

FILED
Court of Appeals
Division III
State of Washington
9/19/2018 4:55 PM

Court of Appeals, Division III Nos. 360059, 360679
Benton County Superior Court Nos. 17-4-00511-2, 17-4-00423-0

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

In Re:

ALYSSA ARELLANO-HAWKINS,

An Incapacitated person,

Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

This appeal concerns two separate motions to seal in a settlement of an incapacitated person and a related guardianship which were improperly denied. Underlying each action is an incapacitated young woman who resolved a substantial malpractice claim which was subject to confidentiality provision. Per court requirement of SPR 98.16W and due to her incapacity, she sought to have her settlement approved. All filings in support of the approval were filed under seal to protect her privacy. The settlement was approved by the Court in a similar sealed order. Two weeks later, another judge, sua sponte and never having presided over the matter, issued an order unsealing the file. The order allowed for a stay of 14 days to allow the incapacitated person opportunity to file a motion for seal. The sua sponte judge's order included various findings of fact and conclusions of law concerning a file he should not have had access.

Motions to seal were timely filed in each cause. The motions alternatively sought to seal only portions including financial references by way of redaction. All motions were denied but remained sealed until appellate review was taken. This appeal timely follows.

II. ASSIGNMENTS OF ERROR

1. Did the Court incorrectly deny the motions to seal?

2. Did the Court erroneously deny striking portions of Judge Spanner's factual findings when such findings were not supported by the record?
3. Does GR 15 and SPR 98.16W, as applied to Alyssa Hawkins violate the Privileges and Immunities Clause of the State and Federal Constitutions?
4. Does GR 15 and SPR 98.16W, as applied to Alyssa Hawkins infringe upon her Constitutional Right to Contract?
5. What is the proper standard in allowing the Court to seal a filing or portions of a file under GR 15 and GR 22?
6. May a judge, sua sponte, issue findings of facts and conclusions of law when said judge has not presided over any hearing relative to the matter?
7. May a judge review a file that is sealed and placed in a red file folder based purely on his curiosity?

III. FACTUAL/PROCEDURAL HISTORY

Alyssa Hawkins is an adjudicated incapacitated person. (CP 41).

As a pre-mature infant Alyssa was given a potassium overdose which resulted in significant cardiac arrest and kidney insult. (CP 124). Her resulting cognitive impairment revealed itself through her early years but she remained reasonably healthy until her kidneys failed at age 13 again

compromising her life. (CP 124). Suit was filed in 2016 on behalf of Alyssa in Spokane County against Deaconess Medical Center wherein the error in potassium dosage was eventually admitted. (CP 126). The parties were able to successfully resolve Alyssa's claim at mediation on November 20, 2017. (CP 70) The amount agreed upon was subject to a Confidentiality Agreement. *Id.* Many parties, representatives, and legal counsel were present at the mediation, including Alyssa's attorneys, Alyssa's Guardian Alexis Arellano-Hawkins, Alexis' attorney Jeff Kreutz, and Alyssa's settlement Guardian ad Litem, Richard Lewis (appointed before resolution under RCW 4.08 and stipulation). (CP 70; CP 122)

As a result of the settlement agreement, Alyssa filed a petition for SPR 98.16 approval of settlement on December 1, 2017 in Benton County. (CP 1-6, See also CP 11). Another order appointing Settlement Guardian ad Litem, Richard Lewis, was entered on December 4, 2017. (CP 7-10) Ultimately, a Motion to Approve the Settlement and to Seal the Order Approving Settlement and Disbursing Funds was filed on February 23, 2018. (CP 16-18) The Motion was based upon various court filings including the Petition to Approve Settlement, the Affidavits of Plaintiff's law firm, and the comprehensive report of Richard E. Lewis, the Guardian ad Litem, on proposed settlement. *Id.*

On March 2, 2018 in open court Alyssa's settlement and resulting settlement trust was approved by the Honorable Judge Samuel Swanberg. (CP 38). The settlement action was thus concluded. Yet, Alyssa had a sizeable estate which required verified inventory and a budget to be approved and monitored within the guardianship action. (CP 40).

In a drastic turn of events and prior to any hearings in the guardianship estate, on March 14, 2018, "the court on its own motion" entered an Order Unsealing Documents. (CP 22-24) The Honorable Judge Bruce Spanner issued the Order *sus sponte* including findings of fact and conclusions of law. *Id.* The findings of fact separately listed various filings within the approval of the settlement action which were filed sealed and "placed by the clerk in a red file folder, thereby making the document inaccessible to the public". *Id.* Finding of fact #8, however, referenced the dissolution proceeding between Alyssa's attorney, Andrea Clare, and her estranged husband pending in Franklin County. (CP 23) The finding was that documents in the settlement action were filed under seal "in order to prevent Ms. Clare's husband from learning the details of the settlement in this matter, and the extremely large fee granted to Plaintiff's attorneys." *Id.* Along these lines, Judge Spanner's conclusion of law #3 indicates that the documents were filed under seal "with perhaps with nefarious motivations..." (CP 24) By its terms, the Spanner's order

provided a period of 14 days for which the unsealing order would be stayed allowing Plaintiff's counsel to file a Motion to Seal per GR 15. *Id.*

Counsel for Alyssa Hawkins mistakenly sealed all the filings without first obtaining an Order. (CP 38) The office had no intention of violating GR 15.¹ (CP 32). Counsel argued that since Alyssa is an incapacitated person who suffered a horrible injury and only sought court approval of her settlement value to ensure her protection, the court records should be sealed. *Id.* Having never dealt with the approval process and Trust requirements in such a significant case Counsel filed everything under seal to protect Alyssa. *Id.* Indeed, the Trustee of the Settlement Trust supported sealing Alyssa's financial information from the public eye. (CP 106) Incapacitated persons are an easy mark for undue influence and safety concerns are real. *Id.* The trustee, claimed previous experience with similarly situated families moving when learning of kidnapping/murder threats and ransom demands upon such trust beneficiaries. (CP 106). Having Alyssa's financial records sealed was an appropriate measure of precaution to ensure she would not become a victim. *Id.*

¹ Pursuant to GR 15(c), the Court or a party may request a hearing to seal or redact court records. After the hearing, the Court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by identified, compelling privacy or safety concerns that outweigh the public interest in access to the court record.

Likewise, Alyssa's attorneys filed motions, declarations, and memorandums in support of sealing her file or portions thereof. (CP 55-56) The Honorable Judge Cameron Mitchell presided over the motion to seal court file in the settlement action on April 19, 2018. *Id.* In his ruling, Judge Mitchell reasoned:

In looking at the - - at this case, and I certainly understand it is a very - - was a very complicated, difficult case, and quite frankly, a very tragic situation. And the court does not want to be in the position of adding insult to what's already been a very significant injury.

However, I would disagree, somewhat, with counsel regarding the purposes of SPR 98.16. I would agree in the sense that it's there to protect the incapacitated person in this case, Alyssa. And I think the reason that the - - these matters have been brought before the court is so the court can evaluate whether or not, under the circumstances that present themselves, whether these settlements are reasonable.

I think that the public also has an interest in verifying and to be able to determine whether or not the court is doing its job appropriately. I think they have an oversight, if you will, position, to ensure that the court is ensuring that these things are reasonable and that settlements are not taking advantage of individuals who are incapacitated.

I don't see how the public can do that job without knowing what the factors are that went into the settlement or the amount of the settlement, whether it was appropriate for this individual, whether the individual is being taken advantage of, I think that the - - the public interest in this is - - is substantial, as well.

(VR 15-16)

Judge Mitchell authorized a stay of unsealing so that appellate review of his decision could be undertaken. (CP 56)

Thereafter, counsel for Alyssa motioned to seal financial references and documents within the guardianship action before filing the budget and verified inventory which would reveal the size and extent of Alyssa's financial estate. (CP 91) On April 25, 2018, Judge Mitchell presided over the motion to seal within the guardianship action and denied the same, subject to a stay for appellate review. (CP 93) At this hearing, Judge Mitchell sought to first ask if anybody in the courtroom had an objection to the motion for sealing (VR 6, lines 21-25). Despite there being no objection, the court found as follows:

And as I indicated, at our hearing last week on the other matter, the public has an interest in overseeing what the court does to ensure that things are being - - that the particular person is being adequately provided for. That the care plan and the - - well, that the financial plan is something that's going to be adequate for the individual, which is what the court does when it reviews these documents to make sure that the - - that they're adequate and that the individual is not being taken advantage of, I think that the - - the public has that same interest.

And, as I indicated in the previous matter, I don't think that the privacy interests of just wanting to keep that information private outweighs the public interest in making sure that the court is - - is making sure that the incapacitated person is adequately provided for, so the court is going to deny the request to file all those documents under seal. (VR 6, line 25, VP 8-9 lines 19-11)

IV. ARGUMENT

In both of Alyssa's cases, the court mistakenly denied her motions to seal. In both cases, the Honorable Judge Cameron Mitchell suggested the public's interest outweighed an incapacitated person's privacy interests and contractual obligations. Most likely, the court denied the motions based upon political reasons in effort to support a fellow judicial colleague's rogue order. Fortunately, Judge Mitchell appears to have invited this appeal allowing the Appellate Court to make the decision.

A. Standard of Review.

Court rules are interpreted as though they were drafted by the Legislature. Nevers v Fireside, Inc., 133 Wn.2d 804, 809 (1997). As such, courts will construe them in accord with their purpose. State v Wittenbarger, 124 W.2d 467, 484 (1994). Just as the construction of a statute is a matter of law requiring de novo review, so is the interpretation of a court rule. See Westberg v All-Purpose Structures, Inc., 86 Wn.App. 405, 409 (1997). Along these lines, the legal standard for sealing or unsealing court records is a question of law. Dreiling v Jain, 151 Wn.2d 900, 908 (2004).

B. Washington Law Allows the Court to Seal.

In determining whether court records may be sealed from public disclosure, courts start with the presumption of openness. Id. at 907. "The

right of access to judicial records, like the openness of court proceedings, serves to enhance the basic fairness of the proceedings and to safeguard the integrity of the fact-finding process.” Republic of Philippines v Westinghouse Elec. Corp., 139 F.R.D. 50, 56 (1991) (citing Press-Enterprise Co v Superior Court, 464 U.S. 501, 508 (1984)). Though openness is presumptive, it is not absolute. Dreiling v Jain, 151 Wn.2d 900, 909 (2004). In other words, while we presume court records will be made open and available for public inspection, court records may be sealed “to protect other significant and fundamental rights.” Dreiling, 151 Wn.2d at 909. In this case, Alyssa’s incapacity and right to privacy significantly outweigh the public’s interest in her settlement.

Unfortunately, there is no case in Washington that was appealed for purposes of providing case law or guidance involving a motion to seal records in a settlement. Most likely, the reason there are no cases is because there was none to challenge or appeal a minor/incapacitated person’s request to seal. Similar to the circumstances presented in this appeal.

The cases which have dealt with sealing records primarily involve exhibits used at trial which would not have otherwise been made public but for the parties requiring the trial process. Washington Courts have analyzed these motions to seal using a five-step approach outlined in Seattle Times Co. v Ishikawa, 97 Wn.2d 30, 37-39 (1982). First, the party seeking to seal court records must show a serious and imminent threat to some important interest, if not to protect a right to a fair trial. Hundtofte v Encarnation, 181 Wn.2d 1, 8 (2014). Second, anyone present when the

motion is made must be given an opportunity to object. *Id.* Third, the court must weigh the competing interests of the party and the public, and it must consider alternative methods to protect the interest. *Id.* Forth, the order must not be broader than necessary to protect the interest. *Id.* Alyssa's private settlement will easily satisfy all analytical steps.

C. GR 15 and SPR 98.16W, as Applied to Alyssa Hawkins, Infringe upon her Constitutional Right to Contract.

Both the State and Federal Constitution prohibit a law that impairs the obligation of contracts. *See* Wash. Constitution, Article 1, Section 23; U.S. Constitution, Article 1, Section 10. The two clauses are substantially similar and are given the same effect. Washington Federation of State Employees v. State, 101 Wn.2d 536, 539, 682 P.2d 869 (1984). The threshold question is whether the state law has, in fact, operated as a substantial impairment of a contractual relationship. Margola Associates v. City of Seattle, 121 Wn.2d 625, 653, 854 P.2d 23 (1993). The impairment is substantial if the party relied upon the potential supplanted part of the contract. *Id.* Here, the terms and conditions of the settlement of Alyssa's claim were paramount and specifically negotiated. Alyssa's representatives entered into an enforceable and legal contract with Deaconess Medical Center to resolve her medical malpractice claim. Settlement agreements are subject to the laws of contracts. Riley Pleas, Inc. v. State, 88 Wn.2d 933, 937-38, 568 P.2d 780 (1977). The parties

specifically negotiated for confidentiality. Alyssa should be afforded the same right to contract as competent adults. The mechanism of SPR 98.16W is designed to protect Alyssa Hawkins, not remove her privacy. As applied, with the addition of GR 15, it would be unconstitutional to not have the entire file sealed. The necessity of the settlement action was only, by virtue of a legislative mandate, to approve settlements. If a competent adult would have entered into the settlement agreement, this file would not exist.

Failing to seal the entire file in the settlement deprives Alyssa of her right to contract and her rights under the privileges and immunities clause of this State and Federal Constitution.

D. GR 15 and SPR 98.16W, as Applied to Alyssa Hawkins, Violates the Privileges and Immunities Clause of the State and Federal Constitution.

Our State Constitution specifically reads that:

“No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”

Article 1, Section 12 of the Washington State Constitution.

Cases in personal injury and medical malpractice are settled routinely and daily. It is routine that the parties negotiate confidentiality in exchange for resolution. In the case of a competent adult with pending

litigation, if the parties settle under a term of confidentiality, an Order of Dismissal is entered in the pending litigation and the terms of the settlement remain confidential.

Alyssa was required by state law to have her settlement approved. Alyssa is an adult, but is disabled. Had she not received such a significant potassium overdose, she would not have been required to seek approval of her settlement. That is the only difference? Had she been less injured she would be entitled to privacy? Our state law (SPR 98.16W) is designed to protect Alyssa Hawkins. GR 15, as applied with SPR 98.16W, results in an unconstitutional outcome to Alyssa. She will not be afforded the same privileges and immunities that somebody without a disability would be afforded - the right to confidentiality.

E. Sealing the File Serves to Further Protect Alyssa.

Alyssa is vulnerable due to her significant incapacity. Our laws were designed to ensure that minors and incapacitated people are adequately protected from exploitation. For this reason, Alyssa filed for court approval. It is indisputable that Alyssa lacks the ability to manage her own financial affairs. Indeed, experts in the case have expressed opinions that Alyssa cannot handle or correctly account with money. For this reason, a trust was established to assist her with the settlement

proceeds. Nevertheless, because of her access to significant funds, she will continue to be a target for exploitation her entire life.

This Court should conclude that Alyssa has a need for secrecy. Alyssa's life has dramatically changed as a result of the litigation. She now has opportunity to do things that were never possible or available to her before. Friends and family may come to learn that her life looks differently, but sealing as much information as possible concerning her settlement and the unfortunate injury she sustained only serves to further insulate and protect a very vulnerable person. The public has no interest in learning about intimate details surrounding Alyssa's settlement. The court file in Spokane exists and remains available to the public should there be an interest in the same. The settlement file however, should be kept confidential. Neither Alyssa nor her family wish to broadcast the settlement as a 'successful result'. Refusing to seal documents concerning the substantial work and efforts expended by her attorneys gives rise to implications concerning the settlement value. At the time of mediation, both the defendant, Deaconess Medical Center, and Alyssa's team agreed to keep the settlement and facts at issue confidential. Indeed, the facts and circumstances underlying Alyssa's significant injury are heartbreaking. The litigation caused Alyssa and those close to her to again 're-live' the circumstances which caused Alyssa's traumatic and substantial brain

injury. Sealing the settlement records which reveal the injury and amount of settlement is justly warranted.

F. At a minimum, the Court Should Have Redacted Portions of the Record that Identify the Terms and Conditions of the Resolution of Alyssa's Claim.

General Rule 15 does have an alternative remedy to sealing. The rule reads:

“A Court record shall not be sealed under this section when redaction will adequately resolve the issues before the Court pursuant to subsection (2) above.”

GR 15(3).

It is the position of counsel for Alyssa that the appropriate remedy here was to seal the entire Court file. There is no public interest in Alyssa's claim. If the Court disagrees, the Court should make findings that portions of every document filed that give any identifying factors of Alyssa, her family, settlement sums, the extent of her disability, her long-term life care needs, the settlement discussions, and any other identifying factors should be redacted.

G. Access to Guardianship Court Records Per GR 22 Supports Sealing Financial Figures/References of Alyssa.

The Guardianship proceeding provides an alternate basis to support sealing or redacting the financial figures and resources of Alyssa. GR 22(a) provides:

“The policy of the courts is to facilitate public access to court records, *provided that such access will not present an unreasonable invasion of personal privacy*, will not permit access to records or information defined by law or court rule as confidential, sealed, exempted from disclosure, or otherwise restricted from public access, and will not be unduly burdensome to the ongoing business of the courts.”

Had the records been sealed under GR 15 per court order, Alyssa would not have required a similar request under GR 22 within the guardianship. See GR 22(c)(3). Nonetheless, the court denied her motion in the guardianship action to seal records concerning her financial estate and affairs. The court again reasoned that the public’s interest outweighed her desire for privacy and confidentiality. Given the undisputed record containing concerns for Alyssa’s safety and lack of any objections to sealing, the court significantly erred.

H. The Unsupported Factual Findings of Judge Spanner’s Order Should be Stricken.

The court failed to grant the motion to strike any and all factual findings of Judge Spanner’s Order which were not based upon the record. There is no dispute that Judge Spanner did not preside over any hearing in either the guardianship or the settlement approval of Alyssa. Rather, Judge Spanner as ‘the Court on its own motion’ made factual findings which were not supported by any factual reference or evidence within the record. Sources outside the record cannot be made a part of the record. Being a

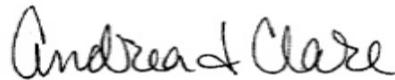
judge does not change the outcome. To this end, finding of fact #8 has no basis in fact and should be stricken. (See CP 23) Likewise, conclusion of law #3 insofar as it states “done with perhaps nefarious motivations, and therefore, improper” which is based upon factual finding #8 should also be stricken. *Id.*

V. CONCLUSION

Based on the foregoing, the appellant respectfully requests this Court reverse the trial court’s orders, grant the sealing of records and further strike portions of Judge Spanner’s Order.

RESPECTFULLY SUBMITTED, this 19th day of September, 2018.

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CERTIFICATE OF SERVICE

On the 19th day of September, 2018, I caused to be served a true and correct copy of the within document described as BRIEF OF APPELLANT to be served on all interested parties to this action as follows:

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Dated this 19th day of September, 2018.

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September 19, 2018 - 4:55 PM

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