

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

DAVID ALAN CARMICHAEL, et al. )

Plaintiffs, )

v. )

Case No.: CL08-2067

THE COMMONWEALTH OF )  
VIRGINIA, et al., )

Defendants. )

**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS,  
PLEA OF THE STATUTE OF LIMITATIONS AND DEMURRER**

Defendants, the Commonwealth of Virginia (the “Commonwealth”), the Honorable Timothy M. Kaine, Governor (“Governor Kaine”), Pierce R. Homer, Secretary of the Virginia Department of Transportation (“Secretary Pierce”), D. B. Smit, Commissioner of the Virginia Department of Motor Vehicles (“Commissioner Smit”) and the Honorable Robert F. McDonnell, Attorney General for the Commonwealth of Virginia (“Attorney General McDonnell”), by counsel, state as follows in support of their Motion to Dismiss, Plea of the Statute of Limitations and Demurrer:

**I. STATEMENT OF THE CASE**

**Factual Allegations**

*Pro se* Plaintiff David Alan Carmichael (“Plaintiff”) has filed suit on behalf of himself and on behalf of his minor son, Jesse Carmichael (“Plaintiff Jesse Carmichael”) alleging violation of their civil rights. Specifically, Plaintiff claims that a Social Security Number is the “Mark of the Beast” as described in the Book of Revelations in the Bible. Based on this belief,

Plaintiff avers that DMV's requirement that an applicant present a Social Security Number in order to obtain a driver's license violates both the U.S. Constitution and the Virginia Constitution. Construing the Complaint liberally, it appears Plaintiff is attempting to state a federal claim pursuant to 42 U.S.C. § 1983 for violation of his due process rights and right to freedom of religion.

Plaintiff and his son, "devout Christians," both have a Social Security Number, and Plaintiff previously used his Social Security Number to obtain a driver's license. Complaint ¶ 9. However, in 1996, Plaintiff developed the belief that his Social Security Number is the "Mark of the Beast" or "Number of the Beast." Complaint ¶ 11. Plaintiff claims his son shares this conviction and that they are "under a mandate of God to abstain from association with a SSN." Complaint ¶ 5.

In "the first half of 2002," Plaintiff attempted to obtain a religious accommodation allowing him to renew his driver's license without being associated with his Social Security Number. Complaint ¶ 19. The acting DMV Commissioner denied his request. *Id.*

Plaintiff renewed his efforts to obtain a license without using his Social Security Number from May 23-25, 2007. *Id.* ¶ 33. On June 20, 2007 and again on July 23, 2007, Secretary Homer denied the request in writing. *Id.* at 34 and 38.

### Counts

The Complaint sets forth numerous counts, and Plaintiff seeks monetary, injunctive and declaratory relief. Plaintiff, though acting *pro se*, requests attorney's fees in addition to costs and expenses.

In Count One, Plaintiff seeks a temporary and permanent injunction against the Attorney General and the Commonwealth's Attorney for the City of Hampton ("Defendant Curtis")<sup>1</sup> preventing prosecution for driving without a valid license. Complaint ¶¶ 70, 72. Plaintiff also seeks a permanent injunction against all Defendants preventing any association between plaintiffs and their Social Security Numbers.

In Counts Two, Three and Four, Plaintiff claims the Defendants have violated Va. Const. art. I, § 16, U.S. Const. amend. I, and the Virginia Act for Religious Freedom, Va. Code § 57-1, *et seq.* by failing to grant his requests for a religious accommodation which would allow him to obtain a license without a Social Security Number. Complaint pp. 22-25.

In Count Five, Plaintiff alleges violations of the due process clause of the U.S. Constitution and the Virginia Constitution, claiming the Defendants have deprived him and his son of the use of their vehicles by denying their request for religious accommodation. Complaint p. 25.

In Counts Six and Seven, Plaintiff seeks relief against Governor Kaine. Plaintiff claims Governor Kaine is liable for delegating his duty to the Secretary of Transportation to "ensure that the law in Virginia was faithfully executed when it was squarely put before him by the Plaintiff." Complaint ¶ 89. Plaintiff seeks a writ of mandamus compelling Governor Kaine to "ensure that his agency act on the law as declared by the Court pursuant to the judgments pleaded for herein." Complaint ¶ 99. Construing the Complaint liberally, it appears Plaintiff is seeking an order requiring Governor Kaine to grant him a religious exception to the requirement that an applicant present a Social Security Number when applying for a license to drive a motor vehicle.

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<sup>1</sup> No response is made herein on behalf of Defendant Curtis.

Plaintiff seeks declaratory relief in Count Eight, and requests to change his name and Plaintiff Jesse Carmichael's name in Count Nine.<sup>2</sup>

The Defendants herein move for the dismissal of the Complaint against them with prejudice and further ask that this Court sustain their demurrer due to Plaintiff's failure to state a cause of action.

## II. MOTION TO DISMISS

A. **This Court must dismiss Plaintiff Jesse Carmichael's suit because Plaintiff David Alan Carmichael, a non-attorney, cannot litigate the claim on his behalf.**

Plaintiff Jesse Carmichael's suit against all Defendants must be dismissed because it is improperly filed. While Va. Code § 8.01-8 permits a parent to sue on behalf of a minor as his next friend, there is no authority which allows a non-attorney parent to litigate his minor child's claims in court. *Myers v. Loudoun County Pub. Schs.*, 418 F.3d 395 (4th Cir. 2005) (noting that while a parent may assert a claim on behalf of a minor child pursuant to Va. Code § 8.01-8, no Virginia cases authorize a *pro se* parent to litigate the minor child's claim). Here, Plaintiff, a non-attorney, is attempting to litigate a case on behalf of his minor son, essentially acting as his son's attorney. There simply is no permissible basis on which Plaintiff may represent his son as an attorney, thus Plaintiff Jesse Carmichael's suit must be dismissed against all Defendants.

B. **This Court must dismiss Plaintiff David Carmichael's suit for failure to timely file an appeal of decisions of an administrative agency.**

This Court has no jurisdiction to consider Plaintiff's claims because Plaintiff failed to timely file an appeal after the denial of his requests for a license. Va. Code § 46.2-321 provides

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<sup>2</sup> In his "Alternative Motion for Relief," Plaintiff does not appear to name any party as a Defendant. See Complaint p. 37. In any event, Plaintiff fails to state a cause of action against the Commonwealth, Governor Kaine, Secretary Homer, Commissioner Smith or Attorney General McDonnell in Count Nine. See *id.*

Done Plaintiff  
of 1/2007

that “[a]ny person denied a license . . . may appeal in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 et seq.)” Va. Code § 46.2-321. Any person aggrieved by a decision denying a license “shall have a right to the direct review thereof by an appropriate *and timely* court action against the agency or its officers or agents in the manner provided by the rules of the Supreme Court of Virginia.” Va. Code § 2.2-4026 (emphasis added). Va. Sup. Ct. R. 2A:2 requires that a party file his notice of appeal with the agency secretary within 30 days after service of the final order in the case decision denying his request for a license. *See* Va. Sup. Ct. R. 2A:2. Because Plaintiff failed to avail himself of the appellate review provided by statute, his claims are not properly before this Court.

Plaintiff’s suit is nothing more than an attempt to circumvent the mandatory and exclusive administrative procedures for challenging an agency’s case decisions. Plaintiff’s Complaint provides no allegation that he noted an appeal as required by statute after denial of his 2002 request for religious accommodation. *See* Complaint. Nor does the Complaint establish that Plaintiff noted an appeal within 30 days of the case decision denying his 2007 request. In both instances, Plaintiff claims his request for a license was denied based upon his refusal to provide his Social Security Number. Complaint ¶¶ 19, 33-34 and 38. In order to obtain review of these decisions, Plaintiff was required to appeal in accordance with the Administrative Process Act. Va. Code § 46.2-321.

Having failed to follow the specific time constraints established by the Virginia Supreme Court, Plaintiff’s claims are barred and should be dismissed.<sup>3</sup> *See Occoquan Land Dev. Corp. v.*

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<sup>3</sup> Because Plaintiff’s claims are not properly before the Court, this Court has no jurisdiction to consider Plaintiff’s claims for injunctive and declaratory relief under Va. Code § 57-2.02, the Virginia Act for Religious Freedom. Even assuming, *arguendo*, this Court has jurisdiction, Plaintiff fails to state a claim pursuant to Va. Code § 57-2.02. Nonetheless, Va. Code § 57-2.02 does not permit recovery for monetary damages. *Id.* The Plaintiff cannot state a claim against

