LITCHFORD & CHRISTOPHER

PROFESSIONAL ASSOCIATION

Attorneys and Counselors at Law

LEGAL NEWS FOR CLIENTS

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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.

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THE DOCTRINE OF STARE DECISIS PROMOTES STABILITY IN THE LAW

There are four key components in any civil or criminal litigation: the parties, the evidence they have to support their positions, the lawyers who present the evidence for the parties, and the judges who decide the legal issues involving the evidence. But, no case is litigated in a vacuum. To develop our legal theories and support our legal arguments based on the evidence in the various cases in which we represent you, we often rely on previously-decided court opinions in which similar facts and issues have arisen. It is the process of finding and using precedent to your advantage that is the essence of effective lawyering. This process necessarily assumes that precedent will be applied and followed consistently by the judges. Indeed, using precedent to create new precedent is the foundation of our legal system.

This is not as simple and straightforward as it seems. Some precedent is considered binding, other precedent persuasive, and yet other precedent is merely informative, for rarely do cases have exactly the same facts, and – depending on the court – one court's legal interpretations and rulings may not command a like decision from another court. Accordingly, there is generally room for legal interpretation and case distinction; thus, there is a reward for lawyer creativity and acumen. Nonetheless, the system fails miserably if a court does not defer to its *own* past decisions on the same point of law.

The doctrine pursuant to which a court follows its own decisions in subsequent cases is known as stare decisis. The underlying principle of stare decisis was explained well by one of Florida's Supreme Court justices in the case of *Perez v. State*, "[A] court, when deciding a particular legal issue will pay due deference to its own past decisions on the same point of law. This is a judge-made rule created to assist courts in rendering decisions by making the work of judges easier, fostering stability in the law, and promoting public respect for the law as an objective, impersonal set of principles."

The recent criminal case of *Puryear v. State* provides an illustration of the doctrine of stare decisis in action. There, the victim was robbed one afternoon while she was kneeling by her car at a self-service car wash. The assailant came from her back side, placed a metal object against her head, which she thought was a gun, and demanded money. The victim pulled her money from her back pocket, and the assailant grabbed the money and ran. As the assailant was running away, the victim stood up and looked. She never directly viewed her assailant's face, but she did observe the assailant's profile, clothing, height, and weight for a few seconds. After being robbed, the victim drove home and told her mother what had happened. She also told her boyfriend she had been robbed and described her assailant to her boyfriend. Her boyfriend took her to the police station, where the victim again described her assailant to a detective. As the victim and her boyfriend were driving home from the police station, the victim spotted an individual whom she believed was her assailant. Her boyfriend and she flagged down a police officer, who then arrested Puryear. At trial, the victim described her assailant. Over the defendant's objection, the prosecutor elicited from both the police detective and the victim's boyfriend the descriptions of the assailant that the victim had given them shortly after she was robbed. At the conclusion of the trial, the jury convicted Puryear.

On appeal, the defendant argued that the trial judge erred in allowing the detective and the boyfriend to testify to the descriptions of the assailant that the victim had given them shortly after being robbed. The defendant's position was that these descriptions constituted hearsay – out of court statements offered for the truth of the matters asserted – that was not admissible under the rules of evidence. The State argued that the descriptions were not hearsay but instead amounted to identifications of the assailant that an evidentiary rule defines as non-hearsay. The real question, then, was whether the descriptions were identifications for purposes of this rule of evidence. A 1988 Florida Supreme Court case addressed this very question and held that a description of a person is not an "identification" of a person that is admissible in evidence as non-hearsay. In a 1992 case, the Florida Supreme Court again had occasion to discuss the pertinent evidentiary rule. In the course of its discussion, it said that an out-of-court statement made in that case by a witness to a deputy that the suspect had reddish-colored hair was probably admissible in evidence under an exception to the rule against admitting hearsay, and additionally was admissible non-hearsay as a statement of identification. Here, the Fourth Circuit Court of Appeal determined that the 1992 case controlled, and thus the victim's description of Puryear amounted to an identification of him that was admissible non-hearsay.

The Florida Supreme Court disagreed with this analysis based on the doctrine of stare decisis. After acknowledging its adherence to the doctrine, it noted that the doctrine bends where there has been a significant change since the adoption of the legal rule in the prior cases or an error in the legal analysis in the prior cases. It then noted that the language in its 1992 case concerning description and identification evidence was not necessary for the holding of the case and thus constituted only dicta. On the other hand, the Supreme Court made clear that the language in its 1988 case concerning description and identification evidence was paramount to and constituted its express holding in that case. As there was no showing of a change of circumstances or error in legal analysis regarding the 1988 case, the court determined that the Fourth Circuit erred in finding that the 1992 case controlled. Under the doctrine of stare decisis, the earlier 1988 case was controlling. The supreme court quashed the Fourth Circuit's decision, and the case was remanded.

FIFTH DISTRICT COURT OF APPEAL SANCTIONS PARTY WHO FAILED TO ATTEND MEDIATION WITHOUT GOOD CAUSE

Almost all trial courts, whether state or federal, now include a provision in their scheduling orders requiring parties to participate in court-annexed mediation. A typical mediation order mandates that a party personally attend the mediation conference. Florida Rule of Civil Procedure 1.720 expressly provides for sanctions if a party fails to appear at a mediation conference without good cause. The sanction may include an award of mediator and attorney's fees and other costs. The rule goes on to provide that a party is deemed to appear at a mediation conference if the following are physically present: the party or its representative having full authority to settle without further consultation; the party's counsel; and, for any insured party, a representative of that party's insurance carrier who is not the carrier's outside counsel and who has full authority to settle up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.

In *Carbino v. Ward*, the court had to decide whether a representative of an insurance carrier can also fulfill the role of a party's representative for purposes of the party's appearing at mediation as required by Rule 1.720. In this case, the Carbinos sued Ward in negligence for damages arising out of an automobile accident. Ward had an insurance policy with a $100,000 limit. The Carbinos made a demand for the policy limit, which was rejected by Ward and his insurer. The trial court ordered the parties to mediation. The Carbinos and their attorney were present. Ward's counsel and a representative from Ward's insurance company were also present. Ward did not attend. Ward's counsel had advised him it was not necessary to attend; however, no prior arrangements had been made regarding his not attending, and a motion seeking to excuse his attendance had never been filed. Upon learning that Ward would not be present, counsel for the Carbinos chose not to go forward with the mediation conference. The Carbinos then filed a motion for sanctions seeking an award of mediator and attorney's fees, costs, and their lost wages. Ward also filed a motion for sanctions arguing that the Carbinos were not justified in refusing to go forward with mediation. The trial court determined that per rule 1.720, Ward was required to be present at the mediation. Thus, it awarded the Carbinos their mediator and attorney's fees but denied their request for lost wages. Upon rehearing, when the court learned that Ward had been advised by his counsel not to attend the mediation, it found Ward had a good faith argument for not attending but not good cause for not attending. The court vacated the award of attorney's fees but maintained the award of mediator fees as a sanction.

On appeal, the Fifth District Court of Appeal held that the trial court properly concluded Ward was required to attend the mediation conference. The phrase "a party or its representative" as used in Rule 1.720 relates to the representative of a corporate party, a partnership party, an incapacitated person, or a minor, all of whom can only physically appear in a case through a representative. A representative of the insured's insurance company was not a "representative" of the party in this sense. Moreover, because the insurance company representative only had authority to settle up to policy limits and the Carbinos had not limited their settlement demand to policy limits, the representative of the insurer was not a "representative having full authority to settle without further consultation." Because of Ward's failure to appear, therefore, the trial court was required to impose sanctions under the rule, including both mediator and attorney's fees. It was error, the appellate court held, for the trial court to withdraw the award of attorney's fees upon rehearing. The Fifth Circuit also awarded the Carbinos their attorney's fees resulting from the appeal. The appellate court did agree with the trial court, however, that it properly denied lost wages as a sanction. No case law, statute, rule, or other authority defines the "other costs" provision of Rule 1.720 to include lost wages.

A TRIAL COURT POSSESSES INHERENT AUTHORITY TO ASSESS ATTORNEY'S FEES AS A SANCTION AGAINST AN ATTORNEY FOR HER BAD FAITH CONDUCT DURING THE COURSE OF LITIGATION

There is no doubt that the litigation process is expensive and can be frustrating at times. Often, part of the expense and frustration can be traced to questionable tactics by opposing counsel. Generally, there are rules and statutes that provide mechanisms for sanctioning an opponent when he or she goes too far or fails to do a required act or make a required filing. The

kinds of sanctions that are available are wide-ranging. One sanction that may be available in certain circumstances is an award of attorney's fees.

In the recent case of *Moakley v. Smallwood*, the Florida Supreme Court was asked to resolve a conflict between decisions of the Third District Court of Appeal, on the one hand, and the First and Second District Courts of Appeal, on the other. The conflict was whether a trial court has the inherent authority, as opposed to authority granted by rule or statute, to assess attorney's fees against opposing counsel as a sanction for bad faith conduct during litigation. The supreme court held that a trial court does have such inherent authority but only in limited circumstances.

In *Moakley*, which was a post-dissolution of marriage case, the former wife, Moakley, subpoenaed her former husband and two of his former attorneys, seeking production of a promissory note that had been awarded to Moakley in the final judgment. A motion to compel production of the note was filed thereafter. On its face, the motion to compel production conceded that one of the former attorneys did not have the note, and the attorney had so testified. Nonetheless, the former attorney was forced to attend the hearing on the motion. The trial court, concluding that there was no reasonable explanation for the issuance of a subpoena to the former counsel, granted monetary sanctions against Moakley and her counsel for putting her former husband's former attorney through the needless exercise. On appeal, the Third District affirmed the imposition of sanctions and held that the trial court had the inherent authority to do so. In previous cases dealing with the same question, the First and Second Districts held that a trial court did not have inherent authority to award attorney's fees as a sanction.

The supreme court began its analysis of this question by noting that in past decisions, it had explained that, generally, a court may only award fees when they are expressly provided for by rule, statute, or contract. Nonetheless, the court also cited to a 1920 case in which it recognized the inherent authority of trial courts to assess attorney's fees for attorney misconduct during the course of litigation. In that early case, an attorney had unnecessarily conducted foreclosure proceedings on a mortgage, against his client's wishes, for the sole purpose of increasing his fee.

The court then cited to other, more recent opinions in which it recognized that a trial judge has the inherent power to do all things necessary to enforce orders, conduct the court's business in a proper manner, and protect the court from acts that obstruct the administration of justice. Finally, the supreme court referred to a 1998 case titled *Bitterman v. Bitterman* in which it determined that under narrow circumstances a trial court has inherent authority to award fees for bad faith conduct against a party, even though no statute authorizes the award.

Relying on these past decisions, the court in *Moakley* found that nothing in the reasoning of prior cases limits the trial court's application of its inherent authority to a party, as opposed to counsel. Moreover, it noted that an attorney is not only the representative of the client, but also an officer of the court who has a special responsibility for the quality of justice. The court turned to a U.S. Supreme Court case, *Roadway Express, Inc. v. Piper*, that held that federal district courts have inherent authority to impose fees against counsel for bad faith conduct; however, a

specific finding that counsel's conduct constituted or was tantamount to bad faith is a necessary precedent to any such sanction under the federal trial court's inherent authority.

Accordingly, the Florida Supreme Court held that trial courts possess inherent authority to impose attorney's fees against an attorney for bad faith conduct. The trial court's exercise of that authority must be based upon an express finding of bad faith conduct and must be supported by detailed factual findings describing the specific acts of bad faith conduct that resulted in the accumulation of unnecessary fees. Further, the amount of the award must be directly related to the fees and costs that the opposing party incurred as a result of the specific bad faith conduct. Such a sanction is appropriate only after the attorney has notice and an opportunity to be heard on the issue, including the opportunity to present witnesses or other evidence. Finally, if a specific rule or statute applies, the trial court should rely on that rule or statute, instead of its inherent authority, to make a fee award. The Florida Supreme Court warned that when exercising its inherent authority, a trial court must strike an appropriate balance by condemning litigation tactics undertaken solely for bad faith purposes while insuring that attorneys will not be deterred from zealously pursuing lawful claims and issues on their clients' behalves.

Applying the above analysis to *Moakley*, the court quashed the Third District's decision because the trial court had not made express findings of bad faith and had not provided the attorney with notice and an opportunity to be heard before it imposed fees.

Chief Justice Charles Wells concurred only in the result of the case. In a separate opinion, he articulated his view that the majority's decision introduced a new basis for sanctioning lawyers that did not come within either The Florida Bar's attorney discipline procedures or the court's contempt power. He also opined that this new basis for attorney sanctions is without adequate procedures, without a definition of "bad faith," and without limitations on the sanctions. He noted that, based on his experience as a litigator, he was tempted to join in the majority's opinion because he had witnessed, firsthand, lawyer abuse that should have been sanctioned but was not because of an apparent lack of an effective way to do it. But, at the same time, he found the majority's opinion problematic in that it could lead to arbitrary or intimidating applications of sanctions and could inappropriately restrain lawyer creativity and innovation. He recommended that, instead of the majority announcing a change in the way lawyers can be sanctioned, it would be far better to have the Bar's rules committees develop rules on bad faith sanctions against lawyers.

BE CAREFUL TO SELECT THE PROPER CLUB

It goes without saying that every weekend golfer would love to improve his or her driving distance and accuracy. Doing so should result in lower scores. Doing so may also result in avoiding liability. In *Gomez v. Holtz*, the plaintiff was driving a riding lawn mower. Richard Holtz hit the plaintiff with his golf ball. The plaintiff then brought suit against Holtz. The trial court entered a summary judgment in favor of Holtz. The plaintiff appealed. The Fourth District Court of Appeal reversed the grant of summary judgment. It noted that a person hitting a golf ball has a duty to exercise ordinary care under the then-present circumstances for the safety of

persons reasonably within the range of danger. Following this standard, the appellate court held that an issue of fact, which by definition can only be dealt with at trial, remains as to whether the noise from the plaintiff's riding lawn mower was sufficient to place Holtz on notice that the mower's driver was in the line of fire of Holtz's golf shot.

PLEASE WELCOME WADE VOSE, MORGAN STREETMAN, AND AMY DEWITT TO LITCHFORD & CHRISTOPHER FOR THE SUMMER

Litchford & Christopher is pleased that its summer associate program is underway. The firm will have three law clerks this summer. Two of the clerks, Wade Vose and Morgan Streetman, began last week. The third, Amy DeWitt, will begin in July. They will work with the firm until August when their third year of law school begins. Please allow us to introduce them to you now.

Wade C. Vose has just completed his second year at the University of Florida Levin College of Law. He received honors in his legal research and writing class and his appellate advocacy class. He is the recipient of the Levin College of Law Leonard Scholarship. Wade was a political science major at the University of Florida, where he graduated with honors in May 2000 with a cumulative 3.95 grade point average. In college, Wade was a National Merit Scholar, a Florida Academic Scholar, and a member of the Omicron Delta Kappa Leadership Honorary – just to mention a few of his accomplishments. He is an Orlando native.

Morgan W. Streetman has just completed his second year at the Duke University School of Law. He is a member of the *Duke Law and Technology Review* and is the editor-in-chief of *Alibi* Literary Magazine. Morgan graduated in December 1999 with honors from the University of Florida, where he majored in economics. Among other distinctions there, Morgan was a National Merit Scholar, a Florida Academic Scholar, and a member of Phi Beta Kappa.

Amy L. DeWitt has just completed her second year at the Wake Forest University School of Law. She is the recipient of the Charles D. Barham Scholarship and a member of the Moot Court Board. Amy received her Bachelor of Science degree in finance, *magna cum laude*, from Syracuse University and a Masters in Business Administration from Binghamton University prior to attending law school.

Litchford & Christopher is proud of the fine accomplishments of these three law students and is happy to have them as part of the firm's legal talent this summer.