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IN THE SUPREME COURT OF FLORIDA

DYER MICHEL, as Administrator and Custodian of the records of the MARION COUNTY HOSPITAL DISTRICT, d/b/a MUNROE REGIONAL MEDICAL CENTER,

Petitioner,

v.

LEROY DOUGLAS,

Respondent.

CASE NO. 61,870
FIFTH DISTRICT COURT
OF APPEAL NO. 80-612

INITIAL BRIEF OF PETITIONER

ON PETITION FOR CERTIORARI FROM THE
FIFTH DISTRICT COURT OF APPEAL OF FLORIDA

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PRELIMINARY STATEMENT

In this Brief, Leroy Douglas, Petitioner in the trial court below, will be referred to as "Douglas". Dyer Michel, Respondent in the trial court proceedings and Appellee at the Fifth District Court of Appeal level will be referred to generally as the "Hospital".

The following abbreviations will be used:

(R-) will refer to the Record on Appeal followed by the appropriate page number.

(TR-) will refer to the transcript of testimony presented at the trial court followed by the appropriate record on appeal page number.

(A-) will refer to the Appendix.

STATEMENT OF THE CASE

On May 9, 1980, Leroy Douglas filed a Petition for a Writ of Mandamus in the Circuit Court in and for Marion County, Florida. A hearing was held on the merits of said Petition before the Honorable Wallace E. Sturgis, Jr., Circuit Judge, on May 14, 1980. By Order dated May 19,

1980, the Petition for a Writ of Mandamus was denied. Notice of Appeal was filed by Mr. Douglas on May 30, 1980. The Fifth District Court of Appeal rendered its decision on the merits by opinion filed January 13, 1982. Appellee's Motion for Rehearing and Clarification was filed January 27, 1982, with Appellant's Reply to Motion for Rehearing filed January 28, 1982. On March 10, 1982, Appellee's Motion for Rehearing was denied but the Fifth District Court of Appeal certified three (3) questions as being of great public importance. On March 23, 1982, Appellee filed Notice to Invoke Discretionary Jurisdiction of the Supreme Court.

STATEMENT OF THE FACTS

At the hearing on the merits, the parties, by stipulation, agreed to certain facts. It was agreed that on or about April 24, 1980, Leroy Douglas requested access to job applications of certain employees of the Marion County Hospital District (TR-24).

It was further agreed that Dyer Michel, as Administrator of Munroe Regional Medical Center is the

Custodian of the requested records and that the requested records were a permanent part of the records in Mr. Michel's custody in his capacity as Administrator (TR 24-25). Finally, it was agreed that upon instructions from the Board of Trustees and on the advice of counsel Dyer Michel refused Mr. Douglas's request to inspect, examine and copy the requested records (TR 25).

Testimony was presented to the Court from Robert L. Young, Director of Personnel at Munroe Regional Medical Center (TR 26-38). Mr. Young testified about the nature of the information contained in an employee's personnel file in addition to describing the current employment application utilized by the hospital. Mr. Young further testified about the hospital's policy towards release of employee personnel records, said policy being one of confidentiality (TR 31-32). At the close of the testimony of Mr. Young and after argument, the trial court denied Petitioner's Request for a Writ of Mandamus (TR 47). Thereafter, appeal proceedings were instituted.

STATEMENT OF QUESTIONS
CERTIFIED AS BEING OF
GREAT PUBLIC IMPORTANCE

I. ARE EMPLOYEE RECORDS, KEPT AS PART OF A TAX-SUPPORTED HOSPITAL'S PERMANENT FILE AND RECORDS, GENERALLY "PUBLIC RECORDS" WITHIN THE SCOPE OF CHAPTER 119?

II. ARE THE HOSPITAL EMPLOYEE RECORDS EXEMPTED FROM CHAPTER 119 BY §119.07 (3)(a) OR BY §119.07 (3)(f)?

III. SHOULD THE ACCESS TO THE PERSONNEL RECORDS UNDER CHAPTER 119 BE BARRED BECAUSE IT CONSTITUTES AN INVASION OF THE EMPLOYEE'S FEDERALLY OR STATE PROTECTED RIGHT OF PRIVACY WHERE THE RECORDS MAY CONTAIN HARMFUL OR DAMAGING INFORMATION?

CERTIFIED QUESTION I

ARE EMPLOYEE RECORDS, KEPT AS PART OF A TAX-SUPPORTED HOSPITAL'S PERMANENT FILE AND RECORDS, GENERALLY "PUBLIC RECORDS" WITHIN THE SCOPE OF CHAPTER 119?

Petitioner obviously had no voice in framing the question certified by the Fifth District Court of Appeal. Therefore, no argument will be made under the first question certified by that Court. It is acknowledged that the definition found in Florida Statute 119.011 (1) and (2) covers virtually everything an agency can possess. Therefore, if not exempt or if no right of privacy applies, the personnel records are public records within the scope of Chapter 119.

CERTIFIED QUESTION II

ARE THE HOSPITAL EMPLOYEE RECORDS EXEMPTED FROM CHAPTER 119 BY §119.07 (3)(a) OR BY §119.07 (3)(f)?

Chapter 119 of the Florida Statutes exempts from its operation:

> "3.a. All public records which are presently provided by law to be confidential or which are prohibited from being inspected by the public, whether by general or special law . . . "

The Marion County Hospital District, which owns and operates Munroe Regional Medical Center, is a body corporate, a Special Tax District, organized and existing by virtue of Special Act of the legislature found in 65-1905, Laws of Florida, 1965. Section 34 of this Special Act provides that the Board of Trustees is empowered to set up rules, regulations and by-laws for the operation of the Hospital and the Hospital's staff. The Board of Trustees is further authorized to set up rules and regulations for control of all professional and non-professional employees of the Hospital. The Board of Trustees did this and the Hospital's policy

for its employees' personnel records was one of confidentiality (TR 31-32).

The Special Act is explicit concerning those records which are to be open and subject to inspection. In relevant part, the Special Act provides:

> "Section 5 . . . The Trustees shall cause true and accurate minutes and records to be kept of all business transacted by them and shall keep full, true, and complete books of account and minutes, which minutes, records and books of account shall at reasonable times be open and subject to the inspection of the residents of the District; and any person desiring to do so may make or procure a copy of the minutes, records or accounts, or such portion thereon as he may desire."

The Hospital submits that 65-1905, Laws of Florida, a Special Law, expressly provides for limited public access to its records. From this Section, the legislature provided that only those minutes, records and books of account maintained by the Trustees are open and subject to inspection. Nothing else is specified. The question is what was the legislative intent behind the enactment of this Special Act.

The legislative intent of this Section is to be determined by accepted rules of statutory construction.

The rules of statutory construction provide that generally the mention of one thing in a statute implies the exclusion of another: "Expresio Unius Est Exclusio Alterus." Further, where a statute enumerates the things on which it is to operate or forbids certain things, it is ordinarily to be construed as excluding from its operation all those not expressly mentioned. Thayer v. State 335 So.2d. 815 (Fla. 1976). The legislative intent is to be determined primarily from the language of the statute for the reason that the legislature must be assumed to know the meaning of the words and to have expressed its intent by the use of the words found in the statute. Thayer, supra, at 817.

From the expressed legislative language and the basic tenets of statutory construction, it is clear that employee personnel records were never intended to be open for public inspection under the Special Act. This is even more evident when one recognizes that one version of the Public Records Act was in effect at the time the legislature enacted Chapter 65-1905. The enactment of the Special Act, 65-1905, supercedes the general law with respect to personnel records being public records by omitting them from those items open for public view.

The Public Records Law contains a broad exclusion for any information revealing personnel under 119.07 (3)(f). This subsection is vague as to its application. Rose v. D'Alessandro 380 So.2d. 419 (Fla. 1980). It is unclear whether its application is restricted to surveillance personnel or personnel in general. If, as the Hospital believes, its application is broader than mere surveillance personnel, then construed in pari materia with other statutes which protect public employee personnel records, it covers all personnel records of public employees. Therefore, under this provision, employee personnel records of the Hospital employees are exempt.

CERTIFIED QUESTION NO. III

III. SHOULD THE ACCESS TO THE PERSONNEL RECORDS UNDER CHAPTER 119 BE BARRED BECAUSE IT CONSTITUTES AN INVASION OF THE EMPLOYEE'S FEDERALLY OR STATE PROTECTED RIGHT OF PRIVACY WHERE THE RECORDS MAY CONTAIN HARMFUL OR DAMAGING INFORMATION?

The interplay of federal rights and state laws was an important ground for objection by the Hospital, which was presented to the trial court. Whether the right to disclosural privacy under the United States Constitution is wholly defined or not, see Shevin v. Byron, Harless, et al, 379 So.2d. 633 (Fla. 1980), it cannot be denied that it does exist. Existing as it does, it is either a privilege or an immunity secured by the Constitution or laws which is protected by Title 42 U.S.C. Section 1983. This Section provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any state or territory, subjects, or causes to be subjected, any citizen of the United States or

> any person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

If a Federal court determined that release of employee personnel records was a violation of this Section, a private right of action by an aggrieved employee would lie against your Petitioner, the Hospital, and the Hospital's Board of Trustees. Fadjo v. Coon 633 F. 2d. 1172 (5th Cir. 1981). As the United States Supreme Court recently held in Owen v. City of Independence, Mo., 448 U.S. 622, 100 S. Ct. 2502 (1980), the good faith of the Hospital would be no defense. As the high court also recently made clear, Section 1983 actions are certainly not limited to traditional civil rights questions. Maine v. Thiboutot 448 U.S. 1, 100 S. Ct. 2502 (1980). What Owen, supra, provides is a form of strict liability upon public bodies for constitutional violations regardless of whether the constitutional right was known or not. (See dissent, Mr. Justice Powell, Owen, supra, at 632.)

The majority's rationale in Owen, supra, as stated by Mr. Justice Brennan is:

> "In sum our decision holding that municipalities have no immunity from damages liability flowing from their constitutional violations harmonizes well with developments in the common law and our own pronouncements on official immunity under Section 1983 . . . The principle of equitable loss spreading has joined fault as a factor in distributing the costs of official misconduct.
>
> We believe that today's decision, together with prior precedents in this area, properly allocates these costs among three principals in this scenario of the Section 1983 cause of action; the victim of the constitutional deprivations; the officer whose conduct caused the injury; and the public, as represented by the municipal entity . . . The public will be forced to bear only the costs of injury inflicted by the execution of a government's policy or custom, whether made by its lawmakers or those whose edicts or acts may fairly be said to represent official policy." id at 632

The interplay of federal rights and state law placed the Hospital between the proverbial "rock and the hard place". The Hospital was faced with a state law that Douglas urged as applicable to employee personnel records. The Supreme Court in Owen, supra, provided for strict liability if constitutional rights were deprived. Maine, supra, opens the door to Section 1983 actions virtually without limitation.

The Hospital could have acceeded to Douglas's request and released the records, thereby depriving hospital employees of their acknowledged constitutional right to disclosural privacy, or the Hospital could have refused to release the records and be subjected to suit by Douglas. To put the Hospital in this position was an inherent denial of due process to the Hospital which the trial court must have recognized.

The legislature of the State of Florida recognized personal privacy as a valuable right for public employees. For example, the release of any record or information, including employee personnel records, which would constitute a clearly unwarranted invasion of personal privacy of credit union employees was prohibited. Florida Statute 657.061 (3)(a) (1979). This same protection and language was found in Florida Statute 658.10 (3)(a) (1979) for department of banking employees. Similarly, Florida Statute 231.29 (3) (1979) protected all school system personnel with limited access records and Florida Statute 240.25 (3) (1979) provided for limited access records for personnel records of employees of the state university system. Community college

employees are similarly protected under Florida Statute 240.337 (1979).

Douglas argued that by failing to include employees of the hospital in this large protected group, the legislature meant for hospital employees to have no protection at all. To the contrary, these provisions, in pari materia, evince a clear intent to protect the public employees' rights of privacy.

If one accepts the Douglas argument, the only conclusion possible is that the legislature has created two classes of persons similarly situated but who receive unequal treatment. One group of public employees receives protection for its personnel records and yet another group does not. If, on its face, this unequal treatment seems to violate the due process and equal protection guarantees of the Constitution of the United States and the Constitution of the State of Florida, a closer examination confirms it.

The citizens of the State of Florida are served by a body of public employees. Douglas says that some of these employees have privacy, as protected by the foregoing statutes, but urges that others do not. To classify public employees in this way, as Douglas urged, is to create an inherent denial of the equal protection guarantees of the

United States Constitution and the Constitution of the State of Florida to the employees of the Marion County Hospital District.

The classic criterion for assessing the validity of a statutory classification is whether that classification rests upon some ground of difference, having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike. Ohio Oil Company v. Conway 281 U.S. 146, 50 S.Ct. 310, 74 L.Ed. 775 (1929). Stated another way "In order for a statutory classification not to deny equal protection, it must rest on some difference that bears a just and reasonable relation to the statute in respect to which the classification is proposed". Gammon v. Cobb 335 So. 2d. 261, 264 (Fla. 1976), State v. Lee 356 So.2d. 276 (Fla. 1978).

That this disparity can be addressed by the judiciary is unquestioned, Lee, supra, for it goes beyond the mere question of the legislative wisdom of the particular classification to the essence of the constitutional guarantees themselves.

In Florida, all natural persons are equal before the

law. Article 1, Section 2, Florida Constitution. The unequal classification of public employees with respect to their personnel records violates this guarantee unless a fair and substantial relationship to a legitimate governmental objective is demonstrated. Craig v. Boren 429 U.S. 190, 97 S. Ct. 451, 40 L.Ed. 2d. 397 (1976), Kahn v. Shevin 416 U.S. 351, 94 S. Ct. 1734, 40 L.Ed. 2d. 189 (1974). There can be no rational basis for allowing, for example, a secretary of a community college to have protected personnel records and denying that same protection to a secretary of the Marion County Hospital District. The wisdom of the legislative classification is not in question but the rational basis for the distinction is. The distinction between two such similarly situated persons bears no just and reasonable relation to the object of the legislation. Lee, supra, at 279.

For these reasons then, if you accept the Douglas view, Chapter 119, Florida Statutes (1979) denies equal protection under Article 1, Section 2, of the Florida Constitution, and it also denies equal protection under the Fourteenth Amendment to the United States Constitution to the employees of the Marion County Hospital District. For

the same reasons, it denies due process to the employees of the Hospital.

Statutes are enacted by the exercise of the sovereigns police power. Police power is the sovereign right of the state to enact laws for the protection of lives, health, morals, comfort and general welfare. Carroll v. State 361 So.2d. 144 (Fla. 1978). When a particular attempted exercise of the police power by a state or under its authority passes the bounds of reason and assumes the character of a merely arbitrary fiat, it will be stricken down and declared void. Carroll, supra, at 146, State v. Lee 356 So.2d. 276, 279 (Fla. 1978). Additionally, the specific form of the police power chosen must be reasonably related to that public purpose or it must fail. Florida Canners Association v. State Department of Citrus 371 So.2d. 503 (Fla. 2d. D.C.A. 1979).

Presumably, under the guise of the public's right to information, the police power of the State has been used to impermissibly invade the constitutionally protected rights of its citizens to disclosural privacy. No valid public purpose can be served by allowing the most intimate, personal details of a person's life to be indiscriminately perused

without control. If the personnel files of an employee contains his unlisted phone number, why does the public need to know it? Why, for example, does the public need to know who the employee's relatives are, or his medical history, or credit standing? These are personal matters. No legitimate state interest or valid public purpose is served by allowing the state, through an exercise of its police power, to invade the personal privacy of its citizens.

To be sure, the public has rights but so, too, do its employees. Observing one set of rights by destroying another is constitutionally impermissible. Construed as Douglas asserts, Chapter 119 is an invalid exercise of the state's police power that can not withstand judicial scrutiny. It is merely an arbitrary legislative fiat that must be struck down and declared void.

In Shevin, supra, a divided Supreme Court rejected a state constitutional right to privacy while barely mentioning that Florida recognizes a common law right of privacy. In 1945 the case of Cason v. Bascom 20 So.2d. 243 (Fla. 1945) established that right. The right of privacy is the right to be let alone, the right to live in a

community without being held up to the public gaze if you do not want to be held up to the public gaze. This right may not be without qualification but it does exist. If this right must be balanced with the rights of the public to information, then this balance must be made.

Hospital employees are not public figures living in glass houses whose lives are constantly under examination. They are average citizens working for a living as productive members of the society. Information contained in their personnel records may be intensely personal or made confidential by other provisions of law. Some of this information may simply not be accurate. (TR 27-32.) Some information may be multiple hearsay or outright lies. This information, taken out of context, could irreparably harm an employee. It could be used illegally or immorally if allowed to be indiscriminately perused. This can not be allowed to happen. The citizens have rights and these rights must be protected.

Cason, supra, has not been overruled and it is the settled law of this State. Harms v. Miami Daily News, Inc., 127 So.2d. 715 (Fla. 3 D.C.A. 1961), Jacova v. Southern Radio & Television Company 83 So.2d. 34 (Fla. 1955). The

employees of the Hospital have a reasonable expectation that information in their personnel files will not be disclosed and that expectation is one that society in general recognizes as reasonable and legitimate. Nixon v. Administrator of General Services 433 U.S. 425, 97 S. Ct. 2777, 53 L.Ed. 2d 867 (1977). The Hospital employees have not agreed to live in this community being held up to the public gaze, and until they do, they have a right to privacy that must be respected.

Article 1, Section 9, of the Florida Constitution provides that no person shall be deprived of property without due process of law. In accord is the Fourteenth Amendment to the United States Constitution. Hospital employees have a property right and property interest in the information contained in their personnel files. They have a legitimate expectation that this information will be maintained as confidential. Chapter 119 is unconstitutionally overbroad because it deprives an employee of a constitutionally protected right without due process of law. This is particularly so since, if Douglas is correct, the employee simply does not know when his personnel file is being reviewed nor does he know by whom the file is being reviewed.

Overbreadth, while usually applicable to First Amendment deprivations under the United States Constitution, has been applied in other areas where the sweeping scope of the attacked legislation impermissibly interferes with other constitutional guarantees. Eisenstadt v. Baird 405 U.S. 438, 31 L.Ed. 2d. 349, 92 S. Ct. 1029 (1972).

Here the incredible scope of Chapter 119 sweeps aside any protections guaranteed by the United States Constitution's Bill of Rights and is overbroad in its application and on its face. While the judiciary can not rewrite legislation, it can, in some cases, construe it in such a way so as to remedy the constitutional defects. In this case, unless such a judicial construction is made, Chapter 119 must be rejected as unconstitutionally overbroad.

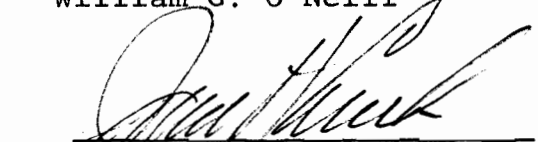
Broad policy questions of employees' rights to disclosural privacy, vis a vis public access to records, was before the trial court with the Hospital caught in the middle. In this case, blanket access to employee personnel records was demanded by Douglas and the only reasonable response for the trial court was to deny that access until the parameters of an employee's constitutional rights are

drawn and the competing interests of the public balanced. Shevin, supra, stated that a "case by case" analysis must be used. This case is one and we ask that this Court balance the competing rights and protect unprotected public employees.

Respectfully Submitted,

O'NEILL AND CORNELIUS

William G. O'Neill



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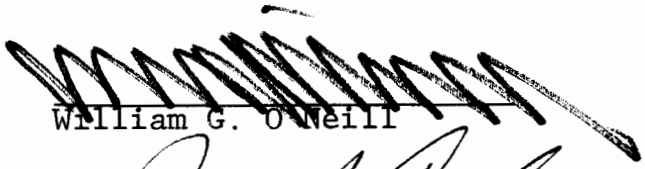
CONCLUSION

Based upon the foregoing arguments, the Hospital respectfully submits that Florida Statutes Chapter 119 is unconstitutional unless this Court balances the public's right to know with the private individual's constitutional right to privacy. The Hospital therefore requests this Court to provide specific guidance and guidelines to be followed to provide that balance when the public seeks access to employees' personnel records. In the alternative, the Hospital submits that absent balance of the competing needs, Florida Statutes Chapter 119 be held unconstitutional as an invasion of privacy contrary to the United States Constitution.

Respectfully Submitted,

O'NEILL AND CORNELIUS



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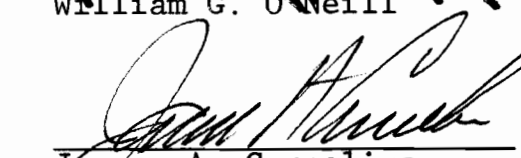

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Petitioner has been furnished to John B. Fuller and Bryce W. Ackerman, Savage, Krim, Simons and Fuller, P.A., Counsel for Respondent, 121 N.W. 3rd Street, Ocala, Florida 32670, and to W. E. Bishop, Jr., Bishop and Behnke, Counsel for Amicus Curiae, Post Office Box 2105, Ocala, Florida 32678, by mail, this 13 day of April, 1982.

James A. Cornelius