

**IN THE SUPREME COURT OF MISSOURI  
EN BANC**

STATE OF MISSOURI, ex rel.	)	
DELMAR GARDENS NORTH	)	
OPERATING, LLC and DELMAR	)	
GARDENS NORTH, INC.,	)	
	)	
Relators,	)	
	)	
vs.	)	No. SC88297
	)	
THE HONORABLE GARY M.	)	
GAERTNER, JR.,	)	
	)	
Respondent.	)	

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Writ of Prohibition from Order of the Circuit Court of St. Louis County

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**BRIEF OF RESPONDENT**

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## Statement of Facts

Relators Delmar Gardens North Operating, LLC and Delmar Gardens North, Inc. seek a writ of prohibition for an order denying their Motion to Quash a Subpoena for Taking Deposition, which requested, *inter alia*, "... the entire personnel file of Beather Johnson..." Ms. Johnson is an employee of Relators and a witness in the underlying lawsuit, which is an action brought by Relators to prohibit Defendant James McNeil ("Professor McNeil") from entering a nursing home, owned and operated by Relators, where his mother resides. Respondent sets out below the pertinent facts and follows with argument why the trial court's order should be upheld.

James McNeil is an engineering professor at Florissant Valley Community College and has held that post for thirteen years. Prior to becoming a professor, he worked in the private sector. His mother, Rita McNeil, resides at Delmar Gardens North, a nursing home where she has lived for eight years. Professor McNeil has regularly visited his mother at Delmar Gardens North for the past eight years, without incident. *See* Prof. McNeil Depo. at 19-34 (filed with the Court of Appeals as Exhibit 1).

On the afternoon of November 8, 2006, Professor McNeil was visiting his mother at Delmar Gardens North. An employee of Relators, Beather Johnson, a nurse's assistant, was working at Delmar Gardens North that day. She was scheduled to report to work at 2:45 p.m. that day, but she was late (as she had been

numerous times since she began working at Delmar Gardens North three months earlier) and did not begin her duties until 3:10 p.m. *See* Deposition of Tracy Lloyd at 15 (filed with the Court of Appeals as Exhibit 2); Johnson Deposition at 28 (filed with Relators' Petition); Transcript of January 18, 2007 Evidentiary Hearing ("Transcript" filed with the Court of Appeals as Exhibit 3) at 21, 43-45, 90-91. Ms. Johnson alleges that soon after she began her duties, she saw the hand of Professor McNeil under the sheet of a resident, Shirley Smith, in a room which adjoins his mother's room. *See* Johnson Depo. at 34; Transcript at 35. Relators allege that Ms. Smith is "non-communicative, unable to walk and feeds by tube." *See* Relators' Suggestions at 3. At some point, Ms. Johnson then left the area to report what she saw to her supervisor, Tracy Lloyd. Johnson Depo. at 34; Transcript at 37. In none of her testimony has Ms. Johnson alleged that Professor McNeil touched Ms. Smith (or any other resident) or that she witnessed any untoward contact or assault, sexual or otherwise, by Professor McNeil. Notably, that same day Professor McNeil was observed assisting a resident with her glasses and shoes, and such behavior is commonplace among visitors to the facility. Lloyd Depo. at 25-26.

On November 9, 2006, Relators filed a "Verified Petition for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction" ("Verified Petition") which sought to bar Professor McNeil from Delmar Gardens North, where his mother resides. In that pleading, Relators allege that Ms. Johnson

“witnessed Defendant touching Resident A [Ms. Smith] in an inappropriate manner. Soon thereafter Defendant fled from the premises.” Verified Petition at par. 10. Contrary to these “verified” assertions, Ms. Johnson has testified under oath that she did not witness Professor McNeil touch anyone. *See Johnson Depo.* at 38-39; Transcript at 72-73, 78. Relators have provided no evidence that Professor McNeil touched any resident in an inappropriate manner, that he “fled” the facility, or that he at any time was uncooperative. Moreover, Ms. Johnson testified that she never told anyone that she witnessed Professor McNeil touch any resident. *See Johnson Depo.* at 39.

Professor McNeil submitted to and passed a polygraph examination relating to the allegations against him. *See McNeil Depo* at 16-18.

Ms. Johnson’s supervisor, Tracy Lloyd, testified that Ms. Johnson reported the incident to her without alarm, and in such a manner that Ms. Lloyd assumed the incident had occurred several days earlier. *Lloyd Depo.* at 16-17, 28.

Although Ms. Johnson is Relators’ sole witness to any alleged impropriety by Professor McNeil, she did not sign the Verified Petition. The petition was “verified” by a Yorvoll Gardner, who has no personal knowledge of the key events alleged in the petition. *See Transcript* at 13-14.

During the course of discovery in this proceeding, Professor McNeil understandably requested the personnel file of his lone accuser, Ms. Johnson. He issued a subpoena commanding her to produce the file at her deposition. It was

not produced at that deposition. As detailed in Relators' Suggestions, Professor McNeil then subpoenaed a deposition of Relators' custodian of records and again requested Ms. Johnson's personnel file. Relators refused to produce the file. When Respondent herein ordered Relators to produce the file, they filed these writ proceedings.<sup>1</sup>

Saliently, at the evidentiary hearing in this matter, Relators' first witness was Catherine Bono, an administrator at Delmar Gardens North, and on direct examination Relators asked her questions regarding the work habits and conduct of Ms. Johnson. *See* Transcript at 4-5. Relators also questioned Ms. Johnson on direct examination about her duties and schedule. *See* Transcript at 20-24.

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<sup>1</sup> Relators disingenuously contend that Ms. Johnson's employment file will be of no use because she already has been deposed and testified during Relators' case in the ongoing evidentiary hearing. *See* Relators' Brief at 17. Relators neglect to mention that they failed to produce her file at her deposition, despite a subpoena, so that Defendant was unable to ask her questions about information in that still unproduced file. Relators obviously have failed to produce the file since that time. The file still is needed, as the evidentiary hearing is ongoing, and Ms. Johnson may be called again to testify. Moreover, if the file contains nothing of value in these proceedings, it is certainly strange that Relators have fought so strenuously against producing it.

Relators **again** called Ms. Bono to question her about disciplining Ms. Johnson after testimony from Ms. Johnson. *See* Transcript at 89-92.

Points Relied On

**I. RELATORS HAVE NO STANDING TO THWART THE PRODUCTION OF MS. JOHNSON’S PERSONNEL FILE AND, EVEN IF THEY DID, PROFESSOR MCNEIL’S FUNDAMENTAL RIGHT TO HAVE A RELATIONSHIP WITH HIS MOTHER TRUMPS ANY RIGHT TO PRIVACY IN THAT FILE; IN ANY EVENT, RELATORS HAVE FILED PLEADINGS AND INTRODUCED TESTIMONY WHICH CAUSE THAT FILE TO BE RELEVANT, DISCOVERABLE AND ADMISSIBLE.**

- A. Relators lack standing to oppose the production of Ms. Johnson’s personnel file.**
- B. Professor McNeil’s fundamental right to have a relationship with his mother trumps any right to privacy in Ms. Johnson’s personnel file.**
- C. Relators filed pleadings and introduced testimony which cause Ms. Johnson’s personnel file to be relevant, discoverable and admissible.**

*Schmersahl, Treloar & Co., P.C. v. McHugh*, 28 S.W.3d 345 (Mo.App.E.D. 2000)

*Shaner v. System Integrators, Inc.*, 63 S.W.3d 674 (Mo.App.E.D. 2001)

*Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477 (Mo. 2005)

*Cruzan by Cruzan v. Harmon*, 760 S.W.2d 408 (Mo. 1988)

*Moore v. City of East Cleveland*, 431 U.S. 494 (1977)

*Herndon v. Herndon*, 857 S.W.2d 203 (Mo. 1993)

R.S.Mo. Sec. 198.088(1)(k)

**II. MS. JOHNSON’S PERSONNEL FILE MUST BE PRODUCED  
BECAUSE IT IS RELEVANT TO HER MOTIVE, BIAS AND  
PREJUDICE IN MAKING ALLEGATIONS AGAINST PROFESSOR  
MCNEIL.**

*State v. Johnson*, 700 S.W.2d 815 (Mo. 1985)

## Argument

When Respondent ordered Relators to provide the personnel file of its employee, Ms. Johnson, Relators declined and, instead, filed this action seeking the drastic remedy of prohibition. First, Relators object that personnel files are protected by “clear Missouri law establishing an employee’s fundamental right of privacy in his or her employment records.” Relators’ Brief at 10. As discussed below, Relators’ contention fails because an employer has no fundamental right of privacy in an employee’s records, and because Relators’ pleadings make Ms. Johnson’s personnel file relevant. Second, Relators contend that Ms. Johnson’s personnel file could only be relevant to her credibility and that, therefore, it should not be produced, since extrinsic evidence is inadmissible for impeachment purposes. As discussed below, Ms. Johnson’s personnel file is relevant for reasons beyond credibility impeachment, such as to establish motive, bias and prejudice.

**I. RELATORS HAVE NO STANDING TO THWART THE PRODUCTION OF MS. JOHNSON’S PERSONNEL FILE AND, EVEN IF THEY DID, PROFESSOR MCNEIL’S FUNDAMENTAL RIGHT TO HAVE A RELATIONSHIP WITH HIS MOTHER TRUMPS ANY RIGHT TO PRIVACY IN THAT FILE; IN ANY EVENT, RELATORS HAVE FILED PLEADINGS AND INTRODUCED TESTIMONY WHICH CAUSE THAT FILE TO BE RELEVANT, DISCOVERABLE AND ADMISSIBLE.**

**A. Relators lack standing to oppose the production of Ms. Johnson’s personnel file.**

Prohibition is an extreme remedy which should issue only if there is considerable hardship and no adequate remedy at law. “Trial courts retain broad discretion over discovery and the admissibility of evidence and appellate courts will not interfere with those decisions unless there is a clear showing of abuse of discretion.” *Hancock v. Shook*, 100 S.W.3d 786, 795 (Mo. 2003) (citations omitted). Relators contend that prohibition of the subpoena in this case is appropriate because the trial court decided the issue incorrectly and an appeal will not provide an adequate remedy. Relators contend that the trial court’s order to produce the disputed personnel file is incorrect because an employee has a fundamental right to privacy in his or her employment records, and production of such records cannot be remedied on appeal. Relators’ contentions fail to support

their burden of proving an abuse of discretion.

While Relators cite case law which states that an **employee** has a right to privacy in his or her employment records, Relators cite no case which states that an **employer** has such a right to privacy. The cases cited by Relators all involve **employees** who contested discovery of their employment records. *See State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340 (Mo. 1998); *State ex rel. Schneider Pierson v. Smith*, 838 S.W.2d 490 (Mo.App.W.D. 1992); *State ex rel. Madlock v. O'Malley*, 8 S.W.3d 890 (Mo. 1999). Indeed, employers routinely provide employment information about their employees to third parties, whether through job references or subpoenas.

Citing *Fierstein v. DePaul Hospital*, 24 S.W.3d 220 (Mo.App.E.D. 2000), Relators contend that they have standing to assert this right – even though the right resides with their employee, Ms. Johnson, and not with them. Relators' Brief at 19-21. Relators' reliance on *Fierstein* is misplaced. Relators contend that they have standing to withhold the file because if they release Ms. Johnson's records, then they, like the defendant in *Fierstein*, might be sued for a breach of fiduciary duty. Relators' Suggestions at 7-8. However, *Fierstein* involved medical records, not employment records. A physician/health care provider has a fiduciary relationship with a patient and is legally obligated to preserve that relationship. Relators have cited no case law which equates a physician-patient relationship with an employer-employee relationship, and Respondent is unaware of any

Missouri case law which purports to recognize a fiduciary relationship between employer and employee such as that between physician and patient. *See, e.g., Schmersahl, Treloar & Co., P.C. v. McHugh*, 28 S.W.3d 345, 350 (Mo.App.E.D. 2000) (“The fact of an employer-employee relationship, standing alone, is not sufficient to cause a confidential relationship to exist as to knowledge which is the natural product of the employment.”) (citation omitted); *Shaner v. System Integrators, Inc.*, 63 S.W.3d 674 (Mo.App.E.D. 2001) (in the context of a request for an accounting, the court found no fiduciary relationship between an employer and an employee because a mere debtor-creditor relationship does not establish a fiduciary duty); *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477 (Mo. 2005) (noting that an employee may have a duty of loyalty to her employer, but distinguishing that duty from a fiduciary duty).

Further, it seems farfetched that such a relationship between employer and employee could exist, when employers are, for example, beholden to shareholders, profit margins, etc. -- all factors which often drastically affect an employer’s relationship with its employees and would trample any attempt at a fiduciary employer-employee relationship. (Relators’ reliance on *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47 (Mo. 1999), is similarly misplaced; again, that case involved a physician-patient fiduciary relationship which protected medical records from disclosure, not a non-fiduciary employer-employee relationship.)

Additionally, in *Fierstein*, the appellate court’s decision rested primarily on the

fact that, in that case, the patient did not have the opportunity to contest the release of her statutorily protected medical records. *See Fierstein*, 24 S.W.3d at 224.

However, in this case, Ms. Johnson has had numerous opportunities to assert any alleged right to protect her employment file and has declined to do so. Although she was aware of the request for her personnel file at her deposition, at the hearing in this matter, as well as throughout these writ proceedings, she has made no attempt to assert any right to privacy to her personnel file.

An employer, a corporation, simply has no fundamental right to privacy in someone else's personnel file. Relators have no standing to urge prohibition in this matter on such grounds, and they can identify no hardship or injury to themselves should the employment records be produced. Therefore, a writ of prohibition is inappropriate.

**B. Professor McNeil's fundamental right to have a relationship with his mother trumps any right to privacy in Ms. Johnson's personnel file.**

Even if an employee (as opposed to, as in this case, her employer) has a right to privacy in her personnel file, rights of privacy are not absolute and must subordinate to compelling state interests under an appropriate balancing of those competing interests. *See, e.g., Cruzan by Cruzan v. Harmon*, 760 S.W.2d 408, 419 (Mo. 1988) ("the right to privacy [is not] absolute; [it] must be balanced against the State's interests to the contrary"). In the context of this case, the State

has a compelling interest in ensuring its citizens have a right to visit their ailing parents and associate with their families. A child's fundamental right to associate with his family is found in many sources. *See, e.g., Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.") (citation omitted); *Herndon v. Herndon*, 857 S.W.2d 203, 209 (Mo. 1993) (in which this Court recognized that "it is not unreasonable for the General Assembly to attempt to strengthen familial bonds"); R.S.Mo. Sec. 198.088(1)(k) (part of the "Nursing Home Bill of Rights" is a guarantee that a resident "[m]ay communicate, associate and meet privately with persons of his choice...").

Since the State has a compelling interest in protecting a child's right to associate with his parent, the State has a compelling interest in ensuring appropriate discovery in cases such as this one, where an entity seeks to prevent a child's fundamental right to associate with his parent based on the slenderest of accusations. The State's compelling interest in allowing discovery of Ms. Johnson's personnel records outweighs any privacy rights Ms. Johnson may have in her personnel file – rights which she herself has not invoked in this matter.

In the balance of privacy rights and this compelling State interest, the State's interest greatly dilutes the power of Relators' assertion that producing a non-objecting employee's personnel records violates any right to privacy. The

right to privacy loses all remaining efficacy when the trial court has tools at its discretion to protect the sensitive information contained within the records, such as protective orders and *in camera* inspections. *See, e.g., State ex rel Tally v. Grimm*, 722 S.W.2d 604 (Mo. 1987) (protective orders sufficient to protect employee's privacy interests in information contained within employment records that were not relevant to the lawsuit); *State ex rel Madlock v. O'Malley*, 8 S.W.3d 890 (Mo. 1999) (noting that *in camera* inspection of employment records is a proper remedy to protect privacy interests where protective orders are insufficient because the employee's adversary in the suit has a direct financial interest in misusing potentially embarrassing or harmful information); *see also WCCO Radio, Inc. v. N.L.R.B.*, 844 F.2d 511 (8th Cir. 1988) (when ruling that an employer had to produce its employees' personnel files to a union, the court found that not all information in an employee's personnel file is *per se* confidential, and the employer must show that harm would result from disclosure). In this case of a son seeking discovery of a third-party employee, there is little, if any, risk of harm from the plaintiff misusing confidential information, and what little risk exists can be dissipated through protective order or *in camera* inspection of the records.

**C. Relators filed pleadings and introduced testimony which cause Ms. Johnson's personnel file to be relevant, discoverable and admissible.**

As noted by Relators, discovery applies to information that relates to matters

put at issue in the pleadings. *See* Relators' Brief at 10. Relators claim they made a report to the Missouri Division of Aging. *See* Verified Petition at par. 11. If they are claiming it was Ms. Johnson's job duty to report what she saw, then her employment records are certainly at issue. Relators additionally have placed the work conduct of Ms. Johnson at issue by relying solely on her representations in bringing the Verified Petition. Relators seek to bar Professor McNeil from visiting his mother in her place of residence -- a more fundamental right is unimaginable. They seek to prohibit Professor McNeil's filial obligations, his right to privacy and his right to freedom of association based on allegations in a Verified Petition, purportedly based solely on a report from Ms. Johnson, that he inappropriately touched another resident and then fled the scene -- allegations **denied** by Ms. Johnson herself. Relators placed Ms. Johnson's employment record in issue at the evidentiary hearing by asking Ms. Bono and Ms. Johnson questions about that record. *See, e.g.*, Transcript at 4-5, 20-24, 89-92.

As noted above, Relators' allegations in their Petition are **not** supported by Ms. Johnson's testimony. She denies seeing Professor McNeil touch anyone, much less telling anyone that she saw such a thing. This provides a further need to disclose her personnel file. Presumably, that file will include what information she reported to Relators.

Finally, Relators opened the door to this entire line of inquiry, and to discovery thereof, by introducing evidence at the hearing relating to Ms. Johnson's work

ethic and employment record. It comes as no surprise that Relators failed to attach a copy of the Hearing Transcript to their Petition for Writ of Prohibition in the Court of Appeals. Only after hearing Relators' witnesses testify about Ms. Johnson's work record did Respondent order Relators to disclose her personnel file. Relators should not be permitted to withhold information which they themselves have placed in issue through direct examination of their own witnesses.

Clearly, Ms. Johnson is the heart of this case and her motives and reporting duties must be explored. Her personnel file is an appropriate, necessary and logical place to begin. The trial court was well within its discretion to order production of the file in discovery.

**II. MS. JOHNSON'S PERSONNEL FILE MUST BE PRODUCED  
BECAUSE IT IS RELEVANT TO HER MOTIVE, BIAS AND  
PREJUDICE IN MAKING ALLEGATIONS AGAINST PROFESSOR  
MCNEIL.**

Relators contend that the only possible relevance of Ms. Johnson's personnel file would be to impeach her credibility. Relators' Brief at 16-18. They contend that since extrinsic evidence of credibility impeachment is inadmissible, it should not be discoverable. Professor McNeil has many viable, important reasons to seek Ms. Johnson's personnel file. An employee at Delmar Gardens North for only three months, Ms. Johnson admits arriving late to work numerous times and being

disciplined for her tardiness. *See, e.g.*, Transcript at 21, 43-45, 90-91. She admits being late on the very day she made her report about Professor McNeil. Indeed, she claims to have witnessed what little she witnessed just minutes after starting her rounds almost half an hour late. *See* Lloyd Depo. at 15; Johnson Depo. at 28; Transcript at 79-81. Clearly, she has a motive to create a story about Professor McNeil to avoid being disciplined, or perhaps even terminated, for her tardiness. Her personnel file may well shed light on her actions.

In a similar vein, Ms. Johnson may have a bias and prejudice against Professor McNeil. In the Verified Petition, Relators lewdly amplified the innocent account of what Ms. Johnson observed (as discussed above, the Verified Petition contains allegations of assault and inappropriate conduct by Professor McNeil which Ms. Johnson denies witnessing). She may well feel pressured to protect her job by supporting the outlandish claims made by Relators. Her personnel file is a sound tool to discover her discipline history, past employment references, employment status, etc., so as to ascertain her bias and motivations. *See, e.g., State v. Johnson*, 700 S.W.2d 815, 817 (Mo. 1985) (“Under Missouri law, ‘the interest or bias of a witness and his relation to or feeling toward a party are never irrelevant matters...’ Furthermore, a party is not confined to the answers elicited on cross-examination and may prove the witness’ bias, prejudice or hostility through the use of extrinsic evidence.”) (citations omitted). Ms. Johnson claims she made her report as a duty of her job. It seems likely that her employment file would contain information

about her job duties and performance of those duties – yet another reason it is discoverable. And, as noted earlier, at the evidentiary hearing, Relators further placed Ms. Johnson’s employment record in issue by asking Ms. Bono and Ms. Johnson questions about that record. *See, e.g.*, Transcript at 4-5, 20-24, 89-92.

And, as noted above, since Ms. Johnson denies seeing Professor McNeil touch anyone, much less telling anyone that she saw such a thing, she contradicts Relators’ Petition, providing a further need to disclose her personnel file. Presumably, that file will include what information she actually reported to Relators.

In an attempt to avoid disclosure of the personnel file of the only witness who alleges anything untoward about Professor McNeil’s conduct (and, again, even Ms. Johnson **denies** the wild allegations Relators make in their Petition for Injunction), Relators advance contradictory theories. As described above, Relators erroneously contend that they can assert another’s right to privacy. At the same time, they contend that that they cannot waive that right. Relators’ Brief at 14-15. This is precisely Professor McNeil’s point. As Relators contend, “Privileges are personal to the holder of the privilege and may only be waived by that person.” *Id.* at 14 (citation omitted). Only Ms. Johnson can assert any privilege in her personnel file. Relators have no standing to assert that privilege, and Ms. Johnson has not done so.

Ms. Johnson’s employment history at Relators certainly is relevant to her

motive, bias and prejudice in this case; therefore, it is neither collateral nor inadmissible and is subject to discovery, as correctly decided by the trial court.

### **Conclusion**

For the foregoing reasons, Respondent requests the Court deny Relators' Petition and grant such other relief that the Court deems meet in the premises.

Respectfully submitted,

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**Certificate of Compliance**

The undersigned hereby certifies that pursuant to Rule 84.06(c) this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 4,383 words. The undersigned further certifies that accompanying CD-ROM has been scanned and is free of viruses.

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**Certificate of Service**

The undersigned certifies that a true and correct copy of the foregoing, as well as a virus-free CD-ROM containing same, were sent by first class mail, postage prepaid, this 27<sup>th</sup> day of April, 2007 to: The Honorable Gary M. Gaertner, Jr., Courts Building, Division 6, 7900 Carondelet, Clayton, MO 63105; and to Mr. Gregory J. Minana and Mr. Giuseppe Giardina, Husch & Eppenberger, LLC, 190 Carondelet Plaza, Suite 600, St. Louis, MO 63105, Attorneys for Relators.

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