COLORADO COURT OF APPEALS

DATE FILED: August 10, 2023
CASE NUMBER: 2022CA807

Court of Appeals No. 22CA0807
Eagle County District Court No. 15CV30145
Honorable Russell H. Granger, Judge

Vail Clinic Inc., d/b/a Vail Valley Medical Center,

Plaintiff-Appellee,

v.

Sports Rehab Consulting LLC and Lindsay Winninger,

Appellants.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE PAWAR
Freyre and Schock, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced August 10, 2023

Hershey Decker Drake, P.L.L.C., C. Todd Drake, Lone Tree, Colorado, for Plaintiff-Appellee

Jesse Wiens Law, Jesse Wiens, Edwards, Colorado, for Appellants

¶ 1 Colorado's civil rules allow "any person" to seek review of an order limiting access to court files (a sealing order). C.R.C.P. 121 § 1-5.4. The person seeking such review need not be a party to the case. Appellants in this case are just that: litigants seeking to vacate a sealing order in a case in which they were not involved.

¶ 2 The appellants are Sports Rehab Consulting LLC and Lindsay Winninger. They appeal the district court's denial of their motion to vacate the seal in a case involving Vail Valley Medical Center (VVMC) and Edgar Downs, a former VVMC patient. We conclude that the district court erred by declining to vacate the seal. We therefore reverse.

I. Background

¶ 3 In February 2014, an anesthesiologist who worked at VVMC died by suicide at home from a drug overdose. The drugs included intravenously injected drugs that she had access to at VVMC. Following her death, Downs, a former patient of hers, threatened to publish allegations against her and VVMC in the local newspaper related to the anesthesiologist's illegal use of narcotics and VVMC's alleged failure to properly address it.

¶ 4 After reviewing the notice Downs intended to publish, VVMC filed a civil action against him, seeking to enjoin him from publicizing the allegations. VVMC filed the complaint under seal and the district court accepted it as such. The court also issued a preliminary injunction against Downs until the matter could be addressed at a hearing. Significantly, for reasons we will explain later, Downs filed a C.A.R. 21 petition asking the supreme court to dissolve the preliminary injunction. The supreme court declined to accept it.

¶ 5 In April 2016, as pretrial litigation proceeded, the Denver Post requested to review the pleadings in the case. The district court responded to that request by sealing the entire case file sua sponte.

¶ 6 A few weeks after the court sealed the case, the Denver Post published an article about VVMC, the anesthesiologist's death, and the problem of health care providers illegally removing opioids and other narcotics from health care facilities.

¶ 7 In 2018, VVMC and Downs agreed to make the preliminary injunction permanent and dismiss the case. Years later, in 2022, appellants moved the district court to review the sealing order and

vacate the seal. The district court largely denied that motion, unsealing only parts of the record.

¶ 8 Appellants appeal. They argue that the district court erred by (1) imposing the seal sua sponte in 2016 and (2) declining to entirely vacate the seal in 2022. We conclude that the court erred by declining to entirely vacate the seal in 2022 and therefore need not address whether it was error to impose the seal in the first place.

II. The District Court Erred

¶ 9 We review a district court's order declining to alter a sealing order for an abuse of discretion. *See In re Marriage of Purcell*, 879 P.2d 468, 469 (Colo. App. 1994). Applying an incorrect legal standard is an abuse of discretion. *See Taylor v. HCA-HealthONE LLC*, 2018 COA 29, ¶ 30.

A. C.R.C.P. 121 § 1-5

¶ 10 C.R.C.P. 121 § 1-5.2 provides that "[a]n order limiting access [to court files] shall not be granted except upon a finding that the harm to the privacy of a person in interest outweighs the public interest." This legal standard also applies to orders declining to

vacate an existing seal. *See Anderson v. Home Ins. Co.*, 924 P.2d 1123, 1126 (Colo. App. 1996).

¶ 11 C.R.C.P. 121 § 1-5 "creates a presumption that all court records are to be open." *Id.* The presumption's purpose is to "ensure that the public will continue to enjoy its traditional right of access to judicial records, except in cases of clear necessity." *Id.* (quoting *Atlanta Journal v. Long*, 369 S.E.2d 755, 758 (1988)). Accordingly, when a court is asked to review an existing seal, the burden is on the party seeking to maintain the seal to demonstrate that the harm to the privacy of a person in interest outweighs the public interest in the accessibility of court files. *See id.*

¶ 12 We emphasize that based on the clear language of the rule, the only interest that can justify limiting access to court files is "the privacy of a person in interest." C.R.C.P. 121 § 1-5.2. Prospective injury to reputation will generally not suffice. *See Anderson*, 924 P.2d at 1127.

¶ 13 Thus, C.R.C.P. 121 § 1-5 creates a balancing test. On one side, there is the public's interest in the accessibility of court files generally. On the other side, there is the harm to the privacy of any person in interest.

B. The District Court Failed to Weigh the Proper Interests

¶ 14 We conclude that the district court abused its discretion because it failed to identify and weigh the proper interests on both sides of this balancing test. *See Taylor*, ¶ 30 ("A district court abuses its discretion if it applies an incorrect legal standard."). In denying appellant's motion, the district court reasoned that it had previously found Downs' allegations were not credible. The court then declined to entirely vacate the seal because "the public has a low interest in non-credible statements and [VVMC] has a high interest in protecting themselves from the damage caused by their dissemination."

¶ 15 But these were the incorrect interests to weigh. First, the relevant public interest here is not the public's interest in the substance of the specific court files protected by the seal. Instead, it is the public's interest in the accessibility of court files in general. *See Anderson*, 924 P.2d at 1126. This proper public interest has nothing to do with whether the specific files at issue contain credible or non-credible statements.

¶ 16 Second, we question whether the harm to VVMC that the district court considered was harm to a privacy interest. Because

the court found Downs' allegations not credible (effectively untrue), we question how their disclosure could have implicated VVMC's privacy interest. To be sure, publicizing the allegations could have caused VVMC reputational harm. But this harm seems independent of privacy concerns and is generally insufficient to justify sealing court files. *Id.* at 1127.

¶ 17 We recognize that the *Anderson* division noted that under the common law in other jurisdictions, some courts have found "a heightened expectation of privacy or confidentiality" in court records involving potentially defamatory material. *Id.* But that is common law in other jurisdictions. And the *Anderson* division's discussion of this heightened expectation of privacy *or confidentiality* in records involving potentially defamatory material was dicta — the division did not hold that such a heightened expectation was encompassed within C.R.C.P. 121 § 1-5's concept of privacy. *Id.*

¶ 18 We are therefore left with C.R.C.P. 121 § 1-5.2's clear language that the only interest that can justify sealing court files is a privacy interest. And we are aware of no holding in this jurisdiction that the privacy interest identified in C.R.C.P. 121 § 1-5.2 encompasses

an interest in limiting access to non-credible and potentially defamatory material.

¶ 19 In sum, because it weighed the incorrect interests, we conclude that the district court applied an incorrect legal standard and therefore abused its discretion. We now explain why this abuse of discretion requires reversal.

C. Applying the Correct Legal Standard Requires Vacating the Seal

¶ 20 To maintain the seal, VVMC had to show that harm to its privacy interest outweighed the public interest in access to court files. VVMC articulated only harm to its interest in avoiding reputational harm. Assuming that this interest is not a privacy interest under C.R.C.P. 121 § 1-5, VVMC failed to meet its burden and the district court should have therefore vacated the seal entirely.

¶ 21 But what if we are wrong and the interest in avoiding reputational harm from Downs' potentially defamatory statements is a privacy interest that could justify a seal under C.R.C.P. 121 § 1-5? We would nevertheless conclude that VVMC failed to overcome the presumption in favor of public access to court records.

¶ 22 VVMC argued in 2022, and now on appeal, that the seal is necessary to prevent Downs' allegations from becoming public. But for the most part, that ship has sailed. The substance of Downs' allegations appear in his C.A.R. 21 petition to the supreme court, which no party disputes is beyond the scope of the sealing order and therefore publicly available.[1] Any reputational harm that VVMC seeks to avoid by maintaining the seal has therefore already occurred.

¶ 23 Similarly, the Denver Post article also significantly blunted any reputational harm that VVMC could suffer by the seal being entirely vacated.[2] The article said that although VVMC's safety manager had told police that she doubted the drugs the anesthesiologist used in her death could have come from VVMC, "a hospital report to the state showed [the anesthesiologist] had removed fentanyl, a powerful narcotic, and another drug illegally." The article

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[1] Indeed, the petition appears in the unsealed portion of the district court file because the district court did not include it in the list of filings that would remain sealed when ruling on appellants' motion to vacate the seal.

[2] Paradoxically, this article, which was published in the Denver Post and is still publicly available on its website, is one of the filings that the district court ordered would remain under seal.

continued, "So how did [VVMC] inform the public about the death of a drug-addicted anesthesiologist in February 2014? It didn't. As in hundreds of other drug-theft cases, hospital patients never learn if someone who treated them was involved." The article also mentioned Downs. It said that "Downs . . . became so concerned that he requested a Colorado Board of Pharmacy investigation, its records show. He thinks [the anesthesiologist], while severely addicted, injured him during his [surgery] at [VVMC] in late 2013."

¶ 24 Because the bulk of Downs' allegations are already public, the severity of harm to VVMC's reputation from entirely vacating the seal is very low — so low that we cannot say that this potential harm overcomes the presumption in favor of public access to court files. We therefore conclude that even if avoiding reputational harm from potentially defamatory statements is an interest that can justify a seal under C.R.C.P. 121 § 1-5, VVMC failed to meet its burden to maintain the seal here.

¶ 25 We recognize that VVMC argues on appeal that the seal should remain in place because it will prevent the public disclosure of its private internal investigations, which are statutorily confidential. But this argument is nowhere to be found in VVMC's response to

appellants' motion to vacate the seal in the district court. And VVMC could have raised it there — the private internal investigations became part of the court file because VVMC attached them to its response to appellants' motion to vacate the seal. In that filing, VVMC could have argued that the entire court file should remain sealed because the court file now included the attached private internal investigations. But VVMC made no such argument. Because VVMC failed to present this argument to the district court, we will not address it on appeal. *See Glover v. Serratoga Falls LLC*, 2021 CO 77, ¶ 26 (issues not raised in or decided by a lower court will not be addressed for the first time on appeal).

¶ 26 Thus, the district court should have vacated the seal entirely in 2022. Based on this conclusion, the issue of whether the court erred by imposing the seal in the first place is moot and we do not address it. *See Nakauchi v. Cowart*, 2022 COA 77, ¶ 24 (an issue is moot when addressing it would have no practical legal effect on the existing controversy).

III. Disposition

¶ 27 The district court's order is reversed and the case is remanded with directions to vacate the seal entirely.

JUDGE FREYRE and JUDGE SCHOCK concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

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