V I R G I N I A:

IN THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY

Whitbeck & Associates, P.C.,	)	
Plaintiff,	)	
v.	)	Case No: CL 71003
WESLEY C. SMITH,	)	
Defendant	)	
CHERI SMITH,	)	
Defendant	)	

#2 – Position On Disposition Of Funds

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

COMES NOW the co-Defendant, Wesley C. Smith, and requests the Court hold the funds until such time as the co-defendants sign and agreement for its release, as required by the Escrow Agreement, and states as follows:

1. On Dec 12, 2003 the co-defendants signed an Escrow Agreement and deposited the funds from the sale of their home with Mr. Whitbeck's law firm.

2. The Court ruled Whitbeck & Associates, P.C may deposit the contents of the Escrow Account held by it with the Clerk of the Court. The amount was $128,733.88.

3. The Escrow Agreement requires the funds to be held until "the parties agree to the division therof"

4. Releasing funds per court order entered in case Chancery 53360 is not a condition set by the Escrow Agreement allowing release of funds.

5. The position submitted by Cheri Smith amounts to nothing less than her asking the court to revoke the Escrow Agreement and disperse the funds in violation of the agreement.

6. Per established case law, Escrows are irrevocable which neither party can revoke during the escrow period without the consent of the other. See Chaffin v Harpham 166 Ark 578, 266 SW 685; Home-Stake Royalty Corp. V McClish, 187 Oka 352, 103 P2d 72;

> In the law governing performance of escrow agreements there is no doctrine of substantial compliance to be found; compliance must be full and to the letter, or else it constitutes merely noncompliance Jones V Gregg, 226 Ark 595, 293 SW 2d 545;
>
> strict and fully performance alone can discharge a condition precedent to valid delivery by the escrow holder

> The question involved is one of performance of the escrow agreement, not of the ability of the parties to perform the agreement, since such ability, without full performance, cannot amount to a compliance. young v claredon twp. 132 us 340, 33 L ed 356 10 S Ct 107;

7. It is also established case law that the Court has no authority to go beyond the contract among interpleading claimants. Interpleading the funds does not void the Escrow Agreement but only changes who holds the escrowed funds. The Court only has the authority to enforce the Escrow Agreement and may not distribute the funds in a manner contrary to that of the Escrow Agreement.

> It has, however been held that where a bank, as escrowee, brings an interpleader suit because of different interpretations of the escrow contract by the respective claimants, **the court has no authority** to go beyond the terms of the contract to determine other matters in dispute among the interpleading claimants. Northern Trust Co v McDowall, 307 Ill App 29, 29 NE2d 865

8. Co-defendant, Cheri Smith, has repeatedly threatened co-defendant Wesley Smith with claims of interest on the funds, which at the same time refusing to enter into any reasonable agreement to release the funds, or part of funds even for the part of the fund that are not disputed. To save time and court costs, I will point out for her benefit that case law prohibits her from claiming any interest, especially since by agreement the funds were held in a non-interest bearing account:

> Interest is not recoverable against the unsuccessful litigant Fox v Loftland, 98 F2d 589, cert de 305 US 658, 83 L Ed 427, 59 S Ct 359; Chase v Skepner, 134 Cal App 453, 25 P2d 471;

9. Case law also does not allow co-defendant Cheri Smith to raise the issue of the claimed "Order" in a separate case, as any issue with enforcing that "Order" can be handled in that case. Co-defendant Wesley Smith is entitled to Jury Trial and will ask for one should the court decide to do anything other than a strict enforcement of the Escrow Agreement.

> And an interpleaded defendant who attempts to raise a matter for which he has a plain and speedy remedy at law should not be permitted to inject that matter into the equitable interpleader suit and thereby deprive the plaintiff of a jury trial thereon. Kauffman v Phillips, 154 Iowa 542, 134 NW 575

10. The only way the Court could even consider co-defendant Cheri Smith's request to disperse the funds per the order she claims was entered on June 9th, 2006 would first require taking Judicial Notice of claimed order.

11. Cheri Smith has neither asked the Court to take Judicial Notice of claimed order, nor has she provided a certified copy of it to the court.

12. A court will not judicially notice records and facts in one proceeding in deciding another proceeding. State courts will generally not take judicial notice of records and facts in one action while deciding another because a party is entitled to have her case decided upon evidence introduced at trial. - American Jurisprudence

13. Judicial Notice is to be used cautiously and only when the facts judicially noted cannot be reasonably disputed. The "order" claimed by Cheri Smith, cannot only be reasonably disputed but is actually disputed. Wesley Smith claims "order" is null and void and unenforceable. Wesley Smith has appealed the order to the Virginia Court Of Appeals.

> A court is not entitled to take judicial notice of facts, which are disputed Wallace v Kaiser Aluminum & chemical corp (La) 586 So 2d 149;

14. The position of Wesley Smith is that there is no order upon which to base a ruling as the "order" cited by Cheri Smith does not exist as a valid legal order.

> The law is well-settled that a void order or judgment is **void even before reversal**. Vallely v. Northern Fire & Marine Ins. Co., 254 U.S. 348, 41 S.Ct. 116 (1920) ("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 EVEN PRIOR TO REVERSAL." [Emphasis added]); 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).

15. Even a certified copy of an order does not provide that the order is valid. The court would still be unable to take Judicial Notice of it as a valid legal court order without allowing Wesley Smith to present evidence that the order is void.

> Since a void order has no legal force or effect there can be no time limit within which to challenge the order or judgment. Further since the order has no legal force or effect, it can be repeatedly challenged, since no judge has the lawful authority to make a void order valid.Bates v. Board of Education, Allendale Community Consolidated School District No. 17, 136 Ill.2d 260, 267 (1990) (a court "cannot confer jurisdiction where none existed and cannot make a void proceeding valid."); People ex rel. Gowdy v. Baltimore & Ohio R.R. Co., 385 Ill. 86, 92, 52 N.E.2d 255 (1943).

> 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].

16. If the "order" is used as a basis for a ruling in this case then the entire file of that case becomes a requirement of the record to provide a complete record for review of this case and the entire record of that case must be made part of the record of this case and See In Interest of C.M.W. (Mo App) 813 SW2d 331.

WHEREFORE co-defendant Wesley Smith requests the Court order that the funds will be held by the Court until the parties comply with the Escrow Agreement and submit a signed agreement for release of funds.

Respectfully Submitted,
Wesley C. Smith

____

Wesley C. Smith, Defendant
5347 Landrum Rd APT 1, Dublin, VA 24084-5603
liamsdad@liamsdad.org - no phone

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that a true and accurate copy of the foregoing motion was sent to John Whitbeck and Loretta Vardy, this 8th day of Dec 2006.

____

Wesley C. Smith