COURT OF APPEALS
DECISION
DATED AND FILED

May 28, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP727 **Cir. Ct. No. 2007CF2381**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JENNIFER HANCOCK,

DEFENDANT,

MARK OLALDE AND MEDILL JUSTICE PROJECT,

INTERVENORS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: DAVID T. FLANAGAN III, Judge. *Reversed and cause remanded for further proceedings*.

Before Lundsten, Higginbotham and Sherman, JJ.

¶1 PER CURIAM. Mark Olalde and the Medill Justice Project appeal an order of the circuit court denying Olalde's request to access medical records that were admitted into evidence during the trial of Jennifer Hancock, who was convicted of first-degree reckless homicide relating to the death of four-month-old L.W. The circuit court determined that the medical records were confidential and that absent a current informed consent, the confidentiality of the records must be maintained. For the reasons discussed below, we reverse the order of the circuit court and remand for further proceedings.

BACKGROUND

¶2 Hancock, who provided care to L.W. in her home as part of an in-home childcare service she operated, was found guilty by a jury of first-degree reckless homicide in the death of L.W. L.W. had become unresponsive while in Hancock's care and was hospitalized for four days before a decision was made to remove him from life support. The medical records stated that L.W.'s cause of death was the withdrawal of life support following severe blunt force head trauma and brain injury. These records were not placed under seal by the court before, during, or after Hancock's trial.

¶3 Olalde is a student at Northwestern University and is affiliated with Northwestern's Medill Justice Project. Olalde contacted the Dane County Circuit Court clerk's office and sought to examine six exhibits that were admitted into evidence at Hancock's trial. The exhibits included: a Dean Healthcare Systems medical chart relating to L.W.; a St. Mary's Hospital medical chart relating to L.W.; an x-ray of L.W.'s skull; a University of Wisconsin Hospital skeletal survey of L.W.; diagrams and slides of L.W.'s skull; and a CAT scan and MRI scan of

L.W. The clerk's office declined to provide access and contacted the circuit court for guidance.

¶4 The circuit court, acting sua sponte, held a hearing regarding Olalde's request. At the hearing, an attorney representing the Medill Justice Project argued that even though the exhibits Olalde seeks to review are patient healthcare records, which are accorded confidentiality under WIS. STAT. § 146.82 (2013-14),[1] Olalde should be permitted to examine the records because they had been made public as part of Hancock's preliminary hearing and trial, and had not been placed under seal by the court. The circuit court, however, denied Olalde's request. The court concluded that § 146.82 "clearly and expressly prohibits [the] court from disclosing [the] patient healthcare records absent a current release from the people who hold the power of confidentiality." After the circuit court entered an order denying Olalde's request, Olalde and the Justice Project intervened in the case against Hancock and appealed the denial of Olalde's request.

DISCUSSION

¶5 The sole issue on appeal is whether Olalde has a right to review exhibits from Hancock's trial that are medical records of L.W., which are a part of the court record held by the clerk of the circuit court, but were not placed under seal. The resolution of this issue requires us to consider the interplay between

[1] WISCONSIN STAT. § 146.82(1) provides: "All patient health care records shall remain confidential. Patient health care records may be released only to the persons designated in this section or to other persons with the informed consent of the patient or of a person authorized by the patient."

All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

WIS. STAT. § 59.20(3), which provides that "[e]very … clerk of the circuit court … shall open to the examination of any person all books and papers required to be kept in his or her office," and WIS. STAT. § 146.82, which provides for the confidentiality of medical records. Statutory interpretation presents a question of law, which this court reviews de novo. ***Konneker v. Romano***, 2010 WI 65, ¶24, 326 Wis. 2d 268, 785 N.W.2d 432.

¶6 The open records laws in Wisconsin provide a requester with the procedure to inspect a public record and/or to make or receive a copy of a public record that appears in written form. ***Osborn v. Board of Regents of the Univ. of Milwaukee***, 2002 WI 83, ¶13, 254 Wis. 2d 266, 647 N.W.2d 158; *see, e.g.,* WIS. STAT. §§ 19.35 and 59.20(3). WISCONSIN STAT. § 19.35 codifies the common law rule that public records are open to public inspection, and § 59.20(3) is a more specific legislative declaration that records in the office of the clerk of the circuit court shall be open for public examination. *See* ***State ex rel. Bilder v. Township of Delavan***, 112 Wis. 2d 539, 553, 334 N.W.2d 252 (1983) (addressing public access to court records under WIS. STAT. § 59.14(1) (1979-80), a predecessor statute to § 59.20(3)). The focus in this case is on the mandate for public availability of court records under § 59.20(3). On appeal, Olalde and the Justice Project reference the public records law, § 19.35. However, Olalde "could be entitled to no greater access to records under the public records law than under § 59.20(3)(a)." ***State v. Stanley***, 2012 WI App 42, ¶31, 340 Wis. 2d 663, 814 N.W.2d 867; *see also* ***Bilder***, 112 Wis. 2d 539, 551-57 (explaining that open court records mandate is generally a stronger guarantee of public access than the public records law). We, therefore, focus our analysis on § 59.20(3).

¶7 The Wisconsin Supreme Court has stated that WIS. STAT. § 59.20(3) "grant[s] those persons who properly come under its umbrella 'an absolute right of

inspection'" of records held by the clerk of the circuit court. ***Bilder***, 112 Wis. 2d at 553-54 (quoted source omitted); s*ee also* ***Stanley***, 340 Wis. 2d 663, ¶29. The "absolute right" of examination is not, however, without limitation. Our supreme court has specified three situations in which public inspection of records held by the clerk of the circuit court may be denied: (1) "when there is a statute authorizing the sealing of otherwise public records"; (2) if disclosure of the record would infringe on a constitutional right; or (3) the administration of justice requires that limitation of public access to the judicial record. ***Bilder,*** 112 Wis. 2d at 554-56; *see also* ***Stanley***, 340 Wis. 2d 663, ¶29. The ***Bilder*** court went on to explain that the third exception protects courts' "'inherent power to take certain evidence in camera where the rights of parties, or witnesses, could not otherwise be protected.'" ***Bilder***, 112 Wis. 2d at 556 (quoted source omitted).

¶8 The party resisting the disclosure of public documents bears the burden of showing that the documents fall within an exception to the general rule of disclosure. *See* ***Newspapers, Inc. v. Breier***, 89 Wis. 2d 417, 427, 279 N.W.2d 179 (1979). Thus, the State, as the party resisting Olalde's examination of the exhibits from Hancock's trial, bears the burden of showing that the exhibits fall within at least one of the exceptions set forth above.

¶9 The State contends that the first ***Bilder*** exception applies to limit public examination of the exhibits because the documents are medical records of L.W. which have been categorized as confidential under WIS. STAT. § 146.82. The State argues that § 146.82's provision that medical records are "confidential" is sufficient to bring the records within the first exception because, according to the State, "[a] declaration that certain records are 'confidential' authorizes 'the sealing' of those records." The State acknowledges that § 146.82 does not explicitly authorize the sealing of medical records. However, the State argues that

presentence investigation (PSI) reports and juvenile records are routinely placed under seal even though the statutes governing those records do not specifically provide for the "sealing" of those records. We are not persuaded.

¶10 During the court proceedings leading to Hancock's conviction, the circuit court did not seal the medical records based on WIS. STAT. § 146.82 or on any other basis. The parents of L.W. waived confidentiality so that the records could be used to prosecute Hancock. The State's comparison with WIS. STAT. § 972.15, which governs PSI reports, and WIS. STAT. § 938.78, which addresses the "[c]onfidentiality of [juvenile] records," is inapt because records covered by these statutes come in under seal in the first instance. Typically, such reports and records are never part of the *public* court record.[2]

¶11 The State also contends that the third ***Bilder*** exception—the administration of justice—applies to limit Olalde's right to examine the exhibits. As noted, "[t]he circuit court under its inherent power to preserve and protect the exercise of its judicial function of presiding over the conduct of judicial proceedings has the power to limit public access to judicial records when the administration of justice requires it." ***Bilder,*** 112 Wis. 2d at 556. The party

[2] We point out that the clerk of the circuit court's Model Recordkeeping Procedures (through March 2013) provides guidance to clerks regarding the confidentiality of court records. The procedures provide that "[c]ourt records are public records except in two situations: 1. There is a statute or rule that designates the record as confidential, or 2. The court orders a particular record confidential." With regard to medical records, the procedures provide:

> There are certain types of records that are often misperceived as being confidential. The clerk should maintain the following records as public unless otherwise ordered by the court.… Health care records are generally not confidential once filed with the court. Unless there is a specific statutory exception, the parties must move to seal medical records.

seeking to persuade the circuit court to exercise its inherent authority "bears the burden of demonstrating, with particularity, that the administration of justice requires that the court records be closed." ***Id.*** at 556-57. As should be apparent now, the problem with this argument is that it does not address something that actually happened below. The circuit court did not exercise any authority that it might have had to limit public access to the medical records by sealing them. Perhaps the circuit court could have justified sealing the records under this authority, but it did not do so.

¶12 The State argues that the administration of justice requires that the exhibits not be made available for public review because WIS. STAT. § 146.82 "requires that these records remain confidential," despite the legislative policy "favoring open records." As we have discussed above, the State is correct that § 146.82 provides that medical records are confidential and that disclosure of medical records requires consent absent the enumerated exceptions. But, plainly, this statute is directed at medical providers and others authorized to maintain confidential medical records. While § 146.82 might well play a role in preventing medical records from becoming a non-sealed part of a public court record, nothing in that statute addresses limitations on access to public court records held by a clerk of courts.

¶13 The circuit court opined that L.W.'s medical records are protected by WIS. STAT. § 146.82. That is undoubtedly true with respect to medical records held by entities covered by that statute. The intervenors here could not obtain medical records from such entities, at least not without complying with that statutory scheme. But a public court record is a different matter.

¶14 The State also argues that the administration of justice requires that the exhibits not be made available for public examination because there is a public interest in protecting the privacy of a crime victim. We recognize that we have placed importance on protecting the privacy of crime victims. However, the State has not presented a developed argument demonstrating that these interests are *self-executing*. That is, although there are reasons that justify sealing particular medical records, we are presented with no reason to think that *all* medical records covered by WIS. STAT. § 146.82 are automatically sealed when they are admitted into evidence at a public trial or otherwise made a part of a public court record.

¶15 We stress that we do not decide that the medical records in this case could not have been sealed during the prosecution of Hancock. We also do not decide whether, at a later date, there might be justification for sealing this part of the circuit court record. Rather, we conclude that the medical records in dispute are not sealed, and neither the circuit court nor the State presents a reason why the clerk of courts need not comply with WIS. STAT. § 59.20(3) and provide the requested access.

CONCLUSION

¶16 For the reasons discussed above, we reverse and remand for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded for further proceedings.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.