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

REPLY BRIEF OF RELATORS

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ARGUMENT

Respondent has attempted to mislead this Court by confusing fact with fiction and injecting principles of law that have no bearing on the issues before this Court. The issue before this Court is *not* whether James McNeil ("McNeil") should be prevented from visiting his mother as a sanction for inappropriately touching another resident. The issue before this Court is whether, in defending the underlying injunction action, he is entitled to confidential employment records that no one disagrees are subject to a fundamental privacy right.

Respondent's fixation with discussing the merits of the underlying case is an attempt to draw this Court's attention from the real issues presented in this Writ. Irrespective, and contrary to Respondent's representations, Ms. Johnson testified clearly and repeatedly that she saw McNeil with his right hand underneath the sheet of a non-communicative and non-ambulatory resident at Relators' facility. *See* Transcript, pp. 35, 69, 70-72 (Exhibit pp. 75, 83-84, Relators' Writ of Prohibition). Respondent apparently believes that in order for Relators to protect their residents from further abuse by enjoining McNeil from entering the facility, Ms. Johnson must have actually seen McNeil's hands engaged in whatever untoward act was taking place. Such a result would be outrageous and contrary to this State's policy to protect its most vulnerable residents. Despite his erroneous recitation of the facts, Respondent does not disagree that an employee such as Ms. Johnson has a fundamental right of privacy in her employment file. Ms. Johnson has been thrown into this lawsuit by the mere fortuity that she witnessed McNeil's appalling act. Ms. Johnson did not file this lawsuit. This lawsuit was filed by

Relators because they have a legal and moral obligation to protect the two-hundred and thirty (230) elderly residents and thirty-five (35) children that are present at Relators' facility on a daily basis.

In an effort to obtain Ms. Johnson's personnel file, McNeil served a Subpoena for Taking Deposition ("Subpoena"), directing Relators' custodian of records to produce *inter alia*, "…the entire personnel file of Beather Johnson…" Relators filed a Motion to Quash, preventing McNeil from obtaining access to Ms. Johnson's confidential personnel file without her authorization that it be disclosed.

I. Relators Have Standing to Object to the Production of Their Employee's Confidential Employment File.

Respondent argues that Relators have no standing to object to the disclosure of Ms. Johnson's personnel file. An employee's fundamental right of privacy was first established by this Court in 1998 in the case of *State ex rel. Crowden v. Dandurand*. 970 S.W.2d 340 (Mo. banc 1998) (*citing State ex rel. Tally v. Grim*, 722 S.W.2d 604, 605 (Mo. banc 1987)) and has been reaffirmed ever since. Respondent does not question the existence of this fundamental right of privacy. Rather, Respondent claims that only the employee may assert this right and that Relators should ignore this right even absent any permission or authorization from the employee to waive the fundamental right of privacy in personnel records.

It has been nearly a decade since this Court first established the fundamental right at issue in this case. It has been a firmly established principle in this State's jurisprudence since that time. Now, nearly a decade since this Court's decision in

Dandurand, Respondent advances the untenable position that McNeil can gain access to otherwise privileged records by merely requesting the records from the employer, rather than the employee. This position is premised on Respondent's belief that the employer has no standing to object to the production. This position is simply illogical. It is illogical because that same reasoning is clearly contrary to existing law when applied to attorney-client communications and the physician-patient privilege. *See e.g. Fierstein v. DePaul Hospital*, 24 S.W.3d 220 (Mo. Ct. App. 2000) (awarding actual and punitive damages against hospital for its wrongful disclosure of confidential medical records). *Id*. Indeed, Respondent does not even attempt to distinguish the decision in *State ex rel. Lause v. Adolf*, 710 S.W.2d 362 (Mo. Ct. App. 1986). That case is directly on point with respect to the obligation of one privy to another's confidential and privileged information to protect the other's privilege and Respondent does not contend otherwise.

Significantly, Respondent does not disagree that Ms. Johnson has a fundamental right of privacy in her employment file. It is illogical to argue that every employer does not a have a corresponding duty to protect that right when it generates and maintains custody of those records. The fundamental right of privacy in employment records is no right at all if there is not a corresponding duty to respect that right. The hallmark of any fiduciary relationship is that one party holds in trust the confidential or proprietary information of another. Attorneys have that duty with respect to their client's confidences, as do healthcare providers with respect to their patients' confidential medical records. That duty is necessarily extended to employers who generate and maintain confidential records of their employees.

Despite Respondent's unsupported assertions to the contrary, the fundamental right in confidential employment files *is* analogous to the physician-patient privilege. In arguing that protection of the fundamental right of privacy cannot be equated to the physician-patient privilege, Respondent has failed to consult this Court's decision in *State ex rel. Tally v. Grim*, which is the basis of the fundamental right of privacy in employment files. In *Grim*, the plaintiff brought a medical malpractice action seeking damages for present and future lost earnings. 722 S.W.2d 604, 604 (Mo. banc 1987). The trial court ordered plaintiff to execute an "earnings authorization" for the production of the wages and income information contained in the plaintiff's personnel records. *Id*. In affirming the trial court's decision, this Court held that the issue was governed by *State ex rel. McNutt v. Keet*, 432 S.W.2d 597 (Mo. banc. 1968) which involved protection and waiver of the physician-patient privilege. Analogizing the plaintiff's "fundamental right of privacy" in his personnel records to the physician-patient privilege in *McNutt*, this Court held that the plaintiff made a limited waiver of his right of privacy by claiming lost earnings. *Id*. at 605. In other words, an employee's fundamental right of privacy in personnel records is waived when the employee places her wages at issue, just as the physician-patient privilege is waived when a patient places her medical condition at issue. *Id.*

Respondent's position here would abolish the right of privacy in employment records established by this Court, because the right could be circumvented by simply requesting the records from someone other than the employee. Moreover, Respondent's position would eliminate the necessity of an authorization for disclosure of an employee's

personnel file, because disclosure could simply be compelled by virtue of a subpoena to the employer. This result is simply not compatible with the fundamental right of privacy created by this Court. Employees are frequently witnesses to an incident subject to litigation. Under Respondent's reasoning, plaintiffs could request these personnel files pursuant to requests for production (because the employer creates and maintains those records) and the employee could not object to the production, even though it is clear that the fundamental right of privacy has attached to those records.

By mere chance, Ms. Johnson happened to be the person that witnessed McNeil in another resident's room with his hands underneath her sheets. This is no different from the vast majority of cases in which a litigant's employee is a witness in a factual dispute subject to litigation. In those cases, as in this case, the employee is free to authorize the disclosure. As is obvious in this case Ms. Johnson agrees with Relators' position that her confidential personnel file is not subject to disclosure; otherwise, she would have provided such an authorization. Where employees such as Ms. Johnson do not have the means to engage in protracted litigation simply to preserve their right of privacy, employers such as Relators have the obligation to preserve that right on their behalf. Particularly where the records are requested by way of a subpoena to the employer, as was done in this case.

The fundamental right of privacy in employment records has been firmly established in Missouri for nearly a decade. It is improbable to think that when this Court established that fundamental right it was qualifying that right of privacy based on *to whom* the records request is directed. It is further improbable to imagine that this Court

was saying that the fundamental right of privacy exists only when the request is sent to the employee, but not to the employer. Such a result is both illogical and contrary to existing law.

II. Relators Cannot Waive Their Employee's Right of Privacy in Confidential Personnel Records and Even If They Could, There is No Waiver Where the Actions Taken Were Done to Comply with a State Mandate.

Respondent argues that Relators have waived Ms. Johnson's fundamental right of privacy by "relying solely on her representations" in filing this case. Resp. Br., 15. *State ex rel. Tally* and its progeny are dispositive of this issue. Those cases 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. Ms. Johnson has not placed her wages, ability to work or employment status in issue. In fact, Ms. Johnson has placed *nothing* in issue in this case because she is not a party to this case. There is simply no law in this State which would suggest that Ms. Johnson's fundamental privacy right has been waived for the purposes of impeachment. Notably, Respondent cites no case to support his claim that confidential personnel records may be used to impeach a witness or show that witness's bias or prejudice.[1] Even if the bias of a witness may be shown through extrinsic evidence, the

1 It is interesting to note that on the one hand Respondent claims that Ms. Johnson's own testimony supports McNeil's position, but on the other hand argues that the evidence is needed to demonstrate her bias and prejudice against McNeil.

evidence must be otherwise subject to disclosure. In other words, a party's right to impeach a witness does not trump that witness's fundamental right to prevent disclosure of records subject to privilege or a right of privacy. No one suggests that the attorney-client privilege or the physician-patient privilege are waived merely because the records may contain some evidence of bias on the witness's part. That result does not change when the privilege at issue is the fundamental right of privacy, which is firmly rooted in this Court's jurisprudence.

Moreover, Ms. Johnson's right of privacy has not been waived by Respondent's (unsupported) claim that Ms. Johnson's employment file "presumably" will include the information she reported to Relators or it "seems likely" that it "would contain information about her job duties and performance of those duties." Resp. Br., 15, 17-18. This is simply a red-herring. These matters can be discovered by means other than wholesale disclosure of Ms. Johnson's confidential employment file. Reports relating to McNeil's inappropriate conduct are contained in files maintained by Relators and the St. Louis County Police. In fact, McNeil has those documents. Ms. Johnson's job duties could have been elicited by deposition or at the injunction hearing. If this is the type of information McNeil is requesting, there are certainly least restrictive measures that can be taken to obtain that information.

Respondent again attempts to mislead the Court by suggesting that it was "[o]nly after hearing Relators' witnesses testify about Ms. Johnson's work record did Respondent order Relators to disclose her personnel file." Resp. Br., 16. This argument is simply disingenuous. Respondent purports to make a correlation between Ms. Johnson's

testimony and the *reason* Relators were ordered to disclose her file. The timing of Respondent's Order was a mere fortuity. Respondent's Order was entered after Ms. Johnson's testimony only because that was the first time the issue was presented to the Court. Indeed, it was not until after Ms. Johnson's testimony that McNeil served his Subpoena requesting Ms. Johnson's confidential employment file. It is simply inaccurate to suggest otherwise.

Irrespective, Respondent's argument ignores the clear mandates of Missouri law relating to the reporting of elder abuse and a skilled nursing facility's obligation to keep its residents safe and free from abuse. Residents of a long-term care facility in Missouri have the right to be free from mental and physical abuse. MO. CODE REGS. 19 – 30-88.010(22) (2001). Missouri's self-reporting scheme requires that when any long-term care facility employee "*has reasonable cause to believe* that a resident of a facility has been abused or neglected, he or she *shall immediately* report or cause a report to be made to the department." MO. REV. STAT. § 198.070.1 (2006) (emphasis added). Missouri places great emphasis on the reporting of abuse, including *suspected* abuse, of a resident. However, a facility's obligation to keep residents free from abuse does not stop with simply reporting. Long-term care facilities have an on-going obligation to keep residents free from abuse.

In light of long-term care employees' obligation to report suspected and actual abuse of nursing home residents, it is abundantly clear that Respondent's position would create bad public policy in this State. Indeed, Respondent's position places an employee's obligation at odds with the mandates of Missouri's statutes and regulations.

More pointedly, Respondent's position places a skilled nursing facility's employee's privacy right at odds with her legal obligation to report elder abuse. In every instance, the employee will be faced with the dilemma of reporting abuse, despite the fact that the effect of her compliance with state law will be the forfeiture of her privacy right. It creates disincentives for responsible employees to report even the hint of elder abuse, for fear that they will have sensitive and confidential information contained in their personnel records open to the public if a lawsuit stems out of the reported abuse. Such a result would undoubtedly have a chilling effect on an employee's obligation to report abuse, such as was done in this case. Respondent's position is both dangerous and irresponsible.

III. The Fundamental Right of Privacy is Not Incompatible with McNeil's Right of Familial Relations.

Respondent argues that McNeil's right to visit his mother and Ms. Johnson's right of privacy in her employment records are mutually exclusive. They are not. No one has argued that McNeil does not have the right to visit or have a relationship with his mother. Nonetheless, McNeil's right to visit is mother is not the issue before the Court. Again, this is an attempt by Respondent to dilute the issue presented in Relators' Writ Petition. The issue remains whether McNeil has the right to obtain confidential employment records where Ms. Johnson has not provided an authorization to disclose those records.

This Court need not balance McNeil's right of familial relations with Ms. Johnson's fundamental right of privacy in her confidential employment file – a right Respondent does not disagree exists. The two rights are not competing and they are not

mutually exclusive. Respondent ignored clear Missouri law when he Order disclosure of Ms. Johnson's records. This Court should prohibit enforcement of that Order.

CONCLUSION

Respondent's argument that Relators have no standing to object to the disclosure of Ms. Johnson's fundamental right of privacy in her employment records is both contrary to logic and well established case law. Moreover, even if Relators desired to, they could not waive Ms. Johnson's fundamental privacy right. Ms. Johnson's privacy right is her right to waive, not Relators'.

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) and (3) contains 2,762 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 document and an electronic version on floppy disk was served by First Class Mail, postage prepaid on this 10th day of May, 2007, to the following:

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