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350 Park Street
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Via Hand Delivery

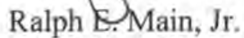
Re: *Frederick W. Payne et al. v. City of Charlottesville et al.*
Case No. CL17-145

Dear Llezelle:

Kindly file the attached Plaintiffs' Opposition To Defendants' Motion For Summary Judgment On Statutory Immunity Grounds among the papers in this case.

Thank you.

Very truly yours,



Ralph E. Main, Jr.

cc: William V. O'Reilly, Esquire
Lisa Robertson, Esquire
Richard H. Milnor, Esquire

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' OPPOSITION TO

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ON STATUTORY IMMUNITY GROUNDS

Introduction

Plaintiffs oppose the Defendants' Motion for Summary Judgment on Statutory Immunity Grounds filed February 27, 2019 on behalf of individual Councillors Bellamy, Signer, Galvin, and Szakos, by Counsel, and ask this Honorable Court (again) to reconfirm the considered and reconsidered decision that the individual Councilors are not immune from civil liability under the circumstances of this case, for the following reasons:

- the Defendants have not put before the Court a properly framed motion on which it can act: a brief cannot substitute for a motion delineating facts as the rules require, and the Court cannot consider extraneous matter brought in by affidavit;
- the Defendants wrongly seek reconsideration and reversal of the Court's decisions, again;
- the Defendants misconstrue the language of the immunity statute;
- assertions and inferences Plaintiffs hotly contest as to whether the Defendants' conduct was sufficiently egregious is a judgment call for the trier of fact;
- damages too are for the trier of fact and are certainly not nominal;
- regardless of the outcome on Va. Code §15.2-1405, the Court cannot dismiss the individual Councilors because Va. Code §15.2-1812 also deprives "authorities of the locality" of immunity from suit

Table of Contents

Introduction ii

Table of Contents iii

Table of Authorities iv

Argument 1

(1) Objection to Defendants' summary judgment motion 1

(a) the motion is defective in form 1

(b) the motion is deficient in substance 3

(2) The Defendants wrongly seek reconsideration and reversal of prior rulings 4

(3) The Defendants misconstrue the language of the immunity statute 5

(4) Gross negligence and willful misconduct are questions for the trier of fact 7

(5) Damages are an issue for the finder of fact 9

(6) The individual Defendants are proper parties under §1812 regardless of §1405 10

Conclusion 11

Table of Authorities

Almond v. Day, 197 Va. 419, 426, 89 S.E.2d 851 (1955)	6
Arlington County et al. v. White, et al., 259 Va. 708, 528 SE 2d 706 (2000)	9
Bell v. United Princeton Properties, Inc., 884 F.2d 713, 720 (3d Cir. 1989)	2
Carwile v. Richmond Newspapers, 196 Va. 1, 82 S.E.2d 588 (1954)	2, 3
Chappell v. White, 182 Va. 625, 29 S.E.2d 858 (1944)	3
Chesapeake Bay Found. v. Com. ex rel. State Water Control Bd., 52 Va. App. 807, 667 S.E.2d 844 (Va. App. 2008)	8
City Nat'l Bank v. United States, 907 F.2d 536 (5th Cir. 1990)	2
Cowan v. Hospice Support Care, Inc., 268 Va. 482, 603 S.E. 2d 916 (2004)	8
Fultz v. Delhaize America, Inc., 278 Va. 84, 677 S.E.2d 272 (2009)	1, 7
Lambert v. Sea Oats Condo Ass'n, 293 Va. 243, 798 S.E.2d 177 (2017)	9
Miller v. Ayers, 213 Va. 251, 260-261, 191 S.E. 2d 261 (1972)	6
Miller v. Highland County, 274 Va. 355, 650 S.E.2d 532 (2007)	11
Payne et al. v. *City of Charlottesville* et al., No. CL 17-145, (Va. Cir. 2017-2019) Judge Richard E. Moore, Letter Opinions and Orders [notebook appended Exhibit 1]	*passim*
Powers et al. *v. County School Bd. of Dickinson Cnty.*, 148 Va. 661, 139 S.E. 262 (1927)	5
Renner v. Stafford, 245 Va. 351, 429 S.E.2d 218 (1993)	3, 4
Rickman v. Commonwealth, 294 Va. 531, 808 S.E.2d 395 (2017)	1
Town of Ashland v. Ashland Inv. Co. Inc., 235 Va. 150, 366 S.E. 2d 100 (1988)	2
Town of Big Stone Gap v. Johnson, 184 Va. 375, 35 S.E. 2d 71 (1945)	8

Va. Code §8.01- 401.1	3
Va. Code §15.2-1405	*passim*
Va. Code §15.2-1812	*passim*
Va. Sup. Ct. Rule 1:4 (d) & (j)	1, 2
Va. Sup. Ct. Rule 3:20	1, 2

Other authorities

Dafron, *Virginia Circuit Judge's Benchbook, Civil*, 94 (Supp. 1994)	2
Sinclair & Hines, *Summary judgment: A Proposal for Procedural Reform* 36 Wm & Mary L. Rev. 1633, 1692-95 (1995)	2

Argument

Summary judgment is disfavored in Virginia courts unless clearly merited. *Fultz v. Delhaize America, Inc.*, 278 Va. 84, 91, 677 S.E.2d 272 (2009) (reversing summary judgment on gross negligence because "reasonable persons may draw different conclusions from the evidence") ["*Fultz*"]. Summary judgment "is a drastic remedy, available only when there are no material facts genuinely in dispute." *Fultz*, 278 Va. at 88. Thus, "if the evidence is conflicting on a material point or if reasonable persons may draw different conclusions from the evidence, summary judgment is not appropriate." *Fultz*, 278 Va. at 88. Moreover, when the motion depends on inferences drawn from facts or exhibits, the Court must accept as true inferences that are "most favorable to the nonmoving party." *Fultz*, 278 Va. at 88.

(1) Objection to Defendants' Summary Judgment Motion

Plaintiffs object to Defendants' Motion for Summary Judgment on Statutory immunity Grounds. We object to the use of brief instead of a properly framed motion, and object to an affidavit putting before the Court unvetted facts and exhibits outside the record. The Court cannot act on these filings and Plaintiffs ask that the Motion be denied.

(a) The motion is defective in form

The Defendants filed only a *pro forma* one paragraph motion which omits a statement of facts deemed undisputed. They rely instead on a brief, arguing exhibits from outside the record furnished via affidavit, the "Declaration of William V. O'Reilly in Support of Individual Councilors' Motion for Summary Judgment" ["affidavit/Declaration"]. The filing contravenes Va. Sup. Ct. Rule 3:20 (stating what pleadings a summary judgment motion may consider), and Va. Sup. Ct. Rules 1:4 (d) requiring "[e]very pleading shall state the facts on which the party relies in

numbered paragraphs . . . ") and (j) (requiring "a simple statement, in numbered paragraphs, of the essential facts) [emphasis added].[1]

Va. Sup. Ct. Rule 3:20 limits a summary judgment decision to considering "the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings." Affidavits introducing exhibits by counsel or anyone else, are not on the list. See *Town of Ashland v. Ashland Inv. Co. Inc.*, 235 Va. 150, 154 & 156, 366 S.E. 2d 100 (1988) (reversing summary judgment, Court erred in relying on "ex-parte affidavit;" it was "erroneous to dispense with the requirements of proof"); see also Dafron, *Virginia Circuit Judge's Benchbook, Civil*, 102 (Supp. 1996) (stating summary judgment "may not be based on affidavits"). The Court cannot consider extraneous materials from outside the record, brought in by affidavit.[2]

A brief also cannot substitute for a properly framed motion with facts separately stated in numbered paragraphs. This Honorable Court stated before: "[b[riefs are not a part of the pleadings." Oct. 3, 2019 Letter Opinion [notebook tab 1 at pg. 16 n. 10]. Briefs are only argument. Statements of fact in a brief may not even bind the Defendants who assert them. Compare e.g., *Bell v. United Princeton Properties, Inc.*, 884 F.2d 713, 720 (3d Cir. 1989) (ruling "statements made in briefs are not evidence of the facts asserted") with *City Nat'l Bank v. United States*, 907 F.2d 536, 544 (5th Cir. 1990) (holding statements in briefs may be binding as admissions).

Specificity matters, especially for a summary judgment motion. See *Carwile v. Richmond Newspapers*, 196 Va. 1, 5, 82 S.E.2d 588 (1954) (citing Burke's Pleadings: a "motion for summary judgment should state the grounds" and "otherwise meet the requirements of the Rules

[1] The word "shall" is mandatory. See generally *Rickman v. Commonwealth*, 294 Va. 531, 537, 808 S.E. 2d 395 (2017) (stating "[p]roperly understood, a 'shall' command in a statute always means 'shall,' not 'may'"; and is even "wholly unconcerned with the presence or absence of prejudice or any resulting harm").

[2] One commentator argues Virginia should change its rule, to allow affidavits on summary judgment in accord with other jurisdictions. Sinclair & Hines, *Summary judgment: A Proposal for Procedural Reform in the Core Motion Context*, 36 Wm & Mary L. Rev. 1633, 1692-95 (1995) at https:// scholarship.law.wm.edu/wmlr/vol36/ iss5/3 The affidavit/Declaration might be welcome elsewhere -- but it is not proper practice in Virginia.

with regard to pleadings") ["*Carwile*"]. Substituting a brief interpreting unvetted affidavit exhibits for properly delineated facts in a motion precludes distinguishing fact from opinion, hearsay, inference, or speculation. The Court should deny the motion.

(b) The motion is deficient in substance

The primary question on summary judgment is which material facts are not disputed? The improper affidavit/Declaration exhibits cannot be considered. So in effect, the Court has no facts to review.

The Defendants' brief argues inferences derived from exhibits, some of which concern hotly contested questions. Plaintiffs cannot here counter all the Defendants' unwarranted assumptions and self-serving speculations, nor reply to the selective choice of exhibits by supplying omitted critical records and information: that is what a trial is for.

To take two examples: the brief citing affidavit/Declaration exhibits debates the degree of culpability of the Defendants. Questions of degree are not resolved at summary judgment: they go to the finder of fact. *Chappell v. White*, 182 Va. 625, 619, 29 S.E.2d 858 (1944) (holding if reasonable men may differ, a jury question is presented).

Moreover, all the Defendants arguments on due care are inferences from the exhibits, and inferences must favor the nonmoving party, the Plaintiffs. *Renner v. Stafford, Jr.*, et al., 245 Va. 351, 353, 429 S.E.2d 218 (1993) (reversing grant of summary judgment: "the trial court is not permitted to adopt inferences from the facts that are most favorable to the moving party") ["*Renner*"]. The proper inference would be the Defendants knew removing the Lee monument, and permanently concealing both the Lee and Jackson monuments under tarps, likely broke the law. They could have asked. They chose not to. They did not want to hear the answer: it *did* break the law. Indeed, facts in the record indicate this is more than just an hypthetical, as set forth below. [pp. 7-8]

A second example: the brief and affidavit/Declaration cite a letter by an activist to the Blue Ribbon Commission offering a gratuitous legal opinion. It is (1) opinion; (2) not

admissible evidence under Va Code §8.01-401.1; and (3) wrong. Moreover there is no indication any Defendant gave it the slightest attention. If the Court is to impute legal acumen to Councilors who had none and sought none, it should be this Court's understanding of the law, not a random third party's misunderstanding. [See Letter Opinion October 3, 2018, notebook tab 1 (concluding Va Code §15.2-1812 applies to monument erected before 1997)].

Summary judgment "does not substitute a new method of trial when an issue of fact exists." *Carwile*, 196 Va. at 5. So far from obviating a trial, the chain of unwarranted inferences and assumptions based on unvetted exhibits establishes the opposite: that a trial is indispensable. For this reason too, Court should deny the Summary Judgment motion. Cf. *Renner*, 245 Va. at 351 (reversing summary judgment: "[w]ith increasing frequency, we are confronted with appeals of cases in which a trial court incorrectly has short-circuited litigation pretrial and has decided the dispute without permitting the parties to reach a trial on the merits").

(2) The Defendants wrongly seek reconsideration and reversal of prior rulings

The brief disguises and conceals as a request for summary judgment what is really another motion to reconsider. The Court ruled for the Plaintiffs on statutory immunity and reconfirmed that decision. [Letter Opinion June 13, 2018 notebook tab 3 & Letter Opinion January 22, 2019 notebook tab 7]. The Virginia Supreme Court refused to second guess the Court, rejecting Defendants' Mandamus Petition. The Court should decline another reconsideration.

Rather than belabor previous arguments, Plaintiffs here incorporate by reference Plaintiffs' briefs, memos, and letters regarding immunity responding to Defendants' April 17, 2017 Demurrers and Pleas in Bar; November 1, 2017 Demurrers and Pleas in Bar; August 27, 2018 Motion to Reconsider; December 2018 Demurrers and Pleas in Bar; and the Court's decisions on these pleadings in the Letter Opinion of October 3, 2017 and order [notebook tab 1]; Letter Opinion of February 23, 2018 and order [notebook tab 2]; Letter Opinion of June 13, 2018 and order [notebook tab 3]; and Letter Opinion of January 22, 2018 (order not entered as of

this writing) [notebook tab 7]. As a finding aid for the arguments below, this table summarizes pertinent points in the Letter Opinions:

Argument	Decided
Va. Code §15.2-1812 applicability	Legislature could not have meant §15.2-1812 to limit protection to monuments erected after 1997, nor does §18.2-173 make it a crime to damage only those monuments. Tab 1 pp. 3 - 7 & n.5 § 15.2-1812; see also tab 2 pg. 1 and n. 1 reciting the Court previously found §15.2-1812 "does apply to statues in existence"
Va Atty General opinion; Danville case	"The Court has considered these and simply reaches a different conclusion" Tab 3 p. 7
Legislature's attempted amendment of §15.2-1812	"Cuts both ways." Could have been legislative attempt to clarify what legislature intended. Tab 3 pg. 7 n. 5.
Tarps an illegal interference	Tarps "interfere with" monuments, covering them "in conflict with the statute" Tab 2 pg. 6-7
Sovereign, legislative, and common law immunity and Va .Code §15.2-1405	no immunity for the City or City Councillors: otherwise §1812 would be unenforceable Tab 3 pp. 1-6; likewise common law immunity is not so all-encompassing that it would "swallow up" §1405, confirming previous decision on reconsideration Tab 7 pp. 3-9.
Voting confers statutory immunity as a matter of law	Court ruled that "the casting of individual votes" while "legislative;" nonetheless is not shielded. Tab 3 pg. 3.
Gross negligence	"I do find Plaintiffs have pleaded enough to adequately allege a case for gross negligence." Tab 3 pg. 3
Damages for preservation; harm from concealment	Court revisited "damages from encroachment;" determined that costs of "preserving" statues i.e. litigation costs recoverable Tab. 3 p 6-9; regarding public's right to view statues, "during those time periods [they are concealed] they have lost it, they cannot get it back." Tab. 2 p 4.

(3) The Defendants misconstrue the language of the immunity statute

Defendants urge on the Court strained, truncated definitions of the words "appropriation" and "misappropriation" in Virginia Code §15.2-1405. Brief pg. 7, Point 2.a, and n. 7. The question is simple: whether the Defendants diverted public funds to an unauthorized use.

Diverting public funds to an unlawful purpose even if it is a public purpose, even if the public officials do not line their own pockets -- is termed misappropriation. See *Powers* et al. *v. County School Board of Dickinson County*, 148 Va. 661, 663, 139 S.E. 262 (1927) (granting injunction against county school board's "misappropriation" of funds for purposes beyond bond enabling legislation) ["*Powers*"]. In *Powers* citizens of one school district opposed "misappropriating and diverting" county bond funds to build a joint school serving another district; to "divert, misappropriate, and wrongfully expend" money outside the district-specific enabling legislation. *Powers* 148 Va. at 665 [emphasis added]. While *Powers* was decided long before §15.2-1405 existed and does not address immunity, it shows that the Virginia Supreme Court recognizes that diversion of public funds to an unauthorized use is called a "misappropriation," even if for a legitimate public purpose.

The decision on which Defendants rely, *Almond v. Day* 197 Va. 419, 426, 89 S.E.2d 851 (1955) ("*Almond*") supports the Plaintiffs, in that it cites the Webster's New International Dictionary definition of the verb "to appropriate:" "[m]oney set apart by formal action to a specific use."[3] City Council by formal votes on resolutions set aside $1 million specifically for parks transformation including monument removal. Moreover the *Almond* case said "appropriations are not usually made 'to' the various beneficiaries . . they are stated to be 'for' a specific purpose." *Almond*, 197 Va. at 426. City Councilors voting on resolutions allocating money for the specific purpose of moving monuments if feasible and if not permanently screening them, is enough. See Revised Second Amended Complaint ¶30 (citing Exhibit H, the February 6, 2017 resolution allocating $1 million for redesign of parks with and without

[3] The 1971 amendments to the Virginia Constitution changed the provision the *Almond* case construed. See *Miller v. Ayers* 213 Va. 251, 260-261, 191 S.E. 2d 261 (1972) (holding *Almond* not controlling: 1971 amendments removed restrictions it addressed). But *Almond's* dictionary definition of "appropriation:" setting apart money for a specific use, was not affected. The definition supports Plaintiffs.

monuments; ¶ 30H citing the November 6, 2017 resolution for park redesign without monuments if feasible; if not then permanently screening them, allocating $1 million); and ¶ 32 (reciting the $1,000,000 allocated by the Resolution in Exhibit H; and that the City "is budgeting $1 million for changes within the parks for Fiscal year 2019") ["Complaint"].[4]

There is no question that the City Councilors spent public funds to conceal the monuments under tarps, which this Court ruled a proscribed interference. [February 23, 2018 Letter Opinion notebook tab 2 pp. 6-7]. When City Council instructed former City Manager Jones to conceal the monuments under tarps in August 2017, the City Parks and Recreation Department used $6,000 of City money to do so. See Complaint ¶ 32 [citing former City Manager Maurice Jones's testimony that the City expended taxpayer money on salaries, and the tarps cost the City approximately $3,000 each]. There is no suggestion even in the imaginings of the Defendants' brief that City employees paid for the tarps out of their own pockets, or volunteered vacation time to cover and conceal the monuments.

All the City Councilors approved allocations or actual expenditures for an endeavor proscribed by Virginia law. Virginia Code §15.2-1405 regarding "the unauthorized appropriation or misappropriation of funds" clearly applies. It is directed at unauthorized use of government funds, whether by allocation (appropriation) or diverting funds already allocated (misappropriation).

(4) Gross negligence and willful misconduct are questions for the trier of fact

The Defendants' brief challenges whether the facts support "gross negligence" as grounds for the loss of statutory immunity under Va. Code §15.2-1405. This too asks the Court to reconsider and reverse its previous ruling: "I do find they have pleaded enough to adequately allege a case for gross negligence." June 13, 2018 Letter Opinion [notebook tab 3 pg. 3.]

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[4] References to the Complaint throughout refer to the Revised Second Amended Complaint filed and served on February 19, 2019, Exhibit 2 to Plaintiffs Opposition to Defendants' Notice and Motion for Entry of Order and Notice and Motion for Entry of Plaintiffs' order, which reflects properly the Strike-Through Version Complaint filed November 29, 2018, to which Defendants have already responded.

As the Court remarked on June 19, 2018 "[i]f their intention, what they knew, what pressure they were receiving, what their motives were, wouldn't that all be considerable for gross negligence? . . . its not using reasonable care in the extreme. That's gross negligence.'" [Transcript June 19, 2018 11:10 A.M-12:31 P.M. hearing, incorporated by reference in Court's Order, Exhibit 2 (A) pg. 53 line 3-6]. Gross negligence is a judgment call for the trier of fact. See e.g. *Fultz,* 278 Va. at 91 (reversing summary judgment on gross negligence when "reasonable minds may differ").

The Plaintiffs here offer fact, disputing the inferences on which the Defendants rely. City Council voted 3-2 on February 5, 2017 by resolution "to **remove"** the monument to Confederate General Robert E. Lee [Complaint ¶29]. They did so despite the warning to fellow councillors on the dais by Mayor Michael Signer, the sole attorney on City Council, that "an existing state statue does prohibit the **removal**" [emphasis added]. [Transcript November 19, 2018 1:39 P.M. hearing, incorporated by reference in Court's Order, Exhibit 2 (B) pg. 59 line 14 to p. 60 line 18].[5]

Further, the Revised Second Amended Complaint states that on August 21 - 22, 2017 all five Councilors: Signer, Galvin, Fenwick, Szakos, and Bellamy voted on an extemporized motion for "covering or obscuring" both the Lee and Jackson monuments "in perpetuity." Councilor Szakos not knowing whether that violates the law said: "we should ask forgiveness rather than permission." [Complaint ¶ 30B].

This Court remarked on June 19, 2018, in ordering the Defendants to comply with discovery: ". . .what if there's a communication . . . between somebody on council and somebody else and this is what it says, . . . 'the state law is against us but I think we should do it anyway?' And what if that's out there?" [Transcript June 19, 2018 3:27 P.M. - 5:55 P.M. hearing, incorporated by reference in Court's Order,] [Exhibit 2 (C) pg. 11 lines 17-22]. Those are exactly

[5] At this Court's November 19, 2018 hearing, without objection, Mr. Main read Mayor Signer's public statement at the February 6, 2017 City Council meeting comparing it to this Court's remarks on the bench "what if [somebody said] the state law is against us but I think we should do it anyway." Previously, over Defendants' objection, the Court decided to consider statements of Councilors at their August 21-22, 2017 meeting that covers were to be permanent, as evidence of intent. Letter Opinion February 23, 2108, notebook tab 3 pg. 6 note 5.

the facts before the Court. The facts show "a heedless and palpable violation of legal duty respecting the rights of others." *Town of Big Stone Gap v. Johnson*, 184 Va. 375, 378 -379, 35 S.E. 2d 71 (1945) (holding heedless violation of legal duty constitutes gross negligence).

The Defendants' wanton disregard for the law may also be viewed as purposeful, willful misconduct as defined in a decision the Defendants cite: *Cowan v. Hospice Support Care, Inc.* 268 Va. 482, 487, 603 S.E. 2d 916 (2004) (defining willful misconduct as acting consciously in disregard of another person's rights or acting with "reckless indifference to the consequences"). In any event, culpability is a question for the finder of fact, not suitable for summary judgment.

(5) Damages are an issue for the finder of fact

A flaw running through the Defendants' argument that gross negligence requires more than nominal damages is it seeks to construe Va. Code §15.2-1405 which is about immunity, using inapposite tort case law about damages. To the contrary, suits for gross negligence against a public official seeking an injunction -- the most urgent and critical lawsuits -- seek equitable relief precisely because damages are an inadequate or inappropriate remedy. cf. *Lambert v. Sea Oats Condo Ass'n*, 293 Va. 243, 256 at n.4, 798 S.E.2d 177 (2017) (noting in public interest litigation for an injunction there may be no damages).

In determining immunity of government officials the question analogous to tort damages is the standing inquiry: harm to the citizen. As this court determined, no more than "trivial" harm is required for citizen standing to sue over a governmental act. cf. *Chesapeake Bay Found. v. Com. ex rel. State Water Control Bd.*, 52 Va. App. 807, 823, 667 S.E.2d 844, 852, (Va. App., 2008) ("identifiable trifle" suffices for standing to challenge State Water Control Board's permit extension). Taxpayer standing requires only that the citizen be a taxpayer. cf. *Arlington County et al. v. White*, et al., 259 Va. 708, 528 SE 2d 706 (2000) (recognizing taxpayer standing to challenge *ultra vires* acts extending health insurance benefits to unmarried "domestic partners). Standing to enforce Va code ¶15.2-1812 and 1812.1 requires only that a party have an "interest." [See generally Letter Opinion October 3, 2017, notebook tab 1].

This case is public interest litigation. Plaintiffs' primary objective is an injunction, and an order declaring null and void all City actions without authority: resolutions, motions, expenditures in furtherance of unauthorized actions, and consequent RFPs. Damages are secondary. But Plaintiffs do seek damages, as stated in the Complaint ¶¶ 32 and Request for Relief ¶¶2 and 5.[6]

This Court in revisiting "general damages under Va Code §15.2-1812.1" ruled that Plaintiffs' can recover as "damages from encroachment, under Va. Code §15.2-1812.1" attorneys fees incurred in preserving monuments. June 13, 2018 Letter Opinion at pp. 6-8 [notebook tab 3]. The logical damages are the costs of the citizen lawsuit to preserve the monuments. The Court has also addressed the question of tarps damages on October 26, 2018, limiting the Plaintiffs to recovering about $6,000. See Complaint ¶ 32; Request for Relief ¶¶ 2 and 5.

The Complaint also seeks an amount representing the loss of use and enjoyment to citizens, visitors, and others, because of the illegal concealment for approximately 188 days, and restitution of City employee salaries expended in the illegal and unauthorized endeavor. Complaint Request for Relief ¶¶ 2 and 5.

Manifestly this case concerns more than trivial harm, or nominal damages. Damages and their allocation are not a matter for summary judgment.

(6) The individual Defendants are proper parties under §1812 regardless of §1405

Even if summary judgment on statutory immunity were to be granted to the Defendants under Va. Code §15.2-1405, the individual Councilors cannot be dismissed because Va. Code §15.2-1812 separately precludes immunity.

Va. Code §15.2-1812 states: ". . . 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 so

[6] The Plaintiffs detailed the damages during discovery. See Plaintiffs' Objections and Answer to Defendants' First Requests for Admission to All Plaintiffs, question and response No. 15, filed and served November 1, 2018.

erected . . ." The "authorities of the locality" means persons, as the next clause confirms: "or any **other** person or persons." [emphasis added]. In addition the criminal provision Va. Code §18-137 which cites §15.2-1812 and is construed *in pari materia,* also refers to "any person." The law proscribes desecration of monuments by persons who are public officials as well as persons who are vandals.

Va Code §15.2-1812 is a waiver of immunity for the authorities of the locality, operating much like §15.2-1405. Acts triggering loss of immunity under §1405 include unauthorized appropriations, misappropriations, gross negligence and willful misconduct. Acts triggering loss of immunity under §1812 are narrower: disturbing or interfering with particular kinds of monuments and memorials. But the effect is the same: the authorities of the locality can be held accountable in a court of law.

Conceivably, both the individual Councilors and City Council may be "authorities of the locality." But dismissing one or the other potentially raises a question of joinder of necessary parties. Cf. Va. Sup. Ct. R. 3:12(a); see e.g. *Miller* et al. *v. Highland County* et al., 274 Va. 355, 373, 650 S.E.2d 532, (2007) (dismissing with prejudice for failing timely to name required parties, both Highland County, and separately its governing Board of Supervisors).

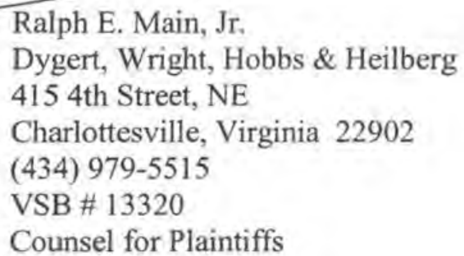
Thus, the Defendants' Summary Judgment Motion on Statutory Immunity even if granted under Va. Code §15.2-1405, would not dismiss the individual City Councilors. They are also properly and necessarily before the Court under Va. Code §15.2-1812.

Conclusion

In sum, disputed material facts -- or at least the impossibility of determining what is and is not disputed from improper filings -- precludes granting the Defendants' Summary Judgment Motion; as does Defendants' once again controverting this Court's rulings, misconstruing the law, and asking the Court to decide as a matter of law inferences and disputed issues that belong to the trier of fact. Plaintiffs ask the Court to deny Defendants' Motion for Summary Judgment.

Respectfully submitted:

FREDERICK W. PAYNE *et al.*



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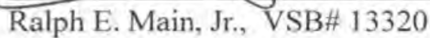
CERTIFICATE OF SERVICE

I certify that I caused a true and exact copy of the foregoing Plaintiffs' Opposition to Defendants' Motion for Summary Judgment on Statutory Immunity Grounds, and Exhibits, to be hand delivered either in person or to the offices of Lisa Robertson, Esq., Charlottesville Deputy City Attorney, at her office address of 605 East Main Street, Charlottesville, Virginia 22902 and either in person or to the offices of Richard Milnor, Esquire, at Zunka, Milnor & Carter, LTD, Counsel for Defendants, at his office address of 414 Park Street, Charlottesville, and either in person to Jones Day associates, or by email to William O'Reilly, Esq., Jones Day, 51 Louisiana Ave. N.W. Washington DC 20001, at his email address of <woreilly@jonesday.com> and in addition by first class mail, postage prepaid to William O'Reilly, Esq., Jones Day, 51 Louisiana Ave. N.W. Washington DC 20001, all of the above being Counsel for the various Defendants, this 6th day of March, 2019.



Ralph E. Main, Jr., VSB# 13320

Exhibit 1

***Payne* et al. v. *City of Charlottesville* et al., No. CL 17-145, (Va. Cir. 2017-2019)**

Judge Richard E. Moore, Letter Opinions and Orders

[see notebook appended]

Exhibit 2

***Payne* et al. v. *City of Charlottesville* et al., No. CL 17-145, (Va. Cir. 2017-2019)**

Hearing transcript excerpts

(A) Transcript June 19, 2018 11:10 A.M-12:31 P.M. hearing, pg. 53 line 3-6

(B) Transcript November 19, 2018 1:39 P.M. hearing, pg. 59 line 14 to p. 60 line 18

(C) Transcript June 19, 2018 3:27 P.M. - 5:55 P.M. hearing, pg. 11 lines 17-22

(A) Transcript June 19, 2018 11:10 A.M-12:31 P.M. hearing, pg. 53 line 3-6

1 V I R G I N I A :
2 IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE
3 **
4 FREDERICK W. PAYNE, et al., *
5 Plaintiffs, *
6 v. *Case No. CL17-145
7 CITY OF CHARLOTTESVILLE, VA, et al., *
8 Defendants. *
9 **
10 TRANSCRIPT OF PROCEEDINGS
11 BEFORE THE HONORABLE RICHARD E. MOORE
12 June 19, 2018
13 11:10 a.m. - 12:31 p.m.
14 Charlottesville, Virginia
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24 Job No. 37161
25 REPORTED BY: Kurt D. Hruneni, CVR, CCR-VA

1 THE COURT: If --
2 MS. ROBERTSON: And I think that --
3 THE COURT: If their intention, what they
4 knew, what pressure they were receiving, what their
5 motives were; couldn't all that be considerable for
6 negligence?
7 MS. ROBERTSON: Your Honor, in your opinion
8 you seemed to base your decision in relation to the
9 statute that sets out the conditions for immunity from
10 suit on some conclusions that you were drawing by the
11 fact that certain actions are prohibited by the
12 statute.
13 You weren't basing your opinion on what
14 someone's motivations were. They --
15 THE COURT: Yeah. But negligence was part
16 of 1405.
17 MS. ROBERTSON: But negligence has nothing
18 to do with, you know, the --
19 THE COURT: It has to do with immunity.
20 MS. ROBERTSON: -- the provisions of 1812.
21 THE COURT: It has to do with immunity of
22 the parties. If you're willing to give that up, so
23 you're doing to say once and for all they're not going
24 to immune, not just talking about demurrer or plea in
25 bar, but they're not going to be immune, then I would

1 agree with you.
2 MS. ROBERTSON: That statute has a string
3 of references that may or may not apply in every single
4 type of case. Now if you -- Your opinions seemed to be
5 suggesting that the fact that city council would take
6 action if they didn't know at the time they acted
7 whether or not it was legal; your opinion seems to
8 suggest that that might be willful misconduct.
9 But gross negligence is something different.
10 Gross negligence is like a tort action. That string of
11 words doesn't necessarily apply in every action.
12 THE COURT: Well, it's not using reasonable
13 care in the extreme. I mean that's what gross
14 negligence is.
15 MS. ROBERTSON: I'm just saying that that
16 string of words, in my opinion, is a reference to a
17 collection of things that may or may not apply in the
18 context of every individual action.
19 We have to look at what type of action you
20 are dealing with and whether you're looking at
21 negligence or a contract or a statutory violation, the
22 analysis might be a little bit different.
23 I'm not arguing your opinion, although we
24 certainly have objections to it.
25 THE COURT: No. I understand.

(B) Transcript November 19, 2018 1:39 P.M. hearing, pg. 59 line 14 to p. 60 line 18

1 VIRGINIA:
2 IN THE CIRCUIT COURT FOR THE CITY OF CHARLOTTESVILLE
3 ***
4 FREDERICK W. PAYNE, et al.,
5 Plaintiffs,
6 -vs- Case No. CL17000145-00
7 CITY OF CHARLOTTESVILLE, et al.,
8 Defendants.
9 ***
10
11 PROCEEDINGS BEFORE
12 THE HONORABLE RICHARD E. MOORE, JUDGE
13 2:39 p.m. to 5:45 p.m.
14 November 19, 2018
15 Charlottesville, Virginia
16
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18
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20
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22
23
24 Job No. 38439
25 REPORTED BY: Rhonda D. Tuck, RPR, CRR

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1 manager, and you get too many answers, "Well, I
2 don't know that. I wasn't here. That's outside
3 of my authority. I wasn't part of that
4 discussion," then maybe we have to take another
5 step.
6 MR. MAIN: Well, what the city is seeking
7 to do here to us is saying, "You can come to the
8 deposition. You can ask us about our official
9 actions, our resolutions, our ordinances,
10 whatever, and that's about as far as we're going
11 to get, but you can't ask" --
12 THE COURT: Well, what more would you get
13 if you were deposing council as council?
14 MR. MAIN: Well, for example, and I'm
15 quoting from a February 6th, 2017 city council
16 meeting when they were deliberating on the
17 removal of the Lee monument, and here's what
18 Councilman Signer said. "Finally, there are
19 specific practical, legal, and logistical
20 obstacles that suggest that this vote will not
21 actually result in any action for a very long
22 time. An existing state statute does prohibit
23 this removal."That was his comment.
24 So I think it would be fair to ask the
25 council designee, "Did he make that comment?

1 Did you all have a discussion about that comment
2 either before or after the city council meeting
3 or at some point in time before you took the
4 vote that you're taking on this occasion?" I
5 think that would be relevant, and that would be
6 something you could ask a designee.
7 We might ask the city municipal
8 corporation designee, "Did Mr. Signer make that
9 statement?"
10 "Yes. He made that statement on
11 February 6th, 2017."
12 "Do you know if he talked to the other
13 councilors about that state law before the
14 meeting?"
15 "I'm not on city council. I don't know."
16 "Do you know if they talked about it
17 after the meeting?"
18 "I'm not on city council. I don't know."
19 THE COURT: Let's play that out. Let's
20 play that out. Let's say I think that's
21 appropriate even if it wasn't in the meeting,
22 because if all the councilors or a majority of
23 them are talking to each other, that may be some
24 violation. I don't know all the rules about
25 public meetings, but if they are actually

C) Transcript June 19, 2018 3:27 P.M. - 5:55 P.M. hearing. pg. 11 lines 17-22

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3 ***
4 FREDERICK W. PAYNE, et al., *
5 Plaintiffs, *
6 v. *Case No. CL17-145
7 CITY OF CHARLOTTESVILLE, VA, et al., *
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10 TRANSCRIPT OF PROCEEDINGS
11 BEFORE THE HONORABLE RICHARD E. MOORE
12 June 19, 2018
13 3:27 p.m. - 5:55 p.m.
14 Charlottesville, Virginia
15
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18 COPY
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24 Job No. 37162
25 REPORTED BY: Kurt D. Hruneni, CVR, CCR-VA

1 But the point is, if there's any information
2 by or from the people who made the decision then I
3 think that they would be entitled to that.
4 MS. ROBERTSON: I understand that, Your
5 Honor. I'm just going to renew -- I'm just going to
6 object. I'm going to say that earlier this morning I
7 noted that the discovery rules don't allow broad
8 discovery based on the subject matter of litigation,
9 but on matters that remain pending.
10 And I just fail to see a link between
11 anything that happened in 2016 and the issues that
12 remain for decision in this case, which are --
13 THE COURT: Well I thought about that.
14 MS. ROBERTSON: -- whether the monuments
15 are --
16 THE COURT: I understand your objection.
17 But what if there's a communication between two people
18 on council or between somebody on council and somebody
19 else, and this is what it says, "We know this is a
20 Civil War monument, and we -- the state law is against
21 us, but I think we should do it anyway"? And what if
22 that's out there?
23 Now technically by you that doesn't have
24 anything to do with the case. But I think it has a lot
25 to do with the case if that is out there. I have no