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

WESLEY C. SMITH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Case No.: 7:07-CV-00117
CHERI SMITH, et al.,	)	
	)	
Defendants.	)	

DEFENDANT RONALD FAHY'S
BRIEF IN SUPPORT OF MOTION TO DISMISS

Defendant Ronald Fahy, by his counsel, submits the following argument in support of his Motion to Dismiss.

I. Statement of the Case

Plaintiff filed this action on March 17, 2007, seeking redress for the alleged violation of various rights arising under federal and state law. Plaintiff's federal claims are brought pursuant to 42 U.S.C. §§ 1983, 1985, and 1986, and he asks the Court to exercise supplemental jurisdiction over his state law claims. He seeks both damages and prospective equitable relief. (Compl. ¶¶ 1-2.)

Mr. Fahy's co-defendants were served in March and April 2007 and have filed motions to dismiss. Those motions have been briefed and the Court has heard argument thereon; however, as of the filing of this brief, the Court has not ruled on the motions.

Mr. Fahy was on May 30, 2007. He has filed Responsive Pleadings, which include a Motion to Dismiss pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure and a Motion to Transfer Venue pursuant to 28 U.S.C. § 1404(a). Because Mr. Fahy's Motion

to Dismiss asserts jurisdictional defenses and absolute immunity from suit, he has asked the Court to rule on that motion before considering the motion to transfer.

II. Issues

A. Whether the Court Has Jurisdiction over Plaintiff's Claims.

B. Whether Mr. Fahy Is Entitled to Absolute Quasi-Judicial Immunity.

C. Whether Plaintiff's Claims Are Barred by the Statute of Limitations.

D. Whether Plaintiff Has Pled Facts Entitling Him to Relief.

III. Statement of the Facts

When considering a Rule 12(b)(1) motion, the court is not bound by the facts as pled by the plaintiff and it may look to evidence beyond the scope of the pleadings in determining whether subject matter jurisdiction exists. *Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995). When considering a Rule 12(b)(6) motion, the court may consider the plaintiff's complaint and other items in the public record, *Papasan v. Allain*, 478 265, 268 n.1 (1986); *Hall v. Virginia*, 385 F.3d 421, 432 n. 3 (4th Cir. 2004), including items appearing in the record of the case, *Anheuser-Busch v. Schmoke*, 63 F.3d 1305, 1312 (4th Cir. 1995). The court may also consider documents quoted, relied upon, or referred to in the complaint, *Davis v. George Mason Univ.*, 395 F. Supp. 2d 331, 334-35 (E.D. Va. 2005); *Shooting Point, L.L.C. v. Cumming*, 238 F. Supp. 2d 729, 736 (E.D. Va. 2002), and if the plaintiff has failed to attach such documents to his complaint, the defendant may attach them to his motion to dismiss without converting the motion to one for summary judgment, *Phillips v. LCI Int'l, Inc.*, 190 F.3d 609, 618 (4th Cir. 1999); 395 F. Supp. 2d at 335 (citation omitted); *see also Scotece v.*

Prudential Ins. Co. of America, 322 F. Supp. 2d 680, 682 (E.D. Va. 2004); *Gasner v. County of Dinwiddie*, 162 F.R.D. 280, 282 (E.D. Va. 1995).

Mr. Fahy's statement of the facts is taken from the Complaint and the following documents, all of which are part of the record of the instant action or the underlying state court chancery case of *Cheri Smith v. Wesley Smith*, Chancery No. 53360 (Prince William County Cir. Ct.) (hereinafter "chancery case"), or are relied upon or referred to by Plaintiff in his pleadings in the instant action:

- Plaintiff's pleading styled "#5 – Facts," which was filed in the instant action on May 15, 2007.
- Plaintiff's pleading styled "#6 – Reply to Issues Addressed at Hearing," which was filed in the instant action on May 25, 2007.
- Plaintiff's "Motion for Appointment of Guardian ad Litem," which was filed in the chancery case (copy attached hereto as Ex. A).
- Mr. Fahy's "Memorandum," which was filed in the chancery case (copy attached hereto as Ex. B).
- Final decree in the chancery case (copy attached hereto as Ex. C).
- Plaintiff's notice of appeal of the final decree in the chancery case to the Court of Appeals of Virginia (copy attached hereto as Ex. D).

As the Court is by now aware, this action arises from an acrimonious divorce and custody dispute between Plaintiff and Defendant Cheri Smith. (*See, e.g.*, #5 – Facts ¶¶ 1-4.) In the course of the chancery case, Plaintiff moved to have a guardian *ad litem* appointed to represent the interests of his and Ms. Smith's minor child. (*See* Ex. A.) The state court granted the motion and appointed Mr. Fahy, an attorney practicing in Prince William County, as the child's guardian.

Plaintiff alleges that Mr. Fahy, in his capacity as guardian, made a motion to suspend Plaintiff's visitation rights. According to Plaintiff, Mr. Fahy never discussed this motion with him, never notified him that the motion would be filed, and filed the motion with knowledge that Plaintiff could properly care for his son and that the child wanted to spend time with his family. According to the pleadings, this motion was made sometime in January 2005. (*See* #5 – Facts ¶¶ 31-34.)

Plaintiff also alleges that Mr. Fahy prepared a report for the state court regarding the motion to suspend visitation, yet did not contact Plaintiff to "get his side of the story," advise Plaintiff that the report would be prepared, or provide Plaintiff with a copy of the report until the day of the hearing on the motion. (#5 – Facts ¶ 39 & 41.) In the report, Mr. Fahy acknowledged that Plaintiff was capable of taking care of the child and that the child was attached to his father; however, Mr. Fahy concluded that it would be in the child's best interest to suspend visitation until the child's psychologist determined that visitation would be beneficial to the child and until Plaintiff submitted an acceptable visitation plan to the state court. (Ex. B.) According to the pleadings, Mr. Fahy's report was prepared and filed sometime in January 2005. (*See* #5 – Facts ¶ 38.)

According to Plaintiff, at the trial of the custody issue, Mr. Fahy did not present witnesses, cross-examine witnesses, or present evidence, and did not attend the second day of trial, which was when the child testified. Plaintiff also alleges that Mr. Fahy failed to complete an independent investigation and did not comply with a subpoena for records served by Plaintiff. (#5 – Facts ¶¶ 78-81.)

Plaintiff contends that these facts establish that Mr. Fahy conspired with the other defendants to deprive him of: his rights under First Amendment to the federal constitution (Compl. Count 1); his right to a jury trial as guaranteed by the federal and state constitutions (*id.* Count 2); his common law rights as a father to enjoy the custody, care, control, and companionship of his minor son (*id.* Count 4); his rights under the Thirteenth Amendment to the federal constitution (*id.* at Count 5); and his rights to due process under the state and federal constitutions (*id.* Count 6). Plaintiff also contends that the facts establish that Defendants conspired to inflict cruel and unusual punishment upon him (*id.* Count 3) and that Mr. Fahy is guilty of obstruction of justice (*id.* Count 7) and legal malpractice (# 6 – Reply to Issues Addressed at Hearing ¶¶ 168-177).[1]

IV. Standards of Review

The Supreme Court of the United States recently revisited the principles governing the review of a Rule 12(b)(6) motion. In *Bell Atlantic Corp. v. Twombly*, the Court held that the plaintiff's obligation to provide the grounds for his entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." No. 05-1126, 2007 U.S. LEXIS 5901, *21 (May 21, 2007). Moreover, while the reviewing court must accept the plaintiff's factual allegations as true and construe the complaint in the light most favorable to the plaintiff, "the factual allegations must be enough to raise a right to relief above the speculative level.... [Thus,] [t]he pleading must contain

[1] Plaintiff also challenges the commonwealth's child custody statutes, both facially and as applied (Compl. Count 8); this count, however, does not appear to be directed toward Mr. Fahy. Moreover, because Mr. Fahy is not an official charged with enforcement of the statutes, he is not a proper defendant in a challenge to the statutes' constitutionality. *See Ex parte Young*, 209 U.S. 123, 157 (1908) (official named in constitutional challenge to state statute must bear a "special relation" to the statute and play a role in the enforcement of the statute).

something more ... than ... a statement of facts that merely creates a suspicion of a legally cognizable right of action." *Id.* at *21-22.

By contrast, when considering a Rule 12(b)(1) motion, the reviewing court is not bound to accept the truth of the plaintiff's factual allegations. Indeed, the court may look beyond the pleadings and resolve factual disputes concerning jurisdiction. *Williams*, 50 F.3d at 304.

V. Argument

A. The Court Lacks Jurisdiction over Certain of Plaintiff's Claims.

1. The *Rooker-Feldman* Doctrine

Plaintiff has asked the Court to vacate the final decree in the chancery case. (Compl. ¶ 7.) Such relief, however, is clearly barred by the *Rooker-Feldman* doctrine.

Stated simply, the *Rooker-Feldman* doctrine provides that federal district courts do not possess jurisdiction to review state court judgments. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005). This Court thus lacks subject matter jurisdiction to vacate the final decree in the chancery case.

2. Standing

The party bringing a federal suit must establish standing to prosecute the action. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). The doctrine of standing is rooted in Article III of the federal constitution and in prudential concerns. The prudential dimensions of the doctrine prohibit a plaintiff from asserting another person's legal rights. *Allen v. Wright*, 468 U.S. 737, 751 (1984). With respect to the putative

claims of legal malpractice against Mr. Fahy, this is precisely what Plaintiff is attempting to do: assert another person's legal rights.

In his capacity as guardian *ad litem*, Mr. Fahy was charged with representing the best interests of the child. *See* Va. S. Ct. R. 8:6. ("When appointed for a child, the guardian ad litem shall vigorously represent the child. . . ."). Thus, to the extent Mr. Fahy could be charged with legal malpractice, such a claim would belong to the child.

In the final decree in the chancery case, Defendant Cheri Smith was granted sole legal custody of the child (Ex. C), and was thus given "responsibility for the care and control of [the] child and [] primary authority to make decisions concerning the child," Va. Code § 20-124.1. Accordingly, the authority to determine whether a legal malpractice should be pursued on the child's behalf rests with Ms. Smith – not with Plaintiff. Indeed, the Supreme Court of the United States has specifically held that a non-custodial parent lacks prudential standing to pursue claims that belong to the child. *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004).

Plaintiff's legal malpractice claims must be dismissed because he lacks standing to pursue such claims.

3. Equitable Claims

In order to invoke the extraordinary equitable jurisdiction of this Court, Plaintiff must prove that, *inter alia,* he has no adequate remedy at law. *See Nivens v. Gilchrist,* 444 F.3d 237, 241 (4th Cir. 2006) (courts of equity should not act when the moving party has an adequate remedy at law); *MercExchange, L.L.C. v. eBay, Inc.,* 275 F. Supp. 2d 695, 711 (E.D. Va. 2003). Plaintiff's pleadings, however, make it evident that he has an adequate remedy at law.

Plaintiff's legal remedy for the injunctive and declaratory relief he seeks is his appeal of the final decree in the chancery case to the Court of Appeals of Virginia. That court has appellate jurisdiction over divorce and custody cases, Va. Code § 17.1-405, and has the authority to consider all the questions of state and federal law, *Richmond, Fredericksburg & Potomac R.R. Co. v. Forst*, 4 F.3d 244, 251 (4th Cir. 1993) (state courts are fully competent to decide questions of federal law), pertinent to Plaintiff's equitable claims. Because the Plaintiff has an adequate remedy at law, this Court lacks jurisdiction to grant the equitable relief he requests.

Furthermore, even if the Court possessed equitable jurisdiction, it should abstain from exercising that jurisdiction. "Equitable relief is a discretionary remedy," *Mullen v. Princess Anne Volunteer Fire, Inc.,* 853 F.2d 1130, 1139 (4th Cir. 1988), and a federal court should abstain from interfering in state proceedings, *even though it has jurisdiction to do so*, if: (1) an ongoing state judicial proceeding instituted prior to the federal proceeding; (2) the state proceedings implicates important state interests; and (3) provides an adequate opportunity for the plaintiff to raise federal constitutional claims. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423 (1982); *see also Nivens v. Gilchrist*, 319 F.3d 151, 153 (4th Cir. 2003). It is evident from the pleadings that each of these criteria is satisfied here.

First, there is an ongoing state judicial proceeding; that is, Plaintiff's appeal before the Court of Appeals of Virginia.

Second, that proceeding implicates an important state interest, that is, domestic relations. Indeed,"[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States," *In re Burrus*, 136 U.S. 586, 593- 594 (1890), and "so strong" is the deference of the federal courts to

this area of state law that the Supreme Court of the United States has recognized a "domestic relations exception" that "divests the federal courts of power to issue divorce, alimony, and child custody decrees," *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992). The equitable relief Plaintiff seeks would necessarily cause this Court to interfere with the commonwealth's interest in adjudicating domestic relations issues.

Third, as noted above, state courts are fully competent to decide questions of federal law. Indeed, it is upon this principle that the doctrine of abstention is premised. *Forst*, 4 F.3d at 251. Plaintiff thus has, or has had, an adequate opportunity to raise his federal claims.

The Court should, therefore, dismiss Plaintiff's claims for equitable relief, either on the ground that it lacks jurisdiction or that it should abstain from exercising jurisdiction.

B. Plaintiff's Claims for Retrospective Relief against Mr. Fahy Are Barred by Absolute Immunity.

1. Federal Claims

Well over a century ago, the Supreme Court of the United States recognized that it was "a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher*, 13 Wall. 335, 347 (1872). The Court has steadfastly applied this principle, consistently holding that judicial officers are absolutely immune to suits against them for acts taken in their judicial capacity. The importance of this immunity to our judicial system is such that it applies even in the face of allegations that the officer acted in excess of his authority, maliciously, or corruptly. *See, e.g.*, *Stump v. Sparkman*, 435 U.S. 349 (1978).

The protection afforded by judicial immunity, however, extends not only to judges. The Supreme Court has held that other actors in the judicial process are also entitled to absolute immunity. Indeed, the Court has explained that the protection for judges forms but part of "a cluster of immunities protecting the various participants in judge-supervised trials," "including counsel and witnesses." *Briscoe v. LaHue*, 460 U.S. 325, 334-35 (1983) (citations and internal quotation marks omitted) (witnesses entitled to absolute judicial immunity); *see also Butz v. Economou*, 438 U.S. 478 (1978) (holding that administrative law judges are entitled to absolute immunity); *Imbler v. Pachtman*, 424 U.S. 409 (1976) (holding that prosecutors are entitled to absolute immunity). Thus, the law provides absolute immunity "for all persons – governmental or otherwise – who [are] integral parts of the judicial process" and the civil rights statutes do not authorize suits against such persons. *Briscoe*, 460 U.S. at 335.

Following the reasoning of the Supreme Court as set forth in *Brisco*, *Butz*, and *Imbler*, the United States Court of Appeals for the Fourth Circuit has held that guardians *ad litem* in child custody cases are entitled to absolute quasi-judicial immunity. *Fleming v. Asbill*, 42 F.3d 886, 889 (4th Cir. 1994). In *Fleming*, an infant's mother died when the child was eight months old. The child thereafter lived with his father. Seven years after his mother's death, the child's maternal grandparents sued for custody. The state court appointed a guardian *ad litem* to represent the interests of the child. *Id.* at 887.

The grandparents obtained an *ex parte* order granting them custody of the child. The guardian *ad litem* participated in this hearing. No notice was given to the father of this proceeding. Thereafter, the guardian prepared an affidavit requesting an order that would permit authorities to seize the child and deliver him to the grandparents. Again, no notice of

this proceeding was given to the father. The order was issued and the child was immediately seized, without even so much as a phone call to the father. 42 F.3d at 888.

The father regained custody of the child only after the grandparents agreed to relinquish custody to him. By that time, the father had spent $10,000 on legal fees and had lost his job, home, car, and life savings. 42 F.3d at 888.

The father later filed suit in federal district court against the guardian *ad litem* on his and his child's behalf, alleging various state law claims and the deprivation of civil rights under § 1983. He accused the guardian of conspiring with the grandparents and their attorney to deprive him of custody and of making intentional misrepresentations to the state court. The district court dismissed the case, holding that the guardian was entitled to quasi-judicial immunity. The father appealed. 42 F.3d at 888.

In affirming the dismissal of the federal claims, the Fourth Circuit explained that there were "sound policy reasons" to afford guardians *ad litem* in custody cases absolute immunity:

> A guardian *ad litem* must . . . be able to function without the worry of possible later harassment and intimidation from dissatisfied parents. Consequently, a grant of absolute immunity would be appropriate. A failure to grant immunity would hamper the duties of a guardian *ad litem* in his role as advocate for the child in judicial proceedings.

42 F.3d at 889 (quoting *Kurzawa v. Mueller*, 732 F.2d 1456, 1458 (6th Cir. 1984)). The court concluded that all of the conduct complained of occurred within the judicial process and that the guardian *ad litem* was therefore entitled to immunity – even to claims that she had lied to the state court in the course of her duties. 42 F.3d at 889.

The allegations of the father in *Fleming* are similar to the allegations of Plaintiff here; and it is clear that under *Fleming*, Mr. Fahy is entitled to absolute immunity to all of Plaintiff's federal claims. All the conduct of which Plaintiff complains was taken in Mr. Fahy's capacity

as guardian *ad litem* for Plaintiff's child. The role of a guardian in a custody dispute is an integral part of the commonwealth's judicial process. *See Bottoms v. Bottoms*, 249 Va. 410, 457 S.E.2d 102, 108 (1995) (recommendation of guardian regarding custody is important, and while not controlling, should not be disregarded). Thus, Mr. Fahy's role as guardian "place[d] him squarely within the judicial process," 732 F.2d at 1458, he is therefore cloaked with absolute immunity to all of Plaintiff's federal claims, 42 F.3d at 889.

2. State Law Claims

The standards for judicial immunity under Virginia law are the substantively the same as those under federal law, *see Battle v. Whitehurst*, 831 F. Supp. 522, 529 (E.D. Va. 1993), and quasi-judicial immunity is extended to officials performing judicial functions within their jurisdiction and in good faith, *Harlow v. Clatterbuck*, 230 Va. 490, 494, 339 S.E.2d 181, 184-85 (1986) (parole board members entitled to immunity); *see also Andrews v. Ring*, 266 Va. 311, 320-21, 585 S.E.2d 780, 784-85 (2003) (prosecutor entitled to immunity); *Johnston v. Moorman*, 80 Va. 131, 142 (1885) (mayor entitled to immunity); *Yates v. Ley*, 121 Va. 265 S.E. 837, 839 (1917) (notary public entitled to immunity).

In determining whether an individual is entitled to quasi-judicial immunity, the Supreme Court of Virginia applies the "functional comparability" test articulated by the Supreme Court of the United States in *Butz*; that is, the court must determine whether the function in question shares enough characteristics of the judicial process that those who participate in the function should be afforded immunity. *Clatterbuck*, 230 Va. at 494, 339 S.E.2d at 184. The reasoning of the Fourth Circuit in *Fleming* teaches that Mr. Fahy's function as a court-appointed guardian *ad litem* placed him squarely within the judicial process and among the participants in that process to whom the common law affords judicial immunity. 42

F.2d at 889: *see also Briscoe*, 460 U.S. at 336 ("[T]he common law provided absolute immunity for all persons – governmental or otherwise – who were integral parts of the judicial process.")

The sole caveat here is that, under Virginia law, quasi-judicial immunity attaches only where the individual has acted in good faith. While Plaintiff has made conclusory statements to the effect that Mr. Fahy acted in bad faith (*see, e.g.*, Compl. ¶ 40), this Court is not bound by such statements, *Bell Atlantic Corp.*, 2007 U.S. LEXIS 5901, at * 21-22, and the facts Plaintiff has pled do not rise "above the speculative level" with respect to any contention that Mr. Fahy acted in any way other than in good faith.

In sum, all the conduct taken by Mr. Fahy was in the judicial process and in his capacity as guardian *ad litem*, and there is nothing in the record other labels and conclusions indicating that he acted in the absence of good faith. He is thus entitled to quasi-judicial immunity under Virginia law to all of Plaintiff's state law claims.[2]

C. Plaintiff's Claims Are Barred by the Statute of Limitations.

An affirmative defense, such as the statute of limitations, may be asserted in a pre-answer 12(b)(6) motion when the pleadings reveal the defense's existence. *See, e.g.*, *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 654 (4th Cir. 2006). Here, it is clear from the face of Plaintiff's pleadings that many of his claims are barred by the statute of limitations.

[2] If the Court were to determine that, for the purposes of Plaintiff's state law claims, Mr. Fahy was not a government official who could claim immunity, *cf. Adkins v. Dixon*, 253 Va. 275, 482 S.E.2d 797 (1997) (court appointed criminal defense attorney not entitled to qualified immunity), then Plaintiff's claims that Mr. Fahy deprived him of certain rights guaranteed by the state constitution must fail, because only a state actor could have deprived Plaintiff of his state rights to due process, equal protection, or a jury trial.

The limitations period for Plaintiff's state and federal law claims is two years. In Virginia, personal injury claims are governed by a two-year statute of limitations. Va. Code § 8.01-243.A. In civil rights actions, federal courts apply state statutes of limitations for personal injury actions. *Wilson v. Garcia*, 471 U.S. 261, 280 (1985); *Shelton v. Angelone*, 148 F. Supp. 2d 670, 676-77 (W.D. Va. 2001); *Blackmon v. Perez*, 791 F. Supp. 1086, 1090 (E.D. Va. 1992). Thus, the limitations period applicable to Plaintiff's federal claims is two years. Va. Code § 8.01-243.A.

Plaintiff filed his complaint on March 15, 2007. Accordingly, any claim that accrued prior to March 15, 2005, is time-barred. All of Plaintiff's claims related to the January 2005 proceedings to suspend his visitation rights accrued prior to March 15, 2005. Thus, those claims – whether arising under state or federal law – are time barred.[3]

D. Plaintiff Has Failed to Plead Facts upon which Relief Can Be Granted.

1. Claims for Retrospective Relief

While Plaintiff's Complaint is rife with conclusions that Mr. Fahy and the other defendants have deprived him of his various federally and state guaranteed rights and contains "a forumlaic recitation of the elements" of various causes of action, he has pled no facts sufficient "to raise a right to relief above the speculative level, [even] on the assumption that all the allegations in the complaint are true." *Bell Atlantic Corp.*, 2007 U.S. LEXIS 5901, at *21-22. None of the facts pled by Plaintiff with respect to Mr. Fahy support Plaintiff's legal conclusions that Mr. Fahy deprived him of any right guaranteed by federal or state law,

[3] While Plaintiff's legal malpractice claim would be subject to a five or three year statute of limitations, as explained above, to the extent such a cause of action exists under the fact of this case, any such a claim would belong to the child and Plaintiff, as the non-custodial parent, has no standing to pursue such claims.

committed obstruction of justice, or committed any common law tort against Plaintiff. Thus, dismissal of Plaintiff's claims is appropriate under Rule 12(b)(6).

This is especially true with respect to Plaintiff's claims of conspiracy under § 1985. To prove such a claim, a plaintiff must show a meeting of the minds by the defendants to deny him his civil rights. *Simmons v. Poe*, 47 F.3d 1370, 1377 (4th Cir. 1995). Because of this high threshold, district courts often grant motions to dismiss § 1985 claims, *Lewin v. Cooke*, 95 F. Supp. 2d 513, 525 (E.D. Va. 2000); *Davis v. Hudgins*, 896 F. Supp. 561, 571 (E.D. Va. 1995), and specifically reject such claims where, as here, "the purported conspiracy is alleged in a merely conclusory manner, in the absence of supporting facts," 47 F.3d at 1377.

VI. Conclusion

Wherefore, for the reasons set forth above, Mr. Fahy asks the Court to grant his Motion to Dismiss and dismiss Plaintiff's Complaint *in toto* and with prejudice.

RONALD FAHY

By: /s Kevin O. Barnard

Kevin O. Barnard
VSB #: 36388
FRITH ANDERSON & PEAKE, P.C.
29 Franklin Road, SW
P.O. Box 1240
Roanoke, Virginia 24006-1240
Phone: 540/772-4600
Fax: 540/772-9167
kbarnard@faplawfirm.com
Counsel for Ronald Fahy

CERTIFICATE OF SERVICE

I certify that on June 15, 2007, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and mailed a true copy of the same by United States Postal Service to the following non-CM/ECF participants: Wesley C. Smith, *pro se* plaintiff, 5347 Landrum Road, Apt. #1, Dublin, VA 24084.

By: /s Kevin O. Barnard