

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Commonwealth of Virginia :
 :
v. : CASE NO: MI-2005-1559
 :
Wesley Smith :

MOTION TO DISMISS

The defendant, Wesley Smith, respectfully moves the Court to dismiss the proceeding against him on the following basis:

1. On June 17, 2005, Mr. Smith was charged with trespass under Va. Code Ann. § 18.2-119.
2. Case law in Virginia has uniformly construed the statutory offense of criminal trespass to require a willful trespass. “As such, one who enters or stays upon another’s land under a bona fide claim of right cannot be convicted of trespass. A bona fide claim of right is a sincere, although perhaps mistaken, good faith belief that one has some legal right to be on the property.” *O’Banion v. Com.*, 30 Va.App. 709, 717, 519 S.E.2d 817, 821 (1999), citations omitted.
3. Mr. Smith did have a bona fide claim of right—as well as an actual right—to be present at the Spring Hill Elementary School on June 17, 2005 because: (a) Mr. Smith is parent of a student in attendance at Spring Hill Elementary School; (b) on the day in question, the school was holding a special event open to all parents; and (c) Mr. Smith had received an invitation to attend the event.

4. Va. Code Ann. § 22.1-4.3 specifies that “Unless a court order has been issued to the contrary, the noncustodial parent of a student enrolled in a public school or day care center . . . **shall not be denied the opportunity to participate** in any of the student’s school or day care activities in which such participation is supported or encouraged by the policies of the school or day care center.”
5. This affirmation of noncustodial parents’ rights to participate in their children’s school activities is mirrored by the Fairfax County School Board’s regulation number 2240.3, which specifies that “A noncustodial parent retains rights to participate in the special education process, to receive information about the child, and to participate in certain school activities unless a valid court order specifically removes or limits those rights,” and that “**This regulation, not custody orders** or settlement agreements, governs school decisions, unless a valid court order specifically directs the school to take a particular action.” (Exhibit A)
6. The Spring Hill Elementary Student-Parent Handbook expressly urges that parents are expected to participate in school activities. (Exhibit B) Moreover, the school party that took place on June was clearly an activity in which parental participation was “supported or encouraged by the policies of the school,” given that the school had invited parents to the event.
7. There is not, and was not on June 17, 2005, any court order in place barring Mr. Smith from participating in his son’s school activities.
8. On the contrary, per an order of the Circuit Court of Prince William County, dated 10/2/2003 (Exhibit C), the child’s mother was required to forward to Mr. Smith all copies of invitations to school events so that he

might attend. Due to the child's Mother not following the provision and Mr. Smith missing out on several school events, the court signed a rule to show cause and in an order dated 03/03/2004 (Exhibit D) specifically ordered the child's Mother to supply "notice of Special Events" at school to Mr. Smith so he could attend.

9. Per order, the child's Mother forwarded to Mr. Smith an invitation to the event on June 17. (Exhibit E)

10. Because (a) state law, local school board regulations, and individual school policy all permit Mr. Smith to attend school events like the one in question; and (b) there was no court order in place prohibiting him from participating in such events; and (c) his presence at the class party was in response to an invitation that he had received from the child's mother, Mr. Smith clearly had a bona fide claim of right, as defined by *O'Banion*, to be present at his son's school on June 17, 2005 and to participate in his son's class party.

11. The principal of Spring Hill Elementary School, Roger Vanderhye, purports to justify his refusal to allow Mr. Smith to participate in this school event with the statement that he had "red flagged" the parties' file because it involved a court custody dispute.

12. However, cases involving custody cases are precisely the sorts of cases that Va. Code Ann. § 22.1-4.3 was enacted to address. Under this statute, school officials—whether acting on their own initiative or at the behest of the custodial parent—are prohibited from acting unilaterally to deny, on the basis of noncustodial status, a noncustodial parent's right to participate in their child's school activities.

13. The principal, Mr. Vanderhye, is not a judge in the Prince William County Court system. Consequently, he had no authority to issue what was essentially an order preventing Mr. Smith from participating his son's school activity on June 17, 2005—regardless of how many “red flags” he had chosen to stick on the parties' file.
14. If either Mr. Vanderhye or Mr. Smith's wife felt that it would be inadvisable for Mr. Smith to participate in school activities, they should and could have gone through the proper legal channels and attempted to obtain a court order to that effect.
15. In the absence of such an order, by law and school policy, Mr. Smith had every right to be present at his son's school on June 17, 2005 and to participate in his son's class party. He should not have been prevented from participating by the school principal, and should certainly not be found guilty of trespass.

Wesley Smith

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CERTIFICATE

I hereby certify that a true and accurate copy of the foregoing was mailed first-class, postage pre-paid, to Fairfax County Commonwealth's Attorney's Office, 4110 Chain Bridge Rd., Room 123, Fairfax, VA 22030 on Sep 26th, 2005.

Wesley Smith