

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

Asbury Park Press v. County of Monmouth, et al. (A-8-09)

(NOTE: This Court wrote no full opinion in this case. Rather, the Court's affirmance of the judgment of the Appellate Division is based substantially on the reasons expressed in Judge Ashrafi's opinion below.)

Argued November 10, 2009 -- Decided January 25, 2010

PER CURIAM

The Court considers whether the County of Monmouth may withhold public disclosure of its agreement with an employee to settle her sexual harassment and discrimination lawsuit.

In April 2005, Carol Melnick, a Monmouth County employee, filed a lawsuit alleging sexual discrimination, sexual harassment, retaliation and hostile work environment. The complaint named as defendants the Monmouth County Board of Chosen Freeholders and five individually named past and present employees of the County. Through the entry of a protective order, the parties agreed to maintain the confidentiality of information exchanged in discovery. In June or July 2007, the lawsuit settled. The settlement agreement contained its own confidentiality provision and was not filed with the court or executed in the form of an order or judgment. Instead, on August 6, 2007, the parties jointly filed a one-sentence stipulation of dismissal terminating the lawsuit.

In July 2007, John Paff and the Asbury Park Press, acting separately, made formal requests under the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, for records relating to the settlement. The County declined both requests. Paff and the Asbury Park Press each filed a complaint in the Superior Court, Law Division, to compel disclosure. The trial court directed that Melnick be joined as a party-defendant and consolidated the two cases for purposes of a summary trial.

At the summary trial, Paff and Asbury Park Press stipulated that the only record they sought was a copy of the County's settlement agreement. The trial court ruled against disclosure after concluding that OPRA's definition of "government record" specifically excludes information generated in connection with a sexual harassment complaint.

The Appellate Division reversed. 406 N.J. Super. 1 (App. Div. 2009). The panel explained that OPRA defines "government record" to include all documents that have been made or received by government in its official business, but provides specific exceptions from that broad definition. One of those exceptions excludes "information generated by or on behalf of public employers or public employees in connection with any sexual harassment complaint filed with a public employer or with any grievance filed by or against an individual or in connection with collective negotiations, including documents and statements of strategy or negotiating position." Noting the statute's requirement that "any limitations on the right of access . . . shall be construed in favor of the public's right of access," N.J.S.A. 47:1A-1, and the exception's express language referring to grievances or to complaints filed with a public employer, the panel found that the exception did not apply to this matter because Melnick's complaint was filed in the Superior Court, not with Monmouth County, and because a complaint is not the same as a "grievance" in the context of employment relationships.

Addressing the parties' confidentiality agreements, the panel determined that the agreements did not override the public's right of access under OPRA. As the panel explained, lawsuits are filed in a public forum and the public has a right of access to court documents filed in civil lawsuits. Noting that the Legislature provided victims the opportunity to bring sexual harassment complaints to their public employers without public access but refrained from interfering with the long-standing governmental policy of conducting judicial affairs openly to the public, the panel advised that a victim who brings a lawsuit should understand that litigation is done in a public forum and is subject to public knowledge. However, the panel recognized that protective orders, such as the discovery order entered in Melnick's case, can preserve the privacy of truly personal information such as medical and psychological records and the contents of personnel files. The panel pointed out that its decision determined only the County's

obligation to disclose the settlement agreement under the provisions of OPRA. Finally, the panel ruled that Asbury Park Press and Paff were entitled to attorney's fees, and that the amount awarded must be developed through a factual record in the trial court.

The Supreme Court granted certification.

HELD: The judgment of the Appellate Division is affirmed substantially for the reasons expressed in Judge Ashrafi's opinion. The Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, requires disclosure of a settlement agreement between the County of Monmouth and an employee who filed a lawsuit claiming sex discrimination, sexual harassment, retaliation, and a hostile work environment. The Court also agrees that plaintiffs Asbury Park Press and John Paff are entitled to reasonable attorney's fees, which the trial court is to determine on remand.

1. The Court rejects the County's argument, made for the first time during oral argument, that the settlement agreement in this case should not be disclosed in light of the Court's decision in Burnett v. County of Bergen, 198 N.J. 408 (2009). In Burnett, a request for eight million pages of land title records containing names, addresses, social security numbers, and other information on countless citizens exposed an untold number of individuals to an increased risk of identity theft. To resolve competing OPRA provisions regarding ready access to government records and protection of a citizen's personal information, the Burnett Court adopted and applied the seven factors outlined in Doe v. Poritz, 142 N.J. 1, 82-86 (1995), and held that the land title records could be disclosed after redaction of individual social security numbers. However, at issue in Burnett was OPRA's privacy clause, which specifies that public agencies have an obligation to safeguard from public access a citizen's personal information when disclosure would violate that citizen's reasonable expectation of privacy. OPRA's privacy clause has no application here because this case does not implicate the concerns raised in Burnett. Even if the clause did apply, disclosure under the circumstances presented would not violate any reasonable expectation of privacy. Here, a former county employee chose to file a public action—a complaint against the County which was available to the public. Had this matter not settled, the lawsuit would have unfolded in a public trial and any outcome would have been revealed in open court. A governmental entity cannot enter into a voluntary agreement at the end of a public lawsuit to keep a settlement confidential, and then claim a reasonable expectation of privacy in the amount of that settlement. There is no reason, therefore, to analyze the Doe factors that the Court considered in Burnett.

The judgment of the Appellate Division is **AFFIRMED**.

CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN, WALLACE, RIVERA-SOTO and HOENS join in this PER CURIAM opinion.

SUPREME COURT OF NEW JERSEY
A-8 September Term 2009

ASBURY PARK PRESS,

Plaintiff-Respondent,

v.

COUNTY OF MONMOUTH and CAROL
MELNICK,

Defendants-Appellants,

JOHN PAFF,

Plaintiff-Respondent,

v.

MONMOUTH COUNTY and JAMES
GRAY, in his capacity as the
Monmouth County Custodian of
Records,

Defendants-Appellants.

Argued November 10, 2009 - Decided January 25, 2010

On certification to the Superior Court,
Appellate Division, whose opinion is
reported at 406 N.J. Super. 1 (2009).

Linda Grasso Jones argued the cause for
appellants County of Monmouth and James Gary
(Cleary, Alfieri & Jones, attorneys).

Michelle M. Tullio argued the cause for
respondent Asbury Park Press (Lanfrit &
Tullio, attorneys).

Walter M. Luers argued the cause for
respondent John Paff.

Linda Wong submitted a letter in lieu of brief on behalf of appellant Carol Melnick (Wong Fleming, attorneys).

PER CURIAM

The judgment of the Appellate Division is affirmed substantially for the reasons expressed in Judge Ashrafi's thoughtful opinion. Asbury Park Press v. Monmouth, 406 N.J. Super. 1 (App. Div. 2009). We agree that the Open Public Records Act (OPRA), N.J.S.A. 47:1A-1 to -13, requires disclosure of a settlement agreement between the County of Monmouth and an employee who filed a lawsuit claiming sex discrimination, sexual harassment, retaliation, and a hostile work environment. We also agree that plaintiff-appellants are entitled to reasonable attorney's fees under OPRA, which the trial court is to determine on remand. We add only the following.

During oral argument before this Court, the County argued for the first time that the settlement agreement should not be disclosed in light of the ruling in Burnett v. County of Bergen, 198 N.J. 408 (2009). We disagree.

This case is a far cry from Burnett. Burnett involved a request for eight million pages of various types of land title records, spanning a period of twenty-two years, which contained names, addresses, social security numbers, signature specimens, information on marital status, and details about mortgages for countless citizens. Id. at 416. We noted that the bulk

disclosure could expose an untold number of individuals to an increased risk of identity theft and held that the records could be disclosed after redaction of individual social security numbers. Id. at 415. We reached that conclusion after analyzing OPRA's text and balancing its competing aims of ready access to government records and protection of a citizen's personal information. Id. at 414-15, 422-27. In balancing those interests, we adopted and applied the seven factors outlined in Doe v. Poritz, 142 N.J. 1, 82-86 (1995). Burnett, supra, 198 N.J. at 427-37.

The County seizes on OPRA's privacy clause to try to prevent disclosure of the settlement agreement in this case. The privacy clause specifies that public agencies have "an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." N.J.S.A. 47:1A-1.

OPRA's privacy clause has no application here because this case does not implicate the concerns raised in Burnett. Even if the clause did apply, disclosure under the circumstances presented would not violate any reasonable expectation of privacy. Here, a former county employee chose to file a public action -- a complaint against the County which was available to the public. Had the matter not settled, the lawsuit would have

unfolded in a public trial, and any outcome would have been revealed in open court. To expect privacy in the outcome of a lawsuit against the County, then, is hardly reasonable and runs counter to OPRA's core concern of transparency in government. A governmental entity cannot enter into a voluntary agreement at the end of a public lawsuit to keep a settlement confidential, and then claim a "reasonable expectation of privacy" in the amount of that settlement.

We need go no further in addressing the County's argument. There is no reason to analyze the Doe factors considered in Burnett.

The judgment of the Appellate Division is affirmed.

CHIEF JUSTICE RABNER and JUSTICES LONG, LaVECCHIA, ALBIN, WALLACE, RIVERA-SOTO, and HOENS join in this opinion.

