

VIRGINIA:

IN THE CIRCUIT COURT OF PULASKI COUNTY

WESLEY C. SMITH,)	
)	
Plaintiff,)	
)	
v.)	
)	Case No. CL 06-267
ROGER D. VANDERHYE)	
)	
Defendant.)	

DEFENDANT ROGER D. VANDERHYE'S DEMURRER TO COMPLAINT

Defendant Roger D. Vanderhye ("Mr. Vanderhye"), by counsel, and pursuant to Rule 3:8 of Rules of the Supreme Court of Virginia, respectfully demurs to the Complaint filed by Plaintiff Wesley C. Smith ("Mr. Smith"). The grounds for this Demurrer are as follows:

1. Mr. Smith is the non-custodial parent of a student at Spring Hill Elementary School, in McLean, Virginia. (Compl. ¶ 2.) Mr. Vanderhye is the Principal of Spring Hill Elementary School. (Compl. ¶ 2.)
2. This case arises out of Mr. Smith's arrest on a charge of criminal trespass on the grounds of Spring Hill Elementary School on June 17, 2005. (Compl. ¶ 7.)
3. Mr. Smith's complaint purports to assert ten counts against Mr. Vanderhye, as well as seeking injunctive and declaratory relief, and compensatory and punitive damages. For the reasons stated below, Mr. Smith's complaint fails to state a claim for relief and should be dismissed with prejudice.

Count I—Violation of Virginia Code § 22.1-4.3

4. Mr. Smith fails to state a claim against Mr. Vanderhye under Virginia Code § 22.1-4.3 for three reasons.

5. First, § 22.1-4.3 does not impose any duties upon Mr. Vanderhye individually, or on upon any other individual employee of a school board. Rather, under Virginia Code § 22.1-79, school boards retain exclusive authority to operate the schools within their division.

6. Second, even if § 22.1-4.3 applied to Mr. Vanderhye personally, the statute does not provide a private right of action and creates no civil liability for its violation. *See, e.g., Clegg v. Local 149 U.A.W.*, 47 Va. Cir. 276 (City of Winchester 1998) (refusing to infer a private action for damages under Va. Code § 40.1-53 because statute did not expressly provide for private right of action).

7. Third, even if § 22.1-4.3 created a private right of action against individual employees of a school board, Mr. Smith does not allege that Mr. Vanderhye violated that statute. That statute provides that "a noncustodial parent of a student enrolled in a public school . . . shall not be denied the opportunity to participate in any of the student's school . . . activities in which such participation is supported or encouraged by the policies of the school . . . *solely on the basis of such noncustodial status.*" Va. Code § 22.1-4.3 (emphasis added).

8. Mr. Smith does not allege that Mr. Vanderhye denied him the opportunity to participate in his son's school activities solely on the basis of his noncustodial status.

Count II—Violation of Fairfax County School District Regulation 2240.3

9. Mr. Smith fails to state a claim against Mr. Vanderhye for violation of the Fairfax County School Board's Regulation 2240.3 because that regulation creates no private right of action.

Counts III & V—False Arrest and Wrongful Imprisonment

10. Mr. Smith fails to assert a claim for false arrest against Mr. Vanderhye in Count III because he does not allege that Mr. Vanderhye arrested or detained him. Rather, he alleges

that he was arrested by the Fairfax County Police. (See Compl. ¶ 25.) Because Mr. Vanderhye did not arrest Mr. Smith, he cannot be held liable for a false arrest. See *Commercial Energies v. United Airlines*, No. 93-1725, 1994 U.S. App. LEXIS 14311, at * 12 (4th Cir. June 10, 1994) ("The private parties did not make any arrest and therefore cannot be held responsible for a false arrest.") .

11. Nor can Mr. Smith assert a false, or wrongful, imprisonment claim in Count V. The essential element of any false imprisonment claim is the illegal detention of a person, without lawful process or the unlawful execution of lawful process. *Montgomery Ward & Co., v. Wickline*, 188 Va. 485, 489, 50 S.E.2d 387, 389 (1948); *Smith v. Button*, 43 Va. Cir. 379, 382 (City of Richmond 1997).

12. If the plaintiff was convicted on the underlying charge, the validity of the arrest and detention is conclusively established, and there can be no claim for false imprisonment or false arrest. See, e.g., *Monroe v. Shaffer*, No. 95-1041, 1996 U.S. App. LEXIS 14617, at * 6 (4th Cir. June 17, 1996) (affirming grant of summary judgment on false arrest claims against officers where evidence showed that plaintiff was convicted); *Yeatts v. Minton*, 211 Va. 402, 177 S.E.2d 646 (1970) (stating that a person cannot be falsely imprisoned pursuant to a lawful arrest).

13. Mr. Smith has not, and cannot, allege that his arrest and detention by the Fairfax County police was illegal because he was convicted on the trespass charge. (See Exhibit 1, Certified Copy of Final Order in *Commonwealth v. Smith*, MI-2005-1559 (October 13, 2005)).¹

¹ In ruling on Mr. Vanderhye's demurrer to the Complaint, the Court may properly take judicial notice of Mr. Smith's conviction on the trespass charge because that criminal proceeding forms the basis of his false arrest and false imprisonment claims. See *Martone v. Martone*, 257 Va. 199, 208, 509 S.E.2d 302, 307 (1999); *Fleming v. Anderson*, 187 Va. 788, 794-95, 48 S.E.2d 269, 272 (1948).

Count IV—Assault & Battery

14. In Count IV, Mr. Smith fails to state a claim for assault or battery.

15. Mr. Smith has not alleged that Mr. Vanderhye did anything to place him in reasonable apprehension of an immediate battery, nor does he allege that he was in apprehension of an immediate battery. He, therefore, cannot assert a claim for assault. *Koffman v. Garnett*, 265 Va. 12, 16-17, 574 S.E.2d 258, 261 (2003).

16. Mr. Smith also cannot allege a claim for battery because he does not allege that Mr. Vanderhye touched him. *Id.*

Count VI—Interference with Parental Rights

17. Mr. Smith fails to state a claim for relief in Count VI because there is no common law claim for "interference with parental rights." Nor does he cite any statutory basis for such a claim.

Count VII—Slander and Defamation of Character

18. Mr. Smith fails to state a claim for relief for "slander and defamation of character" in Count VII.

19. To state a claim for slander or defamation, a plaintiff must set out the exact words spoken *in haec verba*. *Fed. Land Bank of Baltimore v. Birchfield*, 173 Va. 200, 215, 3 S.E.2d 405, 410 (1939); *Cerick v. Central Fidelity Bank*, 19 Va. Cir. 1 (Fairfax County 1989); *Flynn v. Smyth*, 10 Va. Cir. 275 (Fairfax County 1987).

20. Mr. Smith has not set out the exact words allegedly said by Mr. Vanderhye

Counts VIII and X—Negligent Infliction of Emotional Distress and Negligent Infliction of Physical Pain

21. Mr. Smith cannot assert a claim for negligent infliction of emotional distress or "negligent infliction of physical pain" against Mr. Vanderhye in Counts VIII and X. As a

principal of a public school in Virginia, Mr. Vanderhye is immune from liability based on ordinary negligence. *See, e.g., Messina v. Burden*, 228 Va. 301, 301, 321 S.E.2d 657, 657 (1984); *Lentz v. Morris*, 236 Va. 78, 81, 372 S.E.2d 608, 610 (1988).

22. Even if Mr. Vanderhye was not entitled to sovereign immunity, Mr. Smith could not assert a claim for negligent infliction of emotional distress because he has not alleged that he suffered any physical injury. *See, e.g., Hughes v. Moore*, 214 Va. 27, 34, 197 S.E.2d 214, 219 (1973). Even assuming that Virginia law recognized a separate claim for "negligent infliction of physical pain," Mr. Smith has not alleged that Mr. Vanderhye did inflict any physical pain upon him.

Count IX—Intentional Infliction of Emotional Distress

23. Mr. Smith fails to state a claim for intentional infliction of emotional distress against Mr. Vanderhye in Count IX.

24. Mr. Smith has not alleged that Mr. Vanderhye acted with the intention of inflicting emotional distress upon him. *Ely v. Whitlock*, 238 Va. 670, 677, 385 S.E.2d 893, 897 (1989).

25. He also has not alleged that Mr. Vanderhye's conduct was outrageous and intolerable, as is necessary for an intentional infliction of emotional distress claim. *Russo v. White*, 241 Va. 23, 26, 400 S.E.2d 160, 162 (1991).

26. Because Mr. Smith was convicted on the criminal trespass charge, he cannot allege that Mr. Vanderhye's actions in calling the police were outrageous. *Id.* at 27, 400 S.E.2d at 162.

WHEREFORE, for all of these reasons, Roger D. Vanderhye requests the Court to sustain his demurrer and to dismiss all counts of the Complaint with prejudice.

Respectfully submitted,

ROGER D. VANDERHYE

By: _____
Counsel

Thomas J. Cawley (VSB No. 04612)
Sona Rewari (VSB No. 47327)
HUNTON & WILLIAMS
1751 Pinnacle Drive, Suite 1700
McLean, Virginia 22102
(703) 714-7400 (telephone)
(703) 714-7410 (fax)

Gary C. Hancock (VSB No. 16704)
GILMER, SADLER, INGRAM, SUTHERLAND & HUTTON
65 E. Main St.
P. O. Box 878
Pulaski, Virginia 24301
(540) 980-1360
(540) 980-5264 (facsimile)

Counsel for Roger D. Vanderhye

CERTIFICATE OF SERVICE

I hereby certify that, on June 5, 2006, a true and correct copy of Defendant Roger D. Vanderhye's Demurrer to Complaint was sent by electronic mail and by first-class U.S. mail, postage prepaid to:

Wesley C. Smith
5347 Landrum Road
Apartment 1
Dublin, Virginia 24084-5603
liamsdad@liamsdad.org

Counsel

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA)	CRIMINAL NUMBER MI-2005-1559
VERSUS)	
WESLEY CLAY SMITH)	APPEAL - TRESPASSING

FINAL ORDER
JURY TRIAL

On October 5, 2005, Bob McClain, Assistant Commonwealth's Attorney, and WESLEY CLAY SMITH, the Defendant, appeared before this Court. The Defendant is charged with the misdemeanor of TRESPASSING.

The Defendant was arraigned upon the warrant and the Defendant entered a plea of not guilty.

Thirteen veniremen were sworn and examined on their voir dire and found to be competent and qualified jurors. The Commonwealth's Attorney and the Defendant alternately struck the names of three of the veniremen. The remaining seven constituted the Jury and were sworn.

The Jury heard opening statements of the Commonwealth's Attorney and by the Defendant and all of the evidence presented by the Commonwealth. Upon conclusion of the Commonwealth's evidence, the Defendant moved the Court to strike the evidence presented by the Commonwealth. The Court, after hearing argument, denied the motion.

The Jury was recalled and heard all of the evidence presented on behalf of the Defendant.

At the conclusion of all of the evidence presented, the Defendant renewed his motion to strike. The Court denied the motion.

The Jury received the instructions of the Court, heard closing arguments and was sent to deliberate. After some time, the Jury returned to Court and rendered the following verdict:

'We, the Jury, on the issue joined in the case of the Commonwealth of Virginia versus WESLEY CLAY SMITH, Defendant, find the Defendant guilty of TRESPASSING.

/s/Linda Zeoli
Foreman.'

In accordance with the verdict rendered by the Jury, the Court found the Defendant, WESLEY CLAY SMITH, guilty of TRESPASSING, as charged.

The Jury then received the instructions of the Court regarding punishment, heard closing arguments and was sent to deliberate. After some time, the Jury returned to Court and rendered the following verdict:

'We, the Jury, on the issue joined in the case of the Commonwealth of Virginia versus WESLEY CLAY SMITH, Defendant, having found the Defendant guilty of TRESPASSING, fix his punishment at: \$100.00 fine, no jail time.

/s/Linda Zeoli
Foreman.'

The Jury was discharged.

In accordance with the verdict rendered by the Jury, the Court **ORDERED** that the Defendant pay a fine in the amount of \$100.00 and pay the costs of this case.

The Defendant was given fifteen days to pay the fine and costs.

Entered on October 13, 2005.

Gaylord L. Finch

JUDGE GAYLORD L. FINCH

A COPY TESTE:
JOHN T. FREY, CLERK

BY: *Dahl*

Deputy Clerk

Date: 6-2-06

Original retained in the office of
the Clerk of the Circuit Court of
Fairfax County, Virginia