

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF CHARLOTTESVILLE

FREDERICK W. PAYNE *et al*,  
Plaintiffs,

v.

Case No. CL17-145

CITY OF CHARLOTTESVILLE,  
VIRGINIA *et al*,  
Defendants.

**PLAINTIFFS' RESPONSE TO MOTION OF SURJ ACTION**  
**FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF**

Come now Plaintiffs, by counsel, and for their response to the motion of SURJ Action ("SURJ") for leave to file an *amicus curiae* brief, request the Court to deny such leave for the following reasons:

1. That SURJ is not a party to this action. There is no provision in the Rules of the Supreme Court of Virginia for the filing of an *amicus* brief by a non-party. The Rules permit filing of *amicus* briefs only in appellate proceedings, and then only by leave of Court. Virginia Supreme Court Rule 5:30.
2. That SURJ, before it filed its motion and brief, requested the consent of Plaintiffs to file the brief. Plaintiffs, by counsel, refused to consent to the filing.
3. That SURJ, without leave of this Court and without the consent of Plaintiffs, nonetheless proceeded to file its *amicus* brief. There has been no hearing on the SURJ motion, and SURJ has not requested a hearing.
4. That Section 8.01-273 (A) of the Code of Virginia, 1950, requires the demurring party to specifically state the grounds of its demurrer and prohibits the Court from considering any grounds not so stated.

5. That Plaintiffs, having reviewed the SURJ motion and brief, believe that SURJ's interest in this case is not to assist the Court in its consideration of Defendants' demurrer, but rather to advance its political agenda.

A. The motion filed by SURJ states that SURJ is a "grassroots nonprofit organization committed to ending policies and practices that uphold white supremacy" (§ 1), and it is "devoted to building a racially just society and challenging policies and practices that facilitate racial discrimination and intimidation" (§ 2). Neither the complaint nor the demurrer plead those issues.

B. Section II (B) of SURJ's brief advances "social justice" arguments that are unrelated to any allegation in the complaint or to any grounds stated in the demurrer. For example:

1. "...rather, the [Lee] statue has been an instrument to further the pernicious goal of promoting white supremacy...." Brief, pages 14 and 15.

2. "The unveiling of the [Lee] statue in May 1924 by Confederate groups coincided with a massive Southern revival of the Ku Klux Klan...." Brief, page 15.

3. "In Charlottesville ... the Ku Klux Klan's activities became increasingly prominent during the weeks leading up to and immediately following the dedication of the Lee Statue, including speeches, a parade, cross burnings, and the bombing of an African American church". Brief, pages 15 and 16.

4. The Lee and Jackson statues "were erected for the very purpose of reinforcing white supremacy and intimidating African American community members." Brief, pages 16 and 17.

5. “...the very use of Confederate iconography to further the false “Lost Cause” narrative and perpetuate the harmful legacy of Jim Crow...”. Brief, page 17.

C. Most of the “authorities” cited in “Other Authorities” (see page iii of Brief) are not legal authorities, but rather focus on social justice issues, *e.g.*, Blake, Poindexter, Gallagher, Vozzella, Landrieu, Richmond Sunlight, Abramowitz, Southern Poverty Law Center, and Holocaust Memorial.

6. That the SURJ brief also presents arguments on issues not before this Court on demurrer. For example:

A. Section I (B) of the brief presents extensive argument on a government’s right to speak, a legal theory deriving from the United States Supreme Court case of *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460 (2009). The *Summum* theory is **not** a ground stated in the Defendants’ demurrer.

B. There are numerous references in the brief to the temporary injunction hearing and comments made by this Court during that hearing. Those matters are not before this Court on the demurrer.

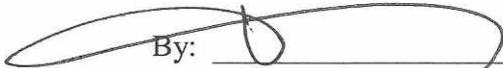
C. A demurrer admits the truth of all material facts that are properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred from alleged facts. *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394 (1991). The complaint is replete with factual allegations that the Lee Statue commemorates the War Between the States and honors a veteran of that War. SURJ, however, proceeds to present factual arguments to dispute those allegations, including a photograph of the Lee Statue at Gettysburg. SURJ brief at pages 10 through 13.

7. That the demurrer hearing and briefing schedule were set at the sounding of the docket on June 19, 2017. Yet SURJ waited until July 5, 2017 to request Plaintiffs' consent to file a brief, and then filed its motion and brief (without Plaintiffs' consent) on July 10, 2017. Plaintiffs' brief is due on August 1, 2017. It is unfair and unjust to Plaintiffs to expect them to respond to the SURJ brief that has been filed without leave of Court and over their objection.

8. That Plaintiffs further believe that SURJ will attempt to inject itself into this case at other points as the case proceeds. This will cause Plaintiffs to incur additional time and expense in dealing with a non-party. And as the SURJ brief demonstrates, SURJ will attempt to convert this case from one about the rule of law into one about social justice issues. Plaintiffs should not have to bear the cost or burden in litigating social justice issues which at this point are not before the Court.

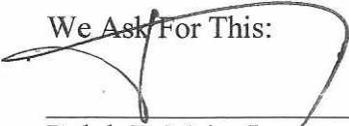
Wherefore Plaintiffs pray that the motion of SURJ to file an *amicus curiae* brief be denied, and that they be granted such other and further relief as may be necessary in this matter.

FREDERICK W. PAYNE *ET AL*

By: 

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Certificate

I certify that on July 20, 2017 copies of the forgoing Plaintiffs' Response To Motion  
Of SURJ Action For Leave To File *Amicus Curiae* Brief were mailed postage prepaid to:

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