

NOT DESIGNATED FOR PUBLICATION

DEBRA A. ESTEEN

*

NO. 2013-CA-1509

VERSUS

*

COURT OF APPEAL

DONALD R. BEALER, ET AL.

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

* * * * *

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2005-00744, DIVISION "J"
Honorable Paula A. Brown, Judge

* * * * *

Judge Dennis R. Bagneris, Sr.

* * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Paul A. Bonin,
Judge Joy Cossich Lobrano)

John O. Pieksen, Jr.
Kenneth W. Andrieu
JOHN PIEKSEN & ASSOCIATES, LLC
829 Baronne Street
New Orleans, LA 70113

COUNSEL FOR PLAINTIFF/APPELLEE, DEBRA A. ESTEEN

M. Clalire Trimble, PLC
938 Lafayette Street, Suite 407
New Orleans, LA 70113

**COUNSEL FOR DEFENDANT/APPELLANT, ARTHUR A.
MORRELL**

JUNE 4, 2014

AFFIRMED

Defendant, Arthur A. Morrell, in his capacity as Clerk of Criminal Court for Orleans Parish,¹ appeals a judgment of the trial court that found in favor of plaintiff, Debra A. Esteen, in the amount of \$6,940.00 for failing to remove her confidential arrest and conviction record from its public database that was previously ordered expunged. For the following reasons, we hereby affirm the judgment of the trial court.

FACTS

In 1999, Ms. Esteen was charged and pled guilty to Possession of Marijuana, Possession of Crack, and Possession of Alprazolam. Thereafter, on September 17, 2001, the trial court granted Ms. Esteen's Motion for Expungement, as well as her Motion to Dismiss and to Set Aside Conviction in accordance with the Louisiana Code of Criminal Procedures Article 893.

¹ It is worth noting that Arthur A. Morrell was not yet elected as Clerk of Criminal Court for the Parish of Orleans at the time this incident arose and that he inherited this litigation from his predecessor in office.

On March 30, 2004, Ochsner Clinic Foundation submitted an official offer of employment to Ms. Esteen in the capacity as a “non-exempt full time PCT [Patient Care Technician] in Post-Operative Surgical Services at a salary rate of \$8.50 per hour effective April 5, 2004.” The letter also explained that Ms. Esteen’s employment is “dependent upon the successful completion of a new employee health assessment, which includes a drug screen and, satisfactory police and reference checks.” Subsequently, Ochsner Clinic Foundation retained Donald R. Bealer, President of Employment Research Services (“ERS”) to perform a background check on Ms. Esteen. While conducting a background check, Mr. Bealer discovered information relative to Ms. Esteen’s criminal background that was subject to the Order of Expungment, Order Setting Aside the Conviction and the Dismissal of the prosecution against Ms. Esteen.

On April 2, 2004, Ochsner Clinic Foundation mailed Ms. Esteen an adverse action notice, which specified that Ms. Esteen’s “employment with Ochsner Clinic Foundation is being terminated...based in whole or part on information contained in a consumer report.”

On April 8, 2004, Mr. Bealer, on behalf of ERS, wrote a letter addressed to Ms. Esteen explaining that he had “furnished the report to Ochsner Hospital and was not involved in any decision regarding the ‘adverse action’” taken against her. The letter further explained that the information contained in the report came “from the records of the Clerk of Court of Orleans Parish.” The ERS background check report number was 61600 and identified Ms. Esteen by both name and social security number. Further, the report detailed Ms. Esteen’s criminal charges as well as the disposition of those charges reflecting that the Motion for Expungement and

Motion to Dismiss and Set Aside Conviction was granted on Ms. Esteen's felony charges under docket number 407-117.

After a one-day bench trial, the trial court found defendant Arthur Morrell, in his official capacity as Clerk of Criminal District Court, liable to Ms. Esteen and awarded \$5,440.00 for lost wages and \$1,500.00 for general damages plus legal interest from the date of judicial demand. The trial court also dismissed all claims with prejudice against the remaining defendants, Marlin N. Gusman, in his capacity as Criminal Sheriff of Orleans Parish, Donald R. Bealer, and ERS.

On appeal, Arthur Morrell, alleges the following assignments of error: (1) the trial court erred in determining that La. R.S. 40:1300.51 does not allow Ochsner Clinic Foundation, a health care provider, to perform a criminal background check and to have access to Ms. Esteen's felony drug record; (2) the trial court erred in admitting Donald R. Bealer's April 8, 2004 letter regarding the report that was furnished to Ochsner Clinic Foundation; (3) the trial court erred in finding that "but for the Clerk of Court's non-compliance with the expungement order, Ms. Esteen's 1999 criminal record would not have been made available to Mr. Bealer; (4) the trial court erred in finding that the Clerk of Court was not permitted to release expunged information during the course of a legal background check to Ochsner Clinic Foundation; and (5) the trial court erred in calculating loss wages for Ms. Esteen as there was no evidence introduced to support such an award.

DISCUSSION

La. R.S. 44:9 provides for expungement of a felony conviction dismissed pursuant to Article 893 of the Code of Criminal Procedure. Specifically, La. R.S. 44:9 provides, in pertinent part:

E. (1)(a) No court shall order the destruction of any record of the arrest and prosecution of any person convicted of a felony, including a conviction dismissed pursuant to Article 893 of the Code of Criminal Procedure.

(b) After a contradictory hearing with the district attorney and the arresting law enforcement agency, the court may order expungement of the record of a felony conviction dismissed pursuant to Article 893 of the Code of Criminal Procedure. **Upon the entry of such an order of expungement, all rights which were lost or suspended by virtue of the conviction shall be restored to the person against whom the conviction has been entered, and such person shall be treated in all respects as not having been arrested or convicted unless otherwise provided in this Section or otherwise provided in the Code of Criminal Procedure Articles 893 and 894.** (Emphasis Added)

* * *

(d) Notwithstanding the provisions of Code of Criminal Procedure Article 893 or any other provision of law to the contrary regarding the set aside of a conviction or the dismissal of a prosecution, an expungement of a felony conviction shall occur only once with respect to any person during a lifetime.

* * *

(4) However a criminal background check requested by a health care provider pursuant to R.S. 40:1300.51 *et seq.* shall include records which would inform a potential employer of any crimes enumerated in said statute which were committed by an applicant for employment.

F. For investigative purposes only, the Department of Public Safety and Corrections may maintain a confidential, nonpublic record of the arrest and disposition. Upon specific request therefor and on a confidential basis, the information contained in this record may be released to the following entities who shall maintain the confidentiality of such record: any law enforcement agency, criminal justice agency, the office of financial institutions, the Louisiana State Board of Medical Examiners, the Louisiana State Board of Nursing, the Louisiana State Board of Dentistry, the Louisiana State Board of Examiners of Psychologists, the Louisiana Board of Pharmacy, the Louisiana State Board

of Social Work Examiners, the Emergency Medical Services Certification Commission, Louisiana Attorney Disciplinary Board, Office of Disciplinary Counsel, the Louisiana Supreme Court Committee on Bar Admissions, the Louisiana Department of Insurance, the Louisiana Licensed Professional Counselors Board of Examiners, or any person or entity requesting a record of all criminal arrests and convictions pursuant to R.S. 15:587.1.

G. “Expungement” means removal of a record from public access but does not mean destruction of the record. An expunged record is confidential, but remains available for use by law enforcement agencies, criminal justice agencies, the Office of Financial Institutions, the Louisiana State Board of Medical Examiners, the Louisiana State Board of Nursing, the Louisiana State Board of Dentistry, the Louisiana State Board of Examiners of Psychologists, the Louisiana Board of Pharmacy, the Louisiana State Board of Social Work Examiners, the Emergency Medical Services Certification Commission, the Louisiana Attorney Disciplinary Board, Office of Disciplinary Counsel, the Louisiana Supreme Court Committee on Bar Admissions, the Louisiana Department of Insurance, the Louisiana Licensed Professional Counselors Board of Examiners, or any person or entity requesting a record of all criminal arrests and convictions pursuant to R.S. 15:587.1.

In *State v. Sims*, 357 So.2d 1095 (La. 1978), the Louisiana Supreme Court discussed the principal purpose for the expungement provisions in the public records law. Specifically, the Court stated:

The primary purpose of the acts in questions is rehabilitative. They were designed to prevent individuals aided by their terms from future harassment and embarrassment by virtue of a criminal record. Without the expungement order involved, for instance, the matters of their arrests and convictions are public records open to public inspection; they thereby are made available to members of the public generally, as well as to credit bureaus, prospective employers, and others. (Citations omitted) The primary evil sought to be remedied by the statutes was to expunge the arrest and conviction as a matter of public knowledge and information and as an ordinary police or criminal ‘record’ of the person involved.

In this case, Arthur Morrell argues that the trial court erred in relying on La. R.S. 44:9(4) and La. R.S. 40:1300.51 *et seq.* in finding that Ochsner Clinic Foundation is not a health care provider pursuant to R.S. 40:1300.51 *et seq.* Rather, Arthur Morrell cites to R.S. 40:1299.41(10)², a Public Health and Safety statute, as well as R.S. 23:1021(6)³, a Labor and Workers Compensation statute, to define a “health care provider.” However, we find La. R.S. 44:9E(4) to be clear on its face that only “a health care provider pursuant to R.S. 40:1300.51 *et seq.*” is an exception to the expungement statute and find no need to use other statutory definitions for a “health care provider.”

The 2004 version of La. R.S. 40:1300.51 defines an “employer” as any of the following facilities, agencies, providers, or programs:

- (a) A nursing home, as defined in R.S. 40:2009.2.
- (b) An intermediate care facility for people with developmental disabilities.
- (c) An adult residential care home, as defined in R.S. 40:2153.

² (10) “Health care provider” means a person, partnership, limited liability partnership, limited liability company, corporation, facility, or institution licensed or certified by this state to provide health care or professional services as a physician, hospital, nursing home, community blood center, tissue bank, dentist, registered or licensed practical nurse or certified nurse assistant, offshore health service provider, ambulance service under circumstances in which the provisions of R.S. 40:1299.39 are not applicable, certified registered nurse anesthetist, nurse midwife, licensed midwife, nurse practitioner, clinical nurse specialist, pharmacist, optometrist, podiatrist, chiropractor, physical therapist, occupational therapist, psychologist, social worker, licensed professional counselor, licensed perfusionist, licensed respiratory therapist, licensed radiologic technologist, licensed clinical laboratory scientist, or any nonprofit facility considered tax-exempt under Section 501(c)(3), Internal Revenue Code, pursuant to 26 U.S.C. 501(c)(3), for the diagnosis and treatment of cancer or cancer-related diseases, whether or not such a facility is required to be licensed by this state, or any professional corporation a health care provider is authorized to form under the provisions of Title 12 of the Louisiana Revised Statutes of 1950, or any partnership, limited liability partnership, limited liability company, management company, or corporation whose business is conducted principally by health care providers, or an officer, employee, partner, member, shareholder, or agent thereof acting in the course and scope of his employment.

³ (6) “Health care provider” means a hospital, a person, corporation, facility, or institution licensed by the state to provide health care or professional services as a physician, hospital, dentist, registered or licensed practical nurse, pharmacist, optometrist, podiatrist, chiropractor, physical therapist, occupational therapist, psychologist, graduate social worker or licensed clinical social worker, psychiatrist, or licensed professional counselor, and any officer, employee, or agent thereby acting in the course and scope of his employment.

- (d) An adult day care center, as defined in R.S. 46:1972.
- (e) A home health agency, as defined in R.S. 40: 2009.31.
- (f) A hospice, as defined in R.S. 40:2182.
- (g) An ambulance service as defined in R.S. 40:1299.41(A)(16).
- (h) A personal care attendant services agency, as defined in R.S. 46:2682.
- (i) A respite care services agency, as defined in R.S. 46:2682.
- (j) A supervised independent living program, as defined in R.S. 46:2682.
- (k) A nonemergency, nonambulance medical transportation facility or entity.

We agree with the trial court that Ochsner Clinic Foundation is not identified in La. R.S. 40:1300.51 *et seq.* as an employer who should have access to Ms. Esteen's confidential records. Further, and more importantly, we agree with Ms. Esteen's argument that even if Ochsner Clinic Foundation did satisfy the health care provider exception permitting it to receive Ms. Esteen's expunged information for the purposes of employment, it still does not absolve Arthur Morrell's failure to expunge her criminal records and protect those records from public access via the Clerk's public-access computer terminals. As stated in La. R.S. 44:9(G), "[e]xpungement" means removal of a record from public access but does not mean destruction of the record. An expunged record is confidential, but remains available for use by law enforcement agencies, criminal justice agencies..." The September 17, 2001 Expungement Order ordered Ms. Esteen's 1999 arrest record and conviction record to be "expunged by the appropriate officials." The Order further directed the Clerk of Criminal District Court to send certified copies of the Expungement Order to (1) the Superintendent Richard Pennington, New Orleans Police Department; (2) Harry Connick, District Attorney, Parish of Orleans; and (3) Lt. Randy Johnson, Louisiana State Police, Bureau of Criminal Identification.

The evidence offered at trial reveals that Ms. Esteen's criminal background information was released to ERS by the Criminal Clerk's office, not by the New Orleans Police Department, the Orleans Parish District Attorney, or the Louisiana State Police, Bureau of Criminal Identification. Accordingly, we find that the Clerk of Criminal Court for Orleans Parish failed to remove Ms. Esteen's arrest record and conviction record from its public record that was subject to the September 17, 2001 Expungement Order.

We also find no merit in Arthur Morrell's argument that the trial court improperly admitted defendant Bealer's April 8, 2004 letter to Ms. Esteen into evidence. Arthur Morrell argues that the letter is inadmissible hearsay, as it was an out of court statement offered to prove the truth of the matter asserted. However, Mr. Bealer⁴ was a party to the lawsuit at that time and defendant Arthur Morrell could have subpoenaed him to insure his attendance and participation.

We also find no merit to Arthur Morrell's argument regarding damages. Ms. Esteen introduced into evidence the letter from Ochsner Clinic Foundation providing her a conditional job, paying \$8.50 per hour for a 40 hour work-week, as well as a letter from Ochsner rescinding the job offer after receiving the background check report which contained her confidential information that was previously ordered expunged by the Clerk of Court.

For these reasons, we hereby affirm the judgment of the trial court in finding in favor of Ms. Esteen in the amount of \$6,940.00 against Arthur A. Morrell, in his capacity as Clerk of Criminal Court for Orleans Parish, for failing to remove her

⁴ A review of the record demonstrates that a preliminary default was entered against Mr. Bealer but was never confirmed.

confidential arrest and conviction record from its public database that was previously ordered expunged.

AFFIRMED