IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

BRIAN H. CLARK,	)	
	)	**Civil Action No. 4:17-cv-00045**
Plaintiff,	)	
	)	
v.	)	
	)	
ROB COLEMAN,	)	**By: Hon. Michael F. Urbanski**
	)	**Chief United States District Judge**
Defendant.	)	

MEMORANDUM OPINION

"Fits of rudeness or lack of gratitude may violate the Golden Rule. But that doesn't make them illegal or for that matter punishable or for that matter grounds for a seizure." Cruise-Gulyas v. Minard, 918 F.3d 494, 495 (6th Cir. 2019).

This case concerns whether an officer may stop a vehicle because a passenger displayed an offensive gesture towards the officer, a gesture that anyone must concede "was crude, [but] not criminal." Wilson v. Martin, 549 F. App'x 309, 311 (6th Cir. 2013). A jury was empaneled, and they determined that the officer's actions did not violate the passenger's rights. The question before the court is whether that verdict can stand. After a review of the applicable law and relevant evidence, the court **GRANTS** Plaintiff Brian Clark's motion to set aside the jury verdict and enter judgment for the plaintiff. ECF No. 141. The law plainly prohibits that which occurred here, and the jury's verdict cannot stand. However, the court **DENIES** Clark's motion for a new trial on the issue of damages, finding, as a matter of law, that Clark has not carried his burden of demonstrating compensable or punitive damages sufficient to warrant a new trial. Id.

I.

On the morning of July 25, 2016, Clark appeared in court in Patrick County, Virginia, on a civil matter unrelated to the present action. Previously, he had been banned from the courthouse, except under certain circumstances, by Circuit Court Judge Martin Clark. Because of that prior order, sheriff's deputies in Patrick County, who were responsible for courtroom security, were keenly aware of Clark. Defendant Lieutenant Rob Coleman was one of those deputies who was in the courtroom for Clark's hearing.[1] Coleman was stationed in the back of the courtroom and, according to his testimony, he was in the courtroom "for quite a while." Trial Tr. 205:11, July 15, 2019, ECF No. 146 (hereinafter "Tr."). Nothing "untoward" happened during Clark's hearing, and Clark did not act intoxicated. Id. at 203:25–204:1; 232:11-16.

After the hearing was over,[2] Coleman left the courthouse and drove his cruiser to a grocery store parking lot near the courthouse. Because he had been in court for some time, he pulled over to check messages and emails on his work cell phone. While Coleman sat in his cruiser, Clark and his sister, Beth Richardson, drove by. (Clark was the passenger, and his sister was driving.) As they did so, Clark "flipped [Coleman] off." Tr. 206:18.[3]

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[1] Coleman has since been promoted to captain. At the time of the events in question, however, he was a lieutenant.

[2] Both Denise Freeman and Wendy Inzerillo testified to conversations they allegedly overheard that day among Patrick County Sheriff's Deputies regarding a plan to "take down" Clark. Their testimony is omitted here and is not considered by the court for two reasons. First, under the applicable standard of review, the evidence is taken in the light most favorable to Coleman. Because the jury returned a verdict in favor of Coleman, the court works under the assumption that the jury rejected Freeman's and Inzerillo's testimony. Second, even if the testimony were considered, there is no evidence that Coleman participated in any of the alleged conversations, nor is there evidence to suggest that, if such a plan did exist, Coleman was aware of it.

[3] The court assumes, and the parties do not appear to contest, that "flipping" someone off means to display one's middle finger so as to transmit a vulgar message of disapproval.

Coleman followed the car; he radioed the dispatcher his location, the license plate of the car, and the number of occupants, and effectuated a traffic stop on the vehicle. Coleman testified as to his rationale for the traffic stop:

> It took me by surprise. In 20 years of doing this job in uniform, I've never had anybody that would flip me off that was not under the influence of drugs or alcohol or not suffering from some sort of mental illness.

Id. at 206:21-25. Coleman believed "[t]hat he had something going on for him to flip a uniformed police officer off, that I needed to make contact with him." Id. at 207:14-16. Coleman testified that he did not charge Clark with a crime:

> No, I did not. After speaking to him, he didn't act intoxicated. He didn't act like he had any type of mental illness. I was just stopping him because it's very out of the norm for a normal citizen to flip off a police officer. . . . I thought it was quite possible that he either needed assistance for or that he had mistook me for somebody else or he was needing help.

Id. at 215:4-14. Coleman quickly made the assessment that none of this applied to Clark.

> After speaking with him and questioning him about him flipping me off, and his answer, I wasn't angry. He wasn't angry. We didn't get in to a heated discussion on the side of the road. I didn't pull him out of the car. I didn't ask him to step on [sic] the car. He stayed seated. I checked to make sure that he didn't have any other outstanding papers. Once that civil paper was brought to the scene and given a copy to him, he was free to go.

Id. at 215:16-23.

When asked on cross-examination whether a police officer may conduct a traffic stop when a passenger in a vehicle insults an officer, Coleman responded that testified that "[i]t depends." Id. at 231:4-8. Coleman explained the grounds under which such a stop may occur:

> If that person is doing something that would endanger himself or others, if he is or she is acting in a mentally ill way or where they could be a danger to someone else or themselves or someone else, then yes, it would be – it wouldn't be probable cause, but it would be enough for me to have reasonable suspicion that something is not normal with the passenger in that vehicle and I need to investigate further.

Id. at 231:9-18.

Once he pulled the car over, Coleman approached the passenger's side of the car. At no point did Coleman approach, or even speak to, the driver. See Tr. 120:10–11. Coleman asked Clark for his identification, which Clark readily produced. Coleman testified that he asked Clark: "What made you flip me off? Are you okay?" Id. at 210:12–13. Clark said he was waving and disagreed that he flipped Coleman off. Although Coleman testified that he realized at that point that Clark was neither intoxicated nor deranged, he did not send Clark on his way. Rather, Coleman walked back to his police car and called dispatch to run a check on Clark.

During the stop, several other patrol cars arrived to support Coleman as needed. See, e.g., Tr. 146:1–13 (testimony of Dustin Dillon); 152:14–24 (testimony of Shawn Keffer); 161:7–162:5 (testimony of Ronald Williams). At some point, Coleman noticed Denise Freeman, a friend of Clark's, videoing the scene with a cellular phone or iPad from some distance away. For his own safety, Coleman approached Freeman and explained that, while she was free to video him, for officer safety she needed to be in front of him. Ultimately, Coleman issued her a citation for impeding traffic.

Upon calling in Clark's information to dispatch, Coleman was alerted that there were civil papers to be served on Clark. Although the papers in question had been served on Clark

some months prior, Coleman was not aware of that fact, and nothing apparently indicated to him or to the dispatcher that those papers had previously been served. Deputy Shawn Keffer, who had arrived on the scene after Coleman's call out, returned to dispatch, retrieved the papers, returned to the scene, and served the papers on Clark. Although Coleman had taken Clark's driver's license, another deputy returned it to him, and Clark was permitted to leave after approximately 10 – 20 minutes. Neither Clark nor his sister were cited for any crime or traffic infraction. Indeed, Coleman testified that "there was nothing about the way the driver was driving the car that indicated any kind of violation of any traffic laws at all." Id. at 119:14-17.

Clark filed suit against Coleman (and others) on July 10, 2017, alleging violations of his constitutional rights, and this matter was tried by a jury on July 15–16, 2019. At trial, the jury was instructed as follows:

> To succeed on this claim [that Coleman violated Clark's Fourth Amendment rights], the plaintiff must prove each of the following elements by a preponderance of the evidence:
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> First: That the defendant intentionally committed acts that violated the plaintiff's federal constitutional right not to be seized without reasonable suspicion;
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> Second: That the defendant acted under color of law; and
>
> Third: That the defendant's conduct caused the plaintiff's injuries.
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> As regards the first element, the plaintiff claims that the defendant seized him under unreasonable circumstances. In general, a seizure of a person in a traffic stop without a warrant is reasonable if the officer had reasonable suspicion to believe the plaintiff had committed or was committing a crime. In order to prove the seizure in this case was unreasonable, the plaintiff must prove by a preponderance of the evidence that he was arrested without reasonable suspicion. The plaintiff has the burden of proving that the defendant lacked reasonable suspicion for the stop. . . .

> Government officials in general, and police officers in particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity. The Constitution requires that, in the face of verbal challenges to police action, officers and municipalities must respond with restraint. The Constitution protects a significant amount of verbal criticism and challenge directed at police officers. Speech, including expressive gestures, is often provocative and challenging. But it is nevertheless protected against censorship and punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. If you find that the traffic stop was solely in response to constitutionally protected speech or gestures, you must find that the traffic stop was unreasonable.
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> As regards the second element, the parties have agreed that the defendant acted under color of law.
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> As regards the third element, the defendant's conduct caused the plaintiff's injuries if the plaintiff would not have been injured without the defendant's conduct, and the injuries were a reasonably foreseeable consequence of the defendant's conduct.

Jury Instruction No. 15, ECF No. 137. Neither party objected to the instruction. Ultimately, the jury returned a verdict in favor of Coleman, as set forth in the verdict form:

> (1) Was defendant Rob Coleman's traffic stop of plaintiff Brian H. Clark unreasonable, i.e., did the defendant lack reasonable suspicion to stop the vehicle and detain the plaintiff?
>
> a. Yes_____ No ✓
>
> If you answered Yes to this question, go to Question 2. If you answered No, skip the remaining questions, go to the Signature Section at the end of the form, and have your foreperson sign it.

Verdict Form, ECF No. 138.

Thereafter, Clark filed a Motion Pursuant to Rule 50(b) and Rule 59 of the Federal Rules of Civil Procedure (i) to Set Aside the Judgment in Favor of Defendant; (ii) to Set Aside the Jury Verdict; (iii) to Enter a Directed Verdict for Plaintiff; and (iv) to Order a New Trial on Damages. ECF No. 141. Coleman opposed the motion, ECF No. 148, primarily focusing on the reasonableness of the traffic stop. Clark replied, responding to the argument that the vehicle was appropriately siezed. ECF No. 149. The court invited both parties to submit supplemental briefs on the issue of damages, which Coleman did. ECF No.154. The matter is ripe for disposition.

II.

Under Federal Rule of Civil Procedure 50(a), after a party has been fully heard on an issue, if the court finds that a "reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may . . . grant a motion for judgment as a matter of law against the party on a claim . . . ." Fed. R. Civ. P. 50(a)(1)(B). "If the court does not grant a motion for judgment as a matter of law under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion." Fed. R. Civ. P. 50(b). A new trial may be granted after the conclusion of a jury trial. Fed. R. Civ. P. 59(a)(1)(A). "A court, however, may not disturb the verdict where there was sufficient evidence for a reasonable jury to find in the non-movant's favor." Dotson v. Pfizer, Inc., 558 F.3d 284, 292 (4th Cir. 2009) (citing Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 259 (4th Cir. 2001)). "A trial court may not appropriately enter [judgment as a matter of law] unless it concludes, after consideration of the record as a whole in the light most favorable to the non-movant, that the evidence presented supports only one reasonable verdict, in favor

of the moving party." Williams v. Cerberonics, Inc., 871 F.2d 452, 458 (4th Cir. 1989) (citations omitted).

"The burden falls heavily upon a party seeking to set aside a jury verdict, for it is well established that the court must view the jury verdict in the light most favorable to the party in whose favor it is found, and such a party is entitled to the benefit of all inferences which the evidence fairly supports, even though contrary inferences might be drawn." Hackett v. Stuckey's, Inc., 670 F. Supp. 172, 173 (W.D. Va. 1987) (citing Jackson v. Virginia, 443 U.S. 307 (1979)). "Issues of fact are left to the determination of the jury, whose duty it is to determine the credibility of the witnesses, and the court should not substitute its judgment for that of the jury in disputed cases." Id. (citing Jacobs v. The College of William & Mary, 517 F. Supp. 791, 794 (E.D. Va. 1980)). "Only in those rare situations where the jury's verdict is wholly contrary to the law or the evidence, or without evidence to support it, is it proper for the court to grant judgment non obstante verdicto. The applicable standard permits the court to grant the judgment n.o.v. only when 'the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict.'" Id. (quoting Brady v. S. Ry. Co., 320 U.S. 476, 479–80 (1943)).

III.

The issue here is a discrete one: may an officer, consistent with the First and Fourth Amendments, seize a vehicle and its passengers simply because a passenger in the vehicle displayed his middle finger at the officer? "In determining whether a Fourth Amendment violation occurred we draw all reasonable factual inferences in favor of the jury verdict, but as we made clear in Ornelas v. United States, 517 U.S. 690, 697–699 (1996), we do not defer to

the jury's legal conclusion that those facts violate the Constitution." Muehler v. Mena, 544 U.S. 93, 98 n.1 (2005). Neither the facts nor the law support Coleman's argument that the seizure was reasonable under the Fourth Amendment because he did not have "reasonable, articulable suspicion that criminal activity [was] afoot" to stop the vehicle. Illinois v. Wardlow, 528 U.S. 119, 123 (2000) (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)). Further, the seizure is not justified under any Fourth Amendment exception.

A.

The law is this area is well-settled. The Fourth Amendment "prohibits unreasonable searches and seizures by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest." United States v. Arvizu, 534 U.S. 266, 273 (2002) (internal quotation marks omitted). "In the nearly fifty years that have passed since issuing its seminal decision in Terry v. Ohio, the Supreme Court has frequently revisited the issue of reasonableness in the context of traffic stops and made clear that an investigatory stop 'is permissible under the Fourth Amendment if supported by reasonable suspicion' that criminal activity may be afoot." United States v. Stacks, 571 F. App'x 163, 169 (4th Cir. 2014) (per curiam) (quoting Ornelas v. United States, 517 U.S. 690, 693 (1996)). Likewise, a traffic stop may be supported by probable cause that the driver had committed a civil traffic violation. Whren v. United States, 517 U.S. 806, 810 (1996).

At trial, the jury was instructed that a traffic stop was a seizure under the Fourth Amendment, and that a stop is "reasonable if the officer had reasonable suspicion to believe the plaintiff had committed or was committing a crime." Jury Instruction No. 15, ECF No. 137. Even taking the facts in the light most favorable to Coleman, see Szedlock v. Tenet, 139

F. Supp. 2d 725, 729 (E.D. Va. 2001), displaying one's middle finger is not illegal, nor does the gesture "on its own create probable cause or reasonable suspicion that [Clark] violated any law." Cruise-Gulyas v. Minard, 918 F.3d 494, 496 (6th Cir. 2019). "This ancient gesture of insult is not the basis for a reasonable suspicion of a traffic violation or impending criminal activity." Swartz v. Insogna, 704 F.3d 105, 110 (2nd Cir. 2013) (emphasis in original). Here, Coleman based the stop solely on Clark's display of an offensive gesture. On that basis, the stop was not grounded in reasonable suspicion of criminal activity.

In his briefing on the Rule 50 and 59 motions, Coleman argues he had reasonable suspicion that Clark was violating Va. Code Ann. § 18.2-388, which makes public intoxication a crime. Resp. to Rule 50 and 59 Mots., ECF No. 148, at 7-8. This post hoc rationalization, however, cannot be squared with the evidence presented at trial, and specifically Coleman's own testimony. By his own admission, it was his "concern" for Clark's safety that motivated the stop, not suspicion of criminal activity.

Of crucial significance to the court's view of this case is the fact that Coleman had just seen Clark minutes before in court where Clark displayed no "untoward" behavior and did not appear intoxicated. Tr. 203:25-204:1; 232:11-16. Under these circumstances, Coleman's expressed concern over safety cannot ring true.[4]

[4] Moreover, even if Coleman did think Clark was "drunk," the evidence still is insufficient to establish reasonable suspicion that Clark was violating Va. Code Ann. § 18.2-388. "A person is 'intoxicated' if he 'has drunk enough alcoholic beverages to observably affect his manner, disposition, speech, muscular movement, general appearance or behavior.'" United States v. Brown, 401 F.3d 588, 596–97 (4th Cir. 2005) (quoting Va. Code Ann. § 4.1-100). Here, Coleman testified that he observed Clark in court that morning, less than half an hour before he pulled over the car in which he was a passenger. At that time, he did not appear intoxicated to Coleman. Tr. 232:15–16. Thus, aside from his constitutionally protected speech, nothing suggested to Coleman that Clark was intoxicated, much less that Clark was "belligerent to the point where [he was] very intoxicated or could have a mental illness," as Coleman testified was his experience every time he had been "flipped off" before. Tr. 207:8–9. To countenance Coleman's argument would, in no uncertain terms, eviscerate the protections of the First Amendment, albeit for the offensive speech in question here.

In Swartz v. Insogna, the Second Circuit was faced with an officer who asserted the passenger's middle finger indicated to him that the passenger "'was trying to get [his] attention for some reason' and that [the officer] 'was concerned for the female driver.'" 704 F.3d at 110. In rejecting the reasonableness of the stop, the court stated:

> Perhaps there is a police officer somewhere who would interpret an automobile passenger's giving him the finger as a signal of distress, creating a suspicion that something occurring in the automobile warranted investigation. And perhaps that interpretation is what prompted Insogna to act, as he claims. But the nearly universal recognition that this gesture is an insult deprives such an interpretation of reasonableness. This ancient gesture of insult is not the basis for a reasonable suspicion of a traffic violation or impending criminal activity. Surely no passenger planning some wrongful conduct toward another occupant of an automobile would call attention to himself by giving the finger to a police officer. And if there might be an automobile passenger somewhere who will give the finger to a police officer as an ill-advised signal for help, it is far more consistent with all citizens' protection against improper police apprehension to leave that highly unlikely signal without a response than to lend judicial approval to the stopping of every vehicle from which a passenger makes that gesture.
>
> On the Plaintiff's version of the facts, the stop was not lawful . . . .

Id. The same is true here. Even if the jury accepted Coleman's proffered reason for the stop, the basis was not reasonable as a matter of law. And even if it had accepted the argument he raises now—that he believed Clark was intoxicated or mentally ill—that basis is not reasonable as a matter of law.

B.

Even if an officer did not have reasonable suspicion that a crime was afoot, a traffic stop can be justified if one of the limited exceptions to the Fourth Amendment applies. At trial, Coleman's testimony implicated two potential exceptions to the Fourth Amendment: (1)

the community caretaking doctrine, and (2) exigent circumstances existed justifying the seizure. Specifically, Coleman argued that the impetus for his stop was a concern for Coleman's safety and the public welfare. Neither exception to the Fourth Amendment was expressly asserted by Coleman in briefs or at trial, nor was a jury instruction requested on either exception. Regardless, there is insufficient evidence for a jury to find either exception applies to the facts of this case.

The community caretaking exception to the warrant requirement can, under limited circumstances, justify a search or seizure when there is no reasonable basis to believe criminal activity is underway. Cady v. Dombrowski, 413 U.S. 433, 441 (1973). Community caretaking functions include established procedures or routine activities such as impoundment of a vehicle that impedes the safe flow of traffic, entry into a car after a traffic accident to assess occupants' medical conditions, or opening a truck compartment to identify the owner. See South Dakota v. Opperman, 428 U.S. 364, 368-69 (1976); United States v. Johnson, 410 F.3d 137, 145 (4th Cir. 2005); Durney v. Doss, 106 F. App'x 166, 169 (4th Cir. 2004). The Fourth Circuit has held that the community caretaking doctrine also extends to activities "protecting the safety of persons or property." United States v. Gillespie, 332 F. Supp. 2d 923, 929 (W.D. Va. 2004); see Phillips v. Peddle, 7 F. App'x 175, 178 (4th Cir.2001). However, there are two limits to this exception. First, the doctrine can only apply to police activities "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." United States v. Ramage, No. 1:09CR61, 2009 WL 10677237, at *6 (N.D. W. Va. July 13, 2009) (citing Cady, 413 U.S. at 441). Second, there cannot be anything on the record to suggest assertion of this exception is pretextual or in bad faith. United States v.

Gwinn, 219 F.3d 326, 335 (4th Cir. 2000) (finding that officer's reentry into suspect's home to obtain suspect's shoes and shirt was not a Fourth Amendment violation).

In addition to the community caretaking exception to the Fourth Amendment, the Supreme Court and this Circuit have held that more general "emergencies," which evince "a sufficient level of urgency, may also constitute an exigency and justify a warrantless entry and search." United States v. Yengel, 711 F.3d 392, 397 (4th Cir. 2013); see also, Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006); United States v. Hill, 649 F.3d 258, 265 (4th Cir. 2011). Under the exigency exception, the person conducting the seizure "must have had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within." United States v. Moss, 963 F.2d 673, 678 (4th Cir. 1992). "An objectively reasonable belief must be based on specific articulable facts and reasonable inferences that could have been drawn therefrom." Yengel, 711 F.3d at 397; see also Mora v. City of Gaithersburg, 519 F.3d 216, 224 (4th Cir. 2008) (citing Terry v. Ohio, 392 U.S. 1, 21 (1968)). When analyzing whether an exigency exists, courts should give some deference to the decisions of trained law enforcement officers to avoid "'unreasonable second guessing' of the officers' assessment of the circumstances that they faced." Figg v. Schroeder, 312 F.3d 625, 639 (4th Cir. 2002) (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 542 (1985)). However, it is incumbent on courts to gauge the reasonableness of an officer's decision in light of the objective evidence. Id.

The emergency doctrine is similar to, but distinct from, the community caretaker doctrine. Both exceptions to the Fourth Amendment arise out of law enforcement's duty to protect persons and property. Moss, 963 F.2d at 678 (stating the emergency exception to

warrant requirement permits officers to make searches in order "to protect property or persons from immediately threatened harm, or to render assistance to persons in need"); Gillespie, 332 F.Supp.2d at 929 (stating that the community caretaker exception to the warrant requirement "allows officers who are ... protecting the safety of persons or property, to make warrantless searches."). "The community caretaking doctrine requires a court to look at the function performed by a police officer, while the emergency exception requires an analysis of the circumstances to determine whether an emergency requiring immediate action existed. Thus, as the district court noted, the doctrines have different 'intellectual underpinning[s].'" Hunsberger v. Wood, 570 F.3d 546, 554 (4th Cir. 2009) (quoting Hunsberger v. Wood, 564 F.Supp.2d 559, 567 (W.D. Va. 2008)).

The Fourth Circuit has indicated that the community caretaking doctrine is more applicable when officers are engaged in "a routine police procedure, such as the policy of locating weapons in towed cars" and that "the court should examine the programmatic purpose of the policy—whether it was animated by community caretaking considerations or by law enforcement concerns." Hunsberger, 570 F.3d at 554. Under a community caretaking doctrine, the court may also inquire as to the subjective motivations of the officer, in determining whether his public safety concerns were mere pretext. Gillespie, 332 F. Supp. 2d at 929. Alternatively, when an officer is "responding to an emergency, and not as part of a standardized procedure, the exigent circumstances analysis and its accompanying objective standard should apply." Hunsberger, 570 F.3d at 554. Additionally, the Fourth Circuit has emphasized that this "emergency exigency" exception to the warrant requirement justifies "immediate entry as an incident to the service and protective functions of the police as

opposed to, or as a complement to, their law enforcement functions." United States v. Ramage, No. 1:09CR61, 2009 WL 10677237, at *6 (N.D. W.Va. July 13, 2009) (quoting Moss, 963 F.2d at 678). Therefore, where community caretaking activities must be wholly untainted by investigatory motivations, the emergency aid exception can apply to activities more closely tied to law enforcement functions.

The community caretaker doctrine does not apply to the facts of this case. First, Coleman's traffic stop is not "totally divorced" from investigative functions, based on his own representations. A court in this district chose not to apply the community caretaking exception because the warrantless home entry at issue felt closely related to a potential investigation, even though officers testified a search was not conducted until a warrant was obtained. United States v. Davis, No. 4:07CR00014, 2007 WL 2301583, at *4 (W.D. Va. Aug. 9, 2007) ("Nonetheless, I am reluctant to ground this decision solely on the community caretaker exception because looking for a shooting suspect or his potential victims is a situation in which law enforcement's community caretaker functions coincide with their investigative functions."). Similarly, Coleman argued that there existed reasonable suspicion to believe Clark was violating Virginia's public intoxication statute, which forecloses reliance on the community caretaker doctrine to justify his actions. See Johnson, 410 F.3d at 145 ("The exception applies only to conduct that is 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute,' and not when community-caretaking functions are used as 'a subterfuge from criminal investigations.'") (quoting Dombrowski, 413 U.S. at 441). Because Coleman contends he was investigating a potential violation of Va. Code Ann. § 18.2-388, the community caretaking exception cannot

justify his actions. See id. at 143–44 ("Indeed, the exception only applies when the police are not engaged in a criminal investigation . . . .").

Second, Officer Coleman's alleged public safety concern seems questionable, at best. Brigham City, 547 U.S. at 403 ("We begin with the familiar proposition that reasonableness is "the ultimate touchstone of the Fourth Amendment. . ."). Although the Fourth Circuit has not established a standard to evaluate the officer's purported public safety concern, a district court in this circuit applied a "reasonable articulable suspicion" standard to assess the officer's claimed concern. United States v. Tavarez-Rojas, No. 1:07CR126, 2008 WL 622041, at *4 (W.D. N.C. Mar. 4, 2008) ("A Terry stop may also be appropriate where the officer has a reasonable articulable belief that a motorist, while not engaged in unlawful driving, poses a threat to public safety or himself, or appears to be in need of assistance."). In that case, the officer was found to have "clearly articulated reasonable concerns. . . for the safety of the motoring public, to wit, that an accident could be caused if the van's rear bumper fell off or if cargo fell out of what she perceived to be an unlatched and partially open rear cargo hatch." Id. at *5. In another case, the court found officers stated "credibly and reasonably that when they saw defendant and Eason unconscious in the Malibu they were concerned that the two might be having a medical emergency." United States v. Thompson, No. 7:17-CR-164-FL-1, 2018 WL 6174690, at *9 (E.D. N.C. July 11, 2018), report and recommendation adopted, No. 7:17-CR-164-FL-1, 2018 WL 4896721 (E.D. N.C. Oct. 9, 2018). Here, Coleman claims he was concerned Clark was drunk or mentally ill, because he could not fathom why else an individual would flip off a uniformed officer. Critically, however, Coleman had just seen Clark in court, saw no signs of visible intoxication or any other untoward behavior, and knew Clark was not

operating the vehicle he pulled over. Tr. 203:25-204:1; 232:11-16. Coleman's recent observation of Clark in the courtroom calls into question both his suspicion that Clark was a danger to himself, as he had just presented himself in court one half-hour earlier without issue, and his concern for the public, as Clark was not operating the vehicle.

Third, there is evidence in the record that suggests Coleman's assertion of concern for Clark's safety and that of the public was pretextual. Johnson, 410 F.3d 137, 145 (4th Cir. 2005) ("If Officer Bentivegna's stated reasons for the search were pretextual, the community-caretaking exception would not apply."). The fact that Coleman did not permit Clark to leave after confirming he was okay casts doubt on his intentions. See United States v. Taylor, No. 3:09CR249, 2009 WL 3334654, at *7 (E.D. Va. Oct. 14, 2009), aff'd, 624 F.3d 626 (4th Cir. 2010) (applying the community caretaker doctrine to a warrantless entry when an officer terminated the interaction as soon as his concern for a lost child abated). While, "[t]he maximum acceptable length of a routine traffic stop cannot be stated with mathematical precision," the detention should not last "longer than was necessary, given its purpose." United States v. Branch, 537 F.3d 328, 336 (4th Cir. 2008); See Florida v. Royer, 460 U.S. 491, 500 (1983) (plurality opinion). "Thus, once the driver has demonstrated that he is entitled to operate his vehicle, and the police officer has issued the requisite warning or ticket, the driver 'must be allowed to proceed on his way.'" Id. (quoting United States v. Rusher, 966 F.2d 868, 876 (4th Cir.1992)). In Gillespie, the court found a community caretaking claim insufficient, in part because the officers "called for backup, requested a K–9 unit to assist him, and started to interview neighbors," which made their community caretaking claim seem pretextual. Gillespie, 332 F. Supp. 2d at 930. Similarly, Coleman never approached the driver of the

vehicle, and after making sure Clark was okay, he did not permit the car to leave, but rather returned to his vehicle and called dispatch to run a check on Clark. During that time, several other police vehicles arrived. Unlike in Thompson, also a vehicular search and seizure, Coleman did not develop probable cause to prolong the interaction upon seizing the car. Thompson, 2018 WL 6174690 at *9. Whatever reasons Coleman had for prolonging the stop, they seem unrelated to his concern for Clark's or the public's wellbeing.

The facts of this case also fall short of justifying the emergency aid doctrine. The Fourth Circuit has not yet held whether this doctrine can apply to searches and seizures of a vehicle, but the Fifth Circuit has. See United States v. Toussaint, 838 F.3d 503, 507–08 (5th Cir. 2016) ("No federal court of appeals has yet approved (nor has any rejected) the extension of this doctrine to a vehicular stop. But there is no logical difficulty with extending the exception to those particular situations."). Assuming it is applicable, the circumstances at hand still fall short of those required by the emergency aid doctrine. First, Coleman did not possess an objectively reasonable belief that an emergency existed requiring immediate aid. Coleman's only basis for concern was that Clark had made an insulting gesture at an officer. There was no evidence of injury or any kind of weapon. United States v. Ramage, No. 1:09CR61, 2009 WL 10677237, at *8 (N.D. W.Va. July 13, 2009). There was no evidence of violence likely to continue. Brigham City, 547 U.S. at 403. Even if there were sufficient evidence of an emergency, there was no evidence of a situation requiring immediate aid. See Yengel, 711 F.3d at 397-400 (refusing to apply the emergency aid doctrine when officers are informed there is a grenade in the house, because there was insufficient evidence that the grenade was an immediate threat); Gillespie, 332 F. Supp. 2d at 927–28 (refusing to apply the emergency aid doctrine when

officers claimed they were concerned about crying children inside an apartment after they saw two individuals escape from the balcony of that apartment: "Although the officers may have believed that there were children in the apartment and been genuinely concerned about them, their belief that this situation rose to the level of an *emergency which required immediate entry* is not objectively reasonable.")(emphasis in original). Plainly, the attenuated suspicion of unwellness arising out of an offensive gesture does not pass constitutional muster. Moreover, even if the emergency aid doctrine did apply, it could not justify the extended nature of the stop. United States v. Moss, 963 F.2d 673, 678 (4th Cir.1992) ("[W]arrantless entry for emergency reasons ... cannot be used as the occasion for a general voyage of discovery unrelated to the purpose of the entry.").

Taking the evidence in total and giving Coleman and the jury's verdict every supportable inference, there is simply no basis in the law to justify the seizure of Clark on July 25, 2016. The evidence establishes Coleman effectuated a seizure of Clark without reasonable suspicion of wrongdoing, and that his actions, under color of law, amount to a constitutional violation. Because the evidence does not reveal any reasonable basis for the seizure of Clark following his constitutionally protected speech, however crude, inappropriate, and unwarranted it may have been, the jury's verdict is contrary to law and must be set aside, and the court will direct judgment be entered for Clark.

IV.

Because Clark seeks money damages, he must overcome Coleman's qualified immunity. Hunsberger v. Wood, 570 F.3d 546, 552 (4th Cir. 2009). "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages

insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). "Qualified immunity protects law enforcement officers from 'bad guesses in gray areas' and ensures that they are liable only 'for transgressing brightlines.'" Phillips v. Peddle, 7 F. App'x 175, 178 (4th Cir. 2001) (quoting Maciariello v. Sumner, 973 F.2d 295, 298 (4th Cir. 1992).) To evaluate qualified immunity claims, the Fourth Circuit has adopted a two-step analysis: (1) Whether a clearly established right has been violated, and (2) whether a reasonable person in the officer's position "would have known that the officer's conduct would violate that right." Id. As the court holds that pulling over a vehicle without reasonable suspicion of criminal activity or a valid claim of under any established Fourth Amendment exception violates a clearly established right, it must proceed to the second step of the analysis.

The crux of the second prong of this analysis is whether a reasonable officer would have known he cannot pull over a vehicle based on nothing more than the passenger making an insulting gesture at him. The inquiry hinges on "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted," which requires the court to establish the contours of established law at the time. Saucier v. Katz, 533 U.S. 194, 202 (2001)); Smith v. Ray, 855 F. Supp. 2d 569, 578 (E.D. Va. 2012), aff'd, 781 F.3d 95 (4th Cir. 2015) ("This pure question of law turns on the 'objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'") (quoting Wilson v. Layne, 526 U.S. 603, 614 (1999)). The established law must then be applied to the specific facts of the case, to assess the reasonableness of the officer's actions. While the test is an objective one, "the immunity inquiry must be filtered through the lens of the officer's

perceptions at the time of the incident in question." Rowland v. Perry, 41 F.3d 167, 173 (4th Cir. 1994).

Although the Fourth Circuit has yet to rule on these specific facts, the court's review of the established law is not so limited. "In determining whether a right is clearly established, it is not necessary for a court to have previously considered the exact facts at issue, or that there be a case involving 'fundamentally similar' facts, so long as 'in light of the pre-existing law the unlawfulness [is] apparent.'" Garcia v. Montgomery Cty., Maryland, 145 F. Supp. 3d 492, 505–06 (D. Md. 2015) (quoting Hope v. Pelzer, 536 U.S. 730, 739 (2002); see also Buckley v. Rogerson, 133 F.3d 1125, 1129 (8th Cir. 1998) ("In order to determine whether a right is clearly established, it is not necessary that the Supreme Court has directly addressed the issue, nor does the precise action or omission in question need to have been held unlawful. In the absence of binding precedent, a court should look to all available decisional law, including decisions of state courts, other circuits, and district courts.") (citations omitted). Indeed, "officials can still be on notice that their conduct violates established law even in novel factual circumstances," as long as they had "fair warning" that their conduct was unconstitutional. Pelzer, 536 U.S. at 740–41.

At summary judgment, the court held that Coleman's claim of qualified immunity did not withstand scrutiny and would be denied. It found that "even if Plaintiff did "gig"[5] Coleman, [] the law clearly establishes that a traffic stop under those circumstances would not comport with the First or Fourth Amendments." Clark v. Coleman, 335 F. Supp. 3d 818, 828 (W.D. Va. 2018). Although Coleman renewed his qualified immunity claim at trial, the court

[5] The court understands this term to mean showing the middle finger.

finds no new basis on which to find qualified immunity applies to the unlawful seizure. The court thoroughly evaluated the argument that qualified immunity should apply to Coleman's assertion that Clark's insulting gesture gave rise to reasonable articulable suspicion of a crime. Id. Following trial, the court must address whether Coleman's public safety concern, though insufficient to give rise to a valid community caretaking or emergency aid claim, is protected by qualified immunity. In other words, does Clark have a clearly established right against seizure by an officer who is concerned about his own welfare and the welfare of others simply because he made an offensive gesture? The court finds that he does.

It is axiomatic that officers are on abundant notice of stringent free speech protections. Gestures intended to communicate ideas are protected speech under the First Amendment of the Constitution, subject to strict limitations. Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) ("Speech is often provocative and challenging . . .[But it] is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."). "Fighting words" are not protected. City of Houston v. Hill, 482 U.S. 451 (1987). The Supreme Court has held on numerous occasions that the "First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." Hill, 482 U.S. at 461. It has said that "[t]he freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principal characteristics by which we distinguish a free nation from a police state." Id. at 463. In his concurring opinion, Justice Powell suggested that "even the 'fighting words' exception recognized in Chaplinsky . . . might require a narrower application in cases involving words addressed to a police officer, because 'a properly

trained officer may reasonably be expected to exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'" Id. at 462 (quoting Lewis v. City of New Orleans, 415 U.S. 130, 135(1974); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)). Officers must surmount a high constitutional bar to interpret expression as giving rise to police action, even under their protect and serve duties.

Coleman cannot make a colorable claim that presenting the middle finger gives rise to a reasonable concern for public safety. Courts across the country have refused to find that offensive language or gestures rise to the level of fighting words that would cause a reasonable officer concern about public safety. Clark, 335 F. Supp. 3d at 828. In fact, many have refused to apply qualified immunity to parallel fact patterns. See, e.g., Nichols v. Chacon, 110 F. Supp. 2d 1099, 1103 (W.D. Ark. 2000), aff'd, 19 F. App'x 471 (8th Cir. 2001) ("This is far from the first case in which a private citizen has either by words or gesture communicated an offensive message to a law enforcement officer. Nor is much of this body of law of recent vintage."); Minard, 918 F.3d at 497 (stating "no matter how he slices it, Cruise-Gulyas's crude gesture could not provide that new justification," for plaintiff's seizure under any Fourth Amendment theory); Stearns v. Clarkson, 615 F.3d 1278, 1283 (10th Cir. 2010) (denying qualified immunity when an officer makes an arrest on an individual who was "loud, belligerent, smelled of alcohol, and pointed his finger at Officer Venable while using profanity"); Duran v. City of Douglas, Ariz., 904 F.2d 1372, 1378 (9th Cir. 1990) ("No less well established is the principle that government officials in general, and police officers in particular, may not exercise their authority for personal motives, particularly in response to real or perceived slights to their dignity. Surely anyone who takes an oath of office knows—or should know—that much.");

Patel v. Dennett, 389 F. Supp. 3d 888, 896 (D. Nev. 2018) ("And because it is clearly established that a citizen has the First Amendment right to criticize officers, even with profanity, Dennett is not entitled to qualified immunity on this claim."). Indeed, similar to the instant case, the Sixth Circuit in Sandul v. Larion, the court denied qualified immunity when an officer detained an individual who "leaned out of the vehicle as it passed by the abortion protesters and shouted 'f—k you,' and extended his middle finger to the group" in part because the individual was the passenger, not the driver, and the car was far from the target of the offensive behavior. 119 F.3d 1250, 1252 (6th Cir. 1997).

Moreover, Coleman's claim for qualified immunity cannot rest on his concern for Clark's and the public's wellbeing. Critically, Coleman had just seen Clark in court minutes before where Clark appeared neither intoxicated nor dangerous. Moreover, as the vehicle's passenger, nothing about Clark's insulting display, however repugnant, objectively suggests any risk to public safety. Given the particular circumstances of this case, in which Coleman had just observed Clark's behavior in the courtroom minutes before the rude gesture, no reasonable officer could have maintained an objectively reasonable concern for public safety warranting a seizure under the Fourth Amendment.

V.

Although the verdict cannot stand, the court declines Clark's motion for a partial new trial on the issue of damages. "The granting of a new trial is a matter resting in the sound discretion of the trial judge, and his action is not reviewable upon appeal except in the most exceptional circumstances." Wadsworth v. Clindon, 846 F.2d 265, 266 (4th Cir. 1988).

The court sees no reason to empanel a new jury on the issue of damages, because Clark did not demonstrate at trial the existence of any compensable injury. The court has wide discretion to decline a request for a partial new trial. Fabri v. The Hartford, 69 F. App'x 187, 192 (4th Cir. 2003) (stating that decisions to deny a new trial on the issue of damages are reviewed for abuse of discretion). Clark indicates here that the jury did not reach the question of damages in the instant case, because they resolved the matter for the defendant on the reasonableness of the stop. Mem. in Supp. of Rule 50 and 59 Mots., ECF No. 142, at 6-7. However, as Coleman contends, "[a] Rule 59(e) motion is neither a second bite at the apple nor an opportunity for a litigant to raise issues it could have raised in the first instance prior to entry of judgment." Supp. Mem. in Opp'n to Rule 50 and 59 Mots., ECF No. 154, at 2 (citing OpenRisk, LLC v. MicroStrategy Servs. Corp., 876 F.3d 518, 529 (4th Cir. 2017)). Clark has indicated no newly discovered evidence and so the court evaluates the request for a partial new trial based on the record. The Supreme Court directs that "determination of whether a new trial should be granted or a judgment entered under Rule 50(b) calls for the judgment in the first instance of the judge who saw and heard the witnesses and has the feel of the case." Globe Liquor Co. v. San Roman 332 U.S. 571, 572 (1948). As the court has heard from all witnesses and reviewed all evidence, it is fit to make a determination as to the existence of compensable damages. In denying Clark's motion for new trial on the issue of damages, the court finds as a matter of law that Clark did not prove injury.

Based on the evidence submit at trial, the court finds that Clark has not presented any evidence from which a jury could find the existence of compensable damages. From the outset, Clark did not plead with any specificity an amount of compensable damages sought. At trial,

Clark conceded the briefness of the detention and minimality of the inconvenience. Tr. 12:12-24. Clark claims he felt threatened but does not present any evidence of emotional distress. Tr. 88:19-21. "A plaintiff seeking compensatory damages for emotional injuries cannot rely on 'conclusory statements that the plaintiff suffered emotional distress [or] the mere fact that a constitutional violation occurred,' but, rather, 'the testimony must establish that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated.'" Knussman v. Maryland, 272 F.3d 625, 640 (4th Cir. 2001) (quoting Price v. City of Charlotte, 93 F.3d 1241, 1254 (4th Cir. 1996)). Although Clark claims he lost government contracts because his security clearance was delayed, he presented no link between the traffic stop and any delay in his security clearance beyond the wild speculation. Indeed, Clark conceded that there was no public record of his encounter with Coleman beyond this lawsuit. Tr. 106:4-19; 107:8-25; 108:1-8; 112:6-18. As the Fourth Circuit has held, injury "experienced as a by-product of litigation or the grievance process was not caused by 'the constitutional deprivation itself'" and is therefore not compensable. Id. at 641 (quoting Price, 93 F.3d at 1250).

In the absence of a compensable injury, the court is free to award nominal damages. See Carey v. Phiphus, 425 U.S. 247, 248 (1978); Farrar v. Hobby 506 U.S. 103, 121 (1992) ("Carey obligates a court to award nominal damages when a plaintiff establishes the violation of [a constitutional right] but cannot prove actual injury"). Under common law, courts can vindicate absolute rights through the award of a nominal sum of money, even without proof of actual injury. Carey, 425 U.S. at 266. In doing so, "the law recognizes the importance to organized society that those rights be scrupulously observed." Id. The right against unreasonable stops is such a right in that its existence "does not depend upon the merits of a

claimant's substantive assertions." Id. However, the brevity of the detention and the lack of demonstrable injury warrants no more than nominal damages. See, e.g., Norwood v. Bain, 166 F.3d 243, 245 (4th Cir. 1999) (en banc) (concluding that plaintiffs who were unconstitutionally searched and seized for a brief period of time were only entitled to nominal damages).

Punitive damages are not an issue in this case. Punitive damages under 42 U.S.C. § 1983 are appropriate "when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56 (1983). Here, no evidence was submitted to the jury on which it could conclude that Coleman's conduct was motivated by evil intent. To the contrary, the only evidence on this point was that Coleman had no ill will towards Clark. Insofar as there was testimony that Coleman was angry, even assuming the jury credited that testimony, that anger was directed at Freeman, not Clark. Furthermore, assuming there was a plan to "take down" Clark, there is no evidence whatsoever that Coleman was aware of any such plan, much less a participant in conversations regarding any such a plan or a willing participant in any such conspiracy.

Likewise, the evidence does not establish that Coleman's actions amounted to "reckless or callous indifference" to Clark's federally protected rights. Id. The only evidence regarding Coleman's motives for his actions was his professed concern for Clark's wellbeing, and the evidence of a conspiracy to "take down" Clark simply does not implicate Coleman.[6] Absent any competent evidence that Coleman's actions were motivated by anything other than a

[6] The jury apparently credited Coleman's testimony that, during his entire career, he has never known of anyone to "flip off" a uniformed police officer unless the person was intoxicated or mentally ill. Because the court is required to give all reasonable inferences to Coleman, the court is bound to accept that rationale.

misunderstanding of the limits of his constitutional authority, there is simply no basis to submit the question of punitive damages to a jury.

The court may grant Clark attorney's fees. To qualify for attorney's fees, a party must meet the definition of "prevailing party" under the civil rights attorney's fees provision. 42 U.S.C.A. §1988. To be a "prevailing party," a plaintiff must obtain an enforceable judgment against defendant from whom fees are sought, which in this case, would be the judgment to award Clark nominal damages. Farrar v. Hobby, 506 U.S. at 112-13. "A judgment for damages in any amount, whether compensatory or nominal, modifies the defendant's behavior for the plaintiff's benefit by forcing the defendant to pay an amount of money he otherwise would not pay." Id. In some instances, the court may not award the prevailing party attorney's fees if so granting would result in a windfall to said attorneys. Riverside v. Rivera, 466 U.S. 561, 580 (1986). "When a plaintiff recovers only nominal damages because of his failure to prove an essential element of his claim for monetary relief, the only reasonable fee is usually no fee at all. Farrar, 506 U.S. at 115 (internal citations omitted).

However, the Fourth Circuit has held "[b]ecause the Court in Farrar held that plaintiffs recovering only nominal damages usually or often will not be entitled to an award of attorney's fees, it is clear that such plaintiffs will at least sometimes be entitled to a fee award." Mercer v. Duke Univ., 401 F.3d 199, 203 (4th Cir. 2005); see also Clark v. Sims, 28 F.3d 420, 424–25 (4th Cir. 1994) (remanding for district court to consider attorney's fee request by plaintiff who was awarded only nominal damages). In discerning nominal damage cases that do not warrant attorney's fees from the ones that do, the Fourth Circuit looks at factors identified by Justice O'Connor in Farrar, including "'the extent of relief, the significance of the legal issue on which

the plaintiff prevailed, and the public purpose served' by the litigation." Mercer, 401 F.3d at 204 (remanding for district court to consider attorney's fee request by plaintiff who was awarded only nominal damages).

Upon balancing the factors, the court finds plaintiff is eligible for attorney's fees. The first factor instructs the court to compare the amount of compensable damages sought to the amount awarded. Id. at 206. While an award of nominal damages may appear limited relief, Clark never specified the damages he sought, primarily seeking a liability finding, condemnation of the officer's behavior, and punitive damages. Tr. 12:12-24 (conceding that compensable damages were limited but that a right was violated, requesting punitive damages). The second factor "is concerned with the general legal importance of the issue on which the plaintiff prevailed." Mercer, 401 F.3d at 206 (holding that discrimination against woman is an important legal issue). See, e.g., Maul v. Constan, 23 F.3d 143, 145 (7th Cir. 1994) ("[W]e understand the second Farrar factor to address the legal import of the constitutional claim on which plaintiff prevailed."); Piper v. Oliver, 69 F.3d 875, 877 (8th Cir. 1995) (explaining that the plaintiff's "right to be free from illegal detention was a significant one"). An unreasonable stop based on an insluting gesture implicates not one, but two constitutional violations, and so this case is plainly of legal significance. The third factor evaluates the public purpose served by the litigation, "as opposed to simply vindicating the plaintiff's individual rights." Mercer, 401 F.3d at 207. In Mercer, although the court found that the plaintiff "ultimately obtained only limited success in her claim against Duke," the precedential value of the case could extend beyond the suit at hand. Id. at 208-09. Similarly, courts in this circuit have not had the opportunity to determine the outer bounds of how the Fourth Amendment's requirements of

reasonable suspicions interacts with First Amendment freedoms. That this court has had an opportunity to resolve the matter helps guide both officer behavior and future judicial determinations. See, e.g. Project Vote/Voting for Am., Inc. v. Dickerson, 444 F. App'x 660, 664 (4th Cir. 2011) ("Here, Plaintiffs successfully brought a meritorious civil rights claim to prevent the enforcement of an unconstitutional government regulation in the public interest; this is the very form of litigation Congress wished to encourage by enacting § 1988."); Daly v. Hill, 790 F.2d 1071, 1084 (4th Cir.1986) ("[Section] 1988 is intended to encourage [civil rights plaintiffs] to bring suit by shifting the costs of litigation to defendants who have been found to be wrongdoers.").

VI.

The jury's verdict lacks a "legally sufficient evidentiary basis . . . ." Fed. R. Civ. P. 50(a). Pursuant to Fed. R. Civ. P. 50(b), judgment will be entered for Clark. Pursuant to Rule 50(c)(1), the court **GRANTS** Clark's motion to set aside the jury verdict and enter a judgment in his favor. The court **DENIES** Clark's motion for a new trial on the issue of damages, instead awarding Clark nominal damages of $1 and attorney's fees.

The clerk is directed to forward a copy of this Memorandum Opinion and accompanying Order to all counsel of record.

ENTERED: March 23, 2020

Michael F. Urbanski

Digitally signed by Michael F. Urbanski
DN: cn=Michael F. Urbanski, o=Western District of Virginia, ou=United States District Court, email=mikeu@vawd.uscourts.gov, c=US
Date: 2020.03.23 15:40:03 -04'00'

Hon. Michael F. Urbanski
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

BRIAN H. CLARK,	)	
Plaintiff,	)	**Civil Action No. 4:17-cv-00045**
	)	
v.	)	
	)	**By: Hon. Michael F. Urbanski**
ROB COLEMAN,	)	**Chief United States District Judge**
Defendant.	)	

ORDER

This matter is before the court on Plaintiff Brian H. Clark's Motion Pursuant to Rule 50(b) and 59 of the Federal Rules of Civil Procedure (A) to Set Aside the Judgment in Favor of Defendant; (B) to Set Aside the Jury Verdict; (C) to Enter a Directed Verdict for Plaintiff; and (D) to Order a New Trial on Damages. ECF No. 141. These matters have been briefed and the court has reviewed the evidence and argument of counsel.

For the reasons stated in the Memorandum Opinion filed herewith, Plaintiff's Motion to Set Aside the Judgment in Favor of Defendant, ECF No. 141, is hereby **GRANTED**. The jury's verdict is set aside, the judgment is set aside, and the court enters **JUDGMENT** on behalf of Clark. However, Plaintiff's Motion for a New Trial on Damages, ECF No. 141, is **DENIED.** The court **GRANTS** the Plaintiff nominal damages of $1 as well as attorney's fees.

It is so **ORDERED.**

Entered: March 23, 2020

Michael F. Urbanski

Digitally signed by Michael F. Urbanski
DN: cn=Michael F. Urbanski, o=Western District of Virginia, ou=United States District Court, email=mikeu@vawd.uscourts.gov, c=US
Date: 2020.03.23 15:41:58 -04'00'

Hon. Michael F. Urbanski
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION
Federal Courthouse
700 Main Street
Danville, Virginia 24541

BRIAN H. CLARK,
Plaintiff,

v. Civil Action No. 4:17-cv-00045-JLK-RSB

ROB COLEMAN

Defendant,

DECLARATION OF HENRY W. MCLAUGHLIN
IN SUPPORT OF BILL OF COSTS

Henry W. McLaughlin, under penalty of perjury, declares the following:

1. I am an adult and have personal knowledge of and am competent to make declaration of the matters stated herein.
2. I am counsel for Brian H. Clark ("Clark") in the above referenced matter.
3. On March 24, 2020, the Court granted judgment in favor of Clark in the above-styled case

   For nominal damages and attorney's fees.
4. As counsel for Clark, I will file a separate pleading seeking an amount olf attorney's fees.
5. Except for attorney's fees, the costs of Clark against Coleman in this case are the following:

   A. $57.14, which is one-seventh of the filing fee for filing this case against seven defendants, with Robe Coleman one of those defendants.

B. $125 for personal service of the complaint on Coleman.

C. $75.00 for service of process on Carolyn Cobbler to appear in deposition in this case on September 5, 2018.

D. $78.50 for the fee for attendance by Carolyn Cobbler as witness at a deposition of her in this case on September 5, 2019.

E. $257.10 for the cost of the deposition of Carolyn Cobbler on Septemb4er 5, 2019.

Total: $592.74

6. Attached hereto marked "Exhibit A" is a copy of such documentation as I submit is needed to support this declaration.

7. Under Fed R. Civ. P. 54 (d), costs other than attorney's fees shall be allowed as a matter of course to the prevailing party unless the Court directs otherwise.

8. The foregoing itemization of cortss were appropriately expended in this case.

Pursuant to 28 U.S. C. Section 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Henry W. McLaughlin

Respectfully submitted,

BRIAN H. CLARK,

By /s/ Henry W. McLaughlin
Counsel

Henry W. McLaughlin (VSB No 07105)
The Law Office of Henry McLaughlin, P.C.

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Richmond, Virginia 23219
(804) 205-9020; fax (804) 205-9029
henry@mclaughlinvalaw.com
Counsel for Brian H. Clark .

CERTIFICATE

I, Henry W. McLaughlin, counsel for Brian H. Clark, certify that on the 1st day of April, 2020, the foregoing will be filed electronically with the ECF filing System of the U.S. District Court for the Western District of Virginia, Danville Division, which will notify the following of the same:

John Chadwick Johnson,
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/s/ Henry McLaughlin

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION
Federal Courthouse
700 Main Street
Danville, Virginia 24541

BRIAN H. CLARK,
Plaintiff,

v. Civil Action No. 4:17-cv-00045-JLK-RSB

ROB COLEMAN

Defendant,

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IN SUPPORT OF BILL OF COSTS

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Henry W. McLaughlin

Respectfully submitted,

BRIAN H. CLARK,

By /s/ Henry W. McLaughlin
Counsel

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henry@mclaughlinvalaw.com
Counsel for Brian H. Clark .

CERTIFICATE

I, Henry W. McLaughlin, counsel for Brian H. Clark, certify that on the 1st day of April, 2020, the foregoing will be filed electronically with the ECF filing System of the U.S. District Court for the Western District of Virginia, Danville Division, which will notify the following of the same:

John Chadwick Johnson,
Esquire Frith Anderson & Peake, PC
29 Franklin Road, SW
Roanoke, Virginia 24011
jjohnson@faplawfom.com

Nathan H. Schnetaler, Esquire
Frith Anderson & Peake, P.C.
29 Franklin Road, SW
P. O. Box 1240
Roanok, Virginia 24006-1240
nschnetzler@faplawfirm.com

/s/ Henry McLaughlin

Henry W. McLaughlin (VSB No 07105) The Law Office of Henry McLaughlin, P.C. 707 East Main Street, Suite 1050
Richmond, Virginia 23219
(804) 205-9020; fax (877) 575-0245
henry@mclaughlinvalaw.com
Counsel for Brian H. Clark.

Exhibit A

Courier One

Customer Number
92
Invoice Number
21260
Invoice Date
10/7/2017

Courier One
1011 E Main St

References BEKENSTEIN

On Demand

Date Ready / Order Type / Deliver Date	Order ID / Caller	Origin	Destination	References / Billing Group	
10/4/2017 1:22 PM Routine 10/4/2017 1:58 PM	300429	Henry McLaughlin 707 E Main St Ste 1050 Richmond VA 23219	Jmcc 400 N 9th St Richmond VA 23219	Bekenstein	
			Routine		$7.15
POD: Harrus			**Order Total:**		**$7.15**

On Demand Totals: $7.15

References - BEKENSTEIN Total: $7.15

References BRIAN CLARK

On Demand

Date Ready / Order Type / Deliver Date	Order ID / Caller	Origin	Destination	References / Billing Group	
10/5/2017 12:00 PM Standard 10/6/2017 11:10 AM	300449	Courier One Process Servers 1011 E Main St Ste Ll55 Richmond VA 23219	Lt. Rob Coleman 742 Commerce St Patrick Count Stuart VA 24171	Brian Clark	
			Standard		$125.00
POD: Felicia Heymore			**Order Total:**		**$125.00**
10/5/2017 12:00 PM Standard 10/6/2017 11:12 AM	300450	Courier One Process Servers 1011 E Main St Ste Ll55 Richmond VA 23219	Geri Hazelwood 106 Rucker St Patrick County Ac Stuart VA 24171	Brian Clark	
			Standard		$125.00
POD: Melissa Shively			**Order Total:**		**$125.00**
10/5/2017 12:00 PM Standard 10/6/2017 11:13 AM	300451	Courier One Process Servers 1011 E Main St Ste Ll55 Richmond VA 23219	Sheriff Daniel Smith 742 Commerce St Patrick Count Stuart VA 24171	Brian Clark	
			Standard		$125.00
POD: Felicia Heymore			**Order Total:**		**$125.00**

On Demand Totals: $375.00

References - BRIAN CLARK Total: $375.00

References DOUGLAS W. HILL

On Demand

Date Ready / Order Type / Deliver Date	Order ID / Caller	Origin	Destination	References / Billing Group	
10/6/2017 11:38 AM Standard 10/6/2017 4:42 PM	300653	Courier One Process Servers 1011 E Main St Ste Ll55 Richmond VA 23219	Equity Trustees Llc 2101 Wilson Boulevard Arlington VA 22201	Douglas W. Hill	
			Standard		$165.68
POD: Betty Ann Ledford			**Order Total:**		**$165.68**

On Demand Totals: $165.68

References - DOUGLAS W. HILL Total: $165.68

Courier One

Customer Number
92
Invoice Number
25060
Invoice Date
9/2/2018

Courier One
1011 E Main St

References — CLARK V. COLEMAN

On Demand

Date Ready / Order Type / Deliver Date	Order ID / Caller	Origin	Destination		References / Billing Group
9/1/2018 9:35 AM	328382	Courier One Process Servers	Carolyn Cobbler		CLARK V. COLEMAN
Rush		1011 E Main St Ste LI55	101 W Blue Ridge St		
9/1/2018 9:36 AM		Richmond VA 23219	Stuart VA 24171		
			Rush	$75.00	
POD:			Order Total:	$75.00	
9/1/2018 9:37 AM	328383	Courier One Process Servers	Ralph Carroll		CLARK V. COLEMAN
Rush		1011 E Main St Ste LI55	42 Commerce St		
9/1/2018 9:36 AM		Richmond VA 23219	Stuart VA 24171		
			Rush	$75.00	
POD:			Order Total:	$75.00	

On Demand Totals: $150.00

References - CLARK V. COLEMAN Total: $150.00

Customer Total: $150.00

INVOICE

RAY REPORTING
6120 Burnt Chimney Road
Wirtz, VA 24184
raycourtreporting@gmail.com
540-397-9603

INVOICE NO. 004438
September 26, 2018
CASE CAPTION:
Clark v. Coleman
Job Date: 9.5.18

Henry McLaughlin, Esquire
The Law Office of Henry McLaughlin, PC
707 East Main Street
Richmond, Virginia 23219

Original transcript of Carolyn Cobbler, 39 pgs.	152.10
Reporter attendance (your share)	105.00
Total	257.10

Thank you – Ray Reporting

We appreciate your business!

INVOICE DUE WITHIN 30 DAYS
TAX ID: 54-2007642

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Western District of Virginia

Brian H. Clark
Plaintiff
v.
Rob Coleman
Defendant

Civil Action No. 4:17-cv-00045-JLK-RSB

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Carolyn Cobbler

(Name of person to whom this subpoena is directed)

☑ *Testimony:* **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place:	Date and Time:
Conference Room, Fayerdale Hall, virginia State Park, Patrick County, Virginia; 967 Fairystone Lake Drive, Stuart, Virginia 24171	09/05/2018 2:00 am

The deposition will be recorded by this method: Certified Court Reporter

☐ *Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

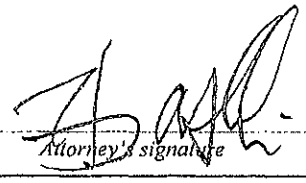
The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 08/23/2018

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk



Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Brian H. Clark, who issues or requests this subpoena, are:

Henry W. McLaughlin, Law Office of Henry McLaughlin, P.C., 707 E. Main St., Ste 1050, Richmond, VA 23219; henry@mclaughlinvalaw.com; (804) 205-9020

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

AO 88A (Rev. 02/14) Subpoena to Testify at a Deposition in a Civil Action (Page 2)

Civil Action No. 4:17-cv-00045-JLK-RSB

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* Carolyn Cobbler
on *(date)* 8-24-18

☒ I served the subpoena by delivering a copy to the named individual as follows: Carthead

_____ on *(date)* _____ ; or

☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ 78.50 .

My fees are $ 34.50 for travel and $ 44.00 for services, for a total of $ 78.50 .

I declare under penalty of perjury that this information is true.

Date: 8-24-18

_____
Server's signature

Albert Schmidt
Printed name and title

7011 E Main St Richmond, VA 23228
Server's address

Additional information regarding attempted service, etc.:

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION
Federal Courthouse
700 Main Street
Danville, Virginia 24541

BRIAN H. CLARK,
Plaintiff,

v. Civil Action No. 4: 17-cv-00045-JLK-RSB

ROB COLEMAN
Defendant,

DECLARATION REGARDING ATTORNEY'S FEES

Counsel for Brian H. Clark ("Clark") sets forth the following declaration regarding Clark's claim for attorney's fees:

1. This declaration limits matters regarding attorney's fees in this case to matters after this Court's Memorandum Opinions in mid-September, 2018, after which this case was narrowed as to parties, leaving only Clark and Rob Coleman ("Coleman") as parties.
2. Attached hereto marked "Exhibit A" is a resume of Clark's counsel, who normally charges by the job not the hour but whose hourly rate is $500.
3. Attached hereto marked "Exhibit B" is a copy of a retainer agreement between Clark and me.
4. As set forth in Exhibit B, Clark paid $7,500 attorney fee, plus out-of-pocket costs for what was described in Exhibit B as a lawsuit to be filed against Rob Coleman and, as appropriate, other personnel of the Sheriff's Department of Patrick County, Virginia.
5. Clark's counsel filed suit on behalf of Clark against Rob Coleman, the sheriff of Patrick County, Virginia, and other deputies, however, the claims against the sheriff and other deputies were dismissed by the Court on motions for summary judgment in September 2018.

6. At to the work in this case of Clark's counsel as regards defendants in this case who were personnel in the sheriff's department of Patrick County, Virginia –at least 75% was for work maintaining Clark's claim in this case against Rob Coleman.

7. This is a reconstruction of hours worked on this case in this Court after the Court narrowed this case to Clark's claim against Rob Coleman.

8. In mid-July, 2020, Clark's counsel did a reconstruction of work done in this case in this Court on behalf of Clark against Rob Coleman beginning mid-September 2018 until July 16, 2019 was is as follows:

   A. 9-4- 18. Filing of witness and exhibit list: Half hour.

   B. 9-5-19 Taking deposition of Carolyn Cobbler, defending deposition of Brian Clark: 8.5 hours (including travel).

   C. 3-28-19. Defending deposition of Wendy Inzerelli, Beth Richardson, and Denise Freeman 7 hrs. (including travel)

   D. 7-1-19 Memorandum opposing motion in limine. 1 hr.

   E. 7-8-19 First proposed jury instructions. 1.5 hrs.

   F. 7-8-19 Oral argument on motions in limine and meeting with Magistrate Judge on potential settlement. 8 hrs. (including travel)

   G. 7-14-19 Preparation for trial. 3 hrs..

   H. 7-15-19 Trial (including travel) 15hrs.

   I. 7-16-19 2nd day of trial. At least 4.5 hrs.

9. On April 1, 2020, Clark's counsel did a reconstruction of work done on this case after mid-July, 2020 as follows:

A. August 12, 2019. Preparation for filing Rule 58 motion and supporting memorandum 2.0 hours.

B. September 2019. Preparation of reply to memorandum in opposition to Rule 59 motion and motion and memorandum seeking leave to file late reply. 1.5 hrs.

10. The total of the above is 52.5 hours, which at the $500 hourly rate of Clark's counsel (referenced in Exhibit B) would total $26,250. Clark's actual payment to his counsel to date pursuant to the aforesaid retainer (Exhibit B) has been $7,500, plus out-of-pocket expenses (also included in the said retainer).

11. Part of out-of-pocket costs included in such retainer were for costs included in a bill of costs submitted by Clark's counsel in this case and not, therefore, duplicated here.

12. Other out-of-pocket costs included in such retainer – related solely to Clark's claim against Rob Coleman have been the following:

A.	September 5,2018 mileage to Stuart, Virginia and return for deposition of Carolyn Cobbler	$199.00
B.	March 28, 2019 mileage to Roanoke and back to Richmond to defend in depositions taken by Rob Coleman's counsel	$187.00
C.	July 15, 2019, mileage to Danville and return to Richmond for trial.	$144.00
D.	July 16, 2019, mileage to Danville and return to	
E.	Richmond for trial.	$144.00
	Total of such costs	$665.00

Under penalty of perjury, I declare this 2nd day of April, 2020, that the foregoing is true and correct to the best of my knowledge, information and belief.

Henry W. McLaughlin

Exhibit A

HENRY W. McLAUGHLIN
3504 Hermitage Road, Richmond, Virginia 23227
(804) 205-9020 (W) (804) 572-5865 (C)
henry@mclaughlinvalaw.com

EDUCATION

Legal	LL.B., University of Virginia, 1966
Undergraduate	B.A., English, Princeton University, 1962 Head of "Princeton Tiger," campus humor magazine

BAR ADMISSIONS State and federal coults in Virginia

EXPERIENCE

LAW OFFICE OF HENRY MCLAUGHLIN, P.C., April 20 I0 to Present (Private Practice):

Counsel of record in the following successful appeals to the Virginia Supreme Court: *Brian D. Parrish and Teresa D. Parrish V Federal National Mortgage Association,* 292 Va 44; 787; S.E. 2d 116 (2016), *Squire v. Va. Haus. Dev. Auth.,* 2014 Va. LEXIS 55 (2014; *Mathews v. PHH Mortg. Co,p.,* 283 Va. 723, 724 S.E.2d 196, (Va. 2012). *(pro bona* for Central Virginia Legal Aid Society)

CENTRAL VIRGINIA LEGAL AID SOCIETY INC. (CVLAS)
March 1990 - March 20 I 0
Executive Director
In charge of LSC filed program serving Richmond and six surrounding counties. Manage an annual budge of over $1.2 millions. Other than from LSC, 1994 funding sources are from civil filing fees and IOLTA, through Legal Service Corporation of Virginia (LSCV), OAA, United Way, City of Richmond, Virginia Law Foundation, contributions from local law firms. Experienced in all aspects of legal aid management: long-term planning, management of operations, funding compliance, fiscal administration, program innovation. Maintain full caseload, specializing in prevention of home foreclosure without bankruptcy. Among counsel in two federal cases seeking calls certification one is which class certification was denied but nationwide relief granted, upheld by Court of Appeals; the other, a RICO case, now pending in District Court

Initiatives (with board, bar associations, client council)

- *Pro bona* hotline sponsored by The Virginia Bar Association, begun August 1992; pro bono lawyers come to legal aid to give telephone legal advice.

- Richmond Bar Association *pro bona* lawyers come to legal aid for intake in housing and consumer (previously domestic) cases, taking contested cases back to their offices for representation. The association won 1991 ABA Harrison Tweed Award for sponsoring this program (begun in 1989 when CVLAS management was with co-director).
- Experimental programs in client helping clients, sponsored by Central Virginia Client Council, including 1993 assistance by client-eligible volunteers to clients waiting in CVLAS reception area as to earned income tax credit; 1990 Council help to tenants in making written comments to proposed changes in public housing lease; 1993 grassroots lobbying opposing cuts and favoring restoration in benefit levels for recipients of General Relief.
- Non-competitive promotion of lawyer and support staff into management with option for those with outstanding service and considerable seniority for significant increase in salary with increased weekly hours. (Begun in 1980's when CVLAS management ,vas with co-director).

Executive Co-Director October 1982 - March 1990
In charge of program on partnership basis with other co-director until she became a judge.

Initiatives (with co-director)
- Implemented night and Saturday staffing.
- Established weekly live call-in radio program, "Lawline", in which *pro bona* and staff lawyers answered legal questions.

NEIGHBORHOOD LEGAL AID SOCIETY, INC. February 1978 - October 1982
Began as **Managing Attorney**, promoted to **Executive Director** in 1981.
MLAS was LSC recipient for same service area as its successor, CVLAS. NLAS had annual budget of over $555,000. Proposed and helped coordinate merger with Metropolitan Richmond Legal Aid Society, Inc., a bar sponsored program; merger was completed in October, 1982.

MCLAUGHLIN & MCLAUGHLIN (Two-person law firm) June 1966 - February 1978
Partner
General civil and criminal practice with concentration on litigation including substantial representation of low income and indigent clients. Litigation included over 40 jury trials, and frequent court appearances, primarily in state coults but also in federal courts. Two successful cases on appeal before the Virginia Supreme Court. Successful habeas corpus case (including decision in U.S. Fourth Circuit Court of Appeals) on grounds of race discrimination in selection of Halifax County juries. Wrote petition for *certiorari* to U.S. Supreme Court for signature of partner (not being eligible to practice before that court because not licensed for three years) in which firm won reversal of conviction when Court granted writ of *certiorari* and summarily reversed without argument in *per curium* decision.

HOWELL FOR GOVERNOR CAMPAIGN March 1973- November 1973
Press Secretary (Paltial leave from McLaughlin & McLaughlin)
Administrative responsibility for statewide press office located in Richmond, including principal speech writing, supervision of five member staff; press relations, production and distribution of press releases, and consultation on financial reports.

IUCHMOND TIMES DISPATCH June 1962 - August 1963
Reporter
Coverage of civil rights issues, (Prince Edward County School closing) and routine new coverage in eight central Virginia counties.

ACTIVITIES AND RECOGNITION

- Steering Committee, Project Advisory Group (PAG), I 983-19787;
  Executive Committee, 1986-87
- The Virginia Bar Association, *Pro Bono Publico* Award, 1992
- Fellow of Virginia Law Foundation, June 1992-Present
- The Virginia State Bar Legal Aid Award, 1994
- Leaders of the Law (20 I 0) Virginia Lawyers Weekly (Voted the one leader by the recipients)
- Member American College of Trial Lawyers
- Member of Virginia Supreme Court's Commission on Virginia Courts in the 2 Issl Century - 2007
- Member of Virginia Supreme Court's Committee to Study Privacy and Access to Court Records- 2006
- Member Hall of Fame of Virginia Lawyer's Weekly 20 I 9

Exhibit B

THE LAW OFFICE OF HENRY MCLAUGHLIN, P.C.
Eighth and Main Building, 707 East Main Street, Suite 1050, Richmond, Virginia 23219
804-205-9020 Toll Free 877-575-0258 Facsimile 877-575-0245

HENRY W. MCLAUGHLIN
Attorney at Law
henry@mclaughlinvalaw.com

DREW D. SARRETT
Attorney at Law
drew@mclaughlinvalaw.com

RETAINER AGREEMENT

This retainer agreement is entered into by and between the Law Office of Henry W. McLaughlin, P.C. ("Lawyer") and Brian Clark ("Client") as of the date of full execution below:

WITNESSETH

That WHEREAS, Client was detained for about 20 minutes on July 25, 2016 by deputies of the Patrick County Sheriff's Department on what Client has advised Client was a pretext of serving a no-trespassing notice which the same sheriff's office has already sent the same notice to the Sheriff's Office of Henry County, Virginia, which had already served that notice; and,

WHEREAS, Client's significant other previously heard officers of the Patrick County Sheriff's Office joke about how they were going to "take down" Client; and,

WHEREAS, Lawyer has advised Client that he has a good faith claim against the Deputy Sheriffs who detained him that could be asserted pursuant to 42 U.S.C. Section 1983 for deprivation of Client's freedom under color of state law with no basis for such de facto detention; and,

WHEREAS, Lawyer has advised Client that the deputy sheriffs have a qualified immunity which can be overcome by a showing of malice; and,

WHEREAS, Client has advised Lawyer that Client believes that his detention was malicious and it appears that the later joking by deputies recited above is some evidence of that, and Client advises there have been other indication of malicious intent by deputy sheriffs against Client; and,

WHEREAS, Client wishes to retain Lawyer to represent Client as to such a case.

NOW THEREFORE, Client retains Lawyer to (a) to file a lawsuit in the U.S. District Court for the Western District of Virginia ("the federal court") against Lieutenant Rob Coleman of the Patrick County Sheriff's Office and other personnel of the Patrick County Sheriff's Office, as applicable, pursuant to 42 U.S.C. Section 1983 for wrongful detention under color of state law and to represent Client as to such case.

Lawyer's fee for the above work is $7,500 plus out-of-pocket expenses plus one-third of any amount recovered for Client, provided that the $7,500 will be credited against the one-

BHC

third fee. Client has delivered to Lawyer this date a check for $6,000, receipt of which Lawyer acknowledges. Client will pay Lawyer an additional $2,000 on October 13, 2016. The two payments will total $8,000, of which $7,500 will be towards Lawyer's fee and $500 will be towards out-of-pocket expenses. Lawyer has advised Client that out-of-pocket expenses will exceed $500 and Lawyer will bill Client for any amount of out-of-pocket expenses that exceed $500.

Out-of-pocket expenses will be for the following:

A. The filing fee to file suit in the federal court;
B. The cost of service of process of the complaint;
C. Reasonable travel costs of Lawyer connected with the lawsuit, at 50 cents a mile, plus tolls.
D. Lodging costs if necessary at the rate of $75 a night. For example if there is a multi-day jury trial, Lawyer may stay in hotel in connection with the trial (likely to be in Roanoke) and, in such an event, Lawyer will reimburse Lawyer up to $75 a night for such lodging.
E. Any costs for regular mail, express mail costs, (such as Federal Express) and courier costs.
F. Any unusual copying costs.

If this case does not settle, there are likely to be additional costs for court reporter fees; however, Lawyer will obtain Client's advance permission before obligating Client for any court reporter fees.

This retainer does not include any work

Lawyer will use best efforts but cannot guarantee the outcome of the case in Court.

Client agrees that Lawyer will charge the following rates up to but not exceeding the $7,500 fee to be paid by Client under this retainer: $500 per hour for work by Henry W. McLaughlin and $300 per hour for work by Drew D. Sarrett.

Brian Clark — Date 9-14-16

Law Office of Henry McLaughlin, P.C. — Date 9-14-16

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION
Federal Courthouse
700 Main Street
Danville, Virginia 24541

BRIAN H. CLARK,
Plaintiff,

v. Civil Action No. 4:17-cv-00045-MFU-RSB

ROB COLEMAN
Defendant,

MEMORANDUM IN SUPPORT OF MOTION FOR DETERMINATION OF ATTORNEY'S FEE AWARD

Brian H. Clark ("Clark"). by counsel, sets forth the following in support of Clark' motion for determination of Attorney's Fee Award.

Accompanying this memorandum as "Exhibit 1" is a declaration of Clark's counsel in support of this motion. As shown by that declaration, the request for the amount of attorney's fees award is far less than the hourly rate of Clark's counsel for work on that part of this case related to Clark's claim against defendant Rob Coleman.

Clark's counsel has represented Clark in other matters, including some state court matters which have been concluded at the state court level (but as to one such matter Clark intends to appeal to the United States Supreme Court) and has represented Clark against other defendants in this case. Clark, by counsel, submits Exhibit 1 as a statement of facts to support Clark's attorney fee request and requests that the Court determine the amount of attorney's fees to be awarded pursuant to the Court's order of March 24, 2020.

Respectfully submitted,

BRIAN H. CLARK,

By /s/ Henry W. McLaughlin
Counsel

Henry W. McLaughlin (VSB No 07105)
The Law Office of Henry McLaughlin, P.C.
707 East Main Street, Suite 1050
Richmond, Virginia 23219
(804) 205-9020; fax (804) 205-9029
henry@mclaughlinvalaw.com
Counsel for Brian H. Clark.

CERTIFICATE

I, Henry W. McLaughlin, counsel for Brian H. Clark, certify that on the 2nd day of April, 2020, the foregoing will be filed electronically with the ECF filing System of the U.S. District Court for the Western District of Virginia, Danville Division, which will notify the following of the same:

John Chadwick Johnson,
Esquire Frith Anderson & Peake, PC
29 Franklin Road, SW
Roanoke, Virginia 24011
jjohnson@faplawfom.com

Nathan H. Schnetaler, Esquire
Frith Anderson & Peake, P.C.
29 Franklin Road, SW
P. O. Box 1240
Roanok, Virginia 24006-1240
nschnetzler@faplawfirm.com

/s/ Henry W. McLaughlin

Henry W. McLaughlin (VSB No 07105) The Law Office of Henry McLaughlin, P.C. 707 East Main Street, Suite 1050
Richmond, Virginia 23219
(804) 205-9020; fax (877) 575-0245
henry@mclaughlinvalaw.com
Counsel for Brian H. Clark.

AO 133 (Rev. 12/09) Bill of Costs

UNITED STATES DISTRICT COURT

for the

Western District of Virginia

Brian Clark)
)
v.) Case No.: 4:17-cv-00045-MFU-RSB
Rob Coleman)
)

BILL OF COSTS

Judgment having been entered in the above entitled action on 03/24/2020 (Date) against Rob Coleman,

the Clerk is requested to tax the following as costs:

Fees of the Clerk	$ 57.14
Fees for service of summons and subpoena	200.00
Fees for printed or electronically recorded transcripts necessarily obtained for use in the case	
Fees and disbursements for printing	
Fees for witnesses *(itemize on page two)*	78.50
Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case	
Docket fees under 28 U.S.C. 1923	
Costs as shown on Mandate of Court of Appeals	
Compensation of court-appointed experts	
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828	
Other costs *(please itemize)*	257.10
TOTAL	$ 592.74

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

Declaration

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill has been served on all parties in the following manner:

☑ Electronic service ☐ First class mail, postage prepaid

☐ Other:

s/ Attorney: /s/ Henry McLaughlin

Name of Attorney: Henry W McLaughlin

For: Brian Clark (Name of Claiming Party) Date: 04/01/2020

Taxation of Costs

Costs are taxed in the amount of $592.74 and included in the judgment.

Julia C. Dudley (Clerk of Court) By: HMcDonald (Deputy Clerk) 4/16/2020 (Date)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

BRIAN H. CLARK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:17cv45**
	)	
ROB COLEMAN,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR ATTORNEY'S FEES

Defendant Rob Coleman ("Coleman") by counsel, pursuant to Rule 54(d)(2) of the Federal Rules of Civil Procedure and Western District of Virginia General Rule 54(a)(1), submits this Memorandum in Opposition to plaintiff Brian H. Clark's ("Clark") Motion for Attorney's Fees, ECF No. 158. In support thereof, Coleman states as follows:

STATEMENT OF THE CASE

In this case brought pursuant to 42 U.S.C. § 1983, Clark contended that Coleman violated Clark's civil rights when Coleman conducted a traffic stop of Clark's vehicle after Clark flashed his middle finger at Coleman. Claiming a violation of his civil rights, Clark sought compensatory damages, punitive damages, and attorney's fees from Coleman. The case proceeded to trial, and the jury returned a defense verdict. Subsequently, Clark filed post-trial motions, and the Court entered an Order setting aside the jury verdict, awarding Clark nominal damages, and declaring Clark a "prevailing party" for purposes of requesting attorney's fees under 42 U.S.C. § 1988.

Clark submitted his Motion for Attorney's Fees and attached to his motion the Declaration of Henry W. McLaughlin, Clark's counsel, Mr. McLaughlin's CV, and a Retainer Agreement. For the reasons set forth below, Clark's request for $26,250 in fees and $665.00 in costs should be denied because Clark has not established his requested fees are reasonable, he enjoyed only limited success, and permitting a full award would amount to a double recovery for Clark's counsel.

ARGUMENT & AUTHORITY

42 U.S.C. § 1988 provides for an award of attorney's fees to a prevailing plaintiff. Under McAfee v. Boczar, Clark bear the burden of establishing his requested amount of section 1988 attorney's fees is reasonable. McAfee v. Boczar 738 F.3d 81, 88 (4th Cir. 2013).

Calculation of a reasonable attorney's fee award follows a familiar three-step process: (1) determining the lodestar figure by deciding the reasonable hours expended and rate charged using the Johnson v. Georgia Highway Express, Inc. factors; (2) deducting fees spent on unsuccessful claims unrelated to successful ones; and (3) awarding some percentage of the remaining amount based on the plaintiff's degree of success. Id. (citations omitted). The Johnson factors the Court must consider are the:

> (1) time and labor expended; (2) novelty and difficulty of the questions raised; (3) skill required to properly perform the legal services rendered; (4) attorneys' opportunity costs in pressing the instant litigation; (5) customary fee for like work; (6) attorneys' expectations at the outset of the litigation; (7) time limitations imposed by the client or circumstances; (8) amount in controversy and the results obtained; (9) experience, reputation, and ability of the attorney; (10) undesirability of the case within the legal community in which the suit arose; (11) nature and length of the professional relationship between attorney and client; and (12) attorneys' fees awards in similar cases.

Id. at 88 n.5 (citation omitted). The Court must make detailed findings of fact regarding its consideration of the Johnson factors. Newport News Shipbuilding & Dry Dock Co. v. Holiday, 591 F.3d 219, 228 (4th Cir. 2009).

In the Western District of Virginia,

> Any motion requesting the award of attorneys' fees must be supported by a memorandum setting forth the nature of the case, the claims as to which the party prevailed, the claims as to which the party did not prevail, a detailed description of the work performed broken down by hours or fractions thereof expended on each task, the attorney's customary fee for such like work, the customary fee for like work prevailing in the attorney's community, a listing of any expenditures for which reimbursement is sought, any additional factors which are required by the case law, and any additional factors that the attorney wishes to bring to the Court's attention.

W.D. Va. Gen. R. 54(a)(2).[1]

I. Lodestar Calculation

"It is important to recognize that billing practices in the private sector may differ from those acceptable in a § 1983 case, as a fee-shifting statute requires transparency and consistency in determining fees to award to a prevailing party." Supinger v. Virginia, No. 6:15cv17, 2019 U.S. Dist. LEXIS 55612, at *23 (W.D. Va. Mar. 4, 2019) (citing Guidry v. Clare, 442 F. Supp. 2d 282, 295 (E.D. Va. 2006)).

a. Clark's Petition Lacks Contemporaneous Time Entries

Contemporaneous time records are the preferred method of proving the reasonableness of an attorney's fee request under a fee-shifting statute. See CoStar Group, Inc. v. LoopNet, Inc., 106 F. Supp. 2d 780, 789 (D. Md. 2000); see also Scott v. City of New

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[1] Clark failed to comply with General Rule 54(a)(2) of the Local Rules for the United States District Court for the Western District of Virginia in at least three respects: Clark failed to set forth the nature of the case in his memorandum; Clark failed to identify the claim against Coleman to which Clark did not prevail; and Clark failed to identify the customary fee for like work in his community. Further, while the Retainer Agreement states that Clark's counsel's fee will be $500 per hour, nothing in Clark's Memorandum substantiates that rate is his counsel's "customary fee."

York, 626 F.3d 130, 133 (2d Cir. 2010) ("[A]bsent unusual circumstances attorneys are required to submit contemporaneous records with their fee applications."); Jones v. Bryant, No. 1:01cv936, 2004 U.S. Dist. LEXIS 8005, 2004 WL 1013308, at *1 (M.D.N.C. May 4, 2004) ("[C]ontemporaneous, accurate time records are required with a sufficient description of the nature of the services allegedly performed to enable the court to determine the reasonableness of the time and fee claimed.").

Clark concedes that he did not maintain contemporaneous time records for time spent on the claims against Coleman. Rather, Clark had to "reconstruct" the work done on this case after the fact. Coupled with the other faults set forth below, Clark's "reconstructions" of work done on this case lack any indicia of reliability and warrant a reduction in his fee request.

b. Clark's Hourly Rate is Contrary to the Prevailing Market Rate

The reasonable hourly rate for an attorney's fee request generally follows the prevailing market rates in the relevant legal community for the type of work which an award is sought. McAfee v. Boczar, 738 F.3d 81, 91 (4th Cir. 2013). The relevant community is usually that in which the district court sits. Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 179 (4th Cir. 1994). Thus, the relevant legal community for purposes of Clark's fee petition is Danville, Virginia. See Hudson v. Pittsylvania County, No. 4:11cv43, 2013 WL 4520023, 2013 U.S. Dist. LEXIS 121930, at *9 (W.D. Va. Aug. 1, 2013), adopted, 2013 WL 4520023, 2013 U.S. Dist. LEXIS 120606 (Aug. 26, 2013), aff'd, 774 F.3d 231 (4th Cir. 2014).

The prevailing market rate "may be established through affidavits reciting the fees of counsel with similar qualifications, information concerning fee awards in similar cases,

and/or specific evidence of counsel's billing practice." Stultz v. Virginia, No. 7:13cv589, 2019 WL 4741315, 2019 U.S. Dist. LEXIS 170183, at *10 (W.D. Va. Aug. 14, 2019). This determination is a "fact intensive exercise requiring the fee applicant to produce 'specific evidence' of prevailing market rates in the relevant community for similar services in similar circumstances." Hudson, 2013 U.S. Dist. LEXIS 121930, at *8; see also Robinson v. Equifax Info. Servs., LLC, 560 F.3d 235, 244 (4th Cir. 2009) (finding that the district court abused its discretion in awarding attorneys' fees where the applicant offered no specific evidence, besides an affidavit of a firm member, that the hourly rates sought coincided with the then prevailing market rates).

Clark has not submitted any evidence to substantiate that his counsel's $500 hourly rate is in accord with the prevailing market rate in the Danville area or even the Western District of Virginia for a 42 U.S.C. § 1983 action. See Hudson, 2013 U.S. Dist. LEXIS 121930, at *8–9 (approving $350 hourly rate for partner-level attorney in civil rights case arising out of Danville Division); Stultz v. Virginia No. 7:13cv589, 2019 U.S. Dist. LEXIS 170183, at *10–11 (W.D. Va. Aug. 14, 2019); Supinger v. Virginia, No. 6:15cv17, 2019 WL 145030, 2019 U.S. Dist. LEIXS 55612, at *9 (W.D. Va. Mar. 4, 2019) (finding $350 hourly rate appropriate for experienced attorney in civil rights case arising out of Roanoke Division), adopted as modified by, 2019 U.S. Dist. LEXIS 56957 (W.D. Va. Apr. 2, 2019). Accordingly, Clark's counsel's hourly rate should be reduced to no more than $350.

In addition, Clark's fee petition seeks compensation at his counsel's full hourly rate for substantial amounts of time spent travelling. See ECF No. 159-1, at *2–3. While attorney travel time is generally compensable, the attorney's hourly rate is routinely

reduced by at least half. Stultz, 2019 U.S. Dist. LEXIS 170183, at *22–23 (W.D. Va. Aug. 14, 2019) (collecting cases). Failure to reduce the rate requested for travel time "indicates a lack of billing judgment." Prison Legal News v. Stolle, 129 F. Supp. 3d 390, 404 (E.D. Va. 2015) (internal quotations omitted). As such, Clark's travel time should be compensable at a rate no higher than $175/hour.

Clark requests compensation for travel to depositions in Stuart, Virginia on September 5, 2018,[2] depositions in Roanoke, Virginia on March 28, 2019, a pretrial conference in Roanoke, Virginia on July 8, 2019, and travel to Danville, Virginia for two days of trial. Using Mr. McLaughlin's office address, the approximate round-trip travel time to Stuart is seven hours, twenty minutes (7.4); to Roanoke is five hours, forty minutes (5.7); and to Danville is five hours, twenty minutes (5.4).[3] Because travel time is not compensable at the full hourly rate, the lodestar should be reduced as follows:

Table T.1

Date	Claimed Time	Travel Time	Non-Travel Time
9-5-18	8.5 hours @ $500/hour	7.4 hours @ $175/hour	1.1 hours @ $350/hour
3-28-19	7 hours @ $500/hour	5.7 hours @ $175/hour	1.3 hours @ $350/hour
7-8-19	8 hours @ $500/hour	5.7 hours @ $175/hour	2.3 hours @ $350/hour[4]
7-15-19	15 hours @ $500/hour	10.8 hours @ $175/hour	4.2 hours @ $350/hour[5]

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[2] Erroneously listed as "9-5-19" in Clark's petition. ECF No. 159-1, at *2.

[3] Calculated using Google Maps and converted using 0.1 billable hour increments.

[4] Subject to further reduction as set forth below.

[5] Clark appears to have billed travel time twice for the 7-15-19 entry because there is no indication any travel time was requested for 7-16-19 even though Clark claims mileage for two trips to Danville for trial. Compare ECF No. 159-1, at *2 with ECF No. 159-1, at *3. According to the trial transcript, the first day of trial began at 10:57 a.m. and ended at 6:06 p.m., approximately 7.2 hours. If Clark did not bill travel time twice for this date, that leaves approximately 2.4 hours of unaccounted for and unsubstantiated billable time (15-7.2-5.4=2.4) that should not be compensable.

c. Block Billing & Insufficient Detail in the Time Records

Block billing is disfavored by federal courts and consists of combining "several tasks together under a single entry, without specifying the amount of time spent on each particular task." Lusk v. Va. Panel Corp., 96 F. Supp. 3d 573, 582 (W.D. Va. 2015) (internal quotations omitted). When presented with evidence of block billing, the Court may "reduce the fee award by either identifying the specific hours that are not sufficiently documented or by reducing the overall fee award by a fixed percentage." Id. (internal quotations omitted).

Clark's petition is replete with block billing entries. As noted above, Clark made no effort to differentiate between travel time and non-travel time. Clark does not distinguish between time spent on his reply brief in support of his post-trial motions and the motion seeking leave to file that reply brief late. ECF No. 159-1, at *3. Therefore, the Court is unable to determine whether the time spent on either filing was reasonable. Further, Clark does not differentiate between the time spent in court arguing motions in limine and the meeting with the Magistrate Judge on July 8, 2019, either. Accounting for (1) travel time from Richmond to Roanoke and back and (2) the Court's minute entry reflecting thirty minutes of in-court time for the motions in limine hearing, that leaves 1.8 hours for the conference with the Magistrate Judge. Coleman's counsel does not recall that meeting lasting 1.8 hours. So, Mr. McLaughlin's non-travel time for 7-8-19 should be reduced by at least .8 to 1.5 hours. See Table T.2 *infra*.

Billing entries that make "'no mention of the subject matter of a meeting, telephone conference or the work performed during the hours billed'" are also not compensable. Abusamhadaneh v. Taylor, No. 1:11cv939, 2013 WL 193778, 2013 U.S. Dist. LEXIS 7451,

at *63–64 (E.D. Va. Jan. 17, 2013) (quoting In re Meese, 907 F.2d 1192, 1204 (D.C. Cir. 1990)); Rum Creek Coal Sales v. Caperton, 31 F.3d 169, 180 (4th Cir. 1994). "[T]he use of excessively vague time descriptions is a generally disfavored billing practice. Such descriptions 'inhibit the court's reasonableness view' and also 'justify a percentage reduction in the fee award.'" Brown v. Mountain View Cutters, LLC, 222 F. Supp. 3d 504, 514 (W.D. Va. 2016) (quoting Ashley II of Charleston, LLC v. PCS Nitrogen, Inc., No. 2:05cv2782, 2015 U.S. Dist. LEXIS 95355, 2015 WL 4469765, at *10 (D.S.C. July 21, 2015)).

Clark claims three hours for "preparation for trial" but does not describe what that preparation entailed, which warrants a further reduction in his claimed fee because without further information, the Court cannot determine that preparation time was reasonable. Stultz, 2019 U.S. Dist. LEXIS 170183, at *16–17 (reducing fee award due to multiple entries describing "preparation" without further detail).[6]

II. Clark's Success was Limited

Whether to reduce a fee award based on the results obtained hinges on two considerations: "[f]irst did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?" Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). It is appropriate to award a reduced fee amount if "the relief, however significant, is limited in comparison to the scope of the litigation as a whole." Id. at 440; Supinger, 2019 U.S. Dist. LEXIS 55612, at *28 ("However, when a plaintiff achieves only partial or limited success, the lodestar figure may be

[6] Clark's motion also fails to address factors 2, 3, 4, 5, 6, 7, 8, 10, and 10 under Johnson v. Georgia Highway Express, Inc., 488 F.2d 715 (5th Cir. 1974).

excessive notwithstanding the fact that all claims were interrelated, nonfrivolous, and raised in good faith."). Section 1988 fees are not meant to produce "windfalls to attorneys." McAfee, 738 F.3d at 92.

Clark sought compensatory and punitive damages from Coleman in regard to the alleged unconstitutional traffic stop. A jury returned a verdict in Coleman's favor, but the District Court entered judgment for Clark notwithstanding. See ECF No. 156. The Court did not, however, grant Clark's motion for a new trial on damages and ruled that Clark failed to put forth sufficient evidence to establish any claim to compensatory damages or punitive damages. See ECF No. 155, at *24–28. Thus, the Court awarded Clark only nominal damages. Clark's meager victory warrants a downward departure in his fee award.

While a plaintiff obtaining a limited degree of success but changing the legal landscape in a particular area may be entitled to all or the bulk of his fee request, Supinger, 2019 U.S. Dist. LEXIS 55612, at *29–30, Clark's claim did not alter the legal landscape in this area of the law. Indeed, in its Memorandum Opinion granting Clark's post-trial motion, the Court observed that "[t]he law i[n] this area is well-settled." ECF No. 155, at *9. The Court also rejected Coleman's defense of qualified immunity, concluding that the law was "clearly established" and that a reasonable person in Coleman's position would have known that Coleman's conduct would violate Clark's rights. Id. at *19–24. Therefore, Clark's case did not alter the legal landscape, and his fee request should be reduced in light of his limited success: an award of one dollar in damages.

Clark may be a "prevailing party" for purposes of claiming attorney's fees, but the fact that Clark recovered only nominal damages in light of his request for compensatory

damages and punitive damages cannot be ignored. Hensley, 461 U.S. at 436 ("That the plaintiff is a 'prevailing party' . . . may say little about whether the expenditure of counsel's time was reasonable in relation to the success achieved."). In the end, Clark's victory was nothing short of Pyrrhic compared to his lofty aspirations and supports a corresponding reduction of no less than 30% of what the Court determines to be a reasonable fee. See Farrar v. Hobby, 506 U.S. 103, 120 (1992) (O'Connor, J., concurring).

III. Clark's Fee Request Should Be Reduced in an Amount Commensurate with the Retainer Agreement

Attached to Mr. McLaughlin's Declaration in support of his fee request is a Retainer Agreement purportedly signed by Clark and his counsel. ECF No. 159-3. According to that agreement, Clark has already paid his counsel $8,000 representing $7,500 in fees and $500 in costs. ECF No. 159-3; ECF No. 159-1. Because he has already received $7,500 in fees and $500 in costs, Clark's counsel's fee request should be reduced in a commensurate amount to avoid a windfall.

"Fee awards should be 'adequate to attract competent counsel, but not produce windfalls to attorneys.'" Supinger v. Virginia, No. 6:15cv17, 2019 U.S. Dist. LEXIS 56957, at *2 (W.D. Va. Apr. 2, 2019) (quoting City of Riverside v. Rivera, 477 U.S. 561, 580 (1986)). "The aim of § 1988 . . . is to enforce the covered civil rights statutes, not to provide "'a form of economic relief to improve the financial lot of attorneys.'" Doe v. Kidd, 656 F. App'x 643, 651 (4th Cir. 2016) (quoting Perdue v. Kenny, 559 U.S. 542, 552 (2010)).

Other courts have reduced fee awards in order to avoid a financial windfall for an attorney to the detriment of the client when a retainer agreement exists. See Wright v. City of New York, 283 F. Supp. 3d 98, 107–08 (S.D.N.Y. 2017) (reducing fee award by amount of contingent fee in retainer agreement); Laster v. Cole, No. 99cv2837, 2000 U.S.

Dist. LEXIS 8672, 2000 WL 863463, at *2 (E.D.N.Y. June 23, 2000) (reducing attorneys' fees by amount specified in retainer agreement to avoid "double recovery" where both a fee-shifting statute and a retainer agreement applied). As such, Clark's petition for fees should be reduced by $7,500, and his requests for costs should be reduced by $500.

CONCLUSION

Clark fails to meet his burden to establish his requested fees are reasonable and further reductions are warranted based on his limited success. In addition, Clark's request should be reduced to account for payments already received by his counsel. Therefore, Clark's fee request should be reduced as follows:

Table T.2

Date	Claimed Time	Travel Time	Non-Travel Time
9-4-18	0.5 hours @ $500/hour		0.5 hours @ $350/hour
9-5-18	8.5 hours @ $500/hour	7.4 hours @ $175/hour	1.1 hours @ $350/hour
3-28-19	7.0 hours @ $500/hour	5.7 hours @ $175/hour	1.3 hours @ $350/hour
7-1-19	1.0 hours @ $500/hour		1.0 hours @ $350/hour
7-8-19	1.5 hours @ $500/hour		1.5 hours @ $350/hour
7-8-19	8.0 hours @ $500/hour	5.7 hours @ $175/hour	1.5 hours @ $350/hour
7-14-19	3.0 hours @ $500/hour		3.0 hours @ $350/hour
7-15-19	15.0 hours @ $500/hour	10.8 hours @ $175/hour	4.2 hours @ $350/hour
7-16-19	4.5 hours @ $500/hour		4.5 hours @ $350/hour
8-12-19	2.0 hours @ $500/hour		2.0 hours @ $350/hour
9-xx-19	1.5 hours @ $500/hour		1.5 hours @ $350/hour
	Total (hours) – 52.5	Total (hours) – 29.6	Total (hours) – 22.1
	Total ($$$) - $26,250	Total ($$$) - $5,180	Total ($$$) - $7,735
		Travel + Non-Travel	$12,915
		Less 10% for Block Billing/Insufficient Detail	($1,291.50)

Lodestar	$11,623.50
Less 30% for Degree of Success	($3,487.05)
Balance	***$8,136.45***
Less Fees Received	($7,500)
Total Fee Award	**$636.45**

Furthermore, because Clark's counsel has already received $500.00 from his client for costs, his request for costs should be reduced to $165.00 for a total award of $801.45 in fees and costs.

For the foregoing reasons, Clark has not established the reasonableness of his requested attorney's fees, and as a result, a reduction in his requested fees and costs is necessary and appropriate. Accordingly, Coleman respectfully requests entry of an Order granting in part and denying in part Clark's Motion for Attorney's Fees and awarding Clark attorney's fees and costs in an amount not exceeding $801.45.

Respectfully Submitted,

ROB COLEMAN

FRITH ANDERSON + PEAKE P.C.
ATTORNEYS AT LAW
Roanoke, Virginia

/s/

John C. Johnson (VSB#: 33133)
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4845-2250-3354 .v6

CERTIFICATE OF SERVICE

I hereby certify that on April 23, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION
Federal Courthouse
700 Main Street
Danville, Virginia 24541

BRIAN H. CLARK,
Plaintiff,

v. Civil Action No. 4:17-cv-00045-JLK-RSB

ROB COLEMAN

Defendant,

SECOND DECLARATION OF HENRY W. MCLAUGHLIN IN SUPPORT OF MOTION FOR AWARD OF ATTORNEY'S FEES

Henry W. McLaughlin, under penalty of perjury, declares the following:

1. I am an adult and have personal knowledge of and am competent to make declaration of the matters stated herein.
2. I am counsel for Brian H. Clark ("Brian Clark") in the above referenced matter.
3. On March 24, 2020, the Court granted judgment in favor of Clark in the above-styled case For nominal damages and attorney's fees. (dkt no. 156)/
4. On April 2, 2020, I filed on Brian Clark's behalf a motion for Attorney's Fees (dkt no. 158) and a memorandum in support of that motion (dkt no. 159). That memorandum included as Exhibit 1 a declaration by me in support of such motion and two exhibits to that declaration, a resume and the retainer agreement between Brian Clark and my law office.
5. The said declaration and the said memorandum did not seek attorney's fees for the time spent in filing the law suit, taking into account that the lawsuit included other

defendants dismissed from this case. The said declaration set forth time spent on two depositions and for the trial including travel costs.

6. On April 23, 2020, defendant Rob Coleman("Coleman") filed a memorandum in opposition to the motion for attorney's fees (dkt no. 161) that included, inter alia, referenced to the fact that my declaration as to reconstruction of time that included travel time, did not specify what amount of such time was for travel.

7. Because of that part of Coleman's memorandum in opposition to the motion for attorney's fees, this declaration addresses the issue of the amount of time set forth in my prior declaration that was for travel time.

8. My declaration that was Exhibit 1 to the April 2, 2020 memorandum in support of the aforesaid motion for attorney's fees referred to the following times that involved travel time:

   A. 9-5-19 Taking Deposition of Carolyn Cobbler and defending deposition of Brian Clark: 8.5 hrs (including travel time")

   B. 3-28-19 Defending deposition of Wendy Inzerelli, Beth Richardson, and Denise Freeman 7, hrs. (including travel time)

   C. 7-8-19 Oral argument on motions in limine and meeting with Magistrate Judge on potential settlement m 8 hrs. (including travel time)

   D. 7-15-19 Trial – 15 hours (including travel time)

9. As to time as to those dates (9.5-19, 3-28-19, 7-15-19) I spent at least the following amount of time that was not travel related.

   (i) 9-5-19, matters related to taking the deposition of Carolyn Cobbler and defending the deposition of Brian Clark: one hour.

(ii)]3-28-19 – defending deposition of Wendy Inzerelli, Beth Richardson, and Denies Freeman – one hour.

(iii) 7-15-19 – First day of trial: 7.5 hrs.

Pursuant to 28 U.S. C. Section 1746, I declare under penalty of perjury this 30th day of April, 2020, that the foregoing is true and correct to the best of my knowledge, information, and belief.

Henry W. McLaughlin

Respectfully submitted,

BRIAN H. CLARK,

By /s/ Henry W. McLaughlin
Counsel

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henry@mclaughlinvalaw.com
Counsel for Brian H. Clark.

CERTIFICATE

I, Henry W. McLaughlin, counsel for Brian H. Clark, certify that on the 30th day of April, 2020, the foregoing will be filed electronically with the ECF filing System of the U.S. District Court for the Western District of Virginia, Danville Division, which will notify the following of the same:

John Chadwick Johnson,
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Nathan H. Schnetaler, Esquire
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/s/ Henry McLaughlin

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Counsel for Brian H. Clark.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION
Federal Courthouse
700 Main Street
Danville, Virginia 24541

BRIAN H. CLARK,
Plaintiff,

v. Civil Action No. 4:17-cv-00045-JLK-RSB

ROB COLEMAN

Defendant,

REPLY TO MEMORANDUM IN OPPOSITION TO ATTORNEY'S FEES

Brian H. Clark ("Brian Clark"), by counsel, sets forth the following in reply to the memorandum by Rob Coleman in opposition to the memorandum in support of Brian Clark's motion for attorney's fees.

This Court has ruled that Brian Clark is entitled to recover attorney's fees in this case. Therefore, the issue before the Court is the amount of such fees.

The memorandum in opposition appears to argue that the correct hourly rate for Brian Clark's counsel in this case is $350.00 an hour, not $500 an hour, which is his counsel's normal hourly rate (although his counsel normally works by the case and not by the hour).

The memorandum in opposition appears to argue that the amount of attorney's fees should be reduced to substantially less than $350 an hour for travel time.

Accompanying this reply as "Exhibit A" is a second declaration, made on April30, 2020 in consideration of Coleman's memorandum in opposition. Exhibit A sets forth the amount of

non-travel time for the four dates as to which his April 2, 2020 declaration set forth time that included travel time.

As a result of the declaration that is an exhibit to this memorandum, Brian Clark, by counsel, would not object to Coleman filing a surrebuttal to this reply.

Based on Exhibit A to this reply, removing travel time from the time spent by Brian Clark's counsel in this case, the total number of hours by Brian Clark's counsel on this case (not including time spent prior to this Court's ruling narrowing this case to Brian Clark's claim against Coleman; and not including time on this reply) has totaled 24.50 hours. On the basis of the $350.00 an hour which Coleman's memorandum seemed to indicate should be the hourly rate by Brian Clark's counsel, that would come to $8,475.00, more than actually paid by Brian Clark to his counsel in this case for his counsel's work on this case. If the Court added travel time at $100 an hour, the total would exceed $10,000.

On the basis of the foregoing, Brian Clark's counsel asks this Court to grant the motion for attorney's fees filed on April 2, 2020 and that the Court set the attorney's fees to be granted according to the Court's discretion.

Conclusion

Wherefore, Brian Clark prays that the Court grant his April 2, 2020 motion for award of attorney's fees.

Respectfully submitted,

BRIAN H. CLARK,

By /s/ Henry W. McLaughlin
Counsel

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henry@mclaughlinvalaw.com
Counsel for Brian H. Clark.

CERTIFICATE

I, Henry W. McLaughlin, counsel for Brian H. Clark, certify that on the 30th day of April, 2020, the foregoing will be filed electronically with the ECF filing System of the U.S. District Court for the Western District of Virginia, Danville Division, which will notify the following of the same:

John Chadwick Johnson,
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/s/ Henry McLaughlin

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Counsel for Brian H. Clark.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

BRIAN H. CLARK,	)	
	)	**Civil Action No. 4:17-cv-00045**
Plaintiff,	)	
	)	
v.	)	
	)	
ROB COLEMAN,	)	**By: Hon. Michael F. Urbanski**
	)	**Chief United States District Judge**
Defendant.	)	

MEMORANDUM OPINION

This matter is before the court on plaintiff Brian H. Clark's motion for attorney's fees. ECF No. 158. Clark seeks attorney's fees in the amount deemed reasonable by the court. Defendant Rob Coleman opposed the motion, ECF No. 161, and the matter is ripe for resolution. For the following reasons, Clark's motion for attorney's fees is **GRANTED in part**, and the court **AWARDS** attorney's fees and expenses in the amount of $3,396.

I.

The Civil Rights Attorney's Fees Awards Act of 1976 provides that a prevailing party in certain civil rights actions may receive "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988. The Supreme Court has directed that the purpose of § 1988 is to ensure meaningful and effective access to the judicial system for persons with civil rights grievances, and thus, a successful plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." Hensley v. Eckerhart, 461 U.S. 424, 429 (1983). To qualify as a "prevailing party," the plaintiff must "obtain at least some relief on the merits of his claim." Farrar v. Hobby, 506 U.S. 103, 111 (1992). "The touchstone of the

prevailing party inquiry must be the material alteration of the legal relationship of the parties." Id. (quoting Texas State Teachers Ass'n v. Garland Indep. Sch. Dist., 489 U.S. 782, 792–93 (1989)).

Once a party is deemed to be the prevailing party, the Fourth Circuit provides a three-step process to determine a reasonable attorney's fee award. McAfee v. Boczar, 738 F.3d 81, 88 (4th Cir. 2013), as amended (Jan. 23, 2014). First, the court calculates the lodestar figure by "multiplying the number of reasonable hours expended times a reasonable rate." Id. (quoting Robinson v. Equifax Info. Servs., 560 F.3d 235, 243 (4th Cir. 2009)). To judge the "reasonableness" of both the hours expended and rate charged by the prevailing party's attorneys, a court must apply twelve factors identified by the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717–19 (5th Cir. 1974), and adopted in this circuit by Barber v. Kimbrell's Inc., 577 F.2d 216, 226 n.28 (4th Cir. 1978). The twelve Johnson factors are:

> (1) the time and labor expended; (2) the novelty and difficulty of the questions raised; (3) the skill required to properly perform the legal services rendered; (4) the attorney's opportunity costs in pressing the instant litigation; (5) the customary fee for like work; (6) the attorney's expectations at the outset of the litigation; (7) the time limitations imposed by the client or circumstances; (8) the amount in controversy and the results obtained; (9) the experience, reputation and ability of the attorney; (10) the undesirability of the case within the legal community in which the suit arose; (11) the nature and length of the professional relationship between attorney and client; and (12) attorney's fees awards in similar cases.

Robinson, 560 F.3d at 243–44. After calculating the lodestar figure, the court must then subtract fees for time spent on any unsuccessful claims unrelated to successful claims. McAfee,

738 F.3d at 88. Finally, the court awards a percentage of the remaining amount based on the prevailing party's "degree of success" on their claims. Id. (citing Robinson, 560 F.3d at 244).

II.

As addressed in the March order and accompanying memorandum opinion, the court found that Clark constituted a prevailing party eligible to obtain attorney's fees. ECF No. 156. The next step in calculating a reasonable hourly rate upon which to determine the "lodestar" figure "by multiplying the number of reasonable hours expended times a reasonable rate." McAfee, 738 F.3d at 88 (quoting Robinson, 560 F.3d at 243). Clark's counsel moves for attorney's fees in the amount the court so determines, based on his usual hourly rate of $500. Declaration in Support, ECF No. 159-1, at 1; Retainer, ECF No. 159-3. Coleman disagrees, arguing that an hourly rate of $350 is more appropriate. ECF No. 161, at 4-5. The court agrees with Coleman.

A party entitled to recover attorney's fees " bears the burden of establishing the reasonableness of the hourly rates requested." Spell v. McDaniel, 824 F.2d 1380, 1402 (4th Cir. 1987). "The reasonable rate is 'to be calculated according to the prevailing market rates in the relevant community.'" LaFleur v. Dollar Tree Stores, Inc., 189 F.Supp.3d 588, 596 (E.D. Va. 2016) (quoting Blum v. Stenson, 465 U.S. 886, 895 (1984)). This is generally accomplished "through affidavits from disinterested counsel, evidence of awards in similar cases, or other specific evidence that allows the court to determine 'actual rates which counsel can command in the [relevant] market.'" Project Vote/Voting for America, Inc. v. Long, 887 F.Supp.2d 704, 710 (E.D. Va. 2012) (quoting Spell, 824 F.2d at 1402). "The relevant market for determining

the prevailing rate is ordinarily the community in which the court where the action is prosecuted sits." Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 175 (4th Cir. 1994).

Here, Clark's attorney provides little by way of evidence through which the court can base a reasonable rate finding, beyond a sworn declaration stating that $500 represents his usual hourly rate and a retainer agreement between Clark and counsel that reflects the same $500 hourly rate. Declaration in Support, ECF No. 159-1, at 1; Retainer, ECF No. 159-3. The court finds $500 to be outside the range of a reasonable hourly rate for a case of this sort in this district. Fee awards granted in other cases in this district suggests that a reasonable hourly rate of $350 is more appropriate for an uncomplicated civil rights case such as this. See e.g. Berthiaume v. Doremus, No. 6-13-CV-00037, 2014 WL 2616990, at *7 (W.D. Va. June 12, 2014) (finding $350 reasonable for a managing attorney in a disability rights lawsuit); Sky Cable, LLC v. Coley, No. 5:11CV00048, 2014 WL 4407130, at *4 (W.D. Va. Sept. 8, 2014) (capping the hourly rate for partners to $350 in a Federal Communications Act civil action resulting in a judgment for over $2 million); Hudson v. Pittsylvania Cty., Va., No. 4:11CV00043, 2013 WL 4520023, at *4 (W.D. Va. Aug. 26, 2013), aff'd, 774 F.3d 231 (4th Cir. 2014) (reducing a requested hourly billing rate for a partner in a constitutional matter to $350); Supinger v. Virginia, No. 6:15-CV-17, 2019 WL 1450530, at *3 (W.D. Va. Mar. 4, 2019), report and recommendation adopted as modified, No. 6:15-CV-00017, 2019 WL 1446988 (W.D. Va. Mar. 31, 2019) (finding an hourly rate of $350 reasonable in an employment law action); Hurd v. Cardinal Logistics Mgmt. Corp., No. 7:17-CV-00319, 2019 WL 6718111, at *4 (W.D. Va. Dec. 10, 2019) (finding $350 a reasonable rate for an experienced attorney in a disability matter for the Roanoke community); Lusk v. Virginia Panel Corp., 96 F. Supp. 3d 573, 582 (W.D. Va.

2015) (finding $300 a reasonable hourly rate for an experienced employment law attorney in Harrisonburg). Under a Johnson framework, a fee of $350 is reasonable given the complexity and novelty of the issues presented (Johnson factor 2), the skill required to properly perform the legal services rendered (Johnson factor 3), the customary fee for the work performed (Johnson factor 5), and the attorneys' experience, reputation, and ability (Johnson factor 9). Doe v. Alger, No. 5:15-CV-35, 2018 WL 4659448, at *4 (W.D. Va. Jan. 31, 2018), report and recommendation adopted in part, rejected in part, No. 5:15-CV-00035, 2018 WL 4655749 (W.D. Va. Sept. 27, 2018).

However, the court will discount the $350 hourly rate by fifty (50) percent for time spent traveling. "Courts routinely compensate attorneys for travel time, but at a reduced rate." Stultz v. Virginia, No. 7:13-CV-589, 2019 WL 4741315, at *8 (W.D. Va. Aug. 15, 2019), report and recommendation adopted as modified, No. 7:13-CV-00589, 2019 WL 4740241 (W.D. Va. Sept. 27, 2019); See e.g. Prison Legal News v. Stolle, 129 F. Supp. 3d 390, 403–04 (E.D. Va. 2015) (reducing hourly rate for traveling from $450.00 to $200.00, which "[struck] an appropriate balance between the task billed, driving a car (which requires no legal skills of any kind), and counsel's opportunity costs of such travel-time"); Project Vote/Voting for Am., Inc. v. Long, 887 F. Supp. 2d 704, 716 (E.D. Va. 2012) (holding that "counsel should not recover their full market rate for travel"); Rosenberger v. Rector & Visitors of Univ. of Va., Civ. A. No. 91-0036-C, 1996 WL 537859, at *6 (W.D. Va. Sept. 17, 1996) (holding counsel should not recover the same fee for travel time as for active legal work). Moreover, Johnson factor 3, which requires the court to discount hourly rates based on the skill required to perform the work, supports applying a discounted hourly rate of $175 to travel time.

The court must next determine the number of hours reasonably expended by counsel for Clark. A prevailing plaintiff typically receives a "fully compensatory fee," though hours may be adjusted for duplicative hours or hours unrelated to the successful claims. See Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169, 174 (4th Cir. 1994) (citing Hensley v. Eckerhart, 461 U.S. 424, 437 (1983)). In this case, counsel for Clark provided a declaration calculating the total hours spent representing Clark on the claims in which he prevailed against Coleman and included a reconstructed billing report with descriptions of the work performed and time taken per task. ECF No. 159-1. His work included filing witness and exhibit lists, taking depositions, defending depositions, filing motions, proposing jury instructions, participating in oral arguments on motions, preparing for trial, participating in the two-day trial, and filing post-trial papers. Id. The number of hours in his reconstruction total 52.5.

Coleman argues that Clark's fee warrants a 10% reduction because his "reconstructions" of work "lack any indicia of reliability." "It is important to recognize that billing practices in the private sector may differ from those acceptable in a § 1983 case, as a fee-shifting statute requires transparency and consistency in determining fees to award to a prevailing party." Supinger v. Virginia, No. 6:15cv17, 2019 U.S. Dist. LEXIS 55612, at *23 (W.D. Va. Mar. 4, 2019) (citing Guidry v. Clare, 442 F. Supp. 2d 282, 295 (E.D. Va. 2006)). The court recognizes the importance of transparency but given its familiarity with this case and the reasonableness of the reconstruction, it finds no reason to doubt the alleged hours spent. However, as Clark has not distinguished time spent on legal work versus travel, the

court calculated travel time based on the distances between counsel for Clark's office and the relevant locations for billed activity.[1] Its findings are reproduced below.

Date	Activity	Total Hours Claimed	Legal Hours Calculated	Traveling Hours Calculated
9/4/18	Filing of witness and exhibit list	0.5	0.5	
9/5/18[2]	Taking depositions of Carolyn Cobbler, defending deposition of Brian Clark	8.5	1.3	7.2
3/28/19	Defending deposition of Wendy Inzerelli, Beth Richardson, and Denise Freeman	7	1.4	5.6
7/1/19	Memorandum opposing motion in limine	1	1	
7/8/19	First proposed jury instructions	1.5	1.5	
7/8/19	Oral arguments on motions in limine and meeting with Magistrate Judge on potential settlement	8	2.4	5.6
7/14/19	Preparation for trial	3	3	
7/15/19	Trial	15[3]	10	5
7/16/19	Trial	4.5[4]	5	5
8/12/19	Preparation for filing Rule 58 motion and supporting memorandum[5]	2	2	
9/19	Preparation of reply to memorandum in opposition to Rule 59 motion and motion and memorandum seeking leave to file late reply	1.5	1.5	
Total			29.6	28.4

[1] The court relied on Google Maps to calculate travel time. The court finds this approach to be sufficiently reliable, given the lack of contemporaneous records.

[2] Incorrectly listed as "9-5-19" in Clark's petition. ECF No. 159-1, at *2.

[3] The court will allocate the 15 hours claimed for the first day of trial as follows. Trial: 10 hours; Travel 5 hours.

[4] Based on the court's records, court was in session for nearly 5 hours on the second day of trial. The court will award 5 hours for trial and 5 hours for travel. The court will assume counsel neglected to add travel time, given that he cites two trips to Danville in requesting reimbursement for mileage.

[5] Counsel for Clark lists this as a Rule 58 motion, but the court understands this to reference work done on the Rule 59 motion filed.

Legal Hours: 29.6 hours x $350 rate = $10,360

Travel Hours: 28.4 x $175 = $4,970

Lodestar Amount: $10,360 (legal work fees) + $4,970 (travel time fees) = $15,330

III.

A strong presumption exists that the "lodestar number represents a reasonable attorney's fee" and "this presumption can only be overcome in those rare circumstances where the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." McAfee v. Boczar, 738 F.3d 81, 88–89 (4th Cir. 2013) (quoting Perdue v. Kenny, 130 S.Ct. 1662, 1673 (2010)), as amended (Jan. 23, 2014). At the same time, however, the Fourth Circuit's three-step process to calculate attorney's fees allows the court to make certain adjustments to the lodestar figure. In the final step of the fee analysis, a court may further reduce the remaining fee amount by a percentage reflecting the prevailing party's "degree of success" in their claims. See, e.g., Robinson v. Equifax Info. Servs., 560 F.3d 235, 244 (4th Cir. 2009). "[T]he degree of success obtained by the plaintiff is the 'most critical factor' in determining the reasonableness of a fee award." Lilienthal v. City of Suffolk, 322 F. Supp. 2d 667, 675 (E.D. Va. 2004) (quoting Hensley v. Eckerhart, 461 U.S. Case 4:11-cv-00043-MFU-RSB 424, 436–37 (1983)). A court must ask whether "the plaintiff achieve[d] a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award." McAfee, 738 F.3d at 92 (quoting Hensley, 461 U.S. at 439–40).

Generally, courts begin by "compar[ing] the amount of damages sought to the amount awarded." McAfee, 738 F.3d at 93 (quoting Mercer v. Duke Univ., 401 F.3d 199, 204 (4th Cir. 2005)). In this case, as noted in this court's March order and accompanying opinion, the

primary relief Clark sought was punitive damages against Coleman, more or less conceding the minimal nature of any compensable injury. However, the court held that punitive damages were not available in this lawsuit, rendering that avenue of relief unavailable. ECF No. 156. While Clark did win a symbolic vindication of his constitutional rights against Coleman and helped set guiding precedent at the intersection of two constitutional rights, the relief he obtained was far less than he originally sought. Having paid $7,500 upfront for counsel's services in this matter, Clark obtained only a nominal damage award of $1. Accordingly, the court finds Coleman's request for a 30% reduction applied to the lodestar amount warranted. ECF No. 161, at 10. "This reduction is sufficient to avoid a windfall to counsel while not so extreme as to discourage counsel from taking on similar cases in the future." Hurd v. Cardinal Logistics Mgmt. Corp., No. 7:17-CV-00319, 2019 WL 6718111, at *9 (W.D. Va. Dec. 10, 2019). A 30% reduction of the lodestar amount ($15,330) is $10,731. Finally, given that Clark has already paid counsel $7,500 for attorney services, the court credits this amount against what counsel is owed. The court awards counsel $3,231 in attorney's fees.

Finally, under § 1988, a prevailing plaintiff in a civil rights action is also entitled to recover "those reasonable out-of-pocket expenses incurred by the attorney which are normally charged to a fee-paying client, in the course of providing legal services." Wyatt v. Owens, No. 7:14-CV-492, 2018 WL 10613184, at *13 (W.D. Va. Jan. 23, 2018) (quoting Spell v. McDaniel, 852 F.2d 762 (4th Cir. 1988). Counsel for Clark represents his costs amount to $665, accounting for the out of pocket costs related to representation on successful claims that were not included in the Bill of Costs submit to the court. Compare Bill of Costs, ECF No. 157 with Declaration in Support ECF No. 159-1. The court credits the $500 counsel for Clark

received from his client specifically for out of pocket legal expenses, pursuant to his Retainer Agreement. The court awards counsel for Clark $165 in recoverable costs.

For the reasons set forth above, the court will grant in part Clark's motion for an award of reasonable attorney's fees in the amount of $3,231 and out of pocket expenses in the amount of $165, for a total award of $3,396.

An appropriate Order will be entered.

ENTERED: April 30, 2020

Digitally signed by Michael F. Urbanski
DN: cn=Michael F. Urbanski, o=Western District of Virginia, ou=United States District Court, email=mikeu@vawd.uscourts.gov, c=US
Date: 2020.04.30 15:23:22 -04'00'

Hon. Michael F. Urbanski
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

BRIAN H. CLARK,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 4:17cv45**
	)	
ROB COLEMAN,	)	
	)	
Defendant.	)	
	)	

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S RULE 59(e) MOTION REGARDING ATTORNEY'S FEES AWARD

Defendant Rob Coleman ("Coleman") by counsel, submits this Memorandum in Opposition to plaintiff Brian H. Clark's ("Clark") Rule 59(e) motion, ECF No. 165, regarding the Court's award of attorney's fees. In support thereof, Coleman states as follows:

STATEMENT OF THE CASE

Clark submitted his Motion for Attorney's Fees and attached to his motion the Declaration of Henry W. McLaughlin, Clark's counsel, Mr. McLaughlin's CV, and a Retainer Agreement. Coleman filed a brief in opposition setting forth numerous grounds for reducing Clark's claimed fee, including a reduction based on fees and costs already paid to his counsel. ECF No. 161. Clark failed to respond to Coleman's argument that the award should be reduced based on the fees and costs already paid to his attorney. ECF No. 162.

On May 1, 2020, the Court issued a Memorandum Opinion and accompanying Order awarding Clark $3,396.00 in attorney's fees and costs. The Court calculated a reasonable fee using the lodestar analysis, reduced the award based on Clark's limited

degree of success, and further reduced the award because Clark has already paid his attorney $8,000 in fees and costs. Clark's current Rule 59(e) motion followed.

ARGUMENT & AUTHORITY

Clark's motion should be denied for two reasons. First, the motion should be denied outright because Clark waived any argument that the fee award should not be reduced in an amount commensurate to the fees and costs paid pursuant to the Retainer Agreement with his counsel. Second, Clark fails to establish that the Court made a clear error of law or caused manifest injustice in rendering its decision on Clark's attorney's fee petition.

I. Standard of Review

Rule 59(e) permits a party to file a motion to alter or amend a judgment. Fed. R. Civ. P. 59(e). But "reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly." Pac. Ins. Co. v. Am. Nat. Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998). A court may amend or alter a judgment under Rule 59(e) "(1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice." F.C. Wheat Mar. Corp. v. United States, 663 F.3d 714, 725 (4th Cir. 2011).

A Rule 59(e) motion is neither a second bite at the apple nor an opportunity for a litigant to rise issues it could have raised in the first instance prior to entry of judgment. Pac. Ins. Co., 148 F.3d at 403 ("Rule 59(e) motions may not be used, however, to raise arguments which could have been raised prior to issuance of the judgment, nor may they be used to argue a case under a novel legal theory that the party had the ability to address in the first instance."); Clark v. Coleman, No. 4:17cv45, 2020 U.S. Dist. LEXIS 50826, at *34

(W.D. Va. Mar. 23, 2020); United States v. Wallis, No. 6:14cv5, 2017 WL 8288094, 2017 U.S. Dist. LEXIS 219189, at *2–3 (W.D. Va. May 16, 2017).

II. Clark Waived Any Argument Against Reducing the Fee Award Based on the Retainer Agreement.

Clark waived any argument that his fee award should be reduced by the amount of his fee agreement.

Coleman argued in his brief in opposition to Clark's fee petition that any award should be reduced by an amount commensurate to what Clark actually paid his attorney. ECF No. 161, at *10–11. Clark failed to even address that argument, much less rebut it. See ECF No. 162. Therefore, Coleman's argument was essentially deemed well taken. See Spellman v. Sch. Bd. of Chesapeake, No. 2:17cv635, 2018 U.S. Dist. LEXIS 73709, at *40–41 (E.D. Va. Apr. 5, 2018); Wright v. Kent Cnty. Dep't of Soc. Servs., No. ELH-12-3593, 2014 WL 301026, 2014 U.S. Dist. LEXIS 9351, at *76–77 (D. Md. Jan. 24, 2014) (failure to address argument in opposition brief may amount to concession); Ferdinand-Davenport v. Children's Guild, 742 F. Supp. 2d 772, 777 (D. Md. 2010) ("By her failure to respond to [defendant's]" argument in a motion to dismiss, "the plaintiff abandons [her] claim."); Westry v. N.C. A&T State Univ., 286 F. Supp. 2d 597 (M.D.N.C. 2003) (collecting cases), aff'd, 94 F. App'x 184 (4th Cir. 2004); Mentch v. E. Sav. Bank, FSB, 949 F. Supp. 1236, 1247 (D. Md. 1997) (plaintiff abandoned claim by failing to address it in opposition brief).

Because the time for Clark to argue that the retainer agreement should not serve as a basis for reducing the fee award was prior to the Court's entry of judgment on the fee petition, Clark waived consideration of that issue. See Holland v. Big River Minerals Corp., 181 F.3d 597, 605 (4th Cir. 1999) (collecting cases). As such, his Rule 59(e) motion should be denied outright.

III. The Court Did Not Make an Error of Law or Cause Manifest Injustice by Reducing Clark's Attorney's Fee Award.

As Clark does not allege there has been an intervening change in the law or present new evidence for the Court, the Court only reconsiders its Order on Clark's fee petition to correct a clear error of law or prevent manifest injustice.

Clark argues that "the fact that the plaintiff has paid part of the amount found by the Court to be appropriate should not be a factor for deduction of the attorney's fee award or the award of out-of-pocket costs." ECF No. 166, at *2 (citing Gulfstream III Assoscs. Inc. v. Gulfstream Aerospace Corp., 995 F.2d 414 (3d Cir. 1992)). Clark's argument, however, is based on a misreading of the Third Circuit Court of Appeals' decision in Gulfstream.

In Gulfstream, a case under the Sherman Act, the district court awarded a prevailing party's counsel only the amount of fees that the prevailing party was contractually obligated to pay its counsel according to a negotiated fee arrangement. Id. at 421. On appeal, the Third Circuit reversed the district court's fee determination and remanded for further proceedings. Id. at 423. The Gulfstream Court reversed the district court's determination because the district court failed to calculate a reasonable fee using the lodestar method. Id. at 422. Critically, the Third Circuit did not preclude a district court from exercising its discretion to reduce a fee award based on a contractual arrangement *after* conducting the lodestar analysis.

Gulfstream is inapposite to this case because the Court did not simply award Clark no more than the fees he contractually agreed to pay his counsel pursuant to the Retainer Agreement. Rather, unlike the district court in Gulfstream, the Court first conducted a lodestar analysis to determine a reasonable attorney's fee award. Clark v. Coleman, No.

4:17cv45, 2020 U.S. Dist. LEXIS 77160, at *3–4, *8–9 (W.D. Va. Apr. 30, 2020) (determining lodestar amount of $15,330.00). After calculating the lodestar, the Court reduced the lodestar amount by 30% to account for Clark's limited degree of success. Id. at *10–11 (reducing award to $10,731.00). Only then did the Court credit the amount Clark already paid his counsel. Id. at *11. Thus, Gulfstream, a nonbinding, out of circuit decision, is distinguishable from this case, and in any event, it does not preclude a court from reducing an attorney's fee award based on a contractual fee arrangement after conducting the lodestar analysis.

Indeed, as previously argued, it is entirely appropriate and within the Court's discretion to reduce a fee award to avoid a financial windfall for an attorney to the client's detriment when a retainer agreement exists. Wright v. City of New York, 283 F. Supp. 3d 98, 107–08 (S.D.N.Y. 2017) (reducing fee award by amount of contingent fee in retainer agreement); Laster v. Cole, No. 99cv2837, 2000 U.S. Dist. LEXIS 8672, 2000 WL 863463, at *2 (E.D.N.Y. June 23, 2000) (reducing attorneys' fees by amount specified in retainer agreement to avoid "double recovery" where both a fee-shifting statute and a retainer agreement applied).

Clark argues "once the Court has determined a reasonable attorney's fee . . . the amount paid towards such by the plaintiff should be refunded to the plaintiff upon payment of the award . . . ." But the Retainer Agreement contains no such obligation. Further, the result would be a de facto award of damages to the plaintiff in contravention of the Court's award of $1 in damages. The purpose of 42 U.S.C. § 1988 is to secure competent counsel, not compensate plaintiffs, which is why unrepresented parties are foreclosed from claiming fees under § 1988. See Kay v. Ehrler, 499 U.S. 432, 438 (1991).

Accordingly, Clark fails to meet his burden to show a clear error of law or manifest injustice in the Court's fee award, and his motion should be denied.

CONCLUSION

Clark waived any argument that the fee award should not be reduced by the amount already paid to his counsel. Regardless, Coleman did not argue, and the Court did not decide, that Clark's fee award should be limited to the amount set forth in the Retainer Agreement. Instead, the Court appropriately exercised its discretion by reducing Clark's fee award based on the amount he already paid his attorney in order to avoid a windfall. Because Clark fails to show that the Court committed a clear error of law or its decision regarding Clark's fee petition caused manifest injustice, Clark's Rule 59(e) motion should be denied.

For the foregoing reasons, Rob Coleman, by counsel, respectfully requests entry of an Order denying Clark's Rule 59(e) motion and granting such further relief as the Court deems just and proper.

Respectfully Submitted,

ROB COLEMAN

/s/
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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/
Of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION
Federal Courthouse
700 Main Street
Danville, Virginia 24541

BRIAN H. CLARK,
Plaintiff,

v. Civil Action No. 4:17-cv-00045-JLK-RSB

ROB COLEMAN

Defendant,

REPLY TO MEMORANDUM IN N OPPOSITION TO MOTION PURSUANT TO RULE 59 (e) OF THE FEDERAL RULES OF CIVIL PROCEDURE TO AMEND THE JUDGMENT BY THIS COURT ENTERED ON MAY 1, 2020

The plaintiff, Brian H. Clark ("Clark"), by counsel, sets forth the following in reply to the memorandum filed on behalf of Rob Coleman ("Coleman") in opposition to Clark's motion pursuant to Rule 59 (e) of the Federal Rules of Civil Procedure, asking this Court to amend the Court's judgment order entered on May 1, 2020 (Dkt No. 164):

1. Clark Should Not Be Held to Have Waived His Motion to Amend

Coleman argues that the basis for Clark's motion to amend has been waived because Coleman's memorandum in opposition to Clark's motion for attorney's fees asked the Court to reduce Clark's attorney fee awrd by the amount set forth in the retainer agreement between Clark and his counsel and Clark's rep[y to that memorandum did not address that argument.

Clark's counsel submits that this Court should not rule in favor of such waiver argument for two reasons:

A. Clark was not required to file a reply to the memorandum in opposition.

B. The rationale for the argument by Coleman that the fee award should be reduced by the amount paid by Clark to his counsel was to prevent a double recovery by Clark's counsel. However, the motion to amend by Clark did not seek such double recovery, rather sought an tttorney fee award to include the amount pa9id by Clark so that the amount paid by Clark could be rebated to him.

2. Clark's Motion to Amend Did Not Misconstrue *Gulfstream III Assocs. Inc. v. Gulfstream Aerospace Corp*, 995 F. 2d 414 (3rd Cir. 1992)

Coleman's memo opposing Clark's motion to amend contended that Clark's memorandum in support of such motion misconstrued *Gulfstream III Assocs. Inc. v. Gulfstream Aerospace Corp*, 995 F. 2d 414 (3rd Cir. 1992) Clark submits that the court in that case ruled against a position taken by the non-prevailing party that the amount of attorney's fees should be limited to the amount paid by the prevailing party to that party's legal counsel. *A fortioari*, the attorney's fee award in this case should not be reduced by the amount paid by Clark to his counsel.

Conclusion

Wherefore, Clark, pursuant to Rule 59 (c) of the Federal Rules of Civil Procedure, Clark prays that the Court amend the Court's judgment order entered on May 1, 2020 to award attorney's fees of $10,731 in this case, rather than $3,231, and to amend the award of out-of-pocket costs to award $665 rather than $165.

Respectfully submitted,

BRIAN H. CLARK,

By /s/ Henry W. McLaughlin
Counsel

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Counsel for Brian H. Clark .

CERTIFICATE

I, Henry W. McLaughlin, counsel for Brian H. Clark, certify that on the 12th day of May, 2020, the foregoing will be filed electronically with the ECF filing System of the U.S. District Court for the Western District of Virginia, Danville Division, which will notify the following of the same:

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Roanoke, Virginia 24006-1240
nschnetzler@faplawfirm.com

/s/ Henry McLaughlin

Henry W. McLaughlin (VSB No 07105)
The Law Office of Henry McLaughlin,
P.C. 707 East Main Street, Suite 1050
Richmond, Virginia 23219
(804) 205-9020; fax (877) 575-0245
henry@mclaughlinvalaw.com
Counsel for Brian H. Clark.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION

BRIAN H. CLARK,	)	
Plaintiff,	)	**Civil Action No. 4:17-cv-00045**
	)	
v.	)	
	)	**By: Hon. Michael F. Urbanski**
ROB COLEMAN,	)	**Chief United States District Judge**
Defendant.	)	

ORDER

This matter is before the court on Plaintiff Brian H. Clark's motion to amend the Court's May 1, 2020 judgment awarding counsel for Clark attorney's fees and expenses pursuant to Fed. R. of Civ. Proc. Rule 59(e). ECF No. 165. Defendant Rob Coleman responded, arguing that amendment of the judgment was unwarranted under the law. The matter is ripe for resolution.

Rule 59(e) permits a party to file a motion to alter or amend a judgment but may not be used to relitigate old matters. Pac. Ins. Co. v. Am. Nat. Fire Ins. Co., 148 F.3d 396, 403 (4th Cir. 1998). The Fourth Circuit has held that the extraordinary remedy of amending a judgment after its entry is only appropriate in three limited circumstances: (1) to accommodate intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice. F.C. Wheat Mar. Corp. v. United States, 663 F.3d 714, 725 (4th Cir. 2011).

Clark contends that the court erred in crediting the payment counsel for Clark received from his client against the Court's award of attorney's fees and reasonable expenses. In so arguing, counsel for Clark does not introduce intervening controlling law, new evidence not

previously considered by the court in making its determination, or grounds upon which the court should find clear error in its original judgment. The court, exercising its sound judgment and broad discretion, determined that crediting the payment counsel for Clark already received against its award of attorney's fees was appropriate given the circumstances to avoid windfall in the form of duplicate payments to counsel for services rendered. Indeed, Clark waived any such argument in leaving the calculation of reasonable attorney's fees and expenses to the court's exclusive discretion in his original motion. ECF No. 158.

For the reasons stated herein, Clark's motion to amend the judgment awarding attorney's fees is **DENIED.**

It is so **ORDERED.**

Entered: 05-21-2020

/s/ Michael F. Urbanski

Hon. Michael F. Urbanski
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
DANVILLE DIVISION
Federal Courthouse
700 Main Street
Danville, Virginia 24541

BRIAN H. CLARK,
Plaintiff,

v. Civil Action No. 4:17-cv-00045-JLK-RSB

ROB COLEMAN

Defendant,

NOTICE OF APPEAL

Brian H. Clark, plaintiff in the above-styled case, hereby appeals to the United States Court of Appeals for the Fourth Circuit from the order of this Court ("Brian Clark"), by counsel, hereby gives notice of appeal to the Fourth Circuit Court of Appeals from the order of this Court entered on May 1, 2020 (Dkt No. 164) and from the Order of this Court entered on May 21, 2020 (Dkt No. 169)

Respectfully submitted,

BRIAN H. CLARK,

By____/s/ Henry W. McLaughlin
Counsel

Henry W. McLaughlin (VSB No 07105)
The Law Office of Henry McLaughlin, P.C.
707 East Main Street, Suite 1050
Richmond, Virginia 23219
(804) 205-9020; fax (804) 205-9029
henry@mclaughlinvalaw.com
Counsel for Brian H. Clark .

CERTIFICATE

I, Henry W. McLaughlin, counsel for Brian H. Clark, certify that on the 22nd day of May, 2020, the foregoing will be filed electronically with the ECF filing System of the U.S. District Court for the Western District of Virginia, Danville Division, which will notify the following of the same:

John Chadwick Johnson,
Esquire Frith Anderson & Peake, PC
29 Franklin Road, SW
Roanoke, Virginia 24011
jjohnson@faplawfom.com

Nathan H. Schnetaler, Esquire
Frith Anderson & Peake, P.C.
29 Franklin Road, SW
P. O. Box 1240
Roanoke, Virginia 24006-1240
nschnetzler@faplawfirm.com

/s/ Henry McLaughlin

Henry W. McLaughlin (VSB No 07105) The Law Office of Henry McLaughlin, P.C. 707 East Main Street, Suite 1050
Richmond, Virginia 23219
(804) 205-9020; fax (877) 575-0245
henry@mclaughlinvalaw.com
Counsel for Brian H. Clark.

OFFICE OF THE CIRCUIT MEDIATOR

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

EDWARD G. SMITH
CHIEF CIRCUIT MEDIATOR
DUNCAN, SOUTH CAROLINA

FRANK C. LANEY
CIRCUIT MEDIATOR
409 ACCOLADE DRIVE
CARY, NC 27513
(919) 469-2853
FAX (919) 469-5278
Frank_Laney@ca4.uscourts.gov

CYNTHIA MABRY-KING
CIRCUIT MEDIATOR
CLARKSVILLE, VIRGINIA

June 19, 2020

Re: 20-1586, Brian Clark v. Rob Coleman

NOTICE OF RESCHEDULED MEDIATION

Dear Counsel:

This letter will confirm that the mediation conference has been rescheduled for Thursday, June 25, 2020, at 3:30 p.m. EASTERN time.

Thank you for your assistance in this matter.

Sincerely,

Frank C. Laney
Circuit Mediator

Copies: John Chadwick Johnson
Henry Woods McLaughlin III
Nathan Henry Schnetzler

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DOCKETING STATEMENT--CIVIL/AGENCY CASES

Directions: Counsel must make a **docketing statement (civil/agency) filed** entry in CM/ECF within 14 days of docketing of the appeal, or within the due date set by the clerk's docketing notice, whichever is later. File with the entry the (1) docketing statement form with any extended answers and (2) any transcript order form. Parties proceeding pro se are not required to file a docketing statement. Opposing counsel who finds a docketing statement inaccurate or incomplete may file any objections within 10 days of service of the docketing statement using the ECF event-**docketing statement objection/correction filed**.

Appeal No. & Caption	20-1586; Brian H. Clark v. Rob Coleman
Originating No. & Caption	4:17-cv-00045-MFU-RSB; Brian H. Clark v. Rob Coleman
Originating Court/Agency	U.S. District Court, Western District of Virginnia, Danville Div

Jurisdiction (answer any that apply)		
Statute establishing jurisdiction in Court of Appeals	28 U.S.C. Section 1291	
Time allowed for filing in Court of Appeals		
Date of entry of order or judgment appealed	May 1, 2020	
Date notice of appeal or petition for review filed	May 22, 2020	
If cross appeal, date first appeal filed		
Date of filing any post-judgment motion	May 8, 2020	
Date order entered disposing of any post-judgment motion	May 21, 2020	
Date of filing any motion to extend appeal period		
Time for filing appeal extended to		
Is appeal from final judgment or order?	◉ Yes	○ No
If appeal is not from final judgment, why is order appealable?		

Settlement (The docketing statement is used by the circuit mediator in pre-briefing review and mediation conducted under Local Rule 33. Counsel may make a confidential request for mediation by calling the Office of the Circuit Mediator at 843-731-9099.)		
Is settlement being discussed?	○ Yes	◉ No

Transcript (transcript order must be attached if transcript is needed and not yet on file)		
Is transcript needed for this appeal?	○ Yes	◉ No
Has transcript been filed in district court?	◉ Yes	○ No
Is transcript order attached?	○ Yes	◉ No

Case Handling Requirements (answer any that apply)		
Case number of any prior appeal in same case	18-2070	
Case number of any pending appeal in same case		
Identification of any case pending in this Court or Supreme Court raising similar issue		
	If abeyance or consolidation is warranted, counsel must file an appropriate motion.	
Is expedited disposition necessary?	○ Yes	◉ No
	If yes, motion to expedite must be filed.	
Is oral argument necessary?	◉ Yes	○ No
Does case involve question of first impression?	○ Yes	◉ No
Does appeal challenge constitutionality of federal or state statute in case to which federal or state government is not a party	○ Yes	◉ No
	If yes, notice re: challenge to constitutionality of law must be filed.	

Nature of Case (Nature of case and disposition below. Attach additional page if necessary.)

The U.S. District Court for the Western District of Virginia, Danville Divisoin ("the district cdourt") entered an order setting aside a jury verdict and awarding the appellant nominal damages and attorney's fees. After the appellant,Brian H. Clark ("Clark") by counsel, filed a declaration and brief in support of atrtorney's fees and after briefing by both sides, the district court entered an order indicating that reasonable attorney work and fee for such work was $10,731, but deducted from that the $7,500 already paid by the appellant to his counsel. The district court found that Clark was entitled to recover $665 in out-of-pocket costs of his counsel, but deducted from that $500 paid by Clark to his counsel. As a result, the district court awarded attorney's fees of $3,231 and $`65 in recoverable costs (in addition to what was taxed as costs by the clerk of the district court.

Clark, by counsel, contends that an award of attorney's fees to a party should not be reduced by the attorney's fees paid by such party to his counsel, and, on that basis, has appealed the decision of the district court on this issue.

Issues (Non-binding statement of issues on appeal. Attach additional page if necessary)

Adverse Parties (List adverse parties to this appeal and their attorneys; provide party's address if the party is not represented by counsel. Attach additional page if necessary.)	
Adverse Party: Rob Coleman Attorney: Nathan H. Schnetzier, Esquire Address: Firth Anderson & Peake 29 Franklin Road, SW Roanoke, Virginia 24011 E-mail: nschnetzier@faplawfirm.com Phone: (540) 772-4600	Adverse Party: Rob Coleman Attorney: John C. Johnson, Esquire Address: Firfth Anderson & Peake 29 Franklin Road, SW Richmond, Virginia 24011 E-mail: jjohnson@faplawfirm.com Phone: (540) 772-4600
Adverse Parties (continued)	
Adverse Party: Attorney: Address: E-mail: Phone:	Adverse Party: Attorney: Address: E-mail: Phone:

Appellant (Attach additional page if necessary.)	
Name: Attorney: Address: E-mail: Phone:	Name: Attorney: Address: E-mail: Phone:

Appellant (continued)	
Name: Attorney: Address: E-mail: Phone:	Name: Attorney: Address: E-mail: Phone:

Signature: _____ **Date:** June 10, 2020

Counsel for: Brian H. Clark

Certificate of Service: I certify that on June 10, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below (Attach additional page if necessary):

Signature:	Date: June 10, 2020

Filed: June 11, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEFING ORDER - CIVIL/AGENCY

No. 20-1586, Brian Clark v. Rob Coleman
4:17-cv-00045-MFU-RSB

Briefing shall proceed on the following schedule:

JOINT APPENDIX due: 07/21/2020

BRIEF [Opening] due: 07/21/2020

BRIEF [Response] due: 08/20/2020

BRIEF [Reply] (if any) due: Within 21 days of service of response brief.

The following rules apply under this schedule:

- Counsel must file the electronic version and one identical paper copy of briefs and appendices. If the case is tentatively calendared for argument, counsel will be required to file three additional paper copies. Local Rules 30(b)(4) & 31(d).
- Filings must conform to the **Fourth Circuit Brief & Appendix Requirements** (available as a link from this order and at **www.ca4.uscourts.gov**). FRAP 28, 30 & 32.
- All parties to a side must join in a single brief, even in consolidated cases, unless the court has granted a motion for leave to file separate briefs. Local Rules 28(a) & 28(d).
- Motions for extension of time should be filed only in extraordinary circumstances upon a showing of good cause. Local Rule 31(c).
- If a brief is filed in advance of its due date, the filer may request a corresponding advancement of the due date for the next brief by filing a

motion to amend the briefing schedule.

- If a brief is filed after its due date, the time for filing subsequent briefs will be extended by the number of days the brief was late.
- Failure to file an opening brief within the scheduled time may lead to imposition of sanctions against court-appointed counsel or dismissal of the case. Local Rules 45 & 46(g).
- Failure to file a response brief may result in loss of the right to be heard at argument. FRAP 31(c).
- If a case has not been scheduled for a mediation conference, but counsel believes such a conference would be beneficial, counsel should contact the Office of the Circuit Mediator directly at 843-731-9099, and a mediation conference will be scheduled. In such a case, the reason for scheduling the conference will be kept confidential. Local Rule 33.
- The court may, on its own initiative and without prior notice, screen an appeal for decision on the parties' briefs without oral argument. Local Rule 34(a).
- If a case is selected for the oral argument calendar, counsel will receive notice that the case has been tentatively calendared for a specific court session approximately two months in advance of the session. Local Rule 34(c).

/s/ PATRICIA S. CONNOR, CLERK
By: Anisha Walker, Deputy Clerk

Gmail john johnson

Compose

Inbox 28,084
Starred
Snoozed
Important
Sent
Drafts 1,206
Categories
Accounts
Follow up
Gibson

Meet
Start a meeting
Join a meeting

Chat
Henry

No recent chats
Start a new one

Re: Clark v. Coleman

Henry McLaughlin III <henry@mclaughlinvalaw.com> Wed, Jun 24, 9:53 AM (
to John

Mr. Johnson, I case we are are successful in settlement as a result of tomorrow's mediation, I request your consideration to agree to the following joint appendix:

Docket Nos. as follows:(to include all exhibits, including declarations)

156. Order setting aside jury verdict and awarding nominal damages and attorney's fees.
158 motion for attorney's fees.
159 brief in support of attorney's fees.
161 response in opposition to motion for attorney's fees
162 Reply
163. Memorandum Opinion of Court
164 Order
165 Motion to amend
166 brief in support of motion to amend
167 opposition to motion to amend
168 reply to opposition
169 order denying motion to amend
170 notice of appeal

Please let me know if you would agree to the above as a joint appendix
Thanks. Henry McLaughlin

--
Henry W. McLaughlin
The Law Office of Henry McLaughlin, P.C.
Eighth and Main Building
707 East Main Street, Suite 1050 (Please note new suite number)
Richmond, Virginia 23219
804-205-9020 / 877-575-0258 Toll Free
877-575-0245 Fax

The Law Office of Henry McLaughlin, P.C.

Henry McLaughlin III <henry@mclaughlinvalaw.com>

RE: Clark v. Coleman
1 message

John C. Johnson <jjohnson@faplawfirm.com>
To: Henry McLaughlin III <henry@mclaughlinvalaw.com>

Wed, Jun 24, 2020 at 10:43 AM

Will review and let you know. By the way my partner Nate Schnetzler will be handling the conference call with the mediator as I have been called away.

John

FRITH ANDERSON + PEAKE

John C. Johnson
ATTORNEY

540.725.3363 direct
540.761.3363 cell
jjohnson@faplawfirm.com

540.772.4600 main | 540.772.9167 fax
29 Franklin Road SW (24011) | P.O. Box 1240 (24006)
Roanoke, Virginia

web | news | bio | map | files

From: Henry McLaughlin III <henry@mclaughlinvalaw.com>
Sent: Wednesday, June 24, 2020 10:00 AM
To: John C. Johnson <jjohnson@faplawfirm.com>
Subject: Re: Clark v. Coleman

Sorry if I worded it wrong. If we settle tomorrow that would make it unnecessary for either of us to file anything further except dismissal of the case. I was asking for agreement on a joint appendix if we don't settle.

On Wed, Jun 24, 2020 at 9:56 AM John C. Johnson <jjohnson@faplawfirm.com> wrote:

Mr. McLaughlin

Your email below is confusing. If we were to be successful in settlement as a result of tomorrow's efforts, why would you need to file anything further?

John

FRITH ANDERSON + PEAKE

John C. Johnson

ATTORNEY

540.725.3363 direct

540.761.3363 cell

jjohnson@faplawfirm.com

540.772.4600 main | 540.772.9167 fax

29 Franklin Road SW (24011) | P.O. Box 1240 (24006)

Roanoke, Virginia

web | news | bio | map | files

From: Henry McLaughlin III <henry@mclaughlinvalaw.com>
Sent: Wednesday, June 24, 2020 9:54 AM
To: John C. Johnson <jjohnson@faplawfirm.com>
Subject: Re: Clark v. Coleman

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167 opposition to motion to amend

168 reply to opposition

169 order denying motion to amend

170 notice of appeal

Please let me know if you would agree to the above as a joint appendix

Thanks. Henry McLaughlin

--

Henry W. McLaughlin
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--

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