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Attorneys and Counselors at Law

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COURT IMPOSES MONETARY SANCTIONS AGAINST LAWYERS FOR THEIR PROSECUTION OF A FRIVOLOUS CASE

Attorneys are charged with vigorously representing the interests of their clients. However, attorneys also have a duty to the court not to prosecute those claims they know, or should know, are meritless. An attorney that does not sufficiently investigate his or her client's claims and allows a frivolous case to go forward may be sanctioned.

Bill and Karen Amlong are a successful husband and wife attorney team that focuses much of its practice on employment matters. In 1998, Bill Amlong successfully argued the landmark case of *Faragher v. City of Boca Raton* before the United States Supreme Court, in which the Court held that an employer may be held vicariously liable for conduct of employees that creates a sexually hostile work environment. Karen Amlong has pursued numerous discrimination claims against national employers and is a self-described employee and women's advocate. One South Florida lawyer has described the pair as "the most prominent plaintiffs' lawyers you can find in the state of Florida."

In *Norelus v. Denny's, Inc.*, the Amlong firm represented a server who sued Denny's, its parent company, a franchisee, and two local managers claiming she had been sexually harassed and raped by the two managers.

Some eight months after the case was filed, the plaintiff was deposed for the first time. She was deposed twice more within the next six months. During these depositions, the plaintiff made numerous conflicting statements about key events. A few months after the last deposition was completed, the Amlong firm filed a document containing corrections and clarifications to the deposition, known as an errata sheet, that was sixty-three pages long and contained 868 changes in the plaintiff's sworn testimony. Some of the changes went to the very heart of the suit. During evidentiary hearings on the defendants' motion for sanctions, the attorneys claimed that the errata sheet was designed to correct inaccuracies due to the plaintiff's tentative command of the English language.

The trial court found, however, the errata sheet was in fact an effort to change the deposition testimony to bolster the plaintiff's case and recitation of facts to correspond more closely to those alleged in the complaint, and not simply to correct mistakes or inaccuracies in the recording of the deposition testimony. The court also found that from the outset, the plaintiff's testimony and conduct called into question the validity of her claims. Further, the court determined that the lawyers had not interviewed the witnesses listed in the complaint before its filing or during discovery in the action. When the witnesses were eventually deposed, they had no knowledge of the allegations.

The trial court dismissed the case two years after it was filed and significant time and expense had been incurred, citing the plaintiff's "willful contempt for the judicial process." Defense counsel was not willing to end the matter at that stage, however. Contending that plaintiff's counsel had filed and continued to prosecute the action without conducting a proper investigation of the plaintiff's allegations, and then had ignored evidence that these allegations were baseless, defense counsel filed a motion to recover their attorneys' fees from the plaintiff's

lawyers. The magistrate judge found the case was frivolous but ruled the plaintiff, not her counsel, should pay the defense fees. The district judge disagreed and placed the blame directly on counsel. The district judge referred the matter of the amounts to be paid to another magistrate judge. He determined, after hearing testimony, that the amount the defense lawyers should receive is some \$385,000, which, with interest, could put the total over \$500,000. The district judge has yet to make a final ruling on the recommended fee award.

THIRD DISTRICT COURT OF APPEAL AFFIRMS DISMISSAL OF CASE FOR “FRAUD ON THE COURT”

Oftentimes, a movie or television show makes it seem that a “slick” lawyer can win a case by artfully operating at the edges of the law. As a plaintiff and his attorney found out, the actual result of such tactics may be dismissal of their lawsuit with prejudice.

In *Leo’s Gulf Liquors v. Laknani*, the plaintiff, who purchased a liquor store from the defendants, alleged the defendants misrepresented the store’s profits and the value of its inventory. The defendants argued, among other things, that any lack of profits was due to the plaintiff’s subsequent mismanagement of the store.

During discovery, both the plaintiff and his attorney claimed in depositions that the defendants’ attorney had represented both buyer and seller during the course of the sale. Regarding a substantive issue in the case, plaintiff and his attorney both denied in discovery that the plaintiff had had any past problems with the Department of Revenue concerning collection of sales taxes.

The trial court found that both the plaintiff and his attorney had lied with respect to both of these issues. Correspondence between the plaintiff’s attorney and the defendants conclusively showed that the defendants’ attorney had always represented an adversarial position to the plaintiff. Even more damning was the revelation that not only had the plaintiff and his wife had sales tax problems with their businesses in the past, but also the plaintiff’s attorney had been the person who had resolved these problems – a fact clearly evidenced by his signature on two stipulations appearing in the public record.

The trial court, and subsequently the Third District Court of Appeal, rejected the plaintiff’s contention that his and his attorney’s deposition testimony was truthful and constituted narrow responses to “inartfully” worded questions. Further, both courts rejected the plaintiff’s implicit argument that a witness’ oath is somehow less demanding during discovery. Agreeing with the trial court’s restatement of the well-settled principle “that a party who has been guilty of fraud or misconduct in the prosecution or defense of a civil proceeding should not be permitted to continue to employ the very institution it has subverted,” the Third District Court of Appeal affirmed the trial court’s order dismissing the complaint with prejudice.

**VICTORIA’S SECRET DEFENDS ITS TRADEMARK AGAINST A
“CYBERSQUATTER” INTENDING TO USE THE COMPANY’S GOODWILL TO
PROMOTE UNSAVORY WEBSITES**

A “cybersquatter” is an individual or company that registers an Internet domain name that is similar or identical to that of a well-established company, usually in the hopes of later selling the name back to the established company at a handsome profit. Recently, the U.S. District Court for the Southern District of Florida imposed stiff penalties on a cybersquatter for violations of the Lanham Act and the Anticybersquatting Consumer Protection Act (“ACPA”).

The facts presented to the trial court in *Victoria’s Cyber Secret Limited Partnership v. V. Secret Catalogue, Inc.* revealed that the Victoria’s Secret Company, the popular vendor of lingerie, clothing and personal care products such as perfumes and lotions, learned that cybersquatter Victoria’s Cyber Secret Limited Partnership (“VCSLP”) had registered four Internet domain names – “victoriassexsecret.com,” “victoriassexysecret.com,” “victoriasexsecret.com,” and “victoriasexysecret.com” – for use in conjunction with adult entertainment websites. Victoria’s Secret sent VCSLP a cease and desist letter. VCSLP responded by offering the domain names for purchase to Victoria’s Secret. Victoria’s Secret did not respond to this offer.

VCSLP filed suit seeking a declaratory judgment that its four domain names did not violate the Lanham Act, rules for the designation of domain names or common law principles of trademark infringement, passing-off, unfair competition, or dilution. Victoria’s Secret counterclaimed under the Lanham Act, ACPA, and various state and common law theories.

Victoria’s Secret also filed a petition with the National Arbitration Forum seeking to prevent VCSLP from using the domain names. An arbitrator, finding the domain names to be confusingly similar to the “Victoria’s Secret” mark, ordered VCSLP to transfer the domain names. VCSLP refused. VCSLP defended its use of the domain names on the grounds that it originally sought to use them in connection with an ill-fated project to involve model and Playboy Playmate Victoria Silvstedt, never sought to profit from the use of the names, and never confused the public as to their use. VCSLP also argued it was not, at the time of trial, using the domain names in any case.

The court was unimpressed. On summary judgment, the Southern District agreed with the arbitrator that “Victoria’s Secret” was a famous trademark and that the various domain names were confusingly similar to it. The court also found that VCSLP’s domain names tarnished and diluted the mark.

More importantly, perhaps, the court found that VCSLP acted in bad faith by registering its domain names in an effort to profit by their eventual sale or by their use in conjunction with adult websites. The court noted the similarity between the domain names and “Victoria’s Secret” and the fact that the only difference was the imposition of the word “sex” or “sexy.” The court also noted that Ms. Silvstedt was no longer involved with any VCSLP project and had formally terminated any rights for VCSLP to use her name. With regard to actual use, contrary

to VCSLP's assertions, the court found the fact that no actual websites existed as evidence that VCSLP likely never intended to create such sites in the first place.

Consequently, the court granted Victoria's Secret's motion for summary judgment as to its claims of violation of the ACPA, trademark infringement, trademark dilution and unfair competition, and its state and common law claims. The court awarded Victoria's Secret treble damages based on statutory damages of \$10,000 per domain name, ownership of all the domain names, and attorney's fees and costs.

IS A "SHOTGUN PLEADING" AS DANGEROUS AS IT SOUNDS?

The facts in *Byrne v. Nezhat* give rise to a straightforward medical malpractice claim. Nonetheless, the plaintiff subsequently retained an attorney with a personal vendetta against the defendants. Soon after the attorney took over the case, a one-count medical malpractice case became a multiple count RICO prosecution containing claims of estoppel, evidence tampering, influencing witnesses, false and fraudulent billing, mail fraud, battery, theft by deception, and numerous other claims.

Each count of the plaintiff's overblown complaint incorporated every previous count. As a result, the defendants were forced to try and frame an answer that of necessity was extraordinarily convoluted. The result was an incomprehensible set of pleadings that consumed nearly three years of the court's time to sort out before it finally dismissed the plaintiff's claims and imposed monetary sanctions of almost \$400,000 on the plaintiff and his attorney.

On appeal, the Eleventh Circuit Court of Appeals determined the plaintiff did not have knowledge of the frivolous claims included by the attorney in the complaint and reversed the imposition of monetary sanctions against the plaintiff. The court affirmed, however, the trial court's dismissal of the claims and imposition of monetary sanctions on the attorney. The appellate court focused its opinion on the "shotgun pleadings" in the case. Shotgun pleadings generally are thought of as ones that take simple claims and wrap them in numerous and tenuous causes of action that incorporate all preceding allegations and counts, and that often are so vague, ambiguous and frivolous that it is nearly impossible to determine what facts allegedly support what claims. Accordingly, it is nearly impossible for a defendant to form an intelligible answer. The court was quick to point out how shotgun pleadings ultimately impede the court's ability to administer justice. Shotgun pleadings make it difficult to narrow the issues and interfere with the court's ability to determine appropriate parameters for discovery. Moreover, the use of shotgun pleadings wastes time and makes it difficult for the court to hear other legitimate cases.

The Eleventh Circuit instructed that the use of shotgun pleadings will not be tolerated and stated that opposing counsel and the trial court should require a plaintiff to provide a more definite statement of his claim before a defendant should have to answer. If the pleading is not corrected, then it is up to the court to dismiss the complaint; otherwise, the use of shotgun pleadings will only create more inefficiencies and waste in the litigation system. The appellate court noted that trial courts should not hesitate to impose sanctions for abuse of the pleading process. Yes, shotgun pleadings may be as dangerous as they sound.

MEDIATOR'S MISCONDUCT MAY INVALIDATE A SETTLEMENT AGREEMENT REACHED DURING MEDIATION

Mediation is an informal process designed to assist the parties in a dispute in reaching a voluntary and beneficial resolution. A mediator is meant to help facilitate the communication between the parties, explore and identify issues in the dispute, and explore options to resolve the dispute. However, the ultimate power to resolve and agree remains with the parties. Court-ordered mediation was officially sanctioned by the Florida legislature in 1987. Since then, the court has used mediation to help ease its heavy caseload and to try and save all parties involved both time and money.

The general rule in Florida is that an agreement between parties cannot be invalidated by a third party's coercion or duress. The Fourth District Court of Appeal has determined, however, that a mediator's misconduct during court-ordered mediation creates an exception to this general rule.

In *Vitakis-Valchine v. Valchine*, Kalliope and David Valchine were ordered to attend mediation to attempt to resolve disputes over their divorce proceedings, which had been going on for almost two years. Both parties were represented by counsel during the court-ordered mediation. After nearly eight hours of negotiating, the mediation resulted in a twenty-three page settlement agreement. The trial court entered a final judgment of dissolution pursuant to the mediated settlement agreement. The issue on appeal before the Fourth District Court of Appeal was whether the trial court erred in denying the wife's request to set aside the settlement agreement on grounds of coercion and duress as a result of the mediator's actions.

The wife claimed that the mediator engaged in a number of acts of coercion and duress during the mediation session. Specifically, she claimed that the mediator told her that the judge would never give her custody of embryos the couple had stored during their marriage, the mediator was going to give up if the parties did not come to an agreement, and she could protest any provisions of the agreement later. The wife also claimed the mediator misrepresented her husband's net worth and the amount of money it would cost to take the case to trial. Finally, the wife claimed that she was under time pressure because the mediator repeatedly mentioned that his daughter was leaving for law school, and he stated, "You guys have five minutes to hurry up and get out of here because [my] family is more important to me."

The court of appeal concluded that it would be "unconscionable for a court to enforce a settlement agreement reached through coercion or any other improper tactics utilized by a court-appointed mediator." A mediator must conduct the mediation according to the rules set forth in the Florida Rules for Certified and Court-Appointed Mediators. The rules state that a mediator shall not coerce or improperly influence a participant, shall not intentionally or knowingly misrepresent any material fact to promote an agreement, shall not offer personal or professional opinions on how the court might resolve the dispute, and shall not make substantive decisions for any party.

Accordingly, the Fourth District held that mediator misconduct can be the basis for a trial court refusing to enforce a settlement reached at court-ordered mediation. It remanded the case to the trial court to make factual findings regarding the allegations of the mediator's misconduct.

**PLEASE WELCOME PAUL E. DEHART, III
TO LITCHFORD & CHRISTOPHER**

Paul DeHart joined the firm in August 2001. He graduated first in his class from the University of Florida in 1998 with a Bachelor of Science degree in Environmental Engineering. Paul then graduated with honors from the University of Florida Fredric G. Levin College of Law in May 2001. Paul will be taking his examination for admission to the Patent Bar in April 2002 and plans on concentrating his practice in intellectual property litigation. We are sure you will enjoy working with Paul DeHart.

SUMMER BOYD IS NOW SUMMER SALADINO

Please join us in congratulating and extending best wishes to Summer Boyd, who was recently married to Frank Saladino. After a short break, Summer is back in the office immersed in her business litigation practice. When you call for Summer now, please ask for Summer Saladino.