Alterra Health Care Corp. v. Estate of Frances Shelley

MR. CHIEF JUSTICE

NEXT CASE ON THE ORAL ARGUMENT CALENDAR THIS MORNING IS ALTERRA HEALTH CARE VERSUS THE ESTATE OF SHELLEY.

MAY IT PLEASE THE COURT. MY NAME ISMARIE BORLAND. I AM WITH THE LAW FIRM OF HENDERSON HILL AND WARD IN TAMP A WE REPRESENT ALTERRA HEALTH CARE, WHICH WE WILL REFER TO, TODAY, AS STERLING HEALTH. I AM HERE WITH MY CO-COUNSEL DONNA FUDGE AND WE ARE ALSO JOINED BY SCOTT, IN AN AMICUS PROCESS.

CERTAINLY THIS COURT HAS REALIZED THE PRIVACY RIGHT IN BALANCING UNDER THE DISCOVERY ANALYSIS. IS THERE SOMETHING DIFFERENT, UNIQUE, SOME KIND OF ADDITIONAL RIGHTS THAT WILL BE CREATED OR THAT YOU ARE CONCERNED WITH, IN RECOGNIZING THE THIRD PARTY RIGHT TO ASSERT THE PRIVACY RIGHT OF AN EMPLOYEE?

YOUR HONOR, IF I UNDERSTAND YOURESTIN, AND I DO WANT TO SAY THAT WE ARE GOING TO BIFURCATE THIS ARGUMENT. I AM GOING TO BE PREENTIG THE FIRST ARGUMENT, SIMPLY ON THE ISSUE OF STANDING.

IT KIND OF GOES TO STANDING.

IT DOES GO TO STANDING. ON THE STANDING ISSUE, WE ARE SIMPLY ASKING THE COURT TO RESOLVE THE CONICT BETWEEN TWO DISTRICT COURTS OF APPEAL, SIMPLY ON THE ISSUE OF WHETHER AN EMPLOYER HAS STAND HADGE IN THE FIRST INSTANCE, AND OUR POSITION, OF COURSE, IS THAT THE EMPLOYER DOES HAVE STANDING.

I UNDERSTAND, BUT I REALLY WANT TO GET TO THE HEART OF WHAT DOES THAT MEAN. IF WE GRANT STANDING, DOES THAT CREATE SOME KIND OF A DIFFERENT POSTURE IN THESE CASES THAN WE USE, ALREADY, TODAY?

YOUR HONOR, IT DOESN'T CREATE A DIFFERENT POSTURE. IT IS JUST RECOGNIZING THAT, IN THESE CASES, WHEN THE REQUESTS FOR PRODUCTION ARE MADE TO THE EMPLOYER, THAT THE EMPLOYER CAN SIMPLY COMEFOARD AND ASSERT THOSE RIGHTS AND THEN THE BALANCING TEST IS THE SAME, THE BALANCING TEST THAT SHOULD OR IS UTILIZED WHEN PRIVACY RIGHTS ARE CONCERNED, SHOULD BE NO DIFFERENT WHEN AN EMPLOYER IS INVOLVED THAN IN ANY OTHER INSTANCE.

LET ME FOLLOW-UP. I AM HAVING A CONCEPTUAL PROBLEM AS JUDGE LEWIS IS HAVING, ABOUT WHAT THIS CONCEPT OF STANDING MEANS. ROUTINELY, WHEN PATIENT RECORDS ARE REQUESTED IN DISCOVERY, JUDGES MAKE DECISIONS, SOMETIMES WITH THE AGREEMENT OF THE LAWYERS AND SOMETIMES NOT. YOU ARE GOING TO REDACT THE NAMES OF THE PATIENTS, BECAUSE REDON'T NEED TO DIVULGE THEIR NAMES. ARE WE GOING TO REDACT THEIR SOCIAL SECURITY NUMBER OR SOMETHING ELSE. THAT IS DONE AND HAS BEEN DONE, AS ALL THESE CASES SHOW, WITHOUT REGARD TO SAYING, WELL, THEY DIDN'T HAVE STANDING TO ASSERT THE PATIENT'S RIGHTS OF PRIVACY, SO WHAT IS THIS CONCEPT? IS IT SOMEHOW THAT, IF THE EMPLOYER DOESN'T HAVE STANDING, THE ISSUE OF WHETHER SOMETHING IS CONFIDENTIAL AND SHOULDN'T BE DIVULGED WON'T BE ABLE TO BE LITIGATED? IS THAT WHAT YOU ARE CONCERNED

WITH?

WELL, THE CONCERN, YOUR HONOR IN THIS CASE, IS THAT IS EXACTLY WHAT HAPPENED. WELL, IN THE TRIAL COURT, THE DOCUMENTS WERE ORDERED TO BE PRODUCED. OUR CLIENT WAS LEFT IN THE POSITION OF EITHER PRODUCING THOSE DOCUMENTS OR FACING, AND REVEALING PRIVACY RIGHTS OR FACING CONSENT -- CONTEMPT OF COURT.

I GUESS THAT GETS TO THE ISSUE OF MERITS IS THEY ARE YOUR PERSONNEL RECORDS, SO AS FAR AS WHETHER THEY HAVE BEEN DISCIPLINED OR WHATEVER, YOU COULD TAKE PRIVACY TOO FAR, BY REALLY SAYING THAT WE ARE NOT GOING TO PRODUCE THIS, BECAUSE THIS IS OUR EMPLOYEES HAVE THIS RIGHT OF PRIVACY, AND SO WE ARE SORT OF MIXING UP TWO THINGS, WHICH IS THE EXTENT TO WHICH SOMETHING IS CONFIDENTIAL, AND WHETHER YOU CAN ASSERT THAT THEY YOU KNOW, THAT THEY WOULD WANT THIS TO BE PROTECTED. I MEAN, EVEN IF THEY DID OR DIDN'T, YOU KNOW, IT MAY HAVE TO BE PRODUCED.

RIGHT, YOUR HONOR. WHAT WE ARE ASKING THE COURT, TODAY, IS LET THE EMPLOYERS ASSERT THAT RIGHT, AND PERHAPS THE COURT'S CONCERN OR CONFUSION IS WHY THIS IS EVN AN ISSUE. I MEAN, THIS IS A FOREGONE CONCLUSION IN EVERY OTHER DISTRICT COURT OF THIS STATE.

WELL, ISN'T ONE OF THE CONCERNS, THOUGH, THAT, IN THE OTHER WAY THAT IS WE HAVE DEALT WITH THIS UP TO THIS POINT, IT HAS BEEN OBVIOUS THAT THERE IS A WIDE RANGE OF WAYS TO DEAL WITH THIS, AND THAT USUALLY, THAT WIDE RANGE DOES NOT INCLUDE THE ABSOLUTE NONDISCLOSURE. THAT IS THAT, OF SAYING, BECAUSE OF A CERTAIN PRIVACY INTEREST, OR WHATEVER, OF SOMEBODY ELSE, THAT NONE OF THE INFORMATION THAT THE OTHER SIDE IS ASKING FOR, CAN BE DISCLOSED. IN OTHER WORDS, THAT THERE IS AN ABSOLUTE BARRIER OR WALL HERE, AND SO, IN REALLY FOLLOWING UP ON THE TWO QUESTIONS THAT HAVE ALREADY BEEN ASKED OF YOU HERE, LET ME ASK THAT QUESTION OF WHY SHOULDN'T THIS AREA BE TREATED PRETTY MUCH THE SAME, AND THAT IS THAT THE, WE SHOULD ENCOURAGE PROVIDING OF INFORMATION TO THE MAXIMUM EXTENT, WHILE TAKING INTO CONSIDERATION ANY SENSITIVE ISSUES OF PRIVACY. CONFIDENTIALITY. INTHWS, HAT THAT SHOULD BE SORT OF GOING INTO IT, THE RULE THAT APPLIES.

WHAT, YOUR HONOR, AND AGAIN THAT GOES TO THE SUBSTANTIVE ISSUE IN THE CASE WHICH MY COLLEAGUE WILL ADDRESS, BUT WE ARE NOT ASKING FOR THE APPLICATION OF A RULE THAT IS DIFFERENT THAN THE RULE HAS EVER BEEN APPLIED. AS IT WAS SET FORTH IN RASMUSSEN AND AS IT WAS SET FORTH IN WIN FIELD. WE ARE STATING ON THE FIRST ISSUE, TO TELL THE RECOGNIZE -- TO RECOGNIZE, AS THE EMPLOYER OR OTHERWISE, THAT RECOGNIZING THAT RIGHT, THAT THAT THEN CAN CERTAINLY BE APPLIED. WE ARE NOT GOING TO THEN SAY WE ARE NOT GOING TO LET THESE DOCUMENTS OUT, NO MATTER WHAT, BECAUSE THEY ARE OUR DOCUMENTS --

DID THE EMPLOYER COME IN, IN THAT INSTANCE, AND SAY HERE IS A PROPOSED SOLUTION THAT WILL ACCOMMODATE EVERYBODY'S INTEREST?

AGAIN THAT GOES TO SUBSTANTIVE ISSUES.

I UNDERSTAND.

WHICH, AGAIN, IF THE COURT --

YOU AREAYING THAT CLEARLY THIS SHOULD BE AN ISSUE ADDRESS ADDRESSED AND NOT JUST ADDRESSED ON THE BASIS THAT, NO, YOU DON'T HAVE ANY RIGHT TO RAISE THIS CONCERN AT ALL.

THAT IS THE PRELIMINARY ISSUE. THAT, TO ME, IS A VERY SIMPLE ISSUE. IS AN ISSUE THAT I

THINK THIS COURT CAN RESOLVE VERY QUICKLY, BY SIMPLY PROVING OF THE FIFTH DISTRICT'S DECISION IN DEUTSCHE, WHERE THE FIFTH DISTRICT DIDN'T AGREED, AS IN DOUGLAS, THAT THE EMPLOYER DIDN'T HAVE THAT RIGHT, AND THEN THE EMPLOYER CAN COME IN AND ASSERT THOSE THIRD PARTY RIGHTS. MR. CHIEF JUSTICE

JUSTICE QUINCE HAD A QUESTION.

IN THIS CASE THE DISCOVERY WAS MADE. CORRECT?

CORRECT.

AND WHAT HAPPENED AT THAT POINT? DID THE EMPLOYER FILE AN OBJECTION?

IN THS PARICULAR CASE,THE HE EMPLOYER FILED ANOBJECTION. AGAIN, LET ME GO, JUST VERY BRIEFLY INTO THE CIRCUMSTANCES OF THIS CASE. THE ETEADA REQUEST FOR PRODUCTION OF THE DOCUMENTS OF EVERY SINGLE EMPLOYEE WHO HAD EVER CED RTHE LATE MRS. SHELLY, WHOS A FORMER EIDEN OF THE FACILITY. THE EMPLOYER OBJECTED ONTE SI -- > WAIT. LET'S GET THE EQUESTORRECT. T WNT ERY RECORD.

WELL, YOUR HONOR, TO BEGIN GIN THT WAS. IT WAS AY AND ALL DOCUMENTATION MAINTAINED BY THE FACILITY, INCLUDING BUT NOT LIMITED TO SEVEN CATEGORIES OF DOCUMENTS. LATER O, THE REQUEST WAS NARROWED TO THOSE SEVEN CATEGORIES.

THAT IS WHAT THIS CASE IS ABOUT, THE SEVEN NARROWED, IS IT NOT? IN ANSWERING, PLEASE LET'S STICK WITH WHAT WE HAVE.

THEN IT WAS IN ERROR TO THOSE SEVEN CATEGORIES. OUR CLIENT OBJECTED TO ON THE BASIS THAT, WITHIN THOSE SEVEN CATEGORIES OF DOCENTS WERE SOME OF THE MOST PERSONAL AND INTIMATE DETAILS OF THEIR EMPLOYEES' LIVES AND THEN THERE WAS THE QUESTION OF WHETHER IT VIOLATED THOSE EMPLOYEES' PRIVACY RIGHTS.

SO IN ANSWER TO YOUR QUESTION YOUR CLIENT WAS ALLOWED TO COME IN AND SAY THIS IS REALLY TOO BROAD AND SO YOU NEED TO PARE IT DOWN, AND WE GOT TO THIS NEW CATEGORY.

TO MAKE IT CLEAR, IT WASN'T THAT IT WAS TOO BROAD. THERE WAS NO SHOWING THAT THESE DOCUMENTS WERE RELEVANT IN THE FIRST INSTANCE, AND THEN EVEN IF THEY WRE RELEVANTTHATAT COMPELLING INTEREST STDD DIDN'T ARRANT THSE DOCUMES, SO, YES, THAT ARGUMENT WAS MADE. ACHIEVE. MR. CHIEF JUSTICE

IF YOU ARE GOING TO SPLIT YOUR TIME, PLEASE BE COGNITIVE.

AGAIN, I AM GETTING INTO THESE ISSUES AND IT MAY BE FOR MY COLLEAGUE TO ADDRESS THOSE ISSUES. I WANTED TO ADDRESS THIS COURT THAT THAT SIMPLY WHAT HAPPENED. WHEN WE WENT UP TO THE FIRST DISTRICT ON THE WRIT OF CERTIORARI. THE FIRST DISTRICT DID NOT DECIDE WHETHER OR NOT THE DOCUMENTS SHOULD HAVE BEEN PRODUCED AND THAT IT WAS ERROR. THE COURT SIMPLY SAID WE DIDN'T HAVE STANDING TO ASSERT THIS RIGHT, SO WE ARE ASKING THIS COURT TO SIMPLY RESOLVE THIS CONFLICT AND PROMOTE HARMONY AND UNIT IN THE LAW AND RECOGNIZE THE INITIAL MATTER THAT THE CLIENT CAN COME IN -- THE EMPLOYER CAN COME IN AND ASSERT THE CLIENTS' PRIVACY RIGHTS AND THEN IT CAN ENGE IN E BALANCING OF SUBSTANTIVE ISSUES IN THE CASE. I WILL DEFER TO MY COLLEAGUE, IF THE COURTHASNO URR QUESTIONS. > MAY IT LEASE TCOURT. MY NAME IS DONNAFUD ANI AM HERE TO ADDRESS THAT SECOND ISSUE, AND THAT IS THE TRIAL COURT'S ERROR IN VIOLATING THE FUNDANTAL RIGHTS OF 80 INNOCENT, NONPARTY WORKERS OF THE STATE OF FLODA. AND IT IS OUR --

WHY SHOULD WE ADDRESS THIS? THE CASE HAS ALREADY BEEN SETTLED. WE DON'T KNOW WHAT THE INFORMATION IS, BECAUSE WE HAVE CATEGORIES BUT WE DON'T KNOW WHAT THE INFRMATION IS, SO WHY SHOULD WE EVEN GO TO THE NEXT STEP?

WE SHOULD ADDRESS THIS ISSUE BECAUSE IT IS A MATTER OF GREAT PUBLIC IMPORTANCE, YOUR HONOR. IT GOES TO THE FUNDAMENTAL CONSTITUTIONAL RIGHTS OF THE WORKERS OF OUR STATE, FIRST AND FOREMOST, AND SECONDLY WE SHOULD ADDRESS IT, BECAUSE THIS IS A MATTER THAT IS GOING TO CONTINUE TO RECUR IN OUR STATE. IT IS NO SECRET THAT LITIGATION AGAINST NURSING HOMES AND ASSISTED-LIVING FACILITIES IS RUNNING RAMPANT IN THIS STATE.

HOW SHOULD WE CONSIDER THE STATEMENTS THAT WERE IN THE RECORD, THE CONCERN THAT, WELL, THE NURSING HOME IS GOING, MAY USE SOME OF THIS INFORMATION TO IMPEACH SOME OF OUR WITNESSES, AND THE RESPONSE IF WE ARE GOING TO DO THAT, THEN WE ARE GOING TO PROVIDE IT. HOW CAN A NURSING HOME MAKE THAT DECISION? IT SEEMS THAT WHAT YOU ARE REALLY LOOKING FOR HERE IS A BROAD BLANKET EXCLUSION AND THAT IS REALLY THE BOTTOM LINE. WE WILL DISCLOSE IT IF WE WANT AND IF IT SERVES OUR INTEREST, BUT IF IT DOESN'T SERVE OUR INTEREST, THEN WE WANT TO BLOCK EVERYTHING.

FIRST AND FOREMOST, WE ARE NOT SEEKING A BLANKET EXCLUSION. WE ARE SIMPLY ASKING THAT THE TRIAL COURTS BE REQUIRED TO FOLLOW THE CONSTITUTION, BEFORE SUCH SENSITIVE INFORMATION IS RELEASED, AND AS TO THE ISSUE OF --

SENSITIVE INFORMATION RELEASED IN THIS CASE?

I WILL GIVE THE COURT AN EXAMPLE. IN THESE PERSONNEL FILES THERE ARE OFTEN REPRIMANDS.

THEY DIDN'T ASK FOR THE PERSONNEL FILES. THEY MADE THE REPRESENTATION THAT MUCH OF THIS COULD BE FOUND IN A PERSONNEL FILE, BUT THERE IS CATEGORIES, SO WITHIN THE CATEGORIES, WOULD YOU LIMIT YOURSELF TO THE CATEGORIES THAT WE ARE TALKING ABOUT.

YES, YOUR HONOR, AND OF THE SEVEN CATEGORIES, ONE OF THE ATERIESWAS REPRIMANDS OR COUNSELING REPORTS ABOUT THIS EMPLOYEE, AND TAKE THE EXAMPLE OF AN EMPLOYEE WHO HAS WORKED FOR AN EMPLOYER FOR THREE YEARS. SUDDENLY THEY HAVE DECIDED THAT THEY NEED TO ASK FOR A LOT OF TIME OFF AND THEY ARE NOT AT WORK AS MUCH AS THEY NORMALLY WORK. THEY GET A REPRIMAND IN THEIR% NIL FILE AND GET CALLED INTO THEIR BOSS'S OFFICE. WITH THE DOOR CLOSED, THEY CONFIDE TO THEIR BOSS THAT THEY HAVE JUST FOUND OUT THIRTEEN AGED DAUGHTER HAS A DRUG PROBLEM. THEY HAVE BEEN GOING TO COUNSELING. THEY HAVE BEEN DEALING WITH A SERIOUS FAMILY HISTORY --

ISN'T THAT SOMETHING THAT IS PART OF THE BALANCING PROCESS AND THOSE ARE THING THAT IS YOU REDACT FROM THESE KINDS OF RECORDS AND YOU DON'T PRODUCE THEM.

THAT IS CORRECT BUT YOU DON'T EVEN GET TO THE REDACTION QUESTION, YOUR HONOR, UNTIL THE PLAINTIFF DEMONSTRATES RELEVANCY AND NECESSITY, AND THAT WAS NOT DONE BY THE ESTATE AT THE LOWER COURT.

HOW DO YOU GET, I MEAN, UNDER YOUR VIEW OF DISCOVERY, AND MAYBE IT IS A FOLLOW-UP OF JUSTICE LEWIS, IF THEY ARE, IF THIS IS AN ISSUE OF WHETHER THE NURSING HOME PERSONNEL PROPERLY PERFORMED THEIR OBLIGATIONS, NOW YOU MIGHT SAY IT IS OVERLY BROAD IF THERE ARE TOO MANY, YOU KNOW, THOSE ARE TYPICAL DISCOVERY ISSUES, BUT AS TO WHETHER OR NOT IT IS GOING TO LEAD TO DISCOVERABLE INFORMATION, IF IT IS, AS LONG AS IT IS NOT OVERLY BROAD, WHICH IS NOT WHAT WE ARE HERE ON. WE ARE HERE ON WHETHER IT MIGHT BE VIOLATETIVE OF SOMEONE'S PRIVACY INTEREST, IF YOU HAVE GOT SOMETHING IN THE

PERSONNEL FILE THAT IS A BAD, SENSITIVE NATURE, THEN THAT IS SOMETHING THAT YOU CAN SPECIFICALLY MAKE AN OBJECTION TO. THE JUDGE LOOKS AT IT IN CAMERA, AND IF IT WON'T LEAD TO THE DISCOVERY OF ADMISSIBLE EVIDENCE THEN IF THE NEED FOR IT IS NOT OUTWEIGHED BY ANY PRIVACY INTEREST, THE JUDGE, THEN, MAKES THAT DECISION, AND IT IS NOT PRODUCED, BUT YOU KNOW, I THINK THE PROBLEM IS, WHO GETS TO MAKE THAT DECISION, IN A CASE WHERE WE HAVE ENCOURAGED, IN THE STATE OF FLORIDA, THE BROADEST TYPE OF DISCOVERY? NOT A NARROW TYPE OF DISCOVERY.

YOUR HONOR, FIRST I WOULD LIKE TO POINT OUT THAT WHAT HAPPENED IN THE LOWER COURT IS SOMETHING THAT I HAVE SEEN HAPPEN IN THE PAST FIVE YEARS OF ING OST EXCLUSIVELY THIS TYPE OF LITIGATION, AND THAT IS THAT THE ESTATE WAS RELAYED TO -- ALLOWED TO RELY UPON VAGUE, CONCLUSORY, VOID ALLEGATIONS IN THEIR COMPLAINT OF INAPPROPRIATE CARE COMMITTED BY AN UNIDENTIFIED INDIVIDUAL AT AN UNIDENTIFIED TIME, AS AN EXCUSE TO INVADE THE FILES OF THESE 80 WORKERS. THEY DIDN'T EVEN MEET THE THRESHOLD ISSUE OF PROVING RELEVANCE.

WHAT WOULD SOMEONE ALLEGE? YOU HAVE GOT AN ELDERLY PERSON, THE ALLEGATIONS, AS I UNDERSTAND I READ THE COMPLAINT, THAT HAD A LEG CAUGHT OR A FOOT CAUGHT AND THAT IT REMAINED UNTREATED FOR SIX-TO-EIGHT HOURS AND HAD TO HOSPITALIZED AND AMPUTATION AND DIED. NOW, WHERE ARE THE FACTS? I MEAN, THE FACTS, THEMSELVES, SUGGEST SOMETHING, SO WHAT IS IT THAT THEY MUST ALLEGE, BEFORE THEY CAN DETERMINE THAT THEY DIDN'T HAVE ANYBODY ON DUTY THAT NIGHT OR THE PEOPLE THEY HAD ON DUTY THAT NIGHT HAD BEEN REPRIMANDED BECAUSE THEY DID NOT RESPOND TO PATIENTS' CARES OR CALLS FOR HELP, OR THAT THE PEOPLE ON DUTY THAT NIGHT HAD HEARING PROBLEMS AND THEY COULD NOT HEAR CALLS FOR HELP? I REALLY DON'T UNDERSTAND WHERE YOU ARE HEADED WITH, THIS BECAUSE I AM PERCEIVING YOUR ARGUMENT AS A BLANKET. YOU DON'T WANT TO DISCLOSE ANY OF THIS INFORMATION AND THAT IS WHERE WE ARE HEADED, AND YOU HAVE GOT TO TELL ME EXACTLY EVERYTHING THAT HAPPENED FROM 9 P.M. TO 10 P.M., BEFORE YOU CAN GET A SINGLE DOCUMENT.

YOUR HONOR, YOU HAVE HIT THE ISSUE RIGHT ON THE HEAD, AND THAT IS THAT, IN THIS CASE THE TRIAL COURT ORDERED PRODUCTION OF INFORMATION ON 80 PEOPLE. ANYBODY WHO CARED FOR MRS. SHELLY DURING A YEAR AND-A-HALF, WHEN THE ONLY SPECIFIC FACTS PLED WERE THAT INCIDENT OF THE NIGHT WHERE SHE ALLEGEDLY GOT HER LEG STUCK. WE ARE CONCEDING THAT, IF THE PLAINTIFF HAD NARROWED THEIR FOCUS THROUGH PROPER DISCOVERY AND GOTTEN THE NAMES OF THOSE TWO EMPLOYEES, THEN, YES, THE TRIAL COURT SHOULD HAVE LOOKED --

BUT WEREN'T THERE OTHER ALLEGATIONS OF NEGLIGENCE DURING THE TIME, THE WHOLE TIME SHE WAS THERE, NOT JUST THAT ONE INCIDENT? I AM SURE THAT WAS PLED, BUT WASN'T THERE OTHER ALLEGATIONS OF NEGLIGENCE ON HALF,Y TE NURSING HOME?

IF WE LOOK AT THE COMPLAINT AND WE LOOK AT WHAT WAS PRESENTED TO THE TRIAL COURT ON THIS ISSUE, THE ONLYECIC FACT THAT WASLLEGED WAS THE INCIDENT WITH MRS. SHELLY GETTING STUCK IN HER BED. THE OTHER ALLEGATIONS WERE BOILERPLATE ALLEGATIONS FROM THE COMPLAINT, THAT WERE BEING USED AS ACTION CUES TO CONDUCT A FISHING EBBS PEDITION.

THIS IS NOT FOR EVERY EMPLOYEE OF THE FACILITY. IT IS THOSE WHO WERE INVOLVED IN THE CARE OF THE PERSON WHOS DECEASED, AND YOUR CARE OF THIS PERSON HAS REPRODUCED THIS RESULT. CERTAIN YOU HAVE A VERY COMPELLING ARGUMENT, HAD IT BEEN EVERYBODY THAT HAS EVER WORKED THERE IN THE HISTORY OF THE NURSING HOME, BUT I AM REALLY HAVING A DIFFICULT TIME. I AM NOT REALLY SURE THAT THAT IS WHAT WE ARE HERE ON. THAT IS A DISCOVERY QUESTION AND ABUSE OF DISCRETION AND THAT IS WHAT THE COURTS DECIDE. THAT

DOESN'T MO ME TO BE ELEVATED TO THE KIND OF CONSTITUTIONAL CONFLICT THAT WE ARE TALKING ABOUT HERE.

BUT WHAT WE ARE SAYINS THAT, AGAIN, JUST BECAUSE THESE 80 EMPLOYEES HAPPENED TO WORK AT THIS FACILITY AND PROVIDE SOME CARE TO MRS. SHELLY, AND LET'S DEFINE WHAT SOME CARE COULD BE. THAT COULD MEAN THEY PROVIDED HER WITH A GLASS OF WATER ON A SINGLE DAY OR THEY HELPED HER GET INTO HER NIGHTCLOTHES ON JUST ONE EVENING.

BUT, AGAIN, YOU ARE TALKING ABOUT JUST CLASSIC DISCOVERY ISSUES AND OBJECTIONS. YOU ARE NOT TALKING ABOUT THE ISSUE THAT WE ARE HERE ABOUT, SOON BY ADDRESS -- BY DRESSING THISP N THIS CONSTITUTIONAL PRIVACY CLAIM, TO BE ABLE TO STAND IN THE SHOES OF THE INDIVIDUAL EMPLOYEES, IT APPEARS THAT WHAT YOU WANT US TO DO IS TO VEST, IN THE EMPLOYER, THE SAME CONSTITUTIONAL RIGHTS THAT, AN EMPLOYEE WOULD HAVE, ON A TRUST-ME BASIS, AND THAT IS THAT WE HAVE THIS ABSOLUTE RIGHT NOT TO DISCLOSE THESE MATERIALS, JUST AS THE EMPLOYEE WOULD HAVE THIS ABSOLUTE RIGHT, AND WE DON'T HAVE TO SHOW THOSE TO A JUDGE OR ANYBODY ELSE, IN ORDER TO VALIDATE, YOU KNOW, WHETHER OUR OBJECTION IS LEGITIMATE OR NOT, A AS OPPOSED TO APPLYING THESE RULES THAT WE HAVE DEVELOPED IN OTHER SITIONS, E IN A HOSPITAL RECORD OR IN A DOCTOR'S OFFICE FILES, AND IN MATTERS LIKE THAT, THOSE THINGS HAVE BEEN WORKED OUT BY A DISCLOSURE, BUT THEN IF THERE IS A CONFIDENTIALITY ISSUE, THAT THEY CAN BE DEALT WITH BY THE JUDGEANT INFORMATION, YOU KNOW, BEING DISCLOSED, BUT THEN THE INFORMATION STILL BEING KEPT CONFIDENTIAL?

WE ARE NOT ASKING FOR A BLANKET EXCLUSION HERE. WE ARE SIMPLY ASKING THAT THE TRIAL COURTS BE REMINDED THAT THEY MUST FOLLOW THE CONSTITUTION, AND THEY ARE NOT DOING THAT. THEY DIDN'T EVEN MAKE THE ESTATE PROVE RELEVANCY, LET ALONE WHEN YOU GET TO THE COMPELLING STATE INTEREST STANDARD, WE MUST PROVE NECESSITY. MR. CHIEF JUSTICE

YOU ARE GETTING INTO YOUR REBUTTAL.

THANK YOU, YOUR HONOR. MR. CHIEF JUSTICE

MR. CONNOR.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. I AM KEN CONNOR ON BEHALF OF THE ESTATE, JOINED BY MY COLLEAGUE, MR. GORDON, WHO MR. GOURD AND, WHO AT ENED THE HEARING WITH ME ON THE KEY POINT. FIRST OF ALL, WITH ASSERTION OF A PRIVACY RIGHT HERE, JUDGE CLARK MADE A SPECIFIC FINDING THAT THE CLIENT WAS NOT SEEKING CONFIDENTIAL AND PRIVATE OR SENSITIVE INFORMATION AND THAT THE CLAIMANT WAS NOT SEEKING PERSONNEL FILES. YOUR HONOR, JUSTICE LEWIS POINTED OUT, THERE WERE SEVEN NARROW CATEGORIES. MR. GORT ANY MADE THE CASE -- MR. GORTNEY MADE THE CASE IN TERMS OF NECESSITY, FOR THE NEED ON THE TRANSCRIPT OF THE HEARING --

BUT LET'S PUT FIRST THINGS FIRST. HOW ABOUT ADDRESSING THE STANDING ISSUE? WHAT ABOUT JUDGE WOLF'S COMMENT, THERE, IN THE FIRST DISTRICT? ARE WE GOING TO MAKE ALL THESE EMPLOYEES HIRE A LAWYER AND COME IN THERE?

THAT IS A VERY GOOD QUESTION, YOUR HONOR, AND I WOULD TAKE, RESPECTFULLY, SHARP EXCEPTION TO THE OBSERVATION THAT JUDGE WOLF MADE IN HIS FOOTNOTE, FROM WHICH HE CONCLUDED THAT AN EMPLOYER OUGHT TO BE ABLE TO ASSERT STANDING. FOR EXAMPLE, JUDGE WOLF STATED THAT FOOTNOTE ONE, ALTERRA AND ITS EMPLOYEES, HAVE A SUBSTANTIAL RELATIONSHIP AND CONSISTENT INTERESTS, WHICH FAVOR THE GRANTING OF A THIRD PARTY STANDING. NOW, THAT, YOUR HONORWE FIND IN THESE CASES, IS SIMPLY NOT THE CASE. MANY, MANY TILES, FOR EXAMPLE, WE HAVE FORMER EMPLOYEES WHO HAVE BEEN FIRED BY THE FACILITY OVER CARE ISSUES. WE HAVE EMPLOYEES WHO HAVE RESIGNED FROM THE FACILITY

OVER CARE ISSUES. MS. FUDGE HAS ARGUED, IN EFFECT, FOR A RULE SO BROAD --

BUT WE ARE ASKING, BUT WHAT THIS CASE BOILED DOWN TO WAS ASKING FOR EMPLOYEES' PERSONNEL RECORDS, AND WHAT I AM CONCERNED ABOUT IS HOW THOSE EMPLOYEES WHO DO HAVE A LEGITIMATE CONCERN ABOUT THEIR RIGHT TO PRIVACY.

THEY ARE PERMITTED TO RAISE THOSE, JUST AS WAS THE CASE IN THE DOUGLAS CASE, WHERE THE NURSES MOVED TO INTERVENE IN THE CASE.

RIGHT. BUT PROCEDURALLY, THAT SEEMS, TO ME, TO BE AN AWFUL BURDEN TEN TO PUT ON THESE HOURLY WAGE EMPLOYEES THERE, IN THESE NURSING HOMES.

IT IS CUMBERSOME. I WILL ACKNOWLEDGE TO THE COURT, BUT THE RULE THAT THE PETITIONER ADVOCATES IN THIS CASE, IS SO BROAD, IT WOULD PERMIT A LONG-TERM CARE FACILITY TO HIDE BEHIND ITS WRONGDOING AND SHIELD FROM DISCLOSURE, BY THE MERE IN KAHNTATION OF THE WORDS "EMPLOYEES' CONSTITUTIONAL RIGHT TO PRIVACY". A RESIGNATION LETTER, FOR EXAMPLE, FROM A DOM WHO SAID I VALUE MY LICENSE MORE THAN MY EMPLOYMENT AT THIS FACILITY, AND IF THE FACILITY CONTINUES TO OPERATE IN THIS MATTER, MY LICENSE WILL BE IN JEOPARDY OR A VICE PRESIDENT WHO HAS WRITTEN THE CORPORATION AND PLEADED AND POINT THED OUT PROBLEMS IN THIS -- AND POINTED OUT PROBLEMS IN HIS FACILITY.

WOULD U AE THTHEE EMPEES HAVE A CONSTITUTIONAL RIGHT TO PRIVACY?

NOT IN THE MATTERS WHICH WE REQUESTED TO BE PRODUCED. FOR EXAMPLEOUHONOR, ONE OF THE, THE VERY FIRSTING ENUMERATED IN OUR REQUEST FOR PRODUCTION WAS AN EMPLOYMT APPLICATION NOW OF INTEREST, I THINK, THE PETITIONER FILED THE EMPYMENT APPLICATION AS APPENDIX IN THEIR BRIEF, AND AT APPENDIX G, FOR EXAMPLE, HERE IS THE LANGUAGE THAT WAS SIGNED OFF ON, BY THE EMPLOYEE. I GIVE THE EMPLOYER THE RIGHT TO CONTACT ANDOBTAIN INFORMATION FROM ALL REFERENCES, EMPLOS, EDUCATIONALS, INSTITUTIONS, AND TO OTHERWISE VERIFY THE ACCURACY OF THE INFORMATION CONTAINED IN THE APPLICATION. NOW, SINCE WE HAVE GOT EFERENCES, EMPLOYES, EDUCATIONAL INSTITUTIONS WHO HAVE IS INFORMATION, AND THEY HAVE AUTHORIZED THE EMPLOYER TO CONTACT THOSE, THEY CAN SCARSLY MAINTAIN THAT THEY HAVEA -- SCARCY MAIN THANK BE -- MAINTAIN THAT THEY HAVE A RIGHT TO REPRESENTATION. THAT IS A CONCLUSION.

JUST SO WE KNOW WHAT WE ARE DECIDING OR T DECIDING, LETS ASSUME AT THE HYPOTHETIAL THAT, IN THE EMPLOYMENT FILE IS SOME VERY SENSITIVE INFORMATION ABOUT THE PERSON'S FAMILY MEMBERS.

RIGHT.

AND, DOES THE EMPLOYER HAVE THE RIGHT TO GO AHEAD AND PUBLISH THAT INFORMATION IN THE TALLAHASSEE DEMOCRAT?

NO, MA'AM. AND THE, AND WE DIDN'T REQUEST THAT INFORMATION.

BUT WHEN WE TALK ABOUT STANDING.

NO, MA'AM, WOULD NOT.

SO HOW, IF, IN THE SITUATION THAT THERE IS THAT TYPE OF SENSITIVE INFORMATION, WITHIN A PERSONNEL FILE, AND LET'S ASSUME IT IS NOT, THE NURSING HOME, BUT AN EMPLOYER, REALLY, DOESN'T CARE ONE WAY OR ANOTHER, AND THEY ARE GOING TO GO AHEAD AND PRODUCE THAT INFORMATION.

WELL, YOUR HONOR --

HOW DOES THAT WORK?

THE RULE CLEARLY PROVIDES FOR THIS, AND THIS HAPPENS EVERYDAY. THE RULE OF CIVIL PROCEDURE, 1.280, EXPSSLY SAYS,T PAGRAPH 5,TH RPECT TO THE INVOKEATION OF THE PRIVILEGE THAT IT IS INCUMBENT ON THE PARTY TO IDENTIFY, WIH SPIFITY, IN AANNR TT DOESNT ATE EPRLEGE UT WHICHIVESHE PARTIEN OPTUNITY TO ADDRESS THE APPLICABILITY.

SO THE EMPLOYER REALLY DOES HAVE SOME OBLIGATION, IN GOOD FAITH, TO MAKE SURE THAT, WHEN THE EMPLOYMENT FILES, FOR EXAMPLE, JUST LIKE IN A, CASES INVOLVING PATIENT RECORDS ARE BEING REQUESTED, THAT THEY JUST, IF IT IS A CASE WHERE, SAY, THERE IS NOTHING IN THERE AND THEY GO WE DON'T CARE, THEY STILL, THEY DON'T CARE, BECAUSE IT DOESN'T HURT THEM IN THEIR LAWSUIT, IN THEIR DEFENSE. THEY, STILL, HAVE AN OBLIGATION, DON'T THEY, TO NOT PRODUCE THINGS THAT WOULD BE PRIVATE INNATE?

IF THEY SEEK TO SHIELD IT FROM DISCLOSURE, THEY MOST CERTAINLY DO, NUMBER ONE. NUMBER TWO --

BUT DON'T THEY HAVE AN OBLIGATION, AND THAT IS REALLY, I THINK, WHETHER WE GET BACK TO WHETHER THIS IS CALLED STANDING OR NOT. IT IS NOT AN EMPLOYER, JUST BECAUSE IT IS IN THEIR FILES, DOESN'T MEAN THAT THE EMPLOYER --

IF I WERE REPRESENTING AN EMPLOYEE, AND I AM NOT, I WOULD MAINTAIN THE EMPLOYER DOES HAVE A CERTAIN OBLIGATION, AND THE OBLIGATION WOULD INCLUDE --

IF YOU ARE REPRESENTING THE EMPLOYER.

NO. YES, MA'AM. NO. IF I AM REPRESENTING THE EMPLOYEE.

EMPLOYEE. OKAY.

I WOULD SAY THE EMPLOYER WOULD HAVE AN OBLIGATION, AND WHAT WOULD IT BE UNDER THE RUSE? IT WOULD BE WHERE A PRIVILEGE IS BEING ASSERTED, TO IDENTIFY WITH SPECIFICITY, IN A MANNER SO THAT THE COURT CAN EVALUATE WHETHER OR NOT THE PRIVRIDGE APPLIES. NOW, IN THIS CASE, FOR EXAMPLE THE DEFENDANT DIDN'T DO. THAT.

BUT THAT IS A PLEADING PROBLEM. AS FAR AS CALLING IT STANDING, THEY HAD, IT IS APPROPRIATE FOR AN EMPLOYER TO RAISE AN ISSUE THAT THIS IS INFORMATION THAT, IF PRODUCED, WOULD VIOLATE THEIR EMPLOYEES' PRIVACY RIGHTS. IT MAY BE THE EXPLOIT -- THE EMPLOYMENT, NOW WE GETTO THE APPLICATION OF IT, BECAUSE THE APPLICATION ISN'T PROTECTED OR THIS IS WAIVED, AND IT GOES INTO INFORMATION IN THE BALANCING TEST, AND I GUESS THIS GOES BACK TO JUSTICE LEWIS'S PRELIMINARY QUESTION. I AM NOT SURE IF YOU CALL IT STANDING, BUT IT IS IN THE FORMULA ON WHETHER A JUDGE IS GOING TO ALLOW THE PRODUCTION, AND THE EMPLOYER SHOULD HAVE THAT OBLIGATION.

I WOULD MAKE THIS OBSERVATION BECAUSE I WRESTLE WITH THIS VERY ISSUE ABOUT HOW DO YOU ADDRESS THE STANDING ISSUE, WITHOUT, ALSO, GETTING INTO THE APPROPRIATE OF THE UNDERLYING ORDER. AND HERE IS WHAT I HAVE CONCLUDED. FIRST OF ALL, THAT THE COURT MUST DETERMINE THAT THERE IS A LEGITIMATE PRIVACY INTEREST THAT HAS BEEN INVOKED AT ALL, AND IN THIS CASE, THE TRIAL COURT MADE A FINDING THAT PRIVATE AND SENSITIVE INFORMATION WAS NOT IMPLICATED HERE, THAT THE ENTIRE PERSONNEL FILE WAS NOT BEING ASKED FOR.

SO THEN THE STANDING IS A RED HERRING.

SECONDLY, I WOULD SUGGEST IT IS NOT A RED HERRING IN THIS RESPECT. IN DOUGLAS, THE COURT MADE THE OBSERVATION THAT THE HOSPITAL HAD NOT PROVEN, THAT IT HAD, ENTITLED TO STANDING, AND SAID -- ENTITLEMENT TO STANDING, AND SAID THAT A MERE ASSERTION OF AN EMPLOYER RELATIONSHIP ALONE WAS NOT ENOUGH. IN THE DEUTSCH CASE, WHERE THE EMPLR OF THE MANAGERIAL OFFICER OF THE CORPORATION HAD NO CARE. THE FIFTH DISTRICT COURT OF APPEAL SAID IT HAD THE AUTHORITY TO ASSERT THE EMPLOYEE'S INTEREST. IN MY JUDGMENT, THERE MAY WE WILL GO, THIS COURT MAY REQUIRE SOME SYMMETRY, FACIAL SYMMETRY OR CONSISTENTLY OF INTEREST, BECAUSE WE KNOW, WE KNOW THAT MANY, OUR CASES USUALLY MADE BY FORMER EMPLOYEES WHO WORKED AT THE FACILITY WHO ARE CRITICAL OF THE FACILITY'S CARE IN A GIVEN CASE, AND THESE EMPLOYEES MAY HAVE WRITTEN LETTERS RESIGNING, COMPLAINING OF CARE, THEY MAY HAVE WRITTEN LICENSING AGENCIES WHICH WERE INCLUDED IN THE PERSONNEL FILE, LETTERS COMPLAINING OF CARE. ETN HAVE WHISTLE BLOWERS.

BUT DOESN'T THAT BRING YOU SORT OF FULL CIRCLE, HERE, WITH HAVING INDIVIDUAL EMPLOYEES, HAVING TO COME IN AND SAY, WHETHEREYO OR DO NOT CARE T MSAT ARE N THEIR FILES?

YES. YOUR HONOR, I THINK THE EMPLOYEES HAVE THE RIGHT TO ASSERT IT. ND I THINK ONE MAY ARGUE THAT THE -- PARDON ME?

DID YOU SAY EMPLOYER?

EMPLOYEE HAS THE RIGHT TO ASSERT IT AND THE EMPLOYER MAY HAVE THE DUTY TO ASSERT IT. IN WHICH CASE, IT MUST GIVE THE TRIAL COURT A SPECIFIC HE ENUMERATION OF WHAT IS AT ISSUE, SO THE COURT CAN DETERMINE WHETHER A LEGITIMATE PRIVACY INTERESTS IMPLICATED AT ALL OR NOT.

WE REALLY --

CAN I ASK THIS QUESTION? E YOU INTERPRETING THE RST DISTRICT'S OPINION HERE AS PRECLUDING THE BALANCING THAT WENT ON IN RASMUSSEN?

NO, YOUR HONOR. I AM NOT AT ALL.

OKAY. I THINK THAT IS WHERE WE ARE HEADED.

I THINK THE FIRST DISTRICT SAID SIMPLY WAS THAT THE HOSPITAL IN THAT CASE, WE HAD NURSES WHO WERE INVOLVED IN THE CARE, AND WHERE YOU HAD NURSES WHO HAD INTERVENED THAT, THE HOSPITAL HADN'T PROVEN ITS ENTITLEMENT TO STANDING. NOW, IN THE CASE OF NURSES, WE ARE DEALING WITH CAREGIVERS, TYPICALLY LOWER ECHELON, IN TERMS OF THE HIERARCHY OR THE PECKING ORDER. IN DEUTSCHE, WE HAVE AN OFFICER HAD THE CORPORATION, AND SO FOINKS, IF YOU WERE TO -- FOR INSTANCE, IF YOU WERE TO GO BACK TO CASES WHERE YOU HAVE WEIGHED THE ABILITY OF PEOPLE TO INTERVIEW FORMER EMPLOYEES AND THE LIKE, YOU HAVE SAID, IN THE CASE OF FORMER EMPLOYEES, THERE IS ABSOLUTELY NO BAR. IN THE CASE OF MANAGEMENT EMPLOYEES, WHERE THERE IS A SYMMETRY OF INTEREST AND THE CONDUCT OF AN EMPLOYEE MAY BE THE CONDUCT OF THE CORPORATION, THEN THAT IS A DIFFERENT STORY, AND YOU MAY CHOOSE TO SAY THAT, IN TERMS OF AN AUTOMATIC STANDING POSITION, THAT, WHEN YOU HAVE A MANAGEMENT LEVEL EMPLOYEE WHOSE CONDUCT IS THE CONDUCT OF THE CORPORATION, THE NURSING HOME OR THE ASSISTED-LIVING FACILITY MAY HAVE AUTOMATIC STANDING TO INVOKE THAT RIGHT. BUT THAT WHERE YOU HAVE FORMER EMPLOYEES, FOR EXAMPLE, OR LOWER ECHELON EMPLOYEES, THE COURT MAY NOT, SHOULD NOT ASSUME, THE COURT SHOULD NOT ASSUME THAT THE INTERESTS OF THE EMPLOYER AND THE EMPLOYEE ARE THE SAME, BECAUSE VERY OFTEN, WHAT IS HAPPENING IS

THE LONG-TERM CARE FACILITY IS SHIELDING INFORMATION COMPLAINED IN THE PERSONNEL FILES THAT WERE VERY DAMAGING TO THE FACILITY.

WHAT YOU ARE REALLY SAYING IS THAT THIS IS, THAT YOUR, YOU ARE QUESTIONING THE GOOD FAITH OF THE NURSING HOME, THAT, WHEN THEY ARE REALLY ASSERTING THIS CONSTITUTIONAL RIGHT --

WITHOUT MORE.

WHAT THEY ARE REALLY DOING IS SAYING THIS IS STUFF THAT IS GOING TO BE HARMFUL TO US IN THE CASE, AND THAT IS WHY --

AND THEY CHOOSE TO HIDE BEHIND A PROTECTURAL ASSERTION OF THE EMPLOYEES' RIGHT TO PRIVACY.

IF, ON THE OTHER HAND, IF, IN FACT, THE NURSING HOME IS ACTING IN GOOD FAITH, LET'S ASSUME THAT AND THERE IS THE KIND OF INFORMATION THAT IS HYPOTHETICALLY DISCUSSED, SOMETHING ABOUT SOMEONE'S FAMILY THEN IT IS APPROPRIATE FOR THE EMPLOYER TO RAISE THAT, CORRECT?

I WOULD AGREE WITH THAT, AND THAT WAS NOT THE CASE HERE. IN FACT, MR. GORTNEY --

UNFORTUNATELY, BECAUSE THE WAY THIS COMES TO US, WE HAVE THIS BROAD ISSUE ABOUT WHETHER THERE IS STANDING TO RAISE PRIVACY RIGHTS.

RIGHT, AND I WOULD SAY, FIRST OF ALL, YOUR HONOR, AND I HAVE WRESTLED WITH THIS CONCEPTUALLY, MYSELF, AS I HAVE TRIED TO EVALUATE THE PRESENTATION. I THINK FIRST AND FOREMOST, ONE OF THE THINGS THAT THE COURT CAN DO IS EVALUATE WHETHER A PRIVACY INTEREST IS IMPLICATED OR NOT. IF THE NOT -- IF NOT, THE COURT NEEDED TO GO NO FURTHER AS TO WHETHER OR NOT THE EMPLOYER HAD STANDING TO ASSERT I. IN THIS CASE, JUDGE CLARK HAD MADE A SPECIFIC FINDING THAT NO CONFIDENTIAL OR SPECIFIC INFORMATIONATION WAS IMPLICATED.

BUT YOU DON'T DISAGREE THAT, IF PRIVACY IS INVOLVED, FOR EXAMPLE SOMEBODY'S SOCIAL SECURITY NUMBER OR, AGAIN, THE NAMES OF PATIENTS IN CASES, THAT WE HAVE NEVER DISCUSSED THIS, IN TERMS OF STANDING.

RIGHT. THAT'S RIGHT.

EVERYONE AGO GREASE IT IS REDACTED AND IT IS PRODUCED THEN OR IT IS LOOKED AT IN CAMERA, AND SO THIS SEEMS, TO ME, AN ARTIFICIAL CONCEPT THAT WE ARE BEING FORCED TO LOOK AT, WHICH YOU ARE SAYING IT WASN'T SPECIFIC ENOUGH OR IT WASN'T, THEY ARE SHIELDING THEMSELVES. BUT WE CAN'T LOOK --

THAT I THINK WAS CREATED, FRANKLY, BY A MISAPPREHENSION ON THE PART OF THE FIRST DISTRICT THAT ITS DECISION IN DOUGLAS CONFLICTED WITH THE FIFTH DISTRICT'S DECISION IN DEUTSCHE, AND I WOULD ASSERT RESPECTFULLY, THAT THERE IS NO CONFLICT.

BUT ISN'T THERE A DANGER IN THE POSTURE THE LAW IS IN RIGHT NOW, WITH THE FIRST DISTRICT'S DECISION, SAYING ABSOLUTELY NO STANDING, AND THE POSSIBILITY THAT THAT CAN BE MISINTERPRETED, SO THAT WHAT WE HAVE BEEN TALKING ABOUT HERE, AND THAT IS AND WHAT YOU CHARACTERIZE, PERHAPS, AS THE EMPLOYERS' OBLIGATION TO ASSERT THE RIGHTS OF THE EMPLOYEES, WHEN SOME OF THESE SENSITIVE ISSUES MIGHT COME UP, THAT THE HOLDING OF THE FIRST DISTRICT COULD BE MISCONSTRUED, TO NOT GIVE THE EMPLOYER, CERTAINLY NOT THE OBLIGATION BUT THE RIGHT TO COME IN AND RAISE ISSUES LIKE THIS, AND

THEREFORE TREAT THEM IN THE WAY THAT WE HAVE DESCRIBED IN OUR PREVIOUS, SO ISN'T THERE A DANGER THERE LEAVING THAT?

YES, YOUR HONOR. GIVEN THE WAY THAT THE FIRST DISTRICT FRAMED THE CERTIFIED QUESTION, THAT DANGER EXISTS. THE REALITY OF IT, IN MY JUDGMENT, IS THAT, IN THE, THAT THE DISTINGUISHING FEATURES BETWEEN DEUTSCHE AND DOUGLAS, IS THAT, IF DOUGLAS, IN DOUGLAS YOU HAD CAREGIVERS WHOSE CARE WAS AT ISSUE, WITH PERSONNEL FILES HAVE NOT BEEN -- HAVING BEEN REQUESTED, WHERE THE CAREGIVERS, THEMSELVES, HAD INTERVENED IN THE PROCEEDING TO ASSERT THEIR OWN PRIVACY INTERESTS, VERSUS IN DEUTSCHE, A MANAGING AGENT, VICE PRESIDENT OF OPERATIONS OF THE FACILITY HOVERS NOT INVOLVED, AND I THINK THE FIFTH DISTRICT DID ENGAGE IN THAT WEIGHING PROCESS, BASICALLY, AND SAID THE PLAINTIFF CAN'T DEMONSTRATE THE NEED, AND I THINK IMPLICIT IN THE FIRST DISTRICT'S DECISION IN DEUTSCHE WAS FOLKS HAVE COME IN WHO TAKE CARE OF THEMSELVES. THEY E SERTED THEIR OWN INTERESTS, AND THE MERE ASSERTION OF THAT RELATIONSHIP, ALONE, DOESN'T CONFER STANDING, SO AS TO DISPLACE THE INTERVENEORS.

BUT YOU HAVE NO OBJECTION TO THE ESTABLISHED LAW ALREADY, WHICH ALLOWS FOR INSTANCE, AN EMPLOYER TO COME IN, UNDER WHAT YOU CALL AN OBLIGATION, AND SAY, WELL, JUDGE, IF WE ARE GOING TO DISCLOSE THIS, THEN THE SOCIAL SECURITY NUMBERSOULD NOT A RECORD THAT JUST ANYBODY CAN COME INTO THE COURTSE NOW AND LOOK IN THIS CASE FILE, BUT YOU ARE SAYING THAT THIS WAS NOT EVEN ATTEMPTED IN THIS CASE, IT WAS A BLANKET ASSERTION. YOU CAN'T, TRUST YOU SAY YOU CAN'T LOOK AT THESE AT ALL.

PRECISELY, AND THAT IS WHY I SAY THE RULE ADVOCATED BY THE PETITIONER IS SO BROAD THAT, BY THE MERE IN KAHNTATION OF THE EMPLOYERS -- INCANTATION OF THE EMPLOYER'S RIGHT TO PRIVACY, THEY OUGHT TO BE REQUIRED TO PROVIDE TO THE JUDGE, HEY, PROVIDE SPECIFIC INFORMATION INFORMATIONATION THAT ENABLES THE TRIAL JUDGE TO EVALUATE THE APPLICABILITY OF THE PRIVILEGE. FAILING THAT, AND THAT DID NOT HAPPEN HERE, FAILING THAT, THE BJETION ISNOTAQUATE TO PREVENT THE DISCLOSURE. THE TRIAL JUDGE TOOK INTO ACCOUNT MR. GORTNEY'S ARGUMENT. AS YOU WELL POINTEDOT, JUSTICE QUINCE, THERE WERE ISSUES ABOUT WHETHER OR NOT PROPER ASSESSMENT WAS DONE OF THE RESIDET ND ETHER OR NOT THE RESIDENTAS EVENPPPRIAE FOR RTENTION IN THE ASSISTED-LIVING FACILITY IN THIS CASE, ISSUES ABOUT THE KINDOF CARE THE RESIDENT ECEIVED ON OTHER MATTERS, AND MR. GORTNEY RIGHTLY ARGUED TO THE COURT THAT THIS WENT DIRECTLY TO THE QUALIFICATIONS OR LACK THEREOF, OF THE EMPLOYEES, THE EMPLOYER'S KNOWLEDGE OF THE LACK OF QUALIFICATIONS, ET CETERA. THOSE WERE DIRECTLY RELEVANT TO ISSUES THAT HAVE BEEN PROPERLY RAISED BY NOTICE PLEADING.

SO YOU ARE SAYING THAT THERE ARE ADEQUATE PROCEDURES AND PROTECTIONS IN PLACE ALREADY.

THERE ARE. THEY WEREN'T FOLLOWED IN THIS CASE. THE TRIAL JUDGE SHOULDN'T GET LOOKED, IN MY JUDGMENT, WHEN THESE MATERIALS WERE NOT, WHEN THE MATERSAT WERE PUT IN THE APPENDIX WERE NOT EVEN MADE AVAILABLE TO HER, AND WHEN THE MATERIALS FACIALLY SHOW NOT ONLY WAS THERE NO PRIVACY INTEREST THAT WAS IN VIEW BUT THAT THEY, ALSO, GAVE A RELEASE OF LIABILITY. THEY COMPLAIN IN THEIR BRIEFS ABOUT THE POTENTIAL LIABILITY RESULTING FROM DISCLOSURE, AND THE EMPLOYMENT APPLICATION SAYS I HERE BY RELEASE FROM LIABILITY THE EMPLOYRD ITS REPRESENTATIVES, FOR SEEKING, GATHERING AND USING SUCH INFORMATION AND ALL OTHER PERSONS, CORPORATIONS OR ORGANIZATIONS FOR FURNISHING SUCH INFORMATION. WHAT HAS HAPPENED HERE IS, WITH THIS --

WITH ALL DUE RESPECT, THAT MPLOYMENT APICATION GIVES THE ELOYER THE RIGHT TO GO TO PRIOR EMPLOYERS TO GET INFORMAON. THAT DOESN'T, ISN'T A PERSPECTIVE WAIVER OF SOMETHING THAT MIT BE CONFIDENAL --

PRIOR EMPLOYERS, PRIOR EATIONALINSTITIONS, AND REFNCES. TO VALIDATETHEINFORMATIN CONTAINED IN THE APLICATION. I WOULD SAY RESPECTFULLY, WHEN THAT MATERIAL IN THE DOMAN OF THE PUBLIC, THERE IS NO EXPECTATION OF PRIVACY, AND I THINK THE COURT SHOULD NOT OVERLOOK THE UNFAIR ADVANTAGE THAT, IF YOU SIMPLY ADOPTED A BLANKET RULE THAT SAID IF YOU IN CAN'T THE-INCANT THE MAGIC WORDS OF INSTITUTIONAL PRIVACY, WITH REGARD TO DISCOVERY --

THAT IS YOUR CONCERN, IS IT NOT, AND I DON'T SEE THAT AS A STANDING CONCERN. I SEE THAT THAT THE RULES OF DISCOVERY HAVE, THERE ARE MANY A WHERE, IF YOU ARE IN A PRODUCTS LIABILITY CASE AND YOU ASK FOR ALL OF THE PERSONNEL RECORDS OF THE GENERAL MOTORS PEOPLE THAT WORKED ON THE DEVELOPMENT OF A, OF THE PARTICULAR PRODUCT, THE EMPLOYER IS GOING TO SAY THAT IS OVERLY BROAD. THAT IS NOT LEADING TO THE DISCOVERY OF ADMISSIBLE EVIDENCE. THEY DON'T SAY OBJECTION, IT IS THEIR PRIVACY INTEREST THAT IS ARE AT STAKE.

YOUR HONOR, I THINK THE COURT SHOULD WRESTLE WITH WHETHER OR NOT THE MERE RELATIONSHIP ALONE, IS ENOUGH, BECAUSE I THINK THE COURT SHOULD, I BEG YOUR PARDON. I AM OUT OF TIME. MR. CHIEF JUSTICE

YOU MAY COMPLETE YOUR STATEMENT.

I THINK THE COURT SHOULD RECOGNIZE THE REALITY THAT THERE ARE VERY SERIOUS CONFLICTS OF INTEREST BETWEEN EMPLOYERS AND EMPLOYEES, AND IT SHOULD NOT ASSUME, AS JUDGE WOLF DID, THAT THERE IS ALWAYS A CONSISTSANCIES AND SYMMETRY OF INTEREST, AND FOR TAKE REASON, THE COURT MAY -- FOR THAT REASON, THE COURT MAY WANT TO EVALUATE WHETHER OR NOT MORE THAN THE MERE EMPLOYMENT RELATIONSHIP ALONE IS ENOUGH. MR. CHIEF JUSTICE

THANK YOU, MR. CONNOR. REBUTTAL?

I WOULD LIKE TO PROVIDE A VERY, VERY BRIEF REBUTTAL AND ALLOW SOME TIME TO OUR CO-COUNSEL IN THE AMICUS, SCOTT MAJOR. THE IMPORTANCE OF THE PRIVACY RIGHTS OF THESE 80 EMPLOYEES IN THIS ISSUE, MOST OF WHOM HAD NOTHING TO DO WITH THE ONLY ALLEGED INCIDENT IN THIS CASE, AND IT SEEMS LIKE THOSE RIGHTS ARE BEING IGNORED IN THIS DISCUSSION TODAY. THERE CAN BE NO DOUBT THAEF ENTHESE REQUESTED DOCUMENTS CONTAINED CONFIDENTIAL INFORMATION ABOUT EVERY SINGLE ONE OF THESE 80 EMPLOYEES, AND ON THAT BASIS ALONE, THOSE DOCUMENTS AND THOSE INDIVIDUALS WERE ENTITLED TO PRODUCTION, AND -- PROTECTION, AND ALL WE ARE SAYING HERE TODAY IS WE ARE NOT SAYING THIS GIVES THE EMPLOYER THE RIGHT TO COME IN AND SAY I AM NOT GOING TO RELEASE ANY OF THOSE DOCUMENTS. TELL THE COURT THAT, WHEN PRIVACY RIGHTS ARE INVOLVED, YOU HAVE TO CONDUCT THE BALANCING TEST. THE RECORD IS CLEAR THERE WAS NO BALANCING TEST IN THIS CASE. COURT, THT EVEN CONSIDERING THESE RIGHTS, SAID THIS ISN'T CONFIDENTIAL INFORMATION. YOU ARE ORDERED TO PRODUCE IT.

IN THE HEARING, DID YOU SAY I AM GOING TO SHOW YOU ONE OF THESE PERSONNL FILES THAT IS IN CAMERA HERE, HAS NOTHING DO WITH THIS LAWSUIT BUT HAS SOMETHING TO DO WITH THIS EMPLOYEE'S FAMILY, WAS THERE ANYTHING LIKE THAT IN THIS RECORD?

YOUR HONOR, MY COLLEAGUE, MRS. FULL WAS AT THE HEARING, AND MY UNDERSTANDING IS THAT SHE WAS CUT OFF IN HER ARGUMENT THAT THE TRIAL COURT WAS REALLY NOT INTERESTED OF GETTING TO THE POINT OF WHAT WAS IN THESE FILES. THE COURT JUST DECIDED THAT IT WASN'T CONFIDENTIAL AND SENSITIVE AND IT NEEDED TO BE PRODUCED, SO ALL WE ARE SAYING IS BALANCE THE INTERESTS. LOOK AT WHETHER THE PLAINTIFF HAS ESTABLISHED A NEED FOR THIS DOCUMENT AND BALANCE WHETHER THAT OVERRIDES THE EMPLOYERS -- THE

EMPLOYEES' PRIVACY RIGHTS.

WOULD YOU ANSWER THE QUESTION OF WHY, JUST ACROSS THE BOARD, DOES THE INITIALIATION OF THE EMPLOYMENT RELATIONSHIP CREATE AN AUTOMATIC BELIEF THAT THERE IS GOING TO BE AN EXACT, I GUESS SYMMETRY OF INTERESTS BETWEEN THE EMPLOYER AND THE EMPLOYEE, SO THAT JUST TO SAY THE MERE CREATION OF THAT EMPLOYER EMPLOYER/EMPLOYEE RELATIONSHIP, CREATES THE STANDING TO RAISE ANYTHING THAT THE EMPLOYER DEEMS APPROPRIATE TO OBJECT TO?

WELL, YOUR HONOR, IN THE CASE OF EMPLOYEE FILES, THE EMPLOYER COLLECTS THE INFORMATION, MAINTAINS THE INFORMATION. THE EMPLOYER IS THE CUSTODIAN OF THE INFORMATION, AND THEN FOR THAT REASON IS IN THE BEST POSITION TO APPLY FOR PROTECTION AND HAS A DUTY. ONE COURT HAS LIKEN THE RELATIONSHIP -- MR. CHIEF JUSTICE

THANK YOU. YOUR TIME IS UP. I AM AFRAID ALL OF THE TIME HAS BEEN USED. THANK YOU, COUNSEL, FOR YOUR ASSISTANCE IN THIS CASE.