

VIRGINIA:

IN THE CIRCUIT COURT OF PULASKI COUNTY

DCSE,	)	
<b>Plaintiff</b>	)	
	)	
v.	)	CL 07-114-00
	)	DCSE #: 0003051740
WESLEY C. SMITH,	)	
<b>Defendant</b>	)	

**#5 - OBJECTIONS & MOTION TO RECONSIDER**

A pdf copy of this motion is available at: <http://www.liamsdad.org/court/withhold>

COMES NOW the Defendant, Wesley C. Smith, and makes the following Objections to the May 4<sup>th</sup> ruling denying his #4 - MOTION TO DISMISS - LACK OF JURISDICTION and respectfully request the court reconsider and reverse its ruling. In support the Defendant states as follows:

1. Judge Turk allowed Loretta Vardy, who is not a party to the case, or representing a party to the case, to argue the case via phone. The Defendant objected to Ms. Vardy having no standing to make argument. Ms Vardy was not called as a witness. The Defendant was not allowed to cross-examine her. Ms Vardy is also personally an opposing party in a lawsuit and is unethical for her to represent anyone in this matter.

2. DCSE did not present any legal argument other than “it’s a valid order”. DCSE did not cite any law or case citations to support their case or to contradict the Defendants case.

3. DCSE did not provide any evidence.

4. Judge Turk made it clear that he was allowing Loretta Vardy to argue the case and that she was not providing evidence.

5. Thus no evidence was entered in support of DCSE. DCSE did not even enter a copy of the “order” they were trying to enforce. Thus there is **NO evidence of any kind to support the Plaintiff’s case.**

6. The Defendant presented relevant case law to show that the “Final Divorce Decree” was null and void and unenforceable. The Defendant even offered documents to show he was not served with process, and that the order was based on on-year separation and that the case record demonstrated that one-year separation had not occurred prior to filing for divorce.

7. Loretta Vardy admitted that the Defendant had not been served with process.

8. DCSE argued, "this court can't decide if another circuit court order is valid". Judge Turk agreed with and stated "... its not for me to go behind that order and now try to determine whether or not that court had subject matter or personal jurisdiction over you. That's not for me to do at this point in time."

9. That argument is not just contrary to law but downright silly as well. If the "Final Divorce Decree" is void then for legal purposes it does not exist. If it does not exist then DCSE is attempting to take \$23,000 without any claim to it as there is **no** "Child Support" order upon which to base an order to withhold.

10. Had either Judge Turk or DCSE bothered to read the motion they would not have made the above embarrassing statements as the motion clearly showed their position was incorrect. Not only **can** this court decide if another circuit court order is valid or not, this court **must** make that determination.

The judge has a duty to continually **inspect the record of the case, and if subject-matter jurisdiction does not appear at any time from the record of the case, then he has the duty to dismiss the case as lacking subject-matter jurisdiction.** Should a judge act in any case in which he does not have subject-matter jurisdiction, he is acting unlawfully, U.S. v. Will, 449 U.S. 200, 216, 101 S.Ct. 471, 66 L.Ed.2d 392, 406 (1980); Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 404, 5 L.Ed 257 (1821), and without any judicial authority.

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) ("if the order is void, it may be attacked at any time in any proceeding, "); Evans v. Corporate Services, 207 Ill.App.3d 297, 565 N.E.2d 724 (2nd Dist. 1990) ("a void judgment, order or decree may be attacked at any time or in any court, either directly or collaterally"); Oak Park Nat. Bank v. Peoples Gas Light & Coke Co., 46 Ill.App.2d 385, 197 N.E.2d 73, 77 (1st Dist. 1964) ("that judgment is void and may be attacked at any time in the same or any other court, by the parties or by any other person who is affected thereby."). [Emphasis added].

The Supreme Court has also noted that [t]he distinction between an action of the court that is void ab initio rather than merely voidable is that the former involves the underlying authority of a court to act on a matter whereas the latter involves actions taken by a court which are in error. An order is void ab initio if entered by a court in the absence of jurisdiction of the subject matter or over the parties, if the character of the order is such that the court had no power to render it, or if the mode of procedure used by the court was one that the court could "not lawfully adopt." **The lack of jurisdiction to enter an order under any of these circumstances renders the order a complete nullity and it may be "impeached directly or collaterally by all persons, anywhere, at any time, or in any manner, irrespective of whether the issue had been properly raised and/or preserved by the parties.** " Singh v. Mooney, 261 Va. 48, 51-52, 541 S.E.2d 549, 551 (2001) (citations omitted) (emphasis added).

**A voidable order is an order that must be declared void by a judge to be void; a void order is an order issued without jurisdiction by a judge and is void ab initio and does not have to be declared void by a judge to be void.** Only an inspection of the record of the case showing that the judge was without jurisdiction or violated a person's due process rights, or where fraud was involved in the attempted procurement of jurisdiction, is sufficient for an order to be void. Potenz Corp. v. Petrozzini, 170 Ill. App. 3d 617, 525 N.E. 2d 173, 175

(1988). In instances herein, the law has stated that the **orders are void ab initio and not voidable because they are already void.**

11. Judge Turk also erred in claiming that the Court Of Appeals not hearing the appeal made the order valid. This is clearly in error. I'd suggest Judge Turk study the following case:

Pursuant to the Vallely court decision, a void order does not have to be reversed by any court to be a void order. **Courts have also held that, since a void order is not a final order, but is in effect no order at all, it cannot even be appealed.** Courts have held that a void decision is not in essence a decision at all, and never becomes final. Consistent with this holding, in 1991, the U.S. Supreme Court stated that, "Since such jurisdictional defect deprives not only the initial court **but also the appellate court of its power over the case or controversy**, to permit the appellate court to ignore it. ...[Would be an] unlawful action by the appellate court itself." Freytag v. Commissioner, 501 U.S. 868 (1991); Miller, supra. Following the same principle, it would be an unlawful action for a court to rely on an order issued by a judge who did not have subject-matter jurisdiction and therefore the order he issued was Void ab initio.

12. The order is void or not based on the jurisdiction or lack of jurisdiction when it was created, if Judge Potter did not have jurisdiction to enter the order, then it is void even prior to an appeal or reversal. Judge Turk simply relied on the opinion of Judge Potter, but that is the wrong legal standard. Judge Turk needs to rely on the record of the case and only the record.

Our Supreme Court has ruled that "**Because a court does not acquire jurisdiction by a mere recital contrary to what is shown in the record**", the record of the case is the determining factor as to whether a court has jurisdiction. State Bank of Lake Zurich v. Thill, 113 Ill.2d 294, 497 N.E.2d 1156 (1986).

**There is a misconception by some attorneys and judges that only a judge may declare an order void, but this is not the law:** (1) there is no statute nor case law that supports this position, and (2) should there be any case law that allegedly supported this argument, that case would be directly contrary to the law established by the U.S. Supreme Court in Valley v. Northern Fire & Marine Ins. Co., 254 U.S. 348, 41 S. Ct. 116 (1920) as well as other state courts, e.g. by the Illinois Supreme Court in People v. Miller. Supra. A party may have a **court vacate a void order, but the void order is still void ab initio**, whether vacated or not; a piece of paper does not determine whether an order is void, it just memorializes it, makes it legally binding and voids out all previous orders returning the case to the date prior to action leading to void ab initio.

This principle of law was stated by the U.S. Supreme Court as "Courts are constituted by authority and they cannot go beyond that power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply **VOID, AND THIS IS EVEN PRIOR TO REVERSAL.**" [Emphasis added]. Vallely v. Northern Fire and Marine Ins. Co., 254 U.S. 348, 41 S. Ct. 116 (1920). See also Old Wayne Mut. I. Assoc. v. McDonough, 204 U.S. 8, 27 S.Ct. 236 (1907); Williamson v. Berry, 8 How. 495, 540, 12 L. Ed, 1170, 1189, (1850); Rose v. Himely, 4 Cranch 241, 269, 2 L.Ed. 608, 617 (1808).

13. Judge Turk claimed I waived subject matter objection by participation in the case. Again this is contrary to case rulings:

While "**objections to subject-matter jurisdiction may be raised at any time and are not waivable,**" Owusu v. Commonwealth, 11 Va. App. 671, 672, 401 S.E.2d 431, 431 (1991), the same is not true for

a finding of personal jurisdiction decided previously by the court and not appealed. "Subject matter jurisdiction alone cannot be waived or conferred on the court by agreement of the parties." Morrison v. Bestler, 239 Va. 166, 169-70, 387 S.E.2d 753, 755 (1990).

14. Judge Turk also claimed that it was the Defendant's responsibility to prove lack of jurisdiction. That is incorrect. The Plaintiff has the obligation to prove the court had jurisdiction. If the Plaintiff can't do that then the order must be recognized as void. The Defendant's had no obligation other than to dispute jurisdiction.

15. Judge Turk also make a smart-alecky remark about the Defendant needing to provide him with the entire case file. Again its not the duty of the Defendant, but rather the person attempting to invoke the court's power to demonstrate that the court has jurisdiction. Also since divorce is a limited jurisdiction function, the only things needed are an index of the case to look for proof of service on the Defendant, and a copy of the order, which MUST contain statements of how it acquired jurisdiction.

16. Given that the official index of the case does not show any proof of service on the Defendant, and the order itself only claims authority based on one-year separation, which the order itself claims to have been only 6 months long, its clear that both items prove the court did not have jurisdiction without needing the entire case file.

17. Judge Turk is just accepting Judge Potter's view that the order is valid, again in spite of rulings to the contrary. Apparently Judge Turk feels Judge Potter knows more than the U.S. Supreme Court which has indicated that Judge Turk needs to ignore Judge Potter and review the record of the case:

A judge's allegation that he has subject-matter jurisdiction is only an allegation (Lombard v. Elmore, 134 Ill.App.3d 898, 480 N.E.2d 1329 (1st Dist. 1985); Hill v. Daily, 28 Ill.App.3d 202, 204, 328 N.E.2d 142 (1975)); **inspection of the record of the case has been ruled to be the controlling factor. If the record of the case does not support subject-matter jurisdiction, then the judge has acted without subject-matter jurisdiction.** The People v. Brewer, 328 Ill. 472, 483 (1928) ("If it could not legally hear the matter upon the jurisdictional paper presented, its finding that it had the power can add nothing to its authority, – it had no authority to make that finding.").

18. The state Supreme Courts have held that those who aid, abet, advise, act upon and execute the order of a judge who acts without jurisdiction are equally guilty. They are equally guilty of a crime against the U.S. Government. Given Judge Turk seemed like a decent guy, you would think he would want to rule on the merits of jurisdiction in order to avoid committing treason.

Should the judge not have subject-matter jurisdiction, then the law states that the judge has not only violated the law, but is also a trespasser of the law. Von Kettler et.al. v. Johnson, 57 Ill. 109 (1870) ("if the magistrate has

not such jurisdiction, then he and those who advise and act with him, or execute his process, are trespassers.");Elliott v. Peirsol, 1 Pet. 328, 340, 26 U.S. 328, 340 (1828) ("without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal in opposition to them. They constitute no justification; and **all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers.** This distinction runs through all the cases on the subject; and it proves, that the jurisdiction of any court exercising authority over a subject, may be inquired into in every court, when the proceedings of the former are relied on and brought before the latter, by the party claiming the benefit of such proceedings."); In re TIP-PA-HANS Enterprises, Inc., 27 B.R. 780, 783 (1983) (a judge "lacks jurisdiction in a particular case until it has been demonstrated that jurisdiction over the subject matter exists") (when a judge acts "outside the limits of his jurisdiction, he becomes a trespasser ... ") ("... courts have held that where courts of special or limited jurisdiction exceed their rightful powers, the whole proceeding is coram non iudice ... ").

**WHEREFORE** as Judge Turk refused to make a ruling as to the "Final Divorce Decree" being void or not based on the record of the case, the Defendant respectfully requests that the court reconsider and make a ruling as to it being void or not by pointing out where in the record the Prince William County Circuit Court had jurisdiction to issue the "Final Divorce Decree", or if unable to do so that this court rule that the "Final Divorce Decree" is void and unenforceable.

**Respectfully Submitted,  
Wesley C. Smith**

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Wesley C. Smith, Defendant  
5347 Landrum Rd APT 1, Dublin, VA 24084-5603  
liamsdad@liamsdad.org  
703-348-7766

**CERTIFICATE OF SERVICE**

I hereby certify that a true and accurate copy of the foregoing motion was served to DCSE, this 24th day of May 2007.

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Wesley C. Smith