

Henrico Circuit Court
Civil Division
4301 Parham Road
Richmond, VA 23228
804-501-4546

Proof Of Service

Virginia:
In the Henrico Circuit Court

Case number: 087CL08001124-00
Service number: 003
Service filed: 05/09/2008
Judge:

Served by: SPECIAL PROCESS SERVER
Style of case: LAWRENCE W. TRULL vs FRANCIS D. SMOLKA

Service on: COUNTY OF HENRICO
NO SERVICE ADDRESS

Attorney: THOMAS H. ROBERTS
105 SOUTH 1ST STREET
RICHMOND, VA 23219
804/783-2000

Instructions:

Returns shall be made hereon, showing service of Summons issued Monday, May 12, 2008 with a copy of the Complaint filed Friday, May 09, 2008 attached.

Date issued : Monday, May 12, 2008

For Sheriff Use Only

ANDREW DICK, PROCESS SERVER

*Accepted by
9/11/08
7/11/08
10:10 AM.*



Henrico Circuit Court
Civil Division
4301 Parham Road
Richmond, VA 23228
804-501-4546

Summons

To: COUNTY OF HENRICO
NO SERVICE ADDRESS

Case number: 087CL08001124-00

The party upon whom this Summons and the attached Complaint are served is hereby notified that unless within 21 days after such service, response is made by filing in the clerk's office of this court a pleading in writing, in proper legal form, the allegations and charges may be taken as admitted and the court may enter an order, judgment, or decree against such party either by default or after hearing evidence.

Appearance in person is not required by this Subpoena.

Done in the name of the Commonwealth of Virginia on, Monday, May 12, 2008.

Clerk of Court: Yvonne G. Smith

By: _____

Jennifer Watts
(Clerk/Deputy Clerk)

Instructions:

Attorney's name: THOMAS H. ROBERTS
105 SOUTH 1ST STREET
RICHMOND, VA 23219
804/783-2000

COPY

VIRGINIA:
IN THE CIRCUIT COURT FOR THE COUNTY OF HENRICO

LAWRENCE W. TRULL,
Plaintiff,

v.

Case No. CL08-1124

FRANCIS D. SMOLKA,
BRIAN W. TANNER,
and
COUNTY OF HENRICO,
Defendants.

COMPLAINT

Comes now Lawrence W. Trull and for his complaint against Francis D. Smolka, ("Smolka"), and Brian W. Tanner, ("Tanner"), jointly and severally, in their individual and official capacities and the County of Henrico and in support thereof states as follows:

- 1) This is a complaint for money damages against Smolka and Tanner for violations of plaintiff's constitutional and common law rights together with a request for declaratory judgment and injunctive relief. The County of Henrico is joined as a defendant on the constitutional claims seeking liability for failure to adequately train and supervise.
- 2) Plaintiff alleges that defendants acting under color of state law, violated state rights and certain rights guaranteed under the United States Constitution by wrongfully and without just cause and without probable cause conducted a warrantless search of the most sacred and private part of his home, the bathroom in violation of the Fourth, Fifth and Fourteenth Amendment of the United States Constitution and Article I Sections 10 and 11 of the Virginia Constitution, wrongfully depriving him of due process and his right to privacy and the sanctity of his home.

JURISDICTION

- 3) This action is brought pursuant to the general powers of the Circuit Court and pursuant to the concurrent jurisdiction under 42 U.S.C. § 1983 and § 1988 and the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I Sections 10 and 11 of the Virginia Constitution.

PARTIES

- 4) Plaintiff, Lawrence W. Trull, ("Trull"), is and was at all times relevant herein a citizen of the United States and a resident of Virginia.
- 5) Defendant Francis D. Smolka ("Smolka") was at all times relevant herein a duly appointed and acting police officer for the County of Henrico, Virginia.
- 6) Defendant Brian W. Tanner, ("Tanner") was at all times relevant herein a duly appointed and acting police officer for the County of Henrico, Virginia.
- 7) The County of Henrico is a defendant in count 4.
- 8) At all times mentioned herein, defendants Smolka and Tanner acted under color of law, to-wit, under the color of the statutes, ordinances, regulations, policies, customs and usages of the State of Virginia, and/or the County of Henrico, Virginia, albeit in violation or contrary to such law.

FACTS

May 13, 2006 Incident

- 9) On or about May 13, 2006, Trull, in his wheelchair, had retreated from his wife into the peace, privacy and sanctity of the bathroom at 5403 Ridgedale Drive in the County of Henrico, following an argument related to their marriage.

- 10) Trull's wife, Mary Ellen Picchi, called the police in an effort to gain an advantage in the marital dispute.
- 11) Smolka and Tanner arrived and determined that no assault or domestic violence had occurred and that Trull had retreated into the peace, privacy and sanctity of the bathroom.
- 12) Smolka and Tanner announced that they were present and that they were police officers with the County of Henrico and ordered Trull to come out of the bathroom, stating they would not talk through the door and that if Trull did not open the door they were "coming in."
- 13) Trull responded that he was in a wheel chair and that the door could not be opened without moving the wheel chair, and indicated that he preferred to remain in the peace, privacy and sanctity of his bathroom.
- 14) Notwithstanding, Smolka and Tanner used force to bust open the bathroom door upon Trull in his wheelchair, knocking Trull and his wheelchair violently across the bathroom and causing Trull so much shock and fright that he urinated upon himself and causing him to experience high blood pressure, shortness of breath and tightness in his chest.
- 15) Smolka and Tanner then screamed at Trull alternating directives to "put your hands up" and "move" which required Trull who was bound by his wheel chair to drop his hands to move the wheels of the wheel chair.
- 16) Thereafter Smolka and Tanner required Trull, against his will, to exit his home and to be transported by ambulance to the hospital where he was examined for his heart after which Trull checked out of the hospital but feared to return to his home.

- 17) No crime had been committed by Trull, let alone a misdemeanor by Trull in the presence of the officers.
- 18) Trull had a Constitutional right to his to security and privacy free from police interference.
- 19) Smolka and Tanner, who were in uniform with firearms, unreasonably detained Trull restricting his freedom and motion and made it clear to Trull that he was not free to remain in his home and forced him to leave in the ambulance, notwithstanding that the Emergency Medical Technicians (EMTs) had opined that the tightness in Trull's chest was related to anxiety rather than to any threat of heart attack.
- 20) Trull suffered the loss of his freedom and his privacy as a result of the action of Smolka and Tanner.
- 21) Trull suffered financial loss as a direct result of the actions of the defendants, including but not limited to the charges associated with the ambulance, the hospital emergency room.
- 22) Defendants Smolka, Tanner and the other unnamed officers acting in concert with Smolka, by words, acts and/or threats which Trull feared to disregard, illegally restrained Trull of his physical liberty without legal excuse therefore.
- 23) Such conduct by defendants constituted an illegal restraint, or false imprisonment of Trull's physical liberty without sufficient legal excuse.
- 24) The restraint was in fact illegal and without legal excuse.
- 25) Defendants Smolka and Tanner had no legal right to restrain the freedom of movement of Trull in connection with his argument with his wife or his desire to retreat to the peace, privacy and sanctity of the bathroom.

- 26) The imprisonment and punishment of Trull resulted in an infringement and curtailment of Trull's freedom, mental pain and suffering, humiliation, embarrassment, insult, shame, mortification, indignity to his feelings and the like, all to his damage in excess of \$100,000.00.
- 27) Defendants Smolka and Tanner's acts were done in reckless or callous disregard of, or indifference to, the rights of Trull.
- 28) The direct and proximate result of defendants' acts is that plaintiff suffered severe injuries, severe anxiety, and emotional injury and was forced to endure mental pain and suffering, indignity, humiliation, embarrassment, insult, shame, mortification, indignity to his feelings and the like, and to legal expenses, medical expense and other costs, and that he was deprived of his constitutional rights and physical liberty.
- 29) Although requests for "any and all policies and procedures regarding domestic calls", have been made, the County of Henrico has refused to disclose such claiming that they are exempt from the Freedom of Information Act under Va. Code § 2.2-3706(D) as "investigative techniques or procedures"
- 30) Upon information and belief, the County of Henrico has adopted a policy of removing one marriage partner any or most of the time that they respond to a call involving domestic discord and further that the policy and practice is more often than not to remove the man rather than the woman.

**COUNT 1
FALSE IMPRISONMENT**

- 31) Plaintiff, realleges paragraphs 1 - 30 as though fully set forth herein.

32) In Virginia, the tort of false imprisonment requires "the direct restraint by one person of the physical liberty of another without adequate legal justification." Jordan v. Shands, 255 Va. 492, 500 S.E.2d 215, 218 (1998). "False imprisonment is restraint of one's liberty without any sufficient cause therefor." Zayre of Va., Inc. v. Gowdy, 207 Va. 47, 147 S.E.2d 710, 713 (1966); Samuel v. Rose's Stores, 907 F. Supp. 159 (E.D. Va. 1995). The person need not be confined in a jail or placed in custody. Id.; Kress v. Musgrove, 153 Va. 348, 149 S.E. 453, 455 (Va. 1929). "The plaintiff makes out a case for compensatory damages when he shows that he has been illegally detained without lawful process." Montgomery Ward & Co. v. Wickline, 188 Va. 485, 50 S.E.2d 387, 389 (Va. 1948). It is enough that the person be placed in reasonable apprehension that unless she willingly submits, force will be used. Zayre, 147 S.E.2d at 713. If he does so submit to the extent that he is denied freedom of action, this restraint constitutes false imprisonment. Id.; Montgomery Ward & Co. v. Freeman, 199 F.2d 720, 723 (4th Cir. 1952); W. T. Grant Co. v. Owens, 149 Va. 906, 141 S.E. 860, 865 (1928) ("any restraint by fear or force upon the action of another is unlawful, and constitutes false imprisonment unless a showing of justification makes it a true or legal imprisonment"). "It is not necessary to show malice, ill will or the slightest wrongful intention, and neither the good faith of a defendant nor that of his employee will defeat plaintiff's right to recover." Montgomery Ward & Co. v. Wickline, 188 Va. 485, 50 S.E.2d 387, 388 (1948).

33) Defendants Smolka and Tanner's falsely imprisoned Trull.

34) Defendants Smolka and Tanner acted intentionally restricting Trull's freedom of movement without legal right.

35) Defendants Smolka and Tanner intentionally used force, words and acts which Trull was afraid to ignore and to which he reasonably believed he must submit restraining his freedom of movement.

**COUNT 2
ASSAULT AND BATTERY**

36) Plaintiff, realleges paragraphs 1 - 30 as though fully set forth herein.

37) An assault is any threatening act that puts another person in reasonable fear of bodily injury. Bourne v. Richardson, 133 Va. 441, 113 S.E.893 (1922). A battery is a touching, however slight, of another person in a rude, insulting or angry way without legal excuse. Crosswhite v. Barnes, 139 Va. 471, 124 S.E.242 (1924). Pike v. Eubank, 197 Va. 692, 90 S.E.2d 821 (1956). "When the arrest is lawful, an officer is not liable for assault and battery by effecting that arrest." DeChene v. Smallwood, 226 Va. 475, 481, 311 S.E.2d 749, 752, cert denied, 469 U.S. (1984).

38). Without legal excuse, defendants Smolka and Tanner intentionally and without the desire or permission of Trull touched him without justification, excuse or consent which constituted a battery

39) Without a warrant for arrest, without a search warrant, and without any provocation by Trull the force used by Smolka and Tanner was not reasonable nor lawful.

**COUNT 3
TRESPASS**

40) Plaintiff, realleges paragraphs 1 - 30 as though fully set forth herein.

- 41) Defendants Smolka and Tanner intentionally entered the premises and specifically the bathroom of and occupied by Trull without any right, lawful authority or an express or implied invitation.
- 42) Defendants Smolka and Tanner acted with intentional disregard for the rights of Trull and thus intentionally trespassed.
- 43) Defendants Smolka and Tanner are liable to Trull for intentional trespass.

**COUNT 4
DECLARATORY JUDGMNET THAT THE DEFENDANTS' CONDUCT
VIOLATES THE VIRGINIA CONSTITUTION**

- 44) Plaintiff, realleges paragraphs 1 - 30 as though fully set forth herein.

**A. ARTICLE 1 SECTION 11
DUE PROCESS-PROHIBITED**

- 45) The deprivation of liberty without due process of law violated Virginia Constitution Article 1 Section 11.
- 46) Article I, Section 11 provides in part, "That no person shall be deprived of ... liberty...without due process of law...."
- 47) Defendants violated Trull's rights under Virginia Constitution Article 1 Section 11.

**B. ARTICLE I SECTION 10 VIOLATION
UNLAWFUL SEARCH**

- 48) The entrance into and the search of the bathroom by defendants violated the rights of Trull under Virginia Constitution Article I Section 10.
- 49) Virginia Constitution Article I Section 10, provides in part, "That ... to seize any person or persons not named, or whose offense is not particularly described and

supported by evidence, are grievous and oppressive, and ought not to be granted..”

COUNT 5
FOURTH, FIFTH AND FOURTEENTH AMENDMENT VIOLATIONS

50) Plaintiff realleges paragraphs 1 - 30 as though fully set forth herein.

51) The Fourth Amendment of the United States Constitution provides:

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

USCS Const. Amend. 4

52) The law is clearly established that “use of force is contrary to the Fourth Amendment if it is excessive under objective standards of reasonableness.” Saucier v. Katz, 533 U.S. 194, 202 (U.S. 2001)

53) Defendants Smolka and Tanner’s use of force to bust open the bathroom door was excessive and not reasonable.

54) Defendants Smolka and Tanner were not faced with a circumstance requiring a “split-second judgment” or one in which the circumstances are “tense, uncertain and rapidly evolving” but instead they were faced with a situation where there had been some marital discord and one of the marriage partners had sought the peace, sanctity and privacy of the bathroom.

55) The facts and circumstances within Smolka and Tanner’s knowledge did not rise to the level that would warrant a prudent man in believing “a crime had been committed.”

56) Smolka and Tanner did not have probable cause to search the bathroom or arrest Trull.

57) There was no special need to enter the bathroom.

58) The law is clearly established that apart from limited exceptions a search without a warrant is unlawful.

59) The law is clearly established that apart from limited exceptions, no arrest or detention without a warrant and/or probable cause is unlawful.

60) Under the circumstances facing defendants Smolka and Tanner on May 13, 2006, where there was no domestic violence, Trull was content to remain in the peace, sanctity and privacy of the bathroom, and defendants without any warrant or probable cause and certainly no misdemeanor committed in the officer's presence, it would be clear to a reasonable officer that the officer's conduct, as described herein, was unlawful in the situation he confronted.

61) Smolka and Tanner violated "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982)

62) The law was firmly established that without the consent of Trull, Smolka and Tanner could not search the bathroom without a warrant. Georgia v. Randolph, 547 U.S. 103, 122-123 (March 22, 2006).

63) Warrantless searches are per se unreasonable, subject to a few well-defined exceptions none of which were applicable to officers Smolka and Tanner. Abell v. Commonwealth, 221 Va. 607, 612 (1980) citing Cady v. Dombrowski, 413 U.S. 433, 439 (1973).

- 64) The restraint of Trull's freedom without a warrant or probable cause was unlawful.
- 65) [T]he claim of liberty protected by the Fifth Amendment is at its strongest when government seeks to detain an individual.
- 66) Detaining Trull without due process of law and without probable cause was a violation of these rights by defendants Smolka and Tanner.
- 67) The County of Henrico is liable under § 1983 where it's failure to train it's officers mere marital discord does not authorize a warrantless search nor authorizes the officers to require a spouse to vacate his home, let alone the bathroom, which amounts to deliberate indifference to the constitutional rights of persons with whom the police come into contact, under the rule of Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694, that a city is not liable under § 1983 unless a municipal "policy" or "custom" is the moving force behind the constitutional violation.
- 68) The failure to train reflects a "deliberate" or "conscious" choice by Henrico County.
- 69) The program is not adequate to the tasks the particular officers must perform, and as such represent "county policy."
- 70) The failure to train is closely related to the ultimate injury to Trull, and caused the police officers' indifference to the peace, sanctity and privacy of Trull in his bathroom.

WHEREFORE, plaintiff requests this Court:

- a) With respect to each count 1, 2, 3 and 5 plaintiff demands judgment, jointly and severally against the defendants Smolka and Tanner, seeking

an award of compensatory damages of \$100,000 and punitive damages in such amount as the jury deems appropriate.

- b) With respect to count 5 plaintiff demands judgment against the County of Henrico, seeking an award of compensatory damages of \$100,000 and punitive damages in such amount as the jury deems appropriate.
- c) With respect to count 4, plaintiff demands a declaratory judgment that the actions of the defendants Smolka and Tanner violated the Virginia Constitution.
- d) With respect to count 5, plaintiff demands his attorneys fees.
- e) With respect to counts 1-5, plaintiff demands costs and such other and further relief as this court deems appropriate.

TRIAL BY JURY IS DEMANDED ON ALL ISSUES TRIABLE BY A JURY.

LAWRENCE W. TRULL

By: 

Counsel

Thomas H. Roberts, Esq.
VSB #26014
Counsel for Trull
Thomas H. Roberts & Associates, P.C.
105 South 1st Street
Richmond, VA 23219
T (804) 783-2000
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thr@robertslaw.org



EVE-URSTB

Received

JUL 01 2008

Henrico County Police
Records Unit

Henrico Circuit Court
Civil Division
4301 Parham Road
Richmond, VA 23228
804-501-4546

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Virginia:
In the Henrico Circuit Court

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Service on: FRANCIS D. SMOLKA
NO SERVICE ADDRESS

Attorney: THOMAS H. ROBERTS
105 SOUTH 1ST STREET
RICHMOND, VA 23219
804/783-2000

Instructions:

Returns shall be made hereon, showing service of Summons issued Monday, May 12, 2008 with a copy of the Complaint filed Friday, May 09, 2008 attached.

Date issued : Monday, May 12, 2008

For Sheriff Use Only

[Faint rectangular stamp or box with illegible text and a handwritten signature below it.]



Henrico Circuit Court
Civil Division
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804-501-4546

Summons

To: FRANCIS D. SMOLKA
NO SERVICE ADDRESS

Case number: 087CL08001124-00

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Done in the name of the Commonwealth of Virginia on, Monday, May 12, 2008.

Clerk of Court: Yvonne G. Smith

By: Jennifer Watts
(Clerk/Deputy Clerk)

Instructions:

Attorney's name: THOMAS H. ROBERTS
105 SOUTH 1ST STREET
RICHMOND, VA 23219
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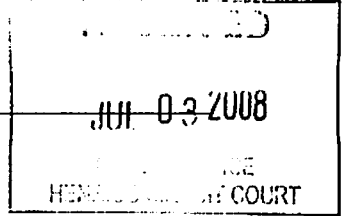
RECEIVED
MAY 12 2008
CLERK OF COURT
HENRICO CIRCUIT COURT
RS

AFFIDAVIT OF SERVICE

Va. Code 8.01-293, 8.01-320, 8.01-325
54.1-2505(18) and 54.1-2506

NAME OF PERSON TO BE SERVED: County of Henrico, Joseph Rapisarda

SERVE AT: County Attorney
4301 E. Parham Road
Richmond, VA 23228



COURT: Henrico County Circuit Court

CASE # - CL08-1124

STYLE - Lawrence W. Trull vs. Francis D. Smolka, Brian W. Tanner and County of Henrico

SERVICE OF:

- | | | | |
|-------------------------------------|---------------------------------|--------------------------|--|
| <input checked="" type="checkbox"/> | Complaint and Summons | <input type="checkbox"/> | Motion |
| <input type="checkbox"/> | Notice of Hearing | <input type="checkbox"/> | Order |
| <input type="checkbox"/> | Motion and Brief in Support | <input type="checkbox"/> | Subpoena for Witness (Attorney Issued) |
| <input type="checkbox"/> | Petition, Complaint and Summons | <input type="checkbox"/> | Notice to Pay or Vacate |
| | | <input type="checkbox"/> | Subpoena for Documents (Attorney Issued) |

DATE SERVED: 7-1-08 **TIME SERVED:** 1:00 PM

PERSONAL SERVICE

BEING UNABLE TO MAKE PERSONAL SERVICE A COPY WAS DELIVERED IN THE FOLLOWING MANNER:

DELIVERED TO PERSON FOUND IN CHARGE OF USUAL PLACE OF BUSINESS OR EMPLOYMENT DURING BUSINESS HOURS AND GIVING INFORMATION OF ITS PURPORT.

John Knight

DELIVERED TO FAMILY MEMBER (NOT TEMPORARY SOJOURNER OR GUEST, AGE 16 OR OLDER AT USUAL PLACE OF ABODE OF PARTY NAMED ABOVE AFTER GIVING INFORMATION OF ITS PURPORT.

POSTED ON FRONT DOOR OF SUCH OTHER DOOR AS APPEARS TO BE THE MAIN ENTRANCE OF USUAL PLACE OF ABODE, ADDRESS LISTED ABOVE. (OTHER AUTHORIZED RECIPIENT NOT FOUND).

SERVED ON SECRETARY OF THE COMMONWEALTH:
ACCEPTED BY _____ OF SERVICE DEPARTMENT.

NOT FOUND _____

DATE		TIME		SERVICE ATTEMPTS	
DATE	TIME	DATE	TIME	DATE	TIME
_____	_____	_____	_____	_____	_____
_____	_____	_____	_____	_____	_____



I, THE UNDERSIGNED: Andrew Dick DO HEREBY CERTIFY THAT I AM OVER THE AGE OF EIGHTEEN YEARS AND I AM NOT A PARTY TO OR OTHERWISE INTERESTED IN THE SUBJECT MATTER IN CONTROVERSY.

Signature of Server: [Signature] DATE: 7-1, 2008

COMMONWEALTH OF VIRGINIA
CITY/COUNTY OF Richmond

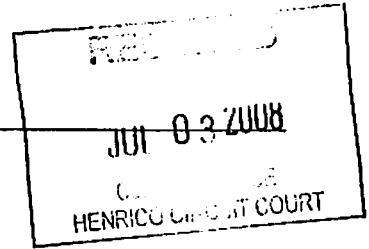
SWORN TO AND SUBSCRIBED BEFORE ME, IN MY PRESENCE THIS 1st DAY OF July, 2008.

A VIRGINIA NOTARY PUBLIC:

Jacqueline O. Waldron
Notary Public # 295415

January 31 2012
My Commission Expires

AFFIDAVIT OF SERVICE
Va. Code 8.01-293, 8.01-320, 8.01-325
54.1-2505(18) and 54.1-2506



NAME OF PERSON TO BE SERVED: Brian W. Tanner

SERVE AT: Henrico County Police Dept.
7721 E. Parham Road
Richmond, VA 23294
T 804.501.5000

COURT: Henrico County Circuit Court **CASE # -** CL08-1124

STYLE - Lawrence W. Trull vs. Francis D. Smolka, Brian W. Tanner and County of Henrico

SERVICE OF:

- | | | | |
|-------------------------------------|---------------------------------|--------------------------|--|
| <input checked="" type="checkbox"/> | Complaint and Summons | <input type="checkbox"/> | Motion |
| <input type="checkbox"/> | Notice of Hearing | <input type="checkbox"/> | Order |
| <input type="checkbox"/> | Motion and Brief in Support | <input type="checkbox"/> | Subpoena for Witness (Attorney Issued) |
| <input type="checkbox"/> | Petition, Complaint and Summons | <input type="checkbox"/> | Notice to Pay or Vacate |
| | | <input type="checkbox"/> | Subpoena for Documents (Attorney Issued) |

DATE SERVED: 7-1-08 **TIME SERVED:** 1:40 PM

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Legh Coward

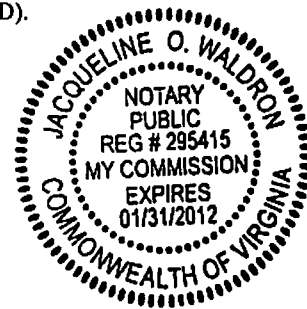
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SERVED ON SECRETARY OF THE COMMONWEALTH:
ACCEPTED BY _____ OF SERVICE DEPARTMENT.

NOT FOUND _____

DATE	TIME	SERVICE ATTEMPTS	DATE	TIME
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____



I, THE UNDERSIGNED: Andrew Dick DO HEREBY CERTIFY THAT I AM OVER THE AGE OF EIGHTEEN YEARS AND I AM NOT A PARTY TO OR OTHERWISE INTERESTED IN THE SUBJECT MATTER IN CONTROVERSY.

Signature of Server: *Andrew Dick* DATE: 7-1, 2008

COMMONWEALTH OF VIRGINIA

CITY/COUNTY OF Richmond

SWORN TO AND SUBSCRIBED BEFORE ME, IN MY PRESENCE THIS 1st DAY OF July, 2008.

A VIRGINIA NOTARY PUBLIC:

Jacqueline O. Waldron
Notary Public # 295415

January 31 2012
My Commission Expires