

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

WESLEY C. SMITH,

Plaintiff,

v.

CHERI SMITH, et al.,

Defendants.

Case No.: 7:07-CV-00117

DEFENDANT RONALD FAHY'S RESPONSIVE PLEADINGS

Defendant Ronald Fahy, by his counsel, responds to Plaintiff's Complaint as follows:

Motion to Dismiss

Mr. Fahy moves to dismiss Plaintiff's Complaint. He makes his motion pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure and on the grounds that, *inter alia*, the Court lacks jurisdiction over certain of Plaintiff's claims and he is entitled to absolute immunity from suit. The reasons for Mr. Fahy's Motion to Dismiss are more fully explained in his accompanying brief in support.

Motion to Transfer Venue

Mr. Fahy moves the Court to transfer venue of this action to the Alexandria Division of the United States District Court for the Eastern District of Virginia ("Eastern District"). He makes his motion pursuant to 28 U.S.C. § 1404(a) and for the following reasons:

1. Other than Plaintiff and the Honorable H. Lee Chitwood, the parties and witnesses reside in the Eastern District.¹

2. The overwhelming majority – if not all – of the events of which Plaintiff complains occurred in the Eastern District.

3. The file in the underlying state court chancery case is located in the Eastern District.

4. This action originally could, and should, have been filed in the Eastern District.

5. For the convenience of the parties and the witnesses, and in the interests of justice, this action should be transferred to the Eastern District.

6. Mr. Fahy asks the Court to defer ruling on his motion to transfer until it has ruled on his Motion to Dismiss, because the absolute immunity asserted in the Motion to Dismiss is an *immunity from suit* rather than a mere defense to liability. *See Borneman v. United States*, 213 F.3d 819, 827 (4th Cir. 2000) (absolute and qualified immunity are immunities from). Accordingly, the Court should determine whether Mr. Fahy is entitled to immunity before subjecting him to the burdens of litigation, including litigating the issue of venue. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (absolute immunity is “an entitlement not to stand trial or face the other burdens of litigation....”).

RONALD FAHY

By: /s Kevin O. Barnard

¹ Mr. Fahy notes that if the Court sustains Judge Chitwood’s motion to dismiss, there will no longer be grounds for venue in the Western District, because none of the remaining defendants reside here and a substantial part of the events giving rise to Plaintiff’s claims did *not* occur here. 28 U.S.C. § 1391(b).

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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