

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
Harrisonburg Division**

<b>ROBERT L. PASCO,</b>	)	
	)	
<i>Plaintiff,</i>	)	
	)	<b>Civil Action No.: 5:11CV87</b>
<b>v.</b>	)	
	)	
<b>HANK ZIMMERMAN, et als.</b>	)	
	)	
<i>Defendant.</i>	)	

**BRIEF IN SUPPORT OF MOTION TO DISMISS**

Defendant Hank Zimmerman (“Zimmerman”) by counsel, states as follows for his Brief in Support of its Motion to Dismiss.

**FACTS**

The plaintiff filed this action for both compensatory and punitive damages arising from Defendant Zimmerman’s alleged acts and conduct in violation of the plaintiff’s rights under both federal and state laws. The Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 1331 and 1343.

This action arises out of the termination of the plaintiff by Defendant Board of Trustees of Shenandoah County (“Board of Trustees”). The plaintiff served as the Director of Defendant Shenandoah County Library (“Library”) from January 1, 2002 until October 12, 2010. Complaint ¶ 6. Defendant Library is a public entity established by the governing body of Shenandoah County pursuant to Virginia Code § 42.1-33, *et seq.* Complaint ¶ 9. Defendant Board of Trustees is also a public entity appointed by the governing body of Shenandoah County pursuant to Virginia Code § 42.1-35. Complaint ¶ 10. Defendant Zimmerman was the Chairman of the Library’s Board of Trustees, and is sued in both his individual and official capacities. Complaint ¶ 7.

On the morning of October 1, 2010, Defendant James Dallas Moore (“Defendant Moore”) came into the plaintiff’s office at the Library. The plaintiff alleges that Defendant

Moore physically pushed him back from his computer and seized two external computer hard drives that were on the plaintiff's desk near his computer, on the opposite side of the desk from the doorway through which Defendant Moore entered the office. Complaint ¶ 17. The plaintiff alleges that one of the hard drives belonged to the Library and one of the hard drives was his personal property. Complaint ¶ 19. When Defendant Moore attempted to leave the plaintiff's office with both of the hard drives, the plaintiff attempted to retrieve the hard drives from Defendant Moore. Complaint ¶¶ 21, 23. When the plaintiff attempted to retrieve the hard drive from Defendant Moore, Defendant Moore allegedly threw both of the drives to the floor and they shattered. Complaint ¶ 24. The plaintiff further alleges that Defendant Moore's conduct destroyed the plaintiff's hard drive, rendering it useless and the files on it irretrievable. Complaint ¶ 27.

The plaintiff avers that when Defendant Zimmerman learned of the incident, he asked the plaintiff not to file a criminal complaint against Defendant Moore, and further told the plaintiff to wait until after the plaintiff had returned from a scheduled conference to make a decision about Defendant Moore's employment. Complaint ¶ 29. Defendant Moore filed a complaint to law enforcement against the plaintiff for assault and battery on October 2, 2010. A Sheriff's Deputy came to the plaintiff's home and advised him of such complaint. Complaint ¶ 30. In response, the plaintiff alleges that he, as Director of the Library responsible for personnel decisions, terminated Defendant Moore and then informed Defendant Zimmerman. Complaint ¶ 31. On or about October 12, 2010, Defendant Board of Trustees met and voted to terminate the plaintiff's employment. Complaint ¶ 36. Further, the Board of Trustees reinstated Defendant Moore to his job. Complaint ¶ 37.

The Complaint contains six separate counts against Defendant Zimmerman, individually and officially, including both federal and state claims. Count One alleges a claim under 42 U.S.C. § 1983, alleging that the defendants' conduct violated clearly established statutory and constitutional rights of which a reasonable person would have known, including the right to be free from unlawful searches and seizures, and the right to protection from unlawful takings without due process under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. Complaint ¶ 42. The plaintiff alleges he had both a statutory and a constitutional right to possession of the computer hard drives. Complaint ¶ 41. Further, the plaintiff alleges a deprivation of his rights, privileges, or immunities secured for him by the Constitution and other

laws, and that his actions to protect his rights resulted in the unlawful termination of his job. Complaint ¶ 43.

Count Two alleges a state claim of conversion, alleging that the defendants had no right to seize his property. Complaint ¶ 47. Count Three alleges a state violation of Virginia Computer Crimes Act. Complaint ¶ 51. Count Four alleges a state claim of assault and battery, stating that Defendant Moore's touching was in an unlawful manner without authority or permission, and that Defendant Board of Trustees "ratified, adopted, acquiesced in Defendant Moore's conduct." Complaint ¶ 55. Count Five alleges a violation of Virginia Constitution Article 1 § 11, stating that no person shall be deprived of his life, liberty, or property without due process of law. Complaint ¶ 62. Count Six alleges a wrongful discharge in violation of Virginia public policy arising out of Virginia Code §§ 18.2-152.1 through 18.2-152.15 and §§ 19.2-11.01 through 19.2-11.4, as well as the Virginia Constitution, Article 1, § 11. Complaint ¶ 74.

## ARGUMENT

### I. Standard of Review

The purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the factual allegations made in a complaint. *E.I. DuPont De Nemours and Co. v. Kolon Ind.*, 688 F. Supp. 2d 443, 449 (E.D. Va. 2009); and *Edwards v. City of Goldsboro*, 178 F.3d 231, 243-44 (4<sup>th</sup> Cir. 1999). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted by the court as true, to 'state a claim to relief that is plausible on its face.'" *E.I. DuPont De Nemours*, 688 F. Supp. at 449 (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007)). To be plausible on its face, the facts alleged must be more than a "sheer possibility that a defendant has acted unlawfully." *Id.* While the Court must accept as true all factual allegations contained in the complaint, it is not bound to accept as true the complaint's legal conclusions. *Ashcroft v. Iqbal*, 556 U.S. 662 129 S. Ct. 1937, 1949 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Moreover, the Court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Kloth v. Microsoft Corp.*, 444 F.3d 312, 319 (4<sup>th</sup> Cir. 2006). A motion to dismiss will be granted if it appears that the plaintiff would be entitled to no relief under any state of facts which could be proved to support his claim. *Wolford v. Budd Co.*, 149 F.R.D. 127, 129 (W.D. Va. 1993).

## **II. No § 1983 Claim Against Defendant Zimmerman Individually or Officially**

In Count One of the Complaint, the plaintiff purports to allege a violation of 42 U.S.C. § 1983, stating: “Because Defendant Moore and the other Defendants had no right to seize plaintiff’s computer hard-drive, because the seizure of Plaintiff’s property was unreasonable and because Plaintiff objected to the seizure, Plaintiff had both a statutory right and a constitutional right to possession of the computer hard-drive.” Complaint ¶ 41. In essence, the plaintiff alleges an unlawful search and seizure and the right to protection from unlawful taking without due process of law under the Fourth, Fifth, and Fourteenth Amendments. Complaint ¶ 42. However, the plaintiff fails to state an actionable claim against Defendant Zimmerman, in either his official or individual capacity.

### **A. Official Capacity Lawsuit against Defendant Zimmerman Must be Dismissed**

Whether an individual is sued in an official or personal capacity will determine what elements a plaintiff must prove. *McDonald v. Dunning*, 760 F. Supp 1156, 1160 (E.D. Va. 1991). When a defendant is sued in his or her official-capacity, as opposed to personally, it is simply another way of suing the entity of which the officer is an agent. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (citations omitted). In *Kentucky*, the U.S. Supreme Court reiterated that an official capacity suit “is *not* a suit against the official personally, for the real party in interest is the entity”, and a plaintiff can only seek to recover on a damages judgment against the government entity itself, not against the official’s personal assets. *Id.* Thus, in this case, the claims against Defendant Zimmerman in his official capacity are merely reiterations of the same claims against the real party in interest, the entity Defendant Board of Trustees.

Further, courts have repeatedly held that there is no need to have an agent defendant in his official capacity in the lawsuit when the entity is also a defendant. *See Will v. Mich. Dept. of State Police*, 491 U.S. 58, 70-71 (1989) (state officials sued in their official capacities are not “persons” within the meaning of § 1983). Moreover, the Western District of Virginia recently held that “to the extent that [the plaintiff] seeks to sue the defendants in their official capacities for monetary damages pursuant to § 1983, such claims must be dismissed.” *Brown v. Ray*, 695 F. Supp. 2d 292, 298 (W.D. Va. 2010); *see also Couch v. Jabe*, 479 F. Supp. 2d 569, 598 (W.D. Va. 2006) (court dismissed the plaintiff’s claims insofar as he seeks monetary damages from the defendants in their official capacities); and *Mainstream Loudoun v. Board of Trustees of Loudoun County Library*, 2 F. Supp. 2d 783, 791 (E.D. Va. 1998) (district court concluded that

individual Library Board Members are unnecessary parties to the action and should be dismissed). Like in *Mainstream Loudoun*, Defendant Zimmerman is an unnecessary party because Defendant Zimmerman is sued only as a surrogate for the Board of Trustees, and a judgment against Defendant Zimmerman cannot be expected to provide the plaintiff with complete relief for the requested declaratory, equitable, or monetary relief demanded. *Mainstream Loudoun*, 2 F. Supp. 2d at 791. Therefore, all of the claims against Defendant Zimmerman in his official capacity must be dismissed.

B. Personal Capacity Lawsuit against Defendant Zimmerman Should Also be Dismissed

On the other hand, suits against agents of the local government agency in their personal capacity seek to impose personal liability on the agent for actions he takes under color of state law. *Kentucky*, 473 U.S. at 165. Thus, to impose personal liability in a § 1983 action, the plaintiff must show that the official, acting under color of state law, caused the deprivation of a federal right. *Id.* at 166 (citing *Monroe v. Pape*, 365 U.S. 167 (1961)).

In this case, the plaintiff cannot recover against Defendant Zimmerman personally, as there are no allegations or acts committed by Defendant Zimmerman that caused any deprivation of a federal right suffered by the plaintiff. Lawsuits against agents in their personal capacities cannot proceed “absent proof of some degree of personal involvement in the alleged deprivation of rights.” *McDonald*, 760 F. Supp at 1160 (citing *Vinnedge v. Gibbs*, 550 F.2d 926, 928-29 (4<sup>th</sup> Cir. 1977); and *Bennett v. Gravelle*, 323 F. Supp. 203, 214 (D. Md.), *aff’d* 451 F.2d 1011 (4<sup>th</sup> Cir. 1971)). The plaintiff makes sweeping conclusions that “the other Defendants” had no right to seize his hard drive (Complaint ¶ 41), and that the “Defendants’ conduct” violated clearly established statutory and constitutional rights (Complaint ¶ 42), and that “Defendants, through state action, subjected Plaintiff to the deprivation of his rights, privileges, or immunities secured by the Constitution or other laws.” Complaint ¶ 43. However, the plaintiff fails to state any actions by Defendant Zimmerman that caused the unlawful search and seizure by Defendant Moore. Defendant Zimmerman was not alleged to have even been present at the Library at the time of the alleged illegal search and seizure by Defendant Moore. Defendant Zimmerman took no part in and was not present during the interaction between Defendant Moore and the plaintiff. *See* Complaint ¶ 28 (“Defendant Zimmerman came to the office later on the morning of October 1, 2010.”). The Complaint is completely devoid of any alleged facts giving rise to a § 1983 claim against Defendant Zimmerman personally. *See Craddock v. Hicks*, 314 F. Supp. 2d 648,

654 (N.D. Miss. 2003) (The district court found no basis for individual liability against defendant Chief White, who did not participate in the plaintiff's arrest in any way).<sup>1</sup>

For these reasons, the lawsuit against Defendant Zimmerman, both in his individual and personal capacity, should be dismissed.

### **III. No Alleged State Claims Against Defendant Zimmerman**

Counts Two, Three, and Four of the Complaint allege state tort claims for conversion, assault and battery, and violation of Virginia Computer Crimes Act, Virginia Code § 18.2-152.12. Defendant Zimmerman, either in his personal or official capacity, is not liable for the alleged actions of Defendant Moore. *See Carter v. City of Danville*, 164 F.3d 215, 221 (4<sup>th</sup> Cir. 1999) (plaintiff's state tort claims of assault, battery, and false imprisonment against the Chief of Police were dismissed as no indication that Chief participated in or authorized raid on the plaintiff's home or her interrogation). First, under Virginia law, "a person is liable for conversion for the wrongful exercise or assumption of authority over another's goods, depriving the owner of their possession, or any act of dominion wrongfully asserted over property in denial of, or inconsistent with, the owner's rights." *E.I. DuPont De Nemours and Co. v. Kolon Ind.*, 688 F. Supp. 2d 443, 454 (E.D. Va. 2009) (quoting *Simmons v. Miller*, 261 Va. 561, 582 (2001)). The plaintiff has failed to state how Defendant Zimmerman deprived the plaintiff of possession of his property or asserted any act of dominion over the plaintiff's property in denial or inconsistent with his rights.

The Complaint alleges that only Defendant Moore seized the hard drive. Defendant Moore did not in fact leave the plaintiff's office with the hard drive. Nor did Defendant Moore maintain possession of the hard drive. While Defendant Moore allegedly attempted to leave the plaintiff's office with the intention of seizing the hard drives, Defendant Moore threw both of the drives to the floor and they shattered. Complaint ¶¶ 20, 21, and 24. Nothing else in the Complaint sets forth any additional facts supporting a claim for conversion against Defendant Zimmerman. All of the facts alleged by the plaintiff focus solely on the actions of Defendant Moore. There are no facts or actions alleged supporting that Defendant Zimmerman wrongfully exercised or assumed authority over the plaintiff's goods or deprived the plaintiff of possession

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<sup>1</sup> Further, the actions allegedly committed by Defendant Moore were not taken against the plaintiff under color of state law, do not constitute state action, and do not give rise to a federal claim under §1983, as the allegations detail a personal dispute between the plaintiff and Defendant Moore. *See* Memorandum in Support of Motion to Dismiss filed by Defendant Moore.

of his property, or any act by Defendant Zimmerman wherein he wrongfully asserted dominion over the plaintiff's property in denial of, or inconsistent with, the plaintiff's rights. The plaintiff merely makes a blanket assertion that the "Defendants had no right to seize Plaintiff's property" (Complaint ¶ 46); however, the facts alleged only show that Defendant Moore, not Defendant Zimmerman, allegedly illegally seized the plaintiff's property. Thus, the plaintiff's conversion claim fails against Defendant Zimmerman.

There are no allegations or facts showing that Defendant Zimmerman actually participated in the seizure of the hard drive, the physical altercation between the plaintiff and Defendant Moore, the grabbing of the hard drive, or the alleged shattering of the hard drive. Indeed, Defendant Zimmerman was not alleged to even be at the Library at the time of any of these events. Likewise, there are no facts supporting that Defendant Zimmerman authorized Defendant Moore to go into the plaintiff's office and grab and break his hard drive. As such, there are no grounds for liability, either directly or indirectly, by Defendant Zimmerman, either in his official capacity or on a personal basis, for the alleged actions of Defendant Moore.

Second, the plaintiff incorrectly applies the provisions of the Virginia Computer Crimes Act. The plaintiff simply alleges that the defendants have violated Virginia Code §§ 18.2-152.1 through 18.2-152.15; however, application of the facts alleged in the Complaint to the Act demonstrates that, in fact, the majority of those Code provisions are not triggered. At best, the plaintiff arguably may have alleged sufficient facts to infer a violation of Virginia Code § 18.2-152.4(A)(3) in that computer data may have been allegedly altered, disabled, or erased when Defendant Moore threw the plaintiff's hard drive to the floor. However, none of the allegations show that Defendant Zimmerman violated the Act in any way at any time. There is no allegation that Defendant Zimmerman altered, disabled, or erased the plaintiff's computer data. The plaintiff's bare allegation that the defendants have violated the Act, without any actual facts to support such conclusions, is legally insufficient to state a claim for relief against Defendant Zimmerman for conversion.

Count Four alleges a claim of assault and battery based solely on the actions of Defendant Moore. Complaint ¶ 54. Moreover, the plaintiff specifically states that the unlawful touching by Defendant Moore "did not arise out of his employment, although such conduct occurred during the course of his employment." Complaint ¶ 54. Rather, the plaintiff makes an allegation without any factual support that Defendant Zimmerman "ratified, adopted and

acquiesced in Defendant Moore's conduct" (Complaint ¶ 55), which is legally insufficient to state a claim for relief against Defendant Zimmerman for assault and battery.

Therefore, Counts Two, Three, and Four should be dismissed as against Defendant Zimmerman, both individually and in his official capacity.

#### **VI. Defendant Zimmerman Did Not Violate Virginia Constitution**

Count Five of the Complaint states a general averment that the Defendants deprived the plaintiff of his property without due process of law (Complaint ¶ 62), but alleges no facts specific or attributable to Defendant Zimmerman. All of the facts and allegations center on the actions of Defendant Moore in seizing and destroying the plaintiff's hard drive. There are no unconstitutional acts alleged by Defendant Zimmerman; thus, Count Five of the Complaint should be dismissed against Defendant Zimmerman.

#### **VII. Defendant Zimmerman Not Liable for Alleged Wrongful Termination**

Count Six of the Complaint alleges that the plaintiff's employer, Defendant Board of Trustees, wrongfully terminated him in violation of Virginia public policy, based on alleged violations of the Crime Victim and Witness Rights Act, Virginia Code §§ 19.2-11.01 through 19.2-11.4, Virginia Computer Crimes Act Virginia Code §§ 18.2-152.1 through 18.2-152.15, and the Virginia Constitution, Article 1, § 11. In essence, the plaintiff asserts a public policy exception to his at-will employment. However, the plaintiff fails to state a valid claim against Defendant Zimmerman, either in his individual or official capacity, for wrongful termination.

Defendant Zimmerman, at the time the plaintiff was terminated, was the Chairman of the Board of Trustees. Defendant Board of Trustees was established pursuant to Virginia Code § 42.1-35 to manage and control Defendant Library. The plaintiff alleges that Defendant Zimmerman had obtained commitments from the other members of the Board of Trustees before October 7, 2010, to terminate the plaintiff's employment. Complaint ¶ 35. However, Defendant Zimmerman's actions, even if taken as true, do not create any liability on his part for Defendant Board of Trustees' decision to terminate the plaintiff.

The Western District of Virginia has recently addressed a similar issue in *VanBuren v. Virginia Highlands Orthopaedic Spine*, 728 F. Supp. 2d 791 (W.D. Va. 2010). In *VanBuren*, the plaintiff alleged that she was terminated in retaliation of her complaints of sexual harassment and hostile work environment, constituting a wrongful discharge in violation of Virginia public policy. *VanBuren* 728 F. Supp. 2d at 792. The plaintiff filed suit against both her employer,



Virginia Highlands Orthopaedic Spine Center, LLC, and her supervisor, Stephen A. Grubb, M.D. *Id.* at 793. Defendant Dr. Grubb filed a motion to dismiss under Rule 12(b)(6), claiming that, as her supervisor, he had no liability for VanBuren’s wrongful termination. The court agreed, stating that “when the employee-employer relationship has been wrongfully terminated, liability to the wronged employee can only rest with the other party in that the [*sic*] relationship, the employer.” *Id.* at 794. The district court further reasoned that the “impetus for permitting a wrongful discharge ‘Bowman’ claim was, from the outset, to protect the vulnerable employee, not to sanction or punish any individual wrongdoer.” *Id.* at 797 (citing *Bowman v. State Bank of Keysville*, 229 Va. 534, 539-40 (1985)). Finding no policy reason to hold a supervisor individually liable for the wrongful discharge,<sup>2</sup> the district court granted Dr. Grubb’s motion to dismiss the plaintiff’s claim against him personally. *Id.* at 798, 800. The same reasoning applies to the facts of this case. Indeed, here, Defendant Zimmerman is neither a supervisor nor an individual wrongdoer. Moreover, there is no basis in law for liability against Defendant Zimmerman individually. All of his alleged actions were performed in his position as Chairman of the Board of Trustees. The plaintiff can recover, if he can recover at all, only against his employer, Defendant Board of Trustees.

For these reasons, Count Six of the Complaint should be dismissed against Defendant Zimmerman, both in his individual and official capacities.

#### **Punitive Damages Not Recoverable Against Defendant Zimmerman**

The plaintiff has failed to allege facts sufficient to support a claim for punitive damages. Virginia courts generally disfavor punitive damages. *Simbeck, Inc. v. Dodd Sisk Whitlock Corp.*, 257 Va. 53, 58 (1999). A claim of punitive damages must be supported by “factual allegations sufficient to establish that the defendant’s conduct was willful or wanton.” *Green v. Ingram*, 269 Va. 281, 291-92 (1995) (citing *Huffman v. Love*, 245 Va. 311, 314 (1993)); and *Booth v. Robertson*, 236 Va. 269, 273 (1988)). In this case, the Complaint contains no facts, merely unsupported conclusions and allegations, of willful and wanton conduct, conscious and/or reckless disregard for the plaintiff’s rights, and malice and ill-will and spite; therefore, such claims are insufficient as a matter of law to support an award for punitive damages.

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<sup>2</sup> The district court also found that permitting non-employer liability would overly broaden public policy exception, in contradiction to consistent holdings of the Virginia Supreme Court that this doctrine is to be narrowly construed. *Id.* at 798.

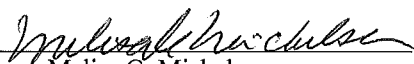
## CONCLUSION

The Complaint fails to state a claim upon which relief can be granted against Defendant Zimmerman, either in his official or personal capacity. First, the plaintiff's 42 U.S.C. § 1983 claim is insufficient as a matter of law. Defendant Zimmerman must be dismissed in his official capacity, as the true and proper party is the entity for whom Defendant Zimmerman represents, the Board of Trustees, who is already a defendant. Thus, the claim against Defendant Zimmerman in his official capacity is redundant and unnecessary and must be dismissed. Second, as there are no allegations of personal action or involvement by Defendant Zimmerman in the alleged unlawful search and seizure by Defendant Moore, the plaintiff has failed to state a proper claim against Defendant Zimmerman in his personal capacity. The alleged state tort claims and violation of the Virginia Constitution arise out of actions putatively committed by Defendant Moore, not Defendant Zimmerman; and therefore, should be dismissed. Finally, under Count Six, the plaintiff's claim for wrongful termination is without merit against Defendant Zimmerman, as the plaintiff can recover only against his employer, Defendant Board of Trustees, not Defendant Zimmerman.

Wherefore, Defendant Zimmerman, by counsel, respectfully requests that based on all of the reasons set forth in this Memorandum in Support of the Motion to Dismiss, and for the reasons to be argued at the hearing of this matter, the Court grant Defendant Zimmerman's Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, dismiss this matter with prejudice in its entirety as against him, both individually and personally, and for any further relief deemed necessary and proper.

**HANK ZIMMERMAN**  
*By Counsel*

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*Counsel for Defendants Hank Zimmerman, Board of Trustees of the  
Shenandoah County Library, and Shenandoah County Library.*

**CERTIFICATE**

I certify that on the 22<sup>nd</sup> day of December, 2011, I electronically filed the foregoing Memorandum in Support of Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to Timothy E. Cupp, Esq., Cupp & Cupp, P.C., 1951-D Evelyn Byrd Avenue, P.O. Box 589, Harrisonburg, Virginia 22803, Cupplaw@comcast.net, Counsel for Plaintiff; and to Julia B. Judkins, Esq., Bancroft, McGavin, Horvath, & Judkins, P.C., 3920 University Drive, Fairfax, Virginia 22030, Jjudkins@bhmjlaw.com, Counsel for Defendant James Dallas Moore.

  
*Counsel for Defendants Hank Zimmerman, Board  
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and Shenandoah County Library.*