

**VIRGINIA:**

**IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY**

**Whitbeck & Associates, P.C.,** )  
**Plaintiff,** )  
 )  
v. ) **Case No: CL 71003**  
 )  
**WESLEY C. SMITH,** )  
**Defendant** )  
**CHERI SMITH,** )  
**Defendant** )

**#1 - REPLY & MOTION TO DISMISS**

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**COMES NOW** the Defendant, Wesley C. Smith, states as follows:

1. In paragraph #10, the Plaintiff incorrectly states that:

“The Firm has no personal knowledge as to the justice or right of the respective claims of the Defendants, and that there is no way by which the claims to the said sum may be determined to the Firm's protection, save by the intervention of a court of equity.”

2. However Mr. Whitbeck has been advised by the Defendants that a court of equity has already made a ruling as to the claims of the Defendants to the sum in his possession and that the ruling has been appealed.

3. Mr. Whitbeck has been advised that the conclusion of the Divorce case will resolve the matter and that no further litigation or additional court cases are necessary, that all Mr. Whitbeck has to do is wait and the matter will be resolved.

4. Given the ruling, which includes the distribution of funds, has been appealed, the court is unable to take judicial notice of the ruling until the appeal is complete.

5. Given the court has already made a ruling as to the distribution of these funds it is inconceivable that the court would enter into more hearings to discuss a different division of the funds. Such a process would be costly and time consuming for all parties and simply a repeat of the evidence/testimony in the other case and is prevented by collateral estoppel and res judicata, is that a `right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the parties." Slagle v. Slagle, 11 Va. App. 341, 344, 398 S.E.2d 346, 348

(1990) res judicata and collateral estoppel relieve parties of the costs and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. Allen v. McCurry, 449 U.S. at 94.

6. Thus this case is both unnecessary and incapable of distributing the funds until after the appeal of the Divorce case is concluded as such it should be dismissed.

7. In Paragraph #7 the Plaintiff claims: "The Firm, simultaneously with the filing of this Complaint, has deposited with the Clerk of this Court the sum of \$128,733.88..." This statement appears to be false as on Sep 21, 2006 Mr. Whitbeck sent e-mail to Mr. Smith stating "I have not deposited anything at this point and will hold off for a while to see if you guys can work this out."

**WHEREFORE** the Defendant requests the court order the following:

1. Dismiss the case.
2. Order that the Plaintiff should bear all costs for this unnecessary case.

**Respectfully Submitted,  
Wesley C. Smith**

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Wesley C. Smith, Defendant  
5347 Landrum Rd APT 1, Dublin, VA 24084-5603  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing motion was sent to John Whitbeck and Cheri Smith, this 5th day of Oct 2006.

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Wesley C. Smith