

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

FREDERICK W. PAYNE, et al.
Plaintiffs,

v.

Case No. CL 17 - 145

CITY OF CHARLOTTESVILLE, VIRGINIA, et al.
Defendants

Plaintiffs' memo: legislative privilege does not shield prohibited acts

There is no privilege, because there was no legislation. The case concerns resolutions to remove two monuments, and a "vote" to cover both monuments with tarps not even framed as an ordinance or resolution. That isn't lawmaking. Legislative immunity does not "protect [officials] when they step outside the function for which their immunity was designed." Board of Supervisors of Fluvanna County v. Davenport Co LLC, 285 Va 580, 590, 742 S.E.2d 59 (2013) (stating legislative privilege applies only to acts "within the sphere of legitimate legislative activity") ["Davenport"]; see also Isle of Wight County v. Nogiec, 281 Va. 140, 155, 794 S.E. 2d. 83 (2011) ["Isle of Wight," attached].

In a case analogous to the one at bar, the court held the "evidence does not demonstrate that the Board was acting in a legislative capacity On the contrary, it shows that the Board was acting in a supervisory or administrative capacity. . . . Thus, because the Board was not acting in a legislative capacity . . . its meeting was not a legislative proceeding to which the public interest supports the attachment of an absolute privilege." Isle of Wight 281 Va. at 155 [attached]. Likewise here, City Council resolutions to remove monuments and a "vote" to cover them with tarps were administrative and supervisory and not legislation.

Even if there were any applicable legislative privilege the Monument Protection Law explicitly waived it, in stating "it shall be unlawful for the authorities of the locality, or any other person or persons, to disturb or interfere with any monuments or memorials" Va. Code §15.2-1812; see Davenport 285 Va at 590 (holding legislative immunity waived). To allow offi-

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cials to act illegally and then shroud those acts in a privilege of any sort, would put them above the law.

Finally to the extent any privilege might have attached, it was also waived by nonassertion in a series of lengthy evidentiary hearings in the case in May 2017, September 2017, and October 2017. The proponent of a privilege has the burden to establish that the information is privileged, and that the privilege was not waived by failing to assert it. Davenport, 85 Va at 590 (stating immunity waived if officials do not “at a proper time, and in a proper manner, claim the benefit of [the] privilege.”) see also Walton v. Mid-Atlantic Spine Specialists, P.C. et al, Record No. 091009 (Va App. 2010) (holding attorney-client privilege waived by implication, by previous disclosure without effort to protect confidentiality). The City has failed to assert, and therefore waived, any such privilege.

In sum, if the City Councillors and City Manager acted within their authority the acts were ministerial; if not then *ultra vires*; in either event they are not shielded by legislative privilege. The fundamental question in this case is what the City did, and why, and such evidence cannot be privileged. “[Without adequate information] the parties cannot properly litigate, the circuit court cannot properly adjudicate, and this Court cannot properly review the issues on appeal.” Ames v. Town of Painter, 239 Va. 343, 348, 389 S.E.2d 702 (1990).

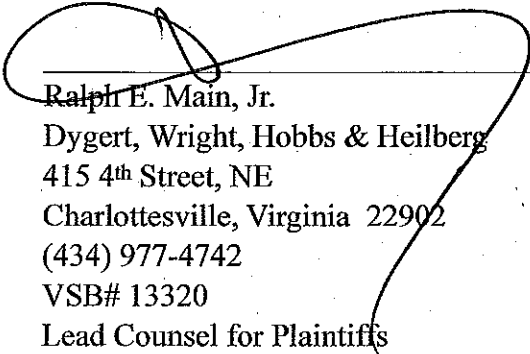
All the Defendants’ records in furtherance of removing, encroaching upon, or desecrating war memorials were part of an illegal endeavor; the transaction itself. Va Code §§ 15.2-1812; 1812.1 & Va Code §18.2-137. The evidence would be admissible not only as *res gestae*, but as admissions against interest, and as statements by co-participants. See e.g. Jones v. Commonwealth, 11 Va. App 75, 83 - 88, 396 S.E. 2d 844 (1990) (defining *res gestae* as a spontaneous declaration which is part of a “litigated act” that “accompan[ies] and explain[s] an act done”);

Chappell v. White, 182 Va 625, 29 SE 2d 858 (1944) (saying “res gestae is not the witness speaking but the transaction voicing itself”).¹

Request for Relief

The Plaintiffs respectfully request the Court to overrule the Defendants’ assertion of legislative immunity.

Respectfully submitted:


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¹ In its barest form *res gestae* is simply the words “so connected with the very transaction or fact under investigation as to constitute a part of it.” Haynes v. Commonwealth, 69 Va. (28 Gratt.) 942, 946 (1877). In Virginia *res gestae* has sometimes been conflated with excited utterance. Jones v. Commonwealth, 11 Va App. 75, 82, 396 SE 2d 844 (1990) (calling *res gestae* “a collective reference for a number of separate hearsay exceptions” having in common spontaneous utterance).