FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RAUL GONZALEZ, JR., *Plaintiff-Appellant,* v. CHANDRA SPENCER; FRANSCELL, STRICKLAND, ROBERTS & LAWRENCE, a Professional Corporation; LOS ANGELES COUNTY, *Defendants-Appellees.*	No. 00-55935 D.C. No. CV-00-01944-WJR OPINION

Appeal from the United States District Court
for the Central District of California
William J. Rea, District Judge, Presiding

Argued and Submitted
November 6, 2001—Pasadena, California

Filed May 13, 2003

Before: Cynthia Holcomb Hall, Alex Kozinski and
William A. Fletcher, Circuit Judges.

Per Curiam Opinion;
Dissent by Judge W. Fletcher

COUNSEL

Robert Mann, Los Angeles, California, argued for the plaintiff-appellant. Donald W. Cook, Los Angeles, California, joined him on the briefs.

Cindy S. Lee, Franscell, Strickland, Roberts & Lawrence, Pasadena, California, argued for defendants-appellees Chandra Spencer and Franscell, Strickland, Roberts & Lawrence.

Jennifer E. Gysler, Monroy, Averbuck & Gysler, Westlake Village, California, argued for defendant-appellee County of Los Angeles. Clayton C. Averbuck, Monroy, Averbuck & Gysler, Westlake Village, California, joined her on the brief.

OPINION

PER CURIAM:

While defending Los Angeles County in a civil rights suit brought by Raul Gonzalez (the "underlying action"), attorney Chandra Spencer accessed Gonzalez's juvenile court file without notifying him and without obtaining authorization from the juvenile court pursuant to California Welfare & Institutions Code § 827(a)(1)(M) and California Rule of Court 1423(b). Spencer used confidential records from the file to cross-examine Gonzalez during his deposition in the underlying action. Gonzalez then brought this suit against Spencer, her firm, Franscell, Strickland, Roberts & Lawrence, and the county for accessing and using his juvenile court file without authorization. He alleged that Spencer's conduct violated his rights under the Fourth and Fourteenth Amendments and California law. The district court dismissed his claims for damages and for declaratory and injunctive relief.

[1] 1. Appellees argue that settlement of the underlying action rendered this case moot because Gonzalez no longer

faces a significant prospect of illegal inspection or disclosure. "A case is moot only if interim events have 'completely and irrevocably eradicated the effects of' an allegedly improper ruling." *In re Pintlar Corp.*, 124 F.3d 1310, 1312 (9th Cir. 1997) (quoting *Wong* v. *Dep't of State*, 789 F.2d 1380, 1384 (9th Cir. 1986)). Although Gonzalez need not fear similar injury in the future, the settlement does not affect his claims for damages based on past conduct.

[2] 2. Spencer acted under color of state law. She was retained to represent state entities and their employees in litigation. She inspected Gonzalez's file in the course of that representation, and used her status to gain access to the file. Her role was analogous to that of a state prosecutor rather than a public defender, because she acted on behalf of the state rather than as its adversary. *See Polk County* v. *Dodson*, 454 U.S. 312, 323 n.13 (1981).

[3] Spencer was not "[c]ourt personnel" for purposes of section 827(a)(1)(A). She was not a court employee and did not perform functions routinely performed by court employees. Rather, she was an outside service provider retained to represent the court with respect to its pecuniary interests. *Michael* v. *Gates*, 38 Cal. App. 4th 737 (Ct. App. 1995), is not on point. One of the statutes at issue there, California Evidence Code section 1043, placed rights to LAPD personnel files in the LAPD as an institution. The privilege to the files belonged to the LAPD itself as well as the individual officers. *See Michael*, 38 Cal. App. 4th at 744. By contrast, neither the juvenile court nor its personnel were entitled to share Gonzalez's case file with counsel simply to protect their own pecuniary interests.

[4] Spencer therefore had to get court permission before inspecting Gonzalez's file. State law required her to petition the juvenile court. *See* Cal. Welf. & Inst. Code § 827(a)(1)(M); Cal. Rules of Court 1423(b). Although the district court could have ordered disclosure notwithstanding

state law, the file was still presumptively protected until it did. *See* 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5428, at 817 (1980) ("[E]ven in cases where federal law applies, constitutional and prudential considerations suggest that courts should carefully assess any attempt to compel disclosure of confidential juvenile court [files]."). Spencer could not inspect the file on her own initiative on the theory that she could have obtained permission, had she asked. *Cf. United States* v. *Echegoyen*, 799 F.2d 1271, 1280 n.7 (9th Cir. 1986) ("[T]o excuse the failure to obtain a warrant merely because the officers had probable cause and could have . . . obtained a warrant would completely obviate the warrant requirement . . . ."). Nor could the district court authorize her search retroactively. If Spencer violated Gonzalez's constitutional rights, he is entitled at least to nominal damages, even if Spencer could have obtained the documents lawfully. *See Wilks* v. *Reyes*, 5 F.3d 412, 416 (9th Cir. 1993).

[5] Because Spencer improperly obtained access to Gonzalez's juvenile court file, we need not reach the question whether Spencer's use of Gonzalez's file in depositions also violated his constitutional rights.

[6] 3. Spencer is not entitled to qualified immunity. She is a private party, not a government employee, and she has pointed to "no special reasons significantly favoring an extension of governmental immunity" to private parties in her position. *See Richardson* v. *McKnight*, 521 U.S. 399, 412 (1997).

Gonzalez's claims were not estopped or waived by his mere pursuit of the underlying action or his failure to object immediately when Spencer first disclosed the file. He did not take "inconsistent positions" with respect to the file's confidentiality, *Rissetto* v. *Plumbers & Steamfitters Local 343*, 94 F.3d 597, 601 (9th Cir. 1996) (internal quotation marks omitted), nor did he voluntarily "relinquish[ ] . . . a known right,"

Yoshida v. *Liberty Mut. Ins. Co.*, 240 F.2d 824, 829 (9th Cir. 1957).

* * *

[7] The district court's dismissal of the damages claims is reversed. The injunctive claims are dismissed as moot. The case is remanded for further proceedings consistent with this opinion.

REVERSED in part, DISMISSED in part and REMANDED. Costs to appellant.

W. FLETCHER, dissenting:

I respectfully dissent. Gonzalez contends that Spencer's access to and use of his juvenile court case file constituted a violation of the Fourth Amendment. A person claiming a right to privacy under the Fourth Amendment must demonstrate a "justifiable," "reasonable" or "legitimate expectation of privacy." *Smith v. Maryland*, 442 U.S. 735, 739 (1979) (internal quotations omitted); s*ee Kee v. City of Rowlett*, 247 F.3d 206, 211-12 (5th Cir. 2001) (applying Fourth Amendment analysis to a § 1983 suit alleging a violation of the constitutional right to privacy). Gonzalez bases his Fourth Amendment claim on California law, which, he contends, forbade Spencer from gaining access to and using his juvenile court case file without first seeking authorization from the California juvenile court.

Specifically, Gonzalez contends that California Welfare and Institutions Code § 827 and California Rule of Court 1423 required Spencer to petition the juvenile court in order to obtain access to his file. He asserts that § 827 establishes that juvenile court case files are confidential, and that Rule 1423 provides that inspection of files by persons other than those specified in § 827 can be authorized only by the juve-

nile court. I agree with Gonzalez that § 827 establishes the confidentiality of juvenile court case files. I also agree that Rule 1423 requires that the juvenile court authorize access to those files by parties within the contemplation of § 827, and that Rule 1423 restricts the ways in which files can be used. However, I disagree with Gonzalez (and the majority) as to the status of Spencer and her law firm, and as to the access and use that are permitted. I would hold that because Spencer and her firm represented the juvenile court in connection with the § 1983 case brought by Gonzalez, and because Spencer obtained and used Gonzalez's juvenile court case file only in depositions of a court employee and Gonzalez himself in connection with that representation, Spencer did not violate § 827 or Rule 1423.

Section 827(a)(1)(A) provides, "[A] [juvenile] case file may be inspected only by the following: (A) Court personnel." Section 827(a)(2) provides, in pertinent part, "[J]uvenile case files . . . shall be released to the public pursuant to an order by the juvenile court after a petition has been filed and interested parties have been afforded an opportunity to file an objection." I read § 827(a)(1)(A) to allow "court personnel," including a retained attorney representing the juvenile court in litigation, to "inspect" a juvenile court case file of a plaintiff in that litigation without the necessity of first filing a petition with a judge of the juvenile court. Further, I do not read § 827(a)(2), which requires a petition if a juvenile court case file is to be "released to the public," to require a petition when the file is to be used in depositions of a court employee and of the plaintiff.

Rule 1423(b) provides, in pertinent part:

> Only those persons specified in sections 827 and 828 may inspect juvenile court records without authorization from the court . . . .
>
> . . . The court shall permit disclosure of, discovery of, or access to juvenile court records or proceedings

> only insofar as is necessary, and only if there is a reasonable likelihood that the records in question will disclose information or evidence of substantial relevance to the pending litigation, investigation, or prosecution.

I do not read Rule 1423 to require prior judicial authorization of Spencer's access to Gonzalez's juvenile court case file because I read the reference to "court personnel" in § 827(a)(1)(A) to include Spencer. In the words of Rule 1423, Spencer is a "person[ ] specified in section 827" who "may inspect juvenile court records without authorization from the court." Further, I do not read Rule 1423 to require prior judicial authorization when Spencer's use of information from the file was limited to the two depositions in this case.

I am assisted in my reading of § 827 and Rule 1423 by *Michael v. Gates*, 38 Cal. App. 4th 737 (1995), in which a California Court of Appeal interpreted analogous provisions of California law governing confidentiality of police personnel records. Michael was a former Los Angeles police officer who had testified as an expert witness in an earlier suit brought against the Los Angeles Police Department. During the course of that litigation, a police officer reviewed Michael's Police Department personnel records in an attempt to find information that could be used to impeach Michael at trial, and turned the records over to the deputy city attorney who was representing the Department. Neither the police officer nor the attorney notified Michael that they were reviewing his Department personnel records, and neither obtained judicial authorization for their review. When the Department's attorney announced that he intended to use information from Michael's personnel records to impeach him, Michael's counsel objected. The court sustained the objection and ordered the records sealed. Michael then brought a separate civil suit alleging a violation of the California statutes providing for the confidentiality of Department personnel records.

The relevant statutes in *Michael* were California Penal Code § 832.7 and Evidence Code § 1043. Welfare and Institutions Code § 827, at issue in our case, provides that juvenile court case files are confidential. Penal Code § 832.7, at issue in *Michael*, similarly provides that police officer personnel records are confidential. Specifically, § 832.7(a) provides, "Peace officer personnel records . . . are confidential and shall not be disclosed by the department or agency that employs the peace officer in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code."

California Rule of Court 1423, at issue in our case, requires prior judicial authorization for disclosure of, discovery of, or access to juvenile court records, except as to certain categories of people. Evidence Code § 1043, at issue in *Michael*, similarly requires prior judicial or administrative authorization for discovery or disclosure of police officer personnel records. Specifically, § 1043 provides, in pertinent part:

> (a) In any case in which discovery or disclosure is sought of peace officer personnel records . . . , the party seeking the disclosure shall file a written motion with the appropriate court or administrative body . . . .
>
> (b) The motion shall include . . . [a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation . . . .

Unlike § 827 and Rule 1423, at issue in our case, the statutes at issue in *Michael* contain no language excusing anyone from their requirements. Insofar as the texts of Penal Code § 832.7 and Evidence Code § 1043 provide, all people (without exception) who seek access to confidential police personnel records are required to seek prior judicial or

administrative authorization. The court in *Michael* nonetheless held that the attorney had violated neither § 832.7 nor § 1043. The court held that, on the facts of the case, there had been no " 'discovery or disclosure' of [Michael's] records within the meaning of the statutes":

> An agency which reviews its own records *with its attorney* has not engaged in discovery.
>
> . . . [R]ather than forbidding a governmental agency which has custody and control of peace officer personnel records from reviewing those records *with its attorney*, the [statutory] scheme contemplates, even demands, that a governmental agency *and its lawyer* will review those records, without noticed motion or court order.

Id. at 38 Cal. App. 4th at 743-44 (italics added; underlining in original). The court held, further, that an inspection of the records by an attorney, for the purpose of defending the agency in litigation, does not constitute disclosure:

> [W]e hold that where, as here, a governmental agency *and its attorney* conduct a contained and limited review of peace officer personnel files within the custody and control of the agency, for some relevant purpose, there is no disclosure under the statutes.

Id. at 745 (emphasis added).

In the analogous context of our case, I conclude that a California court would find that an attorney representing the juvenile court in litigation may obtain access to juvenile court files of a plaintiff in that litigation. Even if § 827 did not contain explicit authorization for "court personnel" to obtain access to court files relevant to litigation in which the court is involved, I would read *Michael* to authorize such access. In fact, how-

ever, § 827 goes beyond the statutory silence in *Michael* and explicitly authorizes access by "court personnel." Informed by *Michael*, I construe the term "court personnel" in § 827(a)(1)(A) to include an attorney representing the court. That is, if an attorney had authority to examine confidential records in *Michael*, where there was no statutory provision providing for such an examination, I believe that a California court would find that an attorney has similar authority here, where there is an explicit statutory provision giving "court personnel" an unrestricted right to "inspect" a juvenile court case file.

The next question is whether an attorney representing the juvenile court may use juvenile court case files in depositions, without first obtaining authorization from a judge of that court. The answer is not provided by *Michael*. In that case, the personnel records were reviewed by the attorney in preparation for cross-examination, but, in the end, they were not used for that purpose. Indeed, the court in *Michael* was careful to specify that the records had not been "disclose[d] in litigation." 38 Cal. App. 4th at 744.

I would hold that § 827 and Rule 1423 were not violated in this case, where information from Gonzalez's juvenile court case file was used only in depositions of a court employee and of Gonzalez himself. The clear concern of § 827 and Rule 1423 is that confidential information contained in a juvenile court case file not be released to the general public unless there has been authorization by a judge of the juvenile court. Indeed, § 827(a)(2) is explicit on this point: "[J]uvenile case files . . . shall be released *to the public* pursuant to an order by the juvenile court after a petition has been filed and interested parties have been afforded an opportunity to file an objection." (Emphasis added.) *See also* Rule 1423(b) ("In determining whether to authorize inspection or release of juvenile court records, in whole or in part, the court shall balance the interests of the child and other parties to the juvenile

court proceedings, the interests of the petitioner, and the interests of *the public*." (emphasis added)).

In this case, the only release of information from Gonzalez's juvenile court case files took place during the two depositions conducted in connection with Gonzalez's § 1983 case, and there is no allegation that Spencer revealed information from the files more broadly than to those who participated in the depositions. The first deponent was a court employee, who, as "court personnel" under § 827(a)(1)(A), is entitled to "inspect" the file. The other deponent was Gonzalez himself, who can hardly be considered a member of the public for purposes of § 827 and Rule 1423.

There is really not much to Gonzalez's case. The sum total is that Spencer gained access to his juvenile court file while representing the juvenile court in the course of defending against a suit brought by Gonzalez, and that Spencer used information from the file in deposing a court employee and Gonzalez. I would hold that, in those circumstances, Spencer violated neither § 827 nor Rule 1423. Because Spencer violated neither § 827 nor Rule 1423, she could not have violated any federal constitutional right of privacy based on a settled expectation arising out of state law. I would therefore affirm the district court's dismissal of Gonzalez's § 1983 suit.