

LITCHFORD & CHRISTOPHER

PROFESSIONAL ASSOCIATION

Attorneys and Counselors at Law

LEGAL NEWS FOR CLIENTS

SUMMER 2001

© 2001, Litchford & Christopher Professional Association, 390 North Orange Avenue, Post Office Box 1549, Orlando, FL 32802. All Rights Reserved.

Legal News for Clients is published periodically by Litchford & Christopher Professional Association. It contains summaries of court decisions and other materials in an effort to keep you abreast of recent developments in areas of the law in which the firm represents clients. Each edition, however, does not necessarily cover cases and information relevant to all of the firm's practice areas. The substantive areas covered in each edition are selected by the firm's lawyers at their discretion based on their views of the significance of the cases and the other information available at the time of publication. The material covered in *Legal News for Clients* is condensed and is not intended to provide legal advice. While the information set forth in each article is accurate, every situation presents unique factual and legal considerations. Accordingly, we encourage you to consult an attorney for proper legal advice before taking any action based on the information summarized in *Legal News for Clients*. The hiring of a lawyer is an important decision that should not be based solely upon advertisements. Before you decide, ask us to send you free written information about our qualifications and experience. You may write to us at the address listed above, call us at (407) 422-6600, fax us at (407) 841-0325, or contact us through our website at www.litchris.com.

In This Edition . . .

- Attorney Is Potentially Liable For Defamation In Connection With A Letter Sent On Behalf Of A Client
- The Eleventh Circuit Will Not Award The Costs Of Innovative Technological Methods For Presenting Evidence To The Prevailing Party
- The Supreme Court Says The PGA Tour Must Let Casey Martin Use A Cart
- Welcome Rich Swank

Hal K. Litchford * Donald E. Christopher * Brian D. DeGailler * David G. Lerner
Alan B. Taylor * Scott K. Lippman * G. Steven Fender * Summer N. Boyd * Richard C. Swank

Antitrust and Unfair Competition
Financial Fraud
Business Torts
Real Property Transactions
Corporate Control Disputes
Civil Litigation

Agreements Not To Compete
Patent, Trademark, Copyright Infringement
Employment Discrimination
Real Property Disputes
Motor Vehicle Dealership Relations
Commercial Litigation

Trade Secrets
Contract Disputes
Public Accommodations
Corporate Transactions
Partnership Disputes
Class Actions

**LETTER BY COUNSEL CHARGING COMMISSION OF A CRIME
MAY BE DEFAMATORY**

Statements made during the course of or related to judicial proceedings are absolutely privileged and thus cannot constitute actionable defamation. When certain statements and allegations are made in court pleadings, therefore, they may not be the basis for a subsequent defamation lawsuit – no matter how egregious. The question that sometimes arises in connection with this “judicial immunity doctrine,” however, is how far it extends, i.e., when is a statement considered to have been made “during the course of or related to” a judicial proceeding.

Florida’s Second District Court of Appeal recently faced this question in *Shafran v. Parrish*. There, Jon D. Parrish, Esquire, and his law firm represented a client who was involved in the general contracting business. Shafran sent a letter to Parrish’s client purporting to terminate the client on certain projects and demanding the client’s resignation and divestment of his interest in their joint corporation. Parrish, on behalf of his client, sent a letter to Shafran in response. Parrish’s letter stated in part as follows:

[W]e are forwarding a copy of your correspondence to the State Attorney by copy of this letter for investigation and prosecution for criminal extortion under Florida Statutes §836.05, a felony of the second degree punishable by a prison term of up to fifteen (15) years and a fine of up to \$10,000. We are appalled by your brazen and illegal attempt to threaten to destroy our client’s integrity and livelihood unless he divests himself of his one-third interest in [your joint corporation]. Clearly, your actions are criminal regardless of whether or not your accusations are untrue.

....

In addition, you have removed (we hesitate to say stolen) several items and valuable documents unrelated to [the joint corporation] which clearly do not belong to you.

The trial court granted Parrish’s and his law firm’s motion for summary judgment. On appeal, the summary judgment was reversed. The appellate court believed that statements in the letter essentially charged Shafran with committing a crime and potentially were defamatory per se. In part, Parrish argued that the statements in the letter, even if defamatory, were absolutely privileged under the judicial immunity doctrine. The appellate court recognized the doctrine but ruled that it did not apply on these facts because there was no judicial proceeding to which the statements could attach. Specifically, the court held that “[h]ere, there was no pending judicial proceeding nor can this correspondence be considered, on the face of this record, as constituting a necessary preliminary act to a judicial proceeding. Thus, the absolute immunity doctrine cannot serve as a basis for the summary judgment.”

**COURTS ENCOURAGE THE USE OF INNOVATIVE TECHNOLOGIES
TO PRESENT EVIDENCE IN THE COURTROOM, BUT THE ELEVENTH CIRCUIT
WILL NOT AWARD THE ASSOCIATED COSTS TO THE PREVAILING PARTY**

It is very expensive to litigate and try lawsuits, regardless of whether you are a plaintiff or a defendant. There are three categories of amounts incurred by the parties in any litigation: taxable costs, non-taxable expenses, and attorneys' fees. ("Taxable" does not refer to the Internal Revenue Service in this context; it refers to the concept of whether the amounts may be charged by the prevailing party to the losing party at the conclusion of the case.) Although litigants usually must bear their own non-taxable expenses and attorneys' fees regardless of whether they win or lose a case, the general rule in either state or federal court is that a prevailing party is entitled to assess certain kinds of costs – taxable costs – against the losing party and may have the judgment increased by the amount of such costs that the court taxes against the loser.

The kinds of costs that may be taxed are relatively narrow and typically include court filing fees, costs for obtaining deposition and hearing transcripts, and some photocopying costs. (Sums incurred for things such as postage, facsimiles, long distance, travel, meals, and computerized legal research are generally viewed as non-taxable expenses that a prevailing party may not recover from a losing party unless the case is one of those few in which the prevailing party also is entitled to recover attorneys' fees from the losing party, but even then, all of these non-taxable expenses may not be recoverable.)

In the Winter 2000 edition of *Legal News for Clients*, we discussed *United States Equal Employment Opportunity Commission v. W&O, Inc.*, where the Eleventh Circuit Court of Appeals provided additional guidance as to whether certain kinds of costs may be taxed by a prevailing party in federal court litigation. Recently, the Eleventh Circuit built on that precedent and provided even more guidance in *Arcadian Fertilizer, L.P. v. MPW Industrial Services, Inc.* There, Arcadian sued MPW for negligence and breach of contract in connection with MPW's cleaning of portions of Arcadian's fertilizer plant. After a seven-day trial, the jury found for Arcadian and awarded it \$2,800,000 in compensatory damages and \$980,000 in pre-judgment interest on the contract claim. Following trial, Arcadian submitted a bill of costs that included, among other items, a claim of over \$29,000 for trial exhibits. Of this amount, approximately \$3,100 was for copies of oversize documents, color photographs, and video exhibits. The balance was for sums associated with a computer animation that was used during trial to depict the chemical process for producing fertilizer and the events leading up to the problems in the plant that Arcadian claimed were caused by MPW.

The trial court concluded the exhibits were necessary for use in the case, acknowledged that the computer animation was especially helpful to the jury, and taxed against MPW half of the total expense of the animation. Including costs taxed for other exhibits in addition to those for oversize documents, color photographs, and video exhibits, the total amount taxed against MPW was approximately \$30,000. On appeal, the Eleventh Circuit addressed the question of whether the trial court abused its discretion in awarding costs to Arcadian for the trial exhibits and the computer animation.

Noting that costs may only be taxed if there are express provisions for doing so in federal statutes, the Eleventh Circuit identified 28 U.S.C. §1920(4) as the only statutory provision that potentially supports the taxation of these particular costs. This statute allows “fees for exemplification and copies of papers necessarily obtained for use in the case” to be taxed by a prevailing party in a federal case against the losing party in that case. The appellate court determined that the oversize documents and color photographs are capable of being characterized as “copies of paper” within the meaning of the statute, and held they were properly taxed against MPW. The court did not believe that the video exhibits and animation properly qualified as “copies of paper.” The remaining question, therefore, was whether they could be considered as “exemplifications” under the statute. Relying in part on the *W&O, Inc.* case, the Eleventh Circuit held that costs associated with the video exhibits and animation did not fall within the statute and should not have been taxed by the trial court.

The court seemed to reach this conclusion somewhat reluctantly. It acknowledged that there are a number of technologies being used by litigants and the courts in the production and presentation of exhibits at trial. And, the use of technology will only increase. Indeed, the various courtrooms in the newly constructed federal courthouse in Tampa contain equipment and are pre-wired specifically to encourage the use of technological methods for presenting evidence. But, the Eleventh Circuit opined that until Congress sees fit to amend the language of 28 U.S.C. §1920 to include the amounts incurred by the use of technologies as costs that may be taxable, these kinds of costs are not taxable in this federal appeals circuit.

U.S. SUPREME COURT REQUIRES THE PGA TOUR TO ALLOW CASEY MARTIN TO RIDE IN A GOLF CART DURING TOUR-SPONSORED EVENTS

The PGA Tour, Inc. sponsors professional golf tournaments conducted on three annual tours. A player may gain entry into the tours in various ways. The most common way is through successfully competing in a three-stage qualifying tournament known as the “Q-School.” Any member of the public may enter the Q-School by submitting letters of recommendation and paying an entry fee to cover greens fees and the costs of golf carts, which are permitted during the first two stages, but are prohibited during the third stage. The rules governing competition in Tour events include the “Rules of Golf,” which apply at all levels of amateur and professional golf and do not prohibit the use of carts, and the “hard card,” which applies specifically to the Tour’s professional tours and requires players to walk the golf course during tournaments (except in “open” qualifying events for each tournament and on the senior PGA Tour).

Casey Martin is a talented and successful golfer afflicted with a degenerative circulatory disorder that prevents him from walking golf courses. His circulatory disorder constitutes a disability under the provisions of the Americans with Disabilities Act of 1990 (“ADA”). When Martin turned professional and entered the Q-School, he made a request for permission to use a golf cart during the third stage. His request was supported by detailed medical documentation. The PGA Tour refused, and Martin sued under the ADA. More specifically, he brought suit pursuant to the provisions of what is known as Title III of the ADA, which states in part that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment

of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. Title III also requires an entity owning or operating a public accommodation to make reasonable modifications in its policies when necessary to afford such accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such accommodations. In other words, Title III of the ADA mandates that disabled and non-disabled persons be provided equal access to places of public accommodation.

The trial court rejected the Tour's contention that the play areas of its tour competitions are not "places of public accommodation" within Title III. And, after trial, the trial court entered a permanent injunction requiring the Tour to allow Martin to use a golf cart during Q-School and tournaments. In its reasoning, the trial court found that the purpose of the walking rule was to inject fatigue into the skill of shot-making, but the fatigue injected by walking a course cannot be deemed to be significant under normal circumstances; in any event, even with the use of a cart, Martin suffered more fatigue from coping with his disability than the fatigue his non-disabled competitors suffer from walking during events. The trial court also concluded that accommodating Martin's request would not fundamentally alter the game. The Ninth Circuit Court of Appeals affirmed the trial court's decision. It concluded that golf courses are places of public accommodation during professional tournaments, and permitting Martin to use a cart would not fundamentally alter the nature of those tournaments. The PGA Tour petitioned the U.S. Supreme Court for a Writ of Certiorari to review the Ninth Circuit's decision. The Supreme Court granted the writ and heard the case.

In *PGA Tour, Inc. v. Martin*, the Supreme Court affirmed. First, it agreed that the Tour's golf tours and qualifying rounds "fit comfortably" within Title III's coverage, and Martin within its protection. Second, the Supreme Court believed that allowing Martin to use a golf cart is not a modification that would fundamentally alter the nature of the tours or the third stage of Q-School. As the Court put it,

In theory, a modification of petitioner's golf tournaments might constitute a fundamental alteration in two different ways. It might alter such an essential aspect of the game of golf that it would be unacceptable even if it affected all competitors equally; changing the diameter of the hole from three to six inches might be such a modification. Alternatively, a less significant change that has only a peripheral impact on the game itself might nevertheless give a disabled player, in addition to access to the competition as required by Title III, an advantage over others and, for that reason, fundamentally alter the character of the competition. We are not persuaded that a waiver of the walking rule for Martin would work a fundamental alteration in either sense. . . . [T]he use of carts is not itself inconsistent with the fundamental character of the game of golf. From early on, the essence of the game has been shot-making The walking rule . . . is not an essential attribute of the game itself. Indeed, the walking rule is not an indispensable feature of tournament golf either.

Justice Scalia, joined by Justice Thomas, strongly dissented, and the best way to appreciate the passion of his position is to read his words. Justice Scalia stated in part as follows:

. . . I see no basis for considering whether the rules of that competition must be altered. It is as irrelevant to the PGA Tour's compliance with [Title III of the ADA] whether walking is essential to the game of golf as it is to the shoe store's compliance whether "pairness" is essential to the nature of shoes. If a shoe store wishes to sell shoes only in pairs it may; and if a golf tour (or a golf course) wishes to provide only walk-around golf; it may. The PGA Tour cannot deny respondent *access* to that game because of his disability, but it need not provide him a game different (whether in its essentials or in its details) from that offered to everyone else.

. . . .

But the rules are the rules. They are (as in all games) entirely arbitrary, and there is no basis on which anyone – not even the Supreme Court of the United States – can pronounce one or another of them to be "nonessential" if the rulemaker (here the PGA Tour) deems it to be essential. . . . To say that something is "essential" is ordinarily to say that it is necessary to the achievement of a certain object. But since it is the very nature of a game to have no object except amusement (that is what distinguishes games from productive activity), it is quite impossible to say that any of a game's arbitrary rules is "essential." Eighteen-hole golf courses, 10-foot-high basketball hoops, 90-foot baselines, 100-yard football fields – all are arbitrary and none is essential. The only support for any of them is tradition and (in more modern times) insistence by what has come to be regarded as the ruling body of the sport – both of which factors support the PGA Tour's position in the present case.

In the end, Justice Scalia warned that his judgment that the Supreme Court's decision was clearly erroneous should not be mistaken for a belief that the PGA Tour *ought not* allow Martin to use a golf cart. He viewed this as a close question on which even the golfers on the Tour are divided, but as a question different from the one with which the Court was faced in the case – whether the PGA Tour *must* allow Martin to use a cart.

**PLEASE WELCOME RICHARD C. SWANK
TO LITCHFORD & CHRISTOPHER**

Rich Swank joined the firm in May 2001 after serving two years as a judicial clerk for Judge Robert T. Benton, II with Florida's First District Court of Appeals in Tallahassee. Rich graduated from the University of Florida in 1986 with a Bachelor of Science degree in psychology. After working for several years in the entertainment industry, Rich attended the Florida State University College of Law from which he graduated magna cum laude in 1999.

Rich was an Articles Editor on the Florida State Law Review. Rich concentrates his practice in general civil litigation, including appeals and federal practice. We are sure you will enjoy working with Rich Swank.