UNITED STATES COURT OF APPEALS
FOURTH CIRCIT

WESLEY C. SMITH Plaintiff/ Appellant	)	
v.	)	Case No: 07-2146
CHERI SMITH, et al Defendants/Appellees	)	

#1 - REPLY TO MOTIONS TO DISMISS

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> Just think back to segregation in the South in the 1950's. It had been a way of life for generations. If you were black, you sat in the back of the bus, you used a different bathroom, you even drank out of a different water fountain. Imagine that! There were laws that enforced this; Appellate decisions that upheld it as good law. "That's how it is, just accept it and go on with your life." Today fathers are deprived of their children by the courts due to the same type of senseless discrimination and told by the judges to just accept it and go on with their life. Legalized discrimination hasn't been eliminated, its just targeting different victims.

1. Defendants Ronald Fahy, Igor Bakhir and Cheri Smith have filed two separate motions to dismiss, their arguments based on a claimed violation of not having filed the notice of appeal within 30 days. Mr. Smith's position is that the Notice Of Appeal should be considered to have been filed within the 30 days, and that an other interpretation of the Rules would result in Due Process violations and Equal Protection Violations. Additionally this court is not required to dismiss the appeal even if the notice was filed late and that allowing the case to proceed in the interest of justice.

2. The Parties agree that the order being appealed was entered on Oct 12, 2007, and that there is a Notice Of Appeal stamped Nov 14, 2007. However the Defendants failed to mention that the Nov 14th Notice Of Appeal is not the only, and was not the first copy submitted to the court. The Defendants also conveniently failed to mention that Mr. Smith was unaware of the existence of the

order for several weeks, and that he sent the notice of appeal to the court within about 11 days. (see attached letter from clerk).

3. Mr. Smith could not afford an attorney, was declared indigent by order of the district court and was handling the case himself.

4. Mr. Smith had asked the district court clerk if he was allowed to participate in the electronic filing system used by attorneys and was told that he was not allowed to use the CM/ECF system.

5. Mr. Smith had been allowed on at least one occasion to submit documents electronically via e-mail followed up by sending paper signature sheets via U.S. mail.

6. Mr. Smith filed the case in March 2007, with a hearing on the motions to dismiss in May 2007. Since May Mr. Smith had been awaiting an order. Since Mr. Smith was not allowed to use the CM/ECF system to check if an order was entered he periodically checked with the court via e-mail and U.S. mail.

7. On October 19, 2007 Mr. Smith, having not heard from the court that a ruling had been made, again contacted the court to check on the status of his case. On October 24th the clerk sent a letter advising Mr. Smith of the entry of the order. (see attached letter from clerk).

8. Mr. Smith, not being an attorney, was unfamiliar with what was needed to be done to appeal a case. The district court had provided no information to him on how to appeal the case, and provided no warning that an appeal must be done within 30 days of entry.

9. On November 10th, about 11 days after receiving a notice/copy of the order, Mr. Smith e-mailed a pdf version of the Notice Of Appeal to the court (as he had done previously), and also mailed paper copies via U.S. mail.

10. Had Mr. Smith been allowed to participate in the CM/ECF system, the electronic copy of his Notice Of Appeal would have been considered 'filed' within the 30-day limit thus rendering the Defendant's motions groundless.

10. Mr. Smith should not be denied an appeal simply because he was not an attorney. Mr. Smith sent his notice electronically On Nov 10th. An attorney could have sent the notice on Nov 11th, Nov, 12, and even Nov 13th and have it considered 'filed' within the 30 day limit. To require Mr. Smith to file his notice of appeal on the 9th (or earlier) due to his pro se status when attorneys are allowed 4 more days is a clear Equal Protection violation. [note due to Mr. Smiths financial status and distance from the district courthouse, U.S. mail and e-mail were the only viable means of getting documents to the courthouse]

11. So unless the Defendants wish to claim, and this court to enforce a shorter filing time period for pro se parties (at least 4 days shorter), the Nov 10th submission via e-mail and U.S. mail must be considered sufficient.

12. Making this shorter submission time all the worse for Mr. Smith was the lack of notice of entry of the order. The court did not call or e-mail him to let him know. Thus from the time Mr. Smith received the order via mail, to require mailing on the 9th would allow for only about 10 days. That is only one third of the time allotted to an attorney who can use the CM/ECF system.

13. The Nov 10th filing should be considered filing within the 30-day rule limit, but even if its not the court stamped copy of Nov 14th is within the 30-day limit (per rules as I understand them). The order was entered Oct 12, that day doesn't count, 30 calendar days later is Nov 11th, which is a Sunday that also doesn't count. Nov 12 was Veterans Day and being a Federal Holiday also doesn't count. Thus Nov 13th would be the '30th' day but that is before Rule 6, which extends the time 3 days (presumably to account for U.S. mail, although in this case 15 days would be more appropriate).

14. Its actually possible the paper copy was received on the 13th but not stamped till the 14th.Its absurd to think of dismissing a case that raises constitutional issues simply due to a document being stamped a day late by the court.

15. This is not a case where the Appellant was negligent in pursuing the case. Mr. Smith made a good faith effort to keep informed about the status of the case, and filed the notice within about 10 days of receiving the order.

16. The cited rule 4(a)(1) should be declared unconstitutional as the Defendant's request it to be applied in this case, as it would dismiss an apple by a indigent pro set party sent to the court on the 10th, while allowing an appeal by a represented party sent to the court on the 13th.

17. Also note that the rules do not require the case to be dismissed. According to rule 4(2) "An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals **to act as it considers appropriate,.."**. Hopefully this court will consider it appropriate for the case to be heard on its merits in light of Mr. Smith's good faith effort to comply, receiving late notice of the order, and ano harm to the Defendants case.

18. If we are going to be nit picky about the rules, it should be noted that Mr. Fahy's motion got the due date wrong - he claimed the 12 (Veteran's day) as the due date. And both motions to dismissed were sent without proper certificate of service, as neither one claims to have served Loretta Vardy, a party to the case who has no counsel of record. There is likely a rule to reject their motions on that ground… If paid professional attorneys can make such mistakes, surely a day late when notice was received over 2 weeks late can be overlooked for a pro se litigant.

> Pro se litigants' court submissions are to be construed liberally and held to less stringent standards than submissions of lawyers. If the court can reasonably read the submissions, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with rule requirements. Boag v. MacDougall, 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982); Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)(quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); McDowell v. Delaware State Police, 88 F.3d 188, 189 (3rd Cir. 1996); United States v. Day, 969 F.2d 39, 42 (3rd Cir. 1992)(holding pro se petition cannot be held to same standard as pleadings drafted by attorneys); Then v. I.N.S., 58 F.Supp.2d 422, 429

(D.N.J. 1999).

Defendant has the right to submit pro se briefs on appeal, even though they may be inartfully drawn but the court can reasonably read and understand them. See, Vega v. Johnson, 149 F.3d 354 (5th Cir. 1998). Courts will go to particular pains to protect pro se litigants against consequences of technical errors if injustice would otherwise result. U.S. v. Sanchez, 88 F.3d 1243 (D.C.Cir. 1996).

Wherefore Mr. Smith, requests this court to either consider the Notice Of Appeal filed within the 30 days or overlook the 1 extra day in light of the delay receiving notice, leaving him only about 10 days to mail the notice, and allow the case to be heard on its merits.

Respectfully Submitted,
Wesley C. Smith
December 27th, 2007

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CERTIFICATE OF SERVICE
I certify that on Dec 27, 2007 I mailed a complete copy of this Reply and all attachments to all parties, addressed as shown below:

December 27th, 2007

_____
Wesley C. Smith, Plaintiff

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