

# PITTSBURGH LEGAL JOURNAL

## OPINIONS

### ALLEGHENY COUNTY COURT OF COMMON PLEAS

**Pennsylvania Liquor Control Board v. A4 Place, Inc.**, Horgos, J. ....Page 353  
*Renewal of Liquor License—Liquor Control Board Objections—Violations of Liquor Code—Incidents of Disturbances*

**Kim Smith v. George M. Dayieb, Jr., et al.**, O'Reilly, J. ....Page 355  
*Unjust Enrichment—Elements of Contract—Statute of Frauds*

**Rita Helen Ference, for herself and all others similarly situated v. Advisa Mortgage Corporation, et al.**, Horgos, J. ....Page 358  
*Class Action Certification—Requirements of Commonality*

**Sharon E. Freeman-Whitted, Administratrix of the Estate of Elizabeth Freeman, deceased v. Beverly Enterprises-Pennsylvania, Inc. et al.**, Wettick, J. ....Page 360  
*Scope of Power of Attorney—Arbitration Agreement—Punitive Damages Under Medical Care Availability and Reduction of Error Act (40 P.S. §1303.505)*

**Commonwealth of Pennsylvania v. David Patrick Thompson**, O'Toole, J. ....Page 362  
*Claimed Insufficiency of Evidence—Expert Testimony—Ineffective Assistance of Counsel*

**Commonwealth of Pennsylvania v. Jumaul Williams**, McDaniel, A.J. ....Page 364  
*Post Conviction Relief Act Petition—Waiver of Claims—Discontinuance of Direct Appeal—Ineffectiveness of Counsel*

**Commonwealth of Pennsylvania v. Leon Parham**, Reilly, S.J. ....Page 366  
*Sentencing—Illegal Sentence—Merger of Offenses*

**Commonwealth of Pennsylvania v. Todd R. Allshouse**, McDaniel, A.J. ....Page 367  
*Probation Revocation Hearing—Hearsay*

**Commonwealth of Pennsylvania v. Tommie Lee Stribling, a/k/a Tommie Lee Stribing**, Todd, J. ....Page 368  
*Carrying a Firearm Without a License—Possessing a Firearm After Having Been Adjudicated a Delinquent—Investigatory Stop—Terry Frisk*

# PLJ

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## OPINIONS

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## Pennsylvania Liquor Control Board v. A4 Place, Inc.

*Renewal of Liquor License—Liquor Control Board  
Objections—Violations of Liquor Code—Incidents of  
Disturbances*

In a de novo hearing, the Court heard evidence and found that the approximately three (3) incidents of disturbance alleged to have occurred at or adjacent to the licensed establishment during Licensee's ownership clearly did not show a pattern or history of criminal activity warranting non-renewal, nor did they demonstrate an abuse of the privilege of holding a liquor license.

*(Lynn E. MacBeth)*

*Michael Plank* for Pennsylvania Liquor Control Board.  
*Charles L. Caputo* for the Licensee.

No. SA08-117. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Horgos, J., July 15, 2008—AND NOW, this 15th day of July, 2008, the Court adopts Petitioner's Proposed Findings of Fact and Conclusions of Law.

#### FINDINGS OF FACT

1. Petitioner, A4 Place, Inc. (Licensee or Petitioner), is a Pennsylvania corporation and holder of Pennsylvania Restaurant Liquor License No. R-14458, which is issued for premises located at 107 Nelbon Avenue, Pittsburgh, PA 15235. (Board Administrative Hearing, Notes of Transcript (N.T.), p. 5; Exhibit (Ex.) B-3).

2. Petitioner timely filed an application for renewal of Restaurant Liquor License No. R-14458 for the licensing period beginning June 1, 2007 and ending May 31, 2009. (N.T. p. 5; Ex. B-3).

3. By letter dated May 18, 2007, Respondent's Bureau of Licensing (Licensing) advised Petitioner that it objected to the renewal of Petitioner's liquor license. (N.T. p. 5; Ex. B-2).

4. On November 2, 2007, Licensing sent Petitioner an Amended Objection Letter and Notice of Hearing indicating that a hearing would be held in Pittsburgh, Pennsylvania on November 14, 2007 for the purpose of receiving evidence on the following objections:

(a) Violations of the Liquor Code relative to Citation Number 06-0110;

(b) The improper conduct of your licensed establishment as there have been approximately three (3) incidents of disturbances at or immediately adjacent to your licensed establishment during the time period June 2005 to present reported to the Penn Hills Police Department. This activity includes but is not limited to after hours, assault and a murder. (Bd. Ex. 1).

5. An administrative hearing was held in front of Board Examiner Matthew Crosliis on November 14, 2007. (N.T. pp. 1-65).

6. By Adjudication and Order of the Administrative Law Judge (ALJ) dated August 11, 2006 regarding Citation No. 06-0110, Licensee was charged with two counts of violating §499(a) of the Liquor Code [47 P.S. §4-499(a)], in that on November 19 and December 18, 2005, the Licensee failed to require patrons to vacate the part of the premises habitually used for service of alcoholic beverages not later than one-half (1/2) hour after the required time for the cessation of the service of alcoholic beverages. The Licensee executed a

Statement of Admission, Waiver and Authorization, in which it admitted to the violation. The ALJ ordered Licensee to pay a fine of \$400.00. (Ex. B-4).

7. Phillip Pusateri has worked for the Penn Hills Police Department for twenty-nine and a half years. He is currently the records coordinator for the department and was used to introduce Exhibits B-5 and B-6. (N.T. p. 6).

8. Exhibits B-5 and B-6 were admitted into evidence by the Board's Hearing Examiner over the objections of Licensee's counsel. (N.T. p. 13).

9. Exhibit B-5 is a copy of Penn Hills Police Department, Incident Investigation Report 0500013070, which alleges that on November 19, 2005, bar manager Nasib Aboud and two (2) males were seated at the bar drinking after hours while two (2) female employees were cleaning. Mr. Aboud claimed to be unaware that he could not have his employees on the licensed premises after hours. (N.T. p. 54; Ex. B-5).

10. The November 19, 2005 incident described in Exhibit B-5 is the same incident which resulted in the Pennsylvania State Police, Bureau of Liquor Control Enforcement issuing Citation No. 06-0110 against the Licensee. (N.T. p. 48).

11. Exhibit B-6 is a copy of Penn Hills Police Department, Incident Investigation Report Number 0600009661, which alleges that on May 21, 2006, a female was observed entering Licensee's premises after hours. There were twelve (12) cars in the parking lot. Officer Long of the Penn Hills Police Department entered the premises and accused Petitioner of being open after hours. Petitioner insisted that the Sergeant come to the premises. When the Sergeant arrived at the premises, he agreed with Mr. Aboud that it was not after hours and the officers left the premises without further incident. (N.T. pp. 55-56, Ex. B-6).

12. Neither the department nor the Bureau of Liquor Control Enforcement took further action in regards to Investigation Report Number 0600009661. (N.T. p. 56).

13. There are several other licensed establishments in Penn Hills and the Penn Hills Police Department receives incident reports of problems at these other establishments. Officer Pusateri could not say for sure if there had been reports of people being served after hours at other establishments, but he has seen reports of shootings, fights, and disorderly patrons at other bars in Penn Hills. (N.T. pp. 18-19).

14. Officer Pusateri reviews several hundred reports a week. The department handles about 21,000 calls per year. He was only asked to testify about two incidents relating to the Licensee's establishment. (N.T. p. 19).

15. Joseph Blaze has been a detective for the Penn Hills Police Department for about two years and has worked for the department for sixteen years, and is familiar with the Licensee's business. (N.T. p. 22).

16. Detective Blaze testified that A4 Place is on Nelbon Avenue, which is a smaller street connecting Frankstown Road and Beulah, which are major arteries in Penn Hills. The surrounding area is commercial with several businesses. A4 Place is on the tail end of a five-point intersection, the intersection in Penn Hills with the most traffic lights. (N.T. p. 22).

17. There are four or five other licensed establishments within a few blocks of the A4 Place. (N.T. p. 47).

18. On December 29, 2005, Detective Blaze went to A4 Place in response to a call for two gunshot victims inside the bar. While en route, the call was updated to four people having been shot. (N.T. p. 24).

19. Upon arrival, the detective observed blood and shell casings on the ground in the paved area directly in front of the bar entrance. He entered the bar where there were patrol officers already on the scene. Two gunshot victims were being treated inside the bar by officers and assisted by some bar patrons. (N.T. p. 24).

20. Detective Blaze recovered a firearm from Darnell Toliver, the bouncer of A4 Place, at which time he placed Mr. Toliver in the back of a marked police unit. (N.T. p. 24-25).

21. Detective Blaze's investigation resulted in Darnell Toliver being charged with criminal homicide charges. (N.T. p. 32). Detective Blaze believes Mr. Toliver was found guilty of one count of involuntary manslaughter and two or three counts of aggravated assault. (N.T. p. 42).

22. Detective Blaze later received information from a Detective Bonner that the other two gunshot victims were in the parking lot of the GetGo station across the street from the A4 Place. (N.T. p. 28).

23. According to Detective Blaze, shootings in Penn Hills occur far too frequently. There are also assaults and other violent crimes that occur in Penn Hills. (N.T. p. 39).

24. The Licensee and its employees cooperated with Detective Blaze on the night of the shooting incident. (N.T. p. 40).

25. Nasib Aboud is the Board approved manager of A4 Place and is on the premises at least nine hours per day. (N.T. p. 54).

26. On December 29, 2005, Mr. Aboud arrived at the bar about 7:30 p.m. after having gone home for dinner. He saw a man sitting and drinking at the bar who had been banned from the establishment three to four weeks earlier for fighting. (N.T. p. 57).

27. Mr. Aboud approached him and reminded him he had been banned. The man said it was his birthday and asked if he could finish his drink then leave. Mr. Aboud said he would allow one drink and then the man would have to leave. The man did not leave after he finished his drink. (N.T. p. 57).

28. Mr. Aboud again approached the man and asked him to leave. When the man refused to leave after he was asked a second time, Mr. Aboud asked the bouncer to assist him in removing the banned patron from the premises. (N.T. p. 58).

29. While Mr. Aboud and Mr. Toliver were escorting the banned patron from the bar, three males walked out with the banned patron. Two other males were outside waiting and as soon as they reached the door, one man punched Mr. Aboud on the left side of his face. Mr. Aboud thinks he lost consciousness, but he recalled hearing the gunshots. (N.T. p. 58).

30. Mr. Aboud sustained a fractured jaw, a fractured ribbone and a plate put in the left side of his head as a result of the attack. (N.T. p. 59).

31. The banned patron got in the bar because he came before the security staff got there and while Mr. Aboud was at home. (N.T. p. 59).

32. Mr. Aboud did not instruct his bouncer to shoot anyone or to display a weapon. Mr. Aboud did not know the bouncer carried a gun. In fact, he had told him he could not carry a weapon. The security guard involved in the incident no longer works for A4 Place. (N.T. pp. 60, 64).

33. Mr. Aboud filed aggravated assault charges against the person who struck him. The charges are still pending. (N.T. p. 60).

34. On the night of the shooting incident, Mr. Aboud was carrying a firearm, but he did not display or discharge it. His current security officers carry firearms. (N.T. p. 62).

35. According to all accounts and the evidence, the incident occurred outside of the main entrance door in a very small sidewalk area of about six feet. (N.T. p. 34).

36. Marian Aboud, wife of Mr. Aboud, is the sole owner of A4 Place since February 2005. (N.T. p. 45).

37. The Abouds purchased the building in which the bar is located in 2003. The building is divided into two businesses, A4 Place and A4 Automotive. Mr. Aboud has also been the manager of A4 Automotive since 2003. (N.T. p. 45).

38. The car business is open from 9:00 a.m. until 5:00 p.m. Mr. Aboud is usually there in the mornings from 9:00 a.m. until noon. Then he goes to see his wife who gets supplies for

the bar. Mr. Aboud is at the bar from 3:00 p.m. until 6:00 p.m. He leaves and comes back about 7:30-8:00 and stays until closing at 2:00 a.m. (N.T. p. 62).

39. When they first purchased the building, the Abouds leased the bar/restaurant portion to a tenant who operated the Toves Tap Inn. The Abouds had trouble with the tenant not paying rent and having incidents in the bar where the police were called. The tenant did not maintain the property in an appropriate manner. The Abouds did not renew his lease and the tenant was eventually evicted for back rent and the lease expiring in February 2005. (N.T. pp. 45-47).

40. In July 2005, after six months of renovating the restaurant portion of the building, the Abouds opened A4 Place. The Abouds rebuilt the kitchen, the ceilings, added new carpet and floors. Ms. Aboud personally recovered all the seats in the bar. They put in new set-in barstools. (N.T. p. 47).

41. Ms. Aboud has taken substantial steps to reduce the frequency of incidents occurring at or around A4 Place since taking over the establishment in 2005, including:

(a) Setting the age limit at 25 to keep the younger troublemakers out. No one under 25 can get in the bar. (N.T. p. 49).

(b) Everyone is required to show ID at the bar. If a person does not have ID, he or she is not allowed in the bar, even if appearing over 21. (N.T. p. 50).

(c) Instituting a strict dress code for patrons, which prohibits gang colors, hoodies, caps and loose clothing. (N.T. p. 50).

(d) Everyone entering the bar, male or female, is either patted down, security wands are used on them, or both. (N.T. p. 50).

(e) Sunday through Wednesday there are two security guards at the door. Thursday through Saturday there are three to four at the door. (N.T. p. 50).

(f) Cameras were installed to view the inside of the bar. The outside area does not have cameras, but is well lit. (N.T. p. 51).

(g) Since the shooting incident, all the security people have law-enforcement backgrounds. One is an ex-state trooper. The second one has an Act 235 badge. The third one is currently a Pittsburgh police officer. (N.T. p. 60).

(h) Mr. Aboud keeps a written list of persons who are banned from the bar and the staff gets a copy of the list on weekly basis. (N.T. p. 62).

42. In addition to owning A4 Place, Ms. Aboud also works full-time from home for the *Journal of Economic Literature*. The Abouds have two children and she takes care of them and the household. (N.T. p. 46).

43. Ms. Aboud is not on the premises on a regular basis. She gets supplies, runs errands, does the banking and the paperwork for the business and supports her husband in his job, but Mr. Aboud handles the day-to-day business operations. (N.T. p. 51).

44. The bar operates from 3:00 p.m. until 2:00 a.m. every night, but alcohol is not served after 1:30 a.m. (N.T. p. 52)<sup>1</sup>.

45. Mr. Aboud has asked the Chief of the Penn Hills Police Department to assist him and to allow off-duty officers to work his security, but the Chief told him they were not allowed to do that. Mr. Aboud asked numerous times for the police to drive by to make sure everything is fine, which they do from time to time. (N.T. p. 60).

46. The day before the Court hearing in this matter, rep-

representatives of the local Nuisance Bar Task Force met with the Abouds to discuss removing A4 Place from the nuisance bar list. (Testimony at de novo hearing).

47. Several recommendations for improved operations were made to the Abouds with no specific timeline on when such changes are to be implemented. The Abouds intend on complying with several of the recommendations made during that meeting. (Testimony at de novo hearing).

48. The Board's Hearing Examiner Matthew Croslic, fact finder at the Board's administrative hearing, recommended a decision in favor of renewal of the liquor license. (Recommended Opinion, page 13).

49. There have not been any new incidents of disturbance at Petitioner's premises since the date of the Board's administrative hearing. (Testimony at de novo hearing).

#### CONCLUSIONS OF LAW

1. The Board has authority under Section 470 of the Liquor Code to consider violations by licensees of the laws of the Commonwealth, compliance by licensees with regulations of the Board and the conduct of their licensed establishment to determine if there is an abuse of the licensing privilege and whether they are eligible for renewal of their liquor license.

2. When an appeal is taken from a decision of the Pennsylvania Liquor Control Board, under Section 464 of the Liquor Code, the trial court hears the matter de novo and is to issue its own findings and conclusions based upon the established record. *Two Sophia's, Inc. v. PLCB*, 799 A.2d 917, 919 (Pa.Cmwlt. Ct. 2002). Based upon that record, the trial court may sustain, alter, modify or amend the Board's action even if it does not find materially different facts. *U.S.A. Deli, Inc. v. PLCB*, 909 A.2d 24, 26-27 (Pa.Cmwlt. Ct. 2006).

3. In appeals arising under Section 464 of the Liquor Code, the trial court may make its own findings and reach its own conclusions based upon those findings even when the evidence it hears is substantially the same as the evidence presented to the Board. *PLCB v. Richard E. Craft American Legion Home Corp.*, 718 A.2d 276, 278 (Pa. 1998).

4. The approximately three (3) incidents of disturbance alleged to have occurred at or adjacent to the licensed establishment during Licensee's ownership clearly do not show a pattern or history of criminal activity warranting non-renewal, nor do they demonstrate an abuse of the privilege of holding a liquor license.

5. The Citation History of the Licensee is not an abuse of the privilege of holding a liquor license.

6. Licensee has taken substantial affirmative steps to address the activity occurring on or about the premises. There have been no further incidents at this establishment.

7. After due consideration of evidence offered in this matter, Licensee has not abused the privilege of holding a liquor license and, therefore, Licensee's restaurant liquor license should be renewed.

#### ORDER OF COURT

AND NOW, this 15th day of July, 2008, following a hearing on June 27, 2008, it is ORDERED, ADJUDGED and DECREED that the Order of the Pennsylvania Liquor Control Board dated January 29, 2008 is reversed and that Petitioner's Restaurant Liquor License No. R-14558 shall be renewed.

BY THE COURT:  
/s/Horgos, J.

<sup>1</sup> These were the normal hours of operation of the establishment at the time of the administrative hearing. Approximately two weeks prior to the Court hearing,

Licensee changed its operating hours to 7:00 p.m. until 2:00 a.m.; however, Licensee intends to return to an earlier opening time by the end of the Summer. (Testimony at de novo hearing).

### Kim Smith v. George M. Dayieb, Jr., et al.

*Unjust Enrichment—Elements of Contract—Statute of Frauds*

1. Claim of unjust enrichment has three elements: (a) benefit conferred on a party, (b) appreciation of the benefit by the party, and (c) acceptance and retention of the benefit under such circumstances that would render it inequitable for the party to retain the benefit without payment.

2. Credible testimony supported the finding that no benefit was received by Plaintiff; in fact, the real estate was damaged by Defendant's actions.

3. Where Defendant offered no expert testimony as to the value conferred on the real estate by his actions, he cannot show a benefit.

4. Contract terms must be sufficiently definite in order for contract to be valid.

5. Statute of Fraud precludes specific performance on a contract involving real estate unless the contract terms are sufficiently identified and described in writing.

6. Description of real estate in this purported contract was indefinite, full of handwritten modifications, and otherwise insufficiently definite to be valid.

(Margaret P. Joy)

David S. Klett for Plaintiff.

John P. Donovan and Thomas J. Campbell for Defendants.

No. GD 02-24743. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

#### MEMORANDUM ORDER

##### I. Introduction

O'Reilly, J., May 22, 2008—This equity case involves causes of action related to a purported real estate sales agreement.

Plaintiff, Kim Smith ("Smith") on or about September 18, 2002, signed a document entitled Realty Sales Agreement as did Defendant, George M. Dayieb, Jr. ("Dayieb") involving certain real estate in the Borough of Bethel Park, Allegheny County owned by Smith. I have ruled that this document does not constitute a contract for the sale of real estate due to its lack of specificity of the land to be sold. I granted Partial Summary Judgment to Smith on that issue on January 8, 2008.

Smith initially sued Dayieb in an eight (8) count Complaint as follows:

COUNT I – TRESPASS TO LAND – QUARE  
CLAUSUM FREGIT;

COUNT II – CONVERSION OF TIMBER

COUNT III – NUISANCE/DEFIANT TRESPASS

COUNT IV – PRELIMINARY INJUNCTION

COUNT V – ASSAULT

COUNT VI – INTENTIONAL INFLICTION OF  
EMOTIONAL DISTRESS/NEGLIGENT INFLIC-  
TION OF EMOTIONAL DISTRESS

COUNT VII – BREACH OF CONTRACT

COUNT VIII – RESCISSION

This suit was filed at Docket No. GD02-24743. Dayieb responded by filing his own lawsuit at Docket No. 03-718 seeking specific performance of the above Realty Sales Agreement. Dayieb also sought, and in the alternative, reimbursement for what he claims was unjust enrichment for work performed on the site. I consolidated the above two cases, and ordered that the Dayieb complaint be considered a Counterclaim.

I had conducted a Pre-Trial Conciliation on December 28, 2007 for this case, which was listed for trial on January 24, 2008. At that conciliation, I assisted the parties to come to a settlement of all the claims being made by Smith against Dayieb. A Stipulation to that effect was entered on January 10, 2008. That, therefore, left *only* the unjust enrichment claim to be decided when the case was called for trial.

At that trial on January 24, 2008, Dayieb claimed unjust enrichment by Smith in the amount of \$21,354 attributable to certain landscaping and timber removal done by him on the site plus refund of the \$10,000 hand money.

Smith denied any amounts were due from her, and that Dayieb's valuation of the claimed unjust enrichment was contrary to law.

## II. FACTS

At the outset, and in view of my GRANTING Partial Summary Judgment, I directed the parties to characterize the document signed by them as a "purported contract." It was received as Dayieb's Exhibit "A." It had been signed on September 18, 2002, and originally contemplated a sales price of \$50,000 for 5 acres. However, on the document the words "5 acres" are crossed out, and "4 acres" has been written in. It also called for hand money of \$10,000 to be paid at the time of signing. (N.T. p. 68). The document at line 5(E) also referred to "a subdivision of the entire 10.5983 acre tract to be developed of which 5 acres are to be granted to Dayieb." Attached to this "purported contract" is an Exhibit which bears the legend "Agreed upon configuration of subdivision" and is a handdrawn sketch of a "subdivision." That drawing is attached hereto. Also, at the bottom of the first page of the document is the handwritten notation "Seller to have access to rear of property at anytime."

While the document called for the hand money to be paid on September 18, 2002, in fact it was not paid until well into October. Dayieb gave Smith 4 checks to hold, being 2 in September, dated the 18th and 26th, and 2 in October, dated the 5th and 15th, with instructions to deposit, as the money would be in his account. (N.T. pp. 21, 67) (Exhibit "B"). Notwithstanding the delay in payments of the handmoney, Dayieb almost immediately entered on the property, and began to cut trees, remove debris, and move earth. Smith testified *none* of these acts by Dayieb were with her permission, and it was well beyond her understanding of the access contemplated in the "purported sales" agreement.

Dayieb offered testimony from a landscaper he had hired, one, Patrick Tolan, who acknowledged his bill, although his recall was less than perfect as to when he did what he did. He testified, however, that he was finished on the site on October 7, 2002, at which time Dayieb paid him the balance due on his total balance of \$21,395. He also testified that he had received cash payments from Dayieb as the job progressed because Dayieb kept asking him to do more and more work. (N.T. p. 55). There was also a dispute as to

whether Smith gave permission to Dayieb to enter on the land and do this work. (N.T. p. 62). Smith asserted the work was done without her consent, or even knowledge, and was done before she had received all of the handmoney. (N.T. p. 67). She also said that when she saw Dayieb doing this work on the property she asked him to stop. (N.T. p. 64). While acknowledging that she had given Dayieb permission to use a machete to cut some vegetation so "...he could get a lay of the land," she did not expect such wholesale excavation. (N.T. p. 72). Dayieb also testified that he had brought a large bulldozer on the site to grade and move earth, and that he, himself, had expended 300 hours on this site. (N.T. p. 27).

Dayieb did not offer any expert testimony as to the value conferred on Smith's property by the tree cutting and earth moving, and offered the tree cutters bill as the only measure of damage. Smith's counsel argued that such is not the proper measure, and, *a fortiori* Dayieb's claim for the tree cutting must fail. It is acknowledged that Smith did ultimately receive \$10,000 hand money from Dayieb.

## III. ANALYSIS

After analysis, I credit Smith when she says she never gave Dayieb permission to perform the extensive work on her property that he did. Further, she, as owner of the property, does not believe that the work done conveyed any value to her, and at best the property is a little easier for her horse back riding. She complained, however, that the aggressive and wide ranging action of Dayieb has denuded her property, taken away privacy and the grading was inept so as to inhibit runoff and cause water accumulation.

Smith's counsel has correctly cited the rule that expert testimony was necessary for Dayieb to prove the value of the service, if any, conferred on this land. Dayieb has failed to do that, and his claim must fail. See, *Sevast v. Kakouras*, 915 A.2d 1147 (Pa. 2007).

Both counsel have forwarded me a review of the case law on unjust enrichment, and the recital of the 3 elements therein, as set forth in *Northeast Fence & Iron Works, Inc. v. Murphy Quigley Co., Inc.*, 933 A.2d 664 (Pa.Super. 2007), to-wit:

1. benefits conferred on defendant by plaintiff;
2. appreciation of such benefits by defendant; and
3. acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.

As I noted earlier, Smith testified credibly that her land was damaged by Dayieb's unauthorized acts. (N.T. pp. 62, 64, 67 & 72). Indeed, that which he claims as the "benefit" to Smith was the basis of her causes of action in trespass to land—*quare clausum fregit*; conversion of timber; and nuisance/defiant trespass. Dayieb settled these claims. How can he claim them to be a "benefit?" Moreover, since Dayieb was unable to offer any expert testimony as to any value conferred on the property, there is no "benefit" or "appreciation." The mere fact of cutting trees and removing brush on property valued by Smith for it sylvan setting does not, in itself, confer a "benefit." Further, Smith does not consider it a "benefit" and claims her recreational use of the property has been limited. Finally, she hardly accepted Dayieb's efforts and kept trying to get him to leave the land. Accordingly, I do not find the necessary elements for unjust enrichment. The evidence clearly reveals that there was no "benefit," no "appreciation," nor any "acceptance" by Smith, and as such, she has not been "unjustly enriched" by Dayieb's acts. Because I found no contract to exist, it is only fair that Smith refund the hand money.

#### IV. OPINION ON THE PARTIAL SUMMARY JUDGMENT

As noted, I found that the “purported contract” was not specific enough to be a contract and GRANTED Partial Summary Judgment in favor of Smith. In all likelihood there will be an appeal of this case, both as to my verdict on the unjust enrichment claim as well as on Summary Judgment. Thus, I here set forth my reasoning as to why I believe the “purported contract” is NOT a contract.

Initially, for a contract to be valid and binding, it must contain all of the essential elements, which are: that both parties must have manifested an intent to be bound by the terms of the agreement; the terms must be *sufficiently definite*; and that consideration exists. If all three of these elements exist, the agreement shall be considered valid and binding. *Burkett v. Allstate Insurance Co.*, 534 A.2d 819 (Pa.Super. 1987), *vacated on other grounds*, 552 A.2d 1036 (Pa. 1988). Furthermore, the Statute of Frauds precludes specific performance *unless* the terms of the agreement are *sufficiently set forth* and the property to be conveyed is *sufficiently identified and described in writing*. See, *Pierro v. Pierro*, 264 A.2d 692 (Pa. 1970).

I do not believe that the real estate involved herein is sufficiently described so as meet the essential terms of an agreement. First, the document, on page 1, line 2 has a pen and ink modification to change 5 acres to 4 acres. Yet at item 5(E) there is a typed-in legend that reads:

“subject to a fully approved and recorded subdivision of the full 10.5983 acres in which 5 of those acres are to be granted to buyer.” [Emphasis supplied].

Below the above typed in language is a further handwritten notation “Seller to have access to rear of property @ (sic) anytime” with the initials of Dayieb and Smith.

Appended to the document is what appears to be a hand made drawing with the notation. “Agreed upon configuration of subdivision” and bears the signatures of Dayieb and Smith.

Dayieb argues that the document as it exists is indeed a contract because the description therein “is specific enough for a surveyor to locate it.” *Felty v. Calhoun*, 21 A. 19 (Pa. 1891). That case, involved a dispute over the description of a rectangular piece of property to front on a public street for four hundred feet, and then extend at a right angle from where the 400 ft. frontage met the line of one Jacob Drew; then back a sufficient distance to make 2 acres. The Supreme Court, in a pithy opinion, said any surveyor could run the line along Drew’s line and achieves 2 acres with mathematical certainty, and do it in an hour. This is quite obvious since an acre is 43,560 square feet. Two of them equal 87,120, and divided by 400 equals 217.8 feet, the distance along the Drews line necessary to make up 2 acres. Indeed, that case was so plain as to not require elaboration.

Here, no surveyor, without additional oral instructions, could plot out the property to be conveyed. The first problem, of course, is whether it’s to be 4 acres or 5 acres, given the conflict between items 2 and 5E on the document.

Apparently, Dayieb’s desire was to buy the rear portion of Smith’s land. He apparently drew the exhibit to the “purported contract” by using Smith’s Deed whereby she originally acquired the property from Leeta A. Schuster, widow, June 12, 1996, by Deed dated June 12, 1996, and of record at Deed Book Volume 971, Page 409. Looking at the Deed discloses an irregular shaped tract with 12 separate calls, and in the Deed, the land is characterized as 11.369 acres, another conflict with the “purported contract.”

The attachment contains no North indication, so I’ve used up, down, right, left and over to attempt to make sense out of it and with reference to Smith’s Deed. One using that attachment could not reach the specificity required for a contract

to exist. My analysis is as follows:

(1) The first call is off of Maple Spring Road, going up the left side of Smith’s line, a distance of 717.63 feet, which is extracted from her Deed, and which ends at a corner. The balance of the description is unintelligible.

(2) The second call is to proceed to the right from the above corner along a dotted line, but we do not know how far along that dotted line or the bearing for that line (90°, 85°, ??); that dotted line then ends at a point;

(3) The dotted line then turns down, but again we have no angle or distance for that second dotted line;

(4) The dotted line then ends at a point which is 125 feet from a slightly slanted solid line not otherwise described;

(5) Thence from that point right proceeding to the right by another dotted line (again no angle shown) a distance of 200 feet to a point (not otherwise described);

(6) Thence up by a slanted dotted line to a point on a solid line (again no distance or angle);

(7) Thence to the right along said solid line 166.90 feet to a point; and

(8) Thence by another solid line which runs down 500.33 feet

Giving Dayieb the benefit of the doubt, the intersection of the 1.66.90 line with the 500.33 line is probably the end of the “subdivision.” We do not know, however, the balance of the property still contained within this subdivision, whether it is 4 or 5 acres, and which parcel is to be conveyed to Dayieb.

Continuing to give Dayieb the benefit of the doubt, it is possible that the solid lines shown are one of the twelve (12) calls from Smith’s Deed. If so, they still cannot give substance to the dotted lines. Further, while I’ve given Dayieb the benefit the doubt, in a dispute for specific performance of the sale of real estate, from an equitable standpoint such benefits should run to Smith, not Dayieb.

The “subdivision” also does not account for Smith’s “access to the rear of the property @ anytime.” Is this to be specifically located or is to be a general right of access? Is it in perpetuity, or does it end with the closing of the sale?

None of these questions or the unidentified lines and points are susceptible to the simple mathematical equation, which solved the problem in *Felty*.

Accordingly, I am satisfied that my GRANTING Partial Summary Judgment was appropriate. It is also abundantly clear that either 4 or 5 acres in Bethel Park one of the affluent bedroom communities of Pittsburgh, for a price of \$50,000, is woefully inadequate and certainly accounts for Dayieb’s aggressive tactics in trying to secure the property by going on it, without permission and engaging in the extensive work claimed.

#### V. RECAPITULATION

To recapitulate my ruling, I enter a Verdict for Dayieb and against Smith for \$10,000.00, and AFFIRM my GRANT of Partial Summary Judgment on the specific performance claim in favor of Smith.

BY THE COURT:  
/s/O’Reilly, J.

Date: May 22, 2008

**Rita Helen Ference, for herself and  
all others similarly situated v.  
Advisa Mortgage Corporation, et al.**

*Class Action Certification—Requirements of Commonality*

Case will not be certified as a class action where there is no evidence to identify a class of persons other than Plaintiff's belief.

(Lynn E. MacBeth)

Steven Larchuk and Stanley D. Ference for Plaintiffs.  
Advisa Mortgage Corporation, *pro se*.

No. GD 05-011299. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION**

Horgos, J., June 17, 2008—Plaintiff, Rita Helen Ference, filed a Complaint in civil action as a class action against Defendants, Advisa Mortgage Corporation (Advisa) and John Does 1-100, seeking damages and injunctive relief for alleged violations of the Telephone Consumer Protection Act, 47 U.S.C. Section 227 (TCPA). The representative Plaintiff avers that Advisa sent at least four (4) unsolicited advertisements to her telephone facsimile (fax) machine without her express invitation or permission. Plaintiff further alleges that the John Doe Defendants are unknown financial institutions who have used a fax machine, computer or other device to send at least one unsolicited advertisement to telephone fax machines. Plaintiff states that the John Doe Defendants will be identified in an Amended Complaint to be filed after discovery.

Plaintiff filed a Notice of Service of the Complaint on June 17, 2005 indicating that service upon Adam Hafford, President and CEO of Advisa, had been accomplished on May 25, 2005. (Motion for Certification of Class Action and Entry of Default Judgment Against Defendant Advisa Mortgage Corporation, hereinafter Motion for Certification, Exhibit B). Advisa failed to timely file a responsive pleading to the Complaint.

On August 22, 2005, Plaintiff filed a Motion for Certification of Class Action and Entry of Default Judgment Against Defendant Advisa Mortgage Corporation. On September 16, 2005, Advisa filed an Answer to the Complaint *pro se* and on November 29, 2005 Advisa, through counsel, filed a Motion for Leave to File Amended Answer. On February 7, 2006, Defendant filed a Brief in Opposition to the Motion for Class Certification. Oral argument on the Motion for Class Certification and Motion for Leave to File Amended Answer was heard before this Court on February 14, 2006 and July 13, 2006.

Counsel for Advisa argued that service of the Complaint had not been effectuated on Advisa but failed to offer any evidence whatsoever in support of his argument. The record in this case shows that service was properly and timely made. In the absence of any evidence contrary to the face of the record, this Court did not grant Advisa's request to amend its Answer. (Certification Hearing Transcript, 7/13/06, pp. 8-9).

Pa. R.C.P. 1715(a) provides:

Except by special order of the court, no judgment by default or on the pleadings or by summary judgment may be entered in favor of or against the class until the court has certified or refused to certify the action as a class action. Pa. R.C.P. 1715(a).

A default judgment entered before the court certifies or refuses to certify a class binds only the named parties. The

Court, therefore, will initially address the issue of class certification. Because Defendant failed to file a responsive pleading within twenty (20) days after service of the Complaint as provided in Pa. R.C.P. 1026(a), the Court shall deem the averments of fact set forth in the Complaint admitted.

Plaintiff seeks certification of a class "which consists of every person or entity to whom Defendant Advisa sent a telephone facsimile transmission advertising the commercial availability or quality of property, goods, or services offered by Defendant without evidence of the recipients' prior express invitation or permission...." (Motion for Certification, paragraph 3).

At the class certification hearing, the party seeking certification has the burden of proof to show that the prerequisites set forth in Pa. R.C.P. 1702 have been met. Pa. R.C.P. 1702, Prerequisites to a Class Action, requires that the moving party establish that:

1. the class is so numerous that joinder of all parties is impracticable;
2. there are questions of law or fact common to the class;
3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;
4. the representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709; and
5. a class action provides a fair and efficient method for adjudication of the controversy under the criteria set forth in Rule 1708. Pennsylvania Rules of Civil Procedure 1702.

The Plaintiff need not present separate and distinct facts in support of each of the requirements of Rule 1702:

Because the requirements for class certification are closely interrelated and overlapping the class proponent need not prove separate facts supporting each, rather, her burden is to sufficiently establish those underlying facts from which the Court can make the necessary conclusions and discretionary determinations. (Citations omitted.)

*Janicik v. Prudential Insurance Co. of America*, 305 Pa.Super. 120, 451 A.2d 451, 454-455 (1982).

The Court must initially determine whether Plaintiff has met her burden in establishing that, under the allegations of the Complaint and the definition of the class set forth therein, the class is so numerous that joinder of all members is impracticable. Pa. R.C.P. 1702(1). The representative Plaintiff need not plead or prove the exact number of class members, but she must be able to define the class with some precision and provide the court with sufficient indicia that more members exist than it would be practicable to join. *Id.*, 451 A.2d at 456. Plaintiff must at least present evidence which, together with reasonable inferences, would warrant a conclusion that the class is sufficiently numerous. *Id.*

Here, the representative Plaintiff specifically recites her receipt of four (4) unsolicited fax advertisements from Advisa. (Complaint, paragraph 5). In her Complaint, Plaintiff avers the following regarding the number and identity of class members:

8. The Representative Plaintiff reasonably believes that, for a period of time before and after the Unsolicited Fax was sent to the Representative Plaintiff, Defendants sent unsolicited faxes, including duplicates of the Unsolicited Fax (collectively

referred to as the "Unsolicited Faxes"), to numerous others in the United States of America, without their prior express invitation or permission. (Complaint, paragraph 8).

9. Based upon the technology available to Defendants and the nature and content of the Unsolicited Fax, the Representative Plaintiff reasonably avers that each unsolicited fax sent by Defendants was sent to at least 2,000 others in the United States of America, without their prior express invitation or permission.

(Complaint, paragraph 9).

Plaintiff further avers:

13. Based upon the technology available to Defendants, the extent and scope of their business operations, and the nature and content of the Unsolicited Fax, the Representative Plaintiff avers that the class of persons receiving the Unsolicited Faxes is so numerous as to make it impractical to bring all members before the Court. The exact number of similarly situated persons is presently unknown to the Representative Plaintiff but may be obtained from the records in the possession, custody or control of Defendants and/or their telecommunications vendors and agents.

(Complaint, paragraph 13).

In her Motion for Class Certification, Plaintiff repeats her recital of her own receipt of four (4) faxes. (Motion for Class Certification, paragraphs 4, 10). She also again sets forth her belief that Advisa sent unsolicited fax advertisements to at least 2,000 others in the United States without their express permission or invitation. (Motion for Class Certification, paragraph 4). Plaintiff further states that the class is so numerous that joinder of all members of the class is impracticable. (Motion for Class Certification, paragraph 11). Plaintiff describes the class:

While the class is numerous, it is finite, and the Plaintiff believes Defendant maintains, has knowledge of, or access to extensive records relating to each class member, including but not limited to each class member's phone number, facsimile number, name and address. Because the class can be ascertained though such information regarding the recipients, determining the size of the class does not impede the ability of the court or the parties to manage the action, and therefore class action remains the most effective method of resolving this controversy.

(Motion for Class Certification, paragraph 15).

Plaintiff did not file a Brief in Support of her Motion for Class Certification and, more importantly, did not introduce any testimony or other evidence regarding the identity or number of class members at the class certification hearing.

While there is no threshold number which must be met under Pa. R.C.P. 1702(1), Plaintiff's burden of proof requires more than mere conjecture and conclusory allegations. *Janicik v. Prudential Insurance Co. of America, supra.*, 451 A.2d at 455. As the Court stated in *Janicik*, "the class representative need not plead or prove the number of class members so long as she is able to define the class with some precision and affords the court with sufficient indicia that more members exist than it would be practicable to join." *Id.*, 451 A.2d at 456.

Here, there are no facts averred from which the Court may make reasonable inferences. The only fact alleged is that Plaintiff received four (4) unsolicited fax transmissions from Advisa. Plaintiff then reaches the conclusion that based upon the technology available to the Defendants, the extent and scope of their business operations and the content of the unsolicited fax, that the class of persons is so numerous as to make it impracticable to bring all members before the court. The receipt of four (4) unsolicited faxes by one individual and the technology available to Advisa and the Doe Defendants do not necessarily support a reasonable inference that Defendants willfully or knowingly violated the TCPA by sending faxes to 2,000 recipients. There are no facts alleged that permit this Court to conclude that Plaintiff can identify a class of persons who: (1) received the fax; (2) that the fax was unsolicited; and (3) that the Plaintiff received the fax on a telephone facsimile machine. These elements must be shown to state a cause of action under the TCPA, 47 U.S.C. Section 227(b)(1)(C).

In the final analysis, the Court has insufficient facts before it in Plaintiff's Complaint and Motion for Class Certification as well as a lack of testimony at the hearing on certification from which it can draw the necessary conclusions and discretionary determinations regarding numerosity. Although the averments of fact in Plaintiff's pleadings are deemed admitted, the Court finds insufficient facts set forth by Plaintiff to identify class members. As the Pennsylvania Superior Court has noted: "[W]here the class definition is so poorly established that the court cannot even discern who the potential class members are, the numerosity criterion has not been met." *Weismer v. Beech-Nut Nutrition Corporation*, 419 Pa.Super. 403, 615 A.2d 428 (1992). Here, the Court cannot discern who the potential class members may be.

Each of the five elements set forth in Pa. R.C.P. 1702 must be present in order to certify an action as a class action. Plaintiff has failed to satisfy the numerosity requirement and the inquiry may therefore end. Moreover, the failure to identify the members of the class with any precision at all precludes an examination of the requirements of commonality and typicality. It is impossible to determine common issues of law and fact when the identity of the class members is vague. Further, defenses, such as an established business relationship or that consent to the fax transmissions was given by class members, may well be raised by the John Doe Defendants. The Court cannot effectively examine the requirements of commonality under these circumstances.

For the foregoing reasons, an Order of Court will be entered denying class certification and denying the Motion for Default Judgment as to the class.

#### ORDER OF COURT

AND NOW, this 17th day of June, 2008, for the reasons set forth in the Opinion of this same date, it is ORDERED, ADJUDGED and DECREED that Plaintiff's Motion for Class Certification and Plaintiff's Motion for Entry of Default Judgment Against Advisa Mortgage Corporation in favor of the Plaintiff class members are denied.

IT IS FURTHER ORDERED that judgment is entered for the individual Plaintiff, Rita Helen Ference, and against Advisa Mortgage Corporation on the issue of liability for violation of the Telephone Consumer Protection Act, 47 U.S.C. Section 227. The case is transferred to the Arbitration Division of the Court of Common Pleas of Allegheny County, Pennsylvania for a determination of damages in favor of Plaintiff.

BY THE COURT:  
/s/Horgos, J.

**Sharon E. Freeman-Whitted,  
Administratrix of the Estate of  
Elizabeth Freeman, deceased v.  
Beverly Enterprises-Pennsylvania, Inc. et al.**

*Scope of Power of Attorney—Arbitration Agreement—Punitive Damages Under Medical Care Availability and Reduction of Error Act (40 P.S. §1303.505)*

1. Attorney-in-fact for decedent signed an Arbitration Agreement upon the principal's admission to a health care facility. The Arbitration Agreement was not a precondition of admission to the facility.

2. 20 Pa. C.S. §5602(a), which is tracked in the Power of Attorney in question, authorizes the attorney-in-fact to authorize admission to a medical facility and to execute any forms required by the facility for admission.

3. Where the Arbitration Agreement was not required for the principal's admission, the power of attorney did not authorize the attorney-in-fact to execute it.

4. Since the attorney-in-fact was not authorized to agree to arbitration, the Arbitration Agreement will not be enforced.

5. Under the Medical Care Availability and Reduction of Error Act (40 P.S. §1303.505, punitive damages are permitted only in cases involving willful or wanton conduct or reckless indifference to the rights of others.

6. Since complaint alleges only failure to provide appropriate treatment and to hire appropriate trained staff, the allegations do not support a claim for punitive damages.

(Margaret P. Joy)

Michael T. Collis for Plaintiff.

John G. Walls for Defendant.

No. GD 06-015111. In the Court of Common Pleas of Allegheny County, Pennsylvania, Civil Division.

**OPINION AND ORDER OF COURT**

Wettick, J., June 25, 2008—This is a wrongful death and survival action based on injuries that Elizabeth Freeman allegedly suffered while a resident at defendants' nursing facility. Defendants have filed preliminary objections to plaintiff's complaint which are the subject of this Opinion and Order of Court. The primary issue which these preliminary objections raise is whether the holder of a power of attorney which empowers the holder to authorize the principal's admission to a medical, nursing, residential, or similar facility and to enter into agreements for the principal's care has the power to execute, on behalf of the principal, an Arbitration Agreement that is not a precondition to admission or to the furnishing of services to the principal.

I.

The issue described in the prior paragraph is raised through defendants' preliminary objection raising an agreement for alternative dispute resolution.

On January 27, 2004, Andrew Owens, Ms. Freeman's son, signed on behalf of Ms. Freeman an Admission Agreement signature page as "agent acting under general POA."<sup>1</sup> On the same date, he signed a Resident and Facility Arbitration Agreement under which both the resident and the facility agreed to arbitrate any claims arising out of or in connection with any service or health care provided by the facility to the

resident, including "fraud or misrepresentation, negligence, gross negligence, malpractice, or claims based on any departure from accepted medical or health care or safety standards." Brief in Support of Preliminary Objections, Ex. C at 1. The Arbitration Agreement provided in bold type:

THE PARTIES UNDERSTAND AND AGREE THAT THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES, AND THAT BY ENTERING INTO THIS ARBITRATION AGREEMENT, THE PARTIES ARE GIVING UP AND WAIVING THEIR CONSTITUTIONAL RIGHT TO HAVE ANY CLAIM DECIDED IN A COURT OF LAW BEFORE A JUDGE AND A JURY, AS WELL AS ANY APPEAL FROM A DECISION OR AWARD OF DAMAGES. Brief in Support of Preliminary Objections, Ex. C at 2.

The Arbitration Agreement also stated "(NOT A CONDITION OF ADMISSION)" (page 1) and "that execution of this Arbitration Agreement is not a precondition to admission or to the furnishing of services to the Resident by the Facility" (page 2).

Defendants' contention that Mr. Owens had the power to sign the Arbitration Agreement on behalf of Ms. Freeman is based on paragraph 2 of subsection 2.3 of the power of attorney related to health care which grants the power "To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care." See Defendants' Reply Brief at 15.

The powers that may be lawfully delegated are set forth in 20 Pa.C.S. §5602(a) (relating to form of power of attorney). Paragraph 2 of the power of attorney upon which defendants rely tracks the language of 20 P.S. §5602(a)(8) which permits a principal to empower an agent: "To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care."

The powers specified in §5602(a) are defined in §5603 relating to implementation of power of attorney. Subsection 5603(h) governs the power to authorize admission to a medical facility and the power to authorize medical procedures. It provides that the power to authorize admission to a medical facility and to enter into agreements for the principal's care "shall mean that the agent may apply for the admission of the principal to a medical, nursing, residential or other similar facility, execute any consent or admission forms required by such facility which are consistent with this paragraph and enter into agreements for the care of the principal by such facility or elsewhere during his lifetime or for such lesser period of time as the agent may designate, including the retention of nurses for the principal." (Emphasis added.)

The provision of the power of attorney upon which defendants rely did not authorize Mr. Owens to execute the Arbitration Agreement waiving Ms. Freeman's right to litigate her claims through court proceedings. While Mr. Owens was authorized to authorize Ms. Freeman's admission, the separately executed Arbitration Agreement did not involve Ms. Freeman's admission. Her admission was governed by a separate Resident Admissions Agreement form. Because of the provisions in the Arbitration Agreement that execution of this Agreement is not a precondition to admission or to the furnishing of services to the resident, the provision in the power of attorney authorizing Mr. Owens to enter into agreements for Ms. Freeman's care did not authorize Mr. Owens to execute the Arbitration Agreement.

I reach the same result when I look to §5603(h) which defines the power conferred in §5602(a)(8). Subsection (h) authorizes the agent to sign any consent or admission forms

“required” by the facility. This provision does not authorize an agent to execute an Arbitration Agreement that is not required to be executed as a condition of admission.<sup>3</sup>

Subsection (h) authorizes an agent to enter into agreements for the care of the principal. An agreement to arbitrate disputes between the resident and the nursing home, which is not required for the furnishing of services, does not involve the care of the principal.<sup>4</sup>

Because Ms. Freeman’s power of attorney did not authorize Mr. Owens to execute the Arbitration Agreement, I am overruling defendants’ preliminary objection raising an agreement for alternate dispute resolution.

## II.

I next consider defendants’ remaining preliminary objections.

I am sustaining defendants’ preliminary objections seeking dismissal of plaintiff’s claims for punitive damages. The Medical Care Availability and Reduction of Error Act permits the award of punitive damages under the following circumstances: Punitive damages may be awarded for “conduct that is the result of the health care provider’s willful or wanton conduct or reckless indifference to the rights of others.... A showing of gross negligence is insufficient to support an award of punitive damages.” 40 P.S. §1303.505(a) and (b). The Act includes nursing homes within the definition of health care provider. 40 P.S. §1303.503.

The acts of negligence set forth in the complaint describe only failures to provide appropriate treatment. The complaint does not describe injuries resulting from an almost complete failure to provide treatment and care. Also, general allegations of a failure to hire appropriately trained staff does not support a punitive damage claim because these allegations are not related to a showing of a reckless indifference to Ms. Freeman’s needs.

I am overruling defendants’ preliminary objection which contends that the conduct described in paragraph 82 (with the exception of 82(d)) does not support a corporate negligence claim. In *Welsh v. Bulger*, 698 A.2d 581, 585 (Pa. 1997) (citations omitted), the Pennsylvania Supreme Court described *corporate negligence* as follows:

...[C]orporate negligence is based on the negligent acts of the institution. A cause of action for corporate negligence arises from the policies, actions or inaction of the institution itself rather than the specific acts of individual hospital employees. Thus, under this theory, a corporation is held directly liable, as opposed to vicariously liable, for its own negligent acts.

The allegations in paragraph 82 of plaintiff’s complaint describe deficiencies in policies, actions, or inactions of the institution.

### ORDER OF COURT

On this 25th day of June, 2008, it is ORDERED that plaintiff’s punitive damage claims are stricken, and defendants’ preliminary objections are otherwise overruled.

BY THE COURT:  
/s/Wettick, J.

<sup>1</sup> The power of attorney which Ms. Freeman executed is attached to this Opinion as Attachment 1.

<sup>3</sup> While Ms. Freeman was competent at the time Mr. Owens signed the Arbitration Agreement, defendants are not contending that Ms. Freeman directed Mr. Owens to sign the Arbitration Agreement or that Mr. Owens ever advised Ms. Freeman that he had signed an Arbitration Agreement. See

Defendants’ Reply Brief at 16.

<sup>4</sup> This litigation does not involve a health care power of attorney governed by the Health Care Agents and Representatives Act (20 Pa.C.S. §§5451-5465). Under 20 Pa.C.S. §5456(a), a health care agent has the authority “to make any health care decision and to exercise any right and power regarding the principal’s care, custody and health care treatment that the principal could have made and exercised.”

### ATTACHMENT 1

#### POWER OF ATTORNEY

##### Article I. Declarations

1.1 This durable power shall take effect upon its execution unless some other date is specified.

1.2 I, ELIZABETH FREEMAN, currently living at B.H.C. MONROEVILLE, 4142 MONROEVILLE BLVD., MONROEVILLE appoint ANDREW OWENS, SON as my Attorney-in-Fact with full power to carry out those acts specified in Article II in accordance with any limitations imposed herein. This power of attorney shall not be affected by my subsequent disability or incapacity. IF ABOVE IS UNABLE TO FULFILL ROLE OF POA. HIS WIFE, FLORENCE OWENS, IS APPOINTED TO ACT IN HIS STEAD.

##### Article II. Powers Granted

2.1 As to any assets, real or personal, standing in my name, held for my benefit or acquired for my benefit, I confer the following powers upon my attorney-in-fact

1. As to any commercial, checking, savings, savings and loan, money market, Treasury bills, mutual fund accounts, safe deposit boxes, in my name or opened for my benefit—to open, withdraw, deposit into, close, and to negotiate, endorse, or transfer any instrument affecting those accounts.
2. As to any promissory note receivable, secured or unsecured, or any accounts receivable—to collect on, compromise, endorse, borrow against, hypothecate, release and reconvey that note and any related deed of trust.
3. As to any shares of stock, bonds, or any documents or instruments defined as securities under law—to open accounts with stock brokers (on cash or on margin), buy, sell, endorse, transfer, hypothecate and borrow against.
4. As to any real property, to collect rents, disburse funds, keep in repair, hire professional property managers, lease to tenants, negotiate and renegotiate leases, borrow against, renew any loan, sign any documents required for any such transaction, and to sell, subject to confirmation of court, any of the real property.
5. To hire and pay from my funds for counsel and services of professional advisors, physicians, dentists, accountants, attorneys and investment counselors.
6. As to my income taxes and other taxes—to sign my name, hire preparers and advisors and pay for their services from my fund, and to do whatever is necessary to protect my assets from assessments as though I did those acts myself.
7. To apply for and receive government and insurance benefits, to prosecute and to defend legal actions, to pursue claim and litigation, to arrange

for transportation and travel, and to partition community property to create separate property for me.

8. — (Note: copy is illegible) — Code, when my best interests or — (copy is illegible) — pursue tax matters to the end, to hire and to pay for legal and financial — (copy is illegible) — that decision as to whether to file that disclaimer.

9. To manage tangible personal property, including but not limited to, moving storing, selling, donating, or otherwise disposing of said property.

10. To make gifts or limited gifts conforming to gift patterns made in earlier years, provided that due care is given to my future needs in the event of incapacity or disability.

11. To create one or more trusts for my benefit and to contribute to such trusts and receive income and/or principal from such trust in accordance with the trust terms, and to engage in banking and financial transactions.

12. To claim an elective share of the estate of my deceased spouse.

13. To renounce fiduciary positions.

14. To engage in insurance and retirement plan transactions.

2.3 As to decisions related to my health care, I hereby grant the following powers to my attorney-in-fact within the limitations specified in paragraph 2.4:

1. To authorize or withhold authorization for medical and surgical procedures.

2. To authorize my admission to a medical, nursing, residential or similar facility and to enter into agreements for my care.

3. To arrange for my discharge, transfer from, or change in type of care provided.

4. To arrange and pay for consultation, diagnosis or assessment as may be required for proper care and treatment.

5. To authorize participation in medical, nursing and special research, consistent with limitations specified in paragraph 2.4 and such ethical guidelines as may appropriately govern such research.

Elizabeth Freeman Jan 7th, 2002

Louise S. Cunliffe Teresa Borst  
425 Filmore Rd 122-B Watson Drive  
Pgh., Pa 15221 Turtle Creek, Pa 15145

**EXHIBIT B**

4 9-19-07

Andrew Owens

**Commonwealth of Pennsylvania v.  
David Patrick Thompson**

*Claimed Insufficiency of Evidence—Expert Testimony—  
Ineffective Assistance of Counsel*

1. Where jury believed that Defendant used excessive and unnecessary force in defending himself, evidence was sufficient to support conviction.

2. Court will not disturb jury's credibility determinations in support of verdict.

3. Testimony of medical examiner was within his area of expertise and therefore was properly admitted.

4. Defendant's counsel's failure to introduce evidence of a 9 year-old adjudication of aggravated assault, and his failure to retain an expert to rebut the testimony of the medical examiner do not constitute ineffectiveness of counsel.

(Margaret P. Joy)

Michael W. Streily for the Commonwealth.

Ken Snarey for Defendant.

No. CC No. 200514116. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

**OPINION**

O'Toole, J., May 22, 2008—The Defendant, David Patrick Thompson, was charged with Criminal Homicide, 18 Pa.C.S.A. §2501, Robbery, 18 Pa.C.S.A. §3701, Violation of the Uniform Firearms Act: Person not to Possess a Firearm, 18 Pa.C.S.A. §6105, and Violation of the Uniform Firearms Act: Carrying a Firearm without a License, 18 Pa.C.S.A. §6106. At the conclusion of a jury trial on July 13, 2007, the jury found the Defendant guilty of Voluntary Manslaughter and Carrying a Firearm without a License. The Court found the Defendant guilty of Person not to Possess a Firearm in a stipulated non-jury trial.

On September 13, 2007, the Defendant was sentenced to serve a period of incarceration of not less than one hundred and ten (110) months nor more than three hundred (300) months.

A Post-Sentence Motion and an Amended Post-Sentence Motion were filed on behalf of the Defendant. An evidentiary hearing was held on February 19, 2008 with regard to the claims of ineffective assistance of trial counsel. The Motions were denied on the same date.

This appeal follows.

The facts of this case can briefly be summarized as follows:

According to the testimony of Tracy Smith, he transported the victim, Brian Harvin, via automobile to Pittsburgh from Fayette County on August 24, 2006 for the purpose of purchasing heroin. During the trip, Mr. Harvin received several telephone calls. Ronald Holmes, with whom the victim was acquainted, was making the arrangements for the purchase from a third party, which turned out to be the Defendant. Mr. Smith and Mr. Harvin picked up Mr. Holmes and his girlfriend, Patricia "Trish" McKee, on Steuben Street in the west end section of the city. Mr. Holmes directed Mr. Smith to drive to West End Park. When they arrived at the park, all four occupants exited the vehicle. Ms. McKee walked to a gazebo and sat down. Mr. Holmes and Mr. Harvin walked up a hill, with Mr. Smith walking behind them. The Defendant was sitting on the ground. Mr. Harvin approached him, while Mr. Holmes stood off to the side. Mr. Smith heard Mr. Holmes yell, "Oh my God, oh my God" and he turned to see the Defendant pointing a gun at Mr. Harvin. The Defendant said, "Take it off, nigger. Is that it, is that all you got?" As Mr. Harvin was taking off his shirt and dropping money on the ground, Mr. Smith testified that he heard two gunshots and then observed a tussle between the Defendant and Mr. Harvin, who fell to the ground. The Defendant scooped up the money that was on the ground, pointed the gun at Mr. Smith who was coming to Mr. Harvin's aid, and fled the scene. (N.T. 07/09/07 pp. 38-50)

Mr. Smith's testimony was essentially corroborated by

the testimony of Mr. Holmes and Ms. McKee.

Bennett Omalu, M.D., a medical examiner with the Allegheny County Coroner's Office, testified that he reviewed the autopsy that had been performed by Dr. Leon Rozin, who is retired. He concurred with Dr. Rozin's findings and conclusion that the cause of death was a gunshot wound to the trunk and the manner of death was homicide. (N.T. 07/09/07, pp. 339-342)

The Defendant testified that he made arrangements with Mr. Holmes to sell him one ounce of crack cocaine, divided into two half-ounce packages. He met with Mr. Holmes on the basketball court at West End Park. The two men shook hands. Mr. Holmes had money in his hand. He told Mr. Holmes that the drugs were in a tea box in a bag near the fence. Mr. Holmes walked over to the fence and looked in the bag. He seemed hesitant to make the deal. Mr. Holmes made a telephone call, but he did not say anything. Several seconds later, two men came over the hill. The Defendant was not going to sell drugs to them because he did not know them. Mr. Harvin, who was shirtless, had his hands in his pockets. As he approached the basketball court, Mr. Harvin removed his hands from his pockets and brandished a firearm in his right hand.

Mr. Harvin said, "Sit down, sit down, nigger." Mr. Harvin then asked the Defendant if he had any money. The Defendant threw his money on the ground. As the Defendant started to stand up, Mr. Harvin fired the gun. The Defendant lunged toward Mr. Harvin and grabbed the gun. The two men scuffled and the gun went off three more times. The Defendant then fled into woods and later threw the gun off the West End Bridge into the river. (N.T. 07/09/07, pp. 476-510)

On appeal, the Defendant alleges the following: there was insufficient evidence to sustain his conviction; the convictions are against the weight of the evidence; the Court erred in overruling the defense objection to an opinion expressed by the assistant medical examiner; the Court erred in denying the Defendant's Petition to Appoint an Investigator; the Court erred in denying the Defendant's motion requesting access to the victim's juvenile court records; and, trial counsel rendered ineffective assistance in three particulars.

The Defendant's first allegation is that the evidence was insufficient to sustain his convictions. The test for sufficiency of the evidence is whether the evidence admitted at trial, and all reasonable inferences therefrom, viewed in the light most favorable to the verdict winner, was sufficient to enable the fact finder to find every element of the crime charged beyond a reasonable doubt. *Commonwealth v. Sullivan*, 864 A.2d 1246 (Pa.Super. 2004). A review of the trial testimony convinces the Court that the jury made findings of credibility with regard to the testimony of the Commonwealth witnesses versus the testimony of the Defendant. It appears that the jury believed that the Defendant was acting in self-defense; however, there was sufficient evidence to establish that the Defendant was not justified in using deadly force to defend himself. Specifically, the Defendant testified that he fired the handgun three times, which the jury was entitled to believe was excessive and unnecessary under the circumstances. Accordingly, this argument is rejected.

The Defendant's second argument is that the verdict was against the weight of the evidence. A motion for a new trial on the grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but claims that notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice. *Commonwealth v. Lyons*, 833 A.2d (Pa.Super.

2003). Again, a review of the testimony indicates definitively that this case hinged on credibility of the witnesses. It appears that the jury believed the Defendant's version of the events to a point, after which they found his credibility lacking and they relied more heavily on the testimony of the other eyewitnesses. As the jury was within its purview to do so, the Court is unable to find that the verdict is against the weight of the evidence.

The Defendant's third allegation is that the Court erred in overruling the defense objection to an opinion expressed by the assistant medical examiner. Expert testimony is permitted as an aid to the jury when the subject matter is distinctly related to a science, skill or occupation beyond the knowledge or experience of the average layman. *Commonwealth v. Auken*, 681 A.2d 1305 (Pa. 1996). Contrary to the Defendant's allegation, the Court sustained defense counsel's objection to Dr. Omalu's testimony that gunshot wound No. 3 was a defensive wound. (N.T. 07/09/07, p. 346) Moreover, the other references set forth by the Defendant refer to testimony elicited by defense counsel when he was cross-examining Dr. Omalu, which, the Court notes, he did rather thoroughly. As this testimony was not outside the area of expertise of a longtime forensic pathologist and the majority of the testimony was in response to questions posed by defense counsel, this allegation is without merit.

The Defendant's fourth allegation is that the Court erred in denying his Motion to Appoint an Investigator. The Defendant chose to retain private counsel to represent him. Counsel should not have undertaken the representation unless he had the resources to do so. In addition, as an accommodation, the Court arranged for the Commonwealth to make its witnesses available to be interviewed by defense counsel at the courthouse prior to trial. In any event, the Court is of the opinion that trial counsel completely and zealously represented the Defendant, without the need of an investigator; and therefore, this claim is unfounded.

The Defendant's fifth allegation is that the Court erred in not granting the Defendant's motion for access to the victim's juvenile records. A review of the Court record indicates that this Petition was filed on February 15, 2008, which was four days before the date set for argument on the Post-Sentence Motions. The Court did not actually rule on the Motion; however, the records were obtained and were provided to defense counsel, who has included them in the certified record on appeal, which makes this allegation moot at this time.

The Defendant's final three allegations concern the ineffective assistance of trial counsel.

To prevail on a claim that counsel was constitutionally ineffective, the appellant must overcome the presumption of competence by showing that (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the challenged proceeding would have been different....A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim. *Commonwealth v. Busanet*, 817 A.2d 1060 (Pa. 2002).

First, the Defendant claims that counsel should have objected to the prosecutor's opening statement wherein he referenced Dante's "Divine Comedy" and the seven deadly sins. As the Court instructed the jury that the arguments of counsel are not evidence, but rather counsel's view of the case, the Court finds that this statement by the prosecutor was not

objectionable; and therefore, trial counsel was not ineffective in failing to pose an objection to it. Second, the Defendant claims that trial counsel was ineffective in failing to introduce evidence that the victim had a juvenile adjudication for Aggravated Assault. As the adjudication occurred in 1996 when the victim was a mere fifteen years old and this incident occurred nine years later in 2005, the Court would not have permitted the defense to admit evidence of the prior adjudication because it was too remote in time to establish that the victim had violent propensities at the time of the incident and that he was the aggressor. Therefore, this claim fails. Third, the Defendant claims that trial counsel should have retained the services of an expert to rebut the testimony of the assistant medical examiner with regard to the testimony that the victim's wounds were defensive in nature. A review of the transcript indicates that trial counsel vigorously and aggressively cross-examined the Commonwealth's expert, including having him back off of his original testimony to a certain extent. In addition, the Defendant was acquitted of murder, which indicates, in some sense, that the jury discounted the testimony of the medical examiner. Again, the Court does not find any ineffectiveness in this regard.

For the foregoing reasons, the Court finds that the Defendant is not entitled to an arrest of judgment or a new trial.

BY THE COURT:  
/s/O'Toole, J.

## Commonwealth of Pennsylvania v. Jumaul Williams

*Post Conviction Relief Act Petition—Waiver of Claims—  
Discontinuance of Direct Appeal—Ineffectiveness of Counsel*

1. Defendant was convicted of Aggravated Assault and acquitted of all remaining charges. Defendant filed a timely direct appeal, but the appeal was discontinued by counsel for reasons not known to the Court.

2. Defendant filed a timely Post Conviction Relief Act Petition which was dismissed because the claims therein were waived for failure to raise on direct appeal except for ineffectiveness of counsel issues.

3. The first ineffectiveness claim involved a photo array and trial counsel's failure to file a motion to suppress it. To the Court's eye, the Defendant does not stand out in such a way as to render the array unduly suggestive or to create a substantial likelihood of misidentification.

4. The second ineffectiveness claim involved counsel's failure to call a character witness. Although the petition contains counsel's certification naming the proposed character witnesses, neither witness provided an affidavit, which is fatal and a proper basis for denial of the claim.

5. The final claim of ineffectiveness involved counsel's stipulation to the admission of medical records. The Court found that claim meritless because the records would have been admitted through the testimony of a witness and the Defendant would not have been able to prevent their introduction.

(Lynn E. MacBeth)

Lisa Phillips for Defendant.

Ed Scheid for the Commonwealth.

No. CC200316802. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

### OPINION

McDaniel, A.J., July 14, 2008—The Defendant has appealed from this Court's Order of January 30, 2008, which dismissed his Amended Post Conviction Relief Act Petition without a hearing. A review of the record reveals that the Defendant has failed to present any meritorious issues on appeal, and, therefore, this Court's Order should be affirmed.

By way of a brief summary of the facts of the case, the evidence presented at trial established that on August 2, 2003, the Defendant, then 32 years of age, was a guest at a friend's house party in the Homestead section of the City of Pittsburgh. At the party, the Defendant met the victim, Rachel Gibson, who had come to the party with her friend, Edweena Poston. Gibson and the Defendant talked, and at one point, even walked to a nearby convenience store together. Later in the evening, the Defendant told Gibson he had a headache and went to an upstairs bedroom to lie down. Gibson accompanied him. Once in the room, the Defendant took Gibson's cell phone away, then began to strike and punch her in the face and choke her until she lost consciousness. She testified that when she awoke, the Defendant was having sexual intercourse with her. When Poston tried to enter the room, the Defendant fled out the bedroom window, leaving behind his jersey, which was spattered with Gibson's blood.

The Defendant was charged with Aggravated Assault,<sup>1</sup> Rape,<sup>2</sup> Sexual Assault,<sup>3</sup> Aggravated Indecent Assault<sup>4</sup> and Indecent Assault.<sup>5</sup> Following a jury trial, he was found guilty of the Aggravated Assault charge but acquitted of all remaining charges. On September 22, 2005, he appeared before this Court and was sentenced to a term of imprisonment of eight (8) to twenty (20) years.

The Defendant filed a timely direct appeal with the Superior Court, but that appeal was discontinued upon the praecipe of his attorney, Erin Morey Busch, Esquire, for reasons which remain unknown to this Court.

On August 21, 2006, the Defendant filed a timely pro se Post Conviction Relief Act Petition with this Court. Counsel was appointed to represent him and an Amended Petition (and several supplements) followed. After giving the appropriate notice, this Court dismissed the Defendant's Amended Petition without a hearing on January 30, 2008. This appeal followed.

Initially, the Defendant argues that "the photo identification lineup was unduly suggestive." (Concise Statement of Matters Complained of on Appeal, p. 1). This Court notes that the issue was not raised in terms of the ineffectiveness or layered ineffectiveness of counsel for failing to raise the claim at an earlier opportunity.

The Post Conviction Relief Act contains a strict waiver provision which states:

*§9544. Previous litigation and waiver*

*(b) Issues waived.—For purposes of this subchapter, an issue is waived if the petitioner could have raised it but failed to do so before trial, at trial, during unitary review, on appeal or in a prior state postconviction proceeding.*

42 Pa.C.S.A. §9544(b). Our appellate courts have specifically held that in the event a direct appeal is discontinued, claims which could have been raised in that appeal are waived for

purposes of postconviction review. *Commonwealth v. Hanyon*, 772 A.2d 1033, 1035 (Pa.Super. 2001).

The Defendant's current claim of error—that the photo array was unduly suggestive, was appropriately raised in the trial court via a Motion to Suppress, or at the very latest, on direct appeal. In discontinuing his appeal, the Defendant waived his ability to challenge his conviction on this basis. See *Hanyon*, *supra*. Then, by failing to appropriately layer the claim in terms of the ineffective assistance of counsel, the Defendant waived the issue for purposes of this review. As such, this claim should be dismissed.

As to the remaining three (3) issues, examination reveals that while they all concern the ineffectiveness of trial counsel, they are not couched in terms of the layered ineffectiveness typically required for viability on collateral review. However, in light of the Pennsylvania Supreme Court's recent decision in *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002), such ineffectiveness claims would not have been decided at the direct appeal stage even had the appeal not been discontinued in this case. Thus, this Court finds that PCRA counsel's failure to appropriately layer the claims is not fatal, and that the claims are ripe for review as follows:

"To obtain relief on a claim of ineffective assistance of counsel, [a defendant] must show that: there is merit to the underlying claim; that counsel had no reasonable basis for their course of conduct; and that there is a reasonable probability that but for the act or omission in question, the outcome of the proceeding would have been different.... The burden of proving ineffectiveness rests with [the defendant].... To sustain a claim of ineffectiveness, [the defendant] must prove that the strategy employed by trial counsel 'was so unreasonable that no competent lawyer would have chosen that course of conduct'.... Trial counsel will not be deemed ineffective for failing to pursue a meritless claim." *Commonwealth v. Rega*, 933 A.2d 1007, 1018-1019 (Pa. 2007), internal citations omitted.

Defendant's first ineffectiveness claim concerns the aforementioned photo array, and trial counsel's failure to file a Motion to Suppress it. A review of the photo array, which is attached as Exhibit 1 to the Defendant's Certification and Motion to Supplement Amended Post Conviction Relief Act Petition reveals a series of eight (8) African-American males, all of whom closely resemble the Defendant in skin tone, facial features, hair style and approximate size. The fact that the Defendant was wearing earrings in the photo used does not render him any more "obvious" than any of the other individuals. To this Court's eye, the Defendant does not "stand out" in such a way as to render the array unduly suggestive or to create a substantial likelihood of (mis)identification. Our Superior Court has held that in such situations, when "the photographic array was consistent with the general description given by the eyewitness and was in no way 'so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification,'" counsel will not be considered ineffective for failing to challenge the array or identification in a Motion to Suppress. *Commonwealth v. Carter*, 509 A.2d 407, 408 (Pa.Super. 1986). This claim must fail.

Next, the Defendant argues that counsel was ineffective for failing to call character witnesses at trial.

"To establish that counsel was ineffective for failing to call a witness, Appellant must demonstrate that (1) the witness existed; (2) the witness was available to testify for the defense; (3) counsel knew or should have known of the existence of the witness; (4) the witness was willing to testify for the defense; and (5) the absence of the testimony of the witness was so prejudicial as to have denied the defendant a

fair trial." *Commonwealth v. Washington*, 927 A.2d 586, 599 (Pa. 2007). Additionally, "ineffectiveness for failing to call a witness will not be found where a defendant fails to provide affidavits from the alleged witnesses indicating availability and willingness to cooperate with the defense." *Commonwealth v. O'Bidos*, 849 A.2d 243, 246 (Pa.Super. 2004). See also *Commonwealth v. Khalil*, 806 A.2d 415, 422 (Pa.Super. 2002) and *Commonwealth v. Copehnefer*, 719 A.2d 242, 254 (Pa. 1998).

Though the proposed witnesses are not named in the Amended Petition or the Concise Statement, counsel's "Certification" contains a notation that the proposed character witnesses were Nataja Scott and the Defendant's mother. Neither woman has provided an affidavit referencing their availability and willingness to testify as to the Defendant's character.<sup>6,7</sup> Given the appellate courts' holdings in *O'Bidos*, *Khalil* and *Copehnefer*, *supra*, the absence of these affidavits is fatal and was a proper basis for this Court's denial of the Amended Petition. This claim must also fail.

Finally, the Defendant alleges that trial counsel was ineffective for stipulating to the admission of the victim's medical records at trial. Again, this claim is meritless. Had the Defendant not so stipulated, the records would have been admitted through the testimony of a physician or records custodian from UPMC Braddock. There was no means by which the Defendant would have been able to prevent their introduction, and therefore a stipulation to their admission was appropriate.

This Court also sees no merit to the Defendant's current argument in the alternative that the abbreviation "ETOH"<sup>8</sup> in the records could have been defined to the jury as "alcohol." The Defendant was acquitted of the sexual crimes in which the victim's use of alcohol could have affected her ability to consent to sexual activity, and thus there is no basis for the required finding that the result would have been different. This claim must also fail.

Accordingly, for the above reasons of fact and law, this Court's Order of January 30, 2008 must be affirmed.

BY THE COURT:  
/s/McDaniel, A.J.

Date: July 14, 2008

<sup>1</sup> 18 Pa.C.S.A. §2702(a)(1)

<sup>2</sup> 18 Pa.C.S.A. §3121

<sup>3</sup> 18 Pa.C.S.A. §3124.1

<sup>4</sup> 18 Pa.C.S.A. §3125

<sup>5</sup> 18 Pa.C.S.A. §3126

<sup>6</sup> Though both women were present in court, reference to the record reveals that Nataja Scott had refused to testify as a character witness, and only appeared in court after being led to believe that she was required to be there by the Defendant's brother. Further reference to the record reveals that the decision not to call either woman was the Defendant's own, made knowingly in order to prevent the entry of his prior convictions. See Trial Transcript, pp. 110-112 and 153-156.

<sup>7</sup> There is also no allegation or credible evidence that had the women testified, the outcome of the trial would have been different.

<sup>8</sup> This Court notes that the abbreviation was located in a "check-off" list next to smoking and drug use, and therefore its meaning was easily discernable even without professional definition.

## Commonwealth of Pennsylvania v. Leon Parham

### Sentencing—Illegal Sentence—Merger of Offenses

1. Defendant was convicted of Rape by Force; Rape of a Child; Statutory Sexual Assault; and Corrupting the Morals of a Minor.

2. Defendant had sexual intercourse on one occasion with 11 year-old victim while victim was in his home visiting his son. Defendant, while alone with the victim in his basement, threatened her with harm if she did not cooperate.

3. Defendant was sentenced to 15 to 40 years for Rape of a Child and guilt without punishment on the remaining three counts.

4. It was brought to the Court's attention that the events occurred prior to amendments of 18 Pa.C.S. §3121; therefore, Defendant was resentenced to 9 to 20 years for Rape by Force; guilt without punishment for Rape of a Child; a consecutive term of 3 to 10 years for Statutory Sexual Assault; and a consecutive term of 2 to 4 years for Corrupting the Morals of a Minor.

5. Defendant claimed he could not be sentenced under both Sections 3121 (rape) and 3122.1 (statutory sexual assault) because the two offenses would merge.

6. The doctrine of merger is a rule of statutory construction designed to determine whether the legislature intended for the punishment of one offense to encompass that for another offense arising from the same criminal act. The inquiry is whether the elements of the lesser crime are all included within the elements of the greater crime.

7. The court concluded that the two offenses did not merge.

(Lynn E. MacBeth)

Matthew Debbis for Defendant.

Michael Streily for the Commonwealth.

No. CC200514431. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

### OPINION

Reilly, S.J., July 14, 2008—The defendant, Leon Parham, was found guilty in a jury trial in April of 2007, of Rape by Force (Count 1); Rape of a Child (Count 2); Statutory Sexual Assault (Count 3); Corrupting the Morals of a Minor (Count 4). On June 28, 2007, the defendant was sentenced to 15 to 40 years on Count 2 (Rape of a Child), and guilt without punishment on the remaining three counts. Subsequently, it was brought to the court's attention that the events had occurred prior to the effective amendments of 18 Pa.C.S. §3121. As such, on March 7, 2008, the Court granted the defendant's motion deeming the June 28, 2007 sentence patently illegal and requiring resentencing. On March 12, 2008, the defendant was resentenced to 9 to 20 years imprisonment on Count 1 (Rape by Force); guilt without punishment on Count 2 (Rape of a Child); a consecutive term of 3 to 10 years imprisonment on Count 3 (Statutory Sexual Assault); and a consecutive term of 2 to 4 years imprisonment on Count 4 (Corrupting the Morals of a Minor). The defendant was awarded confinement credit time for the periods August 24 through 27 of 2005, and April 13, 2007 through March 12, 2008. On June 6, 2008, the defendant's post sentence

motions were denied. In the post sentence motions the defendant asserted that there was an improper judgeless jury selection; ineffective counsel; and improper and unduly harsh sentencing.

At trial, the Commonwealth presented evidence through the victim, her mother, and sister. The defendant presented evidence through the testimony of his wife, son, and step-daughter (all friends of the victim and her family). The incident in question occurred on a single occasion when the victim was 11 years old. The victim, who was a friend of the defendant's sons, spent considerable time at the defendant's home. The victim testified that on the single occasion in the summer before she was going to turn 12 years old, she and the defendant's son were watching a movie in the basement of the defendant's residence. She testified that the defendant came to the basement area and told his son to go upstairs in the house to look for something. At that time the victim and defendant were alone in the basement. The victim testified that the defendant told her to pull down her pants. When she said no the defendant threatened that if she did not, he would hurt her. The defendant subsequently had intercourse with the victim. Afterwards, the defendant told the victim if she told anyone that he would hurt her. The victim testified that because of the closeness of the families, she did not disclose what happened to anyone for some time. The defendant was eventually charged and ultimately convicted. The defense asserted that the story was a fabrication, and presented argument to the jury with regard to inconsistencies of testimony between various witnesses. The facts presented and inferences requested to be drawn therefrom through the witnesses for the prosecution and the defense, were in conflict with each other. As such, credibility and concluding the facts was the cornerstone of the fact finder's duties. The determination submitted to the jury was based upon the facts, whether the prosecution had proved the defendant's guilt beyond a reasonable doubt.

All of the factors were placed before the jury for its consideration regarding the testimony and the weight to be placed thereon. In a jury trial, the function of the fact finder is to weigh conflicting evidence. *Commonwealth v. Tumminello*, 292 Pa.Super., 437 A.2d 435 (1981). Additionally, the fact finder viewing the witnesses makes credibility determinations with regard to their testimony. The fact finder is free to believe all, some, or none of the evidence presented. *Commonwealth v. Miller*, 555 Pa. 354, 724 A.2d 895, certiorari denied, *Miller v. Pennsylvania*, 120 S.Ct. 242, 528 U.S. 903, 145 L.E.d. 2d 204 (1999). The number of witnesses offered by one side or the other does not in itself determine the weight of the evidence. The fact finder determines the credibility of witnesses presented and the weight of their testimony. *Commonwealth v. Dunn*, 424 Pa.Super. 521, 623 A.2d 347 (1993). In this case the jury acting as the fact finder, found the testimony of the Commonwealth's version of the witnesses sufficient to prove the elements of the crimes beyond a reasonable doubt. As such, the defendant was found guilty.

The defendant asserts that even though he executed a written waiver of the presence of the judge during jury selection, it does not demonstrate that it was knowing and intelligent. Obviously, waiver of the presence of the judge is permitted pursuant to Pa.R.Crim.P. Rule 631(A). This was complied with in this instance and evidenced by the defendant's consent. Additionally, the defendant has not asserted any specific prejudice and had not raised this issue during the trial. Since issue was not asserted during the proceedings, the trial court is unable to address its merits. *Commonwealth v. Dowling*, 778 A.2d 683

(Pa.Super. 2001).

The defendant also complains that trial counsel was ineffective in various aspects. In accordance with *Commonwealth v. Grant*, 572 Pa. 48, 813 A.2d 726 (2002), because of the requirement deferring review of trial counsel ineffectiveness claims until the collateral review stage of the proceedings, the court will not address those issues at this time.

Lastly, the defendant complains that the sentences for the convictions were illegal and unduly harsh. In particular, the defendant has asserted that he could not be sentenced under both 18 Pa.C.S.A. §3121 and 18 Pa.C.S.A. §3122.1 even though being convicted of both. Any merger analysis necessarily employs not only close examination of the precise words of the statutes involved, but also “must proceed on the basis of its facts.” *Commonwealth v. Anderson*, 538 Pa. 574, 582 n. 3, 650 A.2d 20, 24 n. 3 (1994). The doctrine of merger is a rule of statutory construction, designed to determine whether the legislature intended for the punishment of one offense to encompass that for another offense arising from the same criminal act or transaction. The inquiry is whether the elements of the lesser crime are all included within the elements of the greater crime, and the greater offense includes at least one additional element which is different, in which case the sentences merge; or whether both crimes require proof of at least one element which the other does not, in which case the sentences do not merge. The defendant was charged in the information in Count 1 of violating 18 Pa.C.S.A. §3121(a)1 and (a)2. The court in its instructions to the jury for Count 1 specifically instructed only on subsections (a)1 and (a)2. 18 Pa.C.S.A. §3121 in part, reads as follows:

§ 3121. Rape

(a) Offense defined—A person commits a felony of the first degree when he or she engages in sexual intercourse with a complainant:

- (1) By forcible compulsion.
- (2) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution.

The charge at Count 3 and instruction to the jury were for the elements contained in 18 Pa.C.S.A. §3122.1, which in entirety reads as follows:

§ 3122.1. Statutory sexual assault

Except as provided in section 3121 (relating to rape), a person commits a felony of the second degree when that person engages in sexual intercourse with a complainant under the age of 16 years and that person is four or more years older than the complainant and the complainant and the person are not married to each other.

In this case, given the facts as applied to the criminal statutes in question, this court ruled that the sentences do not merge. Considering the gravity of the offenses, and the need for society to be protected, the court carefully considered, each of the sentences imposed. Given the convictions, the sentences were appropriate under the circumstances of the case. *Commonwealth v. McCloughan*, 279 Pa.Super. 599, 421 A.2d 361 (1980).

BY THE COURT:  
/s/Reilly, S.J.

Date: July 14, 2008

## Commonwealth of Pennsylvania v. Todd R. Allshouse

### Probation Revocation Hearing—Hearsay

Hearsay may be admitted in probation revocation hearings. A probation revocation hearing is not a trial. The Court’s purpose is not to determine whether the probationer committed a crime. Therefore, a letter written by the victim’s mother was hearsay that was properly admitted, together with other non-hearsay evidence admitted by the Court.

(Lynn E. MacBeth)

David Obara for Defendant.

Chris Hoffman for the Commonwealth.

No. CC200605517. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

### OPINION

McDaniel, A.J., July 15, 2008—The Defendant has appealed from this Court’s Order of January 16, 2008 which revoked his probation and sentenced him to a term of imprisonment of two (2) to ten (10) years. A review of the record reveals that the Defendant has failed to present any meritorious issues on appeal and, therefore, this Court’s Order should be affirmed.

The Defendant was charged with Involuntary Deviate Sexual Intercourse,<sup>1</sup> Statutory Sexual Assault,<sup>2</sup> Aggravated Indecent Assault,<sup>3</sup> Endangering the Welfare of a Child,<sup>4</sup> Corruption of Minors<sup>5</sup> and Indecent Assault.<sup>6</sup> The charges arose out of his sexual relationship with a 14-year-old girl who became pregnant as a result. Pursuant to a plea agreement with the Commonwealth, the Defendant plead guilty to Statutory Sexual Assault and was sentenced to a term of imprisonment of six (6) to twelve (12) months. This Court also imposed a period of probation of three (3) years, and imposed a “No Contact” Order as a term of that probation.

On January 16, 2008, the Defendant appeared before this Court for a Stage II probation violation hearing. At that time, it was determined that in addition to the technical violation of his failure to pay court costs, the Defendant had violated the no contact order imposed as a condition of his probation. At the conclusion of the hearing, this Court revoked the Defendant’s probation and imposed a term of imprisonment of two (2) to ten (10) years. This appeal followed.

Generally, the only appealable issues following the revocation of a term of probation are the validity of the revocation and the legality of the sentence. *Commonwealth v. Infante*, 888 A.2d 783, 790 (Pa. 2005). In this appeal, the Defendant has limited his challenges to the validity of the revocation, namely whether there existed sufficient evidence to support a violation of his probation.

“The burden of proof for establishing a violation of probation is a preponderance of the evidence, lesser than the burden in a criminal trial of proof beyond a reasonable doubt.... ‘The focus of a probation hearing... is whether the conduct of the probationer indicates that the probation has proven to be an effective vehicle to accomplish rehabilitation and a sufficient deterrent against future anti-social conduct.’” *Commonwealth v. Castro*, 856 A.2d 178, 180 (Pa.Super. 2004).

At the hearing, it was determined that the Defendant and his family had engaged in a continual and prolonged course of threats and abuse against the victim by calling her, driving by her house, appearing at her place of employment. It was also revealed that the Defendant had engaged in a physical altercation with the victim and her boyfriend

at a street fair, which resulted in police intervention and disorderly conduct charges being filed against him. These incidents certainly constitute violations of the no contact order imposed by this Court as a condition of the probation and, therefore, are sufficient to establish a violation of that probation.

The Defendant also claims that the only evidence supporting the violation was a letter written by the victim's mother detailing the harassment. He argues that because the letter is hearsay, it was insufficient to support a violation of his probation. Not only is this argument an incorrect statement of the law, it is an incorrect recitation of the facts of this case.

"It must be emphasized that a probation revocation hearing is not a trial. 'The court's purpose is not to determine whether the probationer committed a crime.... It follows that probation revocation hearings are flexible and material not admissible at trial may be considered by the court.'" *Id.* "Hearsay may be admitted in probation... revocation hearings..." *Hracho v. Commonwealth, Pennsylvania Board of Probation and Parole*, 503 A.2d 112, 114 (Pa.Cmwlth. 1986). See also *Commonwealth v. Kavanaugh*, 482 A.2d 1128, 1130 (Pa.Super. 1984). Although the letter written by the victim's mother was hearsay, it was properly admitted at the violation hearing. Contrary to the Defendant's secondary argument, it was not the *only* evidence used to find a violation of the conditions of his probation. Also introduced were the police report from the Defendant's physical altercation with the victim and the victim's boyfriend at the street fair, the testimony of the Defendant and his sister in which they admitted to contact with the victim, as well as evidence of several technical violations including the failure to pay court costs and the failure to be of good behavior. This evidence was more than sufficient to support a finding that the Defendant violated the terms of his probation. These claims must fail.

Accordingly, for the above reasons of fact and law, this Court's Order of January 16, 2008 must be affirmed.

BY THE COURT:  
McDaniel, A.J.

Date: July 14, 2008

<sup>1</sup> 18 Pa.C.S.A. §3123(a)(7)

<sup>2</sup> 18 Pa.C.S.A. §3122.1

<sup>3</sup> 18 Pa.C.S.A. §3125

<sup>4</sup> 18 Pa.C.S.A. §4304(a)

<sup>5</sup> 18 Pa.C.S.A. §6301(a)(1)

<sup>6</sup> 18 Pa.C.S.A. §3126

**Commonwealth of Pennsylvania v.  
Tommie Lee Stribling, a/k/a  
Tommie Lee Stribling**

*Carrying a Firearm Without a License—Possessing a Firearm After Having Been Adjudicated a Delinquent—Investigatory Stop—Terry Frisk*

1. Defendant was convicted of Carrying a Firearm Without a License and Possessing a Firearm After Having Been Adjudicated a Delinquent. The Court denied Defendant's Motion to Suppress which averred that the police lacked reasonable suspicion that he was engaged in

criminal activity to justify the initial investigatory detention, and also lacked reasonable suspicion that he was armed and dangerous to justify conducting a *Terry* frisk.

2. Defendant was stopped by a City of Pittsburgh Housing Authority Police Officer patrolling buildings and hallways in an area of high drug traffic and numerous prior arrests. The officer smelled marijuana odor emanating from the apartment from which Defendant exited. Upon seeing the Defendant, the officer noticed a protrusion in his waistband which he thought could be a firearm. The officer told the Defendant to put his hands on the wall and then patted him down.

3. The purpose of a *Terry* frisk is for the officer's safety during an investigative encounter. The arresting officer had a reasonable suspicion that Defendant was involved in criminal activity justifying an investigative stop and also had a reasonable basis to believe that Defendant was armed.

(Lynn E. MacBeth)

Chris Urbano and Suzanne M. Swan for Defendant.

Eric Hoffman and Michael W. Streily for the Commonwealth.

No. CC200516890. In the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division.

**OPINION**

Todd, J., July 15, 2008—This is an appeal from the conviction of Defendant, Tommie Lee Stribling, on December 14, 2006 after a non-jury trial of Carrying a Firearm Without a License in violation of 18 Pa. C.S. §6106 and Possessing a Firearm After Having Been Adjudicated a Delinquent of Aggravated Assault in violation of 18 Pa. C.S. §6105(a)(1) and (c). Defendant was sentenced on March 20, 2007 and on April 11, 2007, Defendant filed a timely Notice of Appeal to the Superior Court of Pennsylvania. On April 12, 2007, Defendant was ordered to file a Concise Statement of Matters Complained of on Appeal pursuant to Pa.R.A.P. §1925(b) within fourteen (14) days of the receipt of all court transcripts. On August 8, 2007, Defendant filed his Concise Statement of Matters Complained of on Appeal which sets forth the following:

"A. This Court abused its discretion in denying the Motion to Suppress Evidence, based on the facts and arguments presented at the hearing on the motion and set forth in the Brief in Support of the Motion to Suppress, insofar as the police lacked reasonable suspicion that Mr. Stribling was engaged in criminal activity to justify the initial investigatory detention, and also lacked reasonable suspicion that Mr. Stribling was armed and dangerous to justify conducting a *Terry* frisk. The police action deprived Mr. Stribling of his protections against unreasonable searches and seizures under both Article 1, §8 of the Pennsylvania Constitution and the Fourth Amendment of the United States Constitution."

**BACKGROUND**

Defendant was arrested on August 6, 2005 after he was found in possession of an unlicensed firearm during an investigative encounter with a Pittsburgh Housing Authority police officer who believed the Defendant was involved in the possession of marijuana. During the investigatory stop, the officer conducted a *Terry* frisk as a result of his observations of a suspicious bulge in the waistband under the shirt of the Defendant's clothing. Defendant filed a Motion to Suppress on the basis that both the investigato-

ry detention and the *Terry* frisk were not justified as there was no reasonable, articulable suspicion that Defendant was involved in criminal activity or that he may be armed and dangerous.

On June 22, 2006 a suppression hearing was held at which time Officer Clarence Ford of the City of Pittsburgh Housing Authority Police Department testified. Officer Ford testified that on September 6, 2005 at approximately 3:50 p.m., he was on patrol with another officer on Housing Authority property located on Bedford Avenue in Pittsburgh, Pennsylvania. Officer Ford, who had been employed by the Housing Authority for approximately 5 years and who was trained in narcotics recognition, testified that his normal routine in patrolling the Housing Authority property was to enter the buildings and patrol the hallways. (T., pp. 5-7) During his patrol, he entered the hallway of 2507 Bedford Avenue. Upon entering the hallway, he immediately noted a strong odor of marijuana and it was apparent to him that the odor was originating from apartment 295, which was on the first floor landing. (T., pp. 10-12) In order to verify where the odor was coming from, he immediately went to the second and third floor landings to make sure that there was no one in the stairwells or the landings that may have been smoking marijuana. (T., p. 11) When he went to the second floor landing, he noted that the smell of marijuana was less pungent than on the first floor. (T., p. 12) He also noted that there was not a strong odor of marijuana outside of the other five apartment doors in the building. (T., pp. 12-13). He noted that there was no one in the hallway or landings and was proceeding back down to the first floor landing when he encountered Defendant who was exiting the doorway from apartment 295. (T., p. 13). When the door to the apartment was open, Officer Ford noted again that the odor of marijuana was very strong coming from the apartment. (T., p. 13) As Officer Ford watched, Defendant locked the door to the apartment and then turned and observed Officer Ford standing on the steps. (T., pp. 13-14) Defendant then turned away and, as he turned away, Officer Ford saw a protrusion from his shirt on the right side of the Defendant's waistband. (T., p. 14) At this point, Officer Ford was approximately three feet away from the Defendant. The protrusion in his waistband was under his shirt, which was untucked. (T., p. 15) Officer Ford did not believe that it was a cell phone, as he felt that most people carry their cell phones more on their hip, and the protrusion was on the right side but more to the front in the waistband. (T., p. 16) Officer Ford, who was in uniform with a badge prominently displayed, testified that when Defendant first saw him he appeared to have a very surprised look on his face, his eyes got big and he uttered the words "oh, shit." (T., p. 17) Officer Ford felt that given the high drug traffic in the area and the numerous arrests that he had made at this property, that it was possible that the protrusion could be a firearm. (T., p. 16) At that time, Officer Ford told Defendant to put his hands on the wall and Defendant attempted to exit. He again told Defendant to put his hands on the wall and he then patted him down. Officer Ford testified that as he began the pat down, he immediately recognized the bulge as a firearm before he removed it from the Defendant's possession. (T., p. 20) Defendant was then handcuffed and Officer Ford called for back up. As this was occurring, Defendant volunteered that he found the gun and he was carrying it for protection. (T., p. 21) On cross-examination, Officer Ford acknowledged that there was no marijuana found on the Defendant or in the hallway.

The Commonwealth also called Officer Kevin McCue who was on patrol with Officer Ford, but who had not entered the building until after the Defendant was in custody. (T., p. 42)

Officer McCue also testified that upon entering the first floor landing of the apartment building, there was a very strong distinct burning smell of marijuana in the hallway outside of Apartment 295. (T., p. 43)

After reviewing all of the evidence and the totality of the circumstances, an order was entered denying the motion to suppress as the officer articulated a reasonable suspicion that the Defendant was involved in criminal activity and that a *Terry* frisk for the officer's safety was appropriate during his investigative encounter with Defendant

#### DISCUSSION

The issue in this case is whether or not the arresting officer had a reasonable suspicion that the Defendant was involved in criminal activity which would justify an investigative stop of Defendant and, once the investigatory detention was initiated, whether there was a reasonable basis for the officer to believe that the Defendant was armed, justifying a *Terry* frisk.

It is well established that a police officer may pat down an individual whose suspicious behavior he is investigating on the basis of a reasonable belief that the individual is presently armed and dangerous to the officer or others. *Commonwealth v. Gray*, 896 A.2d 601, 605-606 (Pa.Super. 2006). In order to validate such a *Terry* frisk the officer must be able to articulate specific facts from which he reasonably inferred that the individual was armed and dangerous. The sole justification for a *Terry* search is the protection of the police and others nearby and, therefore, the search is limited to that which is necessary for the discovery of weapons that might be used to harm the officer or others nearby. *Commonwealth v. Gillespie*, 745 A.2d 654, 657 (Pa.Super. 2000), quoting *Terry v. Ohio*, 392 U.S. 1, 24, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968). It is also clear that a *Terry* frisk is limited to a search for weapons. The purpose of the pat-down or frisk is not to discover evidence, but to allow the officer to continue his investigation without fear of violence. *Commonwealth v. Gillespie*, 745 A.2d, at 657. In *Commonwealth v. Jackson*, 907 A.2d 540 (Pa.Super. 2006), it was stated that:

"In order for a stop and frisk to be reasonable, the police conduct must meet two separate and distinct standards. *Commonwealth v. Martinez*, 403 Pa.Super. 125, 588 A.2d 513, 514 (Pa.Super. 1991), appeal denied, 530 Pa. 653, 608 A.2d 29 (1992). Specifically, the police officers must have a 'reasonable, articulable suspicion' that criminal activity may be afoot and that the suspect may be armed and dangerous." *Commonwealth v. Jackson*, 907 A.2d at 543.

The level of suspicion that must exist is less than a preponderance of the evidence, but more than a hunch. In deciding whether or not reasonable suspicion was present, the court must take into account the totality of the circumstances. *Jackson*, 907 A.2d at 543. The circumstances are to be viewed through the eyes of a trained officer. *Commonwealth v. Fink*, 700 A.2d 447, 449 (Pa.Super. 1997), appeal denied, 716 A.2d 1247 (1998).

In the present case, Officer Ford entered the apartment building hallway where he was authorized to patrol. Officer Ford knew that this was a high drug activity area as he had made numerous drug arrests in the area. Immediately upon entering the first floor, he noticed a very strong odor of marijuana that he believed was coming from Apartment 295. In order to confirm his belief that the marijuana was coming from that particular apartment, he checked the hallway to make sure that no one was in the hallway or the second or

third floor landings using marijuana. As he proceeded to the second and third floor landings, he noted that the odor of marijuana became less strong, confirming his belief that it was coming from the first floor apartment. He also noted that the odor was not as strong at any of the other apartment doors. Upon returning towards the first floor landing he had an unobstructed view of the entrance to apartment 295, at which time Defendant opened the door, exited the apartment and stepped into the hallway. As Defendant did so, Officer Ford noted that the odor of marijuana was very strong and that it was emanating from the apartment. Officer Ford observed Defendant locking the door, after which Defendant saw Officer Ford on the stairway from the second landing. He appeared surprised and he uttered the words "oh shit." As Defendant turned, Officer Ford observed a protrusion from the right side of Defendant's waistband underneath the Defendant's untucked shirt that, based on the size and location of the protrusion under the shirt, Officer Ford believed might be a handgun. Based on his reasonable suspicion that Defendant was involved in the possession or use of marijuana, Officer Ford initiated an investigatory detention of Defendant.

The first issue is whether or not Officer Ford had a reasonable suspicion to justify the investigatory stop of Defendant based on his observations concerning the location of the odor of the marijuana emanating from apartment 295 and his observation of Defendant exiting apartment 295 and locking the door.

In the case of *In Interest of S.J.*, 713 A.2d 45 (Pa. 1998), the Supreme Court found that the officer therein had a reasonable suspicion to justify an investigatory stop where the officer, during the course of a patrol in a high crime area in which he had previously made six drug arrests, detected the odor of marijuana in the vicinity of a group of men standing on a street corner. The officer then observed some members of the group smoking marijuana and, therefore, approached them. The officer was unable to state with certainty whether the defendant was one of the individuals smoking marijuana, however, the defendant's movements away from the officer as he approached the men appeared suspicious. The Supreme Court found, however, that the detection of the odor of marijuana and his observation of illegal activity among the defendant's companions, combined with his suspicious behavior in a known high crime area for drug activity, provided the requisite reasonable suspicion to conduct an investigatory stop. *In Interest of S.J.*, 713, A.2d at 47, 48.

In the present case, Officer Ford credibly testified that upon entering the apartment building he noted the strong odor of marijuana, particularly in front of apartment 295. The officer, trained in drug recognition, was familiar with the odor of marijuana. The officer made a reasonable attempt to determine that the odor was not coming from anyone else in the hallway or on any of the other landings or apartments in the building. Upon returning towards the first floor landing, he noted the very strong odor of marijuana coming from the apartment door when it was opened and the Defendant exited. These facts, articulated in detail by Officer Ford at the suppression hearing, clearly provide a reasonable suspicion that Defendant, who exited the apartment and locked the door, may be involved in the criminal possession or use of marijuana.

In *Commonwealth v. Pullano*, 440 A.2d 1226 (Pa.Super. 1982) the court considered the issue of whether or not the odor of marijuana provided a basis for probable cause for a search. The court stated:

"The officers at the scene had smelled a strong odor of burning marijuana and had heard noises

suggesting that a party was then in progress. These were circumstances suggesting that criminal activity was underway within their presence. They were not required to ignore that activity. To 'ignore the obvious aroma of an illegal drug which (they were) trained to identify' would have been a 'dereliction of duty.' *Commonwealth v. Stoner*, 236 Pa.Super. Ct. 161, 166, 344 A.2d 633, 635 (1975). By knocking on the door to make inquiry they were not acting unreasonably. They could properly and in the exercise of their duties investigate what was obviously a 'pot' party. See: *Commonwealth v. Merbah*, 270 Pa.Super. Ct. 190, 411 A.2d 244 (1979) indeed, at this point they already had probable cause to make an arrest." *Pullano*, at 1227.<sup>1</sup>

Clearly, under the circumstances in this case the strong odor of marijuana emanating from apartment 295, which Officer Ford detected in combination with his observations of Defendant as described, provided a reasonable suspicion that justified the investigative encounter with Defendant.

The second issue raised by Defendant is whether or not Officer Ford had an articulable, reasonable suspicion that Defendant may be armed and dangerous, thus justifying a *Terry* frisk. As previously noted, the purpose of a *Terry* frisk is not to discover evidence, but to allow the officer to protect himself from harm during an investigatory stop. In *Commonwealth v. Graham*, 721 A.2d 1075 (1998), the Supreme Court recognized that an officer's observation of a bulge in the defendant's pants pocket might be a weapon and, therefore, a *Terry* frisk was justified. The defendant in *Graham* was not even the subject of the arrest, but was a companion to another person who was being arrested on an outstanding warrant. The Court found that the officer's observation of the bulge in the pockets justified the *Terry* frisk. The officer noticing the bulge, "...reasonably concluded that appellant was armed, and criminal activity was afoot, and therefore conducted a pat-down search for weapons." *Graham*, 721 A.2d, at 1077.<sup>2</sup>

In the present case, Officer Ford specifically testified that he noticed a bulge in the Defendant's waistband under his untucked shirt. He did not believe that the bulge was a cell phone and he was immediately concerned that it might be a weapon and, therefore, justifiably initiated a pat-down search. While patting the Defendant down he recognized the bulge as a firearm and only then removed it from the Defendant. Considering the specific evidence regarding Officer Ford's observations and, considering the totality of the circumstances, Defendant's motion to suppress was appropriately denied.

BY THE COURT:  
/s/Todd, J.

<sup>1</sup> *Commonwealth v. Pullano* was cited in *Commonwealth v. Dean*, 940 A.2d 514 (Pa.Super. 2008) in which the court stated:

"Albeit the odor of marijuana has been held sufficient to establish the probable cause necessary to believe a crime is being committed, see *Commonwealth v. Pullano*, 295 Pa.Super. 68, 440 A.2d 1226 (1982)."

<sup>2</sup> The Court in *Graham* recognized that a more extensive search involving shining a flashlight in defendant's back pocket was not justified. *Graham*, 721 A.2d, at 486. However, this did not invalidate the Court's conclusion that a limited search of his outer clothing based on the observation of the bulge which the officer observed was proper.