2017 IL App (1st) 163255-U

FIRST DIVISION
June 26, 2017

No. 1-16-3255

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

A.K. and L.K.,	)	
	)	Appeal from the
Plaintiffs-Appellants,	)	Circuit Court of
	)	Cook County.
v.	)	
	)	No. 15 CH 17913
THE ILLINOIS DEPARTMENT OF CHILDREN AND FAMILY SERVICES and RICHARD CALICA, in His Capacity as Director of the Illinois Department of Children and Family Services,	)	Honorable Franklin Valderrama, Judge Presiding.
	)	
Defendants-Appellees.	)	

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Simon concurred in the judgment.

O R D E R

¶ 1 *Held*: We answer the circuit court's first certified questions in the negative. Whether good cause exists to proceed under a fictitious name is a case-specific determination within the circuit court's discretion; we cannot say as a matter of law that the requisite good cause exists for all individuals wishing to administratively appeal DCFS indicated findings of abuse or neglect to proceed under fictitious names. We decline to answer the court's second question, as it contains assumptions of fact making it hypothetical and inappropriate for review under Rule 308.

¶ 2 This is a permissive interlocutory appeal under Illinois Supreme Court Rule 308(a) (eff. Jan. 1, 2016). Plaintiffs sought administrative review of an indicated finding of child abuse and neglect made by the Illinois Department of Children and Family Services (DCFS). They contemporaneously moved for leave to proceed using only their initials under section 2-401(e) of the Code of Civil Procedure (Code) (735 ILCS 5/2-401(e) (West 2014)). The circuit court denied the motion but, at plaintiffs' request, certified two questions for our review. For the reasons that follow, we answer no to the first question and decline to answer the second question.

¶ 3 BACKGROUND

¶ 4 On July 12, 2014, six-month-old K.K. was brought to a hospital emergency room with swollen legs, where X-rays revealed that he had several bone fractures. DCFS investigated K.K.'s injuries and, on October 21, 2014, made an indicated finding of abuse and neglect against K.K.'s natural parents, A.K. and L.K. (plaintiffs). DCFS determined that plaintiffs had "forced and pulled" their son's legs in what they believed was a faster and more effective method of burping him, that this was not a doctor-approved method for burping an infant, and that this was what caused K.K.'s injuries.

¶ 5 DCFS told plaintiffs that they could administratively appeal the indicated finding of abuse within 60 days but that, absent a successful appeal, the finding would be maintained in the State Central Register (SCR) for 20 years. As DCFS explained, although the contents of the SCR are not public, they can be viewed by childcare facility employers and certain other individuals. DCFS sent plaintiffs a notice that stated:

> "As a person indicated for child abuse and neglect, your name will be maintained on file in the DCFS State Central Register. The State Central Register is confidential under state law and not available to the general public. However,

> employers, prospective employers and other persons, such as law enforcement personnel, physicians and officials responsible for licensing people in professions that involve contact with children, may have access to the information from the State Central Register.
>
> * * *
>
> If you work with children or wish to work with children in the future, you should know that an indicated finding, unless overturned on appeal, may impact your licensure or employment."

¶ 6 Plaintiffs sought an administrative hearing, arguing that the allegations supporting the DCFS indicated finding of abuse and neglect were inaccurate. The administrative law judge (ALJ) received evidence, made findings of fact, and concluded that a preponderance of the evidence supported the DCFS finding. In accordance with the ALJ's recommendation, on November 5, 2015, the director of DCFS issued a final administrative decision denying plaintiffs' request to expunge the indicated finding from the SCR. On December 10, 2015, plaintiffs appealed that decision to the circuit court pursuant to the Administrative Review Act (735 ILCS 5/3-101 *et seq.* (West 2014)).

¶ 7 That same day, plaintiffs filed a motion to proceed using only their initials and for the entry of a protective order, asking that K.K., plaintiffs, and all non-party adult family members be referred to in court filings by first and last initials only. Plaintiffs insisted that they were wrongfully accused of child abuse and "could be subjected to public scrutiny if their full identities were made known." They argued that "[f]orcing [them] to choose between maintaining confidentiality and appealing indications for abuse or neglect would have a chilling effect on people deciding whether to appeal potentially erroneous findings" and would "destroy" the

confidentiality provided for in the legislative framework governing DCFS's investigation of reports of child abuse or neglect. In the alternative, plaintiffs argued that, because they had unique first and last names and only one child, revealing their full names would make K.K.'s identity obvious to anyone who knew them. Although plaintiffs also requested a protective order sealing the record in the circuit court, they insisted that this step, on its own, would not adequately protect their privacy or the privacy of their son.

¶ 8 Before responding to plaintiffs' motion, DCFS moved to seal the record on administrative review pursuant to section 11 of the Abused and Neglected Child Reporting Act (ANCRA) (325 ILCS 5/11 (West 2014)). The circuit court granted the motion on April 20, 2016, sealing the record and providing that the minor victim be referred to in pleadings only by his initials. In opposition to plaintiffs' motion, DCFS argued that plaintiffs had failed to demonstrate why the steps already taken by the court were insufficient to protect their son's privacy. Noting that "[t]he overall purpose of [ANCRA] is the protection of children, not indicated perpetrators," DCFS argued that plaintiffs had failed to show the good cause required by section 2-401(e) of the Code (735 ILCS 5/2-401(e) (West 2014)) for plaintiffs or any other family members to proceed under pseudonyms. DCFS insisted both that the public generally "has a right to know who is utilizing the courts" and that a litigant's potential embarrassment is insufficient to overcome that presumption of public access.

¶ 9 Following argument, the circuit court denied plaintiffs' motion on July 13, 2016. Plaintiffs then filed a motion asking the circuit court to "reconsider the chilling effect of its ruling on both [plaintiffs] and future parents accused of child abuse by the DCFS"; urging the court to consider the effects of its ruling on A.K., in particular, a childcare worker whose future job prospects would be damaged even if plaintiffs' appeal was successful; and urging it to "find

that, at least where minors who are the subject of indicated findings have the same last name as their parents, the parents should be allowed to proceed with pseudonyms." Plaintiffs asked in the alternative, if the court denied their motion, that it certify two questions for interlocutory review pursuant to Illinois Supreme Court Rule 308(a) (eff. Jan. 1, 2016).

¶ 10 The circuit court denied plaintiffs' motion for reconsideration, noting that "[a]lthough Plaintiffs generally argued that revealing their names could lead to identification of their child, the gravamen of [their] Motion was that disclosure of their names would be detrimental to Plaintiffs, their reputation, their decision to appeal DCFS' finding, and their future job prospects." In the court's view, plaintiffs simply had not demonstrated that "exceptional circumstances justif[ied] a departure from the normal method of [publicly] proceeding in courts." Although the court found that plaintiffs' proposed certified questions improperly "intermingle[d] facts and arguments," on its own motion the court certified the following two questions instead, which it found were "questions of law such as to which there are substantial grounds for difference of opinion and that an immediate appeal *** will materially advance the ultimate termination of this litigation":

> "a. In light of the confidentiality requirements set forth in ANCRA, 325 ILCS 5/11 and due process considerations, does good cause exist for persons who have been registered in an indicated report of abuse or neglect in the State Central Register to proceed under a pseudonym pursuant to 735 ILCS 5/2-401(e)?
>
> b. In a case involving administrative review from an indicated finding of child abuse in which the named party contests DCFS' finding, where the identity of the minor victim would be protected by the use of a pseudonym, and where the minor victim and a named party share a last name such that the minor

victim would be readily identified based on the last name of the named party, does good cause exist for allowing the named party to proceed under a pseudonym pursuant to 735 ILCS 5/2-401(e)?"

¶ 11 JURISDICTION

¶ 12 Our jurisdiction is under Illinois Supreme Court Rule 308(a) (eff. Jan. 1, 2016). The circuit court denied plaintiffs' motion on November 17, 2016, and certified two questions for interlocutory review pursuant to Rule 308. Plaintiffs timely filed an application for leave to appeal on December 16, 2016, and, on January 30, 2017, this court exercised its discretion under Rule 308(a) to allow the appeal.

¶ 13 ANALYSIS

¶ 14 Although they opposed plaintiffs' motions in the circuit court, on appeal DCFS and its director take no position on the certified questions and did not participate in oral argument before this court. Plaintiffs urge us to answer both questions in the affirmative.

¶ 15 Supreme Court Rule 308 establishes "an exception to the general rule that only final orders from a court are subject to appellate review." *Morrissey v. City of Chicago*, 334 Ill. App. 3d 251, 257 (2002). Under the rule, we may consider an interlocutory appeal of a nonfinal order presenting "a question of law as to which there is substantial ground for difference of opinion," an answer to which the circuit court finds "may materially advance the ultimate termination of the litigation." Ill. S. Ct. R. 308(a) (eff. Jan. 1, 2016). Because interlocutory appeals under Rule 308 necessarily involve questions of law, we consider questions certified under the rule *de novo*, performing the same analysis that a circuit court judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011). We neither consider fact-based arguments falling outside the scope of the certified question (*Razavi v. Walkuski*, 2016 IL app (1st) 151435, ¶ 9) nor review

the circuit court's application of the law to the particular facts of the case (*Walker v. Carnival Cruise Lines, Inc.*, 383 Ill. App. 3d 129, 133 (2008)). Thus, the issue before us is not whether the circuit court abused its discretion in this case but rather whether, as a matter of law, a party must be allowed to proceed anonymously in either or both of the situations described in the certified questions. *Cf. Doe v. Northwestern Memorial Hospital*, 2014 IL App (1st) 140212, ¶ 36 ("The determination of whether a plaintiff has shown good cause under section 2–401(e) lies in the discretion of the trial court and we will not reverse the court's determination on a section 2-401(e) motion absent an abuse of that discretion.").

¶ 16 A. First Certified Question - Privacy Concerns of the Indicated Perpetrator

¶ 17 Section 2-401 of the Code provides that "for good cause shown the parties may appear under fictitious names." 735 ILCS 5/2-401(e) (West 2014). In the absence of a statutory definition of "good cause," courts in Illinois and elsewhere "look to whether the party seeking to use a pseudonym has shown a privacy interest that outweighs the public's interest in open judicial proceedings." *Doe v. Doe*, 282 Ill. App. 3d 1078, 1088 (1996). Generally, anonymity will only be granted in "exceptional" situations "involving matters of a highly personal nature." *Id.* "[W]here the stated purpose is to avoid personal embarrassment or potential damage to future professional or economic well-being," requests to proceed anonymously are usually denied. *Id.* at 1084 (reviewing the decisions of federal courts).

¶ 18 We first consider plaintiffs' argument that ANCRA establishes a unique privacy interest for individuals subject to DCFS indicated findings of abuse or neglect. Plaintiffs are right that "[f]rom investigation to hearing to placement in the SCR, every aspect of ANCRA includes provisions to maintain the confidentiality of the process." For example, plaintiffs draw our attention to section 11, which states that "[a]ll records concerning reports of child abuse and

neglect *** shall be confidential and shall not be disclosed except as specifically authorized by this Act" (325 ILCS 5/11 (West 2014)); section 11.1, which limits access to such records to specific individuals and for specific purposes (*e.g.*, "[d]epartment staff in the furtherance of their responsibilities," "[a] law enforcement agency investigating known or suspected child abuse or neglect," the child's caretakers and physician, and a licensed child care facility when a current or prospective employee of that facility is an indicated perpetrator) (325 ILCS 5/11.1(a)(1), (2), (4), (6), (15) (West 2014)); section 11.1a, which restricts the information that the director of DCFS may disclose regarding the abuse or neglect of a child (325 ILCS 5/11.1a (West 2014)); section 11.3, which provides that, other than the State's Attorney for the purposes of initiating court action, "[a] person given access to the names or other information identifying the subjects of [a] report [of child abuse or neglect], except the subject of the report, shall not make public such identifying information" (325 ILCS 5/11.3 (West 2014)); and section 7.4(e), which makes the unauthorized disclosure of confidential information a Class A misdemeanor (325 ILCS 5/7.4(e) (West 2014)).

¶ 19 No provision of ANCRA expressly grants a right of privacy to indicated perpetrators of abuse or neglect. Instead, ANCRA's purpose, clearly stated in section 2 titled "application of Act or other applicable law," is to protect the privacy of alleged victims. The statute provides that DCFS "shall, upon receiving reports made under this Act, protect the health, safety, and best interests of the child in all situations in which the child is vulnerable to child abuse or neglect." 325 ILCS 5/2(a) (West 2014). While the identities of alleged perpetrators may be protected under ANCRA, this is an apparent byproduct of the protection that the statute provides for the identities of victims.

¶ 20 We also disagree with plaintiffs' contention that there is no legitimate public interest in

the disclosure of their identities, as we found to be the case in *Northwestern*, 2014 IL App (1st) 140212. The plaintiffs in *Northwestern* were men whose semen or testicular tissue was destroyed when one of the defendant hospital's cryogenic tanks malfunctioned. *Id.* ¶¶ 1, 3. Affirming the circuit court's order, which found in the court's discretion that there was good cause to permit the men to pursue the litigation under fictitious names, we agreed that they had demonstrated good cause under section 2-401(e) because public disclosure would reveal not just that they could no longer have biological children, but "the intimate details of [their] reproductive health and the treatment they [we]re undergoing for medical conditions such as cancer." *Id.* ¶ 42. We emphasized that "[t]he use of [pseudonyms] is disfavored" (internal quotation marks omitted), and made clear that our holding was based on "the peculiar confluence of the circumstances" underlying the plaintiffs' alleged injuries and that it should not be broadly applied to any personal injury cases involving allegations of serious injury. *Id.* ¶¶ 43-44. We recognized in *Northwestern* that the public interest in open proceedings that we weighed against the substantial privacy rights at issue was minimal because the "highly personal matters" at issue in that case "were never intended to see the light of publicity." *Id.* ¶ 44.

¶ 21 Plaintiffs rely on our decision in *Northwestern*, asserting that, "in making the entire ANCRA process confidential, the Illinois legislature sent a clear signal that there is no generalized public interest in the allegations against [them]." But, to the contrary, our supreme court has recognized that there is significant "public[ ] interest in the welfare and protection of abused and neglected children." *American Federation of State, County and Municipal Employees, AFL-CIO v. Department of Central Management Services*, 173 Ill. 2d 299, 319 (1996). ANCRA provides for confidential proceedings *in spite of* a strong public interest in allegations of child abuse and neglect, on the basis that society's desire to protect the privacy

interests of child victims can outweigh that interest.

¶ 22 Plaintiffs argue that due process is violated when indicated perpetrators are not guaranteed the ability to appeal under pseudonyms. We disagree. Plaintiffs' argument appears to be that, although they are provided with the opportunity to challenge the DCFS indicated finding of abuse and neglect in the circuit court under the Administrative Review Act, that opportunity is not meaningful because the disclosure of their identities required to avail themselves of that opportunity "negate[s] the very remedy Plaintiffs seek"—*i.e.*, "to have their names removed from the SCR and to be protected from the disclosure to any person or entity of the wrongly-entered indicated findings against them."

¶ 23 If an appeal is successful, while the fact that the party was accused of child abuse or neglect will indeed be a part of the public record, so too will the fact that the allegations were found to be unsupported. True, in deciding whether to pursue an appeal, a party must weigh the ill effects of the limited disclosure of an indicated finding appearing on the SCR against the broader disclosure of allegations of abuse or neglect in a public appeal, but this does not mean that the opportunity to challenge those allegations is not meaningful. We are simply not persuaded that an individual who availed himself of the courts and successfully challenged an indicated finding of child abuse or neglect has not received due process.

¶ 24 As we recognized in *Doe v. Doe*, 282 Ill. App. 3d, the privacy concerns that plaintiffs raise exist in many cases in which a party is accused—perhaps wrongly—of some misconduct. In *Doe* the plaintiff alleged that her uncle by marriage sexually molested her over a number of years when she was a minor. *Id.* at 1079-80. The circuit court granted the defendant's motion for an order prohibiting the plaintiff from disclosing her name or the defendant's name in any pleadings and, wanting her allegations to be a matter of public record, the plaintiff appealed. *Id.*

at 1080. We reversed the circuit court, finding no good cause under section 2-401(e) of the Code for the parties to proceed under fictitious names. *Id.* at 1088. As we explained, the arguments that the defendant made in favor of anonymity did not constitute the sort of extraordinary circumstances required to show good cause under that section:

> "[I]t is difficult to see how defendant has set himself apart from any individual who may be named as a defendant in a civil suit for damages. It seems to this court that any doctor sued for medical malpractice, any lawyer sued for legal malpractice, or any individual sued for sexual molestation can assert that the plaintiff's allegations will cause harm to his reputation, embarrassment and stress among his family members, and damage to his business as a result of the litigation. *** Here, we cannot say that potential damage caused by these allegations to defendant's reputation, personally or professionally, amounts to a protectable privacy interest through his repeated assertions that plaintiff's allegations, if disclosed, will cause 'severe and imminent harm to [his] family.' Courts have consistently rejected such arguments." *Id.*

¶ 25 We thus answer the first certified question in the negative. Neither the privacy protections afforded by ANCRA nor due process concerns establish, as a matter of law, good cause in all cases for individuals subject to indicated findings of abuse or neglect to appeal final orders of DCFS under pseudonyms. While trial courts remain free in their discretion to allow alleged perpetrators to proceed anonymously, there is no basis for a *per se* rule permitting them to do so in every case.

¶ 26 B. Second Certified Question - Privacy Concerns of the Minor Victim

¶ 27 The circuit court's second certified question asks whether a named party should be

permitted to proceed under a pseudonym, not for the protection of his or her own privacy, but to protect the privacy interests of the alleged minor victim, in cases where revealing the named party's identity will also reveal the minor's identity. It is undisputed that the various provisions of ANCRA discussed *supra* embody the public policy that the privacy rights of a child victim do, often if not always, outweigh the general interest of the public in open adjudicative proceedings. However, as plaintiffs note, the language of the second certified question *assumes* both that the alleged minor victim will be "readily identified" based on a last name shared with the named party seeking to proceed under a pseudonym, and that the identity of the minor will be protected by the use of a pseudonym. These are findings of fact that were not made by the circuit court in this case.

¶ 28 In *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 469 (1998), our supreme court considered a certified question that similarly "assume[d] the existence of certain facts." Although "the matter [wa]s framed as a question of law," the court determined the question was inappropriate for consideration under Rule 308, stating: "we believe that any answer here would be advisory and provisional, for the ultimate disposition [of the claim at issue] will depend on the resolution of a host of factual predicates." *Id.*; see also *Lawndale Restoration Ltd. v. Acordia of Illinois, Inc.*, 367 Ill. App. 3d 24, 27 (2006) ("If the question certified by the trial court calls for a hypothetical answer with no practical effect, we should refrain from answering it.").

¶ 29 The acknowledgement by plaintiffs' counsel during argument in this case that it was necessary to assume these facts to frame the question as a matter of law reinforces the conclusion, recognized by this court in *Northwestern*, that "[t]he determination of whether a plaintiff's particular circumstances are 'exceptional' "—such that good cause under section 2-401(e) of the Code is shown—"must be made by the court on a case-by-case basis."

Northwestern, 2014 IL App (1st) 140212, ¶ 44.

¶ 30 Although we granted plaintiffs' application for leave to appeal with respect to both certified questions, upon further review we conclude that the circuit court's second question is inappropriate for consideration under Rule 308 and decline to answer it.

¶ 31 CONCLUSION

¶ 32 For the reasons stated, we answer the circuit court's first certified questions in the negative and decline to answer the court's second certified question.

¶ 33 First certified question answered; second certified question not answered; cause remanded.