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THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
BERGEN COUNTY
LAW DIVISION, CIVIL PART
DOCKET NO. L-2625-21

IN THE MATTER OF THE
ESTATE OF F.W.K., JR.,
a/k/a F.W.K. JR, Deceased,
By Its Executors, M.E.K.,
S.L.K., and C.A.D,

Plaintiffs,

v.

M.A-V.,

Defendant.

APPROVED FOR PUBLICATION

August 17, 2022

COMMITTEE ON OPINIONS

Decided: May 27, 2021

Raymond Barto for plaintiffs (Barto & Barto, attorneys).

John W. Baldante and Mark R. Cohen, for defendant (Levy Baldante Finney & Rubenstein, PC, attorneys).

Richard J. Abrahamsen for intervenor K.A. (Abrahamsen Grant, LLC, attorneys).

THURBER, J.S.C.

This matter is before the court on the application of Estate of F.W.K., Jr. to enjoin defendant, M.A-V., from filing a complaint containing allegations of

sexual abuse of M.A-V. by F.W.K. except with use of initials in lieu of party names. The court signed an Order to Show Cause on April 23, 2021, setting a return date of May 26, 2021. On May 14, 2021, the court granted a motion to intervene filed by K.A., an engineering firm, after which K.A. filed a brief in support of F.W.K.'s application. M.A-V. opposed the application, and F.W.K. filed a reply. This decision follows oral argument.

F.W.K. died in 2015. M.A-V.'s counsel recently alerted the Estate of F.W.K. that he intended to file a complaint alleging that F.W.K. sexually abused M.A-V. beginning in 1988 when M.A-V. was thirteen years old. The proposed complaint was specific and detailed in its description of the alleged sexual encounters. Plaintiff Estate requested M.A-V. to agree to file the complaint anonymously, which M.A-V. declined to do. The Estate filed this action preemptively, seeking to prevent the public disclosure of the identity of the Estate and F.W.K. in connection with M.A-V's allegations. The Estate argued the allegations would be embarrassing for F.W.K.'s family members and would destroy the reputation of F.W.K. and the family engineering firm, K.A., which would impact K.A.'s thirteen employees and might impact the value of Estate-owned residential rental properties. The Estate executors, who filed this complaint, assert they are acting under their fiduciary duty to protect and preserve assets of the Estate.

The Estate relies on Rules 4:52-1 and 4:52-2, governing temporary restraints and injunctive relief. The court granted temporary restraints to preserve the status quo pending the return date, without M.A-V's having an opportunity to respond or to oppose the application. In considering plaintiff's application, the court is guided by the familiar analysis of Crowe v. De Gioia, 90 N.J. 126 (1992). To establish its entitlement to the injunction, plaintiff must demonstrate that:

> (1) The injunction is necessary to prevent irreparable harm.
>
> (2) The legal rights underlying plaintiff's claim are well-settled.
>
> (3) The material facts are not in dispute.
>
> (4) A balancing of the equities—the relative hardships to parties of granting versus denying the relief—favor plaintiff.
>
> [Id. at 132-34.][1]

[1] Plaintiff frames the test as requiring it to show a threat of irreparable harm, minimal inconvenience to the other party if the relief is obtained, and a reasonable probability of success on the merits, which mirrors language in Zoning Bd. of Adjustment v. Serv. Elec. Cable Television, Inc., 198 N.J. Super. 370, 379 (App. Div. 1985). The Zoning Board court recognized "[a]n interlocutory injunction is an extraordinary equitable remedy utilized primarily to forbid and prevent irreparable injury, and it must be administered with sound discretion and always upon consideration of justice, equity, and morality in a given case." Id.

The Estate denies M.A-V's allegations and intends to dispute them vigorously. The Estate argues the publication of the allegations will destroy the reputation of decedent and the engineering firm, and that that harm cannot be undone if the Estate prevails in the anticipated lawsuit. M.A-V. does not dispute that the reputation harm would be irreparable.

The heart of this dispute on plaintiff's entitlement to the relief sought involves the second Crowe factor—the legal rights underlying plaintiff's claim. Persons seeking to rebut the presumption of access to court records and information about court proceedings have the burden of proving by a preponderance of the evidence that their interest in secrecy outweighs the public's interest in access. Hammock v. Hoffman-LaRoche Inc., 142 N.J. 356, 375–76 (1995). Questions whether to seal or unseal documents are within the trial court's discretion. Id. at 380. The good cause requirement needed to overcome the presumption of access is strictly construed. Lederman v. Prudential Life Ins., 385 N.J. Super. 307, 322–23 (App. Div. 2006). Under Rule 1:38-11, good cause is measured through a two-prong test: (1) that disclosure is likely to cause a clearly defined and serious injury; and (2) that the individual interest in privacy substantially outweighs the presumption of open access. R. 1:38-11(b). The right of a party to proceed anonymously, concealing the names of the litigants from the public, is governed by a similar presumption against

secrecy. A.B.C. v. XYZ Corp., 282 N.J. Super. 494, 500, 504–05 (App. Div. 1995).

Plaintiff recognizes the strong presumption in favor of open and public court proceedings, but it relies on the statute governing Actions for Sexual Abuse, N.J.S.A. 2A:61B-1, to counter that presumption: "(1) The name, address, and identity of a victim or a defendant shall not appear on the complaint or any other public record as defined in P.L.1963, c.73 (C.47:1A-1 et seq.). In their place initials or a fictitious name shall appear." N.J.S.A. 2A:61B-1(f)(1) (emphasis added). Plaintiff argues this provision is clear and unambiguous and prohibits M.A-V. from filing a complaint disclosing the name, address, or identity of the Estate or F.W.K.

M.A-V. replies that subsection (f)(1) cannot be read in isolation, and that when taken in context with the balance of subsection (f), it becomes apparent that the purpose of the statute is to protect the victim, and that defendants in childhood sexual abuse cases do not have the right to anonymity if the complaining alleged victim waives that. M.A-V.'s position is supported by case law. In a decision that has remained unchallenged and unaltered for twenty-five years, the Appellate Division upheld disclosure of the defendants' identities, holding the option for anonymity belonged to the plaintiff alone. T.S.R. v. J.C., 288 N.J. Super. 48, 53 (App. Div. 1996) ("[T]he statute grants only the plaintiff-

victim the option of refusing to disclose identifying information."). The T.S.R. court found an ambiguity between subsections (f)(1) and (f)(3) of the statute. Id. at 54. Subsection (f) in its entirety provides:

> (1) The name, address, and identity of a victim or a defendant shall not appear on the complaint or any other public record as defined in P.L.1963, c.73 (C.47:1A-1 et seq.). In their place initials or a fictitious name shall appear.
>
> (2) Any report, statement, photograph, court document, complaint or any other public record which states the name, address and identity of a victim shall be confidential and unavailable to the public.
>
> (3) The information described in this subsection shall remain confidential and unavailable to the public unless the victim consents to the disclosure or if the court, after a hearing, determines that good cause exists for the disclosure. The hearing shall be held after notice has been made to the victim and to the defendant and the defendant's counsel.
>
> (4) Nothing contained herein shall prohibit the court from imposing further restrictions with regard to the disclosure of the name, address, and identity of the victim when it deems it necessary to prevent trauma or stigma to the victim.
>
> [N.J.S.A. 2A:61B-1 (emphasis added).]

The court analyzed the purpose of the statute, noting the "entire tenor" of the 1992 statute is the protection of the victim's rights and there was no suggestion of any intent to shield defendants' identities if the victim chose to proceed publicly. T.S.R., 288 N.J. Super. at 55. The court noted that "section

(f)(4) allows for 'further restrictions' on disclosure if 'necessary to prevent trauma or stigma to the victim,'" while "[a]ny possible trauma or stigma to the defendant is conspicuously absent as a factor for consideration." Id. at 54. The court went on to say:

> J.C. argues that "disclosure will work a clearly defined and serious injury to [him] and his family." He maintains that "[t]o allow this case to proceed without a protective order will most likely result in public dissemination of baseless and/or meritless allegations of sexual misconduct and further damage the lives, reputations and dignity of defendant J.C. and his family." If, as J.C. suggests, these mere accusations are tantamount to an irreparable injury sufficient to outweigh the public's interest in open proceedings, then he is really asking us to effectively grant all defendants accused of sexual abuse in civil cases the right to defend anonymously, a result which hardly comports with a philosophy granting anonymity only in rare circumstances.
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> [Id. at 58 (emphasis added).]

The Estate argues that is what the Legislature intended in subsection (f)(1)—that all defendants in sexual abuse cases be granted the right to proceed anonymously. The Appellate Division has ruled otherwise.

In Lederman, the trial court sealed records at the request of defendant employer, finding the employer "would suffer serious damage to its reputation if the 'rather serious and damaging' allegations against it as were set forth in the complaint were made public," and despite a confidentiality agreement between

the parties. Lederman, 385 N.J. Super. at 314. The trial court concluded those factors outweighed the presumption of openness to court proceedings. Id. The Appellate Division disagreed:

> The presumption of openness to court proceedings requires more than a passing nod. Open access is the lens through which the public views our government institutions. It is essential to foster public confidence in the judiciary. Access to the courts advances "the first amendment's 'core purpose of assuring freedom of communication on matters relating to the functioning of government.'" Protective orders that have a chilling effect upon this purpose should be used sparingly, and only after the entity that seeks to overcome the strong presumption of access establishes that the interest in secrecy outweighs the presumption. Here, defendants have not met that burden. They have not demonstrated that they will suffer "a clearly defined and serious injury" if the sealing orders are lifted and the lawsuit and related documents are opened to public scrutiny. Simply put, defendants have not proven the need for secrecy.
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> [Id. at 323 (internal citations omitted).]

The court is satisfied that the issue before it falls squarely within the holding of T.S.R. v. J.C. The law is well-settled against the Estate's position, and therefore the Estate cannot meet this essential factor in the Crowe analysis. There is no reason to address the remaining Crowe factors.

> **[At the direction of the court, the published version of this opinion omits the final three paragraphs, addressing issues pertaining to M.A-V.'s capacity to consent. See R. 1:36-3.]**