



NINETEENTH JUDICIAL CIRCUIT OF VIRGINIA

Fairfax County Courthouse
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April 21, 2020

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Re: *Ashley Brown v. Hunter S. Tashman, MD, et al.*
Case No. CL-2017-3852

[REDACTED], *an Infant, By and Through His Mother and Next Friend, Ashley Brown, et al. v. Hunter S. Tashman, MD, et al.*
Case No. CL-2018-16202

OPINION LETTER

Dear Counsel:

The issue before the Court is whether it may seal from public access materials related to an infant settlement approval, which it may not do pursuant to a wrongful death settlement approval.¹ The Court holds it may not seal such materials and denies the “Motion for Approval of Compromise Infant Claim” (“Infant Settlement”) without prejudice.

I. FACTUAL OVERVIEW.

Plaintiff Ashley Brown and her minor son, █,² separately filed complaints against Dr. Hunter S. Tashman and Hunter Scott Tashman, MD, PC (“Defendants”). The Complaints allege Defendant Dr. Tashman, a licensed physician practicing in the fields of obstetrics and gynecology, committed medical malpractice while treating Ashley and her son.

The Court scheduled a jury trial to begin February 24, 2020. Shortly before trial, the parties announced a settlement and the matter was removed from the trial docket. On April 10, 2020, the parties presented their Infant Settlement to the Court for approval, pursuant to Virginia Code § 8.01-424. The parties offered an agreed sketch order wherein Defendants denied liability but agreed to pay an amount listed in an attached schedule. The Court never saw a copy of the settlement agreement itself. Instead, the Court questioned a provision in the sketch order that would seal from public inspection the attached schedule, which was essentially a term sheet displaying the dollar amount of the settlement and the distribution of the proceeds. The Court took the matter under advisement.

II. COURT RECORDS ARE PRESUMED PUBLIC.

Open judicial records are a deeply rooted constitutional and statutory principle. *See Press-Enterprise Co. v. Superior Court of Cal. for Riverside Cty.*, 478 U.S. 1, 15 (1986) (First Amendment “right of access”); *see also* VA. CODE ANN. § 17.1-208. Virginia adheres to a presumption of openness. *See* VA. CODE ANN. § 17.1-208 (“shall” be open to inspection); *Perreault v. The Free Lance-Star*, 276 Va. 375 (2008). Specifically, the Virginia Code states:

Except as otherwise provided by law, any records that are maintained by the clerks of the circuit courts shall be open to inspection in the office of the clerk by any person

VA. CODE ANN. § 17.1-208(B) (emphasis added). *Falkoff v. Falkoff*, CL-2016-14102, 2019 WL 6652402, at *3 (Fairfax Cir. Ct. Dec. 6, 2019).

¹ *Perreault v. Free Lance Star*, 276 Va. 375 (2008).

² Ashley Brown sued on █’s behalf as next friend.

Virginia Code § 17.1-208 creates a “strong presumption in favor of public access to judicial records.” *Perreault*, 276 Va. at 389. To overcome this presumption, the moving party “must bear the burden of establishing an interest so compelling that it cannot be protected reasonably by some measure other than a protective order, and that any such order must be drafted in the manner least restrictive of the public’s interest.” *Shenandoah Publ’g House, Inc. v. Fanning*, 235 Va. 253, 259 (1988) (citation omitted). “[T]he desire of the litigants is not sufficient reason to override the presumption of openness.” *Id.* “Nor [does the Supreme Court of Virginia believe that] risks of damage to professional reputation, emotional damage, or financial harm, stated in the abstract, constitute sufficient reasons to seal judicial records.” *Id.* See also *Shiembob v. Shiembob*, 55 Va. App. 234, 244 (2009).

The law is settled that parties may not redact terms of a wrongful death settlement, which is subject to court approval pursuant to Virginia Code § 8.01-55. *Perreault*, 276 Va. at 386. The question here is, can parties redact terms of an infant settlement, which is subject to court approval pursuant to Virginia Code § 8.01-424(A)? Because the Court finds no principled distinction between the two judicial approval hearings, it must default to the statutory presumption of openness of Virginia Code § 17.1-208 and treat both hearings openly.

Dr. Tashman distinguishes infant settlements from wrongful death settlements three ways: (1) unlike the infant settlement statute, the wrongful death statute requires settlement terms in the petition to the court; (2) the parties here mediated a settlement and enjoy the special mediation confidentiality provisions of Virginia Code § 8.01-581.22; and (3) infant settlements inherently involve minors, who are generally shielded from public glare (*see generally* VA. CODE ANN. § 16.1-300 *et seq.*).³ The Court disagrees, substantively, with Dr. Tashman’s first and second points as a matter of law and, based on the facts of the case, also disagrees with his third point.

1. Both Wrongful Death Settlements and Infant Settlements are Conditional Pending Judicial Approval and are Materially Identical.

Courts must approve both wrongful death and infant settlements.

The wrongful death settlement statute, Virginia Code § 8.01-55, reads: “[Plaintiff] may compromise any claim to damages . . . with the approval of the court in which the action was brought . . .” VA. CODE ANN. § 8.01-55 (emphasis added). It continues, “Such approval may be applied for on petition to such court [and that petition] shall state the compromise, its terms[,] and the reason therefor.” *Id.*

The infant settlement statute, Virginia Code § 8.01-424(A), reads:

³ Plaintiffs join these arguments.

In any action or suit wherein [an infant] is a party, the court . . . *shall have the power to approve and confirm a compromise* of the matters in controversy on behalf [of the infant] . . . if such compromise is deemed to be in the best interest of the [infant].

VA. CODE ANN. § 8.01-424(A) (emphasis added). Subsection B continues:

In case of damage to the person or property of [an infant], caused by the wrongful act, neglect[,] or default of any person, when death did not ensue therefrom, any person or insurer interested in compromise of any claim for such damages . . . may, upon motion to the court in which the action is pending for the recovery of damages on account of such injury . . . *move the court to approve the compromise.*

Id. § (B) (emphasis added).

Similarly, both statutes prescribe the exercise of judicial discretion to approve or reject the proposed settlement. This grant of discretion vests the Court with more than a mere ministerial act to approve that which the parties agreed. *Cf. In re Commonwealth's Attorney for City of Roanoke*, 265 Va. 313, 318 (2003) (holding the proposition in the context of mandamus). To hold otherwise would render meaningless the statutory requirement that the Court be involved in the settlement, as it would not be in most other settlement contexts.

The significant difference between the two statutes is the wrongful death statute requires the settlement terms in the petition, whereas the infant settlement does not. This was one basis for the holding in *Perrault* prohibiting the sealing of the wrongful death compromise petition. However, the principle on which the Supreme Court of Virginia in *Perrault* relied was not the petition itself—it was the information a court considered in exercising its discretion to accept or reject a settlement. *Perrault* emphasized its holding in *Shenandoah Publishing*:

In *Shenandoah Publishing*, we stated that the legislative purpose underpinning Code § 8.01-55 served the public's "societal interest in learning whether compromise settlements are equitable and whether the courts are administering properly the powers conferred upon them." 235 Va. at 260. This is so because "the people have a vital interest, one of personal and familial as well as community concern, in cases involving claims of medical malpractice on the part of licensed practitioners and other health care providers." *Id.*

Perrault, 276 Va. at 389 (internal parallel citations omitted).

This then is the nub of *Perrault*—the public's interest in: (1) seeing that the courts are properly administering powers conferred upon them; and (2) knowing the dispositions of malpractice claims against medical providers in the community. As to the first, the public cannot meaningfully know whether their courts properly execute the mandate to approve or reject settlements without knowing the amount and distribution of the settlement funds. As to the

second, the amount of a settlement informs the public of serious or minor claims of malpractice so that that public can intelligently choose to use a medical provider or not.

Textually, it is true the wrongful death statute specifically mandates the settlement terms be in the petition for approval, whereas the infant settlement statute does not contain such language. Practically, however, this is a distinction without a difference. In both cases the General Assembly mandates that a judge review a settlement, exercising judicial discretion that the public by default has the right to observe.

The Court considered two possible ways to grant judicial approval without creating a record of settlement terms: (1) showing (or telling) the terms to the judge but not marking it as an exhibit⁴; and (2) filing the terms under seal. There is no authority for the latter in the context of this case. As to the former, it contains the same problem identified by *Perrault*—how do you enforce something that is not in the court order or in the court file? *Perrault*, 276 Va. at 386.

Since settling parties must seek court approval of their settlement, the public has a right to see how the Court exercises its authority.

2. The Mediation Confidentiality Statute Does Not Bind a Court that Did Not Participate in the Mediation.

Laudably, the parties reached their pending settlement through mediation. They cite the mediation confidentiality statute, Virginia Code § 8.01-581.22, as a reason to seal the terms of their Infant Settlement. *Perrault* considered this argument but did not rule on it. *Perrault*, 276 Va. at 388.⁵

It is logical to permit mediating parties to maintain the confidentiality of their mediations and resulting settlements. It spurs the use of mediation.⁶ However, most mediated settlements are free from judicial review (e.g., breaches of contract between two companies). Infant settlements are not. Conceptually, an important party was absent from the mediation sessions: the Court. It cannot approve or reject a mediated settlement under Virginia Code § 8.01-424 without reviewing the terms of settlement. It never consented to such statutory review in secret. *Perrault*,

⁴ “Exhibits entered into evidence in a judicial proceeding that lead to the judgment constitute judicial records.” *Lotz v. Commonwealth*, 277 Va. 345, 351 (2009) (citing *Perreault*, 276 Va. at 387).

⁵ “In resolving this issue we acknowledge that within the pertinent statutory scheme there exists at least a facial tension between the ‘[e]xcept as otherwise provided by law’ provision contained in Code § 17.1-208 and the ‘as provided by law or rule’ provision contained in the confidentiality provisions of Code § 8.01-581.22(ix). The former suggests a limitation upon public access to judicial records whereas the latter suggests a limitation upon otherwise confidential mediated agreements. Because of the view we take in resolving this case, we need not further address that issue.” *Id.*

⁶ Mediated settlements are not the only public policy goal for consideration, however. The public policy of favoring out-of-court settlement “cannot heavily outweigh the public’s interest in access to the judicial process.” *K.S. v. Ambassador Programs Inc.*, No. 1:10CV439, 2010 WL 3565481, at *3 (E.D. Va. Sept. 3, 2010).

276 Va. at 388 (reasoning that “we must consider the harmonious application of [the wrongful death statute] and [the mediation statute] in light of the fact that the settling parties were required to obtain court approval of the mediated settlements of these wrongful death claims and to disclose the terms of those settlements in the petitions to the court seeking such approval”).

So long as settling parties must win the Court’s approval of their settlement, the Court must exercise its discretion publicly.

3. Absent a Particularized Harm to a Child from Open Records, Infant Settlements Should Not be Automatically Sealed.

Dr. Tashman argues another distinction between the wrongful death settlement statute and the infant settlement statute is that the later involves a child. He cites the implied public policy of Virginia’s laws sealing many cases involving children (*e.g.*, VA. CODE ANN. § 16.1-300 *et seq.*).

Virginia law seals many matters involving children as a matter of course, but not all. While child support proceedings are sealed when brought in the Juvenile and Domestic Relations Courts and remain sealed when appealed to the Circuit Court, such cases originating in the Circuit Court are open to the public unless the Court agrees to seal it. VA. CODE ANN. § 20-124.

Instead, in the absence of specific statutory authority, court records are open per Virginia Code § 17.1-208 unless there are case-specific grounds for sealing, such as a particularized concern of harm. *Shenandoah Publishing*, 235 Va. at 259; *see generally Falkoff*, 2019 WL 6652402 (listing good and bad reasons to seal a file that could affect children). Risks of damage “stated in the abstract” are insufficient to justify sealing a record.

In this case there was no particularized showing of any harm to the child stemming from the public release of the settlement terms. Plaintiff raised a general concern that the child and his family could be targeted by financial scammers. This, however, is the sort of abstract risk disapproved by *Shenandoah Publishing*. Additionally, there is no credible, particularized evidence of the child’s medical condition necessary to justify a complete sealing of the settlement terms. For example, there is no statement that a portion of the settlement funds would provide pediatric psychological services.⁷ Such references *could* be redacted under the least restrictive means policy of *Shenandoah Publishing*.⁸ Guardian *ad litem* reports, for example, are routinely sealed to protect the child.⁹ While safeguarding children is undoubtedly a compelling

⁷ The Court raises this only as a hypothetical and not as a suggestion or statement of fact that the child has any medical issues.

⁸ The Court would agree to seal any medical records or references to medical conditions of █ in the file.

⁹ The Court would agree to seal the GAL report.

Ashley Brown v. Hunter S. Tashman, MD, et. al.

Case No. CL-2017-3852

█ *v. Hunter S. Tashman, MD, et. al.*

Case No. CL-2018-16202

April 21, 2020

Page 7 of 7

interest (*see, e.g., New York v. Ferber*, 458 U.S. 747 (1982)), a party or a court cannot simply state, “This case involves a child; entire case sealed.” A child in a case, alone, is not a sufficient condition to seal.

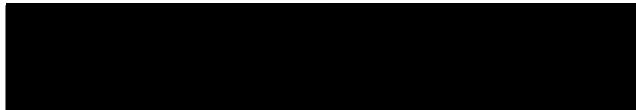
Therefore, there is no reason to seal this case simply because it involves a child.

III. CONCLUSION.

For the reasons stated herein, the Court holds it may not seal settlement terms in infant settlement approvals any more than it can for wrongful death settlement approvals. The “Motion for Approval of Compromise Infant Claim” is denied without prejudice.

An appropriate Order is attached.

Kind regards,



David A. Oblon
Judge, Circuit Court of Fairfax County
19th Judicial Circuit of Virginia

Enclosure

OPINION LETTER

VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

ASHLEY BROWN)
)
 Plaintiff,)
)
 v.)
)
 HUNTER S. TASHMAN, MD, *et al.,*)
)
 Defendants.)

CL-2017-3852

██████████, AN INFANT, BY AND THROUGH)
 HIS MOTHER AND NEXT FRIEND,)
 ASHLEY BROWN, *et al.,*)
)
 Plaintiffs,)
)
 v.)
)
 HUNTER S. TASHMAN, MD, *et al.,*)
)
 Defendants.)

CL-2018-16202

ORDER

THIS MATTER comes before the Court on Plaintiff ██████████'s "Motion for Approval of Compromise Infant Claim." And it

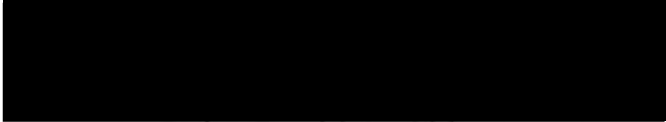
APPEARING the parties desire the terms of their settlement be sealed from public inspection. It is

ADJUDGED the Court may not seal the terms of settlement for the reasons stated in its Opinion Letter dated April 21, 2020, which is incorporated herein by reference. Therefore, it is

ORDERED the "Motion for Approval of Compromise Infant Claim" is DENIED WITHOUT PREJUDICE; and it is further

ORDERED that the parties appear remotely in Calendar Control on May 1, 2020, at 9:30 a.m. to schedule further proceedings.

AND THIS CAUSE CONTINUES.



Judge David A. Oblon

APR 21 2020



Date

PURSUANT TO RULE 1:13 OF THE RULES OF THE SUPREME COURT OF VIRGINIA,
ENDORSEMENT OF THIS ORDER IS WAIVED BY DISCRETION OF THE COURT.
OBJECTIONS MUST BE FILED WITHIN TEN DAYS.