NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

STEPHANIE HALLOWICH AND CHRIS HALLOWICH, H/W	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
RANGE RESOURCES CORPORATION, WILLIAMS GAS/LAUREL MOUNTAIN MIDSTREAM, MARKWEST ENERGY PARTNERS, L.P., MARKWEST ENERGY GROUP, LLC AND PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION	:	
APPEAL OF: OBSERVER PUBLISHING COMPANY D/B/A OBSERVER-REPORTER, PROPOSED INTERVENOR	:	No. 234 WDA 2012

Appeal from the Order Entered January 31, 2012
In the Court of Common Pleas of Washington County
Civil Division No(s).: C-63-CV-201003954

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BEFORE: OLSON, OTT, and FITZGERALD,* JJ.

MEMORANDUM BY FITZGERALD, J.: FILED: December 7, 2012

Observer Publishing Company, d/b/a Observer-Reporter ("The Observer-Reporter") and PG Publishing Company ("The Post-Gazette") (collectively "Appellants") each appeal from the orders entered in the Washington County Court of Common Pleas denying their petitions, on untimeliness grounds, to intervene in the underlying hydraulic fracturing ("fracking") matter and to unseal the record.[1] For ease of disposition we address these two appeals together.[2] Appellants, who are both in the business of publishing daily newspapers, seek to unseal a settlement agreement between the homeowner-plaintiffs and fracking companies-defendants. We vacate and remand for the court to rule on the merits of Appellants' petitions.

The parties of the underlying matter are plaintiffs Stephanie Hollowich and Chris Hallowich, husband and wife ("Plaintiffs"), and defendants Range

* Former Justice specially assigned to the Superior Court.

[1] An order denying a petition to intervene is "final and appealable under the collateral order rule embodied in Pa.R.A.P. 313." ***PA Childcare LLC v. Flood***, 887 A.2d 309, 310 n.1 (Pa. Super. 2005) (citation omitted).

[2] A joint *amici curiae* brief was filed by: the Philadelphia Physicians for Social Responsibility; Physicians, Scientists, and Engineers for Healthy Energy; Earthworks, and several individuals. This brief cites water and air pollution and health risks caused by shale gas development, and advocates **unsealing** the record, to "improve transparency about gas operations and their health effects." *Amici Curiae* Brief at 3, 5.

Resources Corporation, Williams Gas/Laurel Mountain Midstream, Markwest Energy Partners, L.P., Markwest Energy Group, LLC, (collectively, "Defendants") and the Pennsylvania Department of Environmental Protection ("DEP"). The DEP "has not taken part in this litigation in any way." Trial Ct. Op., 4/2/12, at 2. For purposes of this appeal, we refer to all of the defendants, with the exception of the DEP, collectively as "Appellees"; they have filed a joint appellee's brief.

Plaintiffs commenced this matter on May 27, 2010, by filing a praecipe to issue a writ of summons. "The lawsuit concerns fracking in and around Plaintiffs' property by Defendants, and Plaintiffs were vocal critics of the fracking process during the pendency of this litigation.[ ]" ***Id.*** at 1. One year later, the parties reached a settlement agreement, which bound not only Plaintiffs, but also their minor children. The trial court summarized:

> Because minor children were involved, [on July 28, 2011,] Plaintiffs filed a Petition for Approval of Settlement of Minors' Actions in accordance with Pa.R.C.P. 2039 and Washington County Local Rule of Court 2039.1. "The settlement agreement contains express confidentiality provisions, collaboratively drafted and consented to by both parties, which are designed to protect Plaintiffs' and Defendants' interest in prevent public disclosure of the terms of their private agreement to resolve this case."

Id. at 2 (citations to record omitted).

On August 11, 2011, Appellees filed a joint motion for a scheduling order for a "hearing in closed court or in chambers" to hear Plaintiffs' petition for approval of the minors' settlement agreement. Joint Mot. for

Scheduling Order, 8/11/11, at 1. The motion specifically requested a hearing date of "August 24, 2011, or as soon thereafter as suits the convenience of the Court." ***Id.*** at 3. An un-stamped scheduling order, dated August 11th, appears in the certified record; a handwritten note, "Hearing to be held August 26, 2011, at 11:00 a.m." appears at the bottom. The trial docket includes one entry for both the scheduling motion and order, which states, "Hearing to be held 08-26-2011, at 11:00 A.M."

Despite the order, the trial court held a settlement conference in chambers on August **23**, 2011. The court's opinion stated, "The settlement conference was rescheduled at the request of the parties to August 23, 2011." Trial Ct. Op. at 2. However, neither the trial docket nor certified record indicates any request for, or notice of, the change in date. On the date of the hearing, "[t]wo reporters identified themselves as being from the Pittsburgh Post-Gazette and requested to join the in chambers settlement conference; that request was denied by the Court."[3] ***Id.*** at 2. Appellees

[3] The record does not indicate how the reporters learned of the hearing. Furthermore, The Post-Gazette avers in its brief that a court official denied the reporters' request to enter the chambers, but informed them "that the Post-Gazette's objections had been noted in the official record by the trial court." Post-Gazette's Brief at 8 (citing Appellants' Joint Brief in Support of Pet. to Intervene and Mot. to Unseal Record). The only indication in the certified record of the reporters' objection is in the trial court opinion, as we have summarized above.

filed a joint motion to seal the record,[4] which the trial "court signed and filed **that same day** at the specific request of all the parties." ***Id.*** (emphasis added). Two weeks later, on September 6th,[5] The Post-Gazette filed a petition to intervene and unseal the record. On September 13th, The Observer Reporter also filed a petition to intervene and joined The Post-Gazette's motion to unseal the record. The petitions invoked the Pennsylvania Constitution's provision, "All courts shall be open," and the United States Constitution First Amendment's right of access to civil proceedings. ***See*** U.S. Const. Amend. I; Pa. Const. Art. I, § 11.

On October 4, 2011, the court held a hearing on Appellants' petitions to intervene and unseal the entire record. The court *sua sponte* raised the issue of the timeliness of the petitions and directed all parties to brief this issue. At another hearing on January 31, 2012, the court denied Appellants' petitions[6] on the ground that they were untimely under Pennsylvania Rule of

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[4] We note that Appellees did not seek sealing of just the settlement agreement, but the entire record.

[5] The trial court stated, "Seven weeks later, on August 31, 2011, Appellant Pittsburgh Post-Gazette filed a Petition to Intervene and Unseal the Record." Trial Ct. Op. at 2. However, both the "filed" time-stamp on the face of the petition and the trial docket indicate this petition was filed on September 6th, which was two weeks after the hearing.

[6] In the interim, Plaintiffs had filed an emergency petition for limited unsealing of the record and for a ruling on the parties' settlement agreement. The court also denied this petition at the January 31, 2012 hearing.

Civil Procedure 2327,[7] as the case was no longer "pending." Trial Ct. Op. at 6. Both Appellants timely appealed, and both complied with the court's order to file a Pa.R.A.P. 1925(b) statement. Appellants' issues overlap, and we consider them together.

In The Observer-Reporter's first issue, it avers that in denying its petition to intervene, the trial court failed to determine first "whether it had a legitimate interest in opening the record, and to "articulate[ ] why it was appropriate to seal the record or stated what alternatives to closure it considered." Observer-Reporter's Brief at 10. The Observer-Reporter cites the United States Constitution First Amendment and Pennsylvania

[7] Pennsylvania Rule of Civil Procedure 2327, "Who May Intervene," provides:

> At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if
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> (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
>
> (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
>
> (3) such person could have joined as an original party in the action or could have been joined therein; or
>
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa.R.C.P. 2327(1)-(4).

Constitution, Article I, Section 11 presumption of openness in judicial proceedings, as well as the common law requirement for a party to show his interest in secrecy outweighs the traditional presumption of openness. It then reasons the "court violated the spirit of the procedural rules and the case law on media intervention," citing to Rule of Civil Procedure 126, which provides for the liberal construing of the Rules of Civil Procedure. ***Id.*** at 12-13.

In The Observer Reporter's second issue, it alleges the trial court erred in denying its petition on untimeliness grounds under Rule 2327. Instead, it avers, "[a] request by the media to intervene and open judicial proceedings is proper even after the record is sealed and even if the underlying proceeding is over."[8] Observer-Reporter's Brief at 13. The Observer Reporter also states, "The appellate courts have recognized that it is often the case that the need for public access will not be apparent until such time as an underlying case is concluded." ***Id.*** (citing ***Commonwealth v. Frattarola***, 485 A.2d 1147 (Pa. Super. 1984) (plurality)). It further maintains, "Pennsylvania law clearly vests a newspaper with a First Amendment right to file a Petition to Intervene to access public records and

[8] The Observer Reporter does not cite to legal authority to support this principle of law, but instead refers to a range of four pages in its own joint brief in support of the motion to intervene.

judicial proceedings."[9] ***Id.*** at 15.

On appeal, the Post-Gazette first avers "the oral objection of the Post-Gazette reporters [at the August 23, 2011 settlement hearing] was sufficient to raise their Constitutional and common law rights to an open proceeding." Post-Gazette's Brief at 16. The Post-Gazette also maintains that at the settlement hearing, "the court official . . . assured the reporters [their oral objections] would be put on the official record." ***Id.*** Furthermore, it reasons that the court erred in finding ***Commonwealth v. Buehl***, 462 A.2d 1316 (Pa. Super. 1983), did not apply on the ground that ***Buehl*** involved criminal pretrial proceedings. Instead, The Post-Gazette contends, "The trial court's interpretation ignores [that] well-settled Constitutional and common law rights of access to judicial records . . . apply with equal force to both criminal and civil proceedings." Post-Gazette's Brief at 17.

In its second issue, The Post-Gazette further alleges the court erred in denying its petition on untimeliness grounds under Rule 2327. It claims, "Case law is clear . . . that where the media seeks to intervene to open a judicial record, the action remains 'pending' as applied to Pa.R.C.P. 2327 because the order continues to impact the Constitutional and common law

[9] The Observer-Reporter also asserts: (1) the court erred in ignoring the "important detail" that the DEP was a named defendant; and (2) when Plaintiffs filed their emergency petition to open the record in November 2011, "it is clear that the case was no longer 'concluded.'" Observer-Reporter's Brief at 16, 17. Because of our disposition, we do not consider these claims.

rights of the media." ***Id.*** at 19. Like The Observer Reporter, The Post-Gazette also argues that the court erred in finding Plaintiffs' filing of their emergency petition did not render the proceedings "pending." ***See id.*** at 24-25. Finally, in its third issue, The Post-Gazette asserts that Appellees' settlement agreement was a judicial record subject to access and no party could rebut the presumption of openness. ***Id.*** at 27.

We first note:

> We review a trial court's decision to grant or deny access to judicial proceedings under an abuse-of-discretion standard. "Our courts have recognized a constitutional right of public access to judicial proceedings based on Article I, Section 11 of the Pennsylvania Constitution, which provides that 'all Courts shall be open.'" Pa. Const. art. I, § 11. The right of public access to judicial proceedings has an independent basis in the common law as well as in the United States Constitution. Accordingly, Pennsylvania has a mandate for open and public judicial proceedings in both the criminal and civil settings.
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> There are two methods for analyzing requests for closure of judicial proceedings, each of which begins with a presumption of openness—a constitutional analysis and a common law analysis. Under the constitutional approach, which is based on the First Amendment of the United States Constitution and Article I, Section 11 of the Pennsylvania Constitution, the party seeking closure may rebut the presumption of openness by showing that closure serves an important governmental interest and there is no less restrictive way to serve that interest. Under the common law approach, the party seeking closure must show that his or her interest in secrecy outweighs the presumption of openness.

PA ChildCare LLC, 887 A.2d at 311-12 (some citations omitted).

In the instant matter, the trial court denied both Appellants' petitions to intervene on the ground that they were untimely under Rule 2327. As stated above, that rule provides that "a person not a party thereto shall be permitted to intervene" "[a]t any time during the **pendency** of an action[.]" Pa.R.C.P. 2327 (emphasis added). Here, the trial court found Appellants' petitions were not filed during the "pendency" of the underlying action, but instead **after** the case settled. Trial Ct. Op. at 5.

The trial court rejected both Appellants' reliance on ***Frattarola***, 485 A.2d 1147, because in that case, members of the media objected to the closure of a pre-trial criminal hearing, and thus did so during the pendency of the matter. ***See Frattarola***, 485 A.2d at 1148; Trial Ct. Op. at 6. The court also distinguished the federal case of ***Pansy v. Borough of Stroudsburg***, 23 F.3d 772 (3d. Cir. 1994), upon which both Appellants relied. The trial court reasoned that in ***Pansy***, there was no federal rule analogous to Pennsylvania Rule of Civil Procedure 2327, and thus the ***Pansy*** Court "did not determine . . . that the media had the absolute right to file an untimely petition to intervene." Trial Ct. Op. at 7.

We agree with the trial court that Appellants' petitions to intervene and to unseal the record were not filed during the "pendency" of the matter, as required by Rule 2327, as the matter had been settled. ***See Inryco, Inc. v. Helmark Steel, Inc.***, 451 A.2d 511, 513 (Pa. Super.1982) (holding case is no longer pending under Pa.R.C.P. 2327 upon settlement because

settlement decree binds parties with same effect as final decree). However, we agree with The Observer Reporter's argument that in this matter, the trial court should have applied Rule 2327 liberally pursuant to Rule 126. Rule 126 provides:

> The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

Pa.R.C.P. 126.

We emphasize that the only information about this matter available to the public was the trial docket, which stated the hearing was scheduled for "08-26-2011, at 11:00 A.M." Docket, at 5. Furthermore, the docket paraphrased Appellees' joint motion for a hearing and stated their requested date of "Wednesday, 08-24-2011, or as soon thereafter as suits the convenience of the court." ***Id.*** The docket, however, included no information that the court would instead hold the hearing earlier—not only three days before the date stated in its in scheduling order, but also one day before the date requested by Appellees. In addition, we note Appellees sought to seal the entire record, and not just the settlement agreement, and the court granted Appellees' joint motion to seal the record on **the same day** it was filed.

We agree with the Observer-Reporter's reasoning that it "had no interest [in the underlying action] which would justify intervention until the

record was sealed." ***See*** Observer-Reporter's Brief at 13. In light of all the foregoing, we hold the court should have liberally construed Rule 2327 and accepted as timely filed both Appellant's petitions to intervene and to unseal the record. Accordingly, we vacate the court's denials of the petitions, remand for the court to rule on the merits of the petitions, pursuant to ***PA ChildCare LLC*** and relevant authority. The court may request briefs and hold hearings.[10]

Orders vacated. Case remanded with instructions. Jurisdiction relinquished.

Ott, J. files a Concurring and Dissenting Memorandum.

Judgment Entered:

Eleanor R. Valecko

Deputy Prothonotary

DATE: December 7, 2012

[10] We note the court's advice to Plaintiffs' counsel at the January 31, 2012 hearing: "Candidly, if the children weren't involved, you would have just marked it settled and discontinued and no one would have been the wiser." N.T., 1/31/12, at 10-11.