IN THE SUPREME COURT OF THE STATE OF FLORIDA

ALTERRA HEALTH CARE 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

v.

Estate of FRANCES SHELLEY, by and through
MARK S. MITCHELL, Executor de son Tort,

Respondent.
_______________________________________/

ON DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL
FIRST DISTRICT
Case No. 1D00-3260

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STATEMENT OF THE FACTS AND OF THE CASE

This is an action alleging negligence, breach of statutory rights and wrongful death against an assisted living facility. The action was filed by the Executor of the Estate of Frances Shelley against Petitioners, Alterra Health Care Corporation, a/ka/ Alternative Living Services, Inc., d/b/a Sterling House of Tallahassee, and Sterling House Corporation, d/b/a Sterling House of Tallahassee (collectively "Sterling House"). (App. A)

[1] Ms. Shelley was a resident of Sterling House from April 1998 until August 10, 1999. (App. A at ¶ 4) Respondent alleges that sometime during the evening or early morning hours of August 9 or 10, 1999, Ms. Shelley caught her leg in the footboard of her bed, and was not found by Sterling House staff until six to eight hours later. (App. A at ¶ 9) According to Respondent, Sterling House did not maintain sufficient staff, particularly during evening shifts, to properly supervise and assist its residents. (App. A at ¶ 8)

The matter before this Court arises out of a discovery ruling which became the subject of a petition for writ of certiorari to the First District Court of Appeal. During the course of discovery, Respondent requested that Sterling House produce

the personnel files of each employee of Sterling House who provided any care or service to Ms. Shelley during her residency at the facility. (App. B at ¶ 21) Specifically, in paragraph 21(a-g) of the discovery request, Respondent asked Sterling House to produce the following:

> Copies of any and all documentation maintained by Defendants for each employee of Sterling House of Tallahassee who provided any care or service to Frances Shelley at the facility, including but not limited to the following information:
>
> (a) Any and all applications for employment;
>
> (b) Copies of any and all documentation obtained by the facility about said employees from any third source, such as employment verification information from other employers, reports from any law enforcement or state administrative agency, or any abuse reporting agency where such document is not privileged by state or federal law creating the abuse reporting agency;
>
> (c) Copies of any and all licensing certification for said employees;
>
> (d) Any and all documents which would contain disciplinary information on said employees by the nursing home, including letters of reprimand, or complaints by outside persons;
>
> (e) Any and all documents submitted by said employees or recorded by the facility concerning complaints registered by the employees;

> (f) Any and all performance evaluations completed for said employees; and
>
> (g) Any and all forms, letters or notes relating to termination of said employees' service at the nursing home, including writings completed by the employees or any other member of the nursing home's staff or administration.

(App. B at ¶ 21) Sterling House objected to the request, in part, on the basis that it violated the employees' constitutional rights to privacy. (App. C)

Respondent moved to compel the production of the personnel files, arguing that the information was "relevant" because it would help him determine (i) whether the employees were qualified; (ii) the extent of Sterling House's knowledge of its employees' qualifications based on any disciplinary information in their files; and (iii) if the employee was certified or licensed. (App. D) He also argued that because Sterling House *might* seek to impeach its former employees with information from their personnel files, he was entitled to review the personnel files of the employees in order to "weigh their credibility." (Id.) Finally, Respondent argued that the personnel files *might* contain information revealing possible employee concerns regarding the operation of the facility, and were therefore relevant to the issue of the facility's notice of such concerns. (Id.)

The trial court heard argument on Respondent's motion to compel on July 12, 2000. (App. E) Counsel for Sterling House objected to the motion on the basis that the documentation Respondent was seeking contained information protected from disclosure under the privacy provision of Florida's Constitution. (App. E at pp. 32-34) Sterling House explained that Respondent had the burden of demonstrating a need for the confidential documentation which outweighed the employees' privacy rights. (App. E at pp. 32-34)

The trial court disagreed that Respondent was seeking "confidential and sensitive information" and granted the motion to compel. (App. E at pp. 34-35; App. F at ¶ 8) Sterling House then filed a petition for writ of certiorari to the First District Court of Appeal, seeking an order quashing that portion of the trial court's order compelling the production of the personnel files. The First District issued an order to show cause on August 31, 2000, thus indicating that Sterling House had made a prima facie showing of irreparable harm and a departure from the essential requirements of law. See Bared & Co., Inc. v. McGuire, 670 So. 2d 153, 157 (Fla. 4th DCA 1996). The briefing to the First District was completed on October 12, 2000.

On March 8, 2001, the First District denied the petition for writ of certiorari on the narrow basis that

it was bound by its decision in North Florida Regional Hospital, Inc. v. Douglas, 454 So. 2d 759 (Fla. 1st DCA 1984) to hold that Sterling House did not have standing to raise the privacy rights of its employees. (App. G) However, the First District acknowledged and certified conflict between its decision in Douglas and the decision of the Fifth District Court of Appeal in Beverly Enterprises-Florida, Inc. v. Deutsch, 765 So. 2d 778 (Fla. 5th DCA 2000) (App. H). The Fifth District in Deutsch recently held that an employer *does* have standing to assert the privacy rights of its employees, and likewise acknowledged and certified conflict with Douglas.

In his concurring opinion in the present case, First District Judge Wolf noted that if the Court were able to "work with a clean slate," he would follow the Fifth District's decision in Deutsch. Judge Wolf reasoned:

> Innocent employees who are not parties to an action against their employer should not be required to hire a lawyer to protect their interests. It would be better to allow the employer, who is a party to the action and who collected the information, to assert its employees' privacy rights guaranteed by the Florida Constitution.

(App. G at p. 3) Judge Wolf also noted that the "criteria for granting third-party standing to assert a constitutional right are not a barrier in this case."

[1] (App. G at p. 3, n. 1, citing Caplin & Drysdale, Chartered v. United States, 491 U.S.

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[1] Judge Wolf referred to the doctrine of third-party or *jus tertii* standing employed by the federal courts. Under this doctrine, when a litigant seeks to advance the constitutional rights of others, the federal courts

617, 623 n.3, 109 S. Ct. 2646, 2651 n.3, 105 L. Ed. 2d 528 (1989) and Craig v. Boren, 429 U.S. 190, 193, 97 S. Ct. 451, 455, 50 L. Ed. 2d 397 (1976)). Judge Wolf concluded that intervention by the employees "would be costly and inefficient," and that Sterling House and its employees had a "substantial relationship and consistent interests which favor[ed] the granting of third-party standing." (Id.)

Notably, because of its decision on the issue of standing, the First District never reached the substantive issue presented by the petition: Whether the trial court erred when it ordered Sterling House to produce the non-party employee personnel files, violating the employees' constitutionally protected privacy rights and therefore causing irreparable harm.[2] However, if this Court accepts jurisdiction to resolve the certified conflict, it may also address the merits of the discovery ruling. See, e.g., Savoie v. State, 422 So. 2d 308, 310 (Fla. 1982) (Once Supreme Court accepts jurisdiction over case to resolve legal issue in conflict, it may in its discretion consider other issues properly raised and argued). Accordingly, Sterling House respectfully requests that this Court accept jurisdiction to resolve the certified conflict, and further consider

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determine (1) whether the litigant has suffered some injury-in-fact adequate to satisfy Article III; and (2) whether prudential considerations favor the litigant's advancement of the claim. See Caplin & Drysdale, supra. In resolving the second or "prudential" inquiry, the courts look to (1) the relationship of the litigant to the person whose rights are being asserted; (2) the ability of the person to advance his own rights; and (3) the impact of the litigation on third-party interests. Id.

[2] Respondent has argued that the First District's denial of the petition for writ of certiorari somehow amounts to a ruling on the merits and is now the "law of the case." Respondent is wrong. See, e.g., Casey-Goldsmith v. Goldsmith, 735 So. 2d 610 (Fla. 5th DCA 1999) ("We answer by aligning ourselves with the rulings in the other district courts which hold that a denial of a petition for writ of certiorari is not a ruling on the merits and does not establish law of the case").

the substantive issue presented in the petition for writ of certiorari to the First District Court of Appeal.

SUMMARY OF THE ARGUMENT

This Court should accept jurisdiction to resolve the conflict certified by the First District Court of Appeal, and clarify that under Florida law, employers have standing to assert the privacy rights of their employees. In doing so, this Court should disapprove of the First District's decision in Douglas, and hold that the Fifth District's more recent decision in Deutsch sets forth the correct rule of law on the issue of employer standing. A resolution of this conflict by this Court is essential to the maintenance of uniformity and harmony in the law. Indeed, every district court of this state, and this Court, have recognized that employers have standing to assert the privacy rights of their employees.

Permitting employers to assert the privacy rights of their employees is in accordance with the clearly established policy of this state to safeguard the privacy rights of Florida citizens. Even First District Judge Wolf recognized in the present case that an employer which has a substantial relationship and consistent interests with its employees should have standing to assert the employees' privacy rights. So that the First District can "work with a clean slate," this Court should clarify that Douglas is no longer good law, and that employers in this state have standing to assert the privacy rights of their employees.

Sterling House further requests that this Court, in accepting jurisdiction to resolve the certified conflict, also resolve the substantive issue presented to the First District below -- whether the trial court departed from the essential requirements of law by ordering Sterling House to produce the confidential employee personnel files, violating the employees' rights to privacy and therefore causing irreparable harm. The courts of this state have held that information in employee personnel files should be shielded from disclosure under the privacy provision of our state's Constitution. Because of this state's strong public policy

interest in protecting the privacy of its citizens, the trial courts must assure that a party seeking discovery has established a need for such confidential information which outweighs the individual's countervailing interest in maintaining the confidentiality of the information, and that the same information cannot be obtained through less intrusive means.

The trial court in this case departed from the law when it concluded that Respondent was not seeking confidential employee information, and when it ordered Sterling House to produce the personnel files. The documentation Sterling House was ordered to produce indeed contained the very sensitive and confidential information protected from disclosure under our state's Constitution. In ordering the production of this sensitive information, the trial court did not even require Respondent to meet his burden of establishing a need for the documentation which outweighed the employees' right to the privacy of their files, or that the same information could not be obtained through less intrusive means. In fact, Respondent never demonstrated that the employee information is even relevant to any legitimate issues in the case.

The trial court's order will not only create harmful precedent in this state if it is upheld, but it could expose Sterling House to liability to its employees for releasing confidential information in their personnel files. This Court should take a strong stance given the constitutional issues presented in this case, and therefore quash the trial court's order compelling the production of the employee personnel files.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE CONFLICT CERTIFIED IN THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL AND HOLD THAT EMPLOYERS HAVE STANDING UNDER FLORIDA LAW TO ASSERT THE PRIVACY RIGHTS OF THEIR EMPLOYEES.

A. Introduction.

This Court should accept jurisdiction to resolve the conflict arising from the First District's decision in Douglas and the Fifth District's decision in Deutsch on the issue of an employer's standing to assert the privacy rights of its employees. See Lake v. Lake, 103 So. 2d 639, 642 (Fla. 1958) **("To remain stable, the law administered by the Supreme Court and the district courts of appeal must be harmonious and uniform . . . ."); Donoghue v. Beeler, 149 So. 2d 534, 536 (Fla. 1963) (Dissenting opinion discussing the Supreme Court's role of "maintaining uniformity and dispelling confusion in the law"). In furtherance of the goal of reconciling conflicts and ensuring uniformity and harmony of decisions, this Court should overrule Douglas** and hold that under Florida law -- as expressly recognized by the Fifth District in Deutsch -- employers have standing to assert the privacy rights of their employees.

B. The Fifth District's decision in Deutsch states the correct rule of law on the issue of an employer's standing to assert the privacy rights of its employees.

In Deutsch, the Fifth District recently addressed whether a defendant nursing home operator had standing to protect the privacy rights of one of its employees. The plaintiff in Deutsch had sought the production of the personnel file of one of the defendant's vice presidents. The defendant objected to the discovery request on the basis that compelling the production of the employee's personnel file violated his right to privacy. The trial court nevertheless ordered the production of specific items in the personnel file.

The defendant then petitioned the Fifth District for a writ of certiorari quashing the discovery order. In response to the petition, the plaintiff relied on the First District's decision in Douglas to support her argument that the nursing home operator did not have standing to assert the third-party privacy rights of its employee. Id. at 780. The Fifth District disagreed with the holding in Douglas that an employer lacks standing to assert the privacy rights of its employees, and accordingly acknowledged and certified conflict with the decision. The Court reasoned that "Florida's Constitution provides strong protection in regard to privacy." Id. at 784. On this point, the Fifth District turned for guidance to decisions from other states which "have been more protective of third-party personnel records." Id. at 782-783. Specifically, in the out-of-state decisions cited in the Fifth District's opinion, the courts similarly held that defendant employers have standing to assert the privacy rights of their employees. Id.

Unlike the Fifth District's opinion in Deutsch, the First District's opinion in Douglas offers no analysis to support its conclusion that an employer lacks standing to assert the privacy rights of its non-party employees. In Douglas, the defendant hospital petitioned the First District for a writ of certiorari, seeking to

quash an order requiring the hospital to produce the personnel records of four of its nurses. The First District denied the petition, simply concluding that "a mere employee/employer relationship is not the kind of special relationship necessary for third party standing." Id. at 760-761. The Court relied entirely on Craig v. Boren, supra to support this conclusion. Id. 760-761. Notably, the Court also acknowledged that the nurses had moved to intervene, and if permitted to do so, could assert their own rights. Id. at 761.

C. **Douglas is no longer good law.**

The basis underlying the First District's decision in Douglas, compared with the First District's more recent decision in the present case and the Fifth District's decision in Deutsch, reveals why Douglas should be overruled. As noted above, the First District in Douglas relied solely on Craig v. Boren to support its conclusion that the employer/employee relationship is not sufficiently "special" to permit the employer to assert the privacy rights of its employees. However, the Court in Craig *never addressed* whether an employee/employer relationship is sufficiently "special" to confer third-party standing. The First District in Douglas apparently relied on dicta in Craig generally discussing the doctrine of third-party or *jus tertii* standing. Notably, the Court in Craig ultimately concluded that a vendor of 3.2% beer *had standing* to challenge an Oklahoma statute prohibiting the sale of such beer to males under the age of 21 on equal protection grounds.

Seventeen years later, the First District has apparently receded from its conclusion that an employer lacks standing, based on the principles discussed in Craig, to assert the privacy interests of its employees. As noted above, First District Judge Wolf in his special concurring opinion below recognized that the "criteria" for granting third-party standing to assert a constitutional right set forth in Craig and in Caplin & Drysdale are

not a barrier to the employer's standing in this case. (App. G at p. 3, n.1) (emphasis added) Judge Wolf recognized, in fact, that the concerns underlying the standing analysis *favor* allowing an employer to assert the privacy rights of its employees. (Id.) Specifically, he observed that Sterling House and its employees "have a substantial relationship and consistent interests which favor the granting of third-party standing," and that an employer "who is a party to the action and who collected the information" is in a better position to assert the employees' privacy rights. (Id.)

In short, not even the First District believes any longer that an employer lacks standing under the principles set forth by the U.S. Supreme Court to assert the privacy rights of its employees. The First District in the present case instead denied Sterling House's petition for writ of certiorari on the basis of its belief that it was bound to do so under Douglas. However, by certifying conflict between Douglas and Deutsch, the First District seeks relief from its outdated decision. As Judge Wolf stated in his special concurrence, if the First District "were able to work with a clean slate," he would follow the Fifth District's decision in Deutsch.

D. The First District's decision in Douglas is in conflict with decisions of every court of this state.

Although the courts of this state have not expressly addressed the issue of employer standing as the Fifth District recently did in Deutsch, every Florida district court has permitted an employer to assert the privacy rights of its non-party employees. The courts therefore have implicitly resolved the standing issue. In Seta Corporation of Boca, Inc. v. Office of Atty. Gen., Dept. of Legal Affairs, State of Fla., 756 So. 2d 1093 (Fla. 4th DCA 2000)**, the employer challenged a discovery order requiring it to produce its employee personnel files, trade secrets, and financial information. The Fourth District granted the writ and quashed the order requiring the employer to produce the employee personnel files. In**

doing so, the Fourth District implicitly recognized that the employer had standing to assert the privacy interests of its employees. See also American Express Travel Related Services, Inc. v. Cruz, 761 So. 2d 1206 (Fla. 4th DCA 2000) (Granting employer's petition for writ of certiorari and directing trial court to allow employer meaningful appellate review before forcing it to release employee personnel files).

Similarly, in CAC-Ramsay Health Plans, Inc. v. Johnson, 641 So. 2d 434 (Fla. 3d DCA 1994), the Third District Court of Appeal granted the employer's petition for writ of certiorari and quashed a discovery order compelling the production of its employee's records. The employer in CAC-Ramsay-Ramsay-Press Publishing Co., 310 So. 2d 345 Wisher v. News-Press Publishing Co., 310 So. 2d 345 (Fla. 2d DCA 1975), quashed, 345 So. 2d 646 (1977)-Press PublishingNews-Press Publishing Co. v. Wisher,

345 So. 2d 646 (Fla. 1977)Rasmussen v. South Florida Blood Service, Inc.,

500 So. 2d 533 (Fla. 1987)Stanley v. Georgia,

394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 2d 542 (1969)Olmstead v. U.S.,

27 U.S. 438, 48 S. Ct. 564, 72 L. Ed. 2d 944 (1928) that the South Florida Blood Services' motion for protective order, barring the disclosure of the names and addresses of non-party blood donors, should have been granted.

This same concern and respect for the privacy rights of our state's citizens has resulted in numerous court decisions upholding a litigant's ability to assert the privacy rights of non-parties. See, e.g., Berkeley v. Eisen, 699 So. 2d 789 (Fla. 4th DCA 1997) **(Granting investment advisor's petition for writ of certiorari**

and quashing discovery order requiring advisor to produce the telephone numbers of non-party investors); Colonial Medical Specialties of South Florida, Inc. v. United Diagnostic Laboratories, Inc., 674 So. 2d 923 (Fla. 4th DCA 1996) (Granting medical office's petition for writ of certiorari and quashing discovery order requiring medical office to provide addresses and telephone numbers of its non-party patients); Haywood v. Samai, 624 So. 2d 1154 (Fla. 4th DCA 1993) (Granting physician's petition for writ of certiorari and quashing order compelling the production of doctor's appointment book containing names and telephone numbers of non-party patients); McCann v. Foisy, 552 So. 2d 341 (Fla. 4th DCA 1989) (Granting petition for writ of certiorari and quashing discovery order requiring doctor to produce names and addresses of non-party patients).

The above-referenced cases are in line with the Fifth District's recent statement in Deutsch that Florida's interest in protecting the privacy rights of its citizens favors permitting a litigant to assert the privacy rights of non-parties. Even the First District recognized in the present case that a litigant should be permitted to do so where intervention by the non-party would be costly and inefficient, and where the litigant and the non-party have consistent interests favoring the granting of third-party standing. Our state's clear interest in protecting the privacy rights of Florida citizens favors a rule allowing a litigant to seek protection of such privacy rights on behalf of a non-party. Such a rule is particularly warranted where it would be costly and inefficient to force the non-party to intervene to protect his or her interest, and the litigant is in an equal if not better position to do so.

F. Courts in other jurisdictions have similarly recognized that litigants have standing to assert the privacy rights of non-parties.

Courts in other jurisdictions have concluded that a party has standing to assert the privacy rights of a non-party where, as in this case, the party is the custodian of the requested documentation. See, e.g., Doe v. Howe Military School, 1997 W.L. 662504 (N.D. Ind. 1997) **(Because defendant is the custodian of the non-party student medical records, it is in the best position to apply for protection); Camp, Dresser & McKee, Inc. v. Steimle and Associates, Inc., 652 So. 2d 44, 50 (La. 1995) (Firm has an interest in protecting the information it maintains on its employees and therefore has standing to apply for a blanket injunction); Craig v. Municipal Court, 100 Cal. App. 3d 69, 77, 161 Cal. Rptr. 19 (1979) ("The custodian has the right, in fact the duty, to resist attempts at unauthorized disclosure and the person who is the subject of the record is entitled to expect that his right will be best asserted"); Whittingham v. Amherst College, 164 F.R.D. 124, 127 (D. Mass. 1995) (Acknowledging that "personnel files contain perhaps the most private information about an employee within the possession of an employer," and denying plaintiff's motion to compel employer to produce employee files without any particularized showing that the information sought is relevant to his claims).**

Because employers are the custodians of employee personnel files, employers are in a unique position to assert the constitutional rights of the employees to the privacy of their files. Moreover, an employer should be permitted to assert the privacy rights of its employees where the employer is not only the custodian of the employee records, but may risk liability to the employee if the documentation is released. See, e.g., Doe, supra (Defendant could be exposed to

potential liability for disclosing personal and private information about former students to third parties); Montana Human Rights Division v. City of Billings, 649 P.2d 1283 (Mon. 1982) **(Possibility that employer could be sued by employees for revealing their private information constitutes a potential economic injury sufficient to establish employer standing to assert the constitutional rights of its employees).**

G. Deutsch sets forth the correct rule of law and Douglas should be overruled.

In sum, Douglas, a seventeen year old decision, should be overruled in favor of more recent decisions of every court of this state permitting employers to assert the privacy rights of their employees. As First District Judge Wolf noted in his concurring opinion in the present case, an employer should have standing to assert the privacy rights of its employees when the employer and the employees "have a substantial relationship and consistent interests." (Id.) He also noted that forcing employees to intervene in order to protect their privacy rights "would be costly and inefficient." (Id.) Judge Wolf correctly concluded that an employer, "who is a party to the action and who collected the information," is better able to assert the privacy interests of the employees in their personnel records. (Id.) The First District's more recent decision in the present case aptly reveals why Douglas should be overruled, and why the decisions holding that employers have standing under Florida law to assert the privacy rights of their employees should be upheld.

II. THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW WHEN IT ORDERED STERLING HOUSE TO PRODUCE CONFIDENTIAL DOCUMENTATION IN THE NON-PARTY EMPLOYEE PERSONNEL FILES IN VIOLATION OF THE EMPLOYEES' CONSTITUTIONALLY PROTECTED PRIVACY RIGHTS AND THEREFORE CAUSING IRREPARABLE HARM.

A. **The Florida courts are protective of the privacy rights of employees to the confidentiality of information in their personnel files.**

The courts of this state have held that information in employee personnel files is protected from disclosure under the privacy provision of our state's Constitution. See Seta Corp of Boca, Inc., supra (Granting certiorari and quashing order requiring petitioner to produce confidential information in employee personnel files); CAC-Ramsay-Ramsay, supra (Granting certiorari and quashing discovery order compelling the production of personnel file).

The Florida courts have shielded information in employee personnel files from disclosure in furtherance of this state's strong public policy interest in protecting the privacy of its citizens. Indeed, this Court has recognized that the Florida Constitution specifically provides a constitutional right of privacy "much broader in scope than that of the federal Constitution." Winfield v. Division of Pari-Mutuel Wagering, Dept. of Bus. Reg., 477 So. 2d 544, 548 (Fla. 1985). As this Court stated in Winfield-Mutuel Wagering, Dept. State v. Sarmiento,

397 So. 2d 643 (1981)-Mutuel Wagering, Dept. , citing Seattle Times Co. v. Rhinehart,

467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984) and South Florida Blood Service, Inc. v. Rasmussen, 467 So. 2d 798, 803 (Fla. 3d DCA 1985), aff'd, 500 So. 2d 533 (Fla. 1987) (Court orders compelling discovery constitute state action that may impinge on constitutional rights, including the constitutional right of privacy). In Winfield-Mutuel Wagering, Dept. Beagle v. Beagle,

678 So. 2d 1271 (Fla. 1996)-Mutuel Wagering, Dept. -Mutuel Wagering, Dept. Amente v. Newman,

653 So. 2d 1030 (Fla. 1995) at 791.

The constitutional right to privacy shielding confidential information in employee personnel files from disclosure was squarely addressed by the Third District Court of Appeal in CAC-Ramsay-RamsayHiggs v. Kampgrounds of America,

526 So. 2d 980 (Fla. 3d DCA 1988)Rosado v. Bridgeport Roman Catholic Diocesan Corp.,

1994 W.L. 700344 (Conn. Super. Ct. 1994) (citing People v. Sumpter, 75 Misc. 2d 55, 60, 347 N.Y.S. 2d 670 (1973)).

The Rosado court then set forth the following as guidance to the courts in determining whether to permit the disclosure of employee personnel files:

> Because discovery of matters contained in a . . . personnel file involves careful discrimination between material that relates to the issues involved

> and that which is irrelevant to those issues, the judicial authority should exercise its discretion in determining what matters shall be disclosed. An in camera inspection of the documents involved, therefore, will under most circumstances be necessary. . . . [I]n resolving requests for disclosure, routine access to personnel files is not to be had. Requests for information should be specific and should set forth the issue in the case to which the personnel information sought will relate. The trial court should make available to the [party] only information that it concludes is clearly material and relevant to the issue involved.

Deutsch at 783-784, citing Rosado (quoting from State v. Januszewski, 182 Conn. 142, 438 A.2d 679 (1980)).

Both the Third District in CAC-Ramsay-Ramsay and the cases cited in that decision) recognized that the files should not be released unless they directly relate to legitimate issues in the case. Id. at 783. In order to make this determination, the discovery requests should not only be specific, but "should set forth the issue in the case to which the personnel information sought will relate." Deutsch at 783-784, citing to Rosado. Only when this procedure is followed can the court determine whether disclosure of the employee files is warranted based on a "legitimate and demonstrated need for [the] information in any given case." Id.

B. The trial court erred when it determined Respondent was not seeking "confidential and sensitive" information and thus ordered Sterling House to produce the employee personnel files.

The trial court departed from the law when it ordered the production of confidential information in the Sterling House employee personnel files. The court did so based on Respondent's argument that he was not seeking "confidential and sensitive information about each of these employees" but instead "very specific information." (App. E at pp. 34-35) Respondent, however, did not seek "very specific information." Rather, his request included "but was not limited to" the broad range of documentation described in paragraph 21(a-g) of his discovery request. (App. B at ¶ 21)

Even if Respondent had only sought "specific" documentation, the trial court overlooked that even "specific" employee information must be protected from disclosure if the information is private and confidential, as it is in this case. See, e.g., CAC-Ramsay-RamsayEugene J. Strasser, M.D., P.A. v. Bose Yalamanchi, M.D., P.A., 669 So. 2d 1142 (Fla. 4th DCA 1996)§ 400.4174(2), Fla. Stat.§ 435.03, Fla. Stat.Section 435.09, Fla. Stat.§ 435.11 In granting Respondent's motion to compel, the trial court ordered Sterling House to produce this information. However, the

Florida Statutes assure the employee applicant that such information will not be used other than for employment screening purposes. The statutes indicate that it would be a first degree misdemeanor for Sterling House to produce the background screening information to Respondent in this matter.

In short, the trial court erroneously accepted counsel's argument that because Respondent purportedly was not seeking the "entire" personnel file, his request should be granted.[3] Both the trial court and counsel missed the mark. To begin with, Respondent's request was "not limited to" the documents sought in paragraph 21(a-g). (App. B) Further, the documents Respondent specifically requested in paragraph 21 (a-g) contain the sensitive, confidential and private information protected from disclosure under the Florida Constitution and the Florida Statutes. Counsel for Sterling House advised the court that the requested documents contained social security numbers,

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[3] Counsel likely framed his argument this way based on the First District's decision in Hunter Care Centers, Inc. v. Estate of Brinson by and through Sabel, 708 So. 2d 1043 (Fla. 1st DCA 1998), where his colleagues avoided an order quashing their request for the production of personnel files, on the basis that they were seeking "specific items" and "not a request for wholesale disclosure of the personnel files at issue." Of course, the decision is inapposite because it does not address whether the requested documents contained confidential information, as they do in this case.

home telephone numbers, home addresses and more, all of which constitute private and constitutionally protected information. See, e.g., CAC-Ramsay-Ramsay-4.108(4), F.A.C.59 A-4.108(4), F.A.C.-5.0181, F.A.C.58A-5.0181, F.A.C.§ 400.021(8), Fla. Stat.§ 400.401(2), Fla. Stat.Fincke v. Peeples, 476 So. 2d 1319 (Fla. 4th DCA 1985)H.B.A. Management, Inc. v. Estate of Schwartz by and through Schwartz, 693 So. 2d 541 (Fla. 1997); CAC-Ramsay-Ramsay The trial court ignored this policy concern and case law when it ordered Sterling House to produce the confidential documents. The trial court did so without a credible showing of relevancy, much less based on a balancing of Respondent's purported need for the documents with the non-party employees' right to the privacy of their files.

If upheld, the trial court's ruling will create harmful precedent. Will the personnel files of each current or former employee of a defendant be exposed, even though the employee is not charged with wrongdoing, on the unsupported basis that the files are somehow "relevant" to the action? This Court should not condone such unwarranted and unsupported "fishing expeditions," particularly when the result is the exposure of the private files of non-parties who have little if anything to do with

the asserted claims. The trial courts should be compelled to take the rights of this state's citizens more seriously. The courts should be ordered to protect confidential employee information absent a showing of a compelling need for the information which outweighs the employee's privacy rights, coupled with an inability to obtain the same information through less intrusive means. Sterling House requests that this Court take a firm stand given the constitutional issues presented in this case.

E. The trial court's order exposes Sterling House to liability to the non-party employees if the information is released.

The trial court's order not only infringes on the constitutional rights of the non-party employees, but exposes Sterling House to liability to the employees if the information is released. If upheld, the trial court's order will result in the release of confidential information, including the addresses, birth dates, and social security numbers of not only the non-party employee, but of his or her spouse and children. The order will also result in the release of sensitive background screening information clearly protected from disclosure under Florida law. See § 400.4174(2), Fla. Stat.; § 435.09, Fla. Stat.; § 435.11, Fla. Stat.

Sterling House will be forced to comply with the order, even though Respondent has not demonstrated that the requested information is even relevant, much less that he has a compelling "need" for the information justifying an invasion of the employees' privacy rights. The trial court's order thus exposes Sterling House to an action by the non-party employees for violation of their constitutional right to privacy assured under Article I, Section 23 of the Florida Constitution, and under the Florida statutes. See, e.g., Amente, supra (Special concurrence cautioning that mere fact that judge authorizes the discovery of records of non-party patients would not immunize the parties from invasion-of-privacy claims by the patients). See also Montana Human Rights Division, supra (Employer has standing to assert the constitutional rights of its employees where employer could be sued by employees for releasing their private information).

CONCLUSION

This Court should accept jurisdiction to resolve the conflict presented by the decisions in Douglas and Deutsch, and clarify that Deutsch sets forth the correct rule of law on the issue of an employer's standing to assert the privacy rights of its employees. Resolving this conflict will permit the First District to "work with a clean

slate," and will ensure uniformity and harmony in the law on the issue of employer standing. Additionally, because of the important constitutional issues presented in this case, this Court should also review the substantive issue presented to the First District below. In doing so, the Court should hold that the trial court departed from the essential requirements of the law when she ordered Sterling House to produce the confidential employee personnel files, violating the employees' privacy rights and therefore causing irreparable harm. Therefore, for the reasons set forth herein, Sterling House respectfully requests that this Court

overrule Douglas in favor of the Fifth District's more recent decision in Deutsch, and quash the trial court's discovery order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail this _____ day of May, 2001 to Camille Godwin, Esq. and Scott Gwartney, Esq., Wilkes & McHugh, P.A., P.O. Box 11187, Tallahassee, Florida 32302-3187.

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Attorney

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is in compliance with the amendments to Rule 9.210, Fla. R. App. P., and is in the required font of Times New Roman 14. See In re. Amendments to Florida Rules of Appellate Procedure, Case No. SC00-718, Slip Op. (Fla. Oct. 12, 2000).

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Attorney

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[1] References to the Appendix to this brief will be referred to as (App. __).