

IN THE SUPREME COURT OF THE STATE OF FLORIDA

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

Petitioners,

CASE NO. SC01-709

1st DCA Case No. 1D00-3260

Estate of FRANCES SHELLEY, by
and through MARK S. MITCHELL,
Personal Representative,

Respondent.

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

WILKES & McHUGH, P.A.

Camille Godwin

Florida Bar No. 0974323

119 East Park Avenue

Tallahassee, Florida 32301

(850) 681-9550

(850) 681-9379 Facsimile

Counsel for Respondent

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SUPPLEMENTAL STATEMENT OF THE CASE

Petitioners¹, Alterra Healthcare Corporation and Sterling House Corporation, seek discretionary review of the opinion rendered by the First District Court of Appeal in this case on March 8, 2001 wherein the First District denied their Petition for Writ of *Certiorari* in the matter of *Alterra Healthcare Corporation v. Shelley*, 26 Fla. L. Weekly D670 (Fla. 1st DCA 2001). (*R. App. 1*)². Petitioners sought *certiorari* review of a trial court order requiring production of certain documents concerning the status and qualifications of that subset of employees of Petitioners' assisted living facility employees who provided care to Frances Shelley during her residency at Sterling House of Tallahassee.³ (*P.App. B*). In denying the petition, the First District certified conflict between the court's holding in *North Florida Regional Hospital, Inc. v. Douglas*, 454 So. 2d 759 (Fla. 1st DCA 1984), and the Fifth District's holding in *Beverly Enterprises-Florida, Inc. v. Deutsch*, 765 So. 2d 778 (Fla. 5th DCA 2000) relative to the issue of whether an employer has standing to assert the privacy rights of its employees.

On April 23, 2001, Petitioners filed a Notice to Invoke Discretionary Jurisdiction of this Court. (*R. App. 2*). The notice filed by Petitioners clearly stated

¹ Throughout this brief, Petitioners shall be referred to collectively as "Petitioners" or "Sterling House."

² References to Appendix materials provided with Respondent's Brief on the Merits will be cited as, "(R.App. __)," and will be identified numerically. References to appendix materials provided with Petitioners' Initial Brief will be cited as (P.App. __)," and will be identified by letter.

³ These documents are specified in Paragraph 21, subparagraphs A through G of Plaintiff's First Request for Production, a portion of which is attached as Appendix B to Petitioners' Initial Brief.

that the basis of this Court's jurisdiction was the certification by the First District of a conflict between *Douglas* and *Deutsch*. (*R. App. 2*). No other basis was asserted by Sterling House for invoking this Court's discretionary review jurisdiction.

Since the filing of the Petitioners' Initial Brief in this cause on May 10, 2001, the underlying lawsuit between the parties has been amicably resolved by settlement. Accordingly, on May 31, 2001, Respondent filed a Motion to Dismiss the Petition for Discretionary Review because Petitioners have been unwilling to execute a Joint Stipulation for Dismissal. (*R. App. 3*). Indeed, Petitioners have now filed a Response to the Motion to Dismiss affirmatively stating their desire to have this Court exercise jurisdiction to not only address the conflict certified by the First District Court of Appeal, but also to review the substantive order of the trial court which compelled production of the employee information. *Id.* Furthermore, in this response, Petitioners now, for the first time, assert that that this Court should exercise jurisdiction in this cause in order to resolve "an issue of great public importance in this State." *Id.* The issue which Petitioners contend is one of "great public importance" is the matter of what "showing a litigant must make before a trial court may order the production of information protected under the privacy provision of this State's Constitution." *Id.* at ¶11. For reasons explained more

fully in the arguments below, Respondent does not believe the issues presented by Petitioners warrant discretionary review by this Court at this time.

SUPPLEMENTAL STATEMENT OF THE FACTS

Petitioners' Initial Brief contains a Statement of the Case and of the Facts with which Respondent is in substantial agreement. However, certain portions of Petitioners' Statement contain inaccurate characterizations and unnecessary argument which may be misleading to the Court. For this reason, respondent is compelled to provide this brief Supplemental Statement of the Facts.

Throughout the Initial Brief and subsequent filings in this cause, Petitioners repeatedly characterize the documents sought by Respondent as "personnel files." (*See R. App. 4 at ¶2, ¶4, and ¶¶10-12; Petitioners' Initial Brief at pp. 1, 3, 4, 6, 8-9, and 39*). This characterization is inaccurate and misleading because it makes Respondent's discovery request appear much broader than the record demonstrates. In fact, the discovery sought by Respondent and ordered by the trial court was very limited and tailored to request qualified records of only those employees who actually provided care to Frances Shelley. Respondent did not seek "wholesale disclosure of personnel files"⁴ and was quite careful to narrowly draft his discovery request in several ways.

⁴ This was a specific factual finding of the trial court at the time of the hearing. (P. App. E at p. 34).

First, the request sought only those documents maintained by Petitioners “for each employee of Sterling House of Tallahassee who provided any care or service to Frances Shelley.” (*P.App. B at ¶21*). Second, the request itemized seven (7) specific categories of documents which Respondent believed to be discoverable and relevant to its case or reasonably likely to lead to discovery of admissible evidence. *Id.* at ¶21 (a-g). Third, Respondent emphasized to Petitioners that he did not seek production of allegedly confidential materials and agreed to redaction of home telephone numbers and social security numbers from the employee documentation. (*R.App. 5*). Certainly, Respondent acknowledged that most of the information sought could likely be found within an employee’s personnel file. In fact, Respondent argued in his motion to compel that this fact, the ease of location of responsive documents, mitigated against Petitioners’ other argument that the production of responsive documents would be unduly burdensome. (*P.App. D*).

Petitioners’ Statement of Facts also mischaracterizes the allegations of Respondents’ Complaint. Although Petitioners acknowledge that the Complaint in this matter alleged that the Petitioners did not maintain sufficient staff to properly supervise and assist residents, (*Initial Brief at p. 1*), Petitioners fail to state that the Complaint made additional allegations, and, most notably for purposes of the instant issues, alleged that the staff at Sterling House failed to check on Mrs.

Shelley, failed to provide her with access to adequate and appropriate health care and protective and support services, failed to protect her from foreseeable harm, failed to properly supervise staff, failed to properly train staff, and improperly retained staff. (*P.App. A at ¶37 and ¶49*). The relevance of documentation maintained by Sterling House on these employees to the claims alleged in the complaint is much more obvious in light of the extent of Respondents' clearly delineated concerns pertaining to the adequacy of the facility staff in terms of numbers, training, and supervision.

SUMMARY OF ARGUMENT

Petitioners seek to have this Court exercise its purely discretionary authority to review a certified conflict in a case wherein the underlying dispute between the parties has been resolved by settlement. Although the First District in this case certified its decision in this case being in conflict with the decision of the Fifth District in *Deutsch*, Respondent respectfully submits that no conflict actually exists between the decisions, and thus, the conflict jurisdiction of this Court has not been established. There being no discretionary jurisdiction based on conflict, and no other basis being asserted for jurisdiction, this Court should refrain from exercising discretionary jurisdiction in this matter.

If the Court elects to address the issue certified to be in conflict, Respondent urges the Court to recognize the factual distinctions in the instant matter from those set forth in *Douglas* and *Deutsch*. Respondent further urges the Court to refrain from making a decision which would give all employers an unbridled right to shield relevant evidence from discovery by merely asserting the privacy rights of all employees. Such a decision would be overly broad, unnecessary, and fraught with challenges to meaningful implementation.

Should the Court retain jurisdiction, Petitioners have also asked the Court to review not only the issue of whether an employer has standing to assert the privacy rights of employees, but also the issue of whether the trial court departed from the

essential requirements of law in ordering production of the discovery requested by Respondent. Even if this Court elects to address the standing issue, the Court should decline to review the underlying discovery order in light of the resolution of the lawsuit between the parties and the lack of any remaining unresolved issue in this litigation.

Finally, Respondent argues that the trial court's order was wholly consistent with the essential requirements of existing law, that the First District's opinion and the trial court's order compelling production of the requested information is not to be disturbed in the absence of actual conflict resolvable by this Court, and that this Court should not interfere with the inherent authority of the trial courts to fashion discovery orders which promote the interests of the parties to the litigation and also protect the privacy interests of non-parties.

Furthermore, this Court should not permit litigants to abuse the right to petition this Court for discretionary review. The following observation made by this Court many years ago is especially applicable now:

“It is appropriate to remind that certiorari is not to be employed indiscriminately as an added escape route to reach the objective of a second appeal. Once this court undertakes to relax the well-defined barriers which circumscribe and define its jurisdiction then the Courts of Appeal will become mere stepping stones along the appellate way. They will become merely intermediate resting places along an arduous and expensive pathway in the appellate process.”

Karlin v. City of Miami Beach, 113 So. 2d 551, 553 (Fla. 1959).

ARGUMENT

I. THE LAWSUIT UNDERLYING THE INSTANT MATTER WAS RESOLVED BY SETTLEMENT, NO FURTHER LEGAL ISSUES REMAIN FOR DETERMINATION BY THIS COURT, AND THE COURT SHOULD DECLINE TO EXERCISE DISCRETIONARY REVIEW OF THIS CAUSE.

A. Review and Resolution by This Court of a Conflict Certified by a District Court Is Purely Discretionary

This Court’s authority to exercise conflict jurisdiction is found in the Florida Constitution, which provides that the Supreme Court may review any decision of a district court of appeal that “expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.” Art. V, § 3(b)(3), Fla. Const. (1980). Further, discretionary review of certified conflicts is authorized, but not mandated, by Fla. R. App. P.

9.030(a)(2)(A) which provides as follows:

Discretionary Jurisdiction: The discretionary jurisdiction of the supreme court may be sought to review

- (A) decisions of district courts of appeal that
 - (i) expressly declare valid a state statute;
 - (ii) expressly construe a provision of the state or federal constitution;
 - (iii) expressly affect a class of constitutional or state officers;
 - (iv) expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law;

- (v) pass upon a question certified to be of great public importance;
- (vi) are certified to be in direct conflict with decisions of other district courts of appeal.

Clearly, although review of decisions certified to be in direct conflict with decisions of other district courts of appeal is authorized, such review is certainly *not mandatory*. Of course, in the absence of a direct conflict, review by this Court is not authorized. *Wilson v. Southern Bell Telephone and Telegraph Co.*, 327 So. 2d 220 (Fla. 1976).

B. As a Result of the Settlement of the Underlying Lawsuit Between the Parties, No Issues Remain which Require Resolution by This Court.

Notwithstanding the resolution of the underlying lawsuit between the parties, Petitioners seek to have this Court retain jurisdiction to resolve an alleged conflict in decisional authority and to address an issue asserted solely by the Petitioners to be of “great public importance.” Of course, this Court has left no doubt that it is not for a party to designate an issue as one of great public importance. This Court reviews only questions so certified by a district court of appeal. *Allstate Ins. Co. v. Langston*, 655 So. 2d 91, 93, n.1 (Fla. 1995).

Although once the Court assumes jurisdiction of a cause, it also has jurisdiction over all ancillary issues, the Court is not required to exercise its review powers over all such issues. As the Petitioners point out, this Court should exercise such jurisdiction only when the issues raised have been “properly briefed

and argued *and are dispositive of the case.*” *Savoie v. State*, 422 So. 2d 308, 312 (Fla. 1982) (*emphasis added*).

In the instant matter, the dispute between the parties has been resolved by settlement, thus there are no issues remaining for this Court to resolve between the parties to this litigation. Regardless of the Court’s rulings on the merits of the issues presented, no such rulings will affect the instant action. Petitioners have alleged in their Response to Motion to Dismiss matters that were neither properly raised, briefed, and argued below nor raised in their Notice to Invoke Discretionary Jurisdiction by baldly asserting that the substantive issues presented by the Petition are “of great public importance,” are “likely to recur,” and are thus issues ripe for resolution by this Court. Such gratuitous comment cannot, under any reading of Fla. R. App. P. 9.030, be considered appropriate subject matter on a Petition for Discretionary Review.

II. NOTWITHSTANDING EXPRESS ASSERTION OF CONFLICT BY THE FIRST DISTRICT, NO ACTUAL CONFLICT EXISTS AND THIS COURT SHOULD DECLINE TO EXERCISE DISCRETIONARY REVIEW OF THIS CAUSE.

A. The Purpose of Discretionary Review of Decisions in Conflict is To Ensure Uniformity and Certainty in the Law.

The purpose of discretionary review of district court decisions in conflict is to avoid confusion and uncertainty in the law and to further the uniformity of case

law within the state. *Wainwright v. Taylor*, 476 So. 2d 669 (Fla. 1985); *Ansin v. Thurston*, 101 So. 2d 808 (Fla. 1958). In determining the appropriateness of discretionary jurisdiction based on alleged decisional conflict, this Court is limited to a review of the facts contained within the four corners of the majority decision expressing the conflict. *Reaves v. State*, 485 So. 2d 829 (Fla. 1986). Statements in dissenting or concurring opinions simply cannot form the basis for conflict jurisdiction. *Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

If no direct and express conflict is apparent in the main body of the decision, the Court must deny the petition for review. *Reaves* at 830. Similarly, the Court should decline to exercise its review authority where although decisions are claimed to be in conflict, they are actually distinguishable on the facts presented or the applicable law. *Wilson at 221.*; *Protheroe v. Protheroe*, 328 So. 2d 417 (Fla. 1976).

B. No Actual Conflict Exists between the Decisions of the First District Court of Appeal in *Douglas* and *Shelley* and the Decision of the Fifth District Court of Appeal in *Deutsch*.

Although the First District certified a conflict between the *Douglas* and *Deutsch* decisions on the issue of whether employers enjoy standing to assert the privacy rights of their employees, a close examination of both opinions reveals that no actual conflict exists in the decisions. Where no conflict actually exists, this

Court should discharge jurisdiction. *Department of Revenue v. Johnston*, 442 So. 2d 950 (Fla. 1983).

The opinion of the First District in the instant case is very brief and to the point. In denying the petition for writ of certiorari, the Court stated in a simple per curiam opinion:

“We are bound by *North Florida Reg’l Hospital, Inc., v. Douglas*, 454 So. 2d 759 (Fla. 1st DCA 1984), in which we held that an employer does not have standing to raise the privacy rights of its employees. Since, under *Douglas*, Alterra did not have standing to assert the privacy rights of its non-party employees, the trial court could not have departed from the essential requirements of law.” (*P. App. 1*).

The First District then asserted conflict in this decision with the Fifth District in the *Deutsch* case. *Shelley* at D670. In *Deutsch*, the Fifth District quashed an order requiring production of portions of the personnel file for a vice-president of Beverly Health and Rehabilitation Services, Inc., a company which operated the nursing home at issue in that case.⁵ *Deutsch* at 779. The *Deutsch* court had upheld an employer’s right to assert the privacy rights of a *non-caregiver* employee in his personnel file and then certified conflict with the First District Court’s opinion in *North Florida Regional Hosp., Inc. v. Douglas*, 454 So. 2d 759 (Fla. 1st DCA 1984). Notwithstanding these pronouncements of conflict in decisional authority by

⁵ This is the same Beverly Enterprises-Florida, Inc., which has filed an *amicus curiae* brief in this matter on behalf of Petitiones, Sterling House Corporation and Alterra Healthcare Corporation.

the First and Fifth Districts, Respondent respectfully submits that no such conflict actually exists.

The facts in these cases are quite distinguishable. The *Deutsch* respondent requested production of the entire personnel file of the petitioner's former group vice-president, Allen Davis. The *Deutsch* petitioner argued that Mr. Davis' personnel file contained personal information of a potentially sensitive nature:

“for which Mr. Davis, a non-caregiver, has a right to expect will be treated as confidential and private. As a group vice-president, Mr. Davis never provided care to Respondent.”

Deutsch at 780.

In *Deutsch*, Beverly argued that, unlike the personnel files of respondent's caregivers, Mr. Davis' personnel file had nothing whatsoever to do with the case. The *Deutsch* Court found that Beverly had standing to assert the privacy rights of its corporate level employee and that the petitioner's nursing home's group vice president, who **did not** provide care to the respondent/plaintiff, had a reasonable expectation of privacy as to his personnel file. *Deutsch* at 784. Significantly, in *Deutsch*, the nursing home had, in fact, produced personnel files for thirteen employees who had been care givers. *Id.*

Not only does the *Deutsch* opinion fail to support Petitioners' position, it actually emphasizes the soundness of the instant Order, since it validates the discoverable nature of caregivers' personnel files. *In Deutsch, even Beverly*

Enterprises acknowledged that the plaintiff was entitled to petitioner's employee records for those employees that who were caregivers of the plaintiff, as evidenced by the fact that the nursing home apparently did not object to production of caregiver records and *“provided the personnel files of 13 employees and the personnel files of two caregivers”*. *Deutsch* at 779. The relevance of these documents is considerable, and cannot be outweighed by a hypothetical *de minimis* privacy right that Petitioners have failed to show exists.

Finally, in *Douglas*, the First District *did not hold* that an employer *cannot* assert the privacy rights of employees. The Court simply and conservatively held as follows:

“The hospital *has not proven it has standing* to assert the privacy rights of the nurses. A *mere* employee/employer relationship is not the kind of special relationship necessary for third party standing.”

Douglas at 760 (*emphasis added*).

Because there is no conflict in the decisions, there is no basis upon which this Court has jurisdiction. *Miami Daily News, Inc., v. Alice P.*, 467 So. 2d 697 (Fla. 1985).

III. THE COURT SHOULD REFRAIN FROM A RESOLUTION OF THE CERTIFIED CONFLICT ABROGATING THE TRIAL COURT'S ORDER WHICH WAS WHOLLY CONSISTENT WITH THE ESSENTIAL REQUIREMENTS OF LAW AND WHOLLY CONSISTENT WITH THE HOLDINGS OF BOTH *DOUGLAS* AND *DEUTSCH*.

Respondent acknowledges that in the event this Court decides it has conflict jurisdiction based on the certified conflict between *Deutsch* and *Douglas*, the Court is also vested with jurisdiction to review all other issues necessary to a full and final resolution of the cause. *Hall v. State*, 752 So.2d 575 (Fla. 2000). Petitioners urge this Court to resolve the alleged conflict by holding that employers have standing to assert the privacy rights of non party employees. This request is seemingly without limitation and would seem to ask the Court to acknowledge such standing on behalf of all employers, with regard to all employees, in all situations.

A. Trial Courts Have Wide Discretion in Making Orders Relating to the Scope of Discovery.

The discovery order at issue was entirely consistent with the essential requirements of applicable statutory and decisional Florida law. Orders relating to the scope of discovery are within the wide discretion of the trial court and will not be overturned absent an abuse of that discretion. *Douglas* at 760 (Fla. 1st DCA 1984). Florida Rule of Civil Procedure 1.280 provides for a broad scope of pretrial discovery:

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action...It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

This breadth is appropriate, since the purpose of discovery is

- (i) to identify at early stages of a proceeding the real issues to be resolved;
- (ii) to provide each party with all available sources of proof as early as possible to facilitate trial preparation; and
- (iii) to abolish the tactical element of surprise in our adversary trial process. *Dodson v. Persell*, 390 So. 2d 704, 706 (Fla. 1980).

Respondent asserted that Mrs. Shelley suffered because Sterling House failed to provide adequate care to her while she was a resident. Therefore, any matter that would be probative of the inadequacy of care, **such as the qualifications and training of the facility staff**, would be relevant to the claims.

In *Amente v. Newman*, 653 So. 2d 1030 (Fla. 1995), the defendant treated the plaintiff during her pregnancy and birth. The defendant doctor termed the plaintiff's pregnancy high-risk because she weighed over 300 pounds. The doctor opted to use a regular delivery bed rather than a drop-down bed when the plaintiff gave birth. The plaintiffs' child was injured during birth, which plaintiffs' assert was due to the

decision to use a regular delivery bed. Plaintiffs sought discovery in a medical malpractice suit of the defendant doctor's medical record for all patients who were "obese patients who had given birth between" certain dates. The plaintiffs, however, did provide that all patient identifying information could be redacted from the records prior to production. After discovery was ordered, the defendant doctor sought a writ of *certiorari* asserting the confidentiality of the patient-physician relationship.

The Fifth District quashed the order, noting that the plaintiffs failed to show that the records were relevant and that the relevancy outweighed the patients' statutory right to confidentiality. On appeal, this Court reversed the Fifth District, finding that relevancy had been established because the Plaintiffs suggested that if other infants delivered by defendant suffered injuries associated with this delivery method, such evidence would be relevant to show that the doctor had notice that the method was deficient. The Court also held that it could not "say the trial judge abused his discretion in holding that the Amente's discovery request was directed towards relevant evidence." *Amente* at 1033.

B. Petitioners Did Not Present the Trial Court with Anything Other Than Bare Assertions To Support Their Objections to Production Based on Confidentiality Interests of Non-Party Employees.

Petitioners cannot reasonably contend that home addresses of the employees are confidential, particularly in light of their agreement to provide these addresses to

the Respondent. (*R. App. 4*). In addition, by letter dated September 20, 2000, Respondent further clarified the narrow scope of its discovery request by advising that Petitioners could redact the social security numbers, and telephone numbers of employees from the documents to be produced. (*R. App. 5*). These are essentially the only pieces of information Petitioners have alleged to be “confidential.” Again, even assuming, *arguendo*, that the documents sought by Respondent contained information deemed confidential under the circumstances, Respondent agreed to have that information redacted from the production. Accordingly, the basis of Petitioners’ privacy concerns is non-existent and should be mooted. *Santa Rosa County v. Administration Commission, Division of Administrative Hearings*, 661 So. 2d 1190 (Fla. 1995).

C. The Trial Court Expressly Determined that Respondent Was Not Seeking Disclosure of Confidential Information and Appropriately Limited the Discovery Compelled.

Petitioners are critical of the trial court’s express finding that the Respondent was not seeking disclosure of confidential information. (*Initial Brief at p. 27*). Petitioners then argue that the trial court should have weighed the Respondent’s need for the requested information against the privacy interests of the employees about whom information was requested. In making this argument, Petitioners essentially ask this court to accept their confidentiality assertions at face value, because they have not

established to either this court or the trial court that the materials are confidential. In support of their argument that the requested information is confidential, Petitioners cite to several Florida cases, each of which is easily distinguishable from this case.

In their Petition, and during the hearing in the lower court, Petitioners cited *CAC-Ramsay Health Plans, Inc. v. Johnson*, 641 So. 2d 434 (Fla. 3d DCA 1994. (*Initial Brief at p.15, 21, 23, 26-27, 30, 37; P. App. E at p.32-34*). In that case, the court allowed an employer to raise the third party privacy rights of its employees, after a former employee filed suit for employment discrimination and requested discovery of the **entire employment files** of all black and Hispanic employees who had been fired over a specified length of time. However, *CAC-Ramsay* is clearly distinguishable, because unlike the present case, the employees were not connected in any way to the case at issue, nor were they directly involved with the incidents giving rise to the plaintiff's claims. In quashing the order, the Third District held that the trial court departed from the essential requirements of the law by granting such a broad discovery request involving the "**wholesale disclosure** of personnel files containing confidential information of **employees not related to the pending case.**" *CAC-Ramsey* at 434. (*emphasis added*). Presently, the Respondent's discovery request was narrowly drafted and specifically requested information only pertaining to those employees who actually attended to the Respondent. (*P. App. B*). These caregiver employees are obviously involved and connected to the instant litigation. Furthermore, **Respondent**

agreed to have phone numbers and social security numbers redacted from the production. (*R. App. 5*). Therefore, it cannot be said that Respondent's definitive and narrow discovery request was tantamount to the "wholesale disclosure" of confidential personnel information criticized in *CAC-Ramsay*.

The final case to which Petitioners cite in support of their argument that documentation in employee personnel files is confidential is *Seta Corp of Boca, Inc. v. Office of Attorney General*, 756 So. 2d 1093 (Fla. 4th DCA 2000). In that case, the Attorney General sought production of **entire personnel files** for **all employees** of a mail order business under investigation, including information of **employees unrelated** to the case at issue. *Id.* In quashing the order which compelled the production of the personnel files *in toto*, the court quoted from the *CAC-Ramsey* opinion in holding that the request implicated the privacy rights of employees not connected to the litigation because production would entail disclosure of information such as social security numbers, home addresses, and telephone numbers. *Id.* at 1094. As indicated above, the instant, narrowly drawn request of the Respondent is clearly distinguishable from the broad requests made in *CAC-Ramsey* and in *Seta Corp.*

The information sought by Respondent is relevant to determine whether persons hired and employed by Petitioners to render care, treatment or services to Mr. Shelley were qualified, and to determine the extent of Petitioners' knowledge and awareness

of the qualifications and sufficiency of its staff. *See*, Fla. Admin. Code, §59A-4.108(4)(r) and 59A-4.106(3) and (5). Further, a nursing home must ensure that its employees, including but not limited to its nursing personnel, maintain current licenses or certifications. §400.211, Fla. Stat.; Fla. Admin. Code, §59A-4.108. Accordingly, it is only through the information contained within the seven discrete categories of the Shelley caregiver documents that Respondent can accurately determine the extent of Petitioners' knowledge regarding the Shelley caregiver employees' qualifications and disciplinary information, including letters or notices of reprimand and complaints by outside persons to the nursing home. Such information was relevant to the issues of this lawsuit and was likely to lead to the discovery of admissible evidence, and the court's Order compelling Petitioners to respond to appropriately propounded discovery was entirely consistent with applicable law.

Petitioners repeatedly ignore the fact that the Order in the instant case is limited in several critical ways. Very significantly, only the records of employees who **actually rendered care** to Mrs. Shelley are within the ambit of the Order (*P. App. F*). The significance of this limitation cannot be overstated, as the Fifth District made clear in *Deutsch*.

By way of contrast and emphasis, however, the *Deutsch* panel commented that Beverly, the corporate defendant, had already “provided the personnel files of 13 employees and the personnel files of two caregivers.” *Deutsch* at 779. Significantly,

according to the *Deutsch* court, Beverly contested the relevance of the vice president's personnel file to the issues in the case, but conceded the apparently obvious relevance of the information contained in the files of the nursing home employees and caregivers. *Deutsch* at 780.

In this case, Respondent requested, and the Order addressed, only the personnel files of those **caregiver employees who had been involved in Mrs. Shelley's care**. (*P.App. F*). Thus, the relevance of the information contained in the caregiver cases is clear, and allowing production of the compelled portions of the **caregiver employee** files in the instant case would appear to be entirely consistent with this Court's analysis in *Deutsch*.

Similarly, the Petitioners' employees' complaints to the facility are likewise relevant and admissible in the instant claims against Petitioners. *See Fincke v. Peebles*, 476 So. 2d 1319 (Fla. 4th DCA 1985), *rev. denied*, 486 So. 2d 596 (Fla. 1986)(court allowed discovery finding that because the hospital knew of the nurses' complaint against the physician, but took not action to remedy the situation the evidence was both relevant and admissible in a claim against the hospital). Thus, Respondent's discovery request and the Order compelling the same were entirely consistent with the essential requirements of the law. Determinations of the existence and extent of an individual's right to privacy must be made on a case by case basis. *City of North Miami v Kurtz*, 653 So.2d 1025 (Fla. 1995), *cert. den.*

133 L.Ed 2d 658, 116 S.Ct. 701. The trial courts of this state are certainly in the best positions to evaluate the legitimacy of requests for discovery and of objections to such requests. *Rojas v. Ryder Truck Rental, Inc.*, 641 So.2d 855 (Fla. 1994).

IV. PETITIONERS SHOULD NOT BE PERMITTED TO USE THE PRIVACY RIGHTS OF THEIR CURRENT AND FORMER EMPLOYEES MERELY AS A SHIELD TO PROTECT AGAINST DISCLOSURE OF THEIR OWN WRONGDOING IN REGARD TO INNOCENT THIRD PARTIES.

A. Valid and Important Public Policy Reasons Exist which Mitigate against Providing Nursing Homes and Assisted Living Facilities with Such Expansive Power To Control the Dissemination of Adverse Information Concerning the Operations of Such Facilities.

Notwithstanding Petitioners' unsupported assertions to the contrary, there are no compelling public policy concerns which attach to caregiver employee performance reviews, disciplinary and termination documents, to employee complaints, nor to any other category of employee information which was the subject of Respondent's request in the trial court. In fact, the public policy concerns which do exist actually **favor production of such records**. The Legislature enacted §400.401, Florida Statutes in response to wide-spread abuse and neglect suffered by elderly persons living in long term care facilities. Specifically, the legislature sought to enact legislation to protect those elder and

infirm Florida residents who were no longer able to care for and protect themselves.

In fact, the avowed purpose of the Florida legislature in enacting Chapter 400, Part III, regarding assisted living facilities, “is to promote the availability of appropriate services for elderly persons and adults with disabilities in the least restrictive and most homelike environment, to encourage the development of facilities that promote the dignity, individuality, privacy, and decisionmaking ability of such persons, to provide for the health, safety, and welfare of residents of assisted living facilities in the state.” §400.401, Fla. Stat. (1999).

A number of residents’ rights are provided for within the provisions of Chapter 400 pertaining to assisted living facilities, including the right to “live in a safe and decent living environment, free from abuse and neglect,” the right to “access to adequate and appropriate health care,” and the right “to be treated with consideration and respect and with due recognition of personal dignity, individuality and the need for privacy.” §400.428(1)(a), (b), and (j). Pursuant to §400.441, Fla. Stat. (1999), the Florida Agency for Health Care Administration (AHCA), promulgated rules to establish criteria by which a reasonable quality of life and consistent quality of care could be assured to residents of assisted living facilities. *See §58A-5, et. seq.*, Florida Administrative Code. These rules specifically

provided for the required training of care giving staff during Mrs. Shelley's residency at Sterling House, including the following:

58A-5.0191 Staff Training Requirements and Training Fees.

.....

(2) **DIRECT CARE STAFF IN-SERVICE TRAINING.** Each facility must provide the following in-service training to facility staff.

.....

(d) Newly hired staff who provide direct care to residents, other than nurses, CNAs, or home health aides trained in accordance with Rule 59A-8.0095, must receive 3 hours of in-service training within 30 days of employment in the following subjects:

1. Resident behavior and needs.
2. Providing assistance with the activities of daily living.

The administrator of an assisted living facility is required by the rules to staff the facility to ensure compliance with all minimum guidelines and **to take into consideration the capabilities and training of the staff** in doing so:

58A-5.019 Staffing Standards.

(5) The administrator of a facility shall:

(a) Employ sufficient staff in accordance with required staffing ratios, and based on the following factors to assure the safety and proper care of residents in the facility:

1. The physical and mental condition of the residents;
2. The size and layout of the facility;
3. **The capabilities and training of the staff;** and
4. Compliance with all minimum standards.

.....

(d) Develop a written job description for staff responsible for providing personal services to residents and provide a copy of the job description to the employee. Documentation that the staff has

received a copy of the job descriptions shall be maintained in the employee's personnel file.

(e) Assign to each staff member **duties consistent with his or her level of education, training, preparation, and experience.**

Employee job descriptions are just one of several items which the facility is required by law to maintain in an employee's personnel file:

58A-5.024 Records. The owner or administrator of a facility shall maintain the following written records in a place, form and system ordinarily employed in good business practice. All records required by this chapter shall be accessible to department and agency staff.

(e) Facilities with a licensed bed capacity of 17 or more residents employing three or more staff shall maintain a written record of personnel policies, including conditions of employment and job descriptions for each position, with a copy of the job description in each staff member's personnel record.

(f) Personnel records for each staff member which contain, at a minimum, the original employment applications with references furnished, verification of freedom from communicable disease, a copy of the staff member's job description, and written documentation of compliance with all staff training required by §400.452, F.S., and Rule 58A-5.0191.

Many of the items described in these rules were specifically requested by Respondent in his First Request for Production. (*P. App. B*). If this Court were to accept Petitioner's arguments in the instant case, it would prevent Respondent and many other elder or infirm persons who have sustained injuries as the result of neglect suffered at the hands of an assisted living facility from obtaining extremely important and relevant information about the facility's knowledge of the incompetence or lack of qualifications of its employee caregivers.

These documents are of the type normally maintained by all employers. Thus, taking Petitioners' reasoning to its logical conclusion, a plaintiff would rarely, if ever, be able to obtain complaints by employees, performance evaluations or documents relating to termination. Surely, this Court is wary of such a blanket privilege which would result in severely limiting a plaintiff's right to discovery in a vast array of cases and circumstances.

B. Throughout the Course of the Underlying Litigation, Petitioners Made No Efforts To Protect the Privacy Rights of Their Current or Former Employees Unless Doing So Was in the Best Interests of Petitioners.

Recently, in *First HealthCare Corp. v. Hamilton*, 740 So. 2d 1189 (Fla. 4th DCA 1999), the Fourth District upheld a trial court's order sanctioning a nursing home for discovery abuse when it failed to produce its policies and procedural manual, a list of employees, a list of medical staff, decedent's medical records, incident reports of the decedent's death and incident reports of prior negligence relating to that decedent. The trial court below found that "[t]he requests were facially proper objects of discovery," and over defendant's objection on a claim of privilege, ordered the defendant to produce those documents for an *in camera* inspection "**with a privilege log and an affidavit of the basis of the claimed privilege.**" (*emphasis added*). In upholding the sanctions against the defendant, the appellate court stated that "defendant's discovery abuse had caused prejudice to

plaintiff's efforts to prepare for trial in that, had the 'event reports' been timely produced, plaintiff would have acquired helpful information not otherwise available to him."

In the case before this Court, the Petitioners did not provide the lower court with **any documents** for *in camera* inspection nor did they provide a privilege log describing the documents they sought to protect. Nor have they filed any affidavit explaining the basis for the claimed privilege. Petitioners wholly failed to present the court with any foundation, such as a privilege log or affidavit, for their assertions that the requested information was confidential or for their assertions that they would suffer irreparable harm from the disclosure of such information.

V. PETITIONERS HAVE MADE NO SHOWING THAT THE PRODUCTION OF THE REQUESTED DOCUMENTATION WILL SUBJECT THEM TO LIABILITY TO THEIR EMPLOYEES FOR INVASION OF PRIVACY CLAIMS.

Petitioners also argue that compliance with the court's order would have exposed them to liability to their employees for claims based on invasion of privacy. (*Initial Brief at p. 38-39*). In support of this alarmist and extremely tenuous proposition, Petitioners cited to *Amente v. Newman*, 653 So. 2d 1030 (Fla. 1995), in which Justice Overton cautioned in a concurring opinion that "the mere fact that a judge authorized the discovery of the medical records of non-party patients, does not, under my reading of this opinion, immunize the parties from

invasion-of-privacy claims by the non-party patients if the medical records are disclosed in such a manner that the identities of the non-party patients are revealed.” *Amente* at 1033.

The critical distinction is that whereas *Amente* concerned the actual identities of non-party patients, Respondent’s request in the instant matter is for documentation of the training, background, qualifications, and experience of employees who were involved in the care of Mrs. Shelley, not for their identities (which were already known) and sensitive medical or personal information.

To allege a claim for invasion of privacy based on public disclosure of private facts, a person must demonstrate that an actual publication was made of private facts that would be highly offensive to a reasonable person, and are not a matter of public concern. *Heath v. Playboy Enterprises, Inc.*, 732 F. Supp. 1145 (S.D. Fla. 1990); *Cape Publications, Inc., v. Hitchner*, 549 So. 2d 1374, (Fla. 1989). The disclosure of private facts must be to the general public or to so many people that the matter must be regarded as substantially certain to become public knowledge. *Williams v. City of Minneola*, 575 So. 2d 683 (Fla. 1991). Furthermore, the act of disclosure must be of the type that a reasonable person ought to know that the disclosure is likely to cause emotional distress and injury to the average person. *Cason v. Baskin*, 20 So. 2d 243 (Fla. 1944).

There has been no showing that a care giving employee is entitled to keep the fact of his employment a secret from the persons to whom he renders care. Indeed, to do so would be in blatant disregard of the public policy concerns expressed in Chapter 400, Florida Statutes, concerning the protection of vulnerable elderly residents. As this Court observed, “the right of privacy does not forbid the publication of information that is of public benefit, and the right does not exist as to persons and events in which the public has a rightful interest.” *Cason* at 251.

The *Cason* language was repeated by this Court in the 1989 case of *Cape Publications, Inc., v. Hitchner*, 549 So. 2d 1374, 1378 (Fla. 1989). The issue in that case was the disclosure by a newspaper of highly prejudicial ***and unconfirmed*** comments made in a state investigative report concerning allegations of abuse of a child. This Court concluded that the newspaper could not be held liable for the disclosure “under a private facts” theory because the information was obtained lawfully. *Id.* at 1375. The Court went on to state that the facts published by the paper were “clearly a matter of legitimate public concern.” *Id.* at 1377. Surely, if the general public has a legitimate interest in unconfirmed allegations of child abuse, vulnerable residents suffering injuries alleged to be caused by the negligence of assisted living facility and nursing home operators such as Sterling House, Alterra, and Beverly Enterprises have a legitimate interest in the background, training, and

qualifications of the staff caring for them and in the knowledge possessed by such businesses of conditions adversely affecting the care of these residents.

Finally, the role of the trial court in these issues cannot be overemphasized. The body of the *Amente* opinion clearly indicates the Court's contemplation that **parties in litigation may have access to otherwise confidential information and recognizes the trial court's broad discretion and authority to protect the rights of third parties in such instances:** "In those cases where mere redaction of the medical records is deemed insufficient to protect the patients' rights of privacy, the trial court, in its discretion, may also order the medical records sealed and allow only the parties' attorneys and medical experts to have access to the medical records." *Amente* at 1033. Wholesale disclosure of information contained in employee personnel files was never contemplated by Respondent nor by the trial court, and Petitioners' alleged concerns in that regard are simply baseless.

CONCLUSION

Petitioner would have this court believe that the employee documentation obtained pursuant to Respondent's simple discovery request contains all manner of confidential information, the release of which would cause severe mental anguish to current and former employees. Such is just not the case. The information contained in these files is likely to cause anguish only to businesses such as Sterling House, Alterra, and Beverly Enterprises when they are confronted with evidence from their own files concerning staffing problems, training and education deficiencies, and concerns registered by their own employees about the care provided to these residents.

Even if this Court did conclude, for the sake of argument, that Petitioners do, in fact, have standing to assert the privacy rights of all employees under all circumstances, the Court should nevertheless find that at least in this instance, the Petitioners have completely failed to show how the trial court's order in any way departed from the essential requirements of the law. The trial courts of this state are, without question, in the best positions to evaluate claims of privacy and other objections to discovery, and when, as in this case, a trial court compels discovery, appellate courts should not substitute their own judgment.

The trial court's order was narrow, just as the request was narrow. The court made an appropriate determination, based on the arguments presented by counsel at

the hearing on the motion to compel and on the arguments presented in their respective memoranda that Respondent was not seeking disclosure of confidential information and was not seeking wholesale disclosure of entire personnel files. Significantly, notwithstanding the court's order almost a year ago today, none of the documents compelled have ever been produced by Petitioners. They have suffered no harm, no prejudice, and no burden. Furthermore, the underlying lawsuit between the parties has been settled and there is no further issue for resolution by this Court. As such, Respondent respectfully requests this Court to discharge jurisdiction in this cause.

Respectfully submitted,

WILKES & McHUGH, P.A.
Camille Godwin, FBN 0974323
119 East Park Avenue
Tallahassee, Florida 32301
(850) 681-9550
(850) 681-9379 Facsimile
Counsel for Respondent

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Answer Brief of Respondent complies with Florida Rule of Appellate Procedure 9.210 requiring the font size of the type herein to be at least fourteen points if in Times New Roman format.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to the **Honorable Judge Nikki Ann Clark**, Leon County Courthouse, Tallahassee, Florida, and via overnight delivery to **Donna Fudge, Esquire**, and **Marie A. Borland, Esquire**, Hill, Ward & Henderson, P.A., Post Office Box 2231, Tampa, Florida 33601; to **Scott Mager** and **Gary S. Gaffney**, Mager and Associates, P.A., 500 East Broward Blvd., 18th Floor, Fort Lauderdale, Florida 33394; and to **Quintairos, McCumber, Prieto, and Wood, P.A.**, Dadeland Towers II, Suite 725, 9200 South Dadeland Blvd., Miami, Florida, 33156, on this 14th day of June, 2001.
