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

CASE NO: SC01-709

1st DCA Case No. 1D 00-3260

Petitioners/Defendants,

v.

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

Respondent/Plaintiff.

_________________________________/

BRIEF OF *AMICUS CURIAE,* BEVERLY ENTERPRISES-FLORIDA,
On Appeal from the Decision of the First District Court of Appeal,
on certified conflict (with the decision in Beverly Enterprises-Florida, Inc. v Deutsch, 765 So.2d 778 (Fla. 5th DCA 2000))

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CERTIFICATE OF COMPLIANCE WITH FONT SIZE

In accordance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure, we do hereby certify this document is typed using 14 point Times New Roman font.

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PREFACE

This Appeal arises from an action alleged to have arisen under Chapter 400, Florida Statutes, in which the Trial Court issued a discovery Order that required the Petitioner/Defendant - who operates an Florida licensed Assisted-Care Facility - to produce the personnel files of each and every employee who provided any care or service to the Respondent/Defendant.

This *Amicus* Brief is filed in support of Petitioner Beverly Enterprises-Florida, Inc., in an effort to assist the Court in resolving the issues raised in this Appeal. In this *Amicus Brief,* Petitioners Alterra Health Care Corporation (a/k/a Alternative Living Services, Inc., d/b/a Sterling House Corporation, d/b/a Sterling House of Tallahassee)**,** will be referred to alternatively as "Alterra," "the Facility," or simply as "Petitioners." The Plaintiff Respondent Estate of Frances Shelly, by and through Mark S. Mitchell, will be referred to as "Ms. Shelly" or "the Respondent."

All emphasis has been supplied unless otherwise noted.

AMICUS CURIAE ADOPTION OF PETITIONER'S STATEMENT OF CASE AND FACTS

For purposes of arguing the narrower issues raised in the Appeal, *Amicus* hereby adopts the Petitioner's Statement of Facts.

SUMMARY OF ARGUMENT

A State Licensed Assisted-Care Facility has "standing" to assert its own constitutionally protected rights, and those which may inure to its employees and residents, to prevent or limit the unauthorized or unjustified disclosure of confidential information contained within personnel files and records in its possession and control. The Facility's employment and personnel files should not be subject to blanket requests for disclosure submitted by lazy or unscrupulous litigants, and particularly so when the requested materials can be said to include wholly *irrelevant* information that in no way can be considered "reasonably calculated" to lead to the discovery of admissible evidence. Such requests become even more problematic when permitted to impact upon the constitutionally protected privacy rights of third party-employees who have not otherwise been joined in the litigation, and whose rights of privacy, and the very information which those rights are designed to protect are in the exclusive possession and control of the Facility.

The reality is that these discovery requests constitute nothing more than "fishing expeditions" into the private lives of persons who are not on notice of the unjustified inquiry and thus unable to reasonably defend their constitutional and statutory rights in the proceeding. Common sense, logic and public policy should encourage our Courts to limit wholesale discovery of this sort of information, and to

take reasonable steps to prevent its disclosure, and particularly so under circumstances where disclosure is not warranted, or in the absence of an extraordinary showing of necessity which outweighs the countervailing interest in maintaining the confidentiality of such information.

ARGUMENT

I. Employers Have Standing to Protect the Privacy of Information Contained Within Their Personnel Records, and to act to Prevent Those Records From Unjustified Disclosure

An Employer has "standing" to act to protect confidential personnel records within the employer's possession and control. *Amicus* believes that the Petitioner has quite ably argued the "standing" issue in this case to the Court, and thus, does not believe it to be necessary or appropriate to restate those well developed facts and arguments here. However, *Amicus* does believe that the following commentary might provide some assistance to the Court in resolving this difficult issue, and offers it for that purpose.

First, *Amicus* believes that when conducting an analysis on standing in a case such as this, it might be helpful to consider the fact that the "privacy" issue at its crux does not concern just "people" – but "information." It is the disclosure of this confidential "information" which underpins the challenged Order, and at the same time, subjects the Petitioner to potential liability in its own right. *See, e.g., Cason v.*

Baskin, 20 So.2d 243 (Fla. 1945) (the public disclosure of private facts--the dissemination of truthful private information which a reasonable person would find objectionable, may be remedied as part of our tort law through a distinct right of privacy).

Moreover, it must be stressed that this "information" – which generally takes the form of paper files and computer data - is currently in the sole possession and exclusive control of the Petitioner. It is precisely that status – as custodian - or "trustee" or "guardian" – of this sensitive information – in combination with the Petitioner's exercise of exclusive dominion and control over it – that elevates the Petitioner's status in this case to - as the court in *North Florida Regional Hosp., Inc. v. Douglas*, 454 So. 2d 759 (Fla. 1st DCA 1984) phrased it - that of more than a "mere employer." Perhaps even more significantly, this status - as custodian and owner of this information - which establishes the Petitioner's own standing here - to object to the information's disclosure on behalf of its own interests – in preventing any unjustified or unconsented public disclosure which might subject it to liability in the future. *See, e.g., Cason,* 20 So.2d 243*; Board of Trustees of Leland Stanford Junior University v. Superior Court of Santa Clara County,* 119 App.3d 516, 525 (Cal. 1981) citing *Craig v. Municipal Court,* 100 Cal.App.3d 69, 77, 161 Cal.Rptr. 19 (Ct. App. 1979) (the custodian of private information has the right, in fact the duty, to resist any

attempt at unauthorized disclosure, and the person who is the subject of the information is entitled to expect that his right will be thus asserted; the Custodian may not waive privacy rights of persons who are constitutionally guaranteed protection of privacy); *Heller v. Plave*, 1993 WL 557846 (S.D. Fla. 1993) (the taxpayer privacy statute, 26 U.S.C. §§ 6103, protected the taxpayer's reasonable expectations that the IRS will keep any information about his tax returns confidential; *Johnson v. Sawyer,* 640 F.Supp. 1126, 1132 (S.D.Tex.1986); *Montana Human Rights Division v. City of Billings,* 649 P. 2d 1283, 1288 (Mont. 1982) (potential economic injury is sufficient to establish standing).

In this regard, *Amicus* submits that the circumstances under which Petitioner's collected this information – from employees who truly believed the information would be kept confidential - carries with it certain responsibilities, the derogation of which could very well result in direct liability to the Petitioner. In other words, to the extent the information in the requested personnel files can in anyway be considered "private" or "confidential," *Amicus* believes the Petitioner's unjustified disclosure of same could result in a direct and substantial injury to the Petitioner. *See Carey v. Population Services Int'l,* 431 U.S. 678, (1977) (company had standing not only on its own right but on behalf of its potential customers, but in its own right, as it had a

choice of obeying the statute with a resultant economic injury, or of disobeying the statutory command and suffering legal sanctions).

Consider when an employee confides to his employer that he has a problem at work because he has contracted HIV, or because his teen-age daughter has developed a drug problem or some other "private" issue. The employee discloses this information to his employer in the strictest of confidence, and the employer agrees not to tell anyone. All parties agree the information is to be held "private" and "confidential," but the employer <u>does</u> place a note in the employee's personnel file that this was the reason for the employee's work related problems during this period which, of course, is clearly stamped "confidential." Fortunately, the employee learns to live with his diagnosis (or his daughter overcomes her addiction, and goes on to become a successful professional). Years later, the employee leaves the company, takes a job elsewhere, but leaves no forwarding address. Subsequent to the employee's departure, a plaintiff in a civil suit against the employer demands this sensitive, confidential information from the employer. The employer, of course, knows the information is confidential, and knows it is not to be disclosed to anyone. The employer also knows that if he does disclose it, there is a good chance the former employee could sue for public disclosure of private facts. This potential for liability <u>alone</u> should be sufficient to justify the Petitoner's claim of "standing" in this case -

at least until such a time as the employee may be heard, and his consent to such disclosure obtained.

This sort of approach - whereby the Court acknowledges the fact that an employer in such a case might have its own predicate for "standing" – would not be inconsistent with the Fifth District's opinion in *Beverly Enterprises-Florida v. Deutsch*, 765 So.2d 778 (Fla. 5th DCA 2000); but it might also be consistent with – and may even serve to reconcile the First District's view in *Douglas*. Indeed the Court in *Douglas* specifically pointed out how the Petitioner in that case had only argued a theory of "third-party" standing to the Court, and had not claimed to have any first-party interest in protecting the otherwise private information in its own records. More specifically, after finding that the Hospital-defendant in *Douglas* case had not "proven" that it had standing "to assert the privacy rights of [its] nurses," the Court in *Douglas* actually went on to say:

> of course, the hospital may assert its own interest in preventing disclosure. In this regard, however, the hospital has asserted no privilege.

Douglas, 454 So. at 2d 761.

This approach not only lends support to the Fifth District's opinion in *Deutsch*, it also neatly resonates with the First District's holding in *Douglas*, wherein the Court specifically relied upon the principle that "a mere employee/employer relationship is not the kind of special relationship necessary for *third party* standing."

Id. (citations omitted). In this one sentence, the *Douglas* Court confirms that its holding was limited to its analysis of the Hospital's inability to prove up *jus tertii* standing, and at the same time, it reveals how the Court in that case – perhaps not fully briefed on the issue – failed to consider the Hospital's own first party interest in protecting this sort of information. Perhaps even more significantly, it appears as if the *Douglas* Court may have overlooked the legal status of the Hospital-employer as custodian or trustee - in that the critical language in the opinion issued back in 1983 refers quite specifically to the parties in that case having no more than a "mere-employee/employer relationship." *Id*. Regardless of the actual situation in *Douglas*, however, *Amicus* would submit that the Petitioner's role here, as the exclusive custodian of this otherwise private, confidential information – at the very minimum-requires it to take all reasonable steps necessary to prevent it's unauthorized disclosure. Conversely, *Amicus* submits that this same status bestows upon the Petitioner (and other similarly situated) the minimum requirements necessary to establish standing to protect the privacy of this information in a Court of law - so as to insure that the real party in interest – the one whose private information is in danger of being disclosed - can be properly summoned before the Court to either protect their rights, or waive them, or authorize the custodian to act in their behalf.

II. The Trial Court's Order Violates the Substantive Privacy Rights of Unrepresented Non-Parties in Violation of Article I, § 23 of the Florida Constitution and Chapter §400.022(m) of the Florida Statutes.

Amici submit that the Order on Appeal violates the privacy rights of all of the Petitioner's affected employees (as those rights are expressed in the Florida Constitution)[1]

Moreover, in the State of Florida, the "right to privacy" expressed in the Florida Constitution provides Florida citizens with a right of privacy which is much broader in scope than even the protections afforded by the United States Constitution. *See, e.g., Rasmussen v. South Florida Blood Service*, 550 So. 2d 533 (Fla. 1987) (explaining how Florida, through Article 1 §23 intended to provide greater informational privacy protection than the present federal standards, to respond to the reality that a "potential for invasion of privacy is inherent in the litigation process").[2]

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[1]Florida's own "right to privacy" is found in Article I Section 23 of the Florida Constitution, and provides in relevant part that "every natural person has the right to be let alone and free from governmental intrusion into the person's private life."

[2]In deciding whether to protect against disclosure of ordinarily private information, the court must balance the competing interests that would be served by granting discovery or by denying it. *North Miami General Hospital v. Royal Palm Beach Colony, Inc.,* 397 So. 2d 1033, 1035 (Fla. 3rd DCA 1981); *Dade County Medical Association v. Hlis,* 372 So. 2d 117, 121 (Fla. 3rd DCA 1979). Thus, the discovery rules provide a framework for judicial analysis of challenges to discovery on the basis that the discovery will result in undue invasion of privacy. This framework allows for broad discovery in order to advance the state's important interest in the fair and efficient resolution of disputes while at the same time providing protective measures to minimize the impact of discovery on private interests.

Accordingly, (as the Court noted in *Rasmussen)*, a trial court confronted with this issue must assess all of the interests that would be served by the granting or denying requested discovery, evaluate the importance of each, and the extent to which the action serves each interest, consider the particular rights of the person whose information may be divulged, and inquire into whether the information might be available by use of a less intrusive means. *See Harding Lawson Association v. Superior Court*, 12 Cal.Rptr.2d 538 (Ct. App. 1992) (balance between public need for discovery and the fundamental right of privacy generally tilts in favor of privacy with respect to third party personnel files unless the litigant can show a "compelling" need for the particular documents and establish that the information cannot be obtained through depositions or from other non-confidential sources). These rules provide a framework for judicial analysis of challenges to discovery grounded in the reality that the requested production will result in an undue invasion of privacy.[3] Here, had the Trial Court properly performed such a balancing test, there would have been no way the barely marginal "relevance" of this information (and the Respondent's "need" for it) could outweigh the strong policy interest in keeping the information private.

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[3]This framework still allows for broad discovery (in order to advance the state's important interest in the fair and efficient resolution of disputes) while at the same time providing protective measures to minimize the impact of discovery on competing privacy interests. *Rasmussen v. South Florida Blood Services, Inc.*, 500 So. 2d 533 (Fla. 1987).

Attempting to protect the privacy rights of non-parties and at the same time requiring the overriding "necessity" to secure such information in this manner, the Supreme Court in *Beverly-Enterprises-Florida v. Deutsch*[4] found that the plaintiff's need for certain discovery requests in this case could not override the privacy rights of non-party patients, and it thus quashed the discovery order. *Accord Colonial Med. Specialities of South Florida, Inc. v. United Diagnostic Labs., Inc.*, 674 So. 2d 923 (Fla. 4th DCA 1996) (granting *certiorari* against providing patient information, based both on privacy grounds and that respondent had some of the information in its possession).

Here too, in the interest of securing the privacy rights of all similarly affected employees (and in accordance with the protections afforded by both the Florida Constitution and the laws of this State), the Court should consider the Order below as a departure from the essential requirements of law. The Trial Court's Order is wholly inconsistent with the general principles of law - which protect against the discovery of information not reasonably calculated to the admission of relevant evidence – and thus should be quashed.[5]

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[4]765 So.2d 778 (Fla. 5th DCA 2000).

[5]Typically, most lawsuits against an Assisted-Care Facility makes "boiler plate" allegations that there are enumerated rights in §400.022, then the Respondent lists those rights. The Plaintiff then summarily claims that the Defendant (and its employees) has violated those rights. The Plaintiff never identifies just which employees are purported to have violated what specific rights,

A number of different Courts in this state have recognized the fact that employees have a privacy interest in the information contained in their personnel files. *See, e.g., Beverly Enterprised-Florida v. Deutsch*, 765 So.2d 778 (Fla. 5th DCA 2000); *CAC - Ramsay Health Plans, Inc. v. Johnson,* 641 So. 2d 434, 435 (Fla. 3rd DCA 1994) (the trial court erred in ordering the wholesale disclosure of personnel files containing confidential information of employees not related to the case); *Seta Corporation of Boca, Inc. v. Attorney General,* 756 So. 2d 1093 (Fla. 4th DCA 2000) (granting *certiorari*, and finding that the trial court departed from the essential requirements of law in requiring production of personnel files in total).

Indeed, employee personnel files typically contain a wide array of confidential,

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or how they specifically violated the rights, or when the violation occurred (which is rather significant is such cases as these, where the resident stayed for one and a half years). By allowing the Defendant to secure the sort of discovery allowed in this case, a dangerous precedent could be set. Plaintiffs in these cases will be encouraged to plead generally and to make extraordinarily broad allegations so that it can later claim in discovery that it needs (what would obviously be otherwise irrelevant evidence if the issues had been narrowed) to see if it might lead to other evidence that might be admissible in its case. Here, that scenario is neatly illustrated as - on the basis of very few "facts," the Defendant claims to be entitled to the entire personnel files of all employees for their entire employment tenure (i.e. if the employer served the Defendant a glass of water, that employee's entire personnel file and whatever is in it, whether that employee has been working there for 15 years or 15 minutes is discoverable). The Court should not permit this sort of wholesale, unfettered discovery on the basis of nothing more than over broad allegations, which neither identify the specific employee who committed the alleged acts, nor which omission or commission occurred, nor identifies when they were purported to have occurred, to serve as a dangerous, precedential "launching pad" upon which to justify any discovery request of any kind, and especially where the privacy rights of individual citizens are clearly implicated.

sensitive, personal and private information and can contain such things as the employee's social security number, home address, telephone numbers, personal information relating to emergency contacts, insurance beneficiaries, information contained in the employee's application for employment, references, job evaluations, background investigations, drug test results, credit checks, complaints, grievances, disciplinary actions, counseling reports, as well as proprietary company policies, procedures, forms and training manuals. *See Beverly Enterprised-Florida v. Deutsch*, 765 So.2d 778 (Fla. 5th DCA 2000). The importance of safeguarding such private information requires that "[t]he party seeking discovery of confidential information must make a showing of necessity which outweighs the countervailing interest in maintaining the confidentiality of such information." *CAC-Ramsay,* 641 So.2d at 435 (citing *Higgs v. Kampgrounds of America,* 526 So. 2d 980, 981 (Fla. 3rd DCA 1988)).

This Court's decision in *Deutsch* is instructive. There, the Court discussed the right of a state licensed nursing home to protect its employees' privacy rights from forced disclosure of their personnel files. The Court pointed out how other states, including California (which has a provision in its Constitution similar to that here in Florida) have been quite protective of third-party personnel records, and cited the leading case on this issue, *Board of Trustees v. Superior Court*, 119 Cal. App.3d 516, 174 Cal. Rptr. 160 (1st Dist. 1981), in which the court reversed a trial court order compelling the production of employee personnel records. In reversing, the California

Court stated that

> It seems manifest, and we observe no contrary contention, that such records and files relate to the private affairs of Dr. Lucas, and are maintained in confidence by the University. No direct relevance to the issues of the defamation action is apparent, and again [the plaintiff] takes no contrary position; he merely argues that such disclosure might lead to the required proof of malice of one or more of the several defendants of his action. And even were such records' and files' direct relevance more readily apparent, we are of the opinion that a proper balancing of the competing values would here necessarily weigh in favor of Dr. Lucas' right of privacy.
>
> Nor is a "compelling state interest" requiring such disclosure discernable to us. It is concluded that the superior court abused its discretion in granting [the plaintiff] discovery of the personnel, tenure, and promotion records and files of Dr. Lucas in the custody of the University.

Board of Trustees, 174 Cal.Rptr. at 165. *See also Rancho Publications v. SuperiorCourt*, 68 Cal.App.4th 1538, 81 Cal.Rptr.2d 274 (4th Dist.1999) (citing *Board of Trustees*); *Valley Presbyterian Hosp. v. Superior Court,* 94 Cal.Rptr.2d 137 (App.2d Dist.2000) (California's constitutional right to privacy provides a qualified, not absolute, bar to discovery; a party to an action, such as a Hospital, may assert the privacy rights of third parties such as its employees; the Court is required to balance the right of privacy with the need for discovery).

In fact, even where there is a statute that <u>mandates</u> disclosure - a situation far more helpful to the Respondent here - courts have "recognized the principle that, under appropriate circumstances, a statute requiring the disclosure of a person's identity must yield to the constitutional right to privacy. *Alaska Wildlife Alliance v.*

Rue, 948 P.2d 976, 980 (Alaska 1997) (citing *Falcon v. Alaska Public Offices Comm'n*, 570 P.2d 469, 480 (Alaska 1977)).

More recently the Court in *San Diego Trolley, Inc. v. Superior Court*, 105 Cal.Rptr.2d 476 (Cal. App. 4th, March 16, 2001), reiterated this importance of that sort of protection, stating:

> The balance will favor privacy for confidential information unless the litigant can show a compelling need for the particular documents and that the information cannot reasonably be obtained through depositions or from nonconfidential sources. Even where the balance does weigh in favor of disclosure, the scope of disclosure must be narrowly circumscribed.

Id. at 485. *See also Dunnigan v. Waverly Police Dept.*, 719 N.Y.S.2d 399 (N.Y.A.D. 2001) (even if police officer-employee had been properly joined as party in a proceeding brought by convicted felon to compel police department to disclose officer's personnel records under the Freedom of Information Law (FOIL), felon was not entitled to disclosure of such records, as felon failed to show how such records were relevant to his claims of improprieties allegedly committed by officer during criminal trial and conceded that any action or claim he might have against officer or city was now time barred); *Harding Lawson Associates v. Superior Court*, 12 Cal.Rptr.2d 538 (Ct. App. 1992) (employer's third-party personnel files were not subject to discovery in employee's wrongful discharge action, absent showing of compelling need for particular confidential documents in the files or that the

information could not be obtained through depositions or from non-confidential sources); *City of Los Angeles v. Superior Court*, 33 Cal.App.3d 778 (Cal.Ct.App. 1973) (determining that police personnel file was not subject to discovery after concluding that the confidentiality interests of the officer outweighed the disclosure need of private litigants).

The Court in *Deutsch* also cited to *Rosado v. Bridgeport Roman Catholic Diocesan Corp.,* 1994 WL 700344 (Conn.Super.Ct.1994). In *Rosado*, the plaintiff had alleged that he had been sexually assaulted by a priest employed by the Bridgeport Roman Catholic Diocese. The Court noted that while the rules of civil discovery are to be liberally construed, that policy is *qualified* where the object of discovery is contained within a *personnel* file:

> The disclosure of such information must be carefully tailored to a legitimate and demonstrated need for such information in any given case. Where disclosure of the personnel file would place in the hands of a [party] irrelevant or personal and sensitive information concerning ... [another], the entire file should not be disclosed. No ... [party] has the right to conduct a general "fishing expedition" into the personnel records of a[nother]. Any request for information that does not directly relate to legitimate issues that may arise in the course of the ... [trial] ought to be denied.

In recognizing the danger of permitting the unbridled disclosure of personnel records of any witness or litigant, one Court said:

> It has been widely noted that such records often contain raw data, uncorroborated complaints, and other information which may or may not be true but may be embarrassing, although entirely irrelevant to any issue

> in the case, even as to credibility. *People v. Sumpter,* 75 Misc.2d 55, 60, 347 N.Y.S.2d 670 (1973). 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. *See also United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); *Commonwealth v. Dominico,* [1 Mass.App.Ct. 693, 306 N.E.2d 835 (1974)] *People v. Bottom,* 76 Misc.2d 525, 351 N.Y.S.2d 328 (1974).... [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. *See People v. Fraiser,* 75 Misc.2d 756, 757, 348 N.Y.S.2d 529 (1973) (subpoena *duces tecum* issued for personnel files of police witnesses in prosecution for possession and sale of controlled drugs). In this regard, the trial court should exercise its discretion in deciding the temporal relevancy or remoteness of material sought. *Cf. State v. Carbone*, 172 Conn. 242, 262, 374 A.2d 215, *cert. denied,* 431 U.S. 967, 97 S.Ct. 2925, 53 L.Ed.2d 1063 (1977); *State v. Mahmood,* 158 Conn. 536, 540, 265 A.2d 83 (1969); *State v. Towles,* 155 Conn. 516, 523-24, 235 A.2d 639 (1967) (relating to the introduction of evidence at trial); *see also* 1 Wharton, Criminal Evidence (12th Ed.) 151. Because the law furnishes no precise or universal test of relevancy, the question must be determined on a case by case basis according to the teachings of reason and judicial experience. (quoting from *State v. Januszewski,* 182 Conn. 142, 438 A.2d 679 (1980), *cert. denied,* 453 U.S. 922, 101 S.Ct. 3159, 69 L.Ed.2d 1005 (1981)).

The Court in *Deutsch* concluded that the "Florida Constitution's strong protection in regard to privacy" and the "pronounced concern for the privacy of nursing home patients" mandate protection from whimsical or unfettered disclosure of such "personal" personnel records, and thus granted the petition, quashing the

discovery order of the trial court. *Id.* at 783-84.

The rationale of the Court in *Beltran v. State, Dept. of Soc. & Health Servs.*, 989 P.2d 604 (Wash. App. 1999), is applicable here. *Beltran* also arose in the context of a plaintiff's demand for the personnel records of various public employees, and it serves to illustrate the importance of protecting such files and the detrimental impact of allowing disclosure of such confidential information:

> First, if public employees were aware that their performance evaluations were freely available to their co-workers, their neighbors, the press, and anyone else who cares to make a request under the act, employee morale would be seriously undermined. The likely result would be a reduction in the quality of performance by these employees and discord in the workplace. Ripskis v. Department of Housing & Urban Dev.,746 F.2d 1, 3 (D.C.Cir.1984).
>
> Second, disclosure could cause even greater harm to the public by making supervisors reluctant to give candid evaluations. "Disclosure will be likely to chill candor in the evaluation process" Ripskis, 746 F.2d at 3. See also Trenton Times Corp. v. Board of Educ., 138 N.J.Super. 357, 363, 351 A.2d 30 (1976) ("[w]ere all personnel evaluations known to be subject to public disclosure, candor in making them might well be compromised."). The quality of public employee performance would, therefore, suffer because the public employees would not receive the guidance and constructive criticism required for them to improve their performance and increase their efficiency. Dawson, 120 Wash.2d at 799-800, 845 P.2d 995. Applying these concerns to the facts presented in Dawson, the court held the public concern was not legitimate "at least in a case such as this one where our in camera review ... revealed that [the employee's] evaluations do not discuss specific instances of misconduct or public job performance." Dawson, 120 Wash.2d at 800, 845 P.2d 995.
>
> In the instant case, the parties do not state, nor does the record reveal whether the trial court conducted an in camera review. We therefore do not know whether the caseworkers' personnel files would reveal

> instances of misconduct or anything else materially related to this case. In fact, Beltran fails to articulate even a basis for suspicion that the personnel files would contain relevant information. Thus, after considering the legitimate concerns for compromising public employee privacy articulated above, we hold that the trial court did not abuse its discretion when it denied Beltran's motion to compel discovery.

CAC-Ramsay is also instructive here. *CAC-Ramsay* is an employment discrimination suit in which the plaintiff sued his former employer, alleging that he had been wrongfully terminated because of his race. As part of his discovery efforts, the ex-employee requested the personnel records of every African-American or Hispanic employee who had worked at the company for the preceeding five to six years. The Plaintiff's request specifically included demands for, among other things, applications, references, evaluations, background investigations, complaints, grievances and reprimands. The Third District Court of Appeals held that it was error for the Trial Court to order the wholesale disclosure of personnel files containing confidential information about employees *not related to the case*. 641 So. 2d at 435. The Court noted how the production of personnel files can implicate the privacy rights of persons who may not be aware of the intrusion, and may not in any way be connected to the litigation at issue, and also pointed out how in that case, the information being sought was not reasonably calculated to lead to discoverable evidence, and thus found the discovery request to be over broad. The Court stated that while the plaintiff might have been entitled to <u>some</u> of the information in <u>some</u> of the

files, he had not demonstrated a need for the production of each employee's file which outweighed the employees' privacy interest therein. *Id.* at 435-36. As a result, the Court ordered the Trial Court to fashion a more narrowly tailored Order, one which would allow the plaintiff access to the information for which he could display a compelling need. *Id.*

The information that the Trial Court in this case ordered to be disclosed is precisely the same sort of private employee information the Third District Court of Appeal held to be <u>not</u> discoverable in *CAC-Ramsay.* The Order obviously requires the disclosure of virtually all of the private, sensitive information contained within the personnel files of the affected employees, and does so without first requiring any real showing that a particular caregiver was in any way guilty of denying the Respondent's rights as a nursing home resident, nor does it give these employees any opportunity to secure their own counsel or otherwise object to the unfettered disclosure of such information.

Moreover, the Respondent in the present case certainly has even much less need for this information than did the plaintiff in *CAC-Ramsay.* The plaintiff in *CAC-Ramsay* alleged a cause of action for <u>employment discrimination</u>, which of course made the personnel files of similarly situated employees <u>directly relevant</u> in that case. Despite this direct connection, however, the Third District Court in *CAC-Ramsay* nevertheless held that the plaintiff in that case was not entitled to <u>any</u> of the requested

files - absent a specific showing of a need compelling enough to outweigh the employee's privacy interest in the information contained in those files.

By strong contrast, in this case, the Respondents have not alleged <u>any</u> specific facts or cause of action which would make the files of every employee who had contact with Respondent relevant here. To place this request in its proper context, it should first be noted that the Respondent's Complaint (which serves as the basis for the rather broad, wholesale discovery at issue here) appears to be little more than a standard "form" complaint for Chapter 400 cases, a form which basically tracks the statutory language so as to (intentionally and rather) broadly allege every type of claim possible under the residents' rights statute. It alleges violations of the nursing home statute during Respondent's entire residency. It does not identify specific employees (or why such information is needed from their files), nor show which information they wish to expose of the employee without his or her knowledge, nor provide any fair or reasonable time limitations (e.g., an employee who has been working for 15 years, but who gave a cup of water to Respondent is subject to disclosure). There has been no showing of how the Respondent's attempt at this "fishing expedition" (i.e., made only in the hope to manufacture a claim against the Petitioner) <u>outweighs</u> the legitimate privacy expectations to the requested personnel files. No factual allegations identify the name(s) of the employee(s), what acts they are alleged to have specifically committed, and by which employees, when during the

Respondent's stay they were alleged to have occurred, or how they were committed, nor how they caused Respondent's death - a requirement mandated by the statute and case law.[6] Instead, Respondent has propounded this unduly broad discovery as a request for <u>all</u> documents relating to <u>every</u> employee who <u>ever</u> provided him any sort of care. The Respondent does not even bother to narrow the time-frame of their request down to the specific period of time surrounding any particular alleged violation (or person who allegedly committed such violation) during the period. Instead, Respondent seeks to the personnel documents for every employee who cared for Respondent during his residency.

No court should allow individuals, such as the Respondent here, to have the unchecked power - under the guise of a civil lawsuit - to completely devastate the privacy rights of all of those involved in the operation of a state licensed health care facility - or more specifically, the <u>employees</u> of that facility - by allowing the unfettered, wholesale discovery of every piece of information contained within their personnel file. Permitting this sort of unnecessary disclosure can only serve to drive a wedge between the company and its employees.[7] It can engender anger and

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[6] *See Beverly Enterprises-Florida v. Knowles*, 766 So. 2d 335, 337 (Fla. 4th DCA 2000) (en banc) (holding that there is no claim under §400.023 without pleading that the death of the resident directly resulted from the alleged violations of resident's rights).

[7] As discussed in Point I, the Petitioners have standing to protect the privacy rights of their employees in this case. *See, e.g., CAC - Ramsay* 641 So.2d 434;

resentment toward the company - and perhaps legal action - by employees who are understandably upset that the company has revealed their personal information. Moreover, the company risks liability for wrongfully divulging the employees' private information to third parties who have no real interest in the information whatsoever.

In short, the Trial Court's Order departs from the essential requirements of law, and this departure will result in material injury for which there is no adequate remedy by direct appeal - because the Order impermissibly and unnecessarily requires the production of personnel documents containing a wide array of private, confidential and privileged information regarding individuals who are not parties to the action, and whom are unable to defend their rights. And once the information is disclosed, it cannot be made "private" again.

The Respondent has made no showing of any compelling interest which could be considered sufficient to justify obtaining all of these "personal" personnel records, much less one which could outweigh the privacy interest the care givers have in the information contained in their personnel files. The Respondent has also failed to

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Seta Corporation. In fact, Petitioners have a duty to do so. If the Petitioner divulges private, confidential information of their employees, it may be subject to suit by the employees for invasion of their right to privacy. Causes of action for defamation and or disclosure of private facts immediately come to mind. *See, e.g., Amente v. Neuman,* 653 So. 2d 1030, 1032 (Fla. 1995) (J. Overton, concurring) (warning that the mere fact that a judge authorized the discovery of medical record of non-party patients does not immunize the parties from invasion of privacy claims by the non-party patients). Thus, Petitioner has a direct interest in protecting the private, confidential records concerning their employees.

provide any support for the proposition that this information cannot be secured by less intrusive means than obtaining all information of whatever kind contained in these personnel files for as long as the employee worked at the facility. Thus, the Trial Court's Order compelling disclosure of documents in response to Respondents' request for production must be quashed.

In order to fairly protect the rights of all parties, the Respondent should be required to demonstrate a need to obtain the documents relating to each particular employee it has requested and demonstrate that they have no other way to obtain the information concerning the employee before the court allows Respondent to access any employee's private, confidential personnel file.

We must therefore be careful to fashion orders that protect the privacy rights of individuals, while providing access to relevant, admissible evidence. It cannot be overstated that individual citizens' rights are implicated. Business owners' privacy rights are implicated. The exposure of a business to liability for failing to safeguard the privacy rights of its employees is real and significant. The precedential effect of allowing such orders to stand is significant, especially where there is a lack of specificity in the information needed, or in the time frame requested, or without requiring the moving party to show how the need for such information clearly outweighs the constitutionally protected privacy rights.

The Respondent has a duty to give sufficient grounds to support an order that

is narrowly tailored to protect against the unreasonable, over broad disclosure of all personnel files for all years of all employees that have allegedly provided care to Respondent. The request for information and order should specify the specific names of the employees, what acts the particular employee committed that constituted a violation of Respondent's rights, when such acts were committed, and provide facts which can allow the Petitioner and Trial Court to appreciate how those acts caused Respondent's injuries (and death).[8]

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[8]To the extent that personnel files contain information used for the "evaluation" of employees, the reasons protecting this information might be analogized to the reasons set forth for protections afforded to other "self-evaluative" type of information. *See, e.g., Reichhold Chemicals, Inc. v. Textron, Inc.*, 157 F.R.D. 522, 524 (N.D. Fla. 1994), where the Court stated:

> The rationale for the doctrine is that such critical self-evaluation fosters the compelling public interest in observance of the law. *See, e.g., Granger v. National R.R. Passenger Corp.*, 116 F.R.D. 507, 508 (E.D. Pa. 1987). The privilege protects an organization or individual from the Hobson's choice of aggressively investigating accidents or possible regulatory violations, ascertaining the causes and results, and correcting any violations or dangerous conditions, but thereby creating a self-incriminating record that may be evidence of liability, or deliberately avoiding making a record on the subject (and possibly leaving the public exposed to danger) in order to lessen the risk of civil liability. The self-critical analysis privilege is analogous to, and based on the same public policy considerations as, Rule 407, Federal Rules of Evidence, which excludes evidence of subsequent remedial measures.

Id. at 524.

CONCLUSION

In light of the foregoing, and on the strength of the cited authorities, *Amicus* will respectfully request the Court to quash the Order mandated by the lower Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Amicus* Brief was furnished by U.S. Mail this 10th day of May, 2001 to Marie Borland, Esq., Hill, Ward & Henderson, P.A., P.O. Box 2231, Tampa FL 33601 and Camille Godwin, Esq., Wilkes & McHugh, P.A., 119 East Park Avenue, Tallahassee, FL 32301.

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