V I R G I N I A:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

WESLEY C. SMITH	)	
Plaintiff	)	
	)	
v.	)	**CASE NO: CL 2006-0007859**
	)	
ROGER D. VANDERHYE	)	
Defendant	)	

#4 – Objections

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The Plaintiff makes the following objections to the Order of September 8th, 2006:

1. The Order stated no reasons for upholding the Demurrer, as such the reasoning claimed by the Defendant must be assumed.

2. The Defendant claimed that § 22.1-4.3 does not create a private right of action. However § 8.01-221 allows a private cause of action for damages to any person injured by the violation of **any** statute. Thus the Defendant's violation of § 22.1-4.3 does create a private right of action against the Defendant.

> § 8.01-221. Damages from violation of statute, remedy therefor and penalty. Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, even though a penalty or forfeiture for such violation be thereby imposed, unless such penalty or forfeiture be expressly mentioned to be in lieu of such damages….(Code 1950, § 8-652; 1954, c. 333; 1977, c. 617.)

> § 22.1-4.3. Participation by and notification of noncustodial parent. 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 (i) 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 solely on the basis of such noncustodial status and (ii) shall be included, upon the request of such noncustodial parent, as an emergency contact for the student's school or day care activities.
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> For the purposes of this section, "school or day care activities" shall include, but shall not be limited to, lunch breaks, special in-school programs, parent-teacher conferences and meetings, and extracurricular activities. It is the responsibility of the custodial parent to provide the court order to the school or day care center. (1997, c. 762, § 22.1-279.5; 2001, cc. 688, 820; 2005, c. 34.)

3. Given that § 22.1-4.3 was passed by the legislature well after § 8.01-221 we can reasonably assume the legislature was aware of § 8.01-221 when it passed § 22.1-4.3. Thus the fact that the legislature chose not to exempt violations of § 22.1-4.3 shows the legislative intent that § 8.01-221 applies to violations of § 22.1-4.3. The Plaintiff is clearly a member of a class for whose benefit the statute was enacted; A private cause of action is consistent with the underlying purposes of

the legislative scheme; and such private cause of action does not intrude into an area delegated exclusively to the federal government. See *Hurley v. Allied Chemical Corporation*, 164 W.Va. 268, 262 S.E.2d 757 (1980)

4. Under Virginia law, violation of a statute or ordinance may constitute "negligence per se." (see Personal Injury Law in Virginia, Charles E. Friend, (1998)) In order for the statutory violation to be negligence per se, the violation must be the proximate cause of the plaintiff's injury. Where the statutory violation is the proximate cause of the injury, the violation will support a recovery because the violation "is the failure to exercise that standard of case prescribed by a legislative body." (See Moore v. Virginia Transit Co., 188 Va. 493, 50 S.E.2d 268 (1948)) Although negligence per se is a common-law doctrine, the General Assembly of Virginia has codified it in Virginia Code Section 8.01-221.

5. It should be noted that in addition to § 22.1-4.3, the Plaintiff has pointed out that the Defendant also violated the Fairfax County School Board's Regulation 2240.3, which is in effect a regulation required by the state in order to comply with § 22.1-4.3, as such it's violation is an addition failure to exercise the standard prescribed by a legislative body.

6. The Defendant claimed, and the Court agreed, that because Mr. Vanderhye did not arrest Mr. Smith, he cannot be held liable for a false arrest, however that is a position that is clearly contrary to established case law. It is generally held that if an officer makes an arrest without a warrant solely at the request or instigation of a private citizen, **the authority of the officer does not protect the citizen and the liability of the latter is determined as though he had made the arrest himself**. Porter V Granich 136 Cal App 523, 29 P2d 220;

> Accordingly, a private citizen at whose request, direction, or command a police officer makes an arrest without a warrant is liable if the arrest turns out to be unlawful Grimes v Greenblatt 47 Colo 495, 107 P 1111;
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> All those who, by direct act or indirect procurement, personally participate in or proximately cause a false imprisonment or unlawful detention are are liable therefor Allen V. Ruland.
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> He who proximately causes a unlawful restraint is liable therefor regardless of his individual activity coleman v mitnick.
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> All who aid, direct, advise, or encourage the unlawful detention are liable for the consequences Morgan v Beckley, Burk v Howley.
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> In Talyor Bros v Hearn, the accuser was held liable.
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> Request or instigation depends on the facts of the case - need not expressly direct arrest, need not be present, must take some affirmative act to bring it about. McAleer V Good, 216 Pa 473, 65 A 934
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> Incarcerated on false information provided by and at the request of defendants, fact that arrest was made by police officers did not render them immune Ramsden V Western Union (2d Dis) 71 Cal App 3d 873, 138 Cal Rptr 426.

> Where a private citizen conveyed false information to an officer on which the officer based the arrest of a person allegedly ... committing a trespass, or where the private citizen specifically requested that the officer make an arrest, the courts have held that a cause of action for false arrest was established against the private citizen. Karow v. Student Inns, 43Ill App 3d 878, 2Ill Dec 515, 357 NE2d 682, 98 ALR3d 531

7. According to American Jurisprudence, false arrest implies false imprisonment too. Mr. Smith has made the claim that Mr. Vanderhye provided false information to the police thus Mr. Smith does have a valid claim against Mr. Vanderhye for both false arrest and false imprisonment. The court may not dismiss the claims without first ruling against the claimed fact that Mr. Vanderhye provided false information to the police, such a ruling must be made by a jury and not the judge.

8. The Defendant claimed the conviction of Mr. Smith prevents the claims of false arrest and imprisonment. This again is clearly against established case law. It is not necessary to show that the dispute on which the detention was based was judicially resolved in the plaintiff's favor. Mr. Smith was arrested without a warrant on a misdemeanor charge. Conviction of a person charged with an offense is not justification for his wrongful arrest without warrant. See Larson V Feeney. A convicted plaintiff is “not estopped from maintaining an action for false imprisonment and from proving therein that he was not guilty of the offense charged”. palmer v main C. R. Co 92 Me 399, 42 A 800. The Plaintiff in this case, can and will show that he was not guilty of the offense he was charged and convicted of and court rulings require that he be provided the opportunity in this case to do so. Rather than preventing a cause of action, the fact that the Plaintiff was convicted only serves to increase the injury to the Plaintiff and thus increase the liability of Mr. Vanderhye.

9. The Plaintiff did in the complaint, state case law that would show him not guilty of trespass (in spite of the conviction), as such the Order finding him guilty is a void order and the Plaintiff must be allowed to challenge that order in this case. Also note the case is still under appeal with the Virginia Supreme Court.

> It is clear and well established law that a **void order can be challenged in any court.** Old Wayne Mut. L. Assoc. v. McDonough, 204 U.S. 8, 27 S.Ct. 236 (1907) ("jurisdiction of any court exercising authority over a subject `may be inquired into in every other court when the **proceedings in the former are relied upon and brought before the latter by a party claiming the benefit of such proceedings,'** and the rule prevails whether `the decree or judgment has been given, in a court of admiralty, chancery, ecclesiastical court, or court of common law, or whether the point ruled has arisen under the laws of nations, the practice in chancery, or the municipal laws of states.'"); In re Marriage of Macino, 236 Ill.App.3d 886 (2nd Dist. 1992)

10. It should be noted that acquittal does not create a cause of action in the same manner that a conviction does not prevent a cause of action.

11. Direct restraint without adequate legal justification, act is re-guarded as a trespass and is classified as an **injury** to the person.

12. The Defendant claimed there was no stated claim for assault or battery, however the Plaintiff did state the Defendant was responsible for his arrest and detention. According to American Jurisprudence false arrest and false imprisonment always implies assault. Mr. Vanderhye was the cause of the Police using both implied and actual force to deprive Mr. Smith of liberty; as such Mr. Vanderhye is responsible for the assault and battery committed by the officers. Since the assault can reasonably be inferred from the Plaintiffs claim, this count should not have been dismissed.

13. The Defendant claimed that there is no common law claim for "interference with parental rights.", again his claim is contrary to established case rulings. See STRODE V. GLEASON, 510 P.2d 250 (1973); Wood v. Wood, 338 N.W.2d 123 (Iowa 1983)

14. The Defendant claims that count VII should be dismissed due to a requirement that the plaintiff spell out the exact words spoken. However the Plaintiff did make the claim “The statements imputed to the Plaintiff the commission of a crime.” and indicated statements made to both the police and superintendent Jack Dale. Mr. Smith was not a party to those conversations and can’t provide the exact words until Mr. Dale and the Police Officers testify at the trial as to what Mr. Vanderhye told them. However as Mr. Vanderhye did falsely accuse Mr. Smith of committing a crime, his statements are actionable regardless of the exact words he uttered.

15. Words charging crime are actionable per se. Ideal Publishing Corp. v Creative Features, Inc (1977) 59 AD2d 862, 399 NYS2d 118. Mr. Vanderhye’s comments are libel pro se, obviating need to allege and prove special damages and are actionable without the pleading and proof of extrinsic facts.

16. Mr. Vandery claims to be exempt from Counts VIII and X due to lack of negligence, however violation of a statute is *prima facie* evidence of negligence. See *See, e.g., Powell v. Mitchell, 120 W.Va. 9, 196 S.E. 153 (1938); Porterfield v. Sudduth, 117 W.Va. 231, 185 S.E. 209 (1936).” Yourtee v. Hubbard, 196 W.Va. 683, 687, 474 S.E.2d 613, 617 (1996)* the Plaintiff has alleged that Mr. Vanderhye’s action violated at least one statute.

17. Mr. Vanderhy, in reference to Counts VIII and X, claimed issue with injury. As Mr. Vanerhye’s comments are lible pro se, the natural and proximate consequences it will necessarily cause injuryt to the person concerned. Damage is conclusively presumed to result and need not be pleaded. Smith v Mustain, 210 Ky 445, 276 SW 154, 44 ALR 386. Also see Altoona Clay Products v Dun & Bradstreet,. (CA3 Pa) 367 F2d 625. Also Mr. Smith did claim unlawful imprisonment and direct restraint without adequate legal justification, act is re-guarded as a trespass and is classified as an injury to the person.

18. The Plaintiff also states that the court did not properly apply case law to the ruling:

> Moreover, "the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." Bonner v. Circuit Court of St. Louis, 526 F.2d 1331, 1334 (8th Cir. 1975) (quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974)).
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> "A demurrer admits the truth of all material facts properly pleaded. Under this rule, the facts admitted are those expressly alleged, those which fairly can be viewed as impliedly alleged, and those which may be fairly and justly inferred from the facts alleged." Rosillo v. Winters, 235 Va. 268, 270, 367 S.E.2d 717, 717 (1988).

19. Its clear that the complaint filed by the Plaintiff certainly did have allegations that could provide relief under any possible theory. For example the Plaintiff pointed out the legal requirements of trespass were not met, thus it can reasonably inferred that his arrest, imprisonment, conviction were done unlawfully. Indeed the Plaintiff even stated "The Defendant… had the Plaintiff falsely arrested…". The court was in error to rule against the Plaintiff for causes of actions that were stated or could reasonably be inferred from his complaint. Indeed the court seems to have held the Plaintiff to the exact wording and Attorney would have used in a complaint.

20. The court also should have considered that the Plaintiff is pro se and not a professional attorney. Indeed the Plaintiff did request the court take that into account. Based on case law:

> The courts provide pro se parties wide latitude when construing their pleadings and papers. When interpreting pro se papers, the Court should use common sense to determine what relief the party desires. S.E.C. v. Elliott, 953 F.2d 1560, 1582 (11th Cir. 1992). See also, United States v. Miller, 197 F.3d 644, 648 (3rd Cir. 1999)
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> Pro Se pleadings are to be considered without technicality; pro se litigants pleadings are not to be held to the same high standards of perfection as lawyers. HAINES V. KERNER, 92 S.Ct. 594; JENKINS V. MCKEITHEN, 395 US 411, 421 (1969); PICKING V. PENNA. RWY. CO. 151 F.2d 240; PUCKETT V. COX, 456 F.2d 233.
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> Pro se litigants' court submissions are to be construed liberally and held to less stringent standards than submissions of lawyers. If the court can reasonably read the submissions, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigant's unfamiliarity with rule requirements. Boag v. MacDougall, 454 U.S. 364, 102 S.Ct. 700, 70 L.Ed.2d 551 (1982); Estelle v. Gamble, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)(quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)); Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); McDowell v. Delaware State Police, 88 F.3d 188, 189 (3rd Cir. 1996); United States v. Day, 969 F.2d 39, 42 (3rd Cir. 1992)(holding pro se petition cannot be held to same standard as pleadings drafted by attorneys); Then v. I.N.S., 58 F.Supp.2d 422, 429 (D.N.J. 1999).
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> A court faced with a motion to dismiss a pro se complaint must read the complaint's allegations expansively, Haines v. Kerner, 404 U.S. 519, 520-21, 92 S. Ct. 594, 596, 30 L. Ed. 2d 652 (1972), and take them as true for purposes of deciding whether they state a claim. Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 1081, 31 L. Ed. 2d 263 (1972).
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> Moreover, "the court is under a duty to examine the complaint to determine if the allegations provide for relief on any possible theory." Bonner v. Circuit Court of St. Louis, 526 F.2d 1331, 1334 (8th Cir. 1975) (quoting Bramlet v. Wilson, 495 F.2d 714, 716 (8th Cir. 1974)).

(Court has special obligation to construe pro se litigants' pleadings liberally); Poling v. K.Hovnanian Enterprises, 99 F.Supp.2d 502, 506-07 (D.N.J. 2000).

WHEREFORE, Plaintiff moves that the Order of Sep 8th 2006 be vacated.

Respectfully Submitted,
Wesley C. Smith

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served to Hutton & Williams counsel for Mr. Vanderhye, this 1st day of Dec 2006.

_____
Wesley C. Smith