IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

CASE NO 2021-015089 CA 01 (43)

IN RE: CHAMPLAIN TOWERS
SOUTH COLLAPSE LITIGATION,

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THE MIAMI HERALD'S MOTION FOR CLARIFICATION OR, ALTERNATIVELY, OBJECTION TO CLOSURE

The McClatchy Company, LLC, doing business as *The Miami Herald* (the "*Herald*"), moves for clarification of the Court's Further Order on Claims Hearing Procedures (DE 851). Specifically, the *Herald* seeks clarification regarding whether its journalists are permitted to attend a claims hearing if the claimant whose claim is being heard (either the claimant or the decedent's personal representative) invites the journalist to attend for the purpose of reporting on the hearing. Alternatively, if the *Herald*'s journalists are not permitted to attend in such circumstances, the *Herald* objects to closure.

I. BRIEF PROCEDURAL HISTORY

The Court entered an Order Establishing Tentative Claims Hearing Procedures (the "Tentative Procedures Order") (DE 844). In the Tentative Procedures Order, the Court wrote that it would hold hearings to consider claims filed by certain claimants and that those hearings "will be conducted in open court and in public." Tent. Proc. Order at ¶¶3 & 5(c). In that order, the Court asked counsel for the parties to "be prepared to address [at the then-upcoming June 23 Fairness Hearing] all aspects of the claims process and provide the Court any appropriate revisions/modifications of this tentative protocol." *Id.* at ¶8.

The Court entered its Further Order on Claims Hearing Procedures (the "Order") following the Fairness Hearing. The Order recites that "[a]t the Fairness Hearing, counsel suggested that the Court revisit its tentative ruling that the claims process hearings would be conducted in open court and in public. No party objected to making the claims process hearings private and all counsel queried fully supported making this change to the tentative process." Order at ¶3. The Court further wrote and ruled:

> 4. The Court is mindful that judicial proceedings should, absent extraordinary circumstances, be conducted in open court and in public. The Parties are correct, however, that the Court is conducting the claims process hearings in the capacity of Claims Administrator pursuant to Article 5 of the In re: Champlain Towers South Collapse Litigation Class Action Settlement Agreement, for which the Court granted final approval pursuant to the Final Order and Judgment entered on June 24, 2022, and the claims process hearings are not judicial proceedings.
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> 5. The Court has great respect for the privacy concerns of the victims that will be making their claims presentations and will be discussing intimate details on sensitive topics including medical and mental health conditions.
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> 6. Therefore, the Court finds that good cause[1] has been shown to close the claims hearing to the public and make them private and confidential.
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> 7. For each claims hearing, only the following persons may attend without express Court authorization:
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> c. individuals invited by that claimant to serve as witnesses or for emotional support . . . .

[1] The party seeking closure of hearings in civil cases has the "heavy burden" of establishing that closure is warranted. *See Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 118 (Fla. 1988). "[B]efore entering a closure order, the trial court shall determine that no reasonable alternative is available to accomplish the desired result and, if none exists, the trial court must use the least restrictive closure necessary to accomplish its purpose." *See id.*

Order at ¶¶4-7. The Order – which was entered on June 27, 2022 – concludes by stating that "[a]ny interested party objecting to the Court's claims hearing procedures, including its decision to close these claims hearings to the public, shall file an objection setting forth the grounds for it within ten (10) days." *Id.* at ¶10.

The *Herald* seeks clarification of the Order. Specifically, the *Herald* seeks clarification regarding whether its journalists are permitted to attend a claims hearing if the claimant whose claim is being heard invites the journalist to attend for the purpose of reporting on the hearing. Alternatively, if the *Herald*'s journalists cannot attend in such circumstances, the *Herald* objects to closure of the claims hearings.

II. ARGUMENT

A. CLARIFICATION REGARDING ATTENDANCE BY INVITATION

The Order permits a claimant whose claim is being heard (which is defined as the claimant or a decedent's personal representative) to invite third persons to attend an otherwise closed claims hearing if those third persons are serving as witnesses or are invited for emotional support. Order at ¶7(c). The *Herald* seeks clarification regarding whether its journalists are permitted to attend a claims hearing if the claimant whose claim is being heard invites the journalist to attend for the purpose of reporting on the hearing.

As the Order is written, it appears that the journalist could not be invited to attend (or accept an invitation to attend) because the journalist would not be serving as witness, nor would he or she be attending the hearing for the principal purpose of providing emotional support even though the claimant extending the invitation might feel emotionally supported by a journalist attending and observing a hearing where the claimant's rights are being determined by the Court. *See, e.g., Barron v. Florida Freedom Newspapers, Inc.*, 531 So.2d 113, 117 (Fla. 1988) (quoting 6 Wigmore,

Evidence §1834 (Chadbourn rev. 1976)) (providing examples of the ways in which public attendance at hearings helps ensure the fairness of proceedings).

Although the Order, as written, limits permissible invitees to witnesses and people providing emotional support, if the journalist is attending at the invitation of the claimant – ostensibly the person for whose benefit closure has been ordered – then it is unclear what objection there could be to the journalist's attendance or who would make any such objection. The *Herald* requests clarification regarding whether its journalists are permitted to attend a claims hearing if the claimant whose claim is being heard invites the journalist to attend for the purpose of reporting on the hearing.

B. ALTERNATIVELY, THE *HERALD* OPPOSES CLOSURE OF THE CLAIMS HEARINGS

Alternatively, if the *Herald*'s journalists are not permitted to attend a claims hearing despite being invited by the claimant whose claim is being heard, then the *Herald* objects to closure of the claims hearings. The Order premises closure upon two grounds. *First*, that the Court is conducting the claims hearings in the capacity of Claims Administrator under the parties' settlement agreement; therefore, the claims hearings are not judicial proceedings. Order at ¶4. *Second*, "the privacy concerns of the victims that will be making their claims presentations and will be discussing intimate details on sensitive topics including medical and mental health conditions." *Id.* at ¶5. Neither reason supports closure of the claims hearings.

1. The *Herald* Has Standing To Challenge Closure

The *Herald* publishes news throughout Miami-Dade County and Florida, and thus has standing to challenge and oppose closure. *See, e.g., Barron*, 531 So.2d at 118 ("[B]oth the public and news media shall have standing to challenge any closure order."); *see also* Final Order and

Judgment (DE 850) at 7 (recognizing the *Herald*'s Pulitzer Prize-winning coverage of the collapse and its aftermath).

2. The Right Of Public Access Attaches To The Claims Hearings.

"[A] strong presumption of openness exists for ***all*** court proceedings." *See Barron*, 531 So.2d at 118 (emphasis added); *see also id.,* at 116 ("[W]e hold that both civil and criminal court proceedings in Florida are public events and adhere to the well established common law right of access to court proceedings and records."). The Order states that the claims hearings are nonetheless properly closed because the Court is conducting the hearings in the capacity of Claims Administrator under the parties' settlement agreement; therefore, the hearings are not judicial proceedings.

Nothing in Florida's Constitution, statutes, or case law creates a dual-capacity circuit court system in which circuit judges sometimes conduct hearings in a judicial capacity and other times conduct hearings in a non-judicial capacity. The parties chose to have the publicly-owned and publicly-funded circuit court conduct the claims hearings and determine the issues presented at those hearings. The consequence of that choice is that the strong presumption of openness attaches to the hearings that are being conducted by the public's Court because "'[i]n this country it is a first principle that the people have the right to know what is done in ***their*** courts.'" *See Barron*, 531 So.2d at 116 (quoting *In re: Shortridge*, 34 P. 227, 228-29 (Cal. 1893)) (emphasis added).

The parties could have hired a private corporation or a private person to serve as claims administrator to conduct the claims hearings and resolve the issues presented at those hearings. Had they done so, then the public's right of access would not have attached to the hearings, just as there is no public right of access to arbitration hearings. However, the parties chose to have the public's Court conduct the hearings and resolve the issues, and the public's right to attend the

hearings being conducted by their Court accompanies that choice. The *Herald*'s objection to closure should be sustained, and the claims hearings should not be closed.

3. Notions Of Privacy Do Not Support Closure.

In addition to stating that the claims hearings are not judicial proceedings because the Court is conducting them in the capacity of Claims Administrator, the Order also refers to "the privacy concerns of the victims that will be making their claims presentations and will be discussing intimate details on sensitive topics including medical and mental health conditions." Order at ¶5. The fact that evidence regarding medical and mental health conditions and history will be presented in these wrongful death and personal injury cases is not enough to support closure.

The Florida Supreme Court has identified various scenarios in which it might be appropriate to close hearings in civil proceedings. As relevant to the notions of privacy mentioned in the Order, "closure of court proceedings or records should occur only when necessary . . . to avoid substantial injury to a party by disclosure of matters protected by a common law or privacy right not generally inherent in the specific type of civil proceeding sought to be closed." *See Barron*, 531 So.2d at 118. "The language 'not generally inherent' limits the scope of the exception [to the presumption of openness] to those matters that are peripheral to the litigation. Accordingly, in order to respect our system of open courts, litigants cannot have a reasonable expectation of privacy with regard to matters that are inherent to their civil proceedings." *See Carnegie v. Tedder*, 698 So.2d 1310, 1312 (Fla. 2d DCA 1997).

The use of evidence relating to medical and mental health history is inherent and integral in wrongful death and personal injury litigation, and the fact that such evidence will be used in the claims hearings being conducted by the Court does not provide a basis for closure. *See Barron*, 531 So.2d at 119 ("Although generally protected by one's privacy right, medical reports and

history are no longer protected when the medical condition becomes an integral part of the civil proceedings, particularly when the condition is asserted as an issue by the party seeking closure.").

If the public's right to attend civil proceedings could be curtailed simply because evidence of medical and mental health history will be presented, then the public would have no right to attend any of the dozens of wrongful death or personal injury proceedings that are held each week in the Miami-Dade County Courthouse. There is no support for such a result, and the Florida Supreme Court recognizes "personal injury actions" among the actions that are open to the public despite the fact that "medical information" is "presented" in those proceedings. *See Barron*, 531 So.2d at 119. The *Herald*'s objection to closure should be sustained, and the claims hearings should not be closed.

III. CONCLUSION

For these reasons, the *Herald* requests clarification regarding whether its journalists are permitted to attend a claims hearing if the claimant whose claim is being heard invites the journalist to attend for the purpose of reporting on the hearing. Alternatively, if the *Herald*'s journalists cannot attend in such circumstances, the *Herald* objects to closure and the claims hearings should not be closed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 7, 2022, I electronically filed this document with the Florida Courts e-Filing Portal, which will serve it by e-mail on all counsel of record.

By: /s/ Scott D. Ponce