avoid the applicability of any negligence defenses to Gagnon's claim of battery against James Newsome. Gagnon is estopped from now changing his position and arguing that error was committed by the trial court in failing to convert the three separate jury verdicts into one joint and several verdict under any of Gagnon's Assignments of Error Nos. 1 through 4. Gagnon is estopped because (a) Gagnon agreed to Jury Instruction No. 1, the "issues" instruction, which instructed the jury separately as to each defendant of his or her respective grounds for liability and causation; (b) Gagnon agreed to Jury Instruction No. 2, the "findings" instruction, which instructed the jury to make separate factual findings whether Burns, Christine Newsome, and James Newsome were negligent, or guilty of a battery, and a separate proximate cause of the incident; (c) Gagnon never

requested the trial court to request the jury to consider or find that Burns guilty of concurrent negligence which caused a single indivisible injury or any other grounds for joint liability by Burns for the actions of the Newsomes or damages awarded Gagnon against the Newsomes; and (d) Gagnon agreed to the three separate jury verdict forms that instructed the jury to return three separate verdicts. (App. 1204-1309.) See, generally, Garlock, 270 Va. 381, 387-388, 620 S.E.2d 773, 776-777 (2005); Scialdone, 279 Va. 422, 437, 689 S.E.2d 716, 724 (2010); Hilton, 196 Va. 860, 866-867, 86 S.E.2d 40, 43 (1955).

Finally, Gagnon's argument on brief that "(a)t trial, Burns got the damage instruction that the asked (sic) and the verdict form that he induced the judge to give, and thus is estopped from complaining about the legal consequences . . . " is not only false, but misleading. Burns never "inducted the judge to give" the verdict forms. Neither verdict forms offered by Burns or Gagnon were accepted by the Court. (App. 1278-1282.) The three verdict forms were drafted and submitted solely by the trial court judge. (App. 1295-1296, 1304.) Like Gagnon, Burns merely agreed to instruct the jury to return separate verdicts. Moreover, unlike Garlock, Burns has not taken inconsistent positions and has not cited error by the trial court in the use of these verdict forms on the grounds that they

erroneously instructed the jury to return separate verdicts. See, generally, Garlock, 270 Va. at 387-388, 620 S.E.2d at 776-777 (2005).

**C. Gagnon's Assignment of Error Nos. 1, 2, 3 and 4 should be dismissed because Gagnon waived these issues.**

In Plaintiff's Motion And Memorandum For Judgment Or Joint And Several Liability Against Joint Tortfeasor Defendants, dated September 23, 2010, Gagnon made the following motion, "Comes now Plaintiff and moves the Court for entry of Judgment of joint and several liability against all Defendants as Joint Tortfeasors on the jury verdict awarding \$5,000,000.00 in principal plus pre-judgment interest thereon at trial on August 26, 2010." (App. 333.) In the Plaintiff's Motion For Reconsideration Of Joint And Several Liability, dated October 26, 2010, the Plaintiff "moves the Court for reconsideration of the issues of joint and several liability of Defendants . . ." and concludes with a prayer, "Plaintiff prays the Court enter judgment of joint and several liability against: (A) All Defendants for \$5,000,000.00 or, alternatively, for \$3,250,000.00; alternatively, (B) against Travis Burns for \$3,250,000.00; or in the further alternative, (C) against Travis Burns and Christine Newsome for \$1,750,000.00, plus all costs and interest." (App. 474.) In the Plaintiff's Supplemental Motion And Memorandum For Joint And Several Liability, dated December 16, 2010, Gagnon "pray(s) the Court reconsider its prior rulings on joint and several liability and enter judgment

in his favor and against all Defendants jointly and severally.” (App. 485.) Neither before, nor after, the return of the jury verdicts did Gagnon ask the trial court to request the jury to find Burns jointly liable with James Newsome for \$4.5 million as contended in Assignment of Error No. 2. Also, prior to the jury’s return of their verdicts, Gagnon never made the requests to the trial court set forth in Assignments of Error No.’s 1, 3, and 4.

In addition, Gagnon failed to preserve these issues for appeal because he never moved the trial court to set aside the three jury verdicts, and he never stated any grounds, legally or evidentiarily, for doing so. (App. 572-580, 1322-1328, 1373-1374, 1408-1433.) Gagnon never made a motion for a new trial, or to set aside the jury verdict as contrary to the law or without evidence to support it, as required under Virginia law. Hilton, 196 Va. at 865-867, 86 S.E.2d at 43-44. When Gagnon failed to move the trial court to set aside the verdict and grant a new trial, he waived his right to assign error under R. SUP. CT. VA. 5:25. See generally, id. at 867, 86 S.E.2d at 43-44. Indeed, even when asked after the return of the jury verdicts, when asked by the trial court if it was his position that the verdict forms were erroneous, Gagnon’s counsel, stated that it would have been better to use the form he suggested, but that the verdict form “that the

Court went with is not inherently inappropriate. What we take issue with is what you make of the verdict form.” (App. 1340.)

**D. Gagnon’s Assignments of Error Nos. 1, 2, 3, and 4 should be denied because as a matter of fact and law, the three separate jury verdicts cannot be converted into one joint and several verdict.**

The trial court confirmed with all jurors that these verdicts were separate, not joint. All jurors specifically confirmed that their verdicts were separate and that Burns should not be liable for the verdicts against James Newsome and Christine Newsome. (App. 1326-1327.) After the jury returned its verdict, Gagnon admitted “they had returned separate verdicts.” (App. 1323.) The jury was polled in order to clarify its intent. The questions asked by the court were specific and clear, and the Jurors’ answers were also clear. The court said:

Ladies and gentlemen, since there were several defendants, the way the jury verdict form was drawn, I think it’s relatively clear, but I would like to just ask you a couple of questions to make sure I’m clear about your verdict. For example, in Paragraph 1 you indicated a verdict against Travis Burns in the amount of \$1,250,000. Is it your intention that he be responsible only for that amount and not for the amount awarded against James Newsome and Christine Newsome? If your answer is yes, please answer yes.

(App. 1326-1327.)

The jury, in turn, responded, “yes.” In order to be completely clear on the question, the court asked, again, “You intend that he only be

responsible for that?”, to which the jury again responded, “Yes.” The court subsequently inquired the same as to James Newsome and Christine Newsome, and the jury responded similarly that they intended for the individual verdicts to be applied individually to Burns, James Newsome and Christine Newsome, as noted in the jury verdict forms. (App. 1327-1328.) Thus, it is clear that the three jury verdicts were intended to be and, in fact, were three separate verdicts and not one joint verdict. Contrary to Gagnon’s argument, the failure to instruct the jury on concurrent negligence and to object to the instruction of the jury to return separate verdicts does indeed abrogate joint liability as a matter of fact and, thus, as a matter of law. *Garlock*, 279 Va. at 387-388, 620 S.E.2d at 776-777.

Virginia Code § 8.01-443, cited by Gagnon, states that “if sued jointly (an injured party) may proceed to judgment against them successively until judgment has been rendered against . . . all of the defendants, and no bar shall arise as to any of them by reason of a judgment against another, or others, until judgment has been satisfied.” VA. CODE ANN. § 8.01-443 (Michie’s 2011). The purpose of this statute is to prevent a judgment against only one of several defendants who has been determined to be jointly liable for one indivisible injury from constituting a bar to a subsequent judgment against another tortfeasor also determined to be jointly liable for

the same indivisible injury. Smith v. Kim, 277 Va. 486, 992, 675 S.E.2d 193, 197 (2009). Separate jury factual findings, verdicts, and judgments do not constitute a bar to other judgments.

In the present case, the jury did not dictate that the verdicts were separate instead of joint. The jury simply made the factual findings and verdicts it was requested to make. The jury had the authority to respond to the factual issues, findings and verdicts requested of it as a part of the jury instructions and verdicts requested in this case. These instructions constitute the "law of the case," and they cannot now be objected to. Hilton, 196 Va. at 867, 86 S.E.2d at 44. Right or wrong, the instructions and verdicts given in this case became the law of the case on that point, were binding upon all parties and the jury, and are not open for subsequent reconsideration. Id. Pursuant to the "law of the case" doctrine, when a party fails to challenge a decision rendered by a court at one stage of litigation, that party is deemed to have waived its right to challenge that decision during later stages of the "same litigation." Jenkins v. Jenkins, 276 Va. 19, 661 S.E.2d 822 (2008).

**E. Gagnon's Assignments of Error Nos. 1, 2, 3, and 4 should be denied because Burns owed Gagnon no legal duty, is entitled to sovereign immunity, and the trial court improperly admitted the Diaz deposition.**

For the reasons set forth in the Brief Of Appellant, Travis Burns, Gagnon's Assignments of Error Nos. 1, 2, 3 and 4 should be denied because the evidence introduced during the hearing on the Plea In Bar and at the trial of this matter was insufficient to establish that Burns had a legal duty to Gagnon, this evidence established that Burns was entitled to sovereign immunity and the immunity provided by VA. CODE ANN. § 8.01-220.1:2, and the trial court erred in admitting the Shannon Diaz deposition into evidence.

### **CONCLUSION**

For the reasons stated herein, the trial court did not err in refusing to find joint and several liability by Burns for the judgments against James Newsome and/or Christine Newsome, and in refusing to enter judgment against Burns jointly and severally in any of the amounts set forth in the four Assignments of Error of Gagnon for the reasons previously stated.

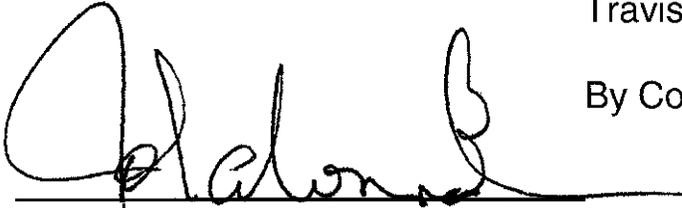
### **STATEMENT OF RELIEF SOUGHT**

Burns moves the Supreme Court of Virginia to deny the Assignments Of Error of Gagnon and provide the other relief requested by Burns.

Respectfully Submitted,

Travis Burns,

By Counsel

A handwritten signature in black ink, appearing to read "John A. Conrad", written over a horizontal line.

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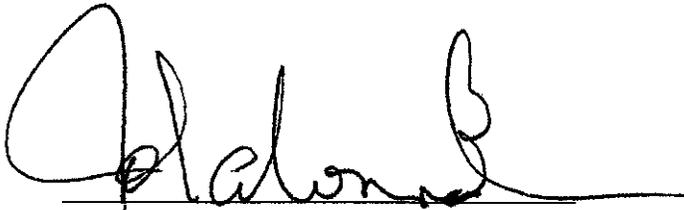
## CERTIFICATE OF SERVICE

Pursuant to Rule 5:26 and Rule 5:18 of the Rules of the Supreme Court of Virginia, I hereby certify that seven copies of this brief were filed by hand delivery this 21<sup>st</sup> day of November, 2011, in the Office of the Clerk of the Supreme Court of Virginia. This same date, a copy of this brief was filed electronically via e-mail at [scvbriefts@courts.state.va.us](mailto:scvbriefts@courts.state.va.us). This same date, a true and exact copy of the foregoing brief (and an electronic copy) was mailed by United States First Class mail, postage prepaid, to all opposing counsel and all parties not represented by counsel, as follows:

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