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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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SCOTT KEITH LIPPMAN
(February 14, 1964 – February 22, 2004)

Scott Lippman, a shareholder with the firm, passed away on Sunday, February 22, 2004. Scott joined the firm in 1993.

Scott graduated cum laude from the University of Florida College of Law in 1990, where he achieved distinction in the study of law. He earned four “book” awards and was a member of the Order of the Coif. After graduation, he became an Assistant State Attorney in Jacksonville, Florida prosecuting misdemeanors, felonies, and repeat felony offenders in the “ROC” court. Scott’s notable success in the courtroom earned him the honor of Rookie Prosecutor of the Year for the Fourth Judicial Circuit in 1992-93.

At Litchford & Christopher, Scott’s practice was devoted to a wide array of civil and criminal litigation matters, with a focus upon intellectual property issues, including trade secrets, non-competition agreements, “cyberlaw,” copyright, trademark, and Lanham Act litigation. Scott served as an Adjunct Professor at the University of Florida’s College of Law, teaching a course in “cyberlaw” during the Fall 1999 semester. Scott was a member of the University of Florida College of Law’s Intellectual Property Advisory Committee. The keen legal mind, curiosity, concern for the needs of his clients, cheerful disposition, and wry sense of humor that Scott brought to the practice of law will be sadly missed. He leaves his wife Lisa and two sons, Brennan and Jake.

**COURT DETERMINES THAT THERE MAY BE VICARIOUS LIABILITY
FOR THE ACTS OF AN INDEPENDENT CONTRACTOR**

There are many occasions when it is important, for business and potential liability reasons, that a company enter into a relationship with another as its independent contractor, as opposed to its employee or agent. One of the substantial benefits of working with someone in an independent contractor relationship is that doing so should avoid the potential imposition of vicarious liability for negligent acts committed by the independent contractor.

Nonetheless, in Roessler v. Novak, et al., the Second District Court of Appeal reversed the entry of a summary judgment in favor of a hospital because it found that genuine issues of material fact existed as to whether the hospital should be vicariously liable for negligent acts of a radiologist. Briefly, plaintiff was a patient at the hospital. Dr. Richard Lichtenstein, a radiologist on duty at the hospital, analyzed and interpreted CT scans of Roessler’s abdomen. Subsequently, Roessler underwent surgery on his abdomen. He survived but developed serious complications that required him to stay in the hospital for two and one-half months. And, he developed additional health problems during his extended hospital stay.

Roessler sued the hospital for medical malpractice based on vicarious liability for the alleged negligent acts of Dr. Lichtenstein. In response to the complaint, the hospital alleged Dr. Lichtenstein was an independent contractor and not an employee or other agent; therefore, the

hospital could not be vicariously liable as a matter of law. The trial court granted the hospital's motion for summary judgment based on this argument.

The appellate court disagreed. As a general rule, a principal may be held liable for the acts of its agent that are within the course and scope of the agency. As a general rule, a principal may not be held liable for the acts of an independent contractor. In this case, the Second District focused on the doctrine of apparent agency. Under this concept, a principal may be liable to a third party for the acts of an agent that are within the agent's apparent authority – the authority a principal knowingly tolerates or permits, or which the principal by its actions or words holds the agent out as possessing. An apparent agency exists only if: there is a representation by the purported principal concerning a purported agent; a third party relies on the representation; and the third party changes its position in reliance on the representation. Apparent authority does not arise from the subjective understanding of the third party, however, or on appearances created by the purported agent.

The professional association of radiologists with which Dr. Lichtenstein practiced had entered into an independent contractor agreement with the hospital. The appellate court determined, though, that in light of evidence that (1) the hospital maintained a radiology department that was physically located within hospital grounds, (2) Dr. Lichtenstein's group was the sole provider of radiological services to the hospital, (3) Dr. Lichtenstein and the association did not have offices outside of the hospital, and (4) the radiologists worked at the hospital to provide services twenty-four hours a day, seven days a week, there was a genuine issue of material fact as to whether the hospital, through its activities, represented that Dr. Lichtenstein was its apparent agent. Although the Second District also opined that other facts may be presented during trial that would negate a conclusion that the hospital should be vicariously liable, it was a question for the jury.

THE REASONABLENESS OF FEES AWARDED AS SANCTIONS MUST BE SUPPORTED BY EXPERT TESTIMONY

In Rakusin v. Christiansen & Jacknin, P.A., the defendant law firm represented its client in a dissolution of marriage proceeding. The client discharged the law firm. The firm's former client never paid her bill, so the firm filed its notice of charging lien. After the underlying suit was concluded, the firm moved to adjudicate its charging lien. Rakusin, substitute counsel for the client after the defendant firm was discharged, did everything possible to delay the charging lien proceedings, including repeatedly noticing and then canceling depositions, failing to produce documents after agreeing to do so, and the like. Finally, the client agreed to the amount of the charging lien.

The law firm filed a motion for sanctions. At the sanctions hearing, it detailed the tactics used by Rakusin to disrupt and delay the conclusion of the matter. The firm admitted into evidence a summary of its fees and costs, and one of its lawyers testified to the fees. Based on its inherent authority, the trial court ordered Rakusin to pay half of the firm's bills incurred during the charging lien proceeding – around \$6,400 – as a sanction, reasoning that the charging

lien matter could have been concluded in half the time actually incurred had it not been for Rakusin's misconduct.

On appeal, the Fourth District Court of Appeal reversed. In doing so, it held that even when an attorney's fee is imposed as a sanction, the amount must be supported by corroborating expert testimony as to the reasonableness of the amount of time expended and the reasonableness of the hourly fee. While the court questioned the advisability of this requirement in every case because of the experience level of the trial judges, it was bound by existing case law. The appellate court remanded the case for further proceedings.

BILLING RECORDS OF OPPOSING COUNSEL GENERALLY ARE NOT DISCOVERABLE

Lynn Hillman, Mary Bosner, and Roberta James brought a whistleblower action against Blake Medical Center. They prevailed. The judgment was appealed. In the interim, they pursued a final judgment awarding fees. They served a subpoena duces tecum seeking Blake Medical's counsel's timesheets, invoices, bills, correspondence, contracts for services, fee agreements, fee schedules, and computer generated records pertaining to fees and costs. Blake Medical objected. After a hearing, the trial court granted a motion to compel and ordered Blake Medical to produce the actual bills submitted by its counsel. The order allowed attorney-client and work product privileged materials to be redacted, with an unedited version submitted to the court for in camera inspection. Blake Medical filed a petition for writ of certiorari.

The Second District Court of Appeal granted the petition and quashed the discovery order in HCA Health Services of Florida, Inc. d/b/a Blake Medical Center v. Hillman, et al. It reasoned that fees of a prevailing party cannot be predicated on the fees of its opponent. It believed the billing records of a party's opponent are at best only marginally relevant to the general issue of the appropriate amount of fees to be awarded.

Further, billing records contain privileged information. The court characterized time slips and billing records as attorney work product that are not discoverable as a matter of course. Thus, to obtain production, the party seeking the billing records must establish that the requested information is actually relevant to a disputed issue, the records are needed to prepare for a fee hearing, and substantially equivalent material cannot be obtained from another source.

The court of appeal concluded its opinion by noting that requests for opposing counsel's billing records should be "few and far between" and admonished trial courts to review such requests very carefully.

Subsequently, in Brown Distributing Co. of West Palm Beach v. Marcel, the Fourth District Court of Appeal also faced this question. There, a successful age discrimination plaintiff sought the production of defense counsel's billing records on the theory that they were relevant to her claim for attorney's fees. The trial court ordered production. Defendant filed a petition for writ of certiorari claiming the production of the documents was protected by the attorney-client privilege and work product doctrine. The Fourth District dismissed the petition. It

distinguished the Hillman case, on which the defendant relied. In doing so, it agreed that descriptions in bills of services rendered, which reveal the mental impressions and opinions of counsel, could be privileged. Here, plaintiff only sought records of the amount of time spent by defense counsel in order for her expert to help formulate an opinion as to the reasonableness of her counsel's time. In explaining her position to the trial court, plaintiff stated that she was only concerned with the amount of time and not the amount charged or any privileged information. The trial court ordered that any information other than the hours incurred could be redacted. Under the circumstances, the appellate court determined production of the information would not cause irreparable harm to the defendant because production did not disclose privileged information; in the words of the court production did not let the "cat out of the bag."

CONGRATULATIONS CYNTHIA WACHTEL

The firm is pleased to announce that Cynthia Wachtel has successfully completed the two-day Certified Legal Assistant examination. She is now entitled to use of the "CLA" professional credential. Cynthia is among some 3,000 legal assistants in the State of Florida and over 11,800 legal assistants nationwide who have attained this goal.

Established in 1976, the Certified Legal Assistant examination program is a voluntary professional credentialing program developed by the National Association of Legal Assistants and administered by a board of composed legal assistants, members of the American Bar Association, and members of the field of education active in legal assistant training. The CLA program involves successful completion of a two-day comprehensive examination covering the topics of communications, legal research, ethics, human relations and interviewing techniques, legal terminology, judgment and analytical ability, and substantive law.

Join us in congratulating Cynthia on this wonderful accomplishment.