

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

WESLEY C. SMITH
Plaintiff

v.

CHERI SMITH, et als
Defendants

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Case No: 7:07-CV-00117

#11 - REPLY TO LORETTA VARDY'S MOTION TO DISMISS

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"Constitutional 'rights' would be of little value if they could be indirectly denied."
Gomillion v. Lightfoot, 364 U.S. 155 (1966), cited also in Smith v. Allwright, 321 U.S.
649.644

1. This is in reply to the MOTION TO DISMISS filed by Loretta Vardy. 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 and #2 - PLAINTIFF'S MEMORANDUM IN OPPOSITION TO SMTIH & BAKHIR JOINT MOTION TO DISMISS.

3. Ms. Vardy filed her motion to dismiss without any legal argument or case citation but rather just relies on the arguments made by Mr. Ingold and Mr. Tatel. Given that Ms. Vardy is not a judge or state employee almost none of Mr. Ingold's arguments can apply to her. Ms. Vardy does not have judicial or 11th amendment immunity - her blanket inclusion of all his reasons is hardly worthy of a response let alone approval by this court.

4. About the only argument made by the others that can apply to her own situation would be the argument that civil rights violations made 'under color of law' don't apply to her, but that has been previously shown false in #2 - PLAINTIFF'S MEMORANDUM IN OPPOSITION TO SMTIH & BAKHIR JOINT MOTION TO DISMISS on page 7:

To act under "color of law" does not require that the accused be an officer of the state; it is enough that he is a willful participant in joint activity with the state or its agents. *Canty v Richmond, Virginia, Police Dept.* (DC Va) 383 F Supp 1396, affd without op (CA4 Va) 526 F2d 587

As long as a defendant who abridges a plaintiff's constitutional rights acts pursuant to a statute of local law which empowers him to commit the wrongful act, an action under the Federal Civil Rights statute is established. 42 U.S.C.A. 1981 et seq.; *LAVERNE V. CORNING*, 316 F.Supp. 629

The Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a property interest only from deprivation by state action; private use of state-sanctioned private remedies or procedures does not rise to the level of state action, **but when private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found.** *Fulsa Professional Collection Services, Inc. v Pope* (1988, US) 99 L Ed 2d 565, 108 S Ct 1340.

5. Other than relying on others arguments Ms. Vardy only make the vague statement that I have failed to state a claim, yet that was proved false in #2 - PLAINTIFF'S MEMORANDUM IN OPPOSITION TO SMTIH & BAKHIR JOINT MOTION TO DISMISS on page 7, where it was shown that being denied physical custody without due process is a cause of action under 42 USCS 1983.

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 See Also *Elam v Montgomery County* 573 F Supp 797

"By the plain terms of section 1983, two - and only two - allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." *Gomez v. Toledo*, 446 U.S. 635 (1980)

6. I have certainly made the claim that I was denied custody without Due Process (such as the Ex Parte hearing in Jan 2005), as such I have made at least one valid claim.

7. Ms. Vardy did not dispute the facts that she personally and in violation of state laws and court rules, took actions to deny me due process. Including but not limited to presenting false information to the court, becoming an eyewitness to events then refusing to comply with a witness subpoena, refusing to comply with a subpoena for documents, scheduling an Ex Parte hearing, scheduling hearings when she knew I couldn't attend, calling witnesses to give testimony she knew to be false.

Right to full and fair hearing granted by due process clause encompasses individual's right to be aware of and refute evidence against merits of his case; Re Application of Eisenberg (1981, CA5 Fla) 654 F2d 1107

Under the line of United States Supreme Court cases which has interpreted the guarantees of due process of law in the Federal Constitution's Fifth and Fourteenth Amendments to include a substantive component which **forbids the government to infringe certain "fundamental: liberty interests at all, no matter what process is provided**, unless the infringement is tailored to serve a compelling state interest-such substantive due process analysis must begin with a careful analysis of the asserted right, for the doctrine of judicial self-restraint requires the Supreme Court to exercise the utmost care whenever the court is asked to break new ground. Reno v Flores (1993, US) 123 L ed 2d 1, 113 S Ct 1439

8. Parental Rights are at least equal to if not more important than First Amendment Rights.

The "liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps **the oldest of the fundamental liberty interests recognized by this Court.**" Troxel v. Granville, 530 U.S. 57, 65 (2000)

A parent's right to the companionship, care, custody and management of his or her children is an interest "far more precious" than any property right. May v. Anderson, 345 US 528, 533; 73 S Ct 840, 843, (1952).

The rights of parents to the care, custody and nurture of their children is of such character that it cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and such right is a fundamental right protected by this amendment (First) and Amendments 5, 9, and 14. Doe v. Irwin, 441 F Supp 1247; U.S. D.C. of Michigan, (1985).

STANDARD FOR DISMISSAL

9. 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)).

10. 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