

COPY

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

OMNI BEHAVIORAL HEALTH,)
a Nebraska Corporation, on behalf)
of itself and all of its clients;)
WILLIAM REAY, President of OMNI)
BEHAVIORAL HEALTH;)
DAVID and WENDY KROM,)

Plaintiffs,)

vs.)

NEBRASKA FOSTER CARE REVIEW)
BOARD, an administrative)
agency of the State of Nebraska;)
CAROLYN K. STITT, Individually)
and as Executive Director of the)
NEBRASKA FOSTER CARE)
REVIEW BOARD; and)
BURRELL WILLIAMS, individually and)
as Chairman of the Board of the)
NEBRASKA FOSTER CARE REVIEW)
BOARD,)

Defendants.)

Case Number: CI 06-4633

DEPARTMENT OF JUSTICE

FEB 29 2008

STATE OF NEBRASKA

ORDER

Omni Behavioral Health, William Reay, the president of Omni, and David and Wendy Krom, have filed this action for declaratory and injunctive relief seeking to restrain the Nebraska Foster Care Review Board ("Board") and its

agents or representatives from conducting inspections of group homes or foster care facilities until certain conditions are satisfied.

Omni is a Nebraska corporation that operates group home facilities for the care of children. Omni has contracted with the State of Nebraska to provide these services and is paid by the State to do so. The Kroms are licensed foster care providers who are under a contract with Omni.

The Board was created by legislation in 1982. It is responsible for reviewing the case plans for children who have been placed in foster care. NAC Title 162, 1-002, defines the purpose of the Board as follows:

The Foster Care Review Board was established as an independent agency to periodically review the case plans of children in foster care. The purpose of the review is to assure that appropriate goals have been set for the child, that realistic time limits have been set for the accomplishment of these goals, that efforts are being made by all parties to achieve these goals, that appropriate services are being delivered to the child and/or his or her family, and that long-range planning has been done to move the child to a permanent home where he or she can grow and thrive.

The Foster Care Review Board is mandated to maintain a tracking system of all children in out-of-home placement in the State. The tracking system is to provide information about the number of children entering and leaving care as well as any other data regarding needs and trends in foster care.

The Foster Care Review Act provides that "[t]he state board may visit and observe foster care facilities in order to ascertain whether the individual physical, psychological, and emotional needs of each foster child are being

met." NEB. REV. STAT. § 43-1303 (3) (Reissue 2004). The Board, or local board, also is charged with reviewing every foster care placement every six months and submitting a report and recommendation to the court having jurisdiction of the child including "whether the current placement is safe and appropriate." NEB. REV. STAT. § 43-1308 (Reissue 2004). Section 43-1303 (2) provides that the Board "may adopt and promulgate its own rules and regulations." (emphasis added).

The plaintiffs contend that any visits by the Board violate their Constitutional rights under the Fourth and Fourteenth Amendments, as well as Article I, Sections 3 and 7 of the Constitution of the State of Nebraska, because the Board has not adopted any rules setting forth the scope or manner of such visits, although Omni has requested the Board to do so. In support of their contention, the plaintiffs rely upon *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970), *United States v. Biswell*, 406 U.S. 11 (1972) and *New York v. Burger*, 482 U.S. 691 (1987).

The plaintiffs also contend that local boards created pursuant to the Act may be made up of unqualified persons and that visits to facilities by such board members may be harmful to the foster care children. It is alleged that the Board made several visits to Omni's facilities in 1998 and Omni believes further visits may occur in the future. Omni has advised its foster care providers to refuse any site inspections by the Board. Omni further alleges

that it was slandered by Stitt in 2004 and that the actions of the Board tortiously interfere with Omni's business relationship with the State of Nebraska.

The defendants have filed a motion for summary judgment basically contending that the potential for visits by the Board do not violate any rights of the defendants, that Omni lacks standing to assert any rights on behalf of the foster children and that the defendants are immune from suit by reason of sovereign immunity.

Summary judgment is to be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Boyd v. Chakraborty*, 250 Neb. 575, 550 N.W.2d 44 (1996); *Bogardi v. Bogardi*, 249 Neb. 154, 542 N.W.2d 417 (1996). Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Burke v. Blue Cross Blue Shield*, 251 Neb. 607, 558 N.W.2d 577 (1997); *Stones v. Sears, Roebuck & Co.*, 251 Neb. 560, 558 N.W.2d 540 (1997).

On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Melick v. Schmidt*, 251 Neb. 372, 557 N.W.2d 645 (1997); *State Farm v. D.F. Lanoha*

Landscape Nursery, 250 Neb. 901, 553 N.W.2d 736 (1996).

The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law. *Melick, supra*. After the moving party has shown facts entitling it to a judgment as a matter of law, the opposing party has the burden to present evidence showing an issue of material fact which prevents judgment as a matter of law for the moving party. *Melick, supra; Swoboda v. Mercer Mgmt. Co.*, 251 Neb. 347, 557 N.W.2d 629 (1997).

This court's order dated May 10, 2007 denying the plaintiffs' request for a temporary injunction discussed the cases relied upon by the plaintiffs to support their assertion that the anticipated visits/inspections by the Board violate their Constitutional rights. In *Colonnade Catering Corp. v. Unites States, supra*, the Court upheld the suppression of liquor seized by federal agents without a warrant. When the owner refused the agents entry to a store room, they broke the lock and seized the liquor. The federal statute at issue provided that any retail liquor dealer who refuses to admit the appropriate official to enter the premises and inspect the same can be fined \$500.00. The Court noted that where Congress has authorized inspections but does not set forth the rules for such inspection, the Fourth Amendment applies. The Court held that Congress only authorized a fine, not warrantless forcible entries, and, therefore, the entry

was unlawful.

In *United States v. Boswell, supra*, the Court upheld the warrantless inspection of a licensed gun dealer's books and the search of his storeroom. The statute in question authorized agents of the Secretary of Treasury to enter the premises of any licensed gun dealer during normal business hours to inspect records, documents, firearms and ammunition. The Court noted the need for such inspections in enforcing the regulation of firearms and ammunition. The Court found that a valid statute that limits the time, place, and scope of the inspection of business premises was not violative of the Fourth Amendment. The Court noted that "[w]hen a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection." *Id.* at 316.

Under the so-called "*Colonnade-Boswell*" doctrine the owner of commercial premises in a closely regulated industry has a reduced expectation of privacy. In *New York v. Burger, supra*, the Court set forth a three part criteria that must be satisfied, namely, (1) a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made, (2) the warrantless inspection must be necessary to further the regulatory scheme, and (3) the statute's inspection program in terms of the certainty and regularity of its application must provide a constitutionally adequate substitute for a warrant. *Id.* at 702-03.

Here, there is no doubt that (1) and (2) are met. The state has a compelling interest in the children who have been placed in the care and custody of the Department of Health and Human Services and an inspection of their living conditions is essential. However, Section 43-1303(3) contains no specific language as to the time or scope of the visits.

This court questions whether the requirements applicable to gun dealers, liquor dealers, mine operators or motor vehicle salvage records are applicable to laws relating to the welfare of children. As much as Omni desires to be considered and treated as a typical regulated industry, it is not. Simply put, it is a business that has contracted with the State of Nebraska to provide services for children that have been placed in the care and control of the state. It must be presumed that when Omni entered into such agreements, it was fully aware of the statutory requirements relating to visits and inspections and accepted such conditions. This also would be true for Omni's foster care providers who are similar to subcontractors. If they do not like the statutory conditions or requirements, they have two choices. One, do not enter into the contract or two, seek legislative action.

The visits here do not constitute "warrantless administrative searches" as categorized by Omni, such as searches related to businesses that are closely regulated by governments. The visits here are in furtherance of the responsibility of the state to assure appropriate care and services for children who are in the state's care. In fact, the state, including the Board, would be remiss if no visits

were conducted and would be subject to criticism and possible legal liability if the Board failed to carry out the visits and inspections provided by statute.

Omni argues that its facilities may house "private placement youth," that is, children who are not under the custody of the state, as well as state wards, and that the warrantless inspections could have a detrimental effect on these children. However, the evidence shows that any so-called private placements are negligible. Again, Omni has a choice. It is free to offer its services solely to private placement clients and avoid the perceived issues with the Board.

As noted above, there have been no inspections of Omni facilities for a number of years. Omni, in the 1990's, objected to such inspections and refused to permit representatives of the Board to visit. The Board did not attempt to press this issue at that time. It has now come to an impasse apparently because of certain orders entered by several highly regarded and competent judges of the Separate Juvenile Court for Douglas County, Nebraska containing the following, or similar, provisions:

IT IS FURTHER ORDERED that the child/children's placement shall be available for and cooperate with announced as well as unannounced visits by the case manager, guardian ad litem, CASA and the Foster Care Review Board.

In effect, by filing this action, the plaintiff's are attempting to collaterally challenge the authority and jurisdiction of these judges. This court is not inclined to question or jeopardize these orders and, in fact, will not do so. These judges have the difficult job of dealing with complicated family matters and with

children, many of whom have experienced serious emotional trauma. These judges would be derelict in their duties if they failed to require that the placement of such children be reviewed and inspected to insure that the welfare of the children is maintained.

In addition, to the "closely regulated industry" exception, the Supreme Court has also allowed warrantless searches if circumstances surrounding the inspection create "special needs" in which the warrant requirement becomes a burden and hampers the purpose of the search. The "special needs" doctrine was created from a number of cases which involved random drug testing.

"In each of those cases, [the Supreme Court] employed a balancing test that weighed the intrusion on the individual's interest in privacy against the "special needs" that supported the program." *Ferguson v. City of Charleston*, 532 U.S. 67, 77 (2001). "In each of those cases, the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement." *Id.* at 79. "Under our precedents, if there was proper governmental purpose other than law enforcement, there was a 'special need,'" and the Fourth Amendment then required the familiar balancing between that interest and the individual's privacy interest." *Id.* at 81. (citing *Chandler v. Miller*, 520 U.S. at 325 (Rehnquist, C.J., dissenting)).

The defendants' contention that they are immune by reason of sovereign immunity is unpersuasive. Although suits attempting to compel affirmative

actions by state officials are barred by sovereign immunity, actions against state officers to obtain relief from an invalid act or from an abuse of authority by such officer is not a suit against the state and not prohibited by sovereign immunity. *Johnson v. Clarke*, 258 Neb. 316, 603 N.W.2d 373 (1999). It appears that the relief sought by the plaintiffs falls into the latter category. If what the plaintiffs seek is an order of this court requiring the Board to adopt rules and regulations, this would not be permissible. However, this is not the case here.

The defendants' contention that the plaintiffs lack standing to bring this action on behalf of the foster children is meritorious. Standing is the legal or equitable right, title, or interest in the subject matter of the controversy which entitles a party to invoke the jurisdiction of the court. *Adam v. City of Hastings*, 267 Neb. 641, 676 N.W.2d 710 (2004). The plaintiffs cannot bring this action under the guise that they are seeking to protect the interest or welfare of the affected children. They do not stand *in loco parentis* to such children. The plaintiffs' reliance on *Planned Parenthood Minnesota v. Ronnds*, 467 F.3d 716 (8th Cir. 2006) is misplaced. The issue addressed in that case was the First Amendment right of the physicians against compelled speech, not a claim on behalf of the women. Omni itself, of course, has standing to question the validity of the inspections, as do the Kroms. This court is at a loss to determine what legal interest Reay as an individual or as an officer of Omni has in this case. Any legal interest of his is that of Omni.

The "special needs" doctrine appears to be applicable here. The inspections

under the Foster Care Review Act do not serve a law enforcement purpose. Clearly, the state's interest in ensuring proper care of the children placed with the Department of Health and Human Services outweighs the privacy interests of the plaintiffs. As note above, the relationship between the plaintiffs and the state is a contractual one that assumably was entered into freely by the plaintiffs. The plaintiffs were aware of the statutory provision authorizing inspections when they entered into the agreements with the state. After freely doing so they now wish to have this court interfere with the agreements and the statutory scheme. Further, although Omni complains that the Board has failed to adopt appropriate rules and regulations, the evidence shows that Omni itself had been uncooperative in moving forward on such a process.

Often, judges and lawyers make legal issues more complicated than is necessary. We get caught up in subtleties and analogies that are not appropriate to the specific issues presented and fail to consider the broader implications of the dispute. For example, this case primarily is not one based on sovereign immunity or "warrantless administrative searches" but a direct challenge to the purpose and duties of the Board and the ability of the courts to insure that children under their jurisdiction are receiving appropriate care and services.

To summarize, this court finds that the visits and inspections by the Board are not "searches" subject to the Fourth Amendment but are specifically authorized by statute, that Omni and the foster care providers were aware of such statutory provisions when they contracted to provide such services and

cannot seek a modification by judicial intervention, that, in effect, the issues raised by the challenge to the visits is an impermissible collateral attack on the orders of certain courts of this state, and the plaintiffs have no standing to represent the foster care children. Therefore, the complaint for declaratory and injunctive relief as to the visits by the Board must be dismissed.

This leaves the claims of Omni that the actions of the Board constitute a tortious interference with the business relationship between it and the State of Nebraska and that Stitt libeled Omni. However, there is no prayer for relief concerning these allegations in the complaint. Generally, a party cannot interfere with its own contract. See *Holloway v. Skinner*, 38 Tex. Sup. J. 582, 898 S.W.2d 793 (1995); *Pruitt Corp. v. Stanley*, 270 Ga. 430, 510 S.E. 2d 821 (1999); *Trail v. Boys & Girls Clubs*, 845 N.E. 2d 130 (Ind. 2006). Both the Board and the Department of Health and Human Services are agencies of the State of Nebraska and this court doubts whether one state agency can be deemed to have interfered with a contract between another agency and a third party. Further, as noted, the only relief sought by the plaintiffs is declaratory, injunctive and other equitable relief. The plaintiffs have not sought any relief at law for damages based on the alleged tortious interference with a business relationship or the inference that Stitt libeled Omni.

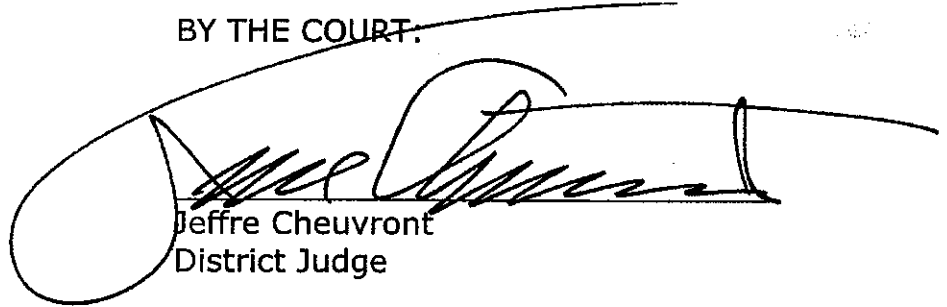
There are no genuine issues of material facts present here. The issues are legal and this court finds that the plaintiffs have no legal basis to support their claims. The motion for summary judgment should be sustained and the

complaint dismissed.

IT IS ORDERED that the motion for summary judgment be sustained and the complaint dismissed at plaintiffs' costs.

Dated February 28, 2008.

BY THE COURT:

A large, stylized handwritten signature in black ink, which appears to read "Jeffrey Cheuvront". The signature is written over a horizontal line.

Jeffrey Cheuvront
District Judge