

STATE OF NORTH CAROLINA
FORSYTH COUNTY

FILED IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
13-CVS-7378

2016 APR 22 P 4:36

KAITLIN SHEPPARD and
KIMBERLY BUCKNER
Plaintiffs,

FORSYTH CO., N.C. S.C.
BY *JK*

v.

ORDER

WINSTON-SALEM/FORSYTH
COUNTY BOARD OF EDUCATION,
Defendant.

This matter came on before the Court during the April 18, 2016, civil session of Forsyth County Superior Court on (i) Defendant’s Motion for Leave to File Exhibits for Summary Judgment Under Seal and (ii) a Motion for Leave to Intervene in Opposition to Closing Court Proceedings and Records (hereinafter “Access Motion”), filed by BH Media d/b/a *The Winston-Salem Journal* in accordance with N.C. Gen. Stat. § 1-72.1. The Plaintiffs in this action were represented by attorneys Harvey Kennedy and Harold Kennedy. The Defendant was represented by attorneys Adam Mitchell and Melissa Michaud. BH Media d/b/a *The Winston-Salem Journal* was represented by attorney Amanda Martin. The Court heard arguments of counsel, and received and reviewed cases and authorities cited by counsel. The Court also conducted an *in camera* review of certain proposed Exhibits that were the subject of both the Defendant’s Motion for Leave to File Exhibits Under Seal and the Access Motion, and the Court makes the following:

Findings of Fact

1. Plaintiffs filed their Amended Complaint on June 23, 2014, stating a number of claims against the Defendant Winston-Salem Forsyth County Board of Education arising after,

as the Amended Complaint alleges, an employee of Defendant, Herman Blount, was convicted of felony sexual offense involving a student.

2. Following a hearing on a Rule 12(b)(6) Motion heard earlier in this case, and Plaintiff's Voluntary Dismissal Without Prejudice filed on April 21, 2016 as to Plaintiff's claim for Negligent hiring only, Plaintiff's remaining claims in this action are Negligent Supervision and Retention of an Employee and Negligent Infliction of Emotional Distress.
3. Plaintiffs' claims against Defendant are related to the conduct of Defendant's employee, Herman Blount, who was a part time athletic trainer at Carver High School, where Plaintiff Sheppard was an eleventh grade student.
4. During the course of discovery in this action, the parties sought discovery of the Forsyth County Sheriff's Department Investigative file (hereinafter "Investigative File"), which was generally subject to the confidentiality provisions of N.C. Gen. Stat. § 132-1.4.
5. On or about September 14, 2014, the Honorable Susan Bray entered an Order in this action Compelling Disclosure of the Investigative File in the discovery process, subject to restrictions on its dissemination that include a prohibition of filing.
6. Similarly, and also during the discovery process, on or about March 14, 2016, the Honorable Stuart Albright entered a Stipulated Consent Protective Order, which incorporated restrictions on the dissemination and filing of discovery documents that were marked "confidential" and subject to the Protective Order, including (i) Student records of Plaintiff ("Student Records"), which are generally subject to the confidentiality provisions of N.C. Gen. Stat. § 115C-402 and the Family Education Rights and Privacy Act (FERPA) 20 U.S.C. § 1232g; (ii) Defendant's personnel file records of employee

Herman Blount (hereinafter “Personnel Records”) which are generally subject to the confidentiality provisions of N. C. Gen. Stat. §§115C-319, -320, -321; and (iii) medical records of Plaintiff (hereinafter “Medical Records”), which are generally subject to the confidentiality provisions of the Health Insurance Portability and Accountability Act of 1996 (HIPAA). After setting out the limitations on access to confidential information, the Protective Order, in paragraph 7, states “... provided that nothing herein shall preclude a witness, attorney, or the Court from reading aloud or discussing the contents of a confidential document in open Court or at depositions.”

7. Defendant filed a Motion for Summary Judgment, and Plaintiff filed a Motion for Partial Summary Judgment.
8. On March 22, 2016, Defendant filed a Motion for Leave for Defendant to File Exhibits to Its Motion for Summary Judgment Under Seal (“Motion to Seal”).
9. In the Motion to Seal, Defendant requested to file its Exhibits 2,3,5,6,7 and 8A under seal, in that they consisted of the Investigative File, Student Records, Personnel Records and Medical Records, and deposition testimony discussing same.
10. On Monday, April 18, 2016, the Motions for Summary Judgment were called for hearing and, prior to hearing the Motions for Summary Judgment, counsel for Defendant asked the Court to hear the Motion to Seal, and stated that the Courtroom may have to be closed during the argument of the Motions for Summary Judgment in light of the Motion to Seal.
11. The Court then recessed until Tuesday, April 19, 2006, at 2 p.m., in order to allow the Court an opportunity to review the statutes and authorities cited in the protective orders,

with argument on the Motion to Seal to occur prior to argument on the Motions for Summary Judgment at 2 p.m. on April 19.

12. On the morning of April 19, 2016, the Court received the Motion for Leave to Intervene in Opposition to Closing Court Proceedings (“Access Motion”) pursuant to N.C. Gen. Stat. § 1-72.1, by BH Media d/b/a *The Winston Salem Journal*.
13. In accordance with N.C. Gen. Stat. § 1-72.1(b), the Court set a hearing on the Access Motion, together with the Motion to Seal, on Thursday, April 21, 2016, at 10:00 a.m., and caused Notice of the date and location of the hearing to be posted at the Courthouse in the usual fashion for “add on” motions, and caused the “add on” calendar to be forwarded to all parties, notifying them of the setting.
14. At the hearing on the Access Motion and Motion to Seal, the only parties present to address the matters of right to access as set out in N.C. Gen. Stat. § 1-72.1 were BH Media d/b/a *The Winston Salem Journal*, Plaintiff and Defendant.
15. The parties all stated that there was no objection to the notice of the hearing, and Plaintiff and Defendant stated that they did not object to the appearance of BH Media d/b/a *The Winston Salem Journal* in accordance with N.C. Gen. Stat. § 1-72.1.
16. Without objection by any of the parties, the Defendant has tendered to the Court its Exhibits for *in camera review*, which Exhibits include the Investigative File, Student Records, Personnel Records and Medical Records, and deposition testimony discussing same, and the Court has in its possession for purposes of *in camera review*: (i) a set of the proposed Exhibits in support of the Motion for Summary Judgment that are un-redacted (furnished via mail by counsel for Defendant), and which have personal identifying information such as Social Security numbers, date of birth, Driver’s License numbers,

and insurance identification numbers (hereinafter “Personal Identifying Information”) shown, and (ii) a comparison set of proposed Exhibits with the Personal Identifying Information redacted. The Court will mark the *in camera* review documents as an Exhibit labeled “Court’s Access Motion 1”.

17. The Court has conducted an *in camera* review of Court’s Access Motion 1.

18. Initially at the hearing in this matter, Plaintiff and Defendant indicated that they had generally agreed as to the filing of the Exhibits unsealed. However, counsel for plaintiff contended that two medical records of the plaintiff from Lyndhurst Gynecological, a part of the Medical Records in Exhibit 2, along with the student transcript and grades of the plaintiff, located in the Student Records in Exhibit 3, were not relevant to the case and should, therefore, be sealed.

19. Counsel for Plaintiff did not address any harm associated with the unsealed filing of the entirety of Exhibits 2 and 3, but made arguments that portions of those Exhibits were not relevant to the claims in this action, and should, therefore, be sealed. Defendant argued that these records were highly relevant to Defendant’s defenses, and BH Media d/b/a *The Winston Salem Journal* objected to the sealing of any of the Exhibits.

20. All parties agreed at the hearing that the Exhibits should be redacted to remove Personal Identifying Information.

Conclusions of Law

21. BH Media d/b/a *The Winston-Salem Journal*’s appearance in this action in accordance with N.C. Gen. Stat. § 1-72.1 is authorized by law for the limited purpose of determining its right to access to court proceedings and filed Exhibits in this action.

22. Consequently, BH Media d/b/a *The Winston-Salem Journal* has standing to bring its Access Motion pursuant to N.C. Gen. Stat. § 1-72.1.
23. It is axiomatic under Article I, Section 18 of the North Carolina Constitution that “All courts shall be open.”
24. The North Carolina Supreme Court has held that “...the open courts provision of the state constitution guarantees a qualified constitutional right on the part of the public to attend civil court proceedings” and that proceedings may be closed only when the closure is “required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily required of our government will be more harmful than beneficial.” Virmani v. Presbyterian Hospital, 350 N.C. 449, 463, 515 S.E. 2d 675, 685 (1999) cert. denied, 529 U.S. 1033, 120 S. Ct. 1452 (2000).
25. Under North Carolina’s Public Records Law, judicial records are public records, and the public has a right of access in all cases except those in which a party has demonstrated an overriding interest that cannot be accommodated by any means less drastic than closure or sealing. Virmani, 350 N.C. at 463, 515 S.E.2d at 685.
26. There is also a statutory right of access in North Carolina to judicial records. As stated by the North Carolina Supreme Court in Virmani, “The public’s right of access to Court records is provided by N.C. Gen. Stat. § 7A-109(a), which specifically grants the public the right to inspect court records in civil and criminal proceedings.” Virmani, 350 N.C. at 463, 515 S.E. 2d at 685.
27. When considering whether restricting access to a proceeding or filing is proper, a Court is to consider whether the compelling public interest in protecting the confidentiality of the information at issue outweighs the public’s right of access in the case, and whether an

alternative to closure will adequately protect that interest. Virmani at 483, 515 S.E.2d at 697; *See, also, Goldsmith v. Henderson Cty. Bd. Of Pub. Educ.*, No. 02 CVS 785, 2003 WL 23341192 (N.C. Super. July 30, 2003).

28. After an *in camera* review of the Exhibits, the Court concludes that there is no compelling need for closure of the courtroom or for filing the Exhibits under seal sufficient to overcome the public's presumptive right of access to these judicial proceedings and records.
29. While counsel for Plaintiff has objected to the unsealed filing of certain of the Medical Records and Student Records on the evidentiary grounds of relevance, there was no evidence or claim by counsel for plaintiff of any harm to be created by filing those Exhibits unsealed.
30. The Court takes judicial notice of the fact that, for the Medical Records and Student Records, the Plaintiff has a privacy interest in those documents. However, "when an individual makes the choice to avail herself of the public court system in seeking restitution or relief from another party, implicit in that choice is an acceptance of the public nature of the proceedings." Corrigan v. White, p. 6, 29 Med. L. Rptr. 1636 (N.C. Super. Feb. 26, 2001). Further, there has been no showing that any potential issues or concerns with disclosure as to the Exhibits are of a "quantifiably different nature or caliber from others routinely heard in North Carolina's public courts in open court proceedings." Id. at p. 5.
31. The Court finds and concludes, in the exercise of its discretion and in the interests of the administration of justice, that: (i) Exhibits 2,3,5,6,7 and 8A may be filed by the parties without being placed under seal in the Court file, and (ii) that closure of the courtroom

during the arguments on the Motions for Summary Judgment is not appropriate or warranted.

32. The Court further finds and concludes that the redaction of Personal Identifying Information from the Exhibits is consented to by the parties and is a less restrictive alternative than sealing certain pages of the Exhibits, and, therefore, the redaction of Personal Identifying Information appropriately balances the interest in protecting Personal Identifying Information that may be contained in the Exhibits with the public's interest in access to judicial records and proceedings.
33. N.C. Gen. Stat. § 1-72.1(d) provides that submission of the proposed Exhibits *in camera* "shall not in itself result in the document or testimony thereby becoming a judicial record subject to constitutional, common law, or statutory rights of access unless the document or testimony is thereafter introduced into evidence after a motion to seal or to restrict access is denied. (emphasis added)." Consequently, and given that all parties have agreed that it is appropriate to redact Personal Identifying Information from the Exhibits and the *in camera* review documents in Court's Access Motion 1 contain unredacted Personal Identifying Information, the *in camera* review set of documents contained in Court's Access Motion 1 should be sealed, with a copy of this Order attached, to be opened upon further Order of the Court.

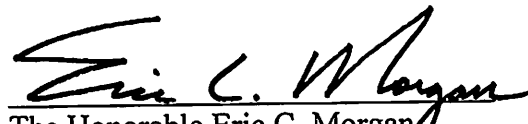
NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED
as follows:

1. Defendant's Motion for Leave to File Exhibits Under Seal is **DENIED**, and Defendant may file the Exhibits in support of the Motion for Summary Judgment,

with redactions only as to Personal Identifying Information as addressed previously herein;

2. Defendant's Request to close the courtroom during the hearing on the Motions for Summary Judgment is **DENIED**;
3. This Order does not address the admissibility of any Exhibits or evidence at the trial of this action, and any such rulings are expressly reserved to the Judge presiding over the trial;
4. Given that all parties have agreed that it is appropriate to redact Personal Identifying Information from the Exhibits, and in accordance with N.C. Gen. Stat. § 1-72.1(d), Court's Access Motion 1 shall be sealed, with a copy of this Order attached, to be opened upon further Order of the Court;
5. The Motions for Summary Judgment and other pending motions in this action are hereby continued until the May 2, 2016, civil calendar; and
6. The Clerk shall serve a copy of this Order on all parties.

This the 22nd day of April, 2016.


The Honorable Eric C. Morgan
Superior Court Judge Presiding