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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

HECTOR ROBLES, as Chief of the Nogales Fire Department; CITY OF NOGALES, a body corporate and politic, Petitioners/Appellants/ Cross-Appellees, v. RIO RICO FIRE DISTRICT, an Arizona body politic, Respondent/Appellee/ Cross-Appellant.	2 CA-CV 2012-0070 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause No. CV10932

Honorable Carmine Cornelio, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 Appellants Hector Robles and the City of Nogales ("Robles") appeal from the trial court's order requiring appellee Rio Rico Fire District ("RRFD") to redact its patient transport records a second time and allowing it to charge Robles $1,110.75. Robles contends the court erred by requiring it to pay redaction costs and an administrative fee, by conditioning access to the records on payment of a fee, and by denying Robles's request for attorney fees. RRFD cross-appeals, again arguing the court erred in determining the records were public records rather than medical records and by reducing the fee required of Robles to less than its actual cost. It further argues that because Robles did not timely comply with the court's order, he is not entitled to relief. For the following reasons, we affirm.

Factual and Procedural Background

¶2 The underlying factual background is undisputed. RRFD provides non-emergency ambulance transportation to patients from medical facilities within Nogales city limits to medical facilities outside the city. Robles and RRFD were previously involved in an administrative proceeding on a related issue.

¶3 In 2010, Robles requested under the public records statutes copies of documents containing response times for each transport from facilities in Nogales to Tucson. After RRFD refused the request, Robles filed a statutory special action under A.R.S. § 39-121.02, challenging the denial of its request. In 2011, the trial court ordered

RRFD to make redacted interfacility transport records available and ordered Robles to pay costs of production, but denied both parties' requests for attorney fees.

¶4 On appeal from that order, Robles argued the court erred by ordering him to pay for the costs of redaction, but because the trial court had not yet ruled on this issue we declined to consider it. RRFD cross-appealed and argued the trial court erred by concluding the transport records were public records rather than medical records. We concluded, however, that RRFD was bound by its judicial admission that the court had the authority to order it to produce the redacted records whether they were public or medical records, and that any error in determining the records were public was harmless. We similarly concluded RRFD had conceded below that both A.R.S. §§ 12-2295 and 39-121.01 required the same result with respect to the fees it could charge for redacting and copying, and it had therefore forfeited the opportunity to argue otherwise on appeal. We remanded for further proceedings.

¶5 On remand, Robles argued he should first be allowed to inspect the records for free and then pay only for copies of records he wished to obtain, that the only allowable costs were for actually making copies of the records, and that RRFD had redacted too much information and must therefore produce records compliant with the original order. RRFD countered that it had produced compliant records at significant cost but it could not be made to turn them over until Robles paid for them, that an administrative fee charge on top of the cost of copying was necessary and appropriate,

and that federal law prevented it from disclosing the information it had redacted. Both parties again requested attorney fees.

¶6 After an evidentiary hearing on April 2, 2012, the trial court ruled that Robles must pay RRFD before accessing the records, that because of the "unique" nature of the case RRFD was entitled to recover some of the labor costs involved in disclosing the records, and additionally that a copying charge of $0.25 per copy was reasonable. The court ordered Robles to pay a total of $1,110.75 to RRFD to cover redaction costs by April 25, 2012 or lose the benefit of the disclosure order. It required RRFD to disclose records redacted according to the plain language of its original order, without redacting any information above the "patient name" line. The court declined to address attorney fees, instead certifying the judgment as final pursuant to Rule 54(b), Ariz. R. Civ. P. Although it appears the order was drafted several days earlier, it was not filed until April 16, 2012 in Pima County and April 19, 2012 in Santa Cruz County.[1] On May 4, 2012, counsel for Robles filed notice he had not received the judgment until that day. Before the court took further action, Robles appealed from the judgment and RRFD cross-appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(4).

Robles's Access to Records

¶7 Robles argues the trial court erred by ordering him to pay the cost of redaction, in violation of A.R.S. §§ 39-121 and 39-121.01. The public's right of

[1]The case was originally filed in Santa Cruz County, but because all the superior court judges in that county recused themselves a judge from Pima County was assigned to the case.

inspection pursuant to § 39-121 is a matter of law we review de novo. *Phx. Newspapers, Inc. v. Keegan*, 201 Ariz. 344, ¶ 11, 35 P.3d 105, 108-09 (App. 2001).

¶8 In its February 2011 ruling, the trial court stated that Robles had argued the records were public records under § 39-121 and RRFD had argued the records were medical records under A.R.S. § 12-2291, subject to subpoena and court order. It then stated: "In the event that the sought records are not public records, to save time and expense and in the interests of judicial economy, the parties stipulated in open court that this Court may issue an order providing for the redaction and availability of the records." The parties therefore removed the issue of which statute controlled the trial court's discretion in determining the "availability of the records" from this litigation. *See Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 189 Ariz. 433, 439, 943 P.2d 793, 799 (App. 1997) (judicial admissions bind party).

¶9 Section 12-2295(A) allows a custodian to charge a "reasonable fee" and "may require the payment of any fees in advance." Robles has not argued that the trial court lacked the authority to order him to pay the redaction costs in advance as a "reasonable fee" under § 12-2295. Therefore, he has failed to challenge one basis for the trial court's ruling and we could affirm the conditional access for that reason alone. *See Leflet v. Redwood Fire & Cas. Ins. Co.*, 226 Ariz. 297, ¶ 12, 247 P.3d 180, 183 (App. 2011) (appellate court affirms on any basis supported by record).

¶10 Moreover, "the availability of records for public inspection [pursuant to § 39-121] is not without qualification," and "an unlimited right of inspection might lead

to substantial and irreparable private or public harm." *Carlson v. Pima Cnty.*, 141 Ariz. 487, 490, 491, 687 P.2d 1242, 1245, 1246 (1984). Therefore courts can in certain circumstances "perform a balancing test to determine whether privacy, confidentiality, or the best interests of the state outweigh the policy in favor of disclosure." *Griffis v. Pinal Cnty.*, 215 Ariz. 1, ¶ 13, 156 P.3d 418, 422 (2007). An important consideration in that analysis is whether the burden of redacting information outweighs the public interest in access. *Judicial Watch, Inc. v. City of Phx.*, 228 Ariz. 393, ¶ 17, 267 P.3d 1185, 1189 (App. 2011).

¶11 In the absence of some ability to shift costs and condition access, a trial court might always be required to find, in a case such as this one involving extensive records requiring redaction, that the costs and burden of production preclude disclosure, in contravention of the policy of open access to records. But we do not read *Griffis* to so narrowly confine the ability of the court to balance the right of access against the burden on the government. Rather, in weighing the harm that might result to the government from producing extensive redacted records, at least in this case, the court should have discretion to conclude that any harm to the government may be offset by a reasonable advance payment from the party requesting the records. In this way, the court may give full meaning to the right of access to public records, but also craft reasonable solutions in situations that might otherwise require the presumption in favor of disclosure to "yield to the burden imposed on . . . the government." *London v. Broderick*, 206 Ariz. 490, ¶ 9, 80 P.3d 769, 772 (2003); *see also Cong. Elementary Sch. Dist. No. 17 v. Warren*, 227 Ariz.

16, ¶ 11, 251 P.3d 395, 397 (App. 2011) ("The 'core purpose of our public records law' is to give the public 'access to official records and other government information so that [it] may monitor the performance of government officials and their employees.'"), *quoting Phx. New Times, L.L.C. v. Arpaio*, 217 Ariz. 533, ¶ 27, 177 P.3d 275, 283 (App. 2008). Based on the stipulation of the parties, the statutes, and the open records policy, we cannot conclude the trial court erred by requiring Robles to pay a redaction fee.

¶12 Robles also argues that *Hanania v. City of Tucson*, 128 Ariz. 135, 136, 624 P.2d 332, 333 (App. 1980), when read in conjunction with § 39-121.01(D)(1) and (3), demonstrates that the only charges permissible under the statute are costs for copying. In that case we held that a prior version of § 39-121.01 did not authorize the custodian of a public record to charge an additional fee for the time its employees spent searching for a record. *Hanania*, 128 Ariz. at 136, 624 P.2d at 333.

¶13 However, here the parties stipulated that the trial court could order disclosure under § 12-2295, as well as § 39-121.01. Furthermore, *Hanania* did not deal with a situation in which the court was required to balance the right of access against the burden on the government. *See* 128 Ariz. at 136, 624 P.2d at 333. Instead, the court only considered what standard fees were permissible in the ordinary course of producing records under the statute. *Id.* Similarly, § 39-121.01(D) addresses ordinary requests for records and does not contemplate fees for records under the judicially created exception to the standard right of access to public records under § 39-121. Accordingly, neither *Hanania* nor § 39-121.01 control our decision here.

¶14 Robles further contends the trial court erred by refusing to allow him to view the redacted records without first paying the ordered fee. But § 12-2295 allows the record custodian to require a reasonable charge be paid in advance and, as discussed above, the policy of open access to records favors requiring an advance charge in this situation. Moreover, allowing Robles to access the records without paying the redaction fee would undermine the court's authority to fashion a ruling that properly balances the competing interests. Here the court concluded that RRFD could not produce the records Robles wished to view without first incurring the costs of copying and redacting them. And the court gave Robles the opportunity to withdraw his request for the records prior to incurring the expense. The court's ruling, in the context of a records request that requires a costly and time-consuming redaction process, was consistent with the common law principles and statutory framework. We therefore reject Robles's argument.

Reasonableness of Fees to Be Paid to RRFD

¶15 In its cross-appeal, RRFD argues the trial court erred by not determining that it is entitled, at a minimum, to its actual costs of production pursuant to § 12-2295 rather than § 39-121.01, because the records are medical rather than public records. We review an award of fees for an abuse of discretion. *Cf. Motzer v. Escalante*, 228 Ariz. 295, ¶ 4, 265 P.3d 1094, 1095 (App. 2011).

¶16 Because this argument hinges on the conclusion that the records at issue are medical rather than public records, we reject it. RRFD's concession below that the trial court had authority to order disclosure under either statute—a concession that did not

limit the court to the allowed charges of a specific statute—removed the issue of whether the records were public records under § 39-121 or medical records under § 12-2291 from this litigation and RRFD may not inject this issue into the appeal.[2] *See Clark Equip. Co. v. Ariz. Prop. & Cas. Ins. Guar. Fund*, 189 Ariz. 433, 439, 943 P.2d 793, 799 (App. 1997) (judicial admissions bind party).

¶17 RRFD further argues that under § 12-2295 it is entitled to a "reasonable fee" for the production of the records and the trial court erred in awarding it an amount below its actual costs. But as noted above, § 12-2295 does not necessarily apply.

¶18 Additionally, RRFD has failed to show the fee here was unreasonable. RRFD has not provided a transcript of the April evidentiary hearing. When no transcripts are provided, we assume the record supports the trial court's conclusions. *See Baker v. Baker*, 183 Ariz. 70, 73, 900 P.2d 764, 767 (App. 1995).

¶19 Moreover, the trial court's detailed minute entry supports its conclusions. It noted RRFD identified some 1,443 records as relevant to Robles's request. These records contained medical information that could identify patients, and therefore the trial court required RRFD to produce only the first page of the record and to redact "all information below and including the line for patient name." Although the court found RRFD had to expend significant effort to redact this information, it concluded RRFD had redacted more than required or allowed under its original order, resulting in unnecessary expense, a finding RRFD does not challenge here independently of its precluded claim

[2]RRFD has attempted to open this issue again in a number of ways in its brief, but for the same reasons articulated above we do not address these arguments.

that the records are not public. The court then settled on a fee of $1,110.75 based on RRFD's testimony about the time and cost of redaction, the timing of the production effort, the labor involved, the method of redaction, and the cost of copying the records. Under these circumstances we cannot say the court abused its discretion.

¶20 RRFD further contends the trial court erred by reducing the overtime expenses it incurred in complying with the original request because it "had only one week to undertake the massive document search, copying, redacting, and re-copying process." But the court previously had noted RRFD's redaction effort was not compliant with the court's original order which should have made "it relatively simple for [RRFD] to redact the documents." It therefore had a basis to conclude overtime charges were inappropriate even with a production schedule of one week. And again, we lack the transcript of this hearing which we presume supports the court's conclusions. *See Baker*, 183 Ariz. at 73, 900 P.2d at 767. Accordingly, the trial court did not abuse its discretion in reducing RRFD's requested fee.

Compliance with Trial Court's Order

¶21 RRFD contends that because the trial court's order set a deadline of April 25, 2012 for the payment of the fee and Robles did not pay by this deadline, it was not required to produce any documents. Robles argues, however, that he did not receive notice of the judgment until May 4, 2012, and therefore could not have timely paid the fee even under protest. This issue has not been presented to the trial court in the first instance, and we will therefore not consider it. *See Burns v. Davis*, 196 Ariz. 155, ¶¶ 40-

41, 993 P.2d 1119, 1129 (App. 1999) (appellate court does not address issues trial court has not ruled on absent a record "so fully developed that the facts and inferences are perfectly clear").

Attorney Fees

¶22 Robles requests attorney fees based on his position at trial. However, the trial court declined to rule on this issue and instead certified the judgment using Rule 54(b), Ariz. R. Civ. P., language. Accordingly, we do not have jurisdiction to consider this argument. *See Maria v. Najera*, 222 Ariz. 306, ¶¶ 5-6, 214 P.3d 394, 395 (App. 2009). He further requests attorney fees on appeal, but Robles was not successful in this appeal. In our discretion, we deny his request for an award of any fees on appeal. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 28, 99 P.3d 1030, 1037 (App. 2004).

¶23 RRFD requests attorney fees under A.R.S. § 12-341.01(C), which provides attorney fees if a claim "constituted harassment, was groundless and not made in good faith," *Berry v. Ariz. State Land Dep't*, 133 Ariz. 325, 328, 651 P.2d 853, 856 (1982), and under A.R.S. § 12-349(A), which provides for attorney fees if a claim is "without substantial justification," "solely or primarily for delay or harassment," or if a party "[u]nreasonably expands or delays the proceeding" or "[e]ngages in abuse of discovery." It bases this request on its claim that Robles improperly filed the initial petition seeking compelled disclosure of the records "as a private discovery tool." This appears to be a renewed request for attorney fees on the same basis for which we already denied it fees in the first appeal. We conclude sanctions are not warranted and deny the request.

Conclusion

¶24 For the foregoing reasons, we affirm the judgment of the trial court.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ Michael Miller
MICHAEL MILLER, Judge