In the

Supreme Court of Virginia

At Richmond

200790

THE CITY OF CHARLOTTESVILLE, VIRGINIA,
CHARLOTTESVILLE CITY COUNCIL,

Appellants,

– v. –

FREDERICK W. PAYNE, JOHN BOSLEY YELLOTT, JR.,
THE MONUMENT FUND, INC., EDWARD D. TAYLOE, II, BETTY JANE
FRANKLIN PHILLIPS, EDWARD BERGEN FRY, VIRGINIA C. AMISS,
STEFANIE MARSHALL, CHARLES L. WEBER, JR., VIRGINIA DIVISION,
SONS OF CONFEDERATE VETERANS, INC., ANTHONY M. GRIFFIN,
BRITTON FRANKLIN EARNEST, SR.,

Appellees.

OPENING BRIEF OF APPELLANTS

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STATEMENT OF THE CASE

In 2017 eight individuals and two organizations filed civil actions against the City of Charlottesville and Charlottesville City Council (together, "City") seeking to enforce Va. Code Ann. §15.2-1812 (2010) which required that, "[i]f [specified monuments or memorials for war veterans] are erected, it shall be unlawful for the authorities of the locality…to disturb or interfere with any monuments or memorials so erected…." As this Honorable Court is aware, §15.2-1812 and two related statutes (Va. Code §§15.2-1812.1(2000) and 18.2-137 (1999)) have been amended, *see* 2020 Acts of Ass'y, ch. 1100, ch. 1101. Effective July 1, 2020 the General Assembly deleted above-referenced provisions from Va. Code §15.2-1812. Further, it clarified that no action for damages may be brought against a locality under Va. Code §15.2-1812.1, and the owner of a monument or memorial is not subject to criminal prosecution under Va. Code §18.2-137 for breaking down, destroying, damaging or removing it. 2020 Acts, *id.*

The 2020 amendments do not render moot any of the City's assignments of error. To the contrary, the City anticipates continuing litigation by persons seeking private enforcement of Va. Code §15.2-1812.[1] This Court's review of the trial

[1] For example, Payne's post-judgment filing in the Charlottesville Circuit Court announces their intention to continue litigating matters such as whether a monument can be "altered" or "destroyed" under §15.2-1812 (2020).

court's rulings on standing, and its review of the court's approach to statutory construction on the other issues to which error is assigned will clarify the role of the court system in interpreting this state legislation which is generating political controversy at state and local levels of government.

a. Material Proceedings Below[2]

On February 6, 2017 the Charlottesville City Council ("Council") approved three resolutions, stating its intention to remove a statue of Robert E. Lee ("Lee Statue") from a City park (App. 340), to rename the park (App. 341), and to develop a master plan for the redesign of its Downtown historic area (App. 342-343). Frederick W. Payne, et al. (hereinafter referred to collectively either as "Payne" or the "Payne plaintiffs") instituted suit in Charlottesville Circuit Court on March 20, 2017, seeking: (i) declaratory judgment that the City resolutions are *ultra vires*, (ii) temporary and permanent injunctive relief prohibiting removal of the Lee Statue, (iii) damages, and (iv) attorney's fees and litigation costs. The operative complaint at the time of trial was the Revised Second Amended Complaint (4/15/2019) (hereinafter, "RSAC"), App. 672-699.[3] The court conducted a temporary injunction

[2] All references within this brief to Va. Code §§15.2-1812, 15.2-1812.1 or 18.2-137 are to the versions of those laws in effect immediately prior to 7/1/2020.

[3] The RSAC incorporated exhibits attached to Payne's 10/11/2017 Amend. Compl. (App. 311-347). Otherwise, the RSAC did not incorporate or relate back to the 3/20/2017 Compl. (R. 1-46), the 10/11/2017 Amend. Compl. (App. 311-347), or the 01/07/2019 Sec. Amend. Compl. (R. 2761-2791).

hearing on May 2, 2017. (Tr. at R. 4083-4411). On 5/6/2019 the City filed its Plea in Bar, Demurrer, Answer, Affirmative and Other Defenses to Plaintiffs' RSAC, incorporating its demurrers and pleas in bar previously filed. App. 728-764.

In August 2017, City Council voted to approve a motion directing that the Lee and Jackson Statues be covered with black fabric, in mourning for lives lost the weekend of August 12, 2017, App. 688 ¶30 B and App. 689 ¶30 C.[4] The black fabric remained in place for 188 days, after the court initially denied Payne's request for an injunction, App. 382; App. 404-405, 408. Later, on February 26, 2018, the court ordered the covers removed. App. 411, App. 465-468. On September 5, 2017, City Council adopted a resolution stating its intention to remove the Jackson Statue from a City park. App. 689 ¶30 D. There is no allegation that City Council's votes or actions caused a change in the condition of either Statue.

(i) Statutory authority for awarding attorney's fees—The City repeatedly has asserted that, in the absence of any allegation of physical damage to either Statue, Payne's Complaint stated no cause of action under Va. Code §15.2-1812.1, *see, e.g.*, App. 32 ¶5. Initially the trial court agreed, App. 158, fn.1. Several months later, the court announced that it was having second thoughts and wanted to revisit "general

[4] *See also* R. 480-511 (Payne's 08/30/2017 filing: "Transcript of "City Council Meeting August 21, 2017" 22:9-12 and 25:4-6).

damages" under Va. Code §15.2-1812.1[5], stating that it had too narrowly interpreted the words "encroachment" and "preserving" in a manner that could preclude Payne from recovering their attorney's fees and litigation costs.[6] App. 461, 463. The trial court ruled that Va. Code §15.2-1812.1 should be "interpreted broadly and applied liberally" and not to preclude recovery of Plaintiffs' "attorney's fees or other costs of preserving or protecting the statues by preventing future encroachments". App. 476.

Within its July 24, 2019 Motion for Summary Judgment on Count I, the City argued that, even if the court found an encroachment, (i) no amount of monetary damages could be necessary to return the Statues to a "preencroachment" condition, and (ii) no *ad damnum* clause sets forth the amount of any necessary damages; therefore, as a matter of law, the RSAC fails to make out a cause of action for damages recoverable under Va. Code §15.2-1812.1 and there is no legal basis for award of damages or attorney's fees. App. 786-789. Within its July 24, 2019 Motion for Summary Judgment on Counts II and III (App. 599-607) the City argued that Payne is not entitled to recover attorney's fees, in the absence of a specific statutory provision. App. 797-798. The court denied the City's motions and reiterated all of

[5] At that time, the Complaint did not seek any "general damages", R. 16.

[6] By its 11/9/2018 Order (App. 571-572) the court dismissed Payne's Amended Complaint *with prejudice* as to any claims seeking an award of damages based on physical harm to either Statue.

its prior rulings in the case. App. 870-876. The City submitted a pre-trial Memorandum of Points and Authorities in support of its contention that attorney's fees cannot be awarded.[7] Payne ultimately proved no damages recoverable under Va. Code §15.2-1812.1. App. 1029-1031. In support of its award of attorney's fees, the court opined that the attorney fee provisions of Va. Code §15.2-1812.1(C) should be construed to promote private enforcement of Va. Code §15.2-1812 and that the General Assembly intended to allow recovery of attorney's fees in the absence of recoverable damages. App. 1037. Within its Final Order the court awarded the amount of $364,989.60 as attorney's fees to Payne. App. 1049-1054.

(ii) Statutory authority for awarding declaratory and injunctive relief—The City has challenged Payne's legal right to bring actions for declaratory and injunctive relief, under the applicable statutes and the doctrine of sovereign immunity. *See, e.g.,* the City's 11/01/2017 Plea in Bar to the Amended Complaint, App. 351-353, and the brief in support thereof[8] Argument was presented at a hearing on April 11, 2018. (Tr. at R.4726-4838). In its June 13, 2018 Letter Opinion (App. 460) the court did not respond to the City's argument under *Miller v. Highland County,* 274 Va. 355, 371-372 (2007) (declaratory judgment actions may not be used to attempt a third-party challenge to a government action, if the challenge is not

[7] R. 3908-3918

[8] R. 967-987 (filed 3/09/2018)

otherwise authorized by statute) but the court overruled the City's assertion that sovereign immunity bars Payne's action for declaratory and injunctive relief ("I also cannot find that, under Va. Code §§15.2-1812 or 15.2-1812.1, the City of Charlottesville or City Council is immune, as that would seem to fly in the face of the explicit language and intent of those statutes."). App. 460. On April 30, 2019 Payne filed a Motion for Partial Summary Judgment on Permanent Injunction and Declaratory Judgment, App. 719-722. On July 24, 2019 the City filed Cross Motions for Summary Judgment on Count I and on Counts II and III, in which it reasserted that there exists no private right of action for declaratory or injunctive relief under Va. Code §§15.2-1812 or 15.2-1812.1. App. 789-790; App. 796-797. The court denied the City's motions and reiterated all of its prior rulings and orders in the case. App. 870-876. The Order: Declaratory Judgment (App. 1024-1028) and Order: Permanent Injunction (App. 1011-1023) set forth the court's final disposition.

(iii) Taxpayer standing—The City contested the basis on which the court found taxpayer standing, beginning with its Demurrer to Payne's Complaint (App. 31-32) and the City's brief in support thereof (R. 282-359). The City reasserted its challenges to any finding of taxpayer standing, within its 7/24/2019 Cross-Motion for Summary Judgment on Counts II and III (App. 797-798). Within its 7/24/2019 Cross-Motion for Summary Judgment on Count I (App. 789-790) the City again noted that declaratory and injunctive relief are not methods of enforcement

designated by the General Assembly within Va. Code §§15.2-1812 or 15.2-1912.1. The court denied the City's motions and reiterated all of its prior rulings and orders in the case. App. 870-876. The parties entered a stipulation as to the basis for review of the individual plaintiffs' standing. App. 868.

(iv) Court's authority to apply Va. Code §15.2-1812 retroactively to the City's Statues—From the outset, the City contended that the provisions of Va. Code §15.2-1812 cannot be applied retroactively to its Statues, *see, e.g.,* App. 32 ¶3, App. 158-165 (9/1/2017 Tr. 158-165), App. 356 ¶5. The City reiterated this position within its various demurrers and arguments. From the outset, the trial court disagreed with the City, because it could not imagine a scenario in which the legislature would have left thousands of monuments unprotected, App. 122 (5/2/2017 Tr. 48:2-19). "Logic and common sense prevent me from reaching such a conclusion. It seems inescapable that the General Assembly had to have had in mind those monuments and memorials already erected. Nothing else would make sense." App. 255-256.

As an additional legal basis for its assertion that Va. Code §15.2-1812 does not apply to the City's Statues, the City also asserted that, in the 1920s, the Statues had not been "authorized and permitted" by the City Council as war memorials, or memorials for war veterans. App. 637-652. The court denied this motion from the

bench on July 31, 2019[9], even while acknowledging: "The City posits that nowhere and at no time did the city formally and expressly approve, authorize, or permit them [the Statues] as monuments and memorials. And to that limited extent, I think that's probably right." App. 807 (07/31/2019 Tr. 8:12-19). On August 28, 2019, the City filed a Motion for Reconsideration of the court's July 31, 2019 ruling, offering a Dillon Rule rationale and additional information about the history of the General Assembly's special acts governing war memorials. App. 829-862. The court denied the City's motion from the bench on September 3, 2019.[10] "[I]t is clear to me, in the colloquial sense of the word, in the common understanding, the statues were approved, permitted, and accepted by the city. And I have found they are monuments and memorials to the Civil War and war veterans." App. 887 (9/3/2019 Tr. 11:5-11:11). Within its 7/24/2019 Cross Motions for Summary Judgment on Count I (App. 792-793) and on Counts II and III (App. 799-801) the City re-asserted that, as a matter of law, the provisions of Va. Code §15.2-1812 do not apply to the City's Statues. The court denied the City's motions and reiterated all of its prior rulings and orders in the case. App. 870-876.

[9] App. 805-807 (07/31/2019 Tr. 6:12 – 8:11). The court had already determined the Lee and Jackson Statues to be "monuments or memorials to Confederate Generals Robert E. Lee and Thomas Jonathan Jackson as veterans of the Civil War or War Between the States" and "Confederate monuments or memorials to veterans of the War Between the States". App. 765-769.

[10] App. 886 – 889 (09/03/2019 Tr. 10:6 – 13:8)

b. Facts

The City of Charlottesville owns two equestrian statues, both installed in public parks of the City in the 1920s. One depicts Confederate General Robert E. Lee (hereinafter "Lee Statue"), App. 678 ¶18; the other, Confederate General Thomas J. Jackson (hereinafter "Jackson Statue"), App. 678-679 ¶19 (together, hereinafter, the "Statues"). In 1918 local benefactor Paul G. McIntire donated land to the City for each of the public parks in which the Statues are located, App. 678-679 ¶¶ 17, 19. The National Register of Historic Places lists both Statues as significant works of art, but not as commemorations of historical persons or events.[11] The Nomination Forms for the Register indicate the 1920s (an era known for its City Beautiful Movement) as the relevant period of significance—not the Civil War/ War Between the States (1861-1865). App. 647, 651. During the City Beautiful Movement, cities across the country improved public spaces with art and sculpture. App. 129 (05/02/2017 Tr. 129:17-23), App. 130 (Tr. 130:9-22). The General Assembly expressly authorized localities, by general law, to **beautify** and otherwise improve their public parks.[12] *See, e.g.* App. 679 ¶20: "These new parks…and **statues** already given to the City by Mr. McIntire **have added beauty** to the City which is

[11] App. 646-647, 650-651

[12] Charlottesville City Code (1908), §1038; Virginia Code (1924) §3032 (every city and town, by general law, had the power to "…in their discretion to establish and maintain parks…and cause the same to be laid out, equipped or beautified….")

without equal…." [emphasis added], and App. 334 (1918 City Council resolution acknowledges the Donor's purpose to "**beautify**" a City park, by erecting an "equestrian **statue**"). [Emphasis added].

In contrast to its general delegation of authority to cities for beautification of public parks, in the early 20th century the General Assembly authorized Confederate monuments and war memorials on a piecemeal basis through enactment of individual, special Acts of Assembly. A 2017 opinion of Virginia Attorney General Mark Herring explains how various monuments and memorials were authorized, and sometimes permanently protected, by such special Acts; this opinion cites several special Acts as examples of various authorizations. *See* 2017 Va. AG Op. No. 17-032, pp. 4-5 (Aug. 25, 2017). *See also* App. 832, 837-860 (providing numerous additional examples). There exists only one memorial for Civil War veterans authorized by special act of the legislature within Charlottesville prior to 1997, at the Albemarle County seat (County Circuit Courthouse). App. 860.[13] No other special act authorizes any Civil War veterans memorial within the City.

In 1904 the General Assembly enacted a general law allowing all counties and their circuit courts to "authorize and permit the erection of a Confederate monument upon the public square at the county seat" and prohibiting subsequent disturbance or

[13] Payne's RSAC does not allege that either of the City's Statues is that monument.

interference thereof. App. 43. (1904 Va. Acts of Ass'y, ch. 29). This statute, as amended, and as recodified ninety-three years later, became Va. Code §15.2-1812 (1997). Payne's RSAC does not allege that the City's Statues were erected by authority of Va. Code §15.2-1812 or its predecessors. Further, in all of the pre-1997 versions of Va. Code §15.2-1812 cities are not mentioned. App. 86-87. Until 1997, no local authorities, *other than* counties and their circuit courts, were authorized by this general law to do anything, or prohibited from doing anything. App. 86-87, App. 42-68.

In 1997 the General Assembly recodified Va. Code, Title 15.1 (Counties, Cities and Towns). Within Va. Code §15.2-1812 (previously §15.1-270) the General Assembly substituted the word "locality" in places where, previously, only "county" or "circuit court" had appeared. According to a drafting note of the Virginia Code Commission, there was "no substantive change in the law." App. 89-90. Confirming the legislature's intention not to modify any Charter powers, it simultaneously enacted Va. Code §15.2-100, specifying that, except when provided by the words, "[n]otwithstanding any contrary provision of law, general or special", or words of similar import, provisions of Title 15.2 do not repeal, amend, impair, or affect any power, right or privilege conferred by charter on counties, cities and towns. *See* Va. Code §15.2-100 (1997, ch. 587).

ASSIGNMENTS OF ERROR

1. The trial court erred when it interpreted the provisions of Virginia Code §§15.2-1812 and 15.2-1812.1 to allow award of attorney's fees and costs against the City, because Payne neither alleged nor proved any damages or attorney's fees recoverable under §15.2-1812.1, §15.2-1812 does not authorize attorney's fees, and the complaint identifies no other basis for recovery of attorney's fees.[14]

2. The trial court erred in construing the provisions of Va. Code §§ 15.2-1812 or §15.2-1812.1 to authorize a civil action against the City for declaratory judgment or a permanent injunction prohibiting the City from removing statues of Robert E. Lee and Thomas J. Jackson (together "Statues") from its parks, because neither §15.2-1812 nor §15.2-1812.1 authorizes such actions.[15]

3. The court erred by adjudicating claims for declaratory and injunctive relief, because the doctrine of taxpayer standing does not provide a basis for the Payne plaintiffs to assert an action against the City for declaratory judgment that the City's resolutions violated Va. Code §15.2-1812, or for a permanent injunction prohibiting removal of the Statues.[16]

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[14] *Error preserved:* App. 473; App. 705-706; App. 875-876; App. 1031; App. 1053-1054; and App. 483-484 (*Tr. 85:16-86:6*); App. 582-583 (*Tr. 30:23-32:6*); App. 670-671 (*Tr. 138:22-139:22*); App. 814-815 (*Tr. 93:23-94:1*); App. 815-816 (Tr. *94:23-95:4*); App. 818 (Tr. *100:13-22*); App. 824 (Tr. *124:2-25*); App. 892 (*Tr. 34:14-20*); App. 1010 (*Tr. 741:12-14*).

[15] *Error preserved:* App. 286; App. 360-361; App. 362; App. 473; App. 574; App. 656; App. 705-706; App. 875-876; App. 1027-1028; App. 1014-1015; App. 1053-1054.

[16] *Error preserved:* App. 286; App. 362; App. 705-706; App. 875-876; App. 1027-1028; App. 1014-1015; App. 1053-1054; and App. 267; App. 815 (Tr. *94:19-22*); App. 817-818 (Tr. *99:13-100:7*); App. 818 (Tr. *100:13-22*); App. 819 (Tr. *104:2-21);* App. 820-821 (Tr. *107:12-108:7*); App. 892 (*Tr. 34:14-20*); App. 894 (Tr. *38:22-25*).

4. Va. Code §15.2-1812 (1997, as amended) does not govern the City's Statues, which were erected in the 1920s, and the trial court erred by interpreting the statute as operating retroactively to prohibit removal of the Statues from the City's parks.[17]

ARGUMENT

I. ATTORNEY'S FEES—(Assignment 1)

STANDARD OF REVIEW: The trial court's construction of the statutory provisions of Va. Code §§15.2-1812 and 15.2-1812.1 is a pure question of law that will be reviewed *de novo* on appeal. *In re Brown*, 289 Va. 343, 347 (2015), *citing Warrington v. Commonwealth*, 280 Va. 365, 370 (2010); *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104 (2007) (citations omitted).

ARGUMENTS AND AUTHORITY: Pursuant to Va. Sup. Ct. R. 3:25(B), a party seeking to recover attorney's fees is required to include a demand therefor within its complaint, and the demand must identify the basis upon which the party relies for the request. A party's failure to comply with this rule constitutes a waiver by the party of the claim for attorney's fees. Rule 3:25(C). Payne presented multiple claims within its RSAC, including for damages, declaratory and injunctive relief. App. 696-698. Under a two-prong test applied by this Court: "In

[17] *Error preserved:* App. 85; App. 350; App. 286; App. 705-706; App. 472-473; App. 768-769; App. 875-876; App. 1027-1028; App. 1014-1015; App. 1053-1054; and on Record: App. 159 (*Tr. 17:20-22*); App. 267; App. 812 (Tr. *13:1-9*); App. 816 (Tr. *95:5-12 and 95:17-24*); App. 818 (Tr. *100:13-22*); App. 821 (Tr. *108:8-24*); App. 892 (*Tr. 34:14-20*); App. 894 (Tr. *38:22-25*).

an action encompassing several claims, the prevailing party is entitled to an award of costs and attorney's fees only for those claims for which (a) there is a contractual or statutory basis for such an award[18], and (b) the party has prevailed." *Manchester Oaks Homeowners Ass'n v. Batt*, 284 Va. 409, 428-429 (2012) (emphasis added). No contract is at issue in this case; therefore, Payne's request for attorney's fees must fail unless there is a statutory basis for the award.

a. Payne's Second Prayer for Relief: attorney's fees requested as a component of "general damages" under §§15.2-1812 and 15.2-1812.1

Payne's RSAC includes two demands for attorney's fees. The first demand appears within its second prayer for relief, seeking recovery of attorney's fees as part of its claim for "general damages under Va. Code §§15.2-1812 and 15.2-1812.1". App. 697. Va. Code §15.2-1812 does not authorize a recovery of attorney's fees in any action. Furthermore, Va. Code §15.2-1812.1(C) (2000) expressly authorizes recovery of attorney's fees only by a party who "initiates and prevails in an action authorized by this section". The only action authorized by Va. Code §15.2-1812.1 is "an action for recovery of damages", expressly restricted to amounts "as necessary for the purposes of rebuilding, repairing, preserving, and restoring such memorials or monuments to "preencroachment condition". Va.

[18] Generally, in the absence of a statute or contract to the contrary, attorney's fees cannot be awarded to a prevailing litigant. *Reineck v. Lemen*, 292 Va. 710, 721 (2016); *Gilmore v. Basic Industries, Inc.*, 233 Va. 485, 490 (1987).

Code §15.2-1812.1(A). Significantly, the statute does not mention "general" ["consequential"] damages, which is a category of contract damages, *see, e.g.*, *William H. Gordon Assocs. v. Heritage Fellowship,* 291 Va. 122, 150 (2016). No contract is at issue in this case.

Statutory authority for award of attorney's fees and litigation costs is in derogation of the common law and subject to **strict interpretation.** *Chacey v. Garvey*, 291 Va. 1, 10-11 (2015). This Court has directed that a statute in derogation of common law is "not to be enlarged in its operation by construction beyond its express terms." *Cherry v. Lawson Realty Corp.*, 295 Va. 369, 376 (2018). The trial court erred, as a matter of law, in awarding attorney's fees to Payne, because its award was based on a liberal statutory construction enlarging the operation of Va. Code §15.2-1812.1(C).

i. ***There is no statutory basis for an award of attorney's fees as "general damages" under §15.2-1812.1(A)***

Initially, the trial court sustained a demurrer filed by the City, finding that, in the absence of any allegation of physical damage to either Statue, the Complaint stated no cause of action under Va. Code §15.2-1812.1. App. 252-253, fn.1. Months later, the court announced that it wished to revisit "general damages" under §15.2-1812.1 (Payne's prayer, at that time, did not refer to "general

damages").[19] The court concluded that it had too narrowly interpreted the words "encroachment" and "preserving" in a manner that could preclude Payne from recovering attorney's fees. App. 461, 463. *See* App. 476 (finding Va. Code §15.2-1812.1 should be "interpreted broadly and applied liberally" and not to preclude recovery of Plaintiffs' "attorney's fees or other costs of preserving or protecting the statues by preventing future encroachments").

Leading up to trial, and at trial, the judge, and Payne's attorneys, referred to "pain and suffering" by the Payne plaintiffs.[20] Payne presented testimony as to emotional impacts supposedly suffered by the individual Payne plaintiffs, but not to any costs that would be necessary to return either Statue to "preencroachment condition". Upon conclusion of the evidence, even while noting that Payne had never asserted there was actual physical damage or harm to the Statues, the court found that there was "harm [to the Payne plaintiffs] from covering the statues" but found that "no firm basis in the evidence was given for the Court to estimate or determine those damages. So there has been no award of monetary damages." App. 1036.

[19] R. 1-46.

[20] *E.g.*, R. 6664 (9/11/2019 Tr. 42:1-19); R. 6536-6537 (8/30/2019 Tr. 58:2-10 - 59:4-7)

"Plaintiffs never asserted there was actual physical damage or harm to the statues." App. 1036, fn.1. The court correctly rejected Payne's argument that attorney's fees should be awarded as damages, agreeing with the City that "if damages were being sought on the merits in the case in chief, then there probably would have needed to be an ad damnum clause…." App. 977 (09/13/2019 Tr. 640:2-18. *See* Va. Sup. Ct. R. 3:2(c)(ii) ("Every complaint requesting an award of money damages shall contain an ad damnum clause stating the amount of damages sought"). "In an action for damages, an award cannot be sustained where the complaint does not include an ad damnum clause." *Lee v. Spoden*, 290 Va. 235, 253 (2015). In the absence of any allegation of physical harm to the Statues, and in the absence of an *ad damnum* within the RSAC alleging damages that were necessary to return either Statue to some "preencroachment condition", there exists no statutory basis under Va. Code §15.2-1812(C) for an award of attorney's fees to Payne. The first prong of the *Manchester Oaks* test cannot be satisfied, *see* 284 Va. at 428-429. For this reason alone, the court's award is in error and its judgment cannot stand.

ii. ***Plaintiffs did not prevail in the only action for recovery of damages authorized by Va. Code §15.2-1812.1***

In the trial court's view "[The plaintiffs unquestionably prevailed in this case." Citing a footnote within *Lambert v. Sea Oats Condo. Ass'n*, 293 Va. 245, 256 (2017) (citations omitted), the court stated "The 'prevailing party' is the one in

whose favor judgment was rendered." *Lambert* is not relevant. First, *Lambert* addresses factors relevant to a determination of reasonableness of attorney's fees; it discussed the issue of "prevailing" only in relation to the comparison of the results obtained by an attorney in relation to the amount recovered by the attorney's client. *Id.* 293 Va. at 256. Second, *Lambert* involved Va. Code §55-79.53(A), which provided that "the prevailing party [in an action to enforce compliance with condominium documents] shall be entitled to recover reasonable attorney fees." *Id.*, 293 Va. at 254. Unlike Payne, the *Lambert* plaintiff prevailed in the authorized action.

Lambert cannot be read as authority for the assertion that, when attorney's fees are authorized by a statute only for a party who "prevails in an action [for the recovery of damages]" a court can award the attorney's fees even though no damages are awarded in said action. Unlike the statute in *Lambert*, the General Assembly did not expressly authorize attorney's fees to a party who prevails in an action to enforce Va. Code §15.2-1812. It could easily have done so. For example, consider the Virginia Anti-Trust Act, in which the General Assembly authorizes specified persons to initiate "actions and proceedings for injunctive relief and civil penalties for violations of this chapter. **In any such action or proceeding** in which **the plaintiff substantially prevails**, the court may award…a reasonable attorney's fee to such plaintiff." Va. Code §59.1-9.15 (emphasis added).

The fact that the Payne plaintiffs packaged requests for declaratory and injunctive relief together with their request for "general damages" does not provide a legal basis for the court to enlarge the operation of Va. Code §15.2-1812.1(C). In *Russell County Dep't of Soc. Servs. v. O'Quinn,* 259 Va. 139, 142, (2000) this Court declined to infer from the words "further relief" used within Va. Code §8.01-186 any authority for a trial court's award of attorney's fees. "We simply cannot, and will not, infer that the General Assembly intended to authorize a court to award attorney's fees in a declaratory judgment action when the Virginia Declaratory Judgment Act fails expressly to grant that authority." *O'Quinn, id.* Payne not only failed to recover damages authorized by Va. Code §15.2-1812.1(A), it even failed to recover the "general damages" requested (but not statutorily authorized). Under the applicable rules of construction, the trial court's refusal to apply the plain language of §15.2-1812.1(C) was erroneous, and an abuse of discretion. *Porter v. Commonwealth,* 276 Va. 203, 260 (2008). The role of the judiciary is to "apply the acts of the legislature as written, and not to rewrite or correct them." *Turner v. Commonwealth,* 297 Va. 257, 260 (2019) (citation omitted).

b. <u>Payne's Sixth Prayer for Relief: general request for attorney's fees</u>

Payne's alternative demand for attorney's fees appears on page 27 of the RSAC, within its sixth prayer for relief: "[t]hat Plaintiffs recover from all

Defendants their litigation costs including but not limited to attorney's fees as described above in paragraph 2, expended herein." This demand fails to specify any statutory, contractual, or other basis for an award of attorney's fees to Payne; therefore, pursuant to Va. Sup. Ct. R. 3:25(B), Payne has waived any claim for attorney's fees under or in connection with this prayer for relief.

II. ACTIONS FOR DECLARATORY AND INJUNCTIVE RELIEF BASED ON VA. CODE §§15.2-1812 OR §15.2-1812.1— (Assignment 2)

STANDARD OF REVIEW: When a litigant asserts standing based on a statutory provision, the question is essentially one of statutory construction, that is, whether or not the legislature intended to confer standing on the litigant to bring that action. *Small v. Fannie Mae,* 286 Va. 119, 126 (2013). A trial court's construction of a statute is a pure question of law that will be reviewed *de novo* on appeal. *In re Brown,* 289 Va. 343, 347 (2015), *citing Warrington v. Commonwealth,* 280 Va. 365, 370 (2010); *Conyers v. Martial Arts World of Richmond, Inc.,* 273 Va. 96, 104 (2007) (citations omitted).

ARGUMENT AND AUTHORITIES: "In Virginia, 'substantive law' determines whether a private claimant has a right to bring a judicial action." *Cherrie v. Va. Health Servs., Inc.,* 292 Va. 309, 314 (2016). "Substantive law includes the Constitution of Virginia, laws enacted by the General Assembly, and historic common-law principles recognized by our courts." *Id.* In their RSAC (App. 672-699) Payne does not allege any right protected by the Constitution of

Virginia, or any common-law right of action; therefore, "the existence of any viable right of action…must come from statutory law." *Id.* at 315. Payne must possess a legal right to bring its actions for declaratory and injunctive relief, and in this case any such legal right depends on the provisions of Va. Code §§15.2-1812 and §15.2-1812.1. *Small v. Fannie Mae*, 286 Va. 119, 126 (2013).

a. <u>The Statutory Scheme</u>

Trial courts may not adjudicate declaratory judgment actions asserted by litigants to challenge a governmental action when the challenge is not otherwise authorized by a statute. *Miller v. Highland County*, 274 Va. 355, 371-372 (2007), *cited in Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Supervisors*, 285 Va. 87, 100 (2013). The provisions of Va. Code §§15.2-1812 and 15.2-1812.1 are silent as to actions for declaratory and injunctive relief. The trial court had no authority to infer a statutory private right of action, absent "demonstrable evidence that the statutory scheme necessarily implies it." *Cherrie v. Va. Health Servs.*, 292 Va. 309, 315 (2016) (citations omitted). The necessity for the implication must be "palpable" and a private right of action cannot be inferred "based solely on a bare allegation of a statutory violation". *Id.* at 315-316.

Payne alleges that the resolutions adopted by the City stating its intention to remove the Statues, and the City's actions in covering the Statues, violate the provisions of Va. Code §15.2-1812 (2010). App. 691 ¶31. Va. Code §15.2-1812

clearly grants no express private right of action to any person for declaratory or injunctive relief to prevent these actions. The sole means and remedies for enforcement of Va. Code §15.2-1812 are set forth within two related statutes: Va. Code §§18.2-137 and §15.2-1812.1; neither grants any express private right of action for declaratory or injunctive relief. The remedies provided are, respectively: criminal penalties and a civil right of action for recovery of money damages necessary to repair a damaged monument. "One of the basic principles of statutory construction is that where a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise." *School Bd. v. Giannoutsos*, 238 Va. 144, 147 (1989), *quoted in Cherrie v. Va. Health Servs.*, 292 Va. 309, 316 (2016). Within §15.2-1812.1(C) the General Assembly states that "[t]he provisions of this section shall not be construed to limit the rights of any person…to pursue any additional civil remedy *otherwise* allowed by law". This language plainly verifies that Va. Code §15.2-1812.1 itself allows no action other than an action for specified damages.

Alluding to a rule of statutory construction employed by the Virginia Attorney General in 2015 (resolving differences in wording among the three statutes by resort to the canon of *in pari materia*)[21] the trial court stated "If these

[21] 2015 Op. Va. Att'y Gen. No. 15-050 (August 6, 2015)(applying *in pari materia* to interpret the differences in terminology among the statutes for identification of types of monuments).

statutes are to be read together for any reason they should be read together for all purposes." App. 1037. The court applied the same rule of construction at the outset of the case. "While on the surface it appears that [the right of any person with an interest in the matter to bring an action for damages] only applies to the monetary damages section…when read together with two other statues enacted at the same time[22], it would appear that such "statutory standing" would apply to any action relating to the enforcement of these statutes….So just as "war veterans" was read into part of one statute, it would seem that the standing provision should have no different application if it is for an injunction under §15.2-1812 or damages under §15.2-1812.1." App. 263. The flaw in the court's selection of this rule of construction to support its decision is that there is no section within any one of the statutes that grants any private right of action for declaratory/injunctive relief which can considered as though a part of the others. *See Prillaman v. Commonwealth,* 199 Va. 401, 405 (1957). Since none of the acts, by their plain language, evinces a palpable right,[23] the only proper inference, reading the statutes *in pari materia,* is that no such right has been granted.

[22] This assertion is incorrect, as a matter of law. App. 60 (Va. Code §15.2-1812 (1997)), 1999 Acts of Ass'y, ch. 625 (§18.2-137 (1999)), and App. 62-63 (§15.2-1812.1 (2000)).

[23] *Cherrie,* 292 Va. at 315.

In *Deerfield v. City of Hampton*, 283 Va. 759 (2012) this Court held that statutory standing is limited to the specific statutory right granted by the General Assembly, and a right expressly granted cannot be interpreted to "spawn" additional rights. ("[t]he committee had no standing to bring suit to enforce a City ordinance, because it had no such right or authority, express or implied, under any reasonable construction of the terms [of the City Charter]"). *Id*., 283 Va. at 767. This Court stated: "In determining legislative intent, the rule is clear that where a power is conferred and the mode of its execution is specified, "no other method may be selected; any other means would be contrary to legislative intent and, therefore, unreasonable." *Deerfield, id.,* 283 Va. at 766. . The trial court's attempt to spawn other rights of action through its statutory construction is contrary to the General Assembly's expressed intentions. *Accord*, *Stoney v. Anonymous*, Record No. 200901 (Order 8/26/2020) (vacating injunction).

b. <u>Sovereign Immunity</u>

Within demurrers, pleas in bar, and their July 24, 2019 Cross Motions for Summary Judgment, the City and City Council asserted their sovereign immunity relative to Payne's action for declaratory and injunctive relief. The trial court

broadly denied immunity, observing that granting immunity "would seem to fly in the face of the explicit language and intent of those statutes."[24]

In this case, the issue of sovereign immunity governs Payne's standing to bring actions against the City and City Council for declaratory judgment and a permanent injunction, because neither Va. Code §15.2-1812 nor §15.2-1812.1 waives sovereign immunity by expressly authorizing such actions. The doctrine of sovereign immunity is not limited to being a bar to a cause of action sounding in tort, but—in the absence of an express statutory waiver—the doctrine bars all actions at law for damages, suits in equity to restrain governmental action or to compel such action, and declaratory judgment proceedings. *Gray v. Va. Secy. of Transp.*, 276 Va. 93, 102 (2008) (general rule is that the sovereign is immune from suits in equity to restrain the government from acting, or to compel it to act). *See also Afzall v. Commonwealth*, 273 Va. 226, 231 (2007) (since statute did not evince an intent to waive sovereign immunity, declaratory judgment action was barred and court was without jurisdiction to adjudicate the claim). In particular, the doctrine of sovereign immunity bars any action for prospective injunctive and declaratory relief that seeks to compel the Commonwealth or its political subdivisions to comply with state statutory or non-Constitutional law. *Digiacinto v. Rector & Visitors of George Mason Univ.*, 281 Va. 127, 138 (2011).

[24] App. 460

Sovereign immunity "prevents citizens from improperly influencing the conduct of governmental affairs through the threat or use of vexatious litigation,'" *id.* (citations omitted), and it "protects the state from burdensome interference with the performance of its governmental functions," *Pike v. Hagaman*, 292 Va. 209, 214-215 (2016). Just as state agencies are entitled to the protection of the state's sovereign immunity, local governments, as political subdivisions, are also protected, *see Ligon v. County of Goochland,* 279 Va. 312, 316 (2010). The City is entitled to sovereign immunity when exercising governmental functions—on the theory that it is performing as an agency of the state. *City of Virginia Beach v. Carmichael Dev. Co.,* 259 Va. 493, 499 (2000). Citing *City of Chesapeake v. Cunningham,* 268 Va. 624, 633-638 (2004), the trial court found that the City's choice to remove the Statues constituted a discretionary governmental action establishing or implementing policy, i.e., a "governmental function". App. 459. All of the resolutions and actions challenged by Payne in this case involve the exercise of the City's political, discretionary, or legislative authority (the performance of governmental functions). *Id.,* 268 Va. at 633-634.

Sovereign immunity may be abrogated only by the sovereign itself, as to a particular legal action. *Mann v. County Bd. of Arlington County*, 199 Va. 169, 175 (1957); *accord, Fry v. County of Albemarle*, 86 Va. 195, 197-99 (1890). Waivers cannot be implied from general statutory language (as the trial court erroneously

did in this case) but must be explicitly set out in a statute. *Ligon*, 279 Va. at 319. According to the trial court itself, nothing in the wording of the statutes evinces legislative intent for a waiver; the court simply was unable to make sense of why the General Assembly would have granted an action for damages without also authorizing private actions for declaratory/injunctive relief to prevent harm from occurring. The trial court had no authority to adjudicate Payne's requests for declaratory or injunctive relief, and the Order: Declaratory Judgment, the Order: Permanent Injunction, and the Final Order must be vacated.

III. ACTIONS FOR DECLARATORY AND INJUNCTIVE RELIEF BASED ON TAXPAYER STANDING—(ASSIGNMENT 3)

STANDARD OF REVIEW: Whether or not a party has established standing is a matter of law reviewed *de novo* on appeal. *Va. Marine Res. Comm'n v. Clark*, 281 Va. 679, 686-687 (2011), *cited in Howell v. McAuliffe*, 292 Va. 320, 330 (2016).

ARGUMENTS AND AUTHORITY: In 2017, this Court affirmed that the allegation of a person's bare position as a taxpayer of the City, even if combined with a "zealous interest" in a topic, does not confer standing to bring an action for declaratory [or related injunctive] relief against a political subdivision. *Lafferty v. Sch. Bd. of Fairfax County*, 293 Va. 354, 364 (2017). In an effort to establish the requisite taxpayer standing to support their action against the City for declaratory/injunctive relief, Payne's RSAC alleges that Payne, Yellott, Tayloe,

Amiss, and Weber pay certain taxes, enjoy the City's parks, and/or have a "special interest" in war memorials; the RSAC presents a threadbare allegation that Yellott has a "financial interest in the outcome of the litigation"[25], but does not allege that he has a direct stake in the *matter in controversy* or owns either Statue. App. 673-675 ¶¶ 2, 3, 4, 7, 9. None of the Payne plaintiffs alleges any proprietary right, title or interest in the Statues, or any other unique circumstances establishing a "peculiar relation" between themselves and the City which render their personal interests in the application of municipal revenues "direct and immediate" and distinct from the general public. *See ASARCO, Inc. v. Kadish,* 490 U.S. 605, 613 (1989), *cited in Goldman v. Landsidle,* 262 Va. 364, 372 (2001). Payne's allegations fail to make out "any unique injury or potential injury that would provide a basis for standing", *see Lafferty v. Sch. Bd. of Fairfax County,* 293 Va. 354, 364 (2017).

When the "…actual objective in a declaratory judgment proceeding is a determination of a disputed issue rather than an adjudication of the parties' rights, the case is not one for declaratory judgment." *Charlottesville Area Fitness Club Operators Ass'n v. Albemarle County Bd. of Supervisors,* 285 Va. 87, 99 (2013) (citation omitted); *Williams v. Southern Bank of Norfolk,* 203 Va. 657, 663 (1962).

[25] Mr. Yellott is the director of The Monument Fund, which has "raised and disbursed money for this litigation". App. 673-674, ¶3; App. 676 ¶12.

The City Council resolutions and actions challenged by Payne represent aspects of a public controversy and disputed political issue. Throughout this case, Payne's sole interest has been to redress an anticipated public injury—preventing removal of the Statues by "defending history against an intolerant present". App. 984 (9/13/2019 Tr. 656:19-23). Even the trial court admitted: "this case has always been about the injunction." App. 1001 (9/13/2019 Tr. 732:8-13). From the start Payne's declaratory judgment proceeding has been a means to get the court to determine a disputed political issue, and Payne's repeated assertions that "this case is about the rule of law"[26] are clear admissions of this. The zealous political interest of these individuals in the City's actions is insufficient to create taxpayer standing. *Lafferty,* 293 Va. at 364.

In order for any of the Payne plaintiffs to have taxpayer standing to bring actions for declaratory or related permanent injunctive relief, the object of their lawsuit must be restraint of the illegal diversion of specific public funds, *see Johnson v. Black,* 103 Va. 477, 484 (1905). In *Goldman v. Landsidle,* 262 Va. 364, 371-372 (2001) this Court reviewed several cases in which it had found taxpayer standing—each involving an expenditure already made, an action taken to approve a specific expenditure, or a contract executed by a locality for specific expenditures

[26] App. 919 (9/13/2019 Tr. 582:13-21; App. 984 (9/13/2019 Tr. 656: 18-23). *See also* R.363, 2268, 2278, 3865, 4098, 5905, 5966, 5973, 5982, 6691, 6716, 6754, 6755, 6758, 6759, 6760, 6767, 6768

or financial transactions. *See Burk v. Porter,* 222 Va. 795 (1981) (expenditure already made); *Armstrong v. County of Henrico,* 212 Va. 66 (1971) (performance of executed contract could deplete a sinking fund and expose taxpayers to special assessment); *Gordon v. Board of Supervisors,* 207 Va. 827 (1967) (approval of a $20,000 loan of county funds to airport authority), *Appalachian Electric Power Co. v. Galax,* 173 Va. 329 (1939) (bond issuance for a specific amount was authorized and approved by ordinance), and *Lynchburg & R. S. R. Co. v. Dameron,* 95 Va. 545 (1898) (executed contract guaranteed payment of private debt). The resolutions and actions sought to be invalidated by the Payne plaintiffs in this case do not present any of these circumstances.

On the other hand, this Court found that individuals did **not** have taxpayer standing, in: *Nicholas v. Lawrence,* 161 Va. 589 (1933) (citizens sought to remove staff member appointed by governing body, alleging financial conflict of interest); *Abbott v. Board of Supervisors,* 200 Va. 820 (1959) (paying customers of a sewage system do not have taxpayer standing to challenge rates, as they have no proprietary interest); and *Lafferty v. Sch. Bd. of Fairfax County,* 293 Va. 354 (2017)(complaint lacked allegations of specific costs or expenditures connected to a challenged policy; policy itself did not authorize an expenditure and the Court declined to infer costs accompanying the policy change or to consider implementation costs).

Like the plaintiffs in *Abbott*, the Payne plaintiffs allege no proprietary interest in the Statues. Like the plaintiffs in *Lafferty*, the Payne plaintiffs do not allege any expenditure for removal of the Statues that has been approved or authorized (appropriated) by the City Council. The RSAC asks the court to infer expenditures from a budget for actions *other than* removal of the Statues (App. 342) and from estimates of costs potentially associated with implementing Council's resolutions, App. 691 ¶32.[27] *See also* App. 692 ¶32 (" 'whatever the costs', they will be borne by taxpayers"). The RSAC alleges general government expenditures not specific to removal of the Statues (such as salaries paid to City employees, App. 692 ¶32, 697 ¶4) which would be expended regardless of whether the actions referred to in the challenged resolutions are ever executed. In fact, Payne avers that the City Councilors had no knowledge of the cost of their actions, App. 691 ¶31, which would not be the case if City Council had actually approved specific expenditures.

Within RSAC Payne refers to an expenditure of $6,000, for black tarpaulins that covered the Statues after August 12, 2017 (App. 691). This expenditure does not relate in any way to the resolutions to remove the Statues from City parks, App. 687-688 ¶28 and App. 689 ¶30 D, and there is no allegation that the

[27] "There was no actual appropriation of funds, and nothing specifically allocating or approving moneys for moving the statues. Along the way plans were solicited that included both options of moving and not moving the statues." App. 776.

tarpaulins physically damaged either Statue. The allegation stating the City covered the Statues, and the allegation stating the City expended $6,000 for two covers, are an insufficient basis for taxpayer standing or to confer authority upon the court for entry of the Order: Declaratory Judgment or the Order: Permanent Injunction. At best, these allegations could confer taxpayer standing to challenge the legality of the already-spent $6,000.00, but the trial court has ruled that the City's action of covering the Statues was not *ultra vires*. App. 1026.

The trial court found the opinion in *Howell v. McAuliffe*, 292 Va. 320 (2016) to be "instructive" and "a good starting point" for its standing ruling. App. 259. The court analogized the impact of the outcome of this controversy upon the Payne plaintiffs with the interests of individuals in *Howell* who alleged their votes would be diluted by state action. App. 259. But *Howell* presented unique circumstances, and the court erred by interpreting the *Howell* decision as a new, expansive "general rule" of standing, instead of a distinct exception to Virginia's more restrictive taxpayer standing doctrine. The trial court failed to note the "unprecedented circumstances" upon which the *Howell* decision was based. *Id.*, 292 Va. at 334.

The Order: Declaratory Judgment does not declare any City expenditure or contract authorizing a financial transaction to be *ultra vires*. App. 1024-1028. The Order: Permanent Injunction does not enjoin any specific City expenditures (App.

1011-1023). The Payne plaintiffs never had any basis for taxpayer standing to assert their claims for declaratory judgment, or related permanent injunctive relief, and the court was without authority to entertain claims based on taxpayer standing.

IV. RETROACTIVE APPLICATION OF §15.2-1812 TO THE CITY'S STATUES—(ASSIGNMENT 4)

STANDARD OF REVIEW: A trial court's construction of a statute is a question of law that will be reviewed *de novo* on appeal. *In re Brown,* 289 Va. 343, 347 (2015), *citing Warrington v. Commonwealth,* 280 Va. 365, 370 (2010); *Conyers v. Martial Arts World of Richmond, Inc.,* 273 Va. 96, 104 (2007) (citations omitted).

ARGUMENT AND AUTHORITIES: From the outset of this case, the City has contended that trial court's interpretation of Va. Code §15.2-1812 is erroneous, and that the provisions of Va. Code §15.2-1812 cannot be applied to the City's Statues, which were erected prior to the statute on which Payne's claims are based. The trial court ruled that §15.2-1812 applies to "monuments or memorials covered by that statute and in existence within a city prior to 1997". App. 285, ¶3. *See also* App. 701 ¶3(b) and App. 404, fn. 1.

a. Presumption against substantive changes arising from a recodification of the law

Courts presume that "a recodified statute does not make substantive changes in the former statute, unless a contrary intent plainly appears in the statute." *Butcher v. Commonwealth,* 838 S.E. 2d 538, 544, 2020 Va. LEXIS 10, 15-16 (2020) (citations omitted); *accord Newberry Station Homeowners Ass'n v. Bd. of Supervisors*, 285 Va. 604, 617 (2013). The trial court was aware that Va. Code §15.2-1812 (1997) resulted from a recodification of Title 15.1 of the Virginia Code and was aware of the drafting note provided by the Va. Recodification Commission ("No substantive change in the law; this section is expanded to include all localities")[28]. Va. Code §15.2-1812 (1997) was enacted exactly as recommended by the Virginia Code Commission, App. 253; therefore, the Commission's drafting note should trigger the presumption that the General Assembly did not intend any substantive changes.

Applying this Court's holdings in *Butcher* and *Newberry,* and considering the 1997 Drafting Note, the effects of the 1997 Recodification, relative to Va. Code §15.2-1812, are as follows, as a matter of law:

(i) monuments erected by authority of 1904 Acts of Assembly, ch. 29, as amended and reenacted (App. 253), continued to be subject to Va. Code §15.2-1812 (1997, as amended) (no change in the law or the statute);

[28] App. 89-90 (1997 Senate Doc. 5, at p.505-506)

(ii) veterans' and war memorials, and Confederate monuments, erected by authority of pre-1997 special Acts of Assembly[29] or other laws, continued to be subject to the requirements of those special Acts or other applicable laws (no change in the law or the statute), and

(iii) consistent with *Day v. Pickett,* 18 Va. (4 Munf.) 104, 109 (1813) and *Richmond v. Supervisors of Henrico County,* 83 Va. 204, 212 (1887), the recodified statute prospectively authorized all localities, at their option, to erect certain specified monuments after 1997, on any public property, and prohibited the removal of such monuments.

The trial court speculated that, if §15.2-1812 does not apply to all monuments erected prior to 1997, then "thousands" of monuments would be left unprotected. "It seems inescapable that the General Assembly had to have in mind those monuments and memorials already erected. Nothing else would make sense." App. 255-256. "I guess what I am getting at is when it was first passed, do you think the General Assembly was understanding—and this is a little sarcastic, but do you really think they are saying we really don't care about these thousands of monuments all over our state to all of these wars, we just care about the ones that are built by localities from here on forward? Is your position that's the way the General Assembly was thinking?" [30]

As a matter of law, whether a particular statue or monument was intended by the General Assembly to be protected by state law from disturbance or interference depends on the specific enabling legislation by which a locality derived authority

[29] *See* 2017 Va. AG Op. No. 17-032, pp. 4-5 (Aug. 25, 2017).

[30] App. 122 (5/2/2017 Tr. 48:9-19)

to erect it. Many war memorials around the Commonwealth owe their existence to specific, special Acts of the General Assembly enacted prior to 1997. "Some of these Acts contain restrictions on the disturbance of the monument, others are silent, and in the case of King William, one Act contains such a restriction and a related Act does not." 2017 Va. AG Op. No. 17-032, p. 5 (Aug. 25, 2017).[31] Like the City's Statues, some monuments are not governed by any special act. The trial court's interpretation of Va. Code §15.2-1812 is not based on the wording of §15.2-1812, it fails to address the fact that the 1997 amendments were part of a recodification, and it ignores the history of the unique legal circumstances of Charlottesville's Statues.

b. Presumption against retroactive legislation

As noted by the United State Supreme Court in *Landgraf v. Usi Film Prods.*, 511 U.S. 244, 265-266 (1994), the presumption against retroactive legislation is deeply rooted in our jurisprudence. The "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Id.* (emphasis added; citations omitted). This Court has frequently recognized that Virginia law "does not favor retroactive application of statutes. . . [f]or this reason, we interpret statutes to apply prospectively 'unless a contrary legislative intent is manifest.' *Bailey v. Spangler*,

[31] The City provided the court with numerous examples of special legislation. App. 837-862. *See also* Payne's Brf. (Dillon Rule) at R.160, 173.

289 Va. 353, 358-359 (2015); *Adams v. Alliant Techsystems,* 261 Va. 594, 599 (2001); *Day v. Pickett,* 18 Va. (4 Munf.) 104, 109 (1813). Legislative intent must be "manifest beyond reasonable question", *Arey v. Lindsey,* 103 Va. 250, 252 (1904). If there is any reasonable question, courts may not construe a statute to apply retroactively "unless there is something on the face of the enactment putting it beyond a doubt that such was the purpose of the legislature." *Danville v. Pace,* 66 Va. (25 Gratt.) 1, 4 (1874); *accord, Shilling v. Commonwealth,* 4 Va. App. 500, 507 (1987) (internal citations omitted).

It is reasonable to conclude that the failure to express an intention to make a statute retroactive evidences a lack of such intention. *See, e.g., Berner v. Mills*, 265 Va. 408, 413 (2003). While courts do not require the use of any specific words to indicate intent for retroactivity, *see Bd. of Supervisors of James City County v. Windmill Meadows*, LLC, 287 Va. 170, 180 (2014), language used must make it clear that the General Assembly intended the legislation to apply both prospectively and retroactively. Any such intent must be determined from the words of the statute itself. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993); *accord Carter v. Nelms*, 204 Va. 338, 346 (1963). The trial court incorrectly applied, or did not apply, these applicable rules of statutory construction.

First, the trial court declined to adhere to the plain language of the statute, refusing to assign significance to the patent relationship between the "authorizing"

words ("localities may erect….") and the "proscriptive" words ("if such are erected, it shall be unlawful…."). The proscriptions of §15.2-1812.1 apply only to "such" monuments or memorials that "are" "so erected". In §15.2-1812, the word "such"[32] refers to the "authorizing words", (i.e., the monuments or memorials erected by authority of the statute) and is used to avoid having to repeat wording at the beginning of the same paragraph[33]. The word "so"[34] refers to the manner in which the memorials are erected (i.e., pursuant to the authority conferred by the statute). The court's "this doesn't make sense" approach to statutory construction is almost identical to that rejected by this Court in *Bailey v. Spangler,* in which the trial court concluded that a mine-void law must apply retroactively, because most severance deeds predated the law. 289 Va. at 358.

Disregarding the presence of "such" and "so", the court instead focused on the word "any" within §15.2-1812 ("If such are erected, it shall be unlawful…to disturb or interfere with *any* monuments or memorials so erected…."). The court

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[32] "Such" means "previously characterized or specified" or "having a quality already or just specified", and is "used to avoid repetition of a descriptive term". *Webster's Third New International Dictionary* 2283 (1976).

[33] *Sharlin v. Neighborhood Theatre, Inc.,* 209 Va. 718, 721 (1969) ("such" refers to the last antecedent).

[34] "So" means "in a manner or way that is indicated or suggested", *Webster's, id.,* at 2159.

relied on *Sussex Community Servs. Assoc. v. The Va. Soc'y for Mentally Retarded Children,* 251 Va. 240 (1996). The statute at issue in *Sussex* originally read:

> "Notwithstanding **any restrictive covenant executed after July 1, 1986**, which restricts occupancy or ownership of real or leasehold property to members of a single family or to residential use or structure, a family care home…shall be considered for all purposes residential occupancy by a single family."

(emphasis added).[35] In 1991 the General Assembly repealed the 1989 law, along with the Code chapter in which it appeared, and enacted a new law and Code chapter, as follows: "A family care home…shall be considered for all purposes residential occupancy by a single family when construing **any restrictive covenant** which purports to restrict occupancy or ownership…." *See* 1991 Acts of Ass'y., ch. 557 (emphasis added). This Court held that the word "any" in the new law manifested a clear legislative intent for the law to apply to restrictive covenants recorded before and after July 1, 1986. *Sussex,* 251 Va. at 244-245. The trial court's reliance on *Sussex* ignored the enactment of Va. Code §15.2-1812 as part of a general recodification of Title 15.2, to which a special presumption against substantive change applies. Further, in *Sussex* this Court reviewed the legislature's use of the word "any" as a stand-alone qualifier. "Any" is used differently within §15.2-1812: the words "such" and "so" clearly regulate the words qualified by "any". The trial court admitted that *Sussex* is "not on all

[35] 1989 Acts of Ass'y., ch. 88

fours with the present case," App. 258, and that "a strictly technical reading of the statute and the legislative history might reach [the result argued by the City], saying 20 years after passage that the General Assembly only applied this to cities thereafter." App. 257.

Second, the court failed to assign legal significance of the present tense verb usage in §15.2-1812 ("are erected"). The court casually observed that the words refer simply to "….if they are built. A building is built".[36] These present-tense words necessarily restrict the statute's application to war memorials erected after July 1997. *See Carr v. United States*, 560 U.S. 438, 449-450 (2010) (if the legislature intended retroactive operation "it presumably would have varied the verb tenses"). "Given the well-established presumption against retroactivity…it cannot be the case that a statutory prohibition set forth in the present tense applies by default to acts completed before the statute's enactment". *Id.*, at 450 n.6. The words "are erected" were incorporated into §15.2-1812 by 1988 amendments to Va. Code §15.1-270 (predecessor to §15.2-1812), as part of a reenactment of §15.1-270. App. 58. The word "reenacted" in a bill or act means that changes are effective prospectively, unless the bill expressly provides that the changes are effective retroactively on a specified date. Va. Code §1-238. *See Berner v. Mills*, 265 Va. 408, 413 (2003) (a "reenacted" statute will be applied retroactively only if

[36] App. 148 (05/02/2017 Tr. 279:15-22)

the bill or act of assembly containing the legislation explicitly and unequivocally meets the requirements of §1-238). The 1988 amendments did not include the words required by §1-238; therefore, there is no legal basis for the court's inference that that the words "if such are erected" include the City's Statues.

Third, the trial court inferred legislative intent for retroactivity from the list of wars within §15.2-1812, stating that "logic and common sense" preclude a conclusion that the General Assembly would have expected a city to erect, after 1997, new monuments or memorials to bygone wars. App. 255, 257-258. This is not the type of clear manifestation beyond reasonable question contemplated by the established rules of statutory construction, especially in light of the various special Acts of Assembly.

c. <u>Substantive rights must be protected against retroactive application of statutes.</u>

Courts zealously protect substantive rights from retroactive application of statutes. *In re Brown,* 289 Va. 343, 348 (2015); *Shiflet v. Eller,* 228 Va. 115, 120 (1984). "Substantive rights…are included within that part of the law dealing with creation of duties, rights, and obligations, as opposed to procedural or remedial law, which prescribes methods of obtaining redress or enforcement of rights." *Shiflet v. Eller, id.* Va. Code §15.2-1812 is silent as to methods of obtaining redress or enforcement of rights, yet the trial court judge asserted that §15.2-1812 is remedial,

because that is the only thing that was "common sense" to him.[37] The court's construction ignores that, in several aspects, the provisions of Va. Code §15.2-1812 create substantive duties and obligations.

First, a government entity—including a political subdivision of the state—has a right to speak for itself. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467-468 (2009). It is entitled to say what it wishes, and to select the views that it wants to express. *Id., citing Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 893 (1995). In *Summum* the U.S. Supreme Court observed:

> Governments have long used monuments to speak to the public…A monument, by definition, is a structure that is designed as a means of expression. When a government entity arranges for construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure….throughout our Nation's history, the general government practice with respect to donated monuments has been one of selective receptivity….Public parks are often closely associated in the public mind with the governmental unit that owns the land. City parks…commonly play an important role in defining the identity that a city projects to its own residents and to the outside world….Government decisionmakers select the monuments that portray what they view as appropriate for the place in question, taking into account such factors as aesthetics, history, and local culture.

Summum, id., 555 U.S. at 470-472. State action that operates to preclude a locality from exercising this right, by prohibiting removal of Statues that convey messages

[37] App. 255-256; App. 414-415 (04/11/2018 Tr. 9:23-10:4); App. 460; App. 669-670 (01/14/2019 Tr. 102:19-25); App. 822 (07/31/2019 Tr. 115:1-20); App. 823 (07/31/2019 Tr.120:13-17); App. 1008-1009 (09/13/2019 Tr. 739:25-740:7.

the locality believes to be unlawful or inappropriate,[38] infringes on this right of speech. That is, quintessentially, an impairment of a substantive right belonging to the City of Charlottesville and its City Council. When the person seeking to force a locality to adopt or perpetuate a particular message is an outside [even sovereign] political body, the result is a suppression of the ideas and opinions of the locality's citizens whose influence—particularly on matters of local aesthetics, history and culture—should be paramount within their own community. *See Creek v. Village of Westhaven,* 80 F.3d 186, 192 (7th Cir. 1996) (observing that municipalities act as amplified voices for their constituents and that "the marketplace of ideas would be unduly curtailed if municipalities could not freely express themselves on matters of public concern.") (J. Posner).

Second, from the early 1900s to the present the City has enjoyed near-exclusive decision making authority as to how its locally owned property, including public parks, is operated, maintained and improved.[39] Between 1924 and 1997 state

[38] *See*, *e.g.*, R.3383-3396 (City's Opp. To Payne's Mot. For Sum. J. on Equal Protection); R.2284-2930 (individual councilors' Opp. To Payne's Mot. For Sum. J. on Equal Protection)

[39] City of Charlottesville Charter (1946), §14 (1946 Va. Acts ch. 384, as amended), Charlottesville Charter (1908), §14 (1908 Va. Acts, ch. 285, as amended). *See also* Va. Code §§15.2-1800 and 15.2-1806, and Va. Code §3032 (1919 and 1924)(granting to every city and town the power "in their discretion to establish and maintain parks…and cause the same to be laid out, equipped or beautified…."). *Ref*. App. 158-165.

law did not prohibit the City from removing either Statue, and the City was under no statutory obligation to maintain them. Payne's RSAC does not allege otherwise. Payne concedes that the Statues are affixed to real property and are real estate. App. 11 (5/2/2017 Tr. 21:23-25[40]). Thus, the trial court's retroactive application of Va. Code §15.2-1812 subjects the City to a new legal disability with respect to management and disposition of its property. According to this Court, this is the very result to be avoided: "Every statute which…creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be deemed retrospective…and opposed to those principles of jurisprudence which have been universally recognized as sound.'" *Richmond v. Supervisors of Henrico County,* 83 Va. 204, 212 (1887). "Especially do courts shrink from holding an act retrospective when it affects public objects and duties, and, when it affects rights accrued and acts done by law for the public interest." *Id.*, at 212.

Third, the court's retroactive application of Va. Code §15.2-1812 to Charlottesville's Statues has the odd effect of treating the City's original decision to authorize the Statues as if it were *ultra vires*, in derogation of the Dillon Rule of statutory construction. [41] Payne's RSAC does not allege that the City's actions

[40] R. 4103-4104

[41] The power of a municipality must be exercised pursuant to an express grant from the legislature. *National Realty Corp. v. City of Va. Beach*, 209 Va. 172, 175

accepting the Statues in the 1920s were in any way *ultra vires*, or that the City unlawfully expended any public funds to erect them.[42] Under the Dillon Rule, the City's acceptance and installation of the Statues, in the 1920s, is entitled to a presumption of legal validity, because the City's actions were expressly authorized by its Charter and general laws that authorized it to establish and "beautify" public parks. *Eagle Harbor LLC v. Isle of Wight County*, 271 Va. 603, 615-616 (2006); *Board of Supervisors v. Robertson*, 266 Va. 525, 532-533 (2003). Both Statues are, concededly, works of art and sculpture, regardless of any other legal inference that can be drawn from the icons they depict.[43] App. 685 ¶21N; *see also* App. 640 ¶¶ 6, 7, 8, App. 646-647, and App. 650-651. The legal presumption of the validity of the City's actions in the 1920s was not overcome by any matters pleaded by Payne, and "[n]o court can base its decree on facts not alleged." *Potts v. Mathieson Alkali Works*, 165 Va. 196, 207 (1935). The trial court's statutory construction improperly applied the Dillon Rule, and ignored *In re Brown* and *Shiflet.* The resulting decision is clearly

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(1968). The court found the Statues to be veterans memorials, but did not cite any 1920s-era legislative act authorizing them as such.

[42] The court ruled that Payne's Complaint set out no *ultra vires* claim apart from the issue of whether the City's 2017 resolutions violate Va. Code §15.2-1812, *see* App. 252-253, fn.1.

[43] "The meaning conveyed by a monument is generally not a simple one like 'Beef. It's What's for Dinner.' Even when a monument features the written word, the monument may be intended to be interpreted, and may in fact be interpreted by different observers, in a variety of ways." *Summum*, 555 U.S. 460, 474 (citation omitted).

erroneous and in conflict with a long line of jurisprudence followed by federal and Virginia courts, disfavoring retroactive application of laws. The Order: Declaratory Judgment, Order: Permanent Injunction, and the Final Order must be vacated.

CONCLUSION

The City of Charlottesville and Charlottesville City Council request this Honorable Court to reverse the judgment of the trial court, to vacate the Order: Declaratory Relief, the Order: Permanent Injunction and the Final Order entered by the trial court in this case, and to enter final judgment in favor of the City of Charlottesville and Charlottesville City Council.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 18, 2020, the Opening Brief and Appendix were filed electronically via the VACES system with the Supreme Court of Virginia. This same date, a copy of the Opening Brief and Appendix were sent via email to all counsel of record, at the email addresses below:

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