

IN THE SUPREME COURT OF THE STATE OF FLORIDA

ALTERRA HEALTH CARE CORPORATION,
a/k/a ALTERNATIVE LIVING SERVICES, INC.,
d/b/a STERLING HOUSE OF TALLAHASSEE,
and STERLING HOUSE CORPORATION,
d/b/a STERLING HOUSE OF TALLAHASSEE,

Petitioners,

CASE NO. SC01-709

v.

ESTATE OF FRANCES SHELLEY, by and through
MARK S. MITCHELL, Executor de son Tort,

Respondent.

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ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF
APPEAL
FIRST DISTRICT
Case No. 1D00-3260

REPLY BRIEF OF PETITIONERS

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ARGUMENT

A. Respondent's "Supplemental Statement of the Facts" is not accurate.

Respondent argues in his "Supplemental Statement of the Facts" that his discovery request did not seek employee "personnel files" because it was limited to the "records of only those employees who actually provided care" to Ms. Shelley and to "seven (7) specific categories of documents." (Brief at p. 4) Respondent's argument is meritless. Respondent requested "*any and all documentation* maintained by [Sterling House] for each employee [of Sterling House] who provided any care or service to Frances Shelley at the facility, *including but not limited to*" the seven different categories.

¹ (App. B at ¶ 21)

¹ Respondent cannot seriously contend that he did not request the "personnel files" of these employees, or that his request was "limited."

Respondent also argues that Sterling House has "mischaracterize[d] the allegations of [his] Complaint" because it does not refer to the "additional allegations"

¹ All Appendix references will be to the Appendix submitted with Sterling House's Initial Brief.

set forth in paragraphs 37 and 49 of the Complaint. (Brief at pp. 4-5; App. A) However, as Sterling House accurately advised this Court, the only allegations supported by any *factual* basis were paragraphs 8 and 9 of the Complaint concerning Ms. Shelley's fall at the facility. (Initial Brief at p. 1). The claims contained in paragraphs 37 and 49 are nothing more than boilerplate allegations that Ms. Shelley's statutory rights were *somehow* violated, unsupported by any facts demonstrating exactly *how* her rights were purportedly violated, or *which employees* purportedly violated those rights.

Contrary to his argument, Respondent is not entitled to confidential employee personnel files as part of his "fishing expedition" to conjure up claims against the facility, when the *only factual basis* supporting his Complaint was Ms. Shelley's unfortunate fall. The courts of this state should not condone such tactics. The trial court's order requiring Sterling House to produce the confidential employee documentation, on the basis of boilerplate allegations, was contrary to Florida law.

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² See Beverly Enterprises-Florida, Inc. v. Deutsch, 765 So. 2d 778 (Fla. 5th DCA 2000), citing Rosado v. Bridgeport Roman Catholic Diocesan Corp., 1994 W.L. 700344 (Conn. Super. Ct. 1994) ("No . . . [party] has the right to conduct a 'fishing expedition' into the personnel records of [another]. Any request

B. The parties' settlement does not preclude this Court from addressing the issues presented in the Petition.

Respondent argues that this Court should decline to exercise jurisdiction because the case has settled. (Brief at p. 8) The parties' settlement, however, does not preclude this Court from exercising jurisdiction to resolve a clear conflict in the law. See Enterprise Leasing Co. v. Almon, 559 So. 2d 214, 217 n.* (Fla. 1999).

Respondent alternatively contends that this Court should not exercise jurisdiction on the grounds that the questions raised are of great public importance and/or are likely to recur, because Sterling House did not make this argument in the trial court below or in its Notice to Invoke Discretionary Jurisdiction. (Brief at p. 10) See Enterprise Leasing Co. v. Jones, 26 Fla. L. Weekly S437 (Fla. July 5, 2000) (mootness doctrine does not destroy court's jurisdiction when the question is of great public importance or is likely to recur). Respondent's argument is illogical. The issue of this Court's continuing jurisdiction over the Petition did not even exist at the time Sterling House filed its Initial Brief. Moreover, Sterling House has not raised a new

for information that does not directly relate to legitimate issues that may arise in the course of the . . . [trial] ought to be denied In resolving requests for disclosure, routine access to personnel files is not to be had. Requests for information should be specific and should set forth the issue in the case to which the personnel information sought will relate").

substantive issue on appeal, but has merely addressed the basis for this Court's continuing jurisdiction over the case.

C. A clear conflict exists between the First District's decision in Douglas and the Fifth District's decision in Deutsch.

Respondent's argument that the decisions in North Florida Regional Hospital, Inc. v. Douglas, 454 So. 2d 759 (Fla. 1st DCA 1984) and Deutsch do not present a conflict on the issue of an employer's standing to assert the privacy rights of its employees is meritless. The conflict could not be more clear. In Douglas, the First District stated clearly that an "employee/employer relationship is not the kind of special relationship necessary for third party standing." Douglas at 760.

³ In Deutsch, the Fifth District stated clearly that "we do not agree with *Douglas* in respect to its holding that an employer does not have standing to assert the privacy rights of its employees," and therefore certified conflict between its decision and Douglas. Deutsch at 784. The First District in the present case then acknowledged the express conflict between Douglas and Deutsch.

Notwithstanding the clear conflict between the decisions, Respondent argues that there is no conflict because the Court in Deutsch upheld an employer's right to assert the privacy rights of a *non-caregiver employee*, and the case facts are therefore

³ Respondent's argument that the First District in Douglas "did not hold that an employer cannot assert the privacy rights of employees" (Brief at p. 14) is clearly wrong.

"distinguishable." (Brief at p. 12) This "factual distinction" has nothing to do with the conflict over the legal issue of whether an employer has standing to assert the privacy rights of its employees. Even if it did, Florida law does not support the proposition that the privacy rights of a "non-caregiver employee" are somehow more compelling than those of any other employees.

Notably, Respondent entirely avoids the arguments set forth in Sterling House's Initial Brief as to why Douglas is no longer good law and should be overruled. Accordingly, Sterling House relies on the arguments set forth at pages 10 through 20 of its Initial Brief, which support this Court's resolution of the certified conflict in favor of a uniform rule permitting employers to assert the privacy rights of their employees.

Finally, while discussing the conflict arising out of the Douglas and Deutsch opinions, Respondent makes the misplaced argument that Deutsch somehow supports *his position* on the *substantive issue* presented in the appeal.

⁴ (Brief at p. 13) Specifically, he contends that because the nursing home in Deutsch produced the personnel files of several employees and caregivers, he is somehow

⁴ Respondent's argument is curious, where he inconsistently asserts that this Court should *not* address the substantive issue concerning the confidentiality of the employee personnel files.

equally entitled to the employee personnel files in the present case. Deutsch does not support Respondent's position. Simply because the defendant in Deutsch may have believed the personnel files were relevant to the claims of negligence asserted in *that* action, does not mean that the personnel files are somehow relevant in *this* case. They clearly are not.

D. The trial court departed from the essential requirements of Florida law when it ordered Sterling House to produce the confidential employee personnel files.

Notably absent from Respondent's brief is any true rebuttal to the key points raised by Sterling House. First, Respondent does not dispute that Florida has a clear and strong public policy interest in protecting the privacy of its citizens, and that this interest has been applied to shield employee personnel files from discovery. Nor does Respondent dispute that the *party seeking discovery* -- not the party objecting to the discovery request -- has the burden of establishing both the relevancy of and a necessity for the employee personnel files, which outweighs the employees' countervailing interest in maintaining the confidentiality of the information. (Initial Brief at p. 23).

Rather than address these critical points, Respondent offers a series of "red

herring" arguments which do not support the trial court's order. For example, Respondent asserts that because he alleged Sterling House "failed to provide adequate care to [Ms. Shelley] while she was a resident," employee documentation revealing the "qualifications and training of the facility's staff" are therefore "relevant" to his claims. (Brief at p. 16) However, Respondent's burden of proof was not met by unsubstantiated and conclusory boilerplate allegations alleging a general "failure of care by the facility." Respondent never alleged nor identified any individual employees who were somehow negligent, or in what way. The only allegation in the Complaint supported by any *factual* basis is that an unidentified member of Sterling House's staff failed to timely discover Ms. Shelley's fall. Respondent has *yet to explain* how he would possibly have a compelling need for the personnel files of over 80 employees who provided "any care or service" to Ms. Shelley during her entire sixteen month residency at the facility, on the basis of an allegation that an unidentified employee was negligent in failing to timely check on Ms. Shelley during the evening of August 9, 1999 -- or how any such "need" could possibly outweigh the employees' right to the privacy of their files.

Respondent also suggests that this Court's decision in Amente v. Newman, 653

So. 2d 1030 (Fla. 1995), somehow supports his request. In Amente, this Court determined that the plaintiff had established the relevancy of the physician's medical records to the claims in that action.⁵ Amente does not support Respondent's argument. In Amente, the physician relied on prior deliveries in his defense, and the requested documents concerning those deliveries therefore had a direct bearing on the claims in that case. In the present case, the alleged negligence consisted of a Sterling House staff member's alleged failure to timely discover Ms. Shelley's fall. Unlike in Amente, the wide range of information requested from the 80 or so employee personnel files is not relevant to the issue in the case.

Yet another "red herring" Respondent offers in an effort to support the trial court's ruling is that Sterling House never established that the employee personnel files were "confidential." He argues that because he agreed to redact the social security numbers and telephone numbers of the employees, no privacy concerns were

⁵ Amente involved a claim of negligence based on the physician's decision to use a regular delivery bed rather than a drop-down bed during the delivery of an obese patient. The physician defended his decision based on his past experience in delivering obese women without complication. The court determined that the plaintiff's request for the records of the physician's other obese patients were therefore relevant to the claim that the physician was on notice that the delivery method he had selected was deficient.

implicated and no constitutional issues were presented. (Brief at p. 17) As noted in Sterling House's brief, the "social security numbers" and "telephone numbers" of the employees clearly were not the only private matters contained in the files. (Initial brief at pp. 27-31) Respondent's purported agreement to redact this information therefore would not remove the constitutional issues implicated by the request.

Respondent nevertheless attempts to support his argument that the employee personnel files were not "confidential" by seeking to distinguish the decisions in CAC-Ramsay Health Plans, Inc. v. Johnson, 641 So. 2d 434 (Fla. 3d DCA 1994) and Seta Corporation of Boca, Inc. v. Office of Atty. Gen., Dept. of Legal Affairs, State of Fla., 756 So. 2d 1093 (Fla. 4th DCA 2000), where the courts quashed discovery orders compelling the production of employee personnel files. Respondent argues that the personnel files in those cases pertained to employees unrelated to the issues in the litigation, while the files in the present case are relevant to the determination of whether the employees who cared for Ms. Shelley were "qualified" or had "current licenses or certifications." (Brief at pp. 19-21)

Respondent inappropriately relies on regulations requiring *nursing home employees* to maintain "current licenses or certifications" to support his argument. As

Respondent well knows, no such requirement applies to *assisted living facility employees*. Accordingly, Respondent had no right to the employee personnel files to determine whether the employees were "certified," because they were not required to be certified.

Respondent not only inappropriately relies on inapplicable nursing home regulations in a misplaced effort to support his discovery request -- he never alleged *which employees* purportedly committed *what acts* of negligence, and he therefore never met *his burden of proof* of establishing his entitlement to the files. Respondent's discrete claim that Sterling House "staff" should have discovered Ms. Shelley's fall sooner, did not support his request for the wholesale production of the personnel files of every single employee who ever provided any care to Ms. Shelley during her entire sixteen month residency at the facility.

E. Respondent's request contravenes Florida public policy.

Respondent boldly and mistakenly asserts that there are no "compelling public policy concerns" attaching to employee personnel files, and that public policy concerns "actually favor production of such records." (Brief at pp. 22-23) Respondent's argument is completely without merit and hardly merits a response. Contrary to his contention, Respondent knows that this State has a clear and strong public policy interest in protecting *the privacy of its citizens*. See, e.g., Winfield v. Div. of Pari-Mutuel Wagering, Dept. of Bus. Reg., 477 So. 2d 544, 548 (Fla. 1985) This public policy concern, in turn, has been applied to safeguard information in employee personnel files. See, e.g., CAC-Ramsay-Ramsay.

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The facts of this case uniquely demonstrate the danger created when trial courts grant such overbroad and blanket requests for employee personnel files on the basis of unsubstantiated boilerplate allegations. In this case, the only specific claim Respondent has ever made is that the employee or employees assigned to check on

⁶ Respondent also overlooks this State's obvious public policy interest in encouraging nurses and nursing assistants to enter the nursing home and assisted living facility field in a state that has a vast elder population. This goal will be hindered if the private lives of such individuals are routinely exposed, and their qualifications and services attacked, on the basis of unsubstantiated and unsupported allegations.

Ms. Shelley during the evening hours of August 9, 1999 failed to timely do so, with the result that her fall was not discovered sooner. Although Respondent makes additional conclusory allegations that Ms. Shelley suffered other resident rights violations, he never points to any employee who actually committed any such violation, or when the purported violation occurred. Yet the trial court on this record ordered Sterling House to produce the entire personnel files of some 80 odd employees who provided "any care or service" to Ms. Shelley during her sixteen month residency at the facility, even though Respondent never alleged with any factual support that these employees were ever negligent. Absent clear direction from this Court, this practice will certainly recur and innocent employees will continue to suffer an intrusion into their private lives, even though their privacy rights are presumably protected under the Constitution of this State. This Court should not allow such practices to continue.

In the face of such clear public policy concerns, Respondent nevertheless disingenuously asserts that if this Court accepts Sterling House's arguments, elderly or infirm persons will somehow be precluded from obtaining information about a facility's knowledge of the "incompetence or lack of qualifications of its employee caregivers." (Brief at p. 26) Nonsense. Of course, a plaintiff who *properly* alleges

claims supported by some factual basis pointing to employee "incompetence" or "lack of qualification" -- rather than conclusory boilerplate allegations of purported residents' rights violations -- might be entitled to the employee documentation. The plaintiff, however, would first have to show that the documentation was relevant to the issues in the litigation, as well as a compelling need for the information which would outweigh the employees' privacy rights. That Respondent failed to meet his burden in the present case, has no bearing on the rights of other litigants who may have meritorious claims and who can meet their burden of proof.

In an effort to support his unsupportable "public policy" theory, Respondent resorts to a lengthy and misplaced discussion regarding the legislative history of the Florida statutes pertaining to assisted living facilities. (Brief at pp. 23-26) The statutory sections he duplicates in his brief, however, have no bearing or relevancy on the issues in the present litigation. Nor do they remotely support his request for the employee files, and not surprisingly, Respondent does not even attempt to suggest that they do.

Finally, Respondent raises yet another "red herring" when he cites to case law discussing sanctions imposed on a defendant for failing to produce documents for an

in camera inspection, a privilege log and affidavits. (Brief at pp. 26-27) Respondent's suggestion that Sterling House acted improperly in this matter is meritless. As Respondent knows, the trial court did not even permit counsel for Sterling House to fully address the confidential and privileged nature of the requested documentation, much less offer to review the documents *in camera* before ordering their production.

In any event, Respondent's argument is not only boldly contradicted by the record -- it again ignores that it was Respondent, and not Sterling House, who bore the burden of proof -- in this case, of establishing both the relevancy of the requested employee documentation, and a compelling need for the documents which outweighed the employees' privacy rights. The record is clear that Respondent failed to make any such showing. The trial court's order requiring the production was contrary to both Florida public policy and the essential requirements of Florida law.

F. This Court has recognized that employers may face liability for releasing confidential employee information.

As noted in Sterling House's Initial Brief, Justice Overton in his special concurring opinion in Amente, supra, cautioned that an employer who releases

confidential information pursuant to a discovery order *may* face liability to the party whose privacy rights are violated by the disclosure. Respondent attempts to distinguish Amente on the basis that the decision concerned the "identities" of non-party patients, whereas the documentation at issue in the present case purportedly does not consist of "sensitive . . . personal information." (Brief at p. 28) As Sterling House has advised, the employee files indeed contain sensitive personal information, including performance reviews and other matters which are both highly private and embarrassing if released. In any event, Florida law recognizes the inherently sensitive nature of employee personnel files. See, e.g., CAC-Ramsay-Ramsay

Respondent nevertheless frivolously asserts that the employee documentation is not protected because an employee is not "entitled to keep the fact of his employment a secret." (Brief at p. 29) Of course, Sterling House did not object to the discovery request because it will reveal the "fact" of the employee's "employment," but because it exposes a broad range of private and sensitive employee information to public view, and therefore violates Florida law.

CONCLUSION²

As the First District acknowledged below, a clear conflict exists between the

First District's decision in Douglas and the Fifth District's decision in Deutsch on the issue of an employer's standing to assert the privacy rights of its employees. In the interest of maintaining uniformity and harmony in the law, this conflict should be resolved.

Further, because the discoverability of constitutionally protected employee personnel files presents a question of great public importance to this State and will likely recur, this Court should also address the substantive issue presented to the First District below. Specifically, this Court should clarify that a plaintiff who does not meet his or her burden of proof of establishing the relevancy of personnel files to the issues in the litigation by identifying specific acts of negligence by identifiable employees -- as well as a compelling need for the employee documentation which outweighs the employees' privacy rights -- will not be entitled to the production of such files. The trial court departed from Florida law,

as well as the public policy of this State, when it required Sterling House to produce the confidential employee documentation, and its order must be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this _____ day of July, 2001 to Camille Godwin, Esq. and Scott Gwartney, Esq., Wilkes & McHugh, P.A., P.O. Box 11187, Tallahassee, Florida 32302-3187; and to Scott A. Mager, Esq., Mager & Associates, 500 E. Broward Blvd., S. 1800, Ft. Lauderdale, FL 33394.

Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with the amendments to Rule 9.210, Fla. R. App. P., and is in the required font of Times New Roman 14. See In re. Amendments to Florida Rules of Appellate Procedure, Case No. SC00-718, Slip Op. (Fla. Oct. 12, 2000).

Attorney

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¹ The request encompassed the files of approximately 80 employees who provided "*any* care or service" to Ms. Shelley during her sixteen month residency, even though Respondent has never claimed how those employees were individually negligent or not qualified.

² Respondent's "Conclusion" should be stricken or ignored because it exceeds the page limitation contained in Rule 9.210(b)(6), Fla. R. App. P.