

LITCHFORD & CHRISTOPHER

PROFESSIONAL ASSOCIATION

Attorneys and Counselors at Law

LEGAL NEWS FOR CLIENTS

Winter 2007

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GHOSTS OF ATTORNEYS' FEES PAST

Sometimes, contracts that you assume are dead and gone will come back to haunt you with the specter of paying someone else's attorneys' fees. That was the situation Sandra Eaton faced in Fabing v. Eaton, 941 So.2d 415 (Fla. 2d DCA 2006).

After her mother died, Ms. Eaton became embroiled in a lawsuit with her mother's personal representative, John Fabing. One of the issues, which the appellate court would later describe as "protracted and bitter," was the valuation of a house Ms. Eaton had jointly owned with her mother. The parties agreed to mediate that issue. As a result of the mediation, they entered into a contract agreeing to abide by the valuation of a particular real estate appraiser. They also agreed that, should any dispute arise concerning the terms of their mediated contract, the losing party would pay the other party's attorneys' fees.

Unfortunately, the appraiser who they had specifically designated, delegated the job to an associate. The associate bungled the work and the resulting appraisal proved useless. The parties submitted the matter to the trial court, which found that the contract the parties had negotiated in mediation was void and unenforceable. Mr. Fabing moved to recover his attorneys' fees, but the trial court determined that neither of the parties could collect attorneys' fees from the other based on the void contract.

On appeal, the Second District Court of Appeal reversed the trial court on a technicality. The appellate court found that the trial court's conclusion not to enforce the attorneys' fee shifting provision would have been correct if it had found that the contract failed when it was formed, but not if it became void and unenforceable due to events that occurred afterward. The appellate court concluded that even though the contract was otherwise unenforceable between the parties it could nevertheless still shift attorneys' fees to the prevailing party. The trial court was given the task to determine whether the contract failed at its formation and, if not, which of the parties had prevailed and was due its attorneys' fees.

The case of Fabing v. Eaton underscores the multifaceted nature of contractual provisions to shift attorneys' fees between the contracting parties. Such provisions can serve beneficial purposes. For example, they can discourage litigation and level the legal playing field between parties with unequal bargaining positions. But, as demonstrated in Fabing, a clause shifting attorneys' fees can survive even if the contract continuing it is later found to be void and unenforceable due to unforeseen events.

At the front end, such clauses must be considered with care. Parties should seek guidance from experienced legal counsel who can accurately explain the potential hazards and benefits. If litigation ensues, fee shifting clauses should be carefully considered by trial counsel who understand the sometimes hair-splitting issues involved. Otherwise, like Sandra Eaton, the unwary party to an improvident contract might have some sleepless nights dealing with the uninvited apparitions of contracts past.

**“BUT I WASN’T DRIVING, I SWEAR!” MIGHT GET YOU OUT OF A DUI –
BUT NOT ALWAYS**

The vast majority of individuals arrested for the offense of driving under the influence of alcohol or drugs – DUI – are stopped while actually operating the vehicle in question. Some, however, much to their surprise and chagrin, are actually arrested even though the car is standing still in a parking lot. Some arrestees apparently believe, inaccurately, that if the car is not moving, they cannot be arrested for “driving” it while intoxicated. They undoubtedly have puzzled expressions, therefore, as they are led away to the police station from their stationary vehicle.

However, one such individual whose license was suspended after he was charged with DUI recently prevailed when a local circuit court operating in its appellate capacity determined that the circumstances of his arrest did not meet the criteria for that offense. The defendant was in the car, seemed dazed and confused, smelled of alcohol, and failed both field sobriety and breath tests. The appellate panel of the Ninth Judicial Circuit nevertheless held that the arresting officer did not have probable cause to find the defendant in actual physical control of the vehicle. The panel therefore granted the defendant’s petition for writ of certiorari and quashed the administrative order suspending his license.

In Heath v. State, Dept. of Highway Safety and Motor Vehicles, 13 Fla. L. Weekly. Supp. 1058 (Fla. 9th Jud. Cir. July 20, 2006), an Orlando police officer entered a public park after witnessing headlights in the park after hours. He approached a 2004 white Cadillac. Inside, the officer observed the defendant sitting in the front seat “with a partially clothed female next to him.” As the officer shined his flashlight into the car, the defendant opened the driver’s side door. The officer observed that the defendant’s “eyes were red and glassy and that his face appeared flushed.” The officer also smelled the odor of alcohol in the car.

The officer asked the defendant to exit the car. The man appeared unsteady on his feet and his speech was slurred. Upon questioning, the man admitted that he had had “a few drinks.” The officer administered a field sobriety test, which the defendant failed. The officer then arrested him for DUI and took him to a DUI center, where the defendant consented to a breath test. “The results were 0.142 and .0143;” substantially over the legal limit. As a result, the defendant’s license was suspended.

Appearing before a hearing officer of the Department of Highway Safety and Motor Vehicles, the defendant argued, among other things, that his license suspension should be set aside because there was no evidence he was in actual physical control of the vehicle. A finding of probable cause of actual physical control is one of the elements necessary for upholding suspension of a license under Section 322.2615(7)(a), Fla. Stat. (2006). The hearing officer denied his motion and sustained the license suspension.

In ordering the reinstatement of the defendant’s license, the appellate panel of the Ninth Judicial Circuit found that the hearing officer’s decision was not supported by competent substantial evidence. The appellate panel held the arresting officer did not have probable cause to believe that the gentleman was in control of the vehicle.

The panel noted that whether an individual is in actual physical control of the vehicle is a fact-specific inquiry that must be done on a case-by-case basis. The panel was careful to make the distinction that the *hearing officer* need not find that the individual was in actual physical control, only that the *arresting officer* had probable cause to make such a finding. The panel found that competent substantial evidence was not present to make such a finding in this case.

The appellate panel noted other cases where actual physical control had been found, even though the arrestee had not actually been driving. In one case, the person had been found at 2:30 a.m. in the driver's seat, sitting in the traffic lane facing the wrong direction. The engine was not running. The keys were in the ignition. The lights were on and the man's foot was on the brake. This was sufficient to place the person in physical control of the vehicle. See Griffin v. State, 457 So.2d 1070 (Fla. 2d DCA 1984). The panel also noted another case where no physical control was found. The person was sleeping in the front seat of his car in a parking lot, lights on, but the engine was not running. The court in that case noted that sitting behind the wheel heavily supported the proposition of physical control, but ended up concluding that merely getting caught sleeping in a parked car was not enough. See Fieselman v. State, 537 So.2d 603 (Fla. 3d DCA 1988).

Considering these two prior decisions, the appellate panel found that the defendant's circumstances to be more similar to the latter. The charging affidavit recited that the defendant was seated in the driver's seat of a vehicle in a closed park. There was no information as to whether the car was running or whether the keys were in the ignition. Though headlights had led the officer to the park, there was nothing in the affidavit stating whether the defendant's car's headlights were on. Finally, the defendant was not alone. He was accompanied by a female in the passenger's seat. Under these facts, the panel concluded that the officer did not have probable cause to make the arrest and thus there was insufficient evidence to support the license suspension.

COURTS MAY INFER WRONGDOING IF IT IS DISCOVERED THAT A PARTY DESTROYED EVIDENCE

In every case, there exists favorable and unfavorable evidence for each side. Bad evidence is troublesome to deal with. Parties oftentimes wish that such evidence did not exist. Sometimes, a party will even go to the extreme measure of physically destroying that evidence in an attempt to hide its existence from the opposing party or the court. However, parties should be wary of any attempt to destroy evidence. Courts have the authority and discretion to severely punish a party for intentionally or even negligently destroying evidence in a lawsuit. In Fini v. Glascoe, 936 So.2d 52 (Fla. 4th DCA 2006), the defendants, Stephen Glascoe and Sawgrass Ford, decided to destroy evidence that seemed particularly harmful to them. In turn, the trial court severely punished the defendants for their acts.

Frank and Olivia Fini (the "Finis") had leased a new 2001 Ford F350 diesel truck (the "truck") from Sawgrass Ford. In connection with their lease, Stephen Glascoe, an employee of Sawgrass Ford, had installed an alarm system in the truck. Following installation of the alarm

system, the Finis began to experience several problems with the truck. At random times, when the alarm was engaged, the horn would blow, the power windows would operate without input, and the lights of the car would flash without input. At other times, the engine would race while the transmission was in park or neutral.

The Finis sought to have the truck repaired. Both Sawgrass Ford and another Ford dealership, Wayne Akers Ford, were unable however to properly diagnose the problem or repair the truck. Mr. Fini was then driving the truck on August 29, 2001, when it accelerated suddenly and uncontrollably. He lost control of the vehicle, which flipped and rolled several times before landing on its hood. Mr. Fini suffered a variety of injuries as a result of the accident.

Following the accident, the wrecked truck was towed to an impound lot that was maintained by the Florida Highway Patrol ("FHP"). The day after the accident, Glascoe, on behalf of himself and Sawgrass Ford, entered the impound lot without the knowledge of the FHP. He proceeded to destroy all evidence of the installation of the alarm system in the truck. Glascoe removed the dashboard and harness cover with a pry bar, destroyed the system wiring, and disconnected the entire system. Glascoe later admitted that he entered the truck after the accident but steadfastly denied any further wrongdoing. However, a witness, who had overheard Glascoe speaking to his wife, came to the Finis. The witness executed an affidavit, stating that Glascoe boasted to his wife, "I just took care of all that. I just took every single wire traceable to that alarm out. You cannot even tell that the alarm was ever there. They will never be able to prove that the alarm caused this, so me and Sawgrass' asses are covered."

The Finis filed a lawsuit against Glascoe, Sawgrass Ford, Wayne Akers Ford, and the manufacturer of the alarm system installed in their truck. The lawsuit alleged that Glascoe and Sawgrass Ford were negligent in the installation of the alarm system and further stated that Glascoe and Sawgrass Ford had spoliated or improperly destroyed evidence in the case.

The trial court found that Glascoe and Sawgrass Ford did in fact improperly spoliate evidence in the case. Glascoe and Sawgrass Ford appealed this ruling to the Fourth District Court of Appeals. In discussing the issue of spoliation, the appellate court distinguished between first-party spoliation and third-party spoliation. In first-party spoliation, one party claims that an opposing party destroyed relevant evidence in the lawsuit between those parties. In third-party spoliation, a party claims that a non-party destroyed evidence that is relevant in the lawsuit. A third-party spoliation claim may become the basis of an independent lawsuit against the non-party who destroyed the evidence. However, first-party spoliation claims do not result in an independent lawsuit. Rather, first-party spoliation claims are decided in the existing lawsuit between the parties. If first-party spoliation claims are found to be warranted, the party who destroyed the evidence may be sanctioned by the trial court. For example, if the trial court finds that a party intentionally or negligently destroyed evidence, then the trial court may infer that the party destroyed the evidence solely to hide wrongdoing.

In the Finis' case, they claimed that Glascoe and Sawgrass Ford were guilty of first-party spoliation. The Fourth District affirmed the trial court's ruling that Glascoe and Sawgrass Ford had in fact committed spoliation of essential evidence in the lawsuit. The Fourth District noted that the trial court should sanction Glascoe and Sawgrass Ford, infer a presumption of negligence

against Glascoe and Sawgrass Ford for their acts of spoliation, or both. Even though evidence may be damaging to one's case, the destruction of that evidence can result in far worse consequences for a party. All evidence no matter how damaging, can be finessed and downplayed. A trial court's ruling that infers wrongdoing against you, however, can seldom be avoided.

WELCOME KEITH ROUNSAVILLE

Litchford & Christopher is pleased to announce the arrival of Keith Rounsaville, our newest attorney. Keith is Board Certified by the Florida Bar in Antitrust and Trade Regulation. He has served as lead trial counsel and appellate counsel in civil and criminal antitrust actions throughout the United States, including Alabama, Florida, Georgia, Colorado, Indiana, Texas, Maryland and Virginia. His industry experience in antitrust matters includes pharmaceuticals, consumer electronics, optical lenses, building products, petroleum products, industrial chemicals, automotive products, agricultural products and thoroughbred horseracing. His practice also includes RICO, environmental and intellectual property litigation. Keith is also a Member of the American Law Institute. Keith received his B.A., with departmental honors, from Yale University, and his J.D., *cum laude*, from Columbia University School of Law. We know you will enjoy working with Keith.