

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.

FINAL ORDER

This cause having come on for trial before this Court on September 11, 12 and 13, 2019, on which dates Plaintiffs appeared by counsel, Ralph E. Main, Jr. and S. Braxton Puryear, and Defendants City of Charlottesville and Charlottesville City Council appeared by counsel, Lisa A. Robertson and Richard H. Milnor, and the Court having received evidence including exhibits and testimony and having heard the arguments of counsel; and

Plaintiffs having filed on August 19, 2019 a Motion for Litigation Costs Including Attorney's Fees, and on August 22, 2019 having filed Plaintiffs' Litigation Costs and Attorney's Fees Points and Authorities, with exhibits detailing hours and expenses up to July 31, 2019, and on September 10, 2019 having filed Plaintiffs' Litigation Cost and Attorney's Fee August-September 2019 & Trial Supplement with exhibits detailing hours and expenses covering August 1, 2019 to September 9, 2019, plus estimated time and costs for the last trial preparation on September 9-10, 2019 and for the trial September 11, 12 and 13, 2019 [together, the "Motion"]; and the Defendants having filed their Defendants Memorandum of Points and Authorities on the Recoverability of Attorney's Fees and Litigation Costs by the Plaintiffs in this Case on September 10, 2019, and the Court having taken Plaintiffs' motion, Defendants opposition to the award, and the evidence and arguments, under advisement, now therefore:

(1) It is **ADJUDGED, ORDERED, and DECREED** that the transcripts filed with the Court of the September 11, 12, and 13, 2019 trial are incorporated in this Order by reference; and it is,

(2) Further, **ADJUDGED, ORDERED, and DECREED** that the Court incorporates by reference and adopts as part of this Order its findings and rulings announced from the bench September 13, 2019, and the Court's Letter Opinion dated January 21, 2020, a copy of which is filed among the papers herein; and it is,

(3) Further, **ADJUDGED, ORDERED, and DECREED** that the Court **GRANTS** Plaintiffs' Motion in part, as follows, and it is,

(4) Further, **ADJUDGED, ORDERED, and DECREED** that, the Court awards the Plaintiffs attorney's fees in the amount of \$364,989.60, plus filing fees of \$441.00, plus service costs of \$250.00; and it is accordingly

(5) **ADJUDGED, ORDERED and DECREED** that Plaintiffs, Frederick W. Payne, John Bosley Yellott, Jr., Edward D. Taylor, II, Betty Jane Franklin Phillips, Edward Bergen Fry, Virginia C. Amiss, Stefanie Marshall, Charles L. Weber, Jr., Virginia Division, Sons of Confederate Veterans, Anthony M. Griffin, Britton Franklin Earnest, Sr. and The Monument Fund, Inc., have and recover judgment against Defendants City of Charlottesville and Charlottesville City Council, jointly and severally, in the principal amount of \$364,989.60, plus filing fees of \$441.00, plus service costs of \$250.00, with interest on said sums at the judgment rate (Virginia Code Section 6.2-302) from the date of entry of this Order; and it is

(6) Further, **ADJUDGED, ORDERED, and DECREED** that Defendants shall pay the amount of said judgment to Plaintiffs' counsel in full within 90 days from January 21, 2020, or else, in their discretion, make payments of \$73,886.12 (20% of the total) monthly, beginning 30 days from entry of the Order, or March 1, 2020, whichever is earlier, until said judgment is paid in full; and it is,

(7) Finally, **ADJUDGED, ORDERED, and DECREED** that, in accord with this Court's Order: Case Status entered October 31, 2019, and pursuant to Virginia Supreme Court Rule 1:1 (b), the Court has disposed of the entire matter before it, including all claim(s) and cause(s) of action against all parties, and the Court has given all of the relief contemplated, and nothing remains to be done by the Court except the ministerial execution of this Order, and so this is and shall be, the final order in this case.

The Clerk will forward certified copies of this Order to Counsel.

AND THIS CAUSE IS ENDED.

It is so Ordered.

ENTER: 

Judge


DATE: 1/29/20

WE ASK FOR THIS, with exceptions stated below:

Plaintiffs respectfully offer an exception to construing Va. Code §15.2-1812.1 which awards "the cost of the litigation, including reasonable attorney's fees", to treat law clerk and paralegal work, as overhead subsumed within the attorneys' hourly rates excluded from the award. Plaintiffs offer an exception as well, to excluding matters on which Plaintiffs did not prevail, and costs other than filing fees and service costs, under the *Chawla* and *Advanced Marine* doctrines respectively. Plaintiffs anticipate a good faith argument on appeal for the limitation, modification, or reversal of such caselaw as contrary to the language and intent of statutory fee shifting, and in tension with the recent holding in *Lambert v. Sea Oats* that Plaintiffs are to be "reimbursed . . . for the costs necessary to effectively litigate the claim"



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Counsel for Plaintiffs

The foregoing FINAL ORDER: Damages is **SEEN AND AGREED** by Defendants City of Charlottesville and Charlottesville City Council, as to: (i) the Court's reiterated finding that Plaintiffs did not establish damages recoverable under the provisions of Virginia Code §15.2-1812.1, (ii) the Court's findings on page 13 of its 1/21/2020 letter opinion, under Advanced Marine Enters. V. PRC, Inc. and Chacey v. Garvey, that Plaintiffs may not recover their litigation expenses, and (iii) other findings and rulings stated from the bench which are favorable to the Defendants.

But the Order is, in part, Seen and Objected to for the reasons set forth following below:

By: _____

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**DEFENDANTS' OBJECTIONS AND EXCEPTIONS TO
the foregoing FINAL ORDER:**

In accordance with Va. Code §8.01-384 and *Chawla v. Burger Busters*, 255 Va. 616, 622 (1998), Defendants object and take exception to the foregoing Final Order on the following grounds:

- (1) Plaintiffs ("Pltfs") did not prevail in the only action authorized by Va. Code §15.2-1812.1 (i.e., an action for recovery of damages), therefore the Court erred in awarding attorney's fees. The trial court expressly found and determined that Pltfs did not prove any damages recoverable under Va. Code §15.2-1812.1; therefore, the Court erred in failing to strictly construe the provisions of Va. Code §15.2-1812.1 which, because they are in derogation of common law, may not be enlarged by construction beyond the express terms of the statute.
- (2) There is no express grant of authority within Va. Code §15.2-1812 or §15.2-1812.1 authorizing a court to award attorney's fees in connection with an action for declaratory or injunctive relief; therefore, the Court erred in failing to strictly construe the provisions of those statutes. Further, the Pltfs pleadings do not establish a basis for recovery of attorney's fees other than the provisions of 15.2-1812.1, and pursuant to Va. Sup. Ct. R. 3:25(B) the Court erred by not finding Pltfs request to be waived.
- (3) The Court erred in awarding attorney's fees, because the billing records for Pltfs attorneys clearly do not reflect timekeeping practices that enable a reviewing court to identify time spent and fees charged for distinct claims throughout the litigation. Pltfs did not prevail on their claim for

damages under Va. Code §15.2-1812.1, and there is no contractual or statutory basis for award of attorney's fees for any of Pltfs other claims.

- (4) The Court's award of attorney's fees is based on the statutory provisions of Va. Code 15.2-1812.1, which provide no authority for the Court's imposition of a specific payment schedule as set forth on p. 13 of the Court's 1/21/2020 letter opinion.
- (5) Def's incorporate herein by reference all of the arguments and legal authority made and cited within their 9/10/2019 Memorandum of Points and Authorities on the Recoverability of Attorney's Fees and Litigation Costs by the Pltfs in this case, their 7/24/2019 Notice and Cross Motion for Summary Judgment on Count I of the Revised Second Complaint (*ref.* Cross-Mot. Sections (1), (2), (3), (5) and (6)), and their 7/24/2019 Notice and Cross-Motion for Summary Judgment on Count II and Count II of the Revised Second Amended Complaint (*ref.* Cross-Mot. Section (2)); and
- (6) Def's incorporate herein by reference, all of their exceptions and objections noted within the following Orders of the trial court—Order: Declaratory Judgment, entered 10/15/19; Order: Permanent Injunction, entered 10/15/2019; Order, Equal Protection, entered 10/15/19; Order: Damages, entered 10/15/19; and Order: Case Status, entered 10/31/19;