

INFORMAL BRIEF

RE: Wesley C. Smith v Cheri Smith, et al, Docket No. 07-2146

1. Jurisdiction (for appellants only)

A. What is the name of the court from which you are appealing?
U.S District Court, Western District Of Virginia, Roanoke Division

B. What is the date(s) of the order or orders you are appealing?
October 12, 2007

2. Timeliness of appeal (for prisoners only)

When did you give your notice of appeal to a prison officer for mailing to the United States District Court? Enter the exact date:

3. Issues on Appeal

Use the following spaces to tell the United States Court of Appeals for the Fourth Circuit why the judgment under review should be affirmed, reversed, or vacated and remanded. Appellants must provide a brief summary of the facts and arguments that support their position that the judgment under review was wrong. Appellees may rely on the facts and law stated in that judgment or may advance alternative grounds for affirmance or dismissal. The parties may cite case law, but it is not required.

Issue 1.

District Court based immunity on 11th amendment without properly considering the well-understood rule that the last expression of the will of the lawmaker prevails, with the 14th amendment being passed after the 11th. See Schick v United States, 195 US 65, 49 L Ed 99, 24 S Ct 826

Supporting Facts and Argument.

The Fourteenth Amendment clearly was intended to force the states to provide Equal Protection, with congressional debate indicating it applied to state actors including judges. Allowing the states to have 11th Amendment immunity in a case of 14th Amendment violations pretty much nullifies the Fourteenth Amendment. Under the well understood rule the last expression of a lawmaker prevails, the lawmakers were aware of 11th amendment and chose not to make an exception for it. Thus the 11th is no bar.

The district court quoted the legislation passed by the 14th applies to "any person" then goes about claiming it doesn't apply to this person or that person. Following the reasoning of the district court there is NO person who can act under color of state law that doesn't have immunity, negating all application of the Civil Rights Acts. Such a conclusion is absurd. The Civil Rights acts were passed to correct exactly this type of situation where a state is unwilling to grant equal rights to all of its citizens (in this case fathers). Are fathers as a class less worthy of protection than African Americans or other minorities?

Issue 2.

Younger Abstention - The court repeatedly used the state court orders as justification for dismissal without first ruling on the issue as to if the orders exist at all. Mr. Smith clearly claimed that the state court 'orders' were null and void, cited case law to support it. If the orders are void, the courts arguments based on them is without merit.

Supporting Facts and Argument.

The Court cited a 6th Circuit ruling to support his decision, but ignored the 6th Circuit Appeal ruling cited by Mr. Smith, in a similar divorce case, that ruled that the state 'orders' were null and void and thus no deference was due to them, no interference with state courts, etc. All the reasons claimed by this court were struck down in that ruling. It was an error to dismiss the case for any of those reasons, without first making a finding as to if the claimed state orders were null and void or not. "if the divorce judgment were unconstitutionally obtained, it should be regarded as a nullity, and any decree so stating would change nothing at all. ...Catz asks the court to examine whether certain judicial proceedings, which happened to involve a divorce, comported with the federal constitutional guarantee of due process. This is a sphere in which the federal courts may claim an expertise at least equal to that of the state courts" Catz v. Chalker, 142 F.3d 279, 281 (6th Cir. 1998)

Issue 3.

The court broadly invoked a claim of "absolute judicial immunity" without considering if it is constitutional and without proper consideration of the argument that the Judges acted without any jurisdiction and were not performing judicial acts.

Supporting Facts and Argument.

The ruling noted that process was never served on Mr. Smith, but failed to note that subject matter jurisdiction in a divorce case occurs only AFTER the statutes about initiating the case are followed, its not something the court or judge has all the time like it does for criminal cases. Lacking a finding that the statutes were complied with the court was unable to state the judges had subject matter jurisdiction. Case law is clear, no subject matter jurisdiction, no immunity. There are some valid arguments in favor of judicial immunity, but absolute judicial immunity, has even larger arguments against. Immunity should allow a judge to be free from coercion, but not free from the Constitution, as absolute immunity provides. When a judge can say "I know the order is unconstitutional but I'll still send you to jail if you don't follow it" then immunity has been carried past its Constitutional limits and harms rather than helps justice.

Issue 4.

The real question before the court is if the U.S. and Virginia Constitutions have any application whatsoever in Virginia Courts. The District Court ruling is in application a ruling authorizing VA judges and others to ignore the Constitutions with impunity.

Supporting Facts and Argument

The courts in Virginia fail to follow the U.S. and Virginia Constitutions on a regular basis. Unless the Federal Courts take action there is no practical (ethical) way to force Virginia judges to honor their oath to uphold the Constitution. The VA court of appeals denied my appeal on procedural grounds, as it does for most cases. It simply refuses to enforce Constitutional Rights. Allowing a judge to knowingly violate First Amendment Rights while dismissing cases due to lack of red covers, wrong font etc is a clear case of "...strain at a gnat, and swallow a camel" (Matt 23:24) Federal Courts intervened in state matters for equal education for African Americans, and decided none of the arguments for non-interference applied. Is being denied Rights due to skin color worse than denial due to gender? Is education more of a Right than being a parent? Not according to the U.S. Supreme court, not that what they say has any application in VA.

4. **Relief Requested**

What do you want the Court of Appeals to do? Identify exactly the relief you seek.

Reverse the ruling and remand for trial on the merits. Find a middle ground on immunity that provides some level of personal accountability for judges so they will make a good faith effort to comply with constitution, instead of knowing they can get away with holding a Kangaroo Court.

5. **Prior appeals (for appellants only)**

A. Have you filed other appeals in this court? Yes No

B. If you checked YES, what are the case names and docket numbers for those appeals and what was the ultimate disposition of each?

Signature
[Notarization Not Required]

[Please Print Your Name Here]

CERTIFICATE OF SERVICE

I certify that on Dec 27, 2007 I mailed a complete copy of this Informal Brief and all attachments to all parties, addressed as shown below.

Signature
[Notarization Not Required]

[List here each party's name and complete mailing address]

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