No. SC85834

IN THE
SUPREME COURT OF MISSOURI

MISSOURI DEPARTMENT OF SOCIAL SERVICES,

Appellant,

v.

MP, et al.

Respondents.

On Appeal from the Circuit Court of Cole County, Missouri

The Honorable Richard G. Callahan

APPELLANT'S REPLY BRIEF

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The essence of the dispute before this Court is the seriousness of the consequences of placement of a name in Missouri's Central Registry as those consequences are outlined by Missouri law. The protection, or "process" that is due an individual whose name in on the registry is determined by the severity of those consequences. What is not genuinely at issue on this appeal is the particular consequences to the respondents since, in spite of argument to the contrary, there is no evidence of actual or potential loss to any of them. And the absence of statutory penalties that foreclose employment or employment opportunities, or statutory conditions that so burden those opportunities as to severely limit them, takes the Missouri statutes outside the realm of federal due process requirements. Missouri mandates certain process for individuals who are investigated and whose names are placed in the Central Registry, and this process must be followed to comply with the Missouri Constitution. But there has been no challenge that the process mandated by statute here was not followed.

It is also undisputed that the State of Missouri does not take on the role of dealing directly with persons for whom probable cause to suspect child abuse has been found. Missouri's approach is to see to it that persons who are involved in child care in various circumstances are informed as quickly as possible when a

person in their charge may have committed some act of abuse or neglect. Though respondents make liberal use of the rhetoric that they have been "branded" child abusers, the Missouri system does no more than to provide notice to persons who need to know that there may be matters relating to the care of children into which inquiry should be made. There is no mandate to inquire, nor any negative consequences to an employer for failure to inquire. A person's name is placed in the registry when there is "probable cause to suspect" that abuse or neglect has occurred. Respondents treat this phrase as equivalent to a declaration that persons on the registry have been convicted of crime of child abuse. Not surprisingly, respondents demand the same process due a person accused of a crime.

Respondents work for an organization that disciplines children by hitting them with a thick wooden board while they are held down by staff members. Such practices do not necessarily constitute abuse, but certainly could depending on the severity. Predictably, there will be accusations of abuse in such circumstances, but Missouri does not categorically classify such practices as abuse. *See* § 210.110(1). The risk is for the caretaker to assume.

The constitutional challenge in this case is based on the following briefly stated propositions: A finding of probable cause to suspect child abuse or neglect is made with no opportunity for an alleged perpetrator to respond, and their name is

placed in a repository that brands them child abusers and forecloses or severely limits their ability to work in the child care field, to adopt children, and to become foster parents. The evidence and unchallenged facts demonstrate that (1) no respondent lost a job; (2) no respondent was denied the opportunity to seek employment in the child care field; (3) no law forecloses or restricts employment, adoption, or foster parenting because their name is in the registry; and (4) an alleged perpetrator has at least three opportunities to be heard–one of which is before a decision is made. Accordingly, the process due respondents is the process set forth in Chapter 210, and respondents do not claim that they were denied such process.

I. Respondents failed to demonstrate any infringement on a protected right.

Respondents continue to complain that they have been denied employment opportunities, and the right to become adoptive or foster parents because their names are in the registry. But respondents acknowledge in their brief that no respondent was denied a job, fired from a job, or prevented from seeking employment. *See* Respondents' Brief, p. 31. Nor was any respondent subject to similar denials or burdens with respect to adopting a child or becoming a foster parent. Respondents declare that they have been foreclosed from such

opportunities, without offering any evidentiary citation. As set forth in appellant's opening brief, respondents only testified that they *made a choice* not to seek certain positions because they did not want to disclose the fact that their names were on the registry.

Given these admitted facts, it is apparent that the essence of the choice respondents made not to seek certain employment positions was the desire to avoid the allegedly defamatory nature of having been accused by someone who remains anonymous of child abuse or neglect. Damages to reputation that flow from defamation by state action do not state a constitutional claim, even when such defamation results in injury to employment or job prospects. *Paul v. Davis*, 424 U.S. 693, 697 (1976). Although respondents may feel that the presence of their names on the Central Registry may have an effect on their job prospects (or the ability to adopt or to become foster parents), respondents have still not demonstrated that there is any feature of Missouri law that effects this result.

In an attempt to remedy this deficit, respondents make three main arguments. First, respondent suggests that inclusion of a name in the Central Registry by itself triggers due process protection. Second, respondents argue that certain registration requirements in Missouri law effect a burden on employment. Finally, respondents declare that one statutory section, dealing with government funding for

reimbursement for in-home day care, is a statute that directly burdens employment. None of these arguments has merit.

1. Inclusion of name in registry

Respondents seem to agree that injury to representation or a "stigma" imposed by the government does not give rise to a claim under due process. *See* Respondents' Brief, p. 39. Nevertheless, respondents argue that placement of a name in the Central Registry (where it will be disclosed to the statutorily identified class of potential employers) is itself sufficient to trigger due process protection. Respondents offer a single case from New York: *Anonymous v. Peters*, 730 N.Y.S. 2d 689 (N.Y. 2001). The New York court acknowledged that there was no alleged statutory impediment to employment. *Id*. at 210. But in direct contradiction to the rulings in *Paul v. Davis,* the New York court simply declared that inclusion in a registry of accused child abusers, and nothing more, satisfies the stigma-plus requirement.[1]

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[1]Ironically, the *Peters* court rejected the plaintiff's argument that there should have been a pre-decision hearing, holding that such a requirement would impede the state's ability to move quickly to protect children. *Peters*, 730 N.Y.S.2d 689, 695 (NY 2001).

For this proposition, the New York court cited *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), a case discussed at length in appellant's brief. *See* Appellant's Brief, pp. 39-40. But the New York court did not discuss *Constantineau*, and the basis for the citation is not apparent. In *Constantineau*, a direct criminal penalty was imposed on anyone selling liquor to a person who appeared on the state's list of citizens with a known drinking problem. The list itself was not held to be unconstitutional.

Respondents have done nothing more that to locate an obscure case that declares, but does not discuss, a rule of law that is contrary to U.S. Supreme Court precedent. Absent a rationale, *Peters* cannot be labeled as even persuasive authority.

2. Registration requirements

Respondents go on to cite other provisions of Missouri law as effecting a burden on employment, but fail to demonstrate how such provisions result in a burden. Respondents cite the Family Care Safety Act (§§ 210.900 *et seq*.) and the licensing requirement set out in § 210.516. In neither of these statutory sections is there any burden placed on an employer of a person whose name is in the registry, and respondents have not shown any. Instead, respondents cite multiple sections of Missouri regulations, which address either reporting and record-keeping

requirements or which permit the Department to deny or revoke child care licenses to certain agencies that employ persons who are on the registry.

None of the cited regulations impose any requirements on an employer, but instead permit the state agency (here the Department of Health and Senior Services - DHSS) to review the circumstances of any person for whom probable cause to suspect child abuse exists. DHSS is permitted, after an investigation, to take actions similar in nature to those that could be taken by any unlicensed employer. In other words, the Central Registry serves its purpose of informing and permitting consideration of the appropriateness of any person whose name is on that registry for child care. These regulations issue no mandates to employers, nor do they require a particular outcome in any individual case. Respondents' final proclamation that no appeal may be taken is simply erroneous. Section 536.150 provides for an appeal to the circuit court.

Respondents have not at any time challenged any regulation in this case. No such challenge appears in respondents' pleadings, nor was such an argument offered to the trial judge. Respondents have preserved no such challenge for appeal.

3. In-home daycare

Respondents' last effort to show that the stigma-plus requirement is satisfied is by reference to § 210.025.1. This section requires the Division of Family Services (DFS) to deny a person seeking federal or state reimbursement for providing in-home daycare if their name is on the registry, or if someone over the age of 18 who is living in their home is on the registry. Respondents' reliance on this section to demonstrate that Chapter 210 burdens employment is erroneous for the following reasons:

First, § 210.025.1 does not address daycare centers, licensed or otherwise, and has nothing to do with persons seeking or maintaining their employment. By its terms, it applies to individuals who apply for funding for in-home daycare.

Second, Missouri law provides for an appeal of any decision to deny funds. § 210.025.4. While § 210.025 may burden the application process, respondent has not demonstrated that it burdens employment.

Finally, no respondent testified that they wished to provide in-home daycare, and respondents in their brief make no such claim. Indeed, the details of § 210.025 were never presented to the trial court below during any hearing nor was it addressed in any brief.

II. Due process does not require a full adversarial hearing

Respondents persist in their insistence that due process requires a full, adversarial hearing. In fact, many of the respondents' citations to law are to criminal cases where more protection is required than in the civil context. The process that is due is dependent on the nature of the deprivation. Respondents attempt to liken the extremely limited deprivation they cite--possible difficulty in getting a job in the child care field at some indeterminate point in the future–to the immediate termination of welfare or disability benefits and to the direct loss of a job. But the great bulk of respondents' commentary and opinion on the process that is due derives directly from their assumption that a probable cause finding to suspect abuse or neglect is the practical equivalent to a conviction for the crime of child abuse–hence their citation of criminal precedents. But that assumption finds no support in law or logic.

1. The interest of the individual in possible employment in certain limited occupations in the future is not as immediate or important as the state's interest in protecting children from abuse.

Respondents offer a foundation for their argument that is erroneous: Respondents state, as if it is obvious, that both the state and the individuals before the court, have substantial or compelling interests at stake. *See* Respondents'

Brief, pp. 52-53. This bare assertion is nothing more than a conclusion. It is ultimately based on respondents' suggestion that their desire to work in the child care field someday, or to adopt–maybe–at some time in the future, or to–perhaps–become foster parents is as important as the right of the state to protect children from abuse and neglect. One of respondents' principal cases refutes such an assertion. In *Peters*, the New York court considered the impairment to the ability to work in certain occupations was not equal to the state's duty to protect children: "On balance, the interest of children to be shielded from abuse must take precedence." *Peters*, 730 N.Y.S. at 695.

Respondents suggest additional authority to support the notion that their interests are sufficiently important to be on a par with the interests of the state in protecting children, but no such authority supports this notion.

First, respondents argue that appellant's reliance on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), is misplaced. *Loudermill* stands for the proposition that government action that deprives an individual of a property right in their employment[2] requires some kind of notice and opportunity to be heard prior to the action. It does not stand for the proposition that an adversarial hearing

[2]Under Ohio law, the employee in *Loudermill* was a "classified civil servant" with a clear property interest in their job. *Loudermill*, 470 U.S. at 1490.

is required, or that there must be an opportunity to subpoena witnesses and to cross examine such witnesses under oath. *Loudermill* demonstrates that due process requires an initial check on the proposed action, and that check involves only notice and an opportunity to be heard in person or in writing. *Id*. at 546.

Surprisingly, respondents argue that *Loudermill* does not apply because the government was in the role of an employer in that case. Presumably, respondents are claiming that the government has a greater interest in terminating employees than it does in protecting children from child abuse or neglect. The absurdity of such a proposition goes without saying, but the applicability of *Loudermill* is particularly apparent since *Loudermill* approved a very minimal pre-termination opportunity to be heard in the context of depriving someone of a job. There was no deprivation of a job in the case at bar.

Respondents go on to characterize their alleged potential losses as similar to the actual and immediate losses of welfare recipients (*Goldberg v. Kelly*, 397 U.S. 254 (1970)), disability benefits recipients (*Mathews v. Eldridge*, 424 U.S. 319 (1976)), and an engineer who had his security clearance revoked on the basis of secret documents and who was fired and directly foreclosed from working in his profession anywhere (*Greene v. McElroy*, 360 U.S. 474 (1959)). In spite of

respondents' characterizations, it remains that respondents have demonstrated no losses whatsoever.

Respondents go to lengths to demonstrate that Missouri's procedures for the child abuse and neglect system do not possess the features of the process afforded to criminal defendants. Appellant agrees. But respondents, who not only are not threatened with imprisonment, but who have not lost a job, who have not been threatened with the loss of a job, and who have offered absolutely no evidence that any of them would be foreclosed from obtaining certain jobs, are not entitled to criminal protections and cannot show the immediacy of their expressed need for protection is greater than what can best be described as the *obvious* need of the state to move quickly to protect children from abuse.

2. The risk of error with existing procedures is minimal.

Respondents argue that the risk of error is "enormous" in the present case because there is too long a delay between a report and the first opportunity for a hearing, rules of evidence are not followed as in a criminal context, a neutral decision maker is not utilized, and the standard of proof is too low. Respondents have offered no legal authority of consequence on any of issues.

a. Delay in obtaining "process"

In support of their claim that there is an unreasonable delay in obtaining an opportunity to be heard, respondents offer a series of numerical miscalculations and outright disregard of "process" afforded to them. They claim that 6 ½ months must pass before their first opportunity for a hearing. Their numerical calculations are ostensibly based upon the statutory time limits set for the various appeals procedures. Those calculations ignore two main things: First, all respondents were afforded the opportunity to present their side of the story to the investigator before any decision was made. This, as pointed out in appellant's opening brief, is in accordance with the statutory mandate that a probable cause finding must be based on a consideration and weighing of the available evidence. § 210.110(10). Respondents refused to speak with the investigator. Tr. p. 52, 57. Respondents also do not challenge the proposition that they thereby waived their right to a pre-decision hearing.

Thereafter, respondents could request a hearing in approximately three, not six, months. Respondents' calculations assume that an alleged perpetrator will in each instance demand their "process" on the last possible date. This would seem inconsistent with the urgency that respondents claim underlies removal of their names from the registry. Of the six months potential delay, about half consists of

periods extended to respondents. For example, respondents include in their calculations the 60 days they are afforded to request a review. The statute permits, but does not require, an alleged perpetrator to request review within 60 days of notification of the division's determination. § 210.152.2-5.

b. Adversarial trial procedures

Respondents demand full adversarial trial procedures for the pre-decision hearing, and support their demand by characterizing their alleged losses as similar to the denial of welfare benefits, disability benefits, and the actual and direct loss of employment. Respondents' principal authority appears to be *Goldberg v. Kelly*, 397 U.S. 254 (1970), and cases cited therein. That case, which involved a consideration of the process due a welfare recipient, was discussed at length in appellant's opening brief. *See* Appellant's Brief, p. 59. Here, it should suffice to observe that the welfare recipient may be deprived of "essential food, clothing, housing, and medical care." *Id.* at 264. Denial of benefits puts the welfare recipient in a situation that "becomes immediately desperate." *Id.* The conclusion of the court in *Goldberg* on the relative importance of the deprivation in considering the process that is due is summed up succinctly:

> [T]he crucial factor in [the context of the welfare recipient]--a factor not present in the case of the blacklisted government contractor, the

> discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended--is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits.

Id.

Absent a direct deprivation on an individual's means of survival, it remains unchallenged that neither state nor federal law requires an evidentiary hearing or sworn statements before an administrative agency may take action. *See Loudermill*, 470 U.S. at 545.

The remainder of respondents' complaints are with the post-decision hearings. Respondents have added nothing new in their brief: It is undisputed that the hearing before the Child Abuse and Neglect Review Board (CANRB) is not an adversarial hearing. However, it is a proceeding in which an alleged perpetrator can be present, represented by counsel, and may submit evidence–even new evidence. More importantly, though, is the provision for the circuit court trial *de novo*, a full adversarial hearing in which the state, not the alleged perpetrator, bears the burden of proof.

Respondents' only substantive complaint with the trial *de novo* is that the alleged perpetrator may not compel the testimony of the victim or the reporter to the abuse or neglect. Respondents have not, however, demonstrated how such a restriction renders the statute unconstitutional. The trial *de novo* is not a review of a prior administrative decision, and nothing is admitted for the purposes of that trial. § 210.153. Any party may appeal an evidentiary ruling of the trial court after a final judgment.

c. Standard of proof

Respondents continue to object to the probable cause standard that is required to be met before a name is placed in the Central Registry, but cite no authority for this proposition. They apparently abandon the authorities they cited in the court below. But the cases, though inapplicable to Missouri specifically, are instructive on the analysis of the standard of proof used in the investigation.

The District Court in Illinois considered a statutory structure in which the initial investigators could substantiate allegations of abuse if they found "some credible evidence" to support the allegations. Missouri's requirement of probable cause is much higher; Missouri requires a judgment of reasonableness based on all available evidence. § 210.110(10). According to the Illinois federal court, the standard of "some credible evidence" is generally not considered to be problematic

at the initial investigative stage, but it does play a role in determining what process is due at a later stage. *Dupuy v. McDonald*, 141 F. Supp. 2d 1090, 1136 (N.D. Il. 2001). The problem, as that court saw it, was that "some credible evidence" was too low a standard prior to disseminating information from the registry. *Id.* Although the Illinois statute, like Missouri, used the term "probable cause," that plaintiff, unlike respondents here, presented the court with *evidence* that "probable cause" was interpreted through training of investigators to mean that "'any' credible evidence of abuse or neglect is sufficient, and thus, investigators gather only inculpatory evidence and disregard any evidence weighing against its indicated finding." *Id*., at 1135. In other words, in Illinois, if any piece of evidence were credible, it was sufficient for a finding of abuse and for a perpetrator's name to be disseminated before any level of hearings take place. Again, that is not true in Missouri.

Though Missouri's definition of probable cause is very similar to the one in Illinois, respondents have offered no evidence that Missouri trains its investigators contrary to the statutory mandate. Missouri's definition of probable cause calls for a weighing of evidence, but also a consideration of available facts, not just some of them or just those that are apparent; and it requires a reasonable person standard for the formation of a **belief**, not a mere **suspicion**.

Respondents also cite *In the Matter of Lee TT* v. *Dowling*, 664 N.E.2d 1243 (NY 1996), as authority for the proposition that Missouri's probable cause standard is unconstitutionally low. In that case, the credible evidence standard was used in the initial investigation, as well as in administrative reviews. Only when a perpetrator was denied a license or job was he entitled to a formal hearing. Again, the parallels to Missouri law are wholly lacking.

III. Respondents have failed to demonstrate that the open courts provisions of the Missouri Constitution are violated by Chapter 210.

Respondents have not shown that their cause of action is within the class of cases that are covered by the Missouri Constitution's open courts provisions. The rule very recently announced by this Court, discussed in appellant's opening brief, shows that the open courts provisions are applicable to recognized causes of action for personal injury. *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d 771, 773 (Mo. 2003). On this point, respondents claim that their appeal of the findings of probable cause to suspect abuse is an action for personal injury. Respondents offer no citation to authority on this proposition, but argue that a finding of probable cause to suspect child abuse is an injury to their reputation and, therefore, a personal injury. As the pleadings demonstrate, respondents have made no claim for personal injuries of any kind. (L.F. 31-37).

CONCLUSION

For the reasons stated in Appellant's Brief and above, this Court should reverse the judgment of the trial court below on all issues relating to the constitutionality of Chapter 210 of the Revised Statutes of Missouri, and to reverse the trial court's order taxing costs of this action against the appellant.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF COMPLIANCE

The undersigned hereby certifies that on this 5th day of October, 2004, two true and correct copies of the foregoing brief, and one disk containing the foregoing brief, were mailed postage prepaid to:

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This undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 3,953 words. The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

_____
Assistant Attorney General