V I R G I N I A:

IN THE COURT OF APPEALS OF VIRGINIA

WESLEY SMITH,	)	
	)	
APPELLANT / Defendant, pro se	)	
	)	
v.	)	**Record No. 2322-04-4**
	)	
CHERI SMITH,	)	
	)	
APPELLEE / Plaintiff	)	

APPELLANT'S OPENING BRIEF

SUBJECT INDEX:

TABLE OF CITATIONS:

NATURE OF THE CASE:

This is a divorce and custody case in which the Plaintiff, Cheri Smith, and her counsel have repeatedly made false claims, tried to get rulings before evidence could be obtained and presented by the Defendant, tried to get hearings held without allowing the Defendant to attend, has refused to comply with discovery requests, etc in an effort to prevent the Defendant from having a fair and equal chance to at trial to prove that he has been a faithful and loving husband and an excellent father and primary caretaker of their son, and that the Plaintiff suffers from uncontrollable rage, has behavior that harms their child, and her having an affair is the real reason for her wanting a divorce.

The Plaintiff and her counsel have tried numerous dishonest attempts to manipulate the system, counting on the well-earned reputation of the Prince William Circuit Court for bias against fathers, expecting that the court would facilitate their efforts, to promote and protect the BEST INTERESTES OF THE MOTHER rather than the best interests of the child, and that the court

would rule in her favor due to her gender instead of complying with the Constitution, laws, rules or equity.

The Prince William County Court has a reputation, as stated by many attorneys, of awarding custody to fathers only if they can prove the mother severely beat the children, rather than t basing the ruling on statutory guidelines in VA 20-124.3, and if the father can't prove severe child abuse that the Circuit Court would punish him for fighting for his right to be a parent. The Defendant has both a Constitutional right to equal protection and treatment by the court, as well as a statutory presumption of equality in a custody case as required by VA 20-124.2 "As between the parents, there shall be no presumption or inference of law in favor of either."

> The U.S. Supreme Court long ago noted a parent's right to "the companionship, care, custody, and management of his or her children" is an interest **"far more precious**" than any other property right.
>
> -- May v. Anderson, 345 U.S. 528, 533, 97 L.Ed. 1221, 73 S. Ct. 840, 843 (1952)

In Troxel v. Granville, 527 U.S. 1069 (1999) Justice O'Connor, speaking for the Court stated:

> "The Fourteenth Amendment provides that **no State shall 'deprive** any person of life, liberty, or property, without due process of the law. We have long recognized that the Amendment's Due Process Clause like its Fifth Amendment counterpart, 'guarantees more than fair process'. The Clause includes a substantive component that "**provides heightened protection against governmental interference** with certain fundamental rights and liberty interest" and "the **liberty interests of parents in the care, custody, and control of their children** – is perhaps the oldest of the fundamental liberty interest recognized by this Court."

The suppression of evidence favorable to the Defendant is not providing a "heightened protection" of the rights of the Defendant and Child, a fact made even more egregious as of January 3, 2005 when Judge Alston, **without evidence, and without allowing the Defendant to be present,** suspended visitation between the father and son. Given that Judge Alston has heard little or no testimony about the care of the child, and the only judge who has heard significant testimony about care of our son, Judge Becker, **ruled that the Defendant was a good father** and, over the objections

of the mother, ordered the child removed from daycare and **placed back into the care of the father** and **ordered visitation several days a week in addition to the daycare provision**, even adding a requirement for father and son time before school in the morning, its hard to find any reason other than bias for Jude Alston's ruling that is in stark contrast to that of a judge who had much more information and evidence on which to base a ruling.

The true nature of this case is if a gender biased Circuit Court can rule whatever it wants without reference to statue or rule, and if there is any hope for equality, fairness, or justice for decent fathers and their children in the Court of Appeals of Virginia.

FACTS:

1. About June 11, 2003, about 9 months after starting the custody case, 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. Mr. Bakhir 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, appendix p2, 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, appendix p5, 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, appendix p3, 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, appendix p6-8, 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, appendix p6.
9. On March 17, 2004 the Defendant filed an amended Cross-Bill, appendix p9-10, 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, appendix p11-12, 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 to quash, appendix p13-18, **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 and would agree to sign a confidential agreement with SAIC relating to business information or agree that SAIC could redact business information not related to the case. The Defendant also disputed some of SAIC's claims relating to when the subpoena was served and SAIC's compliance with the first subpoena. The Defendant also pointed out that some of the documents requested might contain admissions by the Plaintiff about significant points of the case thus eliminating the need to further litigate them, such as if the Plaintiff had informed SAIC of her adultery with Mr. Igor Bakhir.
14. September 24, 2004, **Judge Alston** ruled to quash the subpoena **entirely**, appendix p19, stating that he did not want to do something different than Judge Potter and that he did not know the what Judge Potters intentions were. Judge Alston did not cite any law, rule or precedence to support his ruling, and appeared to ignore Judge Potter allowing the Defendant to amend the Cross-Bill to include adultery in the same order as the quash was granted because adultery was not alleged in the Cross-Bill.
15. September 24, 2004, The Defendant did object to the ruling, appendix p19, citing rule 4:9 and 4:1.

16. November 11, 2004, The Defendant submitted a STATEMENT OF FACTS to the court to certify, appendix p20.
17. December 10, 2004, **21 days after** the Defendant filed the STATEMENT OF FACTS, the Plaintiff filed objections the Defendants STATEMENT OF FACTS. The Plaintiffs attorney personally served a copy on the Defendant at 8:20pm that evening, counting as service 24 days after the Defendant filed the STATEMENT OF FACTS. The Plaintiffs motion claims the Defendant did not comply with the 55day rule and cites her being out of state as an excuse for her late filing of the motion, appendix p21-23.
18. December 16, 2004, **27 days after** the Defendant filed the STATEMENT OF FACTS, and **the day before the hearing** scheduled on the matter, Judge Alston signed an order refusing to sign the STATEMENT OF FACTS due to the Defendant having submitted it apparently 56 days after entry instead of the 55 days required by § vscr-5A:8 (c) 1, yet he conveniently (for the Plaintiff), overlooked the fact that her objections were filed 6 days late in violation of § vscr-5A:8 (d).

ASSIGNMENT OF ERROR:

1. The court erred by hearing the motion **the day after the Defendant was served**
2. The Court erred in granting the motion to quash on a basis other than that listed in §vscr-4:9(1) which states "may (1) quash or modify the subpoena if it is unreasonable **and** oppressive".
3. 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:

1. Should a party be punished for showing restraint in filing a cross-bill, including only claims that were well founded rather than every claim that was suspected to have occurred?
2. Does a subpoena dues tecum, quashed due to a procedural/paperwork problem, prevent a new subpoena from being issued/upheld after the procedural/paperwork has be corrected, and if so does it also apply to documents not covered by the first subpoena?
3. Does a judge have the discretion to effectively refuse to hear a motion on its merits by 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, or that the defect has been corrected, and without citing a law or rule to support his ruling?

ARGUMENT:

The Appellant argues that the conditions for quashing or modifying a Subpoena Duces Tecum **issued by clerk of court** is dictated by §vsr-4:9(1) :

> "…the court…may (1) quash or modify the subpoena if it is unreasonable and oppressive, (2) condition denial of the motion to quash or modify upon the advancement by the party in whose behalf the subpoena is issued of the reasonable cost of producing the documents and tangible things so designated and described or (3) direct that the documents and tangible things subpoenaed be returned only to the office of the clerk of the court…"

The condition required by rule for the court to quash or modifying the subpoena is: "if it is **unreasonable AND oppressive**". The rule does not state any other condition allowing the court to quash 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 item 2 and issued a conditional denial, or followed item 3 and had the documents returned to the clerk. The court clearly did not apply this rule when issuing its ruling. It should also be noted that per §vsr-4:9 the **procedures for quashing a clerk issued Subpoena Duces Tecum are different than those used to quash an attorney issued Subpoena Duces Tecum.**

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, the Plaintiffs attorney, 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 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 relevant and material, without which the Defendant would be at a significant disadvantage in proving the claim of adultery at the final hearing and in disproving her claims by putting forth the real reason she filed for divorce. E-mail messages that document that she chose to leave our son in the care of the Defendant so she could pursue her sexual desires is relevant and material, as such documents show either she felt the Defendant could adequately care for our son, and/or that she selfishly put her sexual desires ahead of the her spending time with of our son, the suppression of these messages will be an unfair advantage to the Plaintiff and unfair disadvantage to the Defendant. E-mail messages that document that she made statements that contradict her statements to the court is relevant and would be used to impeach her testimony and to show that she committed perjury. Documents from her employer that answer questions about her use of the Employee Assistance Program, is directly applicable to the Plaintiffs claims she made about her mental health and other employer documents may indicate the real reason for her transfer to a different department was due to her inappropriate relationship with a co-worker. The documents requested are also likely to lead to other witnesses in the case that the Defendant

should be made aware of and given access to in order to have a fair trial. The requested documents all are reasonably calculated to lead to the discovery of admissible evidence, see Rule 4:1(b)(1) and Rule 4:9(a), (c). In Cox v. Commonwealth, the court stated:

> If materials in the hands of third parties "could be used at the trial," they are the proper subject of a subpoena duces tecum. 227 Va. 324, 328, 315 S.E.2d 228, 230 (1984)

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. The action of the court to summarily suppress some of the most relevant information in this manner is improvident and affected substantial rights of not only the Defendant but of the couples son.

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 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**.

The suppression of evidence favorable to the Defendant upon request violates due process requirements.

It should be noted that the Circuit Court appears to be indicating its bias against Fathers by ignoring rule violations by professional attorneys for the Plaintiff and SAIC, while holding the Pro Se Defendant to a higher standard. Examples of this would include the Court accepting the Plaintiffs motion to quash even though it was unsigned, repeatedly allowing the Plaintiff to schedule hearings without the providing 7 day notice to the defendant, holding a hearing on the motion to quash by SAIC with only one day notice, while holding the Defendant to the 7 day rule. The court has allowed the Plaintiff to file a late amended bill of complaint, accepted the 6 day late objections while refusing the Defendants STATEMENT OF FACTS because it was one day late in violation of a rule the Defendant didn't even know about. The court has refused to hear motions because the Plaintiff's counsel was out of state, yet went ahead with a hearing, even after the Defendant requested a continuance, when the Defendant was out of state with the Child during a court ordered visitation vacation period, where the court had set the dates of the vacation visitation. The court has refused to impose sanctions on the Plaintiff and her attorney as required by Virginia Code 8.01-271.1 even when the Defendant proved that their claims were false and thus their motions frivolous.

The court has repeatedly refused to hear a motion by the Defendant to order the Plaintiff to stop committing acts of adultery and to stop exposing our child to it. The Defendant has repeatedly put the motion on the docket yet 8 months later the court has yet to hear it or rule on it. Quashing this subpoena, which would return documents detailing her adultery, appears to be an effort on the part of the court to help the Plaintiff conceal her adultery and protect her from the consequences of her actions. The actions of the court in this manner appear to be in direct

conflict of Brown v. Brown, 218 Va. 196, 237 S.E.2d 89 (1977), which states "An illicit relationship to which minor children are exposed cannot be condoned." Yet in spite of that the Judge Alston gives every indication of condoning that behavior and its effect on our son.

The Circuit Court has developed a pattern in this case that matches its reputation of being biased against fathers and unwilling to give a father a fair and impartial trial. Judge Alston has even gone so far as to refer to the Defendant as "litigious" for fighting for a right to be a father to his son. That was a very inappropriate remark given the Defendant was not the one who started the court action, hence the term Defendant, had begged the Plaintiff to use mediation instead of court, and had even given the Plaintiff a written offer to settle for 50/50 as long as the Plaintiff agreed to take steps to mitigate the negative impacts her mood problems and admitted "uncontrollable rage" has on their adorable little boy. Judge Alston's remark is both incorrect in describing the Defendant and indicates his attitude of not taking the right of the Defendant to petition for redress seriously and brings in to question Judge Alston's fitness to hear this or any other custody case.

Judge Alston's holding a hearing to deny visitation, in violation of § 20-146.7 which requires "Notice must be given in a manner reasonably calculated to give actual notice and an opportunity to be heard", without allowing the Defendant a chance to attend and present evidence, and apparently no evidence presented by the Plaintiff to support her request, and subsequent refusal to even hold a hearing on the Defendants motion for rehearing, when the Defendant has offered evidence the Plaintiff's motion was based on fraud, removes all doubt that Jude Alston is unfit to hear this or any other custody case, especially when the Defendant was recognized and chosen first by the Plaintiff, then by Judge Becker as being the best choice to provide daycare for our son, and with the Plaintiff, Plaintiff's counsel, GAL, all having admitted

that our son loves the Defendant and wants to be with him and the GAL stating the clearly the Defendant is able to care for the child. There simply is no legal justification for the actions of Judge Alston thus leaving his personal bias as the only apparent reason for his abuse of discretion and more importantly his personal participation in the emotional abuse of our sweet adorable little boy who wants to spend time with both his father and mother.

It can also be argued that neither SAIC or the Plaintiff have any standing to object to the subpoena. SAIC did not file any objection to the first subpoena and as such should not now be able to object to providing documents that are referenced by both the first and second subpoena, and the Plaintiff did not file any objection to the second subpoena.

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, §17.1-405(4)(i) does allow appeal of "granting, dissolving, or denying an injunction". The position of SAIC, and apparently the Trial 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 order subject to appellate review.

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 at a later date.

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 rule that the trial court did not follow the rules and abused its discretion in quashing the subpoena. The Defendant requests that this Court reverse the decree of the trial court and remand the proceedings with instructions that Defendant be allowed the requested discovery. The Defendant also requests that SAIC and/or the Plaintiff pay the Defendant for time, effort and costs expended to hear and appeal this matter.

Respectfully submitted,
WESLEY C. SMITH

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Appellant / Defendant, pro se

CERTIFICATE:

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

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