Circuit Court for Baltimore County
Case No. C-03-CV-21-002335

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND*

No. 1974

September Term, 2022

JAMIE BENNETT & JOHN FITCH

v.

KATHERINE GRACE PORTER, *ET AL.*,

Leahy,
Shaw,
Sharer, J. Frederick,
(Senior Judge, Specially Assigned)
JJ.

Opinion by Shaw, J.

Filed: January 4, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

This interlocutory appeal arises from two orders issued by the Circuit Court for Baltimore County concerning a discovery dispute. In 2021, Appellants filed a lawsuit in their individual capacities as "next friend" to A.B. that made claims against Appellees, Saint Paul's School for Girls ("SPSG"), for breach of contract, intentional and negligent misrepresentation, fraudulent inducement, and other related counts. During discovery, on November 17, 2022, the circuit court entered an order that required a confidentiality designation and the sealing of any documents the parties claimed contained "sensitive personal information." Appellees filed documents and designated most of them as "confidential." In response, Appellants filed a motion challenging SPSG's designation, which SPSG opposed. Following an *in-camera* review, on January 10, 2022, the court granted the motion in part, and required that some of SPSG's documents be declassified. Appellants noted an appeal.

In March 2022, Appellees issued a subpoena for A.B. to appear for a deposition and to produce documents. Appellants filed a motion on behalf of A.B., requesting a protective order to preclude discovery from her. Appellees filed their opposition, and the court, subsequently, denied the motion on April 6, 2022. Appellants noted an appeal.

Appellants' appeals of the January 10 Order and April 6 Order have been consolidated and the following questions are presented for this Court's review:

1. Whether the circuit court's entry of a Confidentiality Order allowing Appellees SPSG to designate documents as confidential without establishing a compelling governmental interest and requiring documents so designated, or pleadings or memorandum referencing those documents, be filed under seal with the court

violated the First Amendment and/or the common law right of access to judicial records in Maryland?

2. Whether the circuit court's denial of a motion for a protective order sought by the Appellants' daughter to preclude or limit her deposition was an abuse of discretion where the court refused to consider the factors set forth in Maryland Rule 2-402(b)(1), including whether the testimony sought from A.B. "is obtainable from some other source that is more convenient, less burdensome, or less expensive," and whether "the party seeking discovery has had ample opportunity in the action to obtain the information sought?"

For reasons set forth below, we shall dismiss both of Appellants' appeals.

BACKGROUND

Our discussion of the background in this case is limited to the facts relevant to deciding the issues presented.

Appellants' daughter, A.B., attended St. Paul's School for Girls ("SPSG"), a private, K-12 Episcopal school located in Brooklandville, Maryland. During A.B.'s tenure at SPSG, Appellants Jamie Bennett and John Fitch allege that she was bullied by fellow students and that when SPSG was notified of the bullying in January of 2020, SPSG failed to adequately respond to and remedy the situation. According to Appellants, the school's inaction resulted in a breach of the parties' enrollment contract that was signed at the beginning of the academic year. On July 20, 2021, as individuals and as "next friend" to A.B., Appellants filed this lawsuit. They later amended their complaint and withdrew their daughter from the lawsuit. A.B. reached the age of majority in 2021.

January 10, 2023, "Confidential" Order

On November 17, 2022, the circuit court entered an order governing the treatment of discovery and outlined the procedures for Appellants and Appellees to designate discovery materials as "confidential." The order provided in pertinent part that "[o]ne who provides material may designate it as 'CONFIDENTIAL' only when such person in good faith believes it contains sensitive personal information, trade secrets or other confidential research, development, or commercial information which is in fact confidential." "The burden of proving the confidentiality of designated information remains with the party asserting such confidentiality."

On December 12, 2022, in response to Appellees classifying SPSG documents 001230-001283 as "confidential," Appellants filed a motion challenging whether the documents should be considered "confidential." Appellees asserted, in their response, that the information was a "broad array of private and confidential documents from SPSG, many of which are also irrelevant and intend to embarrass and harass other individuals." Appellees also claimed that "complaints, school investigations, and school disciplinary matters are confidential."

The court conducted an *in-camera* review of the documents and on January 10, 2023, the court issued an order granting in part, and denying in part, the "confidential" status of a number of SPSG's documents. The court ordered 51 of the 122 documents in question to be submitted "without the 'Confidential' designation." Appellants appealed the court's January 10 Order.

The April 6, 2023, Discovery Order Requiring A.B.'s Compliance

On March 6, 2023, Appellants filed a motion for a protective order on behalf of their adult daughter, A.B., which sought to prevent her from complying with a discovery request. A subpoena issued by Appellees requested documents and deposition testimony concerning the bullying allegations that gave rise to the lawsuit. Appellants argued, in pertinent part, that "A.B.'s testimony is not relevant to the issues in this case." They also asserted that "A.B.'s testimony is not relevant to whether SPSG was at a minimum negligent for purposes of Ms. Bennett's defamation claim because SPSG did not interview A.B. at the time the allegations were made and may not now rely upon after the fact testimony to attempt to prove [] the school acted non-negligently." Appellees opposed the motion arguing that, "in order to determine if an alleged breach occurred, discovery into whether A.B. suffered any physical or emotional injury and whether the school tolerated it must be conducted." The motion included a request from Appellees for attorney's fees and costs. The court denied Appellants' motion and ordered A.B. to comply with SPSG's subpoena. Appellees' request for legal fees and costs was also denied. Appellants and A.B. noted this appeal.

DISCUSSION

The Appealability of the January 10 Discovery Order

Generally, the right to seek appellate review of a trial court's ruling "'must await the entry of a final judgment that disposes of all claims against all parties . . . .'" *Kurstin v. Bromberg Rosenthal, LLP*, 191 Md. App. 124, 134 (2010), *aff'd*, 420 Md. 466 (2011), (quoting *Salvagno v. Frew*, 388 Md. 605, 615 (2005)). A final judgment is a ruling that

must: (1) "decide and conclude the rights of the parties involved;" or (2) "deny a party the means to prosecute or defend rights and interests in the subject matter of the proceeding." *Md. Bd. of Physicians v. Geier*, 451 Md. 526, 545 (2017) (quoting *Harris v. State*, 420 Md. 300, 312 (2011)). It is intended to be a final disposition of the case.

The collateral order doctrine is a narrow exception to the rule. The "exception considers as 'final judgments,' even though they do not 'end the litigation of the merits,' decisions 'which finally determine claims of right separate from, and collateral to rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate jurisdiction be deferred until the whole case is adjudicated.'" *Kurstin*, 191 Md. App. at 143 (quoting *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 798 (1989)) (emphasis omitted). The doctrine requires that the order must: (1) conclusively determine the disputed question; (2) resolve an important issue; (3) be completely separate from the merits of the action; and (4) be effectively unreviewable on appeal from a final judgment. *Kurstin*, 191 Md. at 148 (citing *Town of Chesapeake Beach v. Pessoa*, 330 Md. 744, 755 (1993)). The exception is considered "conjunctive in nature" and requires that each of the four elements be met. *In re Franklin P.*, 366 Md. 306, 327 (2001).

Several federal and state courts, including Maryland, have emphasized that the collateral order doctrine should be "applied sparingly in only the most extraordinary circumstances." *Schuele v. Case Handyman & Remodeling Services, LLC*, 412 Md. 555, 572 (2010). As stated by Justice Souter in *Digital Equipment Corp. v. Desktop Direct*, *Inc.*,

"the 'narrow' exception should stay that way and never be allowed to swallow the general rule." 511 U.S. 863, 868 (1994) (quoting *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985)).

Appellants argue the January 10 Order is appealable under the collateral order doctrine, and it further constitutes a violation of the First Amendment of the U.S. Constitution and the common law. Appellants contend the court's order requiring the sealing of documents would be "effectively unreviewable" on appeal and cite *Vantage Health Plan, Inc. v. Willis-Knighton Med. Ctr*, 913 F.3d 443, 448 (2019), as precedent. According to Appellants, the trial court's sealing provision improperly impacts public access and "there are compelling public interests at stake here in making this information public." They assert that SPSG should have been required to "demonstrate significant countervailing interests, like the existence of trade secrets in the documents, confidential business information or statutory restrictions on access," in order to seal records from public access. Appellants also argue that the court erred in failing to articulate its reasons for the order.

Appellees contend the January 10 Order does not satisfy the collateral order doctrine. Appellees concede the order conclusively resolved whether the documents produced in discovery should be denied a confidentiality designation. However, Appellees argue that none of the remaining elements of the doctrine have been met.

We agree with Appellees that the trial court conclusively determined the discovery issue regarding confidentiality of documents. In doing so, the court did not resolve an

important issue in the case. We consider the court's designation that certain documents be deemed confidential as a routine aspect of the discovery process. The designations do not prevent or preclude the parties from obtaining information, nor do such designations impact the ultimate determination of whether the documents are admissible. *See* Md. R. Civ. P. 2-402(a). We also do not find that the issue regarding designation and sealing during this preliminary process was unique or novel. *See Addison v. State*, 173 Md. App. 138, 154 (2007) (stating that "the Court of Appeals distilled the limited scope of the collateral order doctrine to 'one very unusual situation' that 'involves trial court orders permitting the depositions of high level governmental decision makers' under certain circumstances") (quoting *St. Joseph Med. Ctr., Inc., v. Cardiac Surgery Assocs., P.A.*, 392 Md. 75, 87-88 (2006)); *see also Ehrlich v. Grove*, 396 Md. 550, 571 (2007).[1]

Appellants assert that *Vantage Health Plan, Inc.* instructs otherwise. There, the trial judge, during the discovery process, ordered that certain documents be unsealed and redacted if filed in the public docket. *Vantage Health Plan, Inc.*, 913 F.3d at 446. The appellant, who was a non-litigant, appealed the court's decision, arguing that the interlocutory appeal was proper because the requirements of the collateral order doctrine had been met. *Id.* The U.S. Court of Appeals for the Fifth Circuit agreed. The court found that exposing potentially confidential information was an important issue, wholly separate

[1] *Ehrlich* is a more recent example of the type of unique cases that satisfy the exception to the rule categorically barring the appeal of discovery orders. There, an immediate appeal was granted for a discovery order directed at the Governor of Maryland.

from the merits of the litigation and that "unsealing a document cannot be undone, for '[s]ecrecy is a one-way street'. . . ." *Id.* at 449. The court noted that the harm to non-litigants was not the admission of adverse evidence at trial but rather, "the disclosure of their confidential and sensitive information without full access to appellate review." *Id.* Ultimately, the court found the appeal proper and in ruling on the merits, the court determined the trial judge's order was not an abuse of discretion. *Id.* at 451.

The holding in *Vantage Health Plan, Inc.*, does not guide our analysis in this case. The issue here involves the actual parties, not non-litigants, and factually, the circumstances are quite different. Although the *Vantage Health Plan, Inc.* opinion references both the sealing and unsealing of documents, the facts were limited to the unsealing of documents and the potentially harmful public exposure as a result. The court found that unsealing documents was a particularly important issue because "[o]nce information is published, it cannot be made secret again." *Id.* at 449. The Court also focused on the harm to non-litigants if there was public disclosure of sensitive materials without access to appellate review. *Id.* at 448. Unlike the circumstances in *Vantage Health Plan, Inc.*, here, there is no risk that information that is published cannot be made secret again. To the contrary, in this case, if an appellate court disagrees with the trial court's decision to protect the information at issue, that information can be unsealed. *Vantage Health Plan, Inc.* is clearly distinguishable from the present case. The second element of the collateral order doctrine has not been met.

As to the third element, we do not find that the order here is "completely separate" from the merits of the case. It relates directly to Appellants' claim that Appellee failed to satisfy its contractual obligations, and the order is an integral aspect of how the case will proceed. In examining the fourth element, we consider whether the order would be reviewable on appeal from a final judgment. This element is not satisfied except in extraordinary situations, "'[o]therwise, . . . there would be a proliferation of appeals under the collateral order doctrine.'" *In re Foley*, 373 Md. 627, 636 (2001) (quoting *Bunting v. State*, 312 Md. 472, 482 (1988)). In the case at bar, there is no impediment to addressing the issue of confidentiality and sealing on appeal and thus, the final element has not been satisfied.

We note, further, that Maryland courts have consistently held that discovery rulings, as a category, are not appealable. "The exclusion of discovery rulings, either by way of granting or denying discovery, from immediate appellate review under the collateral order doctrine is virtually an absolute." *Kurstin*, 191 Md. App. at 152; *see St. Joseph Med. Ctr.*, Inc., 392 Md. at 87 (articulating that "[i]t is firmly settled in Maryland that, except in one very unusual situation, interlocutory discovery orders do not meet the requirements of the collateral order doctrine and are not appealable under that doctrine"); *see also Montgomery County v. Stevens*, 337 Md. 471, 477 (1995) (holding that in Maryland, "discovery orders, being interlocutory in nature, are not ordinarily appealable prior to a final judgment terminating the case in the trial court"); *Baltimore City Dep't of Social Servs. v. Stein,* 328 Md. 1, 7 (1992) (emphasizing that "the order from which it has appealed is a discovery

order, which normally is interlocutory and, consequently, nonappealable"). The one notable exception allowing appellate review of discovery orders is limited to issues concerning high level government officials, an issue not present in the instant case. *See Ehrlich*, 396 Md. at 571.

The Appealability of the April 6 Discovery Order

Appellants argue the court erred in denying their request for a protective order for A.B. Citing Md. Rule 2-402(b), Appellants assert the circuit court "failed to consider *any* of the factors listed" in the Rule for persons who are not parties to the suit, and that the circuit court was "guided by erroneous legal principles." Appellants argue there are other sources from which Appellees may obtain the same information they seek from A.B.

Appellees contend, preliminarily, that Appellants "lack any grounds to pursue an immediate appeal of an interlocutory discovery order compelling discovery by a non-party, and A.B. did not file a brief in support of the appeal." Appellees also counter Appellants' arguments, stating that it is Md. Rule 2-403(a), not Md. Rule 2-402(b)(1), that contains the requirements for assessing whether a protective order shall issue. Under Md. Rule 2-403(a) good cause must be shown "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." *Saint Luke Institute, Inc. v. Jones*, 471 Md. 312, 337 (2020). Appellees argue that discovery from A.B. is critical as she is at the center of the lawsuit.

We observe that while A.B. noted a timely appeal, A.B. did not file a brief in support of this appeal and she is not a party to Appellants' brief. Furthermore, A.B. has not

participated in these proceedings. Under MD. Rule 8-602(c)(5), "[t]he court may dismiss an appeal pursuant to this Rule on motion or on the court's own initiative" if "a brief or record extract was not filed by the appellant within the time prescribed by Rule 8-502." Here, because A.B. has failed to file a brief, or otherwise participate in this appeal, we decline to consider the merits of the question posed by Appellants. A.B.'s appeal shall be dismissed.

Assuming arguendo, we were to consider the merits, we would nevertheless hold that Appellants have no standing to proceed. The Supreme Court of Maryland's opinion in *St. Joseph Med. Ctr, Inc.* is instructive. There, the Court was presented with the question of whether a discovery order could be appealed. *St. Joseph Med. Ctr., Inc.*, 392 Md. at 80. Appellant St. Joseph requested a protective order to preclude it from being required to produce internal hospital documents. St. Joseph was not a party to the case and argued that the documents were privileged.

The Supreme Court of Maryland held that, "[i]n situations where the aggrieved appellant, challenging a trial court discovery or similar order, is not a party to the underlying litigation in the trial court, [] Maryland law permits the aggrieved appellant to appeal the order because, analytically, it is a final judgment with respect to that appellant." *Id.* at 90. The Court then held that "[a]lthough the discovery order was interlocutory with regard to the underlying unfair competition litigation and the parties to the case, the order was not interlocutory with regard to St. Joseph," because St. Joseph was "not a party to the unfair competition case and would have no standing to challenge the discovery order by

appealing from a final judgment in that case." *Id.* at 88. Had the appellant been a party to the litigation, the Court reasoned, the trial court's order would have been an unappealable interlocutory order. *Id.* at 86-88. Because St. Joseph was a third party, the Court found that the appeal was proper. *Id.* at 91.

Here, the individuals appealing the discovery order are parties in the case and they seek to preclude discovery from a non-party, A.B. However, A.B., the non-party, has not participated in this appeal and she has not sought relief from the court's order. While, as stated in *St. Joseph*, a non-party may appeal, we hold that a party to the litigation may not appeal on a non-party's behalf. A.B. is an emancipated adult whose parents cannot, independently, pose questions and argue the merits of her appeal.

APPEALS DISMISSED. COSTS TO BE PAID BY APPELLANT.