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July 12, 2007

Wesley C. Smith
5347 Landrum Road
Apartment #1
Dublin, VA 224084

Re: *Wesley C. Smith v. Cheri Smith, et al.*
United States District Court
Western District of Virginia – Roanoke Division
Case No.: 7:07-CV-00117

Dear Mr. Smith:

I enclose a copy of Mr. Fahy's reply to your response to his motion to dismiss, which I electronically filed with the court today.

With regards, I am

Sincerely,

FRITH ANDERSON & PEAKE, PC

Kevin O. Barnard

KOB/plr
Enclosure

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
REPLY TO PLAINTIFF'S RESPONSE TO HIS MOTION TO DISMISS

Defendant Ronald Fahy, by his counsel, replies to Plaintiff's response to his Motion to Dismiss.

I. Argument

A. The Court Does Not Have Jurisdiction over Plaintiff's Claims.

1. The *Rooker-Feldman* Doctrine

Counsel for Mr. Fahy has neither misrepresented the character of the relief Plaintiff seeks nor the jurisdictional consequences of *Rooker-Feldman* doctrine on that relief. Plaintiff has asked this "[C]ourt to vacate the state court ruling due to lack of jurisdiction, and lack of due process, and violations of the U.S. Constitution." (Compl. ¶ 7.) As explained in Mr. Fhay's opening brief, this is precisely the type of relief forbidden by *Rooker-Feldman*. *See Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005).

Moreover, the bar erected by *Rooker-Feldman* is, Plaintiff's protestations the contrary aside, jurisdictional; the doctrine is not a form of abstention. Appellate jurisdiction over state court rulings rests exclusively with the Supreme Court of the United States. Complaints that invite "federal courts of first instance to review and reverse unfavorable state-court judgments

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[are] ... out of bounds, *i.e.*, properly dismissed for want of subject-matter jurisdiction." 544 U.S. at 283-284. This Court, therefore, lacks subject-matter jurisdiction to vacate the state court ruling for any of the reasons put forth by Plaintiff.

2. Standing

Plaintiff asserts that there are "several problems" with Mr. Fahy's standing argument. The "problems" he identifies, however, are his erroneous conclusions regarding Mr. Fahy's fulfillment of his professional obligations to Plaintiff's minor child – obligations, which in fact, Mr. Fahy satisfied in all respects. Moreover, Plaintiff cannot escape the holding of the Supreme Court of the United States that a non-custodial parent lacks standing to pursue claims that belong to a child. *See Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004). Under the holding in *Elk Grove*, Plaintiff cannot assert any claim – such as legal malpractice – that belongs to his child because he is not the custodial parent.

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

1. Federal Claims

Plaintiff asserts that Mr. Fahy is not entitled to judicial or quasi-judicial immunity because he is not a judge and because this immunity is "just plain repugnant to the Constitution." (Pl.'s Reply to Fahy's Mots. at 9.) Unfortunately for Plaintiff, the Supreme Court of the United States and the United States Court of Appeals for the Fourth Circuit disagree with his assertions. As for the wisdom of judicial or quasi-judicial immunity, over the last 130 years, the Supreme Court has consistently recognized the validity of the immunity, and indeed, has expanded its scope. *See Briscoe v. LaHue*, 460 U.S. 325, 334-35 (1983); *Bradley v.*

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Fisher, 13 Wall. 335, 347 (1872). The immunity is plainly not repugnant to our judicial system; rather, there is simply no question that the immunity is vital to it. 13 Wall. At 347.

Similarly, there is no question that the absolute immunity afforded judges extends to other actors in the judicial process and is but a part of the "cluster of immunities protecting the various participants in judge-supervised trials," "including counsel and witnesses." *Briscoe*, 460 U.S. at 334-35 (citations and internal quotation marks omitted) (witnesses entitled to absolute judicial immunity). In recognition of this principle, the Fourth Circuit has held that guardians *ad litem* are entitled to absolute immunity to federal civil rights claims. *Fleming v. Asbill*, 42 F.3d 886, 889 (4th Cir. 1994). While *Fleming* was a South Carolina case, the Fourth Circuit's ruling as it pertained to immunity to federal claims was not dependent upon South Carolina law. Indeed, the court drew support for its ruling from other circuits. Thus, *Fleming* applies to the instant case and Mr. Fahy is, therefore, entitled to absolute immunity to Plaintiff's federal claims.

2. State Law Claims

In his response, Plaintiff clarifies that the instant case is about "**Federal civil rights violations**," and thus asserts that arguments related to judicial immunity under Virginia law are "completely unrelated to this case." (Pl.'s Reply to Fahy's Mots. at 13 (emphasis in original).) If Plaintiff has not made any state law claims, then Mr. Fahy would agree that state law judicial immunity would not be relevant to this case, because such immunity would not apply to federal claims. If that is the case, and Plaintiff makes no state law claims, then the federal immunity described in the preceding section bars Plaintiff's claims.

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

Plaintiff correctly notes that, under federal law, a cause of action does not necessarily accrue when the injury occurs (Pl.'s Relpy to Fahy's Mots. at 16); however, his assertion that a cause of action does not accrue until the injury is discovered (*id.*) is only partially correct: under federal law, a cause of action accrues "when the plaintiff knows, *or through the exercise of reasonable diligence should know*, of the injury [he] has suffered," *Board of Trustees v. D'Elia Erectors, Inc.*, 17 F. Supp. 2d 511, 512 (E.D. Va. 1998)(emphasis added); *see also Nasim v. Warden; Md. House of Correction*, 64 F.3d 951, 955 (4th Cir. 1995).

Under the facts alleged in Plaintiff's pleadings, he knew or should have known of the putative injuries he claims to have suffered by reason of the January 2005 custody proceedings at the time those proceedings took place. The two-year statute of limitations applicable to claims arising from those custody proceedings had expired by the time Plaintiff filed his Complaint on March 15, 2007. Plaintiff has put forth no reason why the running of the limitations period should be have been tolled. Accordingly, his claims arising from the January 2005 custody proceedings – and any other claims that accrued prior to March 15, 2005 – are barred by the statute of limitations.

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

The "facts" Plaintiff recites in his pleadings – including in his response to Mr. Fahy's Motion to Dismiss – simply do not establish that Mr. Fahy acted under color of law to deprive him of a right guaranteed by federal law so as to violate 42 U.S.C. § 1983, or that Mr. Fahy conspired with anyone to deprive him of his equal rights so as to violate 42 U.S.C. § 1985. With respect to the conspiracy claim, it is clear Plaintiff is not part of a specific-class entitled to protection under § 1985, *see Gedrich v. Fairfax County Dept. of Family Services*, 282 F. Supp.

2d 439, 459 (E.D. Va. 2003), and the "statewide" "statistical evidence" he cites regarding "discrimination" against fathers in state custody disputes (Pl.'s Reply to Fahy's Mots. at 19) has no application to Mr. Fahy individually.

Moreover, Plaintiff misapprehends the standard applicable to a Rule 12(b)(6) motion to dismiss. The federal rules require that a complaint "possess enough heft to show that the pleader is entitled to relief." *Bell Atlantic Corp. v. Twombly*, No. 05-1126, 2007 U.S. LEXIS 5901, *25 (May 21, 2007). A district court has "the power to insist upon some specificity in the pleading before allowing a potentially massive controversy to proceed." *Associated General Contractors v. Carpenters*, 459 U.S. 519, 528 n.17 (1983).

Indeed, in *Twombly*, the Supreme Court of the United States clarified and limited the very language Plaintiff cites in his response that a complaint may not be dismissed under Rule 12(b)(6) unless it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The *Twombly* Court not only cautioned that this language should not be taken literally, 2007 U.S. LEXIS 5901, *33, but also held quite clearly that *Conley's* "no set of facts" phrase "is best forgotten as an incomplete, negative gloss on an accepted pleading standard" *id.* at * 35.

The standard by which a pleading should be judged is a plausibility standard. 2007 U.S. LEXIS 5901, *25. Thus, the plaintiff's complaint must provide more than a "forumalic recitation" of the elements of a cause of action and labels and labels or conclusions in support of his claim. Instead, he must plead factual allegations sufficient "to raise a right to relief above the speculative level..." *Id.* at *21. Under this standard, Plaintiff has pleaded no factual allegations sufficient to raise his claim to relief under either § 1983 or 1985 above the speculative level. Accordingly, his Complaint is subject to dismissal under Rule 12(b)(6).

II. Conclusion

Wherefore, for the reasons set forth above, and those stated previously, 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

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CERTIFICATE OF SERVICE

I certify that on July 12, 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