

VIRGINIA:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

CHERI SMITH,)
Plaintiff,)
)
v.) **Chancery No. 53360**
)
WESLEY C. SMITH,)
Defendant)

#50 – MOTION TO COMPEL AND MOTION FOR SANCTIONS

A pdf copy of this motion is available at: http://www.liamsdad.org/court_case/

COMES NOW the Defendant, Wesley C. Smith, per § 8.01-271, Rule 4:12, and Rule 4:9, moves this Court for an order compelling the Plaintiff, Cheri Smith, to provide full and complete discovery and/or to impose significant sanctions on the Plaintiff for not having complied fully with discovery. In support of his MOTION the Defendant states as follows:

1. The Defendant hereby incorporates the statements from his earlier MOTION TO COMPEL (9/10/2004), #29 - DEFENDANTS MOTION FOR SANCTIONS AGAINST PLAINTIFF (8/18/2005), and #44 – REPLY TO MOTION TO QUASH and MOTION FOR SANCTIONS FOR OBSTRUCTION OF DISCOVERY BY PLAINTIFF (2/13/2006).

2. On or about Nov 12, 2003, over two years ago, the Defendant first Interrogatories and First Request For Production Of Documents were served on the Plaintiff. Since then the Plaintiff and her Attorney, Loretta Vardy, have willfully acted to obstruct discovery by the Defendant by: (see previously cited motions for specifics, or this motion would be VERY lengthy)

- A. Refusing to answer some interrogatory questions without stating a valid legal objection
- B. Intentionally providing incorrect and/or incomplete answers to other questions,
- C. Refusing to comply fully with a document request
- D. Refusing to comply in any manner with a subpoena for documents
- E. Refusing to provide updated answers to interrogatories
- F. Refusing to comply with the Nov 3, 2004 ruling to compel

G. Intentionally misused objections of attorney/client, work product, and 5th Amendment

H. Encouraging her lover(s), friends, family, and employer to also refuse to co-operate with the discovery requests of the Defendant.

3. The obstruction if allowed to continue without significant sanctions taken against the Plaintiff will prevent the court from having the information presented to it that it needs to make an informed ruling and also deprive the Defendant of an equal chance to present his case in court and result in a Due Process violation that would make any resulting "final" order null and void.

4. The Plaintiff's has failed to comply with Discovery at even basic level including for example not answering accurately the question about individuals with knowledge of the case. Noticeably missing from her response are witnesses she has used in custody hearings (is she admitting their testimony was false?) and witnesses she subpoenaed in this case, as well as her lover(s) which even apart from the adultery issue would have personal observations of her care of our son, as well as not turning over documents where she makes statements about the case.

5. Rule 4:12(a)(3) states that "For purposes of this subdivision an evasive or incomplete answer is to be **treated as a failure to answer.**"

6. The Court did rule on the Defendants MOTION TO COMPEL (9/10/2004) but unfortunately put the Plaintiff in charge of getting the order entered, which apparently never happened. The ruling itself contained errors that the Defendant would have filed a motion asking the court to correct if/when entered. Errors included but were not limited to, not ordering the Plaintiff to comply with requests made where the Plaintiff **made no legal objection** to providing and also did not follow case law in that Adultery, at least in Virginia, is not grounds to take the 5th.

A claim of Fifth Amendment privilege must establish "reasonable ground to apprehend danger to the witness from his being compelled to answer [T]he danger to be apprehended **must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things**,--not a danger of an imaginary and unsubstantial character, having reference to some extraordinary and barely possible contingency, so improbable that no reasonable man would suffer it to influence his conduct." *Id.*, at 599-600 (quoting *Queen v. Boyes*, 1 Best & S. 311, 321 (1861) (Cockburn, C. J.)).

7. Not only has the Plaintiff failed to get the order entered but has also **failed to comply** with the

terms of the ruling which did require her to update some answers and provide some documents.

8. The Plaintiff's failure to comply with the ruling includes, but is not limited, failing to comply with document request #32, "All correspondence... pertaining to facts in the Bill of Complaint, Answer and Crossbill, Answer to Crossbill and the pleadings filed herein". The Plaintiff did provide some e-mail in response to the ruling but what she provided was almost entirely non-relevant messages that were not requested, such as:

- A. 4 year old message about a thunderstorm raining on her weed killer.
- B. 4 year old message saying she was glad her sister liked her new job
- C. A 4 year old message to her brother about a poem.
- D. And so on...

9. With very few exceptions, the only relevant e-mail provided is old e-mail the Defendant already had copies of. The Plaintiff must have made an intentional effort to exclude any e-mail where she discusses the facts of the case.

10. The lack of cooperation with DR#32 will **significantly impair** the Defendants ability to impeach the Plaintiff and her witnesses at trial as well as prevent him for providing evidence to support his case. **The only way to remedy the situation would be to provide the Defendant with the relevant documents, if it is indeed possible, or to prohibit the Plaintiff from testifying and calling witnesses.**

11. The Plaintiff was ordered to update documents requested in #35 (correspondence with school). The Plaintiff has not complied in any fashion. It should be noted that the school is refusing to comply with a subpoena for the same records, so the records in question must exist making her failure to comply contempt.

12. When the Plaintiff has responded she has done so in manner to impede the Defendant's use of the data such as printing out edited summaries of financials instead of providing the electronic copy of the financial information as requested, and instead of providing the exact electronic copies of e-mail, providing **partial** versions of the e-mail in pdf format. Such actions impair the ability of the Defendant to determine where she actually spent her money and where she actually sent the e-mail from as well as

what other e-mail messages it is related to, which prevents the Defendant from inquiring why the related e-mail was not provided.

13. Over one year has passed since the ruling to compel making it out of date, and over one year has passed since the Plaintiff has updated any discovery materials making updated answers and documents appropriate.

14. The Plaintiff did provide a few documents and both the Plaintiff and her attorney supplied the Defendant with a couple pages of “updated” yet **conflicting answers** to Interrogatories. It is not at all clear, which answer is supposed to be considered the most recent.

15. Given the confusion over what the most recent answers provided by the Plaintiff were the Defendant requested the Plaintiff provide him with a complete up to date copy of her answers to Interrogatories and the Plaintiff refused.

16. The Defendant has requested updated answers to Interrogatories and Document requests, orally, in e-mail and finally by NOTICE filed with the court but the Plaintiff has still refused to comply.

17. Rule 4:12 states in relevant part:

"(2) Sanctions by Court in Which Action Is Pending. If a party ... fails to obey an order to provide or permit discovery, ..., the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following: " ... "(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;" (C) An order **striking out pleadings** or parts thereof, or staying further proceedings until the order is obeyed, or **dismissing the action** or proceeding or any part thereof, or **rendering a judgment by default** against the disobedient party;..." "The failure to act described in this subdivision **may not be excused** on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 4:1(c)." (Emphasis added).

18. Rule 4:12 governs the imposition of sanctions for failure to make discovery." This rule permits circuit courts to strike a party's claims or defenses for failure to comply with a discovery order. Rule 4:12(b)(2)(B). Moreover, Rule 4:12(d) **expressly authorizes the court** to strike a party's claims or defenses for **failure to timely serve answers** to interrogatories.

This rule "gives the trial court broad discretion in determining what sanctions, if any, will be imposed upon a litigant who fails to respond timely to discovery." Woodbury v. Courtney, 239 Va. 651, 654, 391 S.E.2d 293, 295 (1990). Jeff Coal, Inc. v. Phillips, 16 Va. App. 271, 278, 430 S.E.2d 712, 717 (1993).

WHEREFORE as it has been shown the Plaintiff is intentionally obstructing discovery and that her obstruction significantly harms the Defendant's case, the Defendant hereby moves to issue sanctions to both punish her and to deter others from following her example, as well as to compensate him for loss of discovery materials needed for trial, and requests the following:

1. Order the Plaintiff to comply fully with discovery to include providing a complete and updated answer all interrogatories as well as to provide complete and updated response to the document request and subpoena by March 15, 2006.
2. Impose sanctions per § 8.01-271 and Rule 4:12 to include any or all of the following:
 - A. Monetary sanctions paid to the Defendant for the time spent due to her misconduct, since the Defendants current wage would be neither a sanction or deterrent, the rate of a typical attorney (\$175-\$200/hour) is appropriate.
 - B. Prohibit the Plaintiff from filing any more motions until she has complied fully with discovery and subpoena.
 - C. Recommend discipline by the Virginia Bar Association, or other suitable sanction.
 - D. Order that the Plaintiff will not be allowed to present any testimony, witnesses or evidence at the trial if discovery is not complied with by March 15, 2006.
 - E. Order that the Plaintiff will not be allowed to present any testimony, witnesses or evidence at the trial.
3. Or in the alternative of ordering the Plaintiff to comply with the Defendants discovery requests, and in the interest in concluding the matter, impose sanctions per § 8.01-271 and Rule 4:12 to include all of the following:
 - A. Prohibit the Plaintiff from filing any more motions.
 - B. Order that the grounds of divorce will be the Plaintiff's adultery.
 - C. An order refusing to allow the Plaintiff to support her claims or oppose the Defendant's claims or defenses, and prohibiting her from introducing evidence, that the Plaintiff will not be allowed to present any testimony, witnesses or evidence at the trial.

- D. An order striking out the pleadings and claims of the Plaintiff.
 - E. Render a judgment by default against the Plaintiff, and order the divorce on the grounds of the Plaintiff's adultery with sole legal and physical custody to the Defendant.
4. Such further relief as the nature of the case or the goals of equity require.

**Respectfully Submitted,
Wesley C. Smith**

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no phone

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing motion was served to Loretta Vardy and Ronald Fahy (GAL) via e-mail and/or fax and/or website, this 13th day of February 2006.

Wesley C. Smith