IN THE MISSOURI SUPREME COURT

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.	)	

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

BRIEF OF RELATORS

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Jurisdictional Statement

This writ petition concerns the question of whether Relators are entitled to an order prohibiting Respondent from enforcing his order denying Relators' Motion to Quash a Subpoena for Taking Deposition, which requested, *inter alia*, "…the entire personnel file of Beather Johnson…" Hence, this writ involves review of a trial court's discovery order compelling the production of privileged information, the enforcement of which could not be remedied on appeal. This Court has jurisdiction of this matter pursuant to Art. V. § 4 of the Missouri Constitution and to Rules 97 and 84.23 of the Missouri Rules of Civil Procedure, in that Relators seek an original writ of prohibition against the Honorable Gary M. Gaertner, Jr., in his capacity as presiding judge of the Circuit Court of St. Louis County. This Court issued its preliminary writ of prohibition on February 8, 2007 and Respondent filed his answer on March 9, 2007.

Statement of Facts

The proceeding below is an action for permanent injunction filed by Relators to prohibit the Defendant James McNeil ("McNeil") from entering the skilled nursing facility owned and operated by Relators. *See A2-6 (*Exhibit 1, *Verified Petition for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction).* This action was filed after McNeil was found inappropriately in the room of an unrelated resident with his hands underneath the sheets of that resident residing at Relators' skilled nursing facility. *See* Id.

Relators own and operate the skilled nursing facility located at 4401 Prigge Rd. in North St. Louis County, Missouri and are responsible for the care and well-being of approximately two-hundred and thirty (230) elderly residents at that facility, many of whom are unable to communicate and are otherwise vulnerable. That same facility operates a "day-care" center known as Delmar Gardens North Early Childhood Center. On a daily basis, there are approximately thirty-five (35) children at the Early Childhood Center ranging in age from six weeks to six years.

On November 8, 2006, Relators' employee, Beather Johnson ("Johnson") was working as a certified nurses' assistant ("CNA") in Division 300 of the facility. Johnson was deposed on December 22, 2006. Johnson worked the 3:00 p.m. to 11:00 p.m. shift on November 8, 2006. *See A8 (*Exhibit 2, *Deposition of Beather Johnson*, p. 28). When Johnson arrived at work that day she immediately began to dress the residents and move them to the nurses' station for dinner. *See A9* Id., p. 30. One of these residents was Rita McNeil ("Ms. McNeil"), who resided in Room 324. *See A9* Id., p. 33. After assisting the

other residents, Johnson soon realized that Ms. McNeil was no longer present. *See* Id. Johnson walked towards a semi-circular configuration of rooms to locate Ms. McNeil. *See A9-10* Id., pp. 33-34. As she approached Ms. McNeil's room, Johnson discovered Ms. McNeil's son, James McNeil, in resident Shirley Smith's ("Ms. Smith") room with his hand underneath Ms. Smith's sheet. *See A10* Id., p. 34. Ms. Smith is non-communicative, unable to walk and feeds by tube.

On November 9, 2006, Relators sought a Temporary Restraining Order against McNeil. Respondent entered an order that same day prohibiting, *inter alia*, McNeil from entering or trespassing upon the premises located at 4401 Prigge Rd. *See A11-12 (*Exhibit 3, *Order Granting Temporary Restraining Order*). On November 21, 2006, the Temporary Restraining Order was made preliminary, but modified to permit McNeil to pick-up Ms. McNeil from the facility without physically entering the building. *See A 13-14 (*Exhibit 4, *Order Granting Preliminary Injunction*).

The Permanent Injunction hearing was set for January 18, 2007 at 2:30 p.m. At that time, Relators put on their case-in-chief; however, time did not permit the parties to conclude the hearing. Accordingly, the hearing was continued to February 9, 2007 at 1:30 p.m. to permit McNeil the opportunity to put on his case.

Subsequent to the January 18, 2007 hearing, McNeil served upon Relators a Subpoena for Taking Deposition ("Subpoena"), directing the custodian of records to produce documents identified in the attached exhibit. *See A15-16* (Exhibit 5, *Subpoena for Taking Deposition*). The Subpoena requested, *inter alia*, "…the entire personnel file of Beather Johnson…" *See* Id. Relators served their Motion to Quash Defendant's

Subpoena for Taking Deposition ("Motion to Quash") on January 26, 2007. *See A17-19* (Exhibit 6, *Plaintiffs' Motion to Quash Defendant's Subpoena for Taking Deposition*). The Motion to Quash sought an order prohibiting the disclosure of Johnson's personnel file. *See* Id. On January 29, 2007, following a hearing, Respondent denied the Motion to Quash. *See A1* (Exhibit 7, *January 29, 2007 Order*). Respondent's January 29, 2007 Order requires Relators to "…forthwith disclose to Defendant the entire personnel file of witness Beather Johnson."

Relators sought a writ of prohibition from the Missouri Court of Appeals on January 31, 2006, requesting that Respondent's Order not be enforced. Relators' Petition for Writ of Prohibition was denied. Relators then filed this writ of prohibition.

Point Relied On

I. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS JANUARY 29, 2007 ORDER DENYING RELATORS' MOTION TO QUASH A SUBPEONA FOR BEATHER JOHNSON'S ENTIRE CONFIDENTIAL PERSONNEL FILE BECAUSE MS. JOHNSON HAS A FUNDAMENTAL RIGHT OF PRIVACY IN HER EMPLOYMENT RECORDS.

a. Ms. Johnson's confidential employment records are privileged and it is clear that no waiver of that privilege has occurred under the facts alleged in the Verified Petition.

b. Relators cannot waive Ms. Johnson's right of privacy in her confidential employment records because that right is personal to Ms. Johnson.

c. The confidential employment records sought by McNeil have no bearing on the issues in this litigation and McNeil has not demonstrated their materiality to the matters placed in issue by the Verified Petition.

d. The Missouri Supreme Court has made it clear that the right of privacy in employments records is so fundamental that not even disclosure pursuant to a protective order or *in camera* inspection is sufficient to protect the privacy right.

e. Relators have standing to assert the confidentiality of personnel records on behalf of their employees.

- *State ex rel. Madlock v. O'Malley*,

  8 S.W.3d 890, 891 (Mo. banc 1999)

- *State ex rel. Crowden v. Dandurand*,

  970 S.W.2d 340, 343 (Mo. banc 1998)

- *Spacewalker, Inc. v. American Family Mutual Ins. Co.*,

  954 S.W.2d 420, 423 (Mo. Ct. App. 1997)

- *Pipes v. Sevier*,

  694 S.W.2d 918, 925 (Mo. Ct. App. 1985)

Argument

This writ petition concerns an Order denying Relators' Motion to Quash a Subpoena for Taking Deposition, which requested, *inter alia*, "…the entire personnel file of Beather Johnson…" Beather Johnson is an employee of Relators and a witness in the underlying lawsuit. Relators filed the Motion to Quash because under long standing Missouri Supreme Court precedent, employees have a fundamental right of privacy in their confidential employment records. That right of privacy is waived in only limited circumstances, none of which apply here. In denying Relators' Motion to Quash, Respondent ordered that Relators disclose "…the entire personnel file of witness Beather Johnson." Respondent's Order is contrary to Missouri law and a writ of prohibition should issue to prevent Respondent from enforcing said Order.

I. RELATORS ARE ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM ENFORCING HIS JANUARY 29, 2007 ORDER DENYING RELATORS' MOTION TO QUASH A SUBPEONA FOR BEATHER JOHNSON'S ENTIRE CONFIDENTIAL PERSONNEL FILE BECAUSE MS. JOHNSON HAS A FUNDAMENTAL RIGHT OF PRIVACY IN HER EMPLOYMENT RECORDS.

The Missouri Supreme Court has conferred a fundamental right of privacy on records contained in an employment file. As with any fundamental privacy right or privilege, production of the documents forfeits their confidential status. For that reason, a writ of prohibition is "an appropriate remedy to prevent enforcement of discovery

requiring production of privileged documents." *State ex rel. Syntex Agri-Business, Inc. v. Adolf*, 700 S.W.2d 886, 887 (Mo. Ct. App. 1985).

In *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861 (Mo. banc 1986), the Supreme Court outlined the three circumstances in which prohibition against a trial judge is appropriate:

A. The trial court lacks jurisdiction of either the person or the subject matter.

B. The trial court has so grossly abused its discretion that it lacks the power to act as contemplated.

C. The trial court has decided the issue incorrectly and an appeal will not provide an adequate remedy.

706 S.W.2d at 862.

The instant case falls under the third category. Writs of prohibition are the appropriate procedural vehicle to remedy a discovery order that could cause a party to suffer considerable hardship that could not be remedied on appeal. *State ex rel. Helt v. O'Malley*, 53 S.W.3d 623, 624 (Mo. Ct. App. 2001). As the Supreme Court recently held in *State ex rel. Wilfong v. Schaeperkoetter*, 933 S.W.2d 407 (Mo. banc 1996):

> Prohibition will issue if there is an important question of law decided erroneously that would otherwise escape review by this Court, and the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision. This basis for prohibition particularly applies where privileges are at issue. Once the privilege is discarded and the privileged material produced, the damage to the party

> against whom discovery is sought is both severe and irreparable. The damage cannot be repaired on appeal.

933 S.W.2d at 408 (citations and internal punctuation omitted). *Accord, State ex rel. Peabody Coal Co. v. Clark*, 863 S.W.2d 604, 608 (Mo. banc 1993); *State ex rel. Lause v. Adolf*, 710 S.W.2d 362, 364 (Mo. App. 1986); *State ex rel. Gonzenbach v. Eberwein*, 655 S.W.2d 794, 795 (Mo. App. 1983).

Prohibition is the proper remedy when a judge compels disclosure of employment records and has not narrowly tailored that disclosure to only those records placed in issue by the pleadings. *State ex rel. Pierson v. Griffin*, 838 S.W.2d 490, 492-493 (Mo. Ct. App. 1992) (issuing writ of prohibition where court exceeded its jurisdiction in compelling wholesale disclosure of employment records); *State ex rel. Madlock v. O'Malley*, 8 S.W.3d at 892 (same). Prohibition is appropriate when confidential employment records are at issue because once disclosure is made the right of privacy is forever lost and cannot be restored. After disclosure is made to an adversary, the veil of confidentiality is lifted and the right of privacy stripped. Without the remedy of prohibition the fundamental right of privacy would be subject to the trial court's discretion and could not be remedied by appellate review.

In this case, McNeil requested disclosure of fact witness Beather Johnson's *entire* confidential personnel file. Respondent agreed and ordered Relators to produce Johnson's entire confidential employment file. Respondent ordered disclosure without regard to whether Johnson waived the fundamental right of privacy in those records and without regard to whether the confidential records have any relevance to the issues put at

issue in this case. In doing so, Respondent ignored clear and well established Missouri law. Respondent should have granted Relators' Motion to Quash and a writ of prohibition should issue for failure to do so.

a. Ms. Johnson's confidential employment records are privileged and it is clear that no waiver of that privilege has occurred under the facts alleged in the Verified Petition.

In ordering Relators to disclose Johnson's *entire personnel file*, Respondent disregarded clear Missouri law establishing an employee's fundamental right of privacy in his or her employment records. *See State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 343 (Mo. banc 1998) (*citing State ex rel Tally v. Grim*, 722 S.W.2d 604, 605 (Mo. banc 1987)). The Missouri Supreme Court has emphatically stated that "discovery is limited to information that relates to matters put at issue in the pleadings, especially in relation to sensitive personal information." *State ex rel. Madlock v. O'Malley*, 8 S.W.3d 890, 891 (Mo. banc 1999). "Therefore, a subpoena for employment records must be limited to the issues raised in the pleadings." *State ex rel Crowden*, 970 S.W.2d at 343. Even in these cases, the Missouri Supreme Court has held that disclosure is permitted only to the extent that it has been waived by the employee whose records are at issue.

In this case, Respondent made no attempt to limit his Order to the subject matter of this dispute to protect the right of privacy established by the Supreme Court. Nor did Respondent limit his Order temporally to the time frame at issue. Rather, Respondent gave McNeil *carte blanche* authority to inspect every document in Johnson's confidential

employment file. Without question, Respondent's Order is in contravention of Missouri law.

While a trial court is vested with broad discretion regarding discovery matters, that discretion is not unfettered. *Spacewalker, Inc. v. American Family Mutual Ins. Co.*, 954 S.W.2d 420, 423 (Mo. Ct. App. 1997) (reversing default judgment against party as a sanction for failure to comply with discovery). Where a trial court abuses its discretion, an aggrieved party may properly seek a writ of prohibition. *State ex rel. Helt v. O'Malley*, 53 S.W.3d 623, 624 (Mo. Ct. App. 2001).

The Missouri Supreme Court has frequently prohibited enforcement of orders similar to Respondent's Order, reasoning that such disclosure is overbroad and contrary to the fundamental right of privacy in confidential employment records. *See e.g. State ex rel. Pierson v. Griffin*, 838 S.W.2d 490, 492-493 (Mo. Ct. App. 1992) (prohibiting enforcement of order requiring personal injury plaintiffs to disclose entire personnel files and holding that the disclosure should be tailored to that information which is relevant to the issues in the lawsuit upon which employment records may be relevant); *State ex rel. Madlock v. O'Malley*, S.W.3d at 891-92 (holding that authorization requesting an entire employment file was too broad and must be limited to information placed at issue by the pleadings).

In *State ex rel. Crowden v. Dandurand*, the defendant subpoenaed the entire employment file from the plaintiff's employer. 970 S.W.2d at 341. In his petition, the plaintiff alleged that his ability to work was impaired and that he has, and will, miss work and lose wages. *Id*. The Court reaffirmed an employee's right of privacy in his or her

employment file, noting that "employees have a fundamental right of privacy in employment records" and a subpoena requesting disclosure of such records must be limited to the issue raised by the pleadings. *Id*. at 343. However, the Court found that the plaintiff waived his right of privacy based on his broad allegations of damages in his petition. *Id*.

In *Rodriguez v. Suzuki Motor Corp.*, the Supreme Court considered whether the defendant driver waived her physician-patient privilege with respect to toxicology records, which would have established her level of intoxication at the time of the accident. 996 S.W.2d 47 (Mo. banc 1999). At trial, "the question of [the defendant's] alcohol consumption and the effect it had on her driving ability was hotly contested" and was one of the most significant issues at trial. *Id*. at 61. There was no doubt that the evidence was extremely relevant; however, the Court prevented disclosure of the toxicology records on the basis of the physician-patient privilege. *Id*. at 63-64. The Court concluded that the defendant had not waived the privilege despite testifying that she did not feel intoxicated upon leaving the winery and despite her lawyer eliciting testimony from other witnesses on the intoxication issue. *Id*.

Rodriguez is a stark reminder that privileges and fundamental privacy rights are absolute unless waived. The Missouri Supreme Court has applied the same analysis to the fundamental right of privacy in confidential employment records. *See State ex rel. Crowden v. Dandurand*, 970 S.W.2d 340, 343 (Mo. banc 1998) (*citing State ex rel Tally v. Grim*, 722 S.W.2d 604, 605 (Mo. banc 1987); *State ex rel. Madlock v. O'Malley*, 8 S.W.3d 890, 891 (Mo. banc 1999).

In this case, Respondent has ordered that Relators produce a fact witness's entire confidential employment file. Johnson was a witness to the incident alleged in the pleadings – nothing more, nothing less. She is not a party to the underlying lawsuit. By mere fortuity Johnson witnessed the incident that forms the basis of Relators' petition. Mere fortuity is not the standard of disclosure when the right of privacy is at stake. Johnson has not placed her wages, ability to work or employment status in issue. In fact, Johnson has placed *nothing* in issue in this case because she is neither a plaintiff nor a defendant. Nor have *Relators* placed Johnson's employment status in issue. It is admitted and uncontested that Johnson is an employee of Relators.

Most significantly, to require disclosure of confidential employment records under the circumstances of this case would effectively obliterate the right of privacy in confidential employment records established by this State's Supreme Court. Respondent has ordered disclosure of Johnson's confidential employment records because there *may* be something in that file, which *may* be used to discredit and impeach Johnson on cross-examination. If that rationale is accepted, disclosure of employment records could be compelled in every case because the credibility of the witness is always at issue. Indeed, the credibility of not only the plaintiff and defendant is at issue in every case, but the credibility of every witness is also at issue in every case. To carve out an exception to the right of privacy in employment records to permit disclosure of anything that may be used to impeach the witness would permit the exception to swallow the rule. Indeed, disclosure of employment records could be compelled in every case. There would no longer be a right of privacy in employment records.

The decision to order disclosure of Johnson's *entire* confidential employment file must be guided by the long standing principles established by the Supreme Court. *State ex rel. Crowden* and its progeny dictate that disclosure is *only* permitted when the right to privacy has been waived by the employee and the confidential employment records are placed in issue by the petition, not when a witness's credibility is at issue. Based on that line of cases, employment files are relevant to ascertain damages or ability to work – not to impeach a fact witness.

Johnson's employment is not at issue in this case; however, as with any witness, her credibility is at issue. Neither Relators nor Johnson have waived Johnson's fundamental right of privacy in her employment records and this Court should prohibit Respondent from enforcing its Order compelling disclosure of Johnson's "entire personnel file."

b. Relators cannot waive Ms. Johnson's right of privacy in her confidential employment records because that right is personal to Ms. Johnson.

Privileges are personal to the holder of the privilege and may only be waived by that person. *See Pipes v. Sevier*, 694 S.W.2d 918, 925 (Mo. Ct. App. 1985) (holding that the attorney-client privilege is "for the benefit of the client, not the lawyer" and is "personal to the client"). In *State ex rel. Lause v. Adolf*, third-party subpoenas were issued to relator-attorneys that advised one of the parties to the underlying litigation – the Terre Du Lac Association – with respect to the transaction at issue. 710 S.W.2d 362 (Mo. Ct. App. 1986). The respondent ordered the relator-attorneys to produce the

requested records. Respondent argued that the privilege had been waived because the Association's officers and directors (also parties to the litigation) had raised "advice of counsel" as an affirmative defense. *Id*. at 363. The Court of Appeals prohibited disclosure on the basis that there was no waiver of the attorney client privilege, because the individual defendants could not waive the privilege on behalf of the Association. *Id*. at 364.

In this case, Respondent's Order forces Relators to waive Johnson's right of privacy in her confidential employment records. The right is not Relators' to waive. Johnson's right of privacy in her confidential employment records is personal to Johnson and only she can waive that privacy right. As demonstrated above, Johnson has not waived that right, nor has she put it at issue in this case, because she is not a party to the underlying litigation. Respondent's Order essentially destroys the right of privacy in employment records because it forces the custodian of those records to disclose them, regardless of a waiver by the owner of that right of privacy. For these reasons, Respondent's Order was contrary to law and enforcement of that Order should be prohibited.

c. <u>The confidential employment records sought by McNeil have no bearing on the issues in this litigation and McNeil has not demonstrated their materiality to the matters placed in issue by the Verified Petition</u>.

McNeil has failed to demonstrate why he needs Johnson's confidential employment records or for what purpose they will be used. Apparently, McNeil will use

these documents to discredit and impeach Johnson as a witness. McNeil may try to use the documents to demonstrate that Johnson's future employment with Relators was in danger as of November 8, 2006, and she needed to "save" herself by casting herself as a "hero." There is no other conceivable reason for requiring disclosure of a fact witness's employment records. Regardless, McNeil appears to want these documents for one purpose – impeachment.

The evidence the Supreme Court protected from disclosure in *Rodriguez* was likely the most relevant evidence available in a case involving an automobile accident. The evidence could have conclusively determined whether the defendant was drunk at the time of the automobile accident. It is difficult to conceive of more relevant evidence. Nonetheless, the Court did not compel a waiver of the privilege irrespective of its relevance. The Court recognized that privilege and privacy trumps relevance.

In light of the protection afforded by the Supreme Court to fundamental privacy rights, as illustrated by *Rodriguez*, *State ex rel. Crowden* and *State ex rel. Madlock*, there is little question that Johnson's confidential employment file cannot be disclosed. This is particularly the case where the evidence has little, if any, relevance. McNeil has demonstrated no need for Johnson's confidential employment records. Johnson's confidential employment file is irrelevant to any issue in the case. This is a case about whether McNeil is a danger to the nearly three hundred elderly residents and children that are present at Relators' facility on a daily basis. The evidence thus far establishes that he is a danger. Moreover, this case is not about Johnson's ability to work, her wages or her employment status. Thus, there leaves only one use for the evidence – impeachment.

McNeil's need for Johnson's confidential employment records for impeachment purposes is unpersuasive for a number of reasons. Johnson has already been deposed. As such, the records will not be used to impeach her at a deposition. Further, Johnson has already taken the stand at the evidentiary hearing during Relators' case-in-chief and Relators have closed their case. Thus, Johnson will not be taking the stand again during the hearing; therefore, the records cannot be used to impeach her during the evidentiary hearing.

As Johnson has testified twice in this matter already, McNeil has had sufficient opportunity to cross-examine her on any issue that may be relevant to her employment. Additionally, the administrator of the facility also testified at the evidentiary hearing. As such, McNeil was afforded an opportunity at that time to cross-examine the administrator on Johnson's employment status with Relators.

Irrespective of whether McNeil seeks to use Johnson's confidential employment file for impeachment, the documents are inadmissible collateral evidence and would not be admissible on cross-examination. It is an elementary and long-standing rule of evidence that an opposing party is bound by a witness's answers elicited on cross-examination with respect to collateral matters inquired into for purposes of impeachment and is not permitted to introduce extrinsic evidence to refute the witness's answers. *Hurlock v. Park Lane Medical Center, Inc.*, 709 S.W.2d 872, 877 (Mo. Ct. App. 1985); *Rousan v. State*, 48 S.W.3d 576, 590 (Mo. banc 2001) (holding that police officers' personnel records were inadmissible to impeach the officers involved in defendant's arrest).

Johnson's confidential employment records have no relevance to this case. They do not relate to whether McNeil is a danger to Relators' residents. Johnson's testimony is the only relevant evidence on that point. Even if the confidential records were relevant for impeachment purposes, which they are not, they constitute inadmissible extrinsic evidence.

d. The Missouri Supreme Court has made it clear that the right of privacy in employments records is so fundamental that not even disclosure pursuant to a protective order or *in camera* inspection is sufficient to protect the privacy right.

The Missouri Supreme Court has held that the right of privacy in employment records is so fundamental that not even disclosure pursuant to a protective order is sufficient to protect the employee's privacy right. In *State ex rel. Madlock v. O'Malley*, the respondent ordered a personal injury plaintiff to execute an authorization for the inspection of the plaintiff's employment records without limitation. 8 S.W.3d at 891. In making its preliminary writ of prohibition absolute, the Supreme Court held that "a protective order limiting disclosure of such records only to the parties, witnesses, attorneys and staff in the litigation is inadequate because it allows disclosure of irrelevant personal information to adverse parties." Likewise, in *State ex rel. Stecher v. Dowd*, the respondent ordered an *in camera* inspection of plaintiff's employment records for purposes of culling the non-discoverable records; however, that order permitted defendant's counsel to be present during the *in camera* inspection. 912 S.W.2d 462, 463 (Mo. banc 1996). The Supreme Court prohibited the respondent from enforcing its order

to the extent it permitted defendant's counsel to be present during the *in camera* inspection, reasoning that the plaintiff's right of privacy in her employment records "cannot be achieved, of course, if counsel for defendants is present for the inspection." *Id*. at 465.

The Supreme Court's rationale in *State ex rel. Madlock* and *State ex rel. Stecher* forms the bedrock of the fundamental right of privacy afforded to employment records. Once disclosure is made to an adversary, either pursuant to a protective order or *in camera* inspection, the privacy right has been breached and cannot be restored. These cases illustrate the status afforded to an employee's right of privacy in his or her employment records. The Supreme Court has held that the right is of such fundamental importance that disclosure in *any form* is prohibited unless waiver has occurred. The privacy right attaches not just to the use of such records at trial or disclosure outside of the confines of the litigation, but to disclosure in the first instance.

e. Relators have standing to assert the confidentiality of personnel records on behalf of their employees.

In his Return to Relators' writ petition, Respondent argued that Relators do not have standing to object to the production of Johnson's confidential employment records. This argument has no merit. In essence, Respondent is arguing that the lawyer does not have standing to object to the production of its confidential communications with its client; nor does the healthcare provider have standing to object to the production of its patients' medical records. Missouri law is to the contrary.

In *Fierstein v. DePaul Hospital*, DePaul received a third-party *subpoena duces tecum,* which requested the production of plaintiff's confidential medical records. 24 S.W.3d 220, 223 (Mo. Ct. App. 2000). Without obtaining written authorization, DePaul produced the records. Plaintiff filed suit for breach of fiduciary duty for disclosing the confidential records without a waiver or authorization to do so. *Id*. at 223. The Court of Appeals affirmed an award of both actual and punitive damages against DePaul for its disclosure of the confidential medical records. *Id*. *See also State ex rel. Maloney v. Allen*, 26 S.W.3d 244, 247 (Mo. App. 2000); *State ex rel. Lause v. Adolf*, 710 S.W.2d 362 (Mo. Ct. App. 1986) (prohibiting disclosure of attorney-client communications where third-party subpoenas were issued to attorneys).

Fierstein, Allen, and *Lause* demonstrate the state of Missouri law. In all three cases, the request for records was directed to the custodian of the privileged information – the healthcare provider and the attorney, respectively. In both cases, the court prohibited disclosure of the records on the basis that the records were privileged and not subject to disclosure. The law is clear – the custodian of privileged information has a duty to prevent disclosure of confidential records within its possession. The order at issue in this writ petition is the order denying a motion to quash a *subpoena duces tecum* to Relators – that is, the custodian of confidential and privileged documents. *Fierstein, Allen* and *Lause* make this writ of prohibition petition a simple case, particularly where there is no dispute that Ms. Johnson has a fundamental right of privacy in her confidential employment records. If Relators did not have standing to object to the disclosure of Johnson's confidential employment records, Relators could be compelled to disclose

them irrespective of their confidential status. For that reason, it is clear that Relators do have standing to object to the disclosure of Johnson's confidential employment records, just as they would have standing to object to the disclosure of their residents' confidential medical records.

Conclusion

Relators acknowledge that writs of prohibition relating to discovery orders are issued only when the trial court abuses its discretion. But, when the trial court's order is contrary to the fundamental right of privacy established by this State's Supreme Court, extraordinary relief is warranted to prevent the disclosure of personal and private information that cannot be restored once disclosure is made.

For these reasons, Relators respectfully pray that this Court issue a permanent writ prohibiting Respondent from enforcing its January 29, 2007 Order requiring the disclosure of Beather Johnson's personnel file.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Mo.S.Ct. Rule 84.06(b); (3) contains 5,627 words, exclusive of the sections exempted by Mo.S.Ct. Rule 84.06(b)(2), based on the word count that is part of Microsoft Word 2002 SP-2. The undersigned counsel further certifies that the accompanying diskette has been scanned and is free of viruses.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing and an electronic copy on floppy diskette were served by U.S. First Class Mail, postage prepaid, on this 9th day of April, 2007, to the following:

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