

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)

#3 – Reply & Motion For Sanctions

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COMES NOW the co-Defendant, Wesley C. Smith, and requests the Court co-defendant Cheri Smith’s motion to release funds and respectfully demands that the court impose sanctions pursuant to Virginia Code § 8.01-271. In support of his MOTION the Defendant states as follows:

1. On Jan 5th 2007 co-defendant Cheri Smith filed a motion asking to have funds released to her according to a claimed Divorce degree but makes no legal argument whatsoever that would allow the court in this Interpleader case to release funds contrary to the Escrow Agreement.

2. Defendant Wesley Smith incorporates by reference all statements in #2 – Position On Disposition Of Funds submitted on Dec 8, 2006 which clearly points out that established case law restricts the court in this case to enforcing the escrow agreement and that the court has no authority to go beyond the escrow agreement.

3. The position submitted by Cheri Smith amounts to nothing less than her asking the court to revoke the Escrow Agreement and disperse the funds in violation of the agreement.

4. Per established case law, Escrows are irrevocable which neither party can revoke during the escrow period without the consent of the other. See Chaffin v Harpham 166 Ark 578, 266 SW 685; Home-Stake Royalty Corp. V McClish, 187 Oka 352, 103 P2d 72;

In the law governing performance of escrow agreements there is no doctrine of substantial compliance to be found; compliance must be full and to the letter, or else it constitutes merely noncompliance Jones V Gregg, 226 Ark 595, 293 SW 2d 545;

strict and fully performance alone can discharge a condition precedent to valid delivery by the escrow holder

The question involved is one of performance of the escrow agreement, not of the ability of the

parties to perform the agreement, since such ability, without full performance, cannot amount to a compliance. *Young v. Claredon Twp.*, 132 U.S. 340, 33 L. Ed. 356, 10 S. Ct. 107;

5. It is also established case law that the Court has no authority to go beyond the contract among interpleading claimants. Interpleading the funds does not void the Escrow Agreement but only changes who holds the escrowed funds. The Court only has the authority to enforce the Escrow Agreement and may not distribute the funds in a manner contrary to that of the Escrow Agreement.

It has, however, been held that where a bank, as escrowee, brings an interpleader suit because of different interpretations of the escrow contract by the respective claimants, **the court has no authority** to go beyond the terms of the contract to determine other matters in dispute among the interpleading claimants. *Northern Trust Co v McDowall*, 307 Ill. App. 29, 29 NE2d 865

6. Council for Co-Defendant Cheri Smith, should have known, or after reasonable inquiry would have known that the established case law, as cited in #2 – Position On Disposition Of Funds, prohibits the court from granting her the relief requested. Her council made no argument that the cited case law was invalid, did not apply to this case, or that she was seeking to have the case law reversed or modified.

7. This is not the first time council for Cheri Smith has filed motions asking to have the funds released contrary to established case law, for example when she asked the court to order Mr. Whitbeck to release funds in a case he was not a party to. That is a request the court obviously could not grant and was inappropriate (and illegal) for her to file just as it was inappropriate (and illegal) for her to file this motion that has no legal support for it.

8. Under Code § 8.01-271.1 every motion signed or made orally by an attorney constitutes a representation that “to the best of his knowledge, information, and belief, formed after reasonable inquiry,” the argument or legal position is “well grounded in fact,” and is well grounded in current law or is made in good faith application of law that should be extended, modified, or reversed. If this statute is violated, then **the trial court shall impose** upon the attorney and/or the represented party “an appropriate sanction.” (*VINSON v VINSON* 2003)

9. Note the word **shall** in the law - **the discretion of the judge is to determine what sanction to impose not if a sanction should be imposed.**

“...we use an objective standard of reasonableness in determining whether a litigant and his attorney, after reasonable inquiry, could have formed a reasonable belief that the pleading was well grounded in fact, warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and not interposed for an improper purpose. *Flippo v.*

CSC Assocs. III, L.L.C., 262 Va. 48, 65-66, 547 S.E.2d 216, 227 (2001).” (VINSON v VINSON Virginia Appeals 2003)

"Courts often impose sanctions when a litigant . . . has acted in bad faith." Gentry v. Toyota Motor Corp., 252 Va. 30, 34, 471 S.E.2d 485, 488 (1996). Sanctions are also "used to protect courts against those who would abuse the judicial process." Oxenham v. Johnson, 241 Va. 281, 286, 402 S.E.2d 1, 3 (1991). "The purpose of such . . . sanction[s] is to punish the offending party and deter others from acting similarly." Gentry, 252 Va. at 34, 471 S.E.2d at 488.

The statute says only that such expenses can be included in the sanction, suggesting other amounts can be included also. Any other reading of the statute would make the term "including" meaningless. See Rasmussen v. Commonwealth, 31 Va. App. 233, 238, 522 S.E.2d 401, 403 (1999)

Additionally, the two main purposes of sanctions awards under the statute are punishment and deterrence. Cardinal Holding Co. v. Deal, 258 Va. 623, 632-33, 522 S.E.2d 614, 620 (1999). Allowing only reimbursement of costs associated with a motion made under Code § 8.01-271.1 would not always satisfy these purposes. Therefore, sanctions can exceed the amount necessary to reimburse the costs of litigating an action under Code § 8.01-271.1, as long as the sanctions imposed are reasonable. See id.

10. The motion is also in violation of § vscr-6:2-3.1 Meritorious Claims And Contentions. A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

11. For such other and further reasons as may be advanced in open Court.

WHEREFORE co-defendant Wesley Smith requests the Court deny the motion of Cheri Smith and impose sanctions for her motion being filed in violation of state law. An appropriate sanction would be Fines paid to the Defendant for the time spent due to her frivolous motion, since the Defendants current wage would be neither a sanction or deterrent, the rate of a typical attorney (\$175-\$200/hour) is appropriate.

**Respectfully Submitted,
Wesley C. Smith**

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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 Loretta Vardy, this 12th day of Jan 2006.

Wesley C. Smith