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 AMICUS CURIAE

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

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ABBREVIATIONS AND DESIGNATIONS

Leroy Douglas, Appellant below and Respondent herein will be referred to as Douglas or Respondent. Dyer Michel, Appellee below and Petitioner herein will be referred to as Hospital or Petitioner. The Employees represented as Amicus Curiae and others similarly situated will be referred to as Amicus or Employees.

The Record on Appeal in this case will be referred to as "R" followed by the appropriate page number.

STATEMENT OF 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 (R24).

It was further agreed that Dyer Michell 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. Michell's custody in his capacity as Administrator (R 24-25). Finally, it was agreed that upon instructions from the Board of Trustees and on the advice of counsel, Dyer Michell refused Mr. Douglas' request to inspect, examine and copy the requested records (R 25).

Testimony was presented to the Court from Robert L. Young, Director of Personnel of Munroe Regional Medical Center (R 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 (R 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 (R 47). Thereafter, Notice of Appeal to the Fifth District Court of Appeal was timely filed.

STATEMENT OF THE CASE

On May 9, 1980, Leroy Douglas filed his Petition for 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.

A Motion to File Brief of Amicus Curiae was filed with the Fifth District Court of Appeal on August 27, 1980, which Motion was granted by that Court by Order dated September 19, 1980.

On January 13, 1982, the Fifth District Court of Appeal filed it's opinion reversing the decision of the trial court.

On January 27, 1982, the Hospital and Employees filed their Motion for Rehearing and Clarification.

On March 10, 1982, the Fifth District Court of Appeal filed it's response to the Motion for Rehearing and Clarification in which it denied the motion but certified to this Court three questions which were found to be of great public importance.

On March 23, 1982, the Hospital served Notice invoking the discretionary jurisdiction of this Court.

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?

ARGUMENT

CERTIFIED QUESTION NO. I

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

In response to Certified Question No. I, Amicus respectfully submits that the answer is no.

The principal cases announced by this Court clearly show that this Court has never held employee records in general to be public records subject to disclosure.

In New-Press Publishing Company v. Wisher 345 So. 2d. 646 (Fla.1977), this Court reversed a decision by the Second District Court of Appeal which had dealt with general access to personnel files of county employees.

This case involved a county department head whose performance had been the subject of discussion by the Board of County Commissioners at a public meeting. The Board of County Commissioners voted to place a letter warning of possible termination in the unnamed employee's personnel file after public discussion and vote. The newspaper wanted to know the name of the employee. The Board of County Commissioners refused the newspaper's request for access, the trial court ordered release of the records and the District Court of Appeal said no. The Second District had held that New-Press Publishing Company had no right to inspect the personnel records of Lee County on grounds of public policy. Finding that the broad question analyzed by the Second District need not have been reached, this Court reversed but on narrow grounds.

This Court found:

> "The implications of general access to personnel files, and the competing rights of individual privacy were not at stake when the Lee County Commission voted publicly to warn that person by written communication that a termination of employment was imminently possible . . ."
> id at 648

Absent the need to resolve the public policy questions presented by those competing interests, the Court avoided the question. In so doing, the Court said:

> ". . . Under the circumstances of this case it is not appropriate to analyze the public records law in its broad aspects to determine how much, if any, of a county employee's personnel record is exempt from public disclosure." id at 648

Clearly, then the broad question of general access to an employee's personnel record was left unanswered by the Court and is still open.

In 1980, this Court had an occasion to analyze a case that Appellant urges as controlling. This case is plainly distinguishable on its facts since it did not deal with records of employees.

The case relied upon by Respondent is Shevin v. Byron, Harless, et al, 379 So. 2d. 633 (1980), which provided a definition of public records but also imposed an important qualification on that definition.

Shevin, supra, involved the question of public access to notes made by a consultant in connection with the consultant's interview with potential candidates for a managing director's position at the Jacksonville Electric Authority. The Court was confronted by and divided by the constitutional questions of a right of a candidate to disclosural privacy for the confidential information supplied by him to the consultant.

Ultimately, some but not all, of the information held by the consultant was opened. While allowing access to some of the consultant's papers, the Court defined and then qualified the definition of public records. In qualifying its definition, the Court said:

> "It is impossible to lay a definition of general application that identifies all items subject to disclosure under the act. Consequently, the classification of items which fall midway on the spectrum of clearly public records on the one end and clearly not public records on the other will have to be determined on a case by case basis,:

The News-Press case, supra, left the question of general access to employee personnel records very much open, and Shevin, supra, did nothing to settle the question. Shevin did require a case by case analysis after refusing to lay down a hard and fast rule. If the case by case analysis is left to the sound discretion of the trial court, then the trial court was correct.

CERTIFIED QUESTION NO. II

II. ARE THE HOSPITAL'S EMPLOYEES RECORDS EXEMPTED FROM CHAPTER 119 BY SECTION 119.07 (3)(a) OR BY SECTION 119.07 (3)(f)?

In response to Certified Question No. II, Amicus respectfully submits that the answer is yes.

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 (R 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."

Amicus 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 montioned. Thayer v. State 335 So. 2d.

815 (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.

The Public Records Law also contains a broad exclusion for any information revealing personnel. This subsection is vague as to its application. 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 and the trial court was correct.

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?

In response to Certified Question No. III, Amicus respectfully submits that the answer is yes.

A constitutional right to privacy exists and has been recognized by the United States Supreme Court and the Florida Supreme Court. Nixon v. Administrator of General Services, 433 U.S. 425, 97 S. Ct. 2777, 53 L. Ed 2d 867 (1977); Shevin v. Bryon, Harless, Schaffer, Reid and Associates, Inc., et al., 379 So. 2d 633 (Fla. 1980). This right to privacy emanates from the 1st, 4th and 9th Amendments to the United States Constitution and is applicable to the states through the 14th Amendment. Katz v. U. S. 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed 2d S76 (1967); Griswold v Connecticut 381 U. S. 479, 85 S. Ct. 1678, 14 L. Ed 2d 510 (1965). Roe v. Wade 410 U. S. 113.93 S. Ct. 705, 35 L. Ed 2d 147 (1973); Whalen v. Roe 429 U. S. 589, 97 S. Ct. 869; 51 L. Ed 2d 64 (1977).

The issue is not what is actually contained within the personnel files of the Hospital, but whether the confidentiality of those files is to be protected from unwarranted governmental intrusion. The Hospital employees gave information to the Hospital with the understanding that such information was not for public inspection. These employees had a reasonable expectation of privacy based upon the Hospital's previously stated policy of confidentiality.

Amicus recognizes that the legislature is empowered by the people of this state to enact legislation such as Chapter 119. The legislature is not, however, empowered to deprive citizens of constitutional rights. Yet the

Fifth District Court of Appeal, in it's interpretation of Chapter 119 as analyzed in light of Shevin (Supra), has in effect held that the legislature does have the power to eliminate such constitutionally protected freedoms. Shevin is distinguishable from the case at bar since public employees were not involved.

Analysis of the issue of the right of disclosural privacy must necessarily begin not with Shevin, but with News-Press Publishing Company v. Wisher (Supra). This 1977 case dealt with a publishing company which sought access to personnel files of county employees to learn the name of an unnamed public employee whose job performance had been discussed in a public meeting and in whose file a personnel warning letter was inserted. This Court pointed out the difficult questions which revolve around the ideas of free press and the right of privacy. However, the case was decided on more narrow grounds since the document was not provided by a private source who had been promised confidentiality. Rather it was authored by a public body acting in an open public meeting. The News-Press case left open decisions on the competing rights of individual privacy and the general access to personnel files. No case since News-Press has specifically addressed those questions. This concept of the need to balance the competing rights necessarily involves separate analysis of each right and either recognition or rejection of that right.

To resolve the apparent conflict between general access to public records as enacted by the legislature in Chapter 119 and the fundamental constitutional right to privacy, reference to a fundamental concept of constitutional law is appropriate. In Marbury v. Madison 1 Cranch 137,

2L.ed 60 (1803), the United States Supreme Court said:

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.
>
> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution or conformably to the constitution, disregarding the law the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> If, then, the courts are to regard the constitution, and the constitution is superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they both apply."

A comstitutional right of privacy does exist and that right was discussed in Nixon (Supra). The Fifth Circuit in Plant v Gonzales 575 F. 2d.1119 (5th Cir. 1978) and Fadjo v. Coon 633 F. 2d 1172 (5th Cir. 1981) expounded upon and interpreted the rules laid down in Nixon .

If the constitutional right of privacy exists, this Court should find it controlling over state law as mandated in Marbury (Supra). This is true even if it becomes necessary for this Court to expound on and interpret that right. Fundamental concepts of constitutional law dictate that state courts may not disregard constitutional rights. Martin v. Hunters,Lessee, 1 Wheat. 304, 4 L.Ed 97 (1816). Rice v. Arnold 54 So. 2d 117 (Fla. 1951); State v. Dwyer 332 So. 2d 333 (Fla. 1976).

It is clear that the constitutional right of privacy recognized by the United States Supreme Court is binding on state courts and the lower

federal courts. Merely because the Supreme Court has not yet fully defined the scope of the right to privacy does not mean that citizens in Florida should not enjoy the protection afforded by such a right. This Court should expound upon and interpret the general rule articulated by the Supreme Court. Martin v. Hunters Lessee (Supra)

Under our system of jurisprudence, the law in the United States has evolved, case by case, being refined, rejected or clarified as time passes. The United States Supreme Court enunciates broad principles of law and the lower cnurts, both federal and state, interpret those principles. If the interpretations are unwise or unexpected in the Supreme Court's view, the evolving law is made more specific. The disturbing feeling one gets from the Shevin case is that the system is reversed i.e., a citizen's acknowledged constitutional right will go unprotected, even be destroyed, until some future United States Supreme Court fully defines the scope of the right to disclosural privacy.

This Court recognized the problem this case involves in News-Press Publishing Company v. Wisher (Supra) but left us with unanswered questions. Shevin did not answer those questions either. This Court has the power and the obligation to construe a statute so as to render it constitutional if an unconstitutional construction is possible. For the reasons given above Chapter 119 is an unconstitutional invasion of privacy unless a balance is struck to accomodate the competing interests of the public versus the private citizen. Balance in equity must be struck to recognize the legitimate expectations of privacy and the rights of the public to know.

Another problem with Chapter 119 under the Constitution is its apparent denial of equal protection. All public employees are not treated equally i.e, some public employees are specifically exempted from public accessibility to their personnel files. See e.g. Fla. Statutes 240.253, 240.337 and 231.29. No rational basis exists for the distinction i.e, why is a school employee treated differently from a hospital employee?

Amicus believes that the Fifth District Court of Appeal was in error when it found that Shevin (Supra) was controlling in this case. To so hold requires a construction of Chapter 119 that is contrary to the United States Constitution. Shevin must be either limited to its unique factual situation or overruled as contrary to the laws of the land. This Court must construe Chapter 119 in such a manner as to allow it to withstand every test of its constitutionality. The construction sought by the Respondent and adopted by the Fifth District Court of Appeals would necessarily require that this Court strike the whole of Chapter 119 as unconstitutional.

The Hospital is now faced with the prospect of committing a breach of faith and contract with its employees who gave information to it with the understanding of confidentiality. These employees never intended to allow the most personal and intimate details of their private lives to be open for public inspection. These personnel files contain information vital to the Hospital in making necessary decisions on hiring, promotion, salary etc. and such information should be private. Although some governmental information may be contained in these files, this Court should balance the competing needs. As the Fifth Circuit Court of Appeal stated in Fadjo v. Coon (Supra):

". . .the district court must balance the invasion of privacy alleged by Fadjo against any legitimate interests proven by the state . . . an intrusion into the interest in avoiding disclosure of personal information will thus only be upheld when the government demonstrates a legitimate state interest which is found to outweigh the threat to the plaintiff's privacy interest."

CONCLUSION

Based upon the foregoing arguments, Amicus 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. Amicus 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, Amicus 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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Amicus Curiae has been furnished to John B. Fuller and Bryce W. Ackerman, Savage, Krim, Simons and Fuller, P.A., Counsel for Respondent, 121 N. W. Third Street, Ocala, Florida, 32670, and to James A. Cornelius and William G. O'Neill, O'Neill and Cornelius, Counsel for Petitioner, 822 E. Silver Springs Boulevard, Post Office Box 253, Ocala, Florida, 32678, by mail, this 15th day of April 1982.

W. E. BISHOP, JR.