V I R G I N I A:

IN THE COURT OF APPEALS OF VIRGINIA

WESLEY SMITH,	)	
	)	
APPELLANT / Defendant, pro se	)	
	)	
v.	)	**DOCKET NO.**
	)	
CHERI SMITH,	)	
	)	
APPELLEE / Plaintiff	)	

PETITION FOR APPEAL

SUBJECT INDEX:

TABLE OF CITATIONS:

FACTS:

1. About June 11, 2003 the Plaintiff (Appellee) filed for divorce on grounds.
2. On November 12, 2003 the Defendant's (Appellant's) first request for production of documents were served on the Appellee. The Appellee refused to provide several important documents so the Defendant attempted to obtain copies elsewhere.
3. On January 28 2004 the Defendant, via counsel, held a deposition of Igor Bakhir, believed to be a lover of the Appellee, who refused to answer almost any question about the Appellee on Fifth Amendment grounds and also did not produce the subpoenaed documents.
4. On February 13, 2004, the Defendant, via counsel, issued a subpoena for SAIC, the Plaintiff's and Mr. Bakhir's employer, to produce documents relating to the divorce and custody case, including items such as e-mail between her and Igor Bakhir, with whom she was believed to be having an affair.
5. On February 25, 2004, the Plaintiff filed an unsigned motion to quash on the claim that it "sought to prove facts not pled in the Defendant's Cross-Bill of complaint".
6. The original Cross-Bill filed by the Defendant did not allege adultery by the Plaintiff.
7. On February 27, 2004 counsel for SAIC wrote a letter to the Defendant's attorney stating that SAIC was compiling the records and indicating a willingness to provide most of the documents and to work with the Defendant in resolving issues or narrowing a few requests.
8. On March 3, 2004 Judge Potter ruled to approve the motion to quash except for employment and leave information. As part of the same order Judge Potter also ruled,

over the objection of the Plaintiff, to allow the Defendant to amend his Cross-Bill to include a claim of adultery against the Plaintiff.

9. On March 17, 2004 the Defendant filed an amended Cross-Bill with a claim of adultery and specifically mentioning Igor Bakhir a co-worker of the Plaintiff at SAIC and including dates and places that adultery is believed to have occurred.
10. Neither SAIC or the Plaintiff asked for or received a protective order to prevent the records from being provided to the Defendant.
11. On September 13, 2004, the Defendant, now pro se, noting that the reason stated in the Plaintiff's motion to quash no longer applied, issued a new subpoena dues tecum on SAIC, that was similar to the first one but also requested additional items.
12. On September 23, 2004 the Defendant received a motion by SAIC counsel filed a motion to quash to be heard the very next day on September 24. The motion SAIC claimed did not understand what parts of the subpoena meant, that parts were overly broad and burdensome, and admits to not having tried to resolve these issues with the Defendant.
13. At the September 24 2004 hearing, the Defendant requested the motion to quash be dismissed due to not having been provided to the Defendant in sufficient time to prepare for the hearing. The Defendant also pointed out the change in the cross-bill, its affect on the reasoning of the previous ruling, and that he was prepared to explain why each item requested was relevant and that he was willing to work with SAIC to limit the number of documents produced to that necessary to provide needed evidence in court and not the complete set of documents that may exist.

14. September 24, 2004, Judge Alston ruled to quash the subpoena entirely, with the only stated reason being that he did not want to do something different than Judge Potter. He made no mention at all of the change in the cross-bill and its effect on the issue.

ASSIGNMENT OF ERROR:

The court erred by hearing the motion the day after the Defendant was served.

The Court erred in granting the motion to quash on a basis other than that listed in §vscr-4:9(1) [4:9(c)1)?] which states "may (1) quash or modify the subpoena if it is unreasonable and oppressive".

The Court also seems have ignored §vsr-4:1(1) "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action…" and did not consider the fact that the documents were "reasonably calculated to lead to the discovery of admissible evidence", nor the importance of the requested documents in resolving some of the significant issues of the case

QUESTIONS PRESENTED:

Does a previously quashed subpoena prevent a new subpoena from being upheld when the facts of the case have changed, and if so does it also apply to items not covered by the first subpoena?

Should a party be punished for showing restraint in filing a cross-motion, including only claims that were well founded rather than every claim that was suspected to have occurred?

Does a judge have the ability to effectively refuse to hear a motion on its merits by simply stating he doesn't want to do anything different than another judge, without taking the

time to find out what the other judge did and why and check to see that the reasoning is still valid?

ARGUMENT:

The Appellant argues that the conditions for quashing a clerk issued subpoena for a pro-se litigant is dictated by §vsr-4:9(1) [4:9(c)(1)?] and the only reason stated is: "if it is unreasonable and oppressive"

The rule does not state any other reasons for quashing a clerk issued subpoena. So as long as the subpoena was not considered unreasonable AND oppressive it should not have been quashed. If the judge had deemed it either unreasonable or oppressive he should have either upheld the subpoena or followed §vsr-4:9(2) [4:9(c)(2)?] and ordered a conditional denial.

Given that SAIC had previously agreed to provide the documents and did not argue that it was oppressive, and had stated it was compiling the records, its hard to imagine that suddenly it is an undo burden for them to produce the records now, especially when the Defendant had offered to work with them to limit the number of documents produced and to work with SAIC to allow them redact confidential business information or to sign a non-disclosure agreement. SAIC has offered no explanation why records that it felt willing and able to provide in March are suddenly burdensome in September.

The argument that SAIC is unaware of what notices are required by someone holding a security clearance is a blatant lie – very similar to the one used by Ms Vardy to claim the requested documents might contain classified government information. Given the contracts with the government required for a company to hold a security clearance, such statements if true would likely be an admission of a felony by SAIC and grounds for the government to cancel all

their contracts. The statement indicates SAIC is just being uncooperative rather than having any valid complaint with the subpoena. If the contracts that SAIC has with the government are similar to those of my former employer, the Plaintiff would have been required to notify them in writing of the fact that she had sexual relations with a foreign national. Such a document is clearly relevant to the case, and was not covered by the first subpoena, and as such Judge Potters ruling did not cover it.

In any event the Court did not appear to consider and did not state that it had made any determination as to the subpoena being unreasonable or oppressive, nor did the Court allow/request the Defendant to explain how each item was reasonable even after the Defendant stated he was prepared to do so, thus the Court lacked the ability to quash it on those grounds.

§vsr-4:1(1) States that "Parties may obtain discovery regarding any matter, not privileged, which is relevant…". Since this case involves adultery by the Plaintiff, e-mail between her and a lover, arranging dates, communicating about gifts, making statements about the case, are all very relevant and without which the Defendant would be at a significant disadvantage in making his case at the final hearing. It appears that the Court did not consider the relevance of the documents or the potential impact on the outcome of the case. Although given the previous actions of the court in this case and the general reputation of the Prince William County Circuit Court for having significant gender bias in custody cases, it is reasonable to question if the court did indeed consider the importance of the documents to the case and recognized that if the documents were obtained it would be harmful to the Plaintiffs case, and the court not wanting to rule in favor of a Father, decided to not give him an equal chance to collect evidence.

Even in relying on Judge Potter's ruling, the order by Judge Alston is unreasonable. Judge Potter approved the motion to quash, on the basis it didn't apply to the cross-bill, in the very same order that he ruled that the Defendant could amend the cross-bill to include the very statements that would make the subpoena apply to the cross-bill. In other words Judge Potter's ruling can be looked at on the whole as saying the Plaintiff is right because your paperwork isn't in order but I'll give you permission to correct your paperwork. In granting the motion to amend to include adultery, it would appear that Judge Potter did intend to give the Defendant an opportunity to pursue that claim and as such it would be reasonable to conclude that Judge Potter himself would allow discovery related to adultery after the cross-bill was amended.

An order granting or refusing a motion to quash or issue a protective order, pursuant to the Virginia Uniform Foreign Depositions Act, UFDA, is a final order subject to appellate review. (America Online v. Anonymous Publicly Traded Company, March 2, 2001, Record No 0000974). SAIC, Science Applications International Corporation is incorporated in Delaware and its headquarters are in San Diego California and UFDA is thought to apply to this case.

Even if it UFDA does not apply, it appears that §17.1-405(4)(i) does allow appeal of "granting, dissolving, or denying an injunction". The position of SAIC, and apparently the Court, is that the order to quash prevents the Defendant from requesting the records again and as such is an order granting an injunction and thus appealable.

It would be a more efficient use of our legal system to allow the Defendant to collect the necessary evidence before trial rather than hold a meaningless trial and have to appeal and hold a new trial.

CONCLUSION:

The Defendant has properly subpoenaed the records and according to the Rules Of The Supreme Court Of Virginia is entitled to have the subpoena upheld and obtain the records. The appellant prays this Court to overturn the order quashing the subpoena and order SAIC to comply fully with it. The Defendant also requests that SAIC pay the Defendant for time and costs expended to hear and appeal this matter.

Respectfully submitted,
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CERTIFICATE:

I hereby certify that a true and accurate copy of the foregoing was mailed via U.S. Mail to:

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