

# COMMONWEALTH OF VIRGINIA



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## Sixteenth Judicial Court

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April 25, 2019

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Re: **Payne, et al. v. City of Charlottesville, et al.**—Motion for Partial Summary Judgment  
regarding the statues being monuments or memorials—argued January 14-16, 2019  
Recent hearing: Mar. 13, 2019; Trial date Sept. 9-13, 2019; Cir. Ct. file no. CL 17-145

Dear Counsel:

This matter is before the Court on Plaintiffs' Motion for Partial Summary Judgment on the issue of whether the statues of General Robert E. Lee and General Thomas Jonathan Jackson are monuments or memorials to one of the wars listed in Va. Code §15.2-1812 or to a veteran of such wars.

### **The Legal Standard**

Summary judgment, or in this case partial summary judgment as to an issue, is appropriate when there is no factual dispute between the parties such that what is left for the

court is a legal ruling or decision dependent upon applying the law to the facts of the case. If there is no disputed factual issue, there is no need for an evidentiary hearing or decision by a fact-finder. Rule 3:20 of the Rules of the Supreme Court of Virginia states: "Summary judgment ... may be entered as to the undisputed portion of a contested claim.... Summary judgment shall not be entered if any material fact is genuinely in dispute." See also Jackson v. Hartig, 274 Va. 219, 232 (2007) ("Summary judgment is appropriate when 'no material facts are genuinely in dispute'." Citation omitted.); Carwile v. Richmond Newspapers, 196 Va. 1, 5 (1954) (Rule 3:20 "provides for summary judgment in those cases that cannot be reached by demurrer in which the only dispute concerns a pure question of law. It applies only to cases in which no trial is necessary because no evidence could affect the result."). Carwile sets forth the purpose of this rule: "Rule 3:20 was adopted to provide trial courts with authority to bring litigation to an end at an early stage, when it clearly appears that one of the parties is entitled to judgment within the framework of the case as made out by the pleadings, the pretrial [proceedings], and the admissions in [discovery]." Id.

#### **Application to this Case**

I have given a lot of thought and consideration to this question from the beginning of the case. In all of the evidence presented in the various hearings, particularly the original injunction hearings at which testimony was given, including the various exhibits in at least two of the hearings, and in the responses to requests for admissions, and the arguments to the Court, there appears to be no real dispute between the parties as to the statues themselves—their appearance, the description of them, their subjects, and the components and history of the statues.

There is certainly much disputed about their effect and purpose, why they were put there, their impact on people, the justification or rationale for them, and the intent of the benefactor and of the City itself. But there is no real *factual* dispute as to what they are or what persons literally see when they look at the statues. There is also plenty of dispute about the meaning, interpretation, and application of the statutes involved, Va. Code §§15.2-1812 and -1812.1.

But it is undisputed that the two statues are of General Robert E. Lee and Lt. General Thomas Jonathan Jackson. Both are in their military uniforms and dress, on horses associated with each of them during the tragic conflict. There is no dispute that the statue of Lee is of Lee sitting straight on his horse Traveller who appears to be in a walk, and the statue of Jackson is with him riding on his horse Little Sorrel, and appears to be in battle or riding towards it. On the Jackson statue there are the names of three engagements associated with Jackson: Manassas, The Valley Campaign, and Chancellorsville (where he died). There appears to be no writing on

the Lee statue, besides his name.<sup>1</sup>

### Fundamental Facts and Undisputed Evidence

It is not disputed in the evidence and arguments of counsel that the two statues that are the subject of this controversy are of Civil War Generals Robert E. Lee and Thomas Jonathan "Stonewell" Jackson, both of the Confederacy. In various responses in their Answers, in the injunction hearing, in their discovery responses, and in various exhibits, Defendants have made it clear that they are not disputing who the statues are of, or what they look like.

In the injunction hearing on May 2, 2017, Ms. Robertson, representing all of the defendants, stated, "the City will stipulate that the statue depicts Robert E. Lee, Confederate general, in uniform." Tr. 75. Later in that hearing she said "we will stipulate that the statue is a monument to General Robert E. Lee." Tr. 102. She then refers to it as "this Robert E. Lee monument". Tr. 103. It was observed by the Court that Defendants were "not contesting that the statue is a monument to General Robert E. Lee", with no objection, comment, or clarification by Defendants, and the Court then, based on that, excluded some evidence being offered by Plaintiffs as no longer needed. And in closing argument, Ms. Robertson acknowledged: "The testimony established that the statue is a monument to Robert E. Lee, and the Jackson statue is a memorial to General Jackson." Tr. 254. That, coupled with the other evidence presented, is enough for Plaintiffs to prevail on this point.

Earlier in that same hearing, before the stipulations, Fred Payne, a plaintiff, testified as an expert regarding the statues and, specifically, Lee's uniform, tunic, buttons, and collar insignia, uncontradicted and unchallenged. Tr. 72, 74, 80-81, 84. Photographs offered as exhibits clearly show the Lee statue (Plaintiffs' Exh. 22, 5/2/17) and Jackson statue (Plaintiffs' Exh. 21). Likewise, in the October 4, 2017, hearing on the Demurrer, photographs of both statues were admitted into evidence. (Pl. Exh. 4 and 5, 10/4/17). This was reiterated by Plaintiffs' counsel at closing. Tr. 233. Mr. John Bosley Yellott, Jr., another plaintiff, who took some of the above-referenced photographs of the statues, testified as well to the appearance of the statues. Tr. 140-43. Both of the statues feature the name of the respective general in large print.

A report from Facilities Development of the City's Public Works Department referred to both statues as the "Jackson and Lee Memorial Monuments", and repeatedly refers to them as monuments, and considers the possibility of moving them to a Civil War site. Tr. 175; Exhibit J original Complaint, admitted in 5/2/17 hearing, Tr. 177-79; Plaintiffs' Exh. 7, 10/4/17 hearing.

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<sup>1</sup> For a time there was some sort of a Civil War Trail marker, but that apparently has been removed. Transcript 5/2/17 Injunction Hearing, at 143-44, 289.

Likewise, in Defendants Bellamy, Galvin, Signer, and Szakos's Supplemental Response to Plaintiffs' first request for admissions they variously admitted that "General Robert E. Lee...was the commander of the Confederate Army of Northern Virginia, and after February 1865 supreme commander of all Confederate forces, during the War Between the States," (Requests Nos. 1 and 2), and that Lee "surrendered to Union General...Grant at Appomattox Court House on April 9, 1865, precipitating the end of the War Between the States." (Request No. 4). They admitted that the "statue at issue in this litigation is bronze; depicts Robert E. Lee; and is located in what was previously known as 'Lee Park'." (Request No. 5). They agree that the statue "is an historically accurate statue of General Lee, in his military dress uniform, with his rank insignia and ceremonial sword, mounted on his was horse Traveller. His uniform and equipment, as depicted on the [statue] are consistent with his service to the Confederate States of America during the War between the States as a Confederate officer." (Request No. 7).

They further responded, as to the Jackson statue, that "a statue at issue in this litigation is bronze; depicts Thomas Jonathan Jackson; and is located in what was previously known as 'Jackson Park'." (Request No. 17). They also responded that this statue that depicts Jackson located in the former "Jackson Park" also "depicts a horse and that, according to publically available historical information, one of the horses used by Thomas Jonathan Jackson during his lifetime was named 'Little Sorrel'." (Request No. 18).

It is also not disputed that at the ceremonies of dedication for each, both Generals were referred to<sup>2</sup>, and that for years the parks were known as Lee Park and Jackson Park, respectively. It is self-evident that to be known as "Lee Park" or "Jackson Park" is to honor the person, such as Washington Park or McIntire Park, in Charlottesville, or Lafayette Square or L'Enfant Plaza in Washington, D.C. In appointing the Blue Ribbon Commission on Race, Memorials and Public Spaces, the City Council refers to them as "existing Confederate statues", "the two large Confederate monuments in Lee and Jackson Parks", and "memorials." Plaintiffs' Motion for Partial Summary Judgment, Ex. 2, pp. 1, 2.

Virginia Code §15.2-1812 refers to the erection of "monuments or memorials for any war or conflict, or for any engagement of such war or conflict [listing numerous such wars or conflicts] ... [and] monuments or memorials to the veterans of such wars." Va. Code §15.20-

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<sup>2</sup> At the dedication of each statue, the local chapter of Confederate Veterans, Sons of Confederate Veterans, and United Daughters of the Confederacy were asked to plan the event, and the ceremonies coincided with Confederate reunions. A great-granddaughter of each General participated in the ceremonies. It is clear that the focus was on these men in their capacity as Confederate generals and veterans of the Civil War and not just Mr. McIntire's parents. *History and Gardens of Lee Park* and *History and Gardens of Jackson Park*, Exhibits 23 and 24, 5/2/17 hearing; Exhs. 10 and 11, 10/4/17 hearing.

1812.1 refers to “any monument, marker or memorial for war veterans as designated in §§15.2-1812 and 18.2-137.”<sup>3</sup> A monument or memorial, in its common usage, denotes an edifice, structure, statue, or other piece of art to remember, honor, or note the significance of a person, event, or thing. See Declaration of William B. O'Reilly and Appendix in Support of Opposition to Motion for Partial Summary Judgment, Exhs. 4, 5, 6; Brief in Opposition Page 5, footnote 1. It is hard to see, on the evidence before the Court, how these statues do not have a primary purpose, function, and effect of remembering or calling to mind and honoring these two men as generals in the Civil War and the battles they fought in, and what they did and stood for.<sup>4</sup>

Whether these statues are monuments or memorials to a war or veterans of a war clearly is a legal question for the Court, the facts underlying such a determination being evidentiary matters. Both parties have asserted or conceded this throughout. See for example, Answer to Amended Complaint, filed 1/16/18, ¶¶ 6, 21A, 21C, 21D, 21G, 22; Defendants' Response to Requests for Admissions 6, 9, 10, 12, 13, 16, 19, 20, 23); see also PM for PSJ, ¶ 11. There are other similar references to or descriptions of the two statues and their subjects in the exhibits and other evidence besides those cited; I do not have time to list them all, but the Court is not aware of any such underlying facts, as distinct from conclusions of law, that are disputed.

### **Discussion of Rationale and Conclusion**

Upon a full consideration of the matter, I find that there is no other reasonable conclusion but that these statues are monuments and memorials to Lee and Jackson, as Generals of the Confederate States of America, and that as such they are monuments or memorials to veterans of one of the wars listed in Va. Code §15.2-1812. I find this conclusion inescapable. It is the very reason the statues have been complained about from the beginning. It does no good pretending

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<sup>3</sup> In their Answer to the Second Amended Complaint, Defendants City of Charlottesville, City Council, and Counselor Fenwick, and all defendants in the Brief in Opposition to the Motion for Partial Summary Judgment, argue that there is no reference to “war veteran” [singular] in any of the pertinent statutes. Answer ¶¶ 21.A and 21.C, page 6; Brief in Opposition, Argument I.A.1, pp. 3-4. The statutes involved here, both in the headings and in the language of the statutes, refer to “war veterans”. However, I agree with Plaintiffs that the issue of “veterans” or “veteran” is a red herring, because Virginia Code §1-227, under Rules of Construction, applicable to the entire Code, makes it clear that the singular form of a word shall include the plural, and the plural form shall include the singular, unless the statute specifically says otherwise. This was raised and addressed by Plaintiffs in a recent hearing, and I do not recall Defendants disagreeing with or challenging this; they may have, but even if they did I find Plaintiffs' position more tenable and persuasive.

<sup>4</sup> Defendants argue that the average person, upon seeing the statues, would think of the “Lost Cause” narrative, but I find it much more likely that a person observing the statues would think of Lee, Jackson, and the Civil War.

they are something other than what they actually are.<sup>5</sup> The Jackson statue justifiably may also be deemed to be a monument or memorial to the Civil War itself (War Between the States), or engagements of the War, given the names of the three battles or campaigns spelled out on the monument, and the action apparent in the statue, but that is not necessary for my ruling.

So considering all of the evidence heard by the Court so far in the various evidentiary hearings, including the initial injunction hearing and on the motion to enlarge and extend the injunction, Defendants' responses to admission requests, and Mr. O'Reilly's two-volumes of declarations, it is apparent to any rational observer or casual observer, that these are Confederate monuments. It is clear that they are statues of Confederate General Robert E. Lee, and Confederate Lt. General Thomas Jonathan Jackson, also known as "Stonewall". They are both in their Confederate uniforms, with accoutrements, mounted on their horses that they rode in battle. These are clearly monuments and memorials to those two men, even if one or both of them was also erected to honor or memorialize the benefactor's mother as well. I think the general public would be confused indeed were the Court to rule that these two statues were, after all, not monuments or memorials to Confederate Generals Lee and Jackson as Civil War veterans.

I believe that Defendants have confused or conflated 1) what the statues are with 2) the intentions or motivations of some involved in erecting them, or the impact they might have on some people and how they might make some people feel. But that does not change *what* they are. Defendants quote back to the Court its words from the bench regarding the "difference between a tank on the battlefield and a tank in a defiant neighborhood in the 'former Soviet Bloc in Eastern Europe'". Brief in Opposition, page 10. But their argument misses the point, and they have misinterpreted or misunderstood the analogy. The Court's point was that the purpose and effect of a military tank in the field fighting against a declared enemy of a nation and of one in a street against its own citizens is vastly different, but it is still a tank in both cases. It does no good to say that in one case it is military equipment or represents aid or help, and in the other it is a threat or a symbol of oppression. That distinction does not make either of them not a tank; the Court actually reiterated this clarification in one of the subsequent hearings. While some

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<sup>5</sup> I have been struck from early on in this matter—see 5/2/17 hearing transcript, page 277—by the inconsistency or incongruity of Defendants' position on this point, because that is why the statues are so offensive and objectionable to so many people, in that they clearly are monuments and memorials giving honor and glory to these two Confederate Generals; that is what monuments do. That argument, as it goes, rests on the Confederacy's fighting to preserve slavery, so that is what these two generals are taken to stand for, at least by many people. But that argument makes no sense if they are not monuments or memorials to the Confederate Generals. That being the genesis of this case, it has seemed to me to take some effort to try now to make them into something else.

people obviously see Lee and Jackson as symbols of white supremacy, others see them as brilliant military tacticians or complex leaders in a difficult time (much like Washington, Jefferson, Lincoln, William Tecumseh Sherman, or even Oliver Cromwell or Dietrich Bonhoeffer), and do not think of white supremacy at all and certainly do not believe in, accept, or agree with such. In either event, the statues to them under the undisputed facts of this case still are monuments and memorials to them, as veterans of the Civil War.

I find this to be so clear that if the matter went to trial on this issue and a jury were to decide that they are not monuments or memorials to veterans of the Civil War, I would have to set such verdict aside as unreasonable and not supported by, but contrary to, the law and the evidence (and common sense); this realization is what has confirmed to myself this ruling today. If that is the case, then it is appropriate to grant Plaintiffs' motion and enter the partial summary judgment on this discrete issue. I do not believe that any reasonable, rational factfinder could find that these two statues are not monuments or memorials to two Confederate Generals from Virginia and as such to veterans of the American Civil War, or the War Between the States, one of the conflicts listed in the statute. No additional evidence is necessary or would be helpful in further considering this issue.

I also want to address specifically a few other matters raised in Defendants' Brief in Opposition. Much of what they argue in opposing the Motion for Partial Summary Judgment relating to whether the statues are monuments or memorials to veterans of the Civil War is not apposite or pertinent to the issues before the Court in this particular matter, but are policy arguments more appropriately made to the state legislature. Some may be relevant to the Equal Protection issue. Defendants argue at least twice that Plaintiffs' position is that just because they are statues of Lee and Jackson, they are automatically monuments to war veterans and thus protected by the statute. Brief in Opposition, pp. 4, 10. The Court does not perceive this to be Plaintiffs' position, but rather that these particular statues are monuments to war veterans.<sup>6</sup>

I do not see the relevance of Defendants' comment on the opposition and fear of southerners relating to the end of slavery and freeing of the slaves (Br. Opp. Pg. 13) as to

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<sup>6</sup> Defendants' examples of the bust of George Washington and the hypothetical statue of Lee (Br. Opp. pp. 5-6, 9-10) also miss the mark. If a statue of Washington were of him in his military uniform and not civilian dress, or kneeling at Valley Forge, it would be reasonable to conclude that it was a monument to him as a soldier, General, or Commander of the Continental Army. And the Court's previous remarks at the demurrer hearing that if the Lee statue had been of him in civilian clothes in a rocking chair in Lexington, or in a 1<sup>st</sup> Lieutenant's uniform at Fort Monroe, or a Brevet Colonel at West Point, such would not necessarily be of him as a veteran of the Civil War, is precisely why at that stage I sustained the demurrer on this count on the pleadings. There was a lack of specific pleaded facts on that point to avoid, remove, or resolve any ambiguity. Not so here.

whether these are monuments or memorials to Civil War veterans.<sup>7</sup>

Finally, Defendants quote Alexander Stephens, Lee, and Jackson about their views on the inferiority of the African or black race to the white race. Br. Opp. 13, 15-17. I do not see the relevance of this to the issue before the Court. It is a non-sequitor, and does not prove or lead to the point being argued. As I mentioned from the bench in a previous hearing, Abraham Lincoln expressed similar views on racial equality. In the Lincoln-Douglass debates just a few years before he became President, he said some things very much like the quotes in the brief.<sup>8</sup> This is not to say that such views are, in any way, acceptable or less bad because he held them, but it does show how widespread and pervasive, even ubiquitous, such views in society were. And I do not see how those views being held by many southerners (and northerners) informs or helps decide whether these statues in question are monuments or memorials to veterans of the Civil War.

Therefore, in conclusion, I find that both statues are monuments and memorials to veterans of the War Between the States, as mentioned in Virginia Code §15.2-1812, and am granting Plaintiffs' Motion for Partial Summary Judgment as to these two statues each being a monument or memorial to a veteran of the Civil War, or the War Between the States.<sup>9</sup>

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<sup>7</sup> This is particularly so in light of the well-known concern and even fear in the North about the end of slavery in the South, as well as in Great Britain and France, because of its possible impact on their economies. The economy of the entire nation was based on cheap goods linked to slave labor in the South (e.g., cotton), and probably the majority of those in commerce were apprehensive about such a prospect. Likewise the statements made about Jim Crow being the reason these statues were put up in the South between 1900 and 1930 does not take into account that during this same time period such Civil War statues were also being erected, to specific individuals and generic soldiers, throughout the North, in Maine, Wisconsin, Indiana, Illinois, Pennsylvania, and other states, as well as Washington, D.C.

<sup>8</sup> Mr. O'Reilly includes Lincoln's Second Inaugural Address in his Declaration (Exh. 24), and it is quoted in the Brief in Opposition, page 14, and rightly so, because it is one of the greatest (perhaps the greatest) and most significant addresses or speeches in our nation's history. Defendants do not, however, include, from just six years earlier and two years before he was elected President, the following words of Lincoln, who is considered by many to be the greatest President our nation has ever had, and who is widely viewed as having helped the cause of African-Americans and former slaves as much as anyone: *[I have been asked] whether I was really in favor of producing a perfect equality between the negroes and white people...I will say then that I am not, nor ever have been, in favor of bringing about in any way the social and political equality of the white and black races...that I am not nor ever have been in favor of making voters or jurors of negroes, nor of qualifying them to hold office, nor to intermarry with white people; ...in addition...there is a physical difference between the white and black races which I believe will forever forbid the two races living together on terms of social and political equality. [So,] while they do remain together there must be the position of superior and inferior, and I ...am in favor of having the superior position assigned to the white race...I have never seen, to my knowledge, a man, woman or child who was in favor of producing a perfect equality, social and political, between negroes and white men.*

<sup>9</sup> This is distinctly different from the Danville case, where a house was found not to be a monument or memorial as anticipated by the statute.



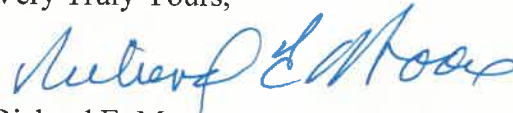
Mr. Main, Mr. Puryear, and Mr. Walsh, Esqs.  
Ms. Robertson, Mr. Milnor, Mr. O'Reilly, Ms. Mankodi, Esqs.  
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But this is the only motion I am ruling on at this time, in this letter. There are still several other issues remaining in the case. So this does not mean that Plaintiffs will prevail simply because I find that these statues are monuments and memorials as referred to by the statute. I have simply concluded that there is no point in putting this determination off any longer. They are what they obviously are, and I am just calling them what they in fact are. The purpose of a Motion for Partial Summary Judgment is to prevent the expenditure of time, energy, and expense on a futile point, on a matter that is self-evident, and on which no additional evidence can change the outcome. This is such a situation.

I thank all counsel for your presentations, both written and oral, on this point. I ask Mr. Main to prepare an order reflecting the findings and rulings in this letter.

It is my intention next to reach a decision on Plaintiffs motion to exclude the Equal Protection defense, and after that to address the individual councilor Defendants' motion for partial summary judgment on the issue of statutory immunity, then which issues Defendants are entitled to a jury trial on, and then the City's motion for partial summary judgment as to the statute's applicability. I do not have a clear or firm timetable for these matters but will get to them as soon as I can. I hope to have a decision on the partial summary judgment motion as to the Equal Protection defense within the next week, and should get to the other issues next month. I know we have an appearance set May 1 for the announcing of any rulings or a status update on them.

Very Truly Yours,



Richard E. Moore

P.S. I received Mr. O'Reilly's "reminder" letter after this letter was in large part already written. I will compare his listing of pending motions to the last paragraph above, and see if I have overlooked anything. I very well may have.