

# LITCHFORD & CHRISTOPHER

PROFESSIONAL ASSOCIATION

*Attorneys and Counselors at Law*

## LEGAL NEWS FOR CLIENTS

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## **EMPLOYERS DO NOT HAVE STANDING TO RAISE PRIVACY INTERESTS OF THEIR EMPLOYEES AS A SHIELD AGAINST DISCOVERY, BUT . . .**

The scenario is not particularly unfamiliar – a company is a party in a lawsuit, and the opposing party serves a request for the production of documents seeking information from employee personnel files. The law in Florida’s First District provided that private employers did not have standing to raise the privacy rights of their employees to prevent the production of the documents. The law in Florida’s Fifth District was just the opposite. In the recent case of *Alterra Healthcare Corporation v. Estate of Francis Shelley*, however, the Florida Supreme Court resolved the conflict between these districts.

In this case, the personal representative of the Estate of Francis Shelley filed an action against an assisted living facility known as Sterling House. The personal representative alleged that the facility was liable for negligence, breach of certain statutory rights, and wrongful death in connection with its dealings (or lack thereof) with Mrs. Shelley. During the course of discovery, the personal representative requested Sterling House to produce documents pertaining to each employee who provided any care or service to Mrs. Shelley while she resided at the facility. The personal representative acknowledged that most of the information could likely be found in personnel files, but he claimed that he did not seek confidential information and agreed that purely private information such as employee home telephone numbers and social security numbers could be redacted from the documents before they were produced. Sterling House objected to the document request, in part on the grounds that it violated its employees’ constitutional rights to privacy, and that the personal representative’s need for the documentation did not outweigh the employees’ privacy rights. The personal representative moved to compel the production of the documents. As part of his motion, he argued that the documents were relevant because they would help him determine things such as whether employees were qualified, the extent of Sterling House’s knowledge of their qualifications based upon disciplinary information in the files, and whether the employees were certified or licensed. He also argued that Sterling House could use information from the files to impeach its former employees who were witnesses, so he should also be entitled to review that information. Finally, he argued that the documents may reveal potential employee concerns with the operation of the facility and the care the facility provided to its residents. The trial court granted the personal representative’s motion to compel.

Sterling House filed a petition for a writ of certiorari to the First District Court of Appeal. The First District denied the petition on the grounds that, based on existing precedent from that district, Sterling House did not have standing to raise the privacy rights of its employees. In doing so, however, the First District acknowledged the conflict with a decision from Florida’s Fifth District Court of Appeal. Sterling House’s petition for review to the supreme court followed.

The Florida Supreme Court began its analysis by recognizing that the Florida Constitution contains a strong right of privacy provision that may extend to personal information contained in non-public employee personnel files. It also recognized, though, that the constitutional right to privacy is a personal one that inures solely to individuals. From this starting point, the court considered the limited circumstances when a litigant may rest a claim for

relief on the legal rights or interests of third parties. Those circumstances exist when three criteria are met. First, the litigant must have suffered an “injury in fact” giving him or her a concrete interest in the outcome of the issue that is in dispute. Second, the litigant must have a close relation to the third party. Third, there must be something hindering the third party’s ability to protect his or her own interests.

Regarding the first criterion, the employer in this case asserted that it was potentially subject to liability for disclosing employees’ private information in personnel files. The court believed that Sterling House’s concern about potential liability made it at least questionable whether the “injury in fact” prong of the test was satisfied. Regarding the second criterion, the court believed that it is not necessarily the employer-employee relationship that should be the focus of the inquiry as much as the character of the contents of the personnel files and the relevance to the case. Regarding the third criterion, the court noted that employees may move to intervene in a case to protect their interests and can assert their own rights, and there is no hindrance to their ability to protect their own interests. The supreme court concluded that on balance, an employer does not have standing to assert its employees’ privacy rights to prevent production of personnel records.

The court did not end its opinion there. After announcing this rule, it expressly stated that an employer’s lack of standing does not mean that important non-party rights, such as those of employees, should not be considered or that the right to privacy and the right of a litigant to discover pertinent facts in a case should not be weighed during the discovery process. Thus, the court opined that employers, while having no standing to assert employees’ privacy interests in personnel records, certainly have standing to oppose production of personal information contained in personnel files on the ground that the information is not relevant to the pending lawsuit. It stated that the trial court can consider the constitutional rights of third parties who would be substantially affected by the outcome of the litigation when considering a relevancy objection. Thus, as may be appropriate, a trial court can conduct an in camera examination of the records at issue and in that context may balance the right to privacy with the “right to know” or right to discover relevant information, even if employees have not intervened. The supreme court gave some guidance to parties and the lower courts in this regard. As a predicate to an in camera review, the trial court’s attention should be directed to the allegedly private information. Decisions on the inclusion or exclusion of that information from production must be made in the context of permitting relevant discovery based on the issues properly framed by the pleadings. Legitimate employee privacy concerns can be addressed in a carefully drawn discovery order. The court warned that if private and confidential employee information that is not relevant is redacted or withheld from production, the requesting party must be provided descriptive details concerning the information withheld in order to be able to allow it to address the issue at a hearing before the trial court and, subsequently, to challenge the trial court’s ruling on appeal if necessary.

## THE ELEVENTH CIRCUIT SPEAKS OUT AGAINST FRAUD ON THE COURTS

In the last edition of *Legal News for Clients*, we discussed a Florida Second District Court of Appeal opinion affirming the trial court's dismissal of a complaint (with prejudice) as a sanction for the plaintiffs' perpetrating a fraud upon the court. In *Martin v. Automobili Lamborghini Exclusive, Inc.*, it was the Eleventh Circuit Court of Appeals' turn to deal with this same issue. This case began when one of the plaintiffs, named Martin, brought suit in federal court involving a defective Lamborghini Diablo that he claimed he had purchased. While pursuing the case in federal court, he filed a claim with a Florida arbitration board under Florida's Lemon Law. The federal court enjoined the arbitration board's proceedings. An appeal of this injunction order ultimately was dismissed by the Eleventh Circuit as moot; however, the case went forward in federal court while the appeal of the injunction was pending. During the course of discovery, the presiding Magistrate Judge sanctioned the plaintiffs five separate times. Evidence emerged during the discovery process that Martin was not the owner of the Lamborghini Diablo, and that the lawsuit had been filed by the plaintiffs in bad faith.

The defendants subsequently filed a motion to dismiss the case on the grounds that the plaintiffs had perpetrated a fraud upon the court. The District Judge referred this and all pending motions to the Magistrate Judge. After conducting many hearings, the Magistrate Judge concluded that the action constituted a fraud upon the court. She recommended dismissal of the case and additional severe sanctions against the plaintiffs. The District Judge adopted the Magistrate Judge's report and recommendation. The trial court then required the defendants to submit attorneys' fee applications and referred the fee issue to the Magistrate Judge. The Magistrate Judge said she was not inclined to consider the plaintiffs' ability to pay in setting sanctions but nonetheless allowed them to submit evidence of their financial conditions. After conducting hearings, the Magistrate Judge concluded that the defendants should be awarded the full amount of fees and costs sought in the fee applications, less certain deductions they made voluntarily at the fee hearings. Regarding the ability to pay issue, the Magistrate Judge concluded that under the court's inherent authority, the ability to pay the sanctions need not be considered. But, she also stated that if it was considered, the plaintiffs failed to demonstrate they lacked the ability to pay based on their combined assets. The District Judge adopted the Magistrate's recommendation and held the plaintiffs jointly and severally liable for over \$1.5 million. The plaintiffs appealed the sanctions award.

The Eleventh Circuit began its opinion by noting that courts have the inherent authority to control the proceedings before them, including the authority to impose reasonable and appropriate sanctions. A court also has the power to conduct an independent investigation to determine whether it has been defrauded. Although the sanctions in this case are severe, the appellate court believed they reflected the plaintiffs' continual and flagrant abuse of the judicial process. The imposition of severe sanctions was clearly justified in its view. Regarding the amount of the monetary sanctions, the Eleventh Circuit addressed each plaintiff's contention that the lower court failed to take into account his ability to pay as a factor limiting the amount imposed. The court heeded a United States Supreme Court warning that inherent powers must be exercised with restraint and held that when imposing a sanction under its inherent authority, a court must take into consideration the financial circumstances of the party being sanctioned. It went on to state that sanction awards must not be so large that they do not seem to jibe with

common sense given the financial circumstances of the party being sanctioned. The court of appeals summarized it this way: “[S]anctions must never be hollow gestures; their bite must be real. For the bite to be real, it has to be a sum that the person might actually pay. A sanction which a party clearly cannot pay does not vindicate the court’s authority because it neither punishes nor deters.”

The Eleventh Circuit concluded that the lower court’s considering the plaintiffs’ combined financial ability to pay the sanctions award was improper in that they were held jointly and severally liable, meaning each was individually responsible for the entire obligation. Upon review of the record, the court of appeals found that one of the plaintiffs likely was unable to pay even a proportionate share of the amount, another probably had the ability to pay the entire amount, and it had no particular observation about the third plaintiff’s ability to pay. Accordingly, the Eleventh Circuit remanded the case to the trial court for a determination of the amount of each plaintiff’s sanctions, taking into consideration his ability to pay.

### **THE FLORIDA SUPREME COURT ENDS A PRO SE LITIGANT’S CONTINUED ABUSE OF THE JUDICIAL SYSTEM**

Rick Lussy, appearing *pro se*, petitioned the supreme court for writs of mandamus against the Fourth District Court of Appeal and others, and one John Fenniman and others. The court consolidated the related cases and dismissed the petitions as insufficient on their faces. It also issued an order requiring Lussy to show cause why he should not be denied the right to file *pro se* petitions with the court. Lussy, in turn, filed a reply and motion to strike the show cause order. In *Lussy v. Fourth District Court of Appeal*, the supreme court denied the motion to strike and imposed sanctions on Lussy for his continued abuse of the judicial system.

The court began its analysis by stating that abuse of the legal system is a serious matter that requires the court to exercise its inherent authority to prevent. It cited to opinions sanctioning petitioners who abuse the legal process by requiring them to be represented by counsel. It determined that a limitation on Lussy’s ability to file would permit the court to devote its full but not unlimited resources to the legitimate claims filed by others. In this way, such a sanction would further the constitutional right of access to the courts. The supreme court went on to note that Lussy had also abused Montana’s judicial system by filing various unfounded *pro se* actions, which ultimately resulted in the Montana Supreme Court enjoining him from filing papers *pro se* in any Montana court without first getting leave to file or proceed, and staying all pending Lussy actions. The Florida Supreme Court also found, as part of its research, that a Montana federal court at one time ordered Lussy to pay his opponents’ litigation fees and expenses as sanctions for bringing thirteen separate federal cases against the same state and federal judicial officers, each of whom ruled adversely to him in previous matters.

The Florida Supreme Court ordered that the clerk of the supreme court reject any civil filings from Lussy unless signed by a member of The Florida Bar. It also required, as part of its order, that any other pending Lussy case be dismissed unless a notice of appearance signed by a member of The Florida Bar was filed within thirty days of the opinion becoming final.

## **DID THE JUDGE ABUSE A WITNESS, OR DID THE WITNESS ABUSE THE SYSTEM?**

Dr. Stephen Gervin is a board certified neurosurgeon. For some twenty-five years, litigation lawyers have retained him to perform independent medical examinations. He has served as an expert witness and testified in court principally in Broward County, Florida.

The defendant in a personal injury case retained Gervin as an expert to conduct an independent medical examination of the plaintiff. At trial, the defendant planned to introduce into evidence Gervin's videotaped deposition. The plaintiff did not object to the introduction of the deposition testimony. Defense counsel learned from the trial judge's judicial assistant, however, that the trial judge, the Honorable Robert Andrews, would not allow Gervin to testify at trial. Accordingly, the defense filed a motion for recusal or alternatively, a motion to allow Gervin to testify. At the hearing on this motion, the Judge Andrews blasted Gervin. He said that after watching him testify for years, he concluded he was a witness incapable of understanding the duty of a witness to tell the truth. Some of the judge's statements during the hearing were as follows: "He wouldn't know the truth if it leapt up and bit him in the ass."; "Doctor Gervin, in my book, is one of the most insidious perjurers that I've ever seen."; "I have witnessed Doctor Gervin on numerous occasions lie. He doesn't know the truth . . . ."; and "I'm not going to allow a perjurer into my courtroom. I'm clear and convinced that he's a perjurer." Instead of seeking a review of Judge Andrews' ruling that Gervin could not testify at trial, defense counsel retained a different expert and proceeded to trial.

In *Gervin v. Honorable Robert Andrews*, Gervin brought suit against the judge alleging that his constitutional rights of due process had been violated in that as a result of the judge's statements, which he claimed were utterly false, he lost the engagement for that particular case, his reputation had been injured, and the judge's statements and ruling severely impaired his ability to obtain other employment as an expert witness. Gervin sought a declaratory judgment that Judge Andrews' statements were null and void and should be expunged from the record. He also sought recovery of his attorneys' fees. The trial court (with a different judge presiding) dismissed the complaint on the grounds that Gervin failed to plead a deprivation of a liberty or property interest to state a federal due process claim. Gervin appealed. The Fourth District Court of Appeal affirmed the dismissal.

Relying on Eleventh Circuit and United States Supreme Court precedent, the appellate court noted that Gervin was required to show the deprivation of a liberty or property interest to make out his due process claim, but that defamation by the government, standing alone from any other governmental action, does not constitute a deprivation of liberty or property under the due process clause. To claim a deprivation based on defamation, the plaintiff must show defamation plus the violation of some more tangible interest – the so-called "stigma-plus test." Defamation with nothing more may make out a claim under state tort law but is not actionable in an action alleging a due process violation under the federal constitution. The Fourth District further determined that Gervin had not suffered the loss of a protected right because Florida law did not require his presence at the hearing at which he was disqualified. At best, he established a temporary partial loss of income, but he remained a licensed neurosurgeon qualified to testify in future proceedings whether in Broward County, Florida or elsewhere.

The appellate court concluded its opinion by noting that the cases on which Gervin relied to support his appeal all were distinguishable for one reason or another. Still, in affirming the dismissal of his complaint, the court was careful to point out that the affirmance was not intended in any way to condone the language or procedure used by Judge Andrews.

### **PLEASE WELCOME KEITH LATEK AND CYNTHIA WACHTEL**

Litchford & Christopher is delighted to announce that Keith Latek and Cynthia Wachtel are its newest paralegals.

Keith received his Bachelor of Arts degree from Spring Hill College in Mobile, Alabama. Before moving to Orlando, Keith worked for the Washington, DC law firm of Wilmer, Cutler & Pickering, where he was an antitrust legal assistant for five years. Prior to his work for that firm, Keith was a legislative intern on Capitol Hill and also worked part-time with the Republican National Committee.

Cynthia received her paralegal certificate from California State University, Chico. Cynthia also comes to Litchford & Christopher from Washington, DC. She was a paralegal in the government antitrust practice group of the law firm of Howrey Simon Arnold & White.

At their respective Washington firms, Keith and Cynthia had substantial responsibility for controlling and coordinating document productions and other tasks in connection with many high profile corporate mergers. Additionally, both Keith and Cynthia have experience in general complex civil litigation matters and other areas of the law.

Please welcome Keith Latek and Cynthia Wachtel to the firm.

### **HAPPY HOLIDAYS**

This is the last edition of Litchford & Christopher's *Legal News for Clients* for 2002. We hope you all have a very happy and healthy holiday season. We look forward to bringing you our next edition in the spring of 2003.