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Transcript of Hearing

Date: November 16, 2021

Case: Fairfax County School Board -v- Tisler, et al.

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V I R G I N I A:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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FAIRFAX COUNTY SCHOOL BOARD,

Plaintiff,

v.

Case No. 2021-13491

DEBRA TISLER AND CALLIE

OETTINGER,

Defendants.

-----x

Judge's Ruling

Before the Honorable Richard E. Gardiner

Fairfax, Virginia

Tuesday, November 16, 2021

10:02 a.m. EST

Job No.: 414077

Pages: 1 - 22

Transcribed by: Bobbi J. Fisher, RPR

1 Judge's Ruling was held at:

2 Fairfax County Circuit Court

3 4110 Chain Bridge Road

4 Fairfax, Virginia 22030

5

6 Pursuant to Notice, before Diamante Parrish,

7 Digital Court Reporter and Notary Public in and for

8 the Commonwealth of Virginia.

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A P P E A R A N C E S

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E X H I B I T S

(None.)

1 P R O C E E D I N G S

2 THE COURT: All right. Swear in the
3 court reporter, please.

4 (The court reporter was duly sworn.)

5 THE COURT: All right. This is Fairfax
6 County School Board versus Debra Tisler, et al.
7 CL2021-13491.

8 I have counsel for the School Board.
9 Sir, if you could identify yourself for the record.

10 MR. BATES: Yes. Good morning, Your
11 Honor. Ryan Bates representing Fairfax County
12 School Board.

13 THE COURT: All right. Mr. Bates is
14 present in the courtroom.

15 MR. BHIRUD: Good morning. Ketan Bhirud
16 with Troutman Pepper Hamilton & Sanders here with
17 the defendant.

18 THE COURT: All right. And then
19 Mr. Sandefur, who was admitted pro hac vice, is
20 present by Webex.

21 I had asked the parties to appear today
22 because I want to give you my decision. There's

1 some motions and then, of course, the underlying
2 preliminary injunction request.

3 Let me start -- Mr. Sandefur, I'm going
4 to move you over a little bit here so I can see
5 people who are in the courtroom.

6 MR. SANDEFUR: Certainly, Your Honor.
7 Thank you.

8 THE COURT: Don't take it personally.

9 MR. SANDEFUR: And I appreciate the
10 Court's willingness to accommodate my schedule.

11 THE COURT: Yes, sir. Not a problem.

12 The first thing I wanted to rule on was
13 the Board's Motion to Strike, which was filed --
14 let me pull that out. The Board's Motion to Strike
15 defendant's response to October 22nd, 2021, order
16 that was re-filed November 3rd, and I received a
17 response from Defendants on that.

18 My ruling on that is as follows: I'm
19 going to grant the Motion to Strike in part and
20 deny it in part. With regard to the legal
21 argument, since I did not ask the defendants for
22 additional legal argument, I am going to grant the

1 Motion to Strike to the extent it deals with the
2 legal or additional legal argument that defendants
3 made. I certainly heard all the legal arguments in
4 court. I had read the initial pleadings in the
5 case as well, so that part of the Motion to Strike
6 is granted.

7 With regard to the second part of the
8 Motion to Strike that is regarding what the
9 defendants said as to the various redactions, I'm
10 going to deny that part of the Motion to Strike. I
11 think, well, the answer is -- the question was why
12 or what I had asked for is why such redaction is
13 not legally justified. I'll accept what the
14 answers the defendants gave. That's what their
15 answers are. The plaintiff may not think they were
16 sufficient and maybe they weren't, but, in any
17 event, they were what the defendant's response was.
18 So the Motion to Strike as to that, the second part
19 of the Motion to Strike, is denied.

20 Now, turning to the merits of the Board's
21 motion for a preliminary injunction, the first
22 thing I wanted to note is that Virginia state

1 courts have a little bit different standard than
2 the federal standard. The Board, of course, cited
3 the federal standard, the now famous Winter case
4 from the U.S. Supreme Court. Although, I think, in
5 the end, it doesn't make any difference which
6 standard I apply, but I do want to make it clear
7 that Virginia standard, which is articulated in
8 Wright versus Castles, 232 Va. 218 at page 224 --
9 that's a 1986 case -- the Court said, to obtain the
10 injunction, Wright had to prove that he would
11 suffer irreparable harm if the injunction were not
12 granted and that he did not have an adequate remedy
13 at law.

14 Virginia Supreme Court has apparently
15 not, I believe, adopted the four-part federal
16 standard most recently articulated in Winter. But,
17 as I said, I think whether I use the federal
18 standard or the state standard, the result is the
19 same.

20 And so what I'm going to do, since the
21 federal standard is a little bit more inclusive, is
22 give my ruling based on the federal standard and

1 then I'll mention Virginia standard at the end.

2 The federal standard -- the first part of
3 the federal standard is likely to succeed on the
4 merits, and that really is, in my view, in this
5 case, the key part of this case as whether the
6 Board is likely to succeed on the merits. And of
7 course the merits are whether the Court should
8 restrain the defendants by ordering them to return
9 the documents that they received and accepting in
10 their place, excuse me, accepting in their place
11 the second set of documents.

12 The Board argues vociferously that this
13 is not a prior restraint. I equally vociferously
14 disagree with that. This is about as much a prior
15 restraint as there ever could be. The Board is
16 coming to a government agency, the Court, that has
17 the power to restrain and asking the Court to
18 restrain the defendants in this case. So this is a
19 prior restraint. No question about it, in my mind.
20 And that means that we're governed by several cases
21 from the U.S. Supreme Court, the most recent or the
22 most applicable, I would say, is the Supreme Court

1 decision in the Florida Star versus BJT, which is
2 491 U.S. 524 from 1989. And the standard set out
3 there -- the first question that one has to ask in
4 a prior restraint case is whether the publisher --
5 in that case, it was a newspaper; in this case,
6 it's two individual citizens -- lawfully obtained
7 truthful information about a matter of public
8 significance.

9 In my view, in this case, the publishers
10 did lawfully obtain truthful information. They
11 made a Freedom of Information Act request. The
12 Board's designee or the Board's employee -- I'm not
13 exactly sure what the relationship was, whether it
14 was employee or somebody else, but in any case,
15 their agent -- the Board's agent released the
16 information in response to the Freedom of
17 Information Act request. The information wasn't
18 stolen or otherwise unlawfully obtained. It was
19 obtained quite lawfully, and it's clearly also
20 about a matter of public significance because this
21 has to do with legal bills that are being paid by
22 the taxpayers of Fairfax County.

1 And while it's not a matter of something
2 like the Pentagon papers where we're talking about
3 the war in Vietnam, certainly it's a matter of
4 public significance as to what the taxpayers --
5 what bills the taxpayers are having to absorb.

6 So I find that the first part of the
7 Florida Star or the Florida Star test, which,
8 obviously, goes back to other cases, but it's most
9 reiterated in the Florida Star case, that that
10 first standard has been met.

11 The fact that these were disclosures that
12 were not required to be disclosed under the Freedom
13 of Information Act, as the Supreme Court said in
14 the Florida Star, does not make it unlawful for
15 the -- in this case, the defendants to receive them
16 when they were furnished by the government.

17 And I would say, generally, with regard
18 to the Freedom of Information Act and the
19 permitted -- the redactions that it permits, at
20 this stage in the proceedings, those permissible
21 redactions are simply not relevant anymore. We're
22 past the stage where I can consider possible

1 Freedom of Information Act redactions.

2 The issue now, as set out in Florida --
3 in the Florida Star and of course the other cases
4 that proceeded it and came after it is whether this
5 information is such information concerning personal
6 privacy that the State can protect individuals from
7 intrusion by the press.

8 And the holding of Florida Star, I think,
9 is right on point here. This is at page -- the
10 last page of the opinion: "We do not hold that
11 truthful publication is automatically
12 constitutionally protected or that there's no zone
13 of personal privacy within which the State may
14 protect the individual from intrusion by the press.
15 We hold only that, where a newspaper publishes
16 truthful information, which it has lawfully
17 obtained, punishment may lawfully be imposed if at
18 all only when narrowly tailored to a State interest
19 of the highest order."

20 And, in this case, the State interest of
21 the highest order would be information relating to
22 personal privacy, and, therefore, it is the Court's

1 view that the Board is not likely to succeed in
2 this case with regard to virtually everything that
3 was not redacted. The only thing that I think the
4 board has any likelihood of success on is
5 information concerning bank account names and
6 numbers and tax IDs and federal IDs to the extent
7 those are in there. Everything else -- and I went
8 through every single redaction here. Everything
9 else here is not, the Court finds, within the zone
10 of personal privacy. Even information as to
11 routing numbers, which are public information and
12 SWIFT codes are not within the realm of personal
13 privacy. You can look up a routing number and a
14 SWIFT code on the internet for any bank -- probably
15 any bank in the world but certainly any bank in the
16 United States.

17 And -- but the information -- other
18 information that's in -- that was redacted does not
19 come within the zone of personal privacy.

20 In addition, the Board's argument about
21 attorney-client privilege and work product, at this
22 stage, is really -- is irrelevant in the --

1 because, in the Court's view, both the
2 attorney-client privilege and any work product
3 privilege there might be has been waived by the
4 client by releasing the information.

5 Now, the Board makes what I think to be
6 almost a frivolous argument when they say, Well, it
7 wasn't the individual board members who made the
8 decision; it was their -- it was an employee or
9 their agent. But that, in my view, makes
10 absolutely no difference at all. They were the
11 ones -- the Board were the ones who gave that duty
12 to that person, and they are bound by what that
13 employee did.

14 So I find that, as to any attorney-client
15 privilege or work product privilege that may be
16 claimed that that has been waived and that,
17 therefore, any information dealing with that is --
18 the board is not likely to succeed on the merits of
19 keeping that information -- requiring that
20 information to be restrained.

21 So the bottom line on the likelihood to
22 succeed on the merits prong is that I don't

1 believe, for the vast bulk of the redactions, other
2 than the bank account names and numbers and tax IDs
3 and federal IDs, that the Board is likely to
4 succeed on the merits.

5 With regard to irreparable harm, the
6 Board, in this case, is not -- I don't find that
7 there is irreparable harm to the Board. The Board,
8 for whatever reason -- maybe it was ineptness, I
9 don't know; I have no evidence on that -- made the
10 decision to turn over the information, and they're
11 stuck with that. And I don't believe there's any
12 harm to them other than disclosure of a tiny, tiny
13 percentage of the information which relates to bank
14 account names and numbers and tax ID and federal ID
15 information.

16 With regard to the balance of the
17 hardships, again, in this case, since the Board is
18 asking me to impose a prior restraint on the
19 defendants in this case, I find that the balance of
20 hardship weighs strongly in favor of the defendants
21 and against the Board.

22 And with regard to the public interest, I

1 don't think there's any question in this case that
2 it's in the public -- this is in the public
3 interest. What we're doing here is -- what the
4 defendants are doing is enforcing their rights
5 under the First Amendment, and those rights,
6 enforcing their rights under the First Amendment,
7 is about as high in the public interest scale as
8 you can get.

9 So given -- given that, under the federal
10 standard, the Court is going to -- with the minor
11 exception of the bank account names and numbers and
12 tax ID and federal ID that's shown in there, that
13 was redacted, the Court is going to deny the
14 Board's motion for preliminary hearing under the
15 State standard, which requires only irreparable
16 harm and not having adequate remedy at law. I do
17 agree that, in this case, the Board does not have
18 an adequate remedy at law, so they meet the first
19 half of the State standard. But as I have
20 explained already with regard to the federal
21 standard, the Board has not -- will not suffer
22 irreparable harm so it doesn't meet -- it doesn't

1 qualify for an injunction under the State standard
2 either.

3 I'm going to ask Mr. Sandefur or, I
4 guess, local counsel, please, to prepare an order
5 with regard to the preliminary injunction, denying
6 it in vast part but granting it in a very tiny area
7 as I have explained. And, also, I'm going to ask
8 counsel for the Board to prepare the order with
9 regard to the Motion to Strike.

10 All right. Are there any questions --
11 and one other matter: Judge Oblan has entered a
12 temporary restraining order through calendar
13 control on September 30th of 2021. That temporary
14 restraining order is hereby vacated.

15 All right. Let me start with counsel for
16 the School Board.

17 MR. BATES: Yeah, Judge, I don't think we
18 have anything further.

19 THE COURT: Okay. All right.

20 Counsel in the courtroom for the
21 defendants?

22 MR. BHIRUD: Yeah, I'll defer to

1 Mr. Sandefur substantively, but I just -- I'm new
2 to Virginia, so I had a technical question as to,
3 when you asked us to prepare the order, would you
4 like us to run it by opposing counsel?

5 THE COURT: Absolutely. It's got to be
6 endorsed by opposing counsel so that he can note
7 his actions if -- to the extent he has any.

8 MR. BHIRUD: Okay.

9 THE COURT: And I'm not going to --
10 ordinarily we ask you to do it in court, but this
11 is a little bit more complicated than the ordinary
12 case, so I'm going to ask you to do that and get it
13 back to me this afternoon. Get it back to
14 Ms. Perez.

15 Mr. Sandefur, I believe you probably have
16 her email address: Karen.Perez.

17 MR. SANDEFUR: Yes, Your Honor.

18 THE COURT: Please get the order to her
19 after, though -- after counsel for the School Board
20 has had an opportunity to endorse it however he
21 deems appropriate.

22 MR. SANDEFUR: I will, Your Honor.

1 THE COURT: All right. Mr. Sandefur,
2 your local counsel is deferring to you if there are
3 any questions.

4 MR. SANDEFUR: I had one question, which
5 was part of our opposition, we also asked the Court
6 to dismiss the case entirely. I would ask if the
7 Court has a view on that. And if the Court would
8 prefer, we could file a separate motion to that
9 effect.

10 THE COURT: Well, I'm not dismissing the
11 case -- I'll act on that now. That motion to
12 dismiss the case in its entirety is denied. I
13 think the -- since there is a very, very, very
14 limited amount of redacted information that can be
15 restrained because it deals with personal privacy.
16 That's going to be the order, restraining just
17 that --

18 MR. SANDEFUR: I understand, Your Honor.

19 THE COURT: -- extremely limited
20 information.

21 MR. SANDEFUR: I understand, Your Honor.

22 THE COURT: All right. Mr. Sandefur, so

1 you're taking on the obligation to draft the order?

2 MR. SANDEFUR: I will do that, Your
3 Honor.

4 THE COURT: And then you'll have to have
5 local counsel endorse it, obviously, as well, and
6 then counsel for the School Board.

7 All right. Anything else from any other
8 parties then?

9 MR. SANDEFUR: Nothing from me, Your
10 Honor.

11 THE COURT: All right. Court is in
12 recess.

13 (At 10:20 a.m., the above hearing
14 concluded.)

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1 CERTIFICATE OF COURT REPORTER - NOTARY PUBLIC

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3 I, Diamante Parrish, the officer before
4 whom the foregoing deposition was taken, do hereby
5 certify that said proceedings were electronically
6 recorded by me; and that I am neither counsel for,
7 related to, nor employed by any of the parties to
8 this case and have no interest, financial or
9 otherwise, in its outcome.

10 IN WITNESS WHEREOF, I have hereunto set my
11 hand and affixed my notarial seal this 16th day of
12 November, 2021.

13

14



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16 _____
17 Diamante Parrish, Notary Public
18 for the Commonwealth of Virginia

18

19 Notary Commission No. 7936707

20 Notary Commission Expires: 5/31/2025

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CERTIFICATE OF TRANSCRIBER

I, Bobbi J. Fisher, do hereby certify that the foregoing transcript is a true and correct record of the recorded proceedings; that said proceedings were transcribed to the best of my ability from the audio recording and supporting information; and that I am neither counsel for, related to, nor employed by any of the parties to this case, and I have no interest, financial or otherwise, in its outcome.



Bobbi J. Fisher, RPR
NCRA Registered Professional Reporter (RPR)
November 17, 2021

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Conducted on November 16, 2021

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