**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF VIRGINIA**
**Roanoke Division**

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| WESLEY C. SMITH<br>Plaintiff | ) | |
| v. | ) | Case No: 7:07-CV-00117 |
| CHERI SMITH, et als<br>Defendants | ) | |

## #10 - REPLY TO FAHY MOTIONS

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> **Those who make peaceful revolution impossible make violent revolution inevitable**." - John F. Kennedy, March 12, 1962
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> "**Government immunity violates the common law maxim that everyone shall have remedy for an injury done to his person or property**." FIREMAN'S INS/ CO. OF NEWARK, N.J. V. WASHBURN COUNTY, 2 Wis.2d 214, 85 N.W.2d 840 (1957)

1. This is in reply to the MOTION TO DISMISS and MOTION TO TRANSFER VENUE filed for Ronald Fahy. Note due to traveling and not being allowed to get documents electronically from the court as the attorneys are, I did not receive the motion until many days after it was filed. The Plaintiff has filed this reply within 7 business days of receiving the motion.

2. The Plaintiff incorporates by reference all statements in #6 - REPLY TO ISSUES ADDRESSED AT HEARING, #2 - PLAINTIFF'S MEMORANDUM IN OPPOSITION TO SMTIH & BAKHIR JOINT MOTION TO DISMISS, #6 - REPLY TO ISSUES ADDRESSED AT HEARING

## JURISDICTION - Rooker-Feldman

3. Mr. Fahy argues this court does not have jurisdiction to vacate the state court orders due to the The *Rooker-Feldman* Doctrine. However in doing so he intentionally misrepresents the both the Plaintiff's request and the doctrine.

4. Rooker-Feldman Doctrine (and Younger Doctrine) are not lack of jurisdiction but are more accurately described as abstention - that is a refusal to exercise jurisdiction. Rooker is not a lack of jurisdiction, nor does it cause a lack of jurisdiction. If this court does not already have jurisdiction, this court has no authority to make any ruling invoking Rooker-Feldman. In order to make a ruling, for or against, invoking Rooker-Feldman, this court must first assume jurisdiction.

> "If jurisdiction does not exist, one never reaches the question of whether to abstain. U.S. v. Will, 449 U.S. 200, 216, 101, S. Ct. 471, 66 L.Ed. 2d 392, 406 (1980)

5. To apply Rooker-Feldman at all would require a state court ruling, which the existence or not of a state court ruling is a question the Plaintiff has asked this court to resolve. Rooker-Feldman can't be applied until after the court rules if the state court lacked jurisdiction or not.

6. Abstention, ie invoking Rooker-Feldman or any other abstention doctrine is frowned upon in cases such as this where the Plaintiff has been denied basic Constitutional Rights - especially when the state Circuit Court and Court Of Appeals have refused to rule on the Constitutional issues.

> **Abstention is rarely proper** when fundamental constitutional rights, particularly First Amendment rights, are involved. Fernwood Books & Video, Inc. v Jackson (1984, SD Miss) 601 F Supp 1093.
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> **Abstention is generally not favored** in actions brought under this 42 uscs 1983 Bergman v stein (1975, SD NY) 404 F Supp 287
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> Abstention is available in civil cases **only** where stat's proceedings implicate overriding state interests and provide **adequate opportunity to raise constitutional challenges**; interest of state in administering its lease laws without federal interference is not of sufficient magnitude to persuade court to invoke abstention. Stewart v Hunt (1984, ED NC) 598 F Supp 1342.
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> recognizing that abstention "**is the exception, not the rule**." Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992). "**It should be 'rarely . . . invoked**, because the federal courts have **a virtually unflagging obligation . . . to exercise the jurisdiction given them**.'" Roe #2 v. Ogden, 253 F.3d 1225, 1232 (10th Cir. 2001) (quoting Ankenbrandt, 504 U.S. at 705).

7. Mr. Fahy attempts to apply Rooker-Feldman to this case by claiming the Plaintiff has petitioned this court to vacate the state court orders, when instead the Plaintiff has asked this court to recognize the orders as null and void. In the Prayer For Relief of the #1 - VERIFIED COMPLAINT, item #6 the Plaintiff asks the court to "Declare that all orders in case Chancery 53360 are null and void for lack of jurisdiction;"

8. The Plaintiff has requested the court declare the orders as null and void, which is a completely different concept from vacating the orders. Vacating the orders changes the status of the orders as opposed to declaring them null and void which does not change them. If they are null and void they are that way without this court taking any action, declaring it only makes it easier for the Plaintiff to explain the concept to others (say police, state judges).

9. The Rooker Fieldman abstention doctrine does not apply to this case and has been addressed in #6 - REPLY TO ISSUES ADDRESSED AT HEARING see page 6 and page 15 and in #3 - PLAINTIFF'S MEMORANDUM IN OPPOSITION TO ATTORNEY GENERAL MOTION TO DISMISS on page 16.

10. Case precedence also allows cases such as this to go forward in spite of *Rooker-Feldman* See Catz v. Chalker in the above documents for an example of a case similar to this where a Federal Appeals Court struck down the abstention and allowed the case to proceed and declare a state court divorce decree void.

> See Sun Valley Foods Co. v. Detroit Marine Terminals, Inc., 801 F.2d 186, 188-89 (6th Cir. 1986). There, we noted that although a district court
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> "has no authority to review final judgments of a state court in judicial proceedings," Feldman, 460 U.S. at 482, . . . [a] **federal court "may entertain a collateral attack on a state court judgment which is alleged to have been procured through fraud, deception, accident, or mistake** . . . ." Resolute Insurance Co. v. State of North Carolina, 397 F.2d 586, 589 (4th Cir. 1968).
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> Sun Valley, 801 F.2d at 189. See also Lewis v. East Feliciana Parish Sch. Bd., 820 F.2d 143, 146 (5th Cir. 1987) (**due process challenge to state proceedings not barred by Feldman doctrine**)

## JURISDICTION - Standing

11. Mr. Fahy argues that I do not have standing to bring the suit. There are several problems with his argument. First off if Mr. Fahy had properly fulfilled his rule as GAL it is likely I would still have legal custody. Mr. Fahy should not be exempt from suit simply because he was negligent and failed to do his duty.

12. Mr. Fahy admits it was his duty to "… vigorously represent the child." Mr. Fahy failed to fulfill this duty. Failure to fulfill this duty makes him subject to liability.

> "It is guardian ad litem's duty to stand in shoes of child and weigh factors as child would if his judgment were mature and he was not of tender years." J.W.F. v. Schoolcraft, 763 P.2d 1217 (Utah, l987)
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> "Role of the guardian ad litem in custody disputes is to zealously represent the child ..." Carter v. Brodrick, 816 P.2d 202 (Sup. Ct. Alaska l991).
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> [A]ppointment as guardian ad litem of a minor is a position of the highest trust and no attorney should ever blindly enter an appearance as guardian ad litem and allow a matter to proceed without a full and complete investigation into the facts and law so that his clients will be fairly and competently represented and their rights fully and adequately protected and preserved.....The proposition in Bonds that a guardian ad litem occupies a position of the highest trust suggests that he or she is a fiduciary. Judge Donnelly, in expressing his views on the question certified to us, analogized the position of the guardian ad litem to that of a general guardian or conservator...Fiduciaries, of course, are subject to liability to their wards for harm resulting from ordinary negligence in the discharge of their fiduciary duties; if anything, they are charged with a higher standard of care than are persons who do not owe fiduciary duties. See Pino v Budwine, 90 N.M. 750, 568 P.2d 586 (l977); Estate of Guerra v New Mexico Human Services Dep't, 96 N.M. 608, 633 P.2d 7l6 (Ct.App. l98l).

13. Mr. Fahy is attempting to evade responsibility for his actions by claiming only the winning parent can sue a Guardian Ad Litem. That effetely removes any legal responsibility for a GAL to diligently perform his duties because no matter how negligent or no matter how wrong his actions are; a winning parent is never going to sue a GAL who sided with her. It is also a circular argument as the question of legal custody of the child is largely based on the opinion of the

GAL. His argument amounts to nothing more than a statement that "you can't sue me because I gave the right to sue me to the other parent".

14. The argument also skips over the fact that parents can and do sue GAL's (check out Marylands recent court of appeals ruling allowing it). Mr. Fahy accepted the role of GAL, as he noted due to my having made a specific request. Given that I was the one requesting the appointment of a GAL and that I paid him for his services Mr. Fahy is liable to me personally for not properly fulfilling his role as a GAL. He may not owe me reports or motions I agree with but he does own me a responsibility to fulfill his duty to represent my son's interest. I asked for a GAL to represent my son's interest, I paid Mr. Fahy thousands of dollars, yet Mr. Fahy failed to "vigorously represent the child". The state of Virginia has set standards for GAL's - STANDARDS TO GOVERN THE PERFORMANCE OF GUARDIANS AD LITEM FOR CHILDREN. http://www.courts.state.va.us/gal/gal_standards_children_080403.html

15. Not only did Mr. Fahy completely fail to follow those guidelines, the guidelines even state that **simply siding with one parent or the other is unacceptable**, yet that accurately describes the conduct of Mr. Fahy.

16. **Mr. Fahy was so negligent in the performance of his duties that he didn't even bother to attend the two most important hearings for our son**. Mr. Fahy would attend and bill for each and every hearing about the money, debt, and other issues for which he had no interest or responsibility but when it came to attending a hearing about depriving our son of the ability to see his father (Jan 18th 2005) Mr. Fahy didn't bother to attend. When it came to deciding final legal and physical custody he left the hearing before that issue was heard and before our son testified.

17. By any stretch of the imagination, the minimal expected of a GAL would be to at least be present when his 'client' was testifying. **Instead when our 8-year-old mentally retarded son took the stand to testify, the attorney appointed to represent his interest chose not to be present**. Clearly Mr. Fahy is grossly negligent.

18. Mr. Fahy agreed to fulfill the role of Guardian Ad Litem, he then failed to fulfill that role, **his actions thus deprived me of having a competent GAL represent my son as I desired** and for which I had gotten court approval.

19. Mr. Fahy took thousands of dollars from me, supposedly to represent the interests of our son, yet failed to provide those services. His actions are not only malpractice but **fraud** as well.

20. I had both a personal and financial interest in Mr. Fahy properly fulfilling his role as GAL. The fact that he intentionally failed to fulfill that role does give me a right to sue him, independent of any right my son might have to sue him.

21. Mr. Fahy's argument rests on the rights being that of my son or his mother and ignores the fact that I myself have constitutional rights, rights to Due Process, Parental Rights, and Due Process. Those rights are independent of any rights my son has.

> The forced separation of parent from child, **even for a short time (in this case 18 hours); represent a serious infringement upon the rights of both**. J.B. v. Washington County (10th Cir. 1997)
>
> A natural parent who has demonstrated sufficient commitment to his or her children is thereafter **entitled to raise the children free from undue state interference**. As Justice White explained in his opinion of the Court in Stanley v Illinois, 405 US 645 (1972)

22. Regardless of the outcome of the court case, I had a right to Due Process, Equal Protection, Parental Rights, etc. Mr. Fahy not only failed follow the standards set by the state but also conspired with Loretta Vardy to deprive me of my parental rights and Due Process rights. He agreed with Loretta Vardy to hold and Ex Parte hearing in Jan 2005. He also didn't attend the

follow-up hearing on Jan 18th 2005. His refusal to attend the hearing deprived me of my right to confront my accusers as the Judge claimed his order was based on the opinion of Mr. Fahy.

**JURISDICTION - Domestic Relations**

23. Mr. Fahy also indirectly drags up the issue of the Domestic Relations abstention doctrine. The doctrine does not apply to this case and has been addressed in other replies. See #3 - Plaintiff's Memorandum In Opposition To Attorney General Motion To Dismiss page 14. Since this case does not ask the court to a divorce, alimony or custody decree, the Domestic Relations exception does not apply. Indeed it specifically does not apply in a case such as this where the non-custodial parent is suing due to Due Process violations.

> **…the domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree**, we necessarily find that the Court of Appeals erred by affirming the District Court's invocation of this exception. This lawsuit in no way seeks such a decree; Ankenbrandt v. Richards (91-367), 504 U.S. 689 (1992)
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> Parent who is wrongfully deprived of physical custody of children without due process has cause of action under 42 USCS 1983; **domestic relations exception to federal diversity jurisdiction over custody dispute is inapplicable**. Hooks v Hooks (1985, CA6 Tenn) 771 F2d 935

24. Even the 4th Circuit agrees the Domestic Reltions exception does not apply here:

> **A decision by a federal court not requiring the adjustment of family status or establishing familial duties or determining the existence of a breach of such duties, does not contravene the domestic relations exception to federal diversity jurisdiction**. Kelser v. Anne Arundel County Dept. of Social Services, 679 F.2d 1092 (4th Cir. 1982)

25. Not only does the Domestic Relations Exception not apply to this case but also it is out of date. It is based on the concept that the states will regulate domestic relations and that the Federal government will stay out of it. However since the doctrine has been created the Federal government has gotten actively involved in Domestic Relations. Its absolutely preposterous to suggest that Federal Courts must abstain from hearing a case that is based at least in part on

Federal legislation, indeed it may very well be that without the Federal laws and the Federal Funds paid to Virginia that the parents may have been able to agree to share parenting and avoid the state custody case as well as this lawsuit.

26. Because of IV-D funding, states must designate an active, present parent as "absent," even when both parents are fit, willing, and able to care for their children. These incentives drive courts to rule that a child's "best interest" is to have limited contact with one parent in order to conform to the Title IV-D model of custodial and non-custodial instead of two custodial parents, Further, "child support" creates an economic incentive for mothers (who file most divorces) to break up their families. See Welfare and the "Road to Serfdom" by Stephen Baskerville

27. If Congress is going to pass laws that interfere with Domestic Relations and fund the programs that are violating my Constitutional Rights, I can certainly bring that issue before a Federal Court without exception.

## IMMUNITY

> "**Government immunity violates the common law maxim that everyone shall have remedy for an injury done to his person or property**." FIREMAN'S INS/ CO. OF NEWARK, N.J. V. WASHBURN COUNTY, 2 Wis.2d 214, 85 N.W.2d 840 (1957)
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> "Governmental immunity is not a defense under (42 USC 1983) making liable every person who under color of state law deprives another person of his civil rights." WESTBERRY V. FISHER, 309 F.Supp. 95 (District Ct.- of Maine - 1970 "

28. Mr. Fahy also attempts to invoke immunity in the same manner as a judge. He motion cites cases about judicial immunity, which are irrelevant as Mr. Fahy is not a judge and did not act in a judicial capacity. Not even the judges in this case have judicial immunity due to lack of jurisdiction, what makes him think that an incompetent attorney that shirks his duty to represent a handicapped child has a greater claim on immunity?

29. Mr. Fahy also again is getting the cart before the horse. He is claiming his appointment by the court protects him. However one of the questions before this court is if the state court ever had jurisdiction and if the orders are void. If the orders are void, he is not and never was a Guardian Ad Litem, and there is no court order or official status for him to even attempt to hide behind. So before he can claim immunity this court must rule if he was a Guardian Ad Litem or not.

30. Mr. Fahy claims the United States Court of Appeals for the Fourth Circuit has granted guardians *ad litem* in child custody cases are entitled to absolute quasi-judicial immunity. While I am unable to confirm his claim it is of no consequence. Any ruling to that effect would be grossly unconstitutional and the 4th Circuit Court of Appeals is without authority to make such a ruling and this court should give the 4th Circuit Court of Appeals a chance to correct their error by ruling against Mr. Fahy's claim for immunity.

> **If a judge does not fully comply with the Constitution, then his orders are void**, *In re Sawyer*, 124 U.S. 200 (1888), he/she is without jurisdiction, and he/she has engaged in an act or acts of treason.

31. While I couldn't get the text of the Flemming ruling I did see it was based on South Carolina law not Virginia law and as such is not binding on actions arising in Virginia. I saw that the Federal Court asked the South Carolina Supreme Court to answer questions about Guardian Ad Litem immunity, since the ruling was based on another state's law instead of Virginia or Federal law it should have no relevance to this case.

32. As a practical note, judges granting themselves, and their attorney friends, immunity makes judges rather than the constitution the supreme law of the land. No judge, no court has the authority to do that. Its just plain repugnant to the Constitution. The long-term consequences of

such rulings will lead only to misconduct by judges and attorneys and social strife until this lawless class of judges and attorneys is overthrown.

33. While it may have been possible to apply this concept of "above the law" to judge and attorneys handling criminal cases, applying it to custody cases is a major threat to the judicial system and our government. There are over 25 million non-custodial parents nationwide. That is over 10% of population who have had their most precious Constitutional Right violated. 25 million people that feel screwed by their government, 25 million people who had their faith in our justice system destroyed. Those are 25 million people who have had their children stolen and their constitutional rights violated by the very judges and others who have sworn an oath to uphold the constitution. Such violation of rights large scale is a destabilizing force for our country.

34. It is especially poor judgment for our judges to put our country in that position because if those 25 million people ever rise up to throw out those who oppress them, who will the judges and the government, call upon for protection? The police? The National Guard? The Army? All those organizations are composed mostly of men, and guess what most (96%) of those 25 million non-custodial parents are men. It may not happen this month, this year, or even this decade but if it comes to large-scale conflict between a corrupt judiciary who grants itself immunity and the 25 million people they victimized the judges shouldn't count on men to protect them.

35. It's past time for the Federal Courts to start reigning in the tyranny of state judges. I'm sure that not all 25 million are as patient as I am and willing to work for reform thru paperwork and lawsuits and websites. Given the increasing numbers of victims the state courts are creating, sole custody as a means of financial profit and tyranny by state judges, attorneys, and bar associations is doomed. Eventually there will be enough millions of noncustodial parents, or a trigger to set

them off, to put an end to that barbaric and unconstitutional practice. The only question is will sole custody be abolished peacefully by the Federal Courts or violently by a mob. As President Kennedy said "**Those who make peaceful revolution impossible make violent revolution inevitable**." (John F. Kennedy, March 12, 1962) Hopefully the Federal Courts will decide to allow a peaceful revolution to take place to put an end to sole custody.

36. Mr. Fahy has claimed Absolute Quasi-Judicial Immunity such an obviously unconstitutional concept nobody who wouldn't be protected by it could even suggest it with a straight face. While the 4th Circuit may have gotten it wrong due to wanting to protect a buddy or friend, or perhaps because the ruling was based on South Carolina law, traditionally Quasi-Judicial Immunity would not apply to Mr. Fahy.

37. Quasi-Judicial Immunity applies when a public official acts in a role similar to a judge. Mr. Fahy's role was as an attorney not as a judge. Mr. Fahy is also not a public official. Dotzel v. Ashbridge sets 3 specific criteria for determining if Quasi-Judicial Immunity applies. Mr. Fahy's claim fails all 3. He did not decide facts, did not apply the law (indeed didn't even make legal arguments typical of attorneys), had he properly fulfilled his role he wouldn't have been exposed to numerous actions, he didn't decide the case, and there are no PRACTICAL safeguards to protect the parties' constitutional rights.

> Quasi-judicial absolute immunity attaches when a public official's role is "functionally comparable" to that of a judge. Hamilton v. Leavy, 322 F.3d 776, 785 (3d Cir. 2003) (quoting Butz v. Economou, 438 U.S. 478, 513 (1978)); Harper v. Jeffries, 808 F.2d
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> Factors in determining whether a public official's role is functionally comparable to that of a judge, thereby entitling her to quasi-judicial immunity, include: (1) whether the official performs a traditional adjudicatory function, in that she decides facts, applies law, and otherwise resolves disputes on the merits; (2) whether the official decides cases sufficiently controversial that, in the absence of absolute immunity, she would be subject to numerous damages actions; and (3) whether the official adjudicates disputes against a backdrop of multiple safeguards designed to protect the parties' constitutional rights. Dotzel v. Ashbridge, 438 F.3d 320, 325 (3d Cir. 2006).

> In Downs v Sawtelle, 574 F 2d 1 (1st Cir. 1978) **the Federal Court of Appeals ruled that immunity was inappropriate for guardians** because private parties are not confronted with the pressures of office, the decision making or the threat of liability facing, governors and highest level public officials.
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> ". . . we hold that once the appointment of a public defender in a given case is made, his public or state function ceases and thereafter he functions purely as a private attorney concerned with servicing his client. His professional relationship with his client takes on all the obligations and protections attendant upon a private attorney-client relationship except one: the public pays his fee. In this respect, he is like the physician rendering professional services which are paid for out of public funds and, like that physician, he ought to be subject to liability for tortious conduct. E.g., Jackson v Kelly, 557 F2d 735 (10th Cir. 1977); U.S. ex rel. Fear v Rundle, 506 F2d 331 (3d Cir. 1974)." Reese v Danforth, 486 Pa. 479, 486, 406 A2d 735, 737 (1979)

38. It's obvious that Mr. Fahy did not act in a judicial rule (criteria 1). A Guardian Ad Litem who properly fulfills his role while recognizing the equal constitutional parental rights of both parties, is only rarely (if ever) going to recommend sole custody instead of equal custody, as such there would be no real risk of frequent lawsuits (criteria #2). The only risk of frequent lawsuits is when a GAL totally ignores the fact that both parents have a Continual right to be a parent and when the GAL recommends sole custody based on gender or political biases. Such action should not be protected. In Virginia there are no realistic safeguards to protect a parents rights against a vindictive or incompetent Guardian Ad Litem (criteria #3). As shown in this case. The Court Of Appeals won't hear a case until a final order, and a 'final order' can take years and years, of which most of what the case is about is lost and the Court Of Appeals would be unable to redress. Children only grow up once and even if an appeal is successful it can never return the lost parenting time for the years that occurred before the appeal occurred. Also as shown in this case the Virginia Court Of Appeals typically refuses to hear many of the appeals, looking for any minor excuse to avoid even making a ruling, thus depriving the parent of any safeguard to protect his constitutional rights.

39. Mr. Fahy also goes on to argue the Virginia standards for judicial immunity. Which is completely unrelated to this case, as this case is about civil rights, and **State law cannot provide immunity from suit for Federal civil rights violations**.

> Where a statute authorizes official conduct, which is patently violation of fundamental constitutional principles, an officer who enforces that statute is **not entitled to qualified immunity**. Grossman v. City of Portland, (9th Cir. (1994)
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> State law providing immunity from suit for child abuse investigators has no application to suits under § 1983. Wallis v. Spencer, (9th Cir. 1999)
>
> **Immunity is defeated i**f the official took the complained of action with malicious intention to cause a deprivation of rights, or the official violated clearly established statutory or constitutional rights of which a reasonable person would have known. McCord v. Maggio, (5th Cir. 1991)
>
> "There was no judicial immunity to civil actions for equitable relief under Civil Rights Act of 1871. 42 U.S.C.A. 1983 Shore v. Howard. 414 F.Supp. 379
>
> Attorney who takes action on behalf of client that attorney knows or reasonably should know will violate clearly established constitutional or statutory rights of another may be held liable for damages. Stevens v Rifkin (1984, ND Cal) 608 F Supp 710

40. Even Mr. Fahy admits under Virginia Jaw, quasi-judicial immunity attaches only where the individual has acted in good faith. Which kind of beggs the question of why he even brought up the immunity issue in the first place, since Mr. Fahy didn't even bother to attend the two most important hearings, that he didn't bother to attend court when his 'client' testified, that he presented no case, called no witnesses, presented not evidence, no reasonable person could claim he acted in good faith.

41. To act 'in good faith' as required by Virginia law requires some minimal professional standard of performance by Mr. Fahy as an attorney. While we could debate exactly how much that would require for investigating facts, for how many witnesses he called, etc. I think the court will agree that whatever else may be required of an attorney acting in good faith, certainly attending hearings is an absolute requirement.

42. The fact that Mr. Fahy didn't bother to attend the Jan 18th 2005 hearing about suspending visitation, that Mr. Fahy didn't bother to more than an hour or two of a two day hearing to determine custody, that Mr. Fahy didn't attend court when his 'client' testified, its clear that he not only acted in bad faith, but he didn't care that it was obvious to everyone that he was acting in bad faith.

43. Since its clear that **Mr. Fahy did not act in good faith, all his arguments to quasi-judicial immunity under Virginia law must fail.**

44. Even if Mr. Fahy had immunity for the portion of his role where he acted within the constitution, he has no immunity, nor can the state grant him any immunity for his actions that violated the constitution.

> The U.S. Supreme Court, in *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 1687 (1974) stated that "when a state officer acts under a state law in a manner violative of the Federal Constitution, he "comes into conflict with the superior authority of that Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. **The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States."**
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> "**The language and purpose of the civil rights acts, are inconsistent with the application of common law notions of official immunity**. . . " JACOBSEN V. HENNE, 335 F.2d 129, 133 (U.S. Ct. App. 2nd Circ. - 1966) Also see" ANDERSON V. NOSSER, 428 F.2d 183 (U.S. Ct. App. 5th Circ. - 1971)

45. Immunity for Guardians Ad Litem fosters neglect and breeds irresponsibility. Indeed the thought that he couldn't be held accountable for even gross violations likely led directly to Mr. Fahy being so negligent as to present no case and not even bother to attend hearings related to custody. Making a ruling that GAL's are not immune would have immediate benefit to thousands of children across the state as their Guardians would be immediately motivated to improve their representation for their 'clients'.

**Immunity fosters neglect and breeds irresponsibility, while liability promotes care**

**and caution, which caution and care is owed by the government to its people**." RABON V. ROWEN MEMORIAL HOSP., INC, 269 NSI. 13, 152 S.E.2d 485, 493 (1967)

In 1984 the United States Supreme Court again took up the claims of an appointed attorney that he should be immune from suit for malpractice. In Tower v Glover, 467 U.S. 914, 104 S Ct 2820 (1984) Writing for the Court Madam Justice O'Connor reasoned: "State public defenders **are not immune from liability under Sec 1983** for intentional misconduct by virtue of alleged conspiratorial action with the state officials that deprives their clients of federal rights. For purposes of Sec. 1983, immunities are predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." Glover, 104 S. Ct. 2820, 2821-22 (1984)

"In contrast, the primary office performed by appointed counsel parallels the office of privately retained counsel. Although it is true that appointed counsel serves pursuant to statutory authorization and in furtherance of the federal interest in insuring effective representation of criminal defendants, his duty is not to the public at large, except in that general way. His principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation. The fear that an unsuccessful defense of a criminal charge will lead to a malpractice claim **does not conflict with performance of that function. If anything, it provides the same incentive for appointed and retained counsel to perform that function competently.** Ferri v Ackerman, 444 U.S. l93, 204, l00 S.Ct. 402, 409 (l979). (Emphasis added).

Following Ferri v Ackerman and Tower v Glover, state courts took up the claims of guardians and appointed counsel for "absolute immunity", "judicial immunity" and "quasi-judicial immunity" and routinely held that granting these attorneys immunity would **encourage slip-shod work**. See: Eli Bon E.I. Bon Ghananee v Black, 504 A2d 281, 284 (1986); Williams v Office of the Public Defender County of Lehigh, 586 A2d 924, 927 (1990); and Dziubak v Mott, 486 Nw2d 837 (Minn App 1992): "Unlike judges or prosecutors, the duty of the public defender is not to the public at large but rather to the individual client." 486 Nw2d 837, 840.

## STATUTE OF LIMITATIONS

46. Mr. Fahy has argued that many of the claims are barred by the statute of limitations. Mr. Fahy claims the limit in Virginia is two years. Unfortunately for him that doesn't get him off the hook. Many of the claims took place inside the two-year limit he cites, and even those outside it are not barred by the statute of limitations as it was tolled for previous acts when each new act

was committed. Thus for ALL actions the statute of limitations is two years from May 2006. Thus the filing was less than one year, well within the two-year limit.

> A conspirator is responsible for the acts of other conspirators who have left the conspiracy before he joined it, or joined after he left it; **statute of limitations tolled for previous acts when each new act is done**. US v. GUEST, 86 S.Ct. 1170; US V.COMPAGNA, 146 F.2d 524.

47. Also the Statute Of Limitations does not necessarily run from the time the act was done but rather when the injury was discovered. While Mr. Fahy did not attend the hearing in Jan 2005, the Plaintiff was unaware of the reason why Mr. Fahy didn't attend, its possible he had some family emergency or unexpected event come up. It wasn't until much later when I went thru the court records and got a copy of the clerk notes that indicated that on Jan 3rd 2005 Mr. Fahy discussed the date with Judge Alston and knew at that time he couldn't attend and agreed to the date anyway. So it was less than 2 years from the time I learned Mr. Fahy simply chose not to attend and that he had two weeks to ask to continue or reschedule and simply chose not to.

48. It is also quite reasonable to conclude that the statute of limitations didn't begin to run until after the 'final order' was entered in May 2006 See MORALES v CITY OF LOS ANGELES **U.S.** 9th Circuit Court of Appeals JUNE 12, 2000. It is also appropriate to toll the statute of limitations while the appeal was pending. Indeed if we accept the previous defendant's claim that finishing the appeal first is mandatory then certainly the time involved in the appeal can't be held against the Plaintiff.

49. Mr. Fahy is also only looking at active actions not his inaction. His role required him to take active steps to protect the interests of our son. During the 17 month period that visitation was suspended Mr. Fahy had an obligation to check how our son was dealing with it and given our son became depressed and was diagnosed with depression and that our son was very insistent on wanting to see his father, Mr. Fahy had an obligation to inform the court of the depression

caused by the suspension as well as to inform the court that our son desired to spend time with his father. Mr. Fahy did not fulfill this obligation so even if the court were to dismiss 2 months of it that would still leave 15 moths left in this suit.

50. It is also possible that the Plaintiff would qualify for equitable tolling of the statute of limitations. Certainly the Plaintiff not being an attorney (or able to afford one) was completely ignorant about the statute of limitations. And it' hard to imagine how an extra two months would impair Mr. Fahy an attorney from defending himself [Especially as the Statute of Limitations for my son suing him does not start for another 8 years minimum]. See See Supermail Cargo, Inc. v. United States, 68 F.3d 1204, 1207 (9th Cir. 1995) The Plaintiff also has a limited financial situation that makes it is impossible for him to hire an attorney to handle the case and ADD makes it very difficult to research and file legal paperwork and representing himself in the divorce case and writing the appeal delayed research and work on a federal case.

51. Indeed focusing first on preparing an appeal before focusing on a civil rights lawsuit may have tolled the statute of limitations.

> in *Elkins v. Derby* (1974) 12 Cal.3d 410, an injured man commenced a worker's compensation action which was dismissed by the WCAB more than one year after the injury after finding that plaintiff was not covered as an "employee" and, therefore, not entitled to benefits. When he subsequently filed a Superior Court action to recover for his injuries, defendants asserted that it was barred by the statute of limitation. In finding for the plaintiff, the Supreme Court held that if the defendant is not prejudiced by the delay, the running of the limitations period is tolled when an injured person has several legal remedies and, reasonably and in good faith, pursues one. This applies also to actions filed in federal court but dismissed for lack of jurisdiction. [*Addison v. State* (1978) 21 Cal.3d 313.]

**VENUE**

52. Mr. Fahy has requested a transfer to Alexandria Division of the United States District Court for the Eastern District of Virginia ("Eastern District"). He claims the action should have been

filed there. This issue has already been addressed in #6 - REPLY TO ISSUES ADDRESSED AT HEARING on page 7, I pointed out:

a. "Venue is proper in the Western District of Virginia pursuant to 28 U.S.C. 1391(b), because the Plaintiff's rights were violated in this district and at least one defendant resides in this district."

b. This is one of the few issues that Mr. Smith did get a (free) legal opinion on and was told by an attorney that he should file in the western district because that is where his rights were violated. Yes much of the paperwork that caused the deprivation of rights took place in the eastern district, the paperwork isn't the problem but rather that Mr. Smith was prevented from exercising his constitutional rights in the western district.

c. 28 U.S.C. 1391(b) states "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where **any** defendant resides, if all defendants reside in the same State," Given that Defendant Chitwood resides in the western district then that is sufficient to make jurisdiction in the western district of Virginia proper.

53. Its clear that 28 U.S.C. 1391(b) gives the Plaintiff the option of choosing which district to file in if more than one qualifies. I made a choice on the Western District based on the statement from a licensed attorney that the Western District was appropriate and the most convenient for me as a Pro Se litigant.

54. Mr. Fahy asks for a transfer based on the "convenience of the parties and the witnesses", yet fails to specify how a transfer to the Eastern District is convenient for an indigent Plaintiff. Indeed given that most of the other parties are represented by attorneys that practice in the

Western District, it would appear that his request is meant more to cause inconvenience to the Plaintiff rather than accommodate the various parties.

55. The Plaintiff request the court deny his request to transfer the case to Alexandria, and is willing to agree to hold hearings in any courthouse in the Western District that may closer to the Defendants in Northern Virginia (such as Harrisonburg) if that would be more convenient for them.

## CONSPIRACY - Requirements / Proof

56. Mr. Fahy has argued that the Plaintiff "must show a meeting of the minds by the defendants to deny him his civil rights" or state specifics of how the Defendant's reached agreement, as if the Plaintiff had been invited to their planning sessions. Such a claim is well above that actually required. It is allowed to prove conspiracy with only circumstantial evidence.

In order prove existence of civil conspiracy, plaintiff is **not required to provide direct evidence of agreement between conspirators**, and **circumstantial evidence may provide adequate proof of conspiracy;** plaintiff seeking redress under 42 USCS 1985 for civil conspiracy need not prove that each participant in conspiracy knew exact limits of illegal plan or identity of all participants therein, and express agreement among all conspirators in not necessary element of civil conspiracy. Hampton v Hanrahan (1979, CA7 Ill) 600 F2d 600

57. Statistical evidence is sufficient to show practice of discrimination. The Plaintiff has shown that statewide there is a 96% to 4% gender disparity. Mr. Fahy is believed to follow in line with this statewide gender discrimination. If Mr. Fahy sided with females 85% that would still be sufficient to show conspiracy but would give him a reputation as being "father friendly". Mr. Fahy does not have such a reputation and it is expected that discovery will document his sever gender bias - so no discussion was needed, his participation in the conspiracy was presumed by the others (and he did not let them down)

> Proof of gross statistical disparity may itself constitute prima facie case of intentional pattern and practice discrimination. Pennsylvania v International Union of Operating Engineers (1978, ED Pa) 469 F Supp 329

58. Given that the physical attributes of the Plaintiff as a member of the class are obvious just by looking, the conspirators would have no need to discuss this particular case but have just a tacit agreement to deprive Equal Protection to all similar members of the class.

> Conspiracy in context of 42 USCS 1985(3) means that co-conspirators must have agreed, at least tacitly, to commit acts which will deprive plaintiff of equal protection of law. Santiago v Philadelphia (1977, ED Pa) 435 F Supp 136

59. Mr. Fahy is also guilty of conspiracy on the basis of being able to prevent the deprivation but taking no action to do so. If a party has potential to stop illegal activity and fails to do so, then that party has impliedly conspired. So instead of the unrealistically high bar the Defendant's claim for proof, the only thing that need be shown is that the parties had the ability to stop the illegal deprivations of his constitutional rights and failed to do so. Mr. Fahy as a GAL would have submitted motions recommending Equal Custody, or even recommending continued visitation. It is very likely that a judge would at least have resumed visitation if Mr. Fahy had requested it. The fact that he did not do so and went along with the mother's request to suspend visitation is proof he conspired.

> Second most important element of cause of action under 42 USCS 1985(3), after intent, is proof of conspiracy; **if party has potential to stop illegal activity but fails to act to do so, then that party may be said to have impliedly conspired in such illegalities.** Dickerson v United States Steel Corp. (1977, ED Pa) 439 F Supp 55, 15 BNA FEP Cas 752 15 CCH EPD par 7823, 23 FR Serv 2d 1429

> ... proof of agreement itself, as distinct from comprehensible injury, can derive from evidence of act done by conspirators, whether or not act caused injury that would be actionable under $1985(3) Hobson v Wilson (182, DC Dis Col) 556 F Supp 1157

60. It is believed that Loretta Vardy and Ronald Fahy had repeated meetings where they discussed depriving Mr. Smith of his rights. In fact at one hearing that Loretta Vardy did not attend Ronald Fahy made a statement about Loretta Vardy supposedly not receiving the motion on a certain date, indicating that he kept in close contact with her.

## STANDARD FOR DISMISSAL

61. Pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers and **can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts** in support of his claim that would entitle him to relief.'" Estelle v. Gamble, 429 U.S. 97, 106 (1976) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)).

62. Its clear that the Plaintiff can prove that an Ex Parte hearing was held at the request of Ms. Vardy, and that the Plaintiff was denied the right to see his son without being provided the opportunity to present evidence or cross-examine his accuser, thus it is impossible for Ms. Vardy to meet the standard and thus her motion must be denied.

## CONCLUSION

For the foregoing reasons, the Defendant's motion to dismiss, pursuant to F.R.Civ.P. 12(b)(1) and (6), should be denied, and Plaintiff afforded the opportunity to proceed to discovery and develop a factual record in support of his claims.

**Respectfully Submitted,**
**Wesley C. Smith**

July 5th, 2007

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**CERTIFICATE OF SERVICE**

I hereby certify that I have e-mailed copies of the foregoing to the following parties/counsel on July 5th 2007: Barry Tatel, James Ingold, Loretta Vardy, and Kevin Barnard.

_____
Wesley C. Smith