



**LITCHFORD &
CHRISTOPHER**
PROFESSIONAL ASSOCIATION

Attorneys and Counselors at Law

Legal News for Clients

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“WHEN OTIS THE DRUNK GETS OUT OF LINE IN THE MAYBERRY JAIL, BARNEY FIFE CAN TAKE CARE OF IT WITHOUT FEAR OF A LAWSUIT.”

Many news stories focus on the improper or excessive use of force by police officers. These stories often downplay the dangerous nature of the profession. In real life, sometimes a certain degree of force is necessary for the officer to perform his or her job and protect the members of the public. Luckily for one officer, the United States Court of Appeals for the Eleventh Circuit recently acknowledged this reality.

The plaintiff in Cockrell v. Sparks, 510 F.3d 1307 (11th Cir. 2007), suffered injuries. A corrections officer had shoved him while attempting to move another inmate between cells. Plaintiff Thomas G. Cockrell, who had been arrested for public intoxication, was incarcerated at the Polk County, Georgia jail. Another inmate at the jail had attempted suicide. The guards implemented county policy by attempting to move the suicidal inmate into the drunk tank, where it was less likely that he could do himself any more harm. To make room, the guards moved Cockrell out of the drunk

tank into a neighboring cell.

While the guards were tending to the suicidal inmate, Cockrell, who was still drunk, took off his shoe. He began pounding on his cell door demanding to be allowed to post bond so he could be released. This disrupted the guards' efforts to secure the suicidal inmate. One of the guards told Cockrell to “shut the hell up” and shoved him with an open hand away from the cell door. Cockrell fell awkwardly. He suffered a broken hip and wrist and a lacerated ear as a result. The guards immediately called for medical attention for Cockrell, who was then transported to the hospital for the remainder of the night.

Cockrell sued the guards. Among other things, he claimed a violation of his civil rights due to the guards' alleged use of excessive force. The District Court granted the guards' motion for summary judgment. The Eleventh Circuit affirmed. The appellate court took into account the actual amount

of force used against Cockrell, balancing it with the need to maintain order and protect the suicidal inmate that the guards had been attempting to relocate. The legal standard applied is that a guard's use of force must be so egregious as to “shock the conscience.” Though the court noted the extent of Cockrell's injuries, it did not find this determinative. It observed that an open-hand shove was likely the minimum amount of force the guard could have used. Finally, the Eleventh Circuit held that the guard's order to Cockrell to “shut the hell up” evidenced a desire to restore order, rather than a sadistic desire to cause harm.

So, the next time Otis the drunk checks himself into the Mayberry jail, he should continue to remain his usual well-mannered self. If not, Sheriff Andy Taylor and Deputy Barney Fife may well use reasonable force to restore order without fear of federal civil rights liability.

DON'T GET STUCK IN SOMEONE ELSE'S HOME TURF

A forum selection clause in a contract allows the parties to agree that any litigation resulting from the contract will be initiated in a specific forum. A "forum" may refer to a particular court, such as federal or state court in a specific location, or to a kind of dispute resolution process, such as mediation or arbitration. This article focuses on forum selection clauses that designate a particular court for a lawsuit. Businesses will typically include this type of forum selection clause in their standard form contracts. Such contracts usually designate the business' home state as the forum. The business' motivation in having these types of clauses is to keep the lawsuit in its "home turf," in which it has familiarity with the courts. In signing contracts that include forum selection clauses, one should pay attention to whether the language is permissive or mandatory. If a forum selection clause is mandatory, you are required to litigate in a particular forum. On the other hand, if a forum selection clause is merely permissive, you have consented to litigate in a particular forum but may not be required to do so.

In Weisser v. PNC Bank, N.A., 967 So.2d 327 (Fla. 3d DCA 2007), the Third District Court of Appeal recently examined a forum selection clause to determine whether an inconsistency in a subse-

quent agreement potentially rendered it permissive instead of mandatory. Michael Weisser executed a loan application with PNC Bank. A forum selection clause was included that stated, "The parties further consent to the exclusive jurisdiction of either the United States District Court for the District of Kansas or the District Court of Johnson County, Kansas." After executing the application, Weisser also executed a rate agreement with PNC Bank. It included a separate forum selection clause that stated, "The parties further consent to the exclusive jurisdiction of either the United States District Court for the Western District of Missouri or the Circuit Court of Jackson County, Missouri." When the bank failed to fund his loan, Weisser filed suit against PNC in state court in Miami-Dade County, Florida. PNC Bank filed a motion to dismiss the lawsuit on the grounds that Weisser brought it in the wrong forum. The trial court granted PNC Bank's motion to dismiss, and Weisser appealed to the Third District.

The language of the forum selection clause is often indicative of whether it is mandatory or permissive. Words like "may" indicate that it is a permissive forum selection clause, whereas words like "must" or "shall" denote a mandatory clause. In Weisser, there were two mandatory forum selection

clauses. Weisser nevertheless argued that this ambiguity or conflict between the two rendered both forum selection clauses to be only permissive, not mandatory. The Third District rejected this argument on the ground that the clauses were unambiguous and contained words of exclusivity. Moreover, the appellate court pointed out that the rate agreement provided, "Applicant acknowledges that nothing in this [rate agreement] shall modify the terms of the Commitment." This eliminated any potential conflict or ambiguity between the two clauses. Based on the fact that the rate agreement could not modify the original agreement, the Court held that the forum selection clause in the rate agreement was unenforceable. It had no effect on the clause in the loan application. The appellate court accordingly affirmed the dismissal of the lawsuit on the grounds that Weisser brought it in the wrong forum.

Forum selection clauses should be read and considered carefully whenever signing any agreement. If the clause is unambiguous and includes terms of exclusivity, the venue specified in the clause will be the only place where issues arising from the contract may be litigated. If not careful, you may be stuck in your opponent's home turf.

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INTRODUCING OUR WONDERFUL SUMMER CLERKS

If you visited our office from May to August of this year, you may have seen two bright eyed clerks eager to learn more about the legal profession. This summer, we were fortunate to have not one, but two talented summer clerks from the University of Florida law school — a rising third year law student, Keri McGovern, and a rising second year law student, Vince Galluzzo.

Keri McGovern

Keri McGovern spent the summer with Litchford & Christopher. This coming fall she will be returning to the University of Florida Levin College of Law to complete her final year of law school. A Florida native, Keri attended Covenant College, located just outside of Chattanooga, Tennessee. She graduated with double majors in History and in English. While at Covenant College, she served in a number of student leadership roles and acted as an assistant to the college president.

When she's not in the office or the classroom, Keri is actively involved as

a team member and Executive Board member of the University of Florida's Trial Team. She also serves as a mentor and tutor with the Law School Mentor program, and as a teaching assistant for various legal skills classes.

When asked about her experience at Litchford & Christopher, Keri replied, "I enjoyed this summer opportunity. I was able to develop my legal skills under some accomplished legal practitioners at Litchford & Christopher. It was challenging to undertake such a variety of legal work in serving our clients' diverse needs."

Vince Galluzzo

Vince Galluzzo also worked with us as a law clerk this summer. In May, he finished his first year of law school at the University of Florida Levin College of Law. Vince is originally from the Orlando area, and attended Oviedo High School. He was an undergraduate at the University of Florida where he obtained his degree in computer engineering.

During his first year of law school, Vince received two book awards. These are awarded to students who score the highest grade in a particular class. He recently received the prestigious honor of being invited to join the University of Florida Law Review. While not busy with school, Vince enjoys attending Gator football and basketball games, playing tennis and golf, and cooking.

When asked about his summer experience, Vince says, "I have enjoyed my summer at Litchford and Christopher immensely. I received an incredible amount of responsibility and experience and have worked with really great people." After law school, Vince hopes to be involved in litigation.

"This summer, we were fortunate to have not one, but two great summer clerks from the University of Florida law school — a rising third year law student, Keri McGovern, and a rising second year law student, Vince Galluzzo."

**LITCHFORD &
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AND YOUR LOVED ONES A
HAPPY SUMMER!**



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About our Firm

Litchford & Christopher is a Florida law firm representing clients involved in difficult business disputes. We try lawsuits. The firm, established in 1985, is an “AV-rated” firm with clients of varying sizes – from small, local businesses to national, Fortune 500 corporations – and in diverse industries.