IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ADIL LAHRICHI, REGINE CSIPKE, T.L., M.l, Y.L., A.L., Y.L., AZIZA BENAZZOUZ,	)	No. 66073-0-I
	)	DIVISION ONE
Appellants,	)	
	)	UNPUBLISHED OPINION
v.	)	
KATRIN E. FRANK and MACDONALD HOAGUE & BAYLESS,	)	
Respondents.	)	FILED: October 8, 2012

Grosse, J. — The statute of limitations for legal malpractice is three years and begins to run when the plaintiff knew or should have known all the essential elements of his cause of action. Here, the underlying lawsuit which gave rise to Adil Lahrichi's claims of legal malpractice was dismissed on summary judgment more than three years before Lahrichi commenced this suit. Lahrichi knew at that time, if not earlier, the facts that gave rise to his cause of action. The trial court properly dismissed the action as time barred.

Lahrichi also contends the trial court erred in denying his motion to seal or redact selected documents and pleadings, and for a preliminary injunction. Because all of the documents Lahrichi sought to seal were already public, we affirm the trial court's ruling.

FACTS

Adil Lahrichi was employed by Lumera Corporation as vice president of technology development. Lumera terminated Lahrichi's employment in 2002. In 2004, Katrin Frank, representing Lahrichi, filed suit in King County Superior

Court for unlawful discrimination based on racial and religious discrimination. The defendants, represented by Stoel Rives, removed the case to the United States District Court for the Western District of Washington.

There was a discovery battle between Lahrichi and the employer, Lumera. Lumera sought medical records claiming they were relevant to Lahrichi's claim for emotional distress damages, including damages for conduct that exacerbated a condition of Lahrichi's that caused involuntary facial movements. Lumera also sought medical records of Lahrichi's son relating to his leukemia diagnosis in 2002. The son's diagnosis occurred at a critical point in the course of the employment events at issue and was included in the complaint filed in court. Frank's declaration indicated that Lahrichi had seen and approved the draft of the complaint with that language before the initial filing in 2004.

The federal district court compelled discovery, including medical records of Lahrichi. The medical records were filed under seal and protective orders. Various pleadings, however, including the complaint, two discovery orders, and materials filed in support and in opposition to summary judgment, included general references to the information contained in those orders. Frank withdrew as attorney of record on February 10, 2006. The federal district court ultimately dismissed Lahrichi's suit on summary judgment in March 2, 2006. The Ninth Circuit Court of Appeals affirmed the dismissal in 2011 and the United States Supreme Court denied certiorari.[1]

[1] Lahrichi v. Lumera Corp., 433 Fed. App'x 519 (9th Cir. (Wash.) May 11, 2011), cert. denied, __ U.S. __, 132 S. Ct. 2780, 183 L. Ed. 2d 640 (U.S. Jun. 18, 2012).

On April 27, 2009, Lahrichi brought this action against his former attorney, Frank, and MacDonald Hoague & Bayless. An amended complaint was filed on July 20, 2009, setting forth 133 numbered paragraphs of factual allegations. On December 30, 2009, Frank responded and counterclaimed to recover $58,704.49 in litigation costs incurred under the written attorney fee agreement for the underlying employment discrimination suit. The trial court dismissed the action on summary judgment and Frank voluntarily withdrew her counterclaim.

Lahrichi appeals.

ANALYSIS

Standard of Review

When reviewing a summary judgment order, we undertake the same inquiry as the trial court.[2] Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). "A material fact is one upon which the outcome of the litigation depends."[3] The nonmoving party cannot rely on speculation but must assert specific facts in order to defeat summary judgment.[4] All facts and inferences are considered in the light most favorable to the nonmoving party.[5]

Legal Malpractice.

The gravamen of Lahrichi's complaint is that Lumera's attorneys improperly used confidential information regarding Lahrichi in the course of the

[2] Thompson v. Peninsual Sch. Dist., 77 Wn. App. 500, 504, 892 P.2d 760 (1995).
[3] Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980).
[4] Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986).
[5] Ashcraft v. Wallingford, 17 Wn. App. 853, 854, 565 P.2d 1224 (1977).

lawsuit, and that Frank took no action against them. Lahrichi also asserts that Frank responded to Lumera's filings by "re-quot[ing] protected confidential information from Defendants' said pleadings." The trial court concluded that Lahrichi's claims were barred by the pertinent statute of limitations. The statute of limitations for legal malpractice is three years.[6] Generally, the statute of limitations accrues when the plaintiff has a right to seek relief in the courts.[7] The discovery rule applies in legal malpractice actions. Under this rule, the limitations period does not begin to run until the client discovers, or in the exercise of reasonable diligence should have discovered, the facts that gave rise to his or her cause of action. "The rule does not specifically require knowledge of the existence of a legal cause of action."[8] "Instead, the statute of limitations begins to run when 'the plaintiff knew or should have known all of the essential elements of the cause of action.'"[9]

Lahrichi and Frank's attorney-client relationship ended on February 10, 2006, when the court permitted Frank to withdraw as counsel. While representing Lahrichi, Frank provided him with copies of all pleadings filed in the underlying action contemporaneously with their filing.

The lawsuit ended when the court granted summary judgment on March 2, 2006. At that time, if not before, Lahrichi knew or should have known of all

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[6] Huff v. Roach, 125 Wn. App. 724, 729, 106 P.3d 268 (2005) (citing RCW 4.16.080(3)).
[7] Janicki Logging & Constr. Co., Inc. v. Schwabe, Williamson & Wayatt, P.C., 109 Wn. App. 655, 659, 37 P.3d 309 (2001).
[8] Huff, 126 Wn. App. at 729.
[9] Huff, 126 Wn. App. at 729 (internal quotation marks omitted) (quoting Matson v. Weidenkopf, 101 Wn. App. 472, 482, 3 P.3d 805 (2000)).

the actions about which he now complains, i.e., Frank's alleged failure to protect him from the following wrongdoings by his former employer's attorneys:

- referring to evidence protected by a mediation confidentiality agreement or protective orders in depositions, and including such evidence in pleadings
- introducing defamatory evidence
- abusive conduct during depositions
- tampering with or concealing evidence
- rehearsing questions with witnesses before depositions

All of these actions were known or should have been known to Lahrichi before Frank withdrew and certainly by the time the case was dismissed. These are not new complaints. Any tort claims are time-barred by the three-year statute of limitations.

Lahrichi argues that he is also bringing claims under various other theories besides legal malpractice. Merely labeling actions differently on a claim does not change the nature of the claim.[10] "A party's characterization of the theory of recovery is not binding on the court. It is the nature of the claim that controls."[11]

Even if we were to assess any breach of contract claims, such claims are subject to either three- or six-year limitation periods. Contracts not in writing are subject to a three-year period. RCW 4.16.080(3). Written contracts are subject to a six-year period. RCW 4.16.040(1). Lahrichi does not submit any written contracts to lengthen the statute of limitations from three to six years. Thus, any contractual issues would also be time-barred.

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[10] See G.W. Constr. Corp. v. Professional Serv. Indus., Inc., 70 Wn. App. 360, 853 P.2d 484 (1993).

[11] Pepper v. J.J. Welcome Constr. Co., 73 Wn. App. 523, 546, 871 P.2d 601 (1994).

Procedural Issues

Additionally, Lahrichi argues that the trial court erred in denying his motion to seal or redact selected documents and pleadings, and for a preliminary injunction. The court denied the motion, finding no compelling privacy or safety reason to withhold the already public information.

We review a trial court's decision to redact or seal a court record for abuse of discretion.[12] "A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons."[13] Absent some overriding interest, trial proceedings and records attached to dispositive motions filed in civil cases are presumptively open. In Dreiling v. Jain,[14] our Supreme Court reiterated the constitutional significance of article I, section 10's constitutional guarantee of open administration of justice:

> The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history.

General Rule (GR) 15 governs the general procedure to be used in sealing court records. It is Lahrichi's burden to "identif[y] compelling privacy or safety concerns that outweigh the public interest in access to the court record."[15] In Rufer v. Abbott Labratories,[16] the court held that trial courts must apply the five-

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[12] Indigo Real Estate Servs. v. Rousey, 151 Wn. App. 941, 946, 215 P.3d 977 (2009).
[13] Hundtofte v. Encarnacion, __ Wn. App. __, 280 P.3d 513, 518 (2012) (citing State v. McEnry, 124 Wn. App. 918, 924, 103 P.3d 857 (2004)).
[14] 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004).
[15] GR 15(c)(2) (emphasis omitted).
[16] 154 Wn.2d 530, 549, 114 P.3d 1182 (2005).

step analysis set forth in Seattle Times Co. v. Ishikawa[17] to requests for sealing documents. When determining whether to seal a file, the trial court should (1) consider whether the proponent of sealing made a showing of the need for closure; (2) give anyone present the opportunity to object; (3) analyze whether the method from curtailing access is both effective and the least restrictive method; (4) weigh the competing interest of the parties and the public and consider alternative methods; and (5) make a decision that is no broader in application or duration than is necessary to serve its purpose.[18]

The first Ishikawa factor requires that the proponent of sealing must demonstrate a compelling interest in sealing, and if the need for sealing is not based on a right to a fair trial, then the proponent must show a serious and imminent threat to the right.[19] "This requires a showing that is more specific, concrete, certain, and definite than a 'compelling' concern."[20] This Lahrichi has failed to do.

Lahrichi sought to seal certain documents that refer generally to the medical/physical condition which formed the basis of the underlying employment discrimination suits. These documents included the following:

- Redaction of Frank's summary judgment motion in this action by removing supporting documentation and any reference to Lahrichi's medical condition.
- The November 2005 United States District Court order compelling Lahrichi to produce his pertinent medical records.
- The January 2006 United States District Court order compelling Lahrichi to comply with the 2005 order and specifically requiring all medical records from 1989.

[17] 97 Wn.2d 30, 37-39, 640 2d 716 (1982).
[18] Ishikawa, 97 Wn.2d at 37-39.
[19] State v. Waldorn, 148 Wn. App. 952, 958, 202 P.3d 325 (2009).
[20] Waldorn, 148 Wn. App. at 962-63.

- The United States District Court's March 2, 2006, summary judgment order.
- The complaint filed in the federal action.
- The motions for discovery sanctions and the supporting declaration filed by the employer in the federal action, which were attached as exhibits to Frank's summary judgment motion.
- E-mail from Frank's attorney responding to Lahrichi's requested redactions.

None of the documents identified by Lahrichi in either the federal proceeding or the King County legal malpractice action contain the actual medical records that were subject to the protection orders in federal court. All of the identified documents filed in the federal action are and have been available for an extended period of time in the federal court records. When Lahrichi first filed in the Ninth Circuit Court of Appeals, the court permitted him to file the pleadings under seal until a determination was made. It did not seal the documents that were already public in the federal district court. The limited bits of sealing ordered by the Ninth Circuit pending that appeal are of little significance, especially since the Ninth Circuit rejected Lahrichi's arguments.

On November 1, 2005, the federal district court ordered Lahrichi to produce the medical records from 1989 forward that linked his posttraumatic stress disorder and other psychological conditions to the involuntary facial movement disorder. Lahrichi failed to comply with the order and the court found that he had thereby forfeited the protection of any psychological records. Accordingly, on January 4, 2006, the court imposed sanctions on Lahrichi and ordered him to produce all psychological and medical records dating back to January 1, 1989. Between the issuance of that order and the time Frank

withdrew, no pleadings were filed that attached any of those records as exhibits.

In an unpublished memorandum decision, the Ninth Circuit held that the district court did not abuse its discretion by ordering production of Lahrichi's medical records. Nor did it abuse its discretion by finding the records were not protected by psychotherapist-patient privilege, because a plaintiff who places his emotional condition at issue during a trial waives any privilege protecting these psychological records.[21]

Lahrichi does not establish a compelling need for sealing. Though he contends the ease with which people are now able to access court records increases the harm to him, he does not demonstrate a specific and imminent threat to his privacy. The information is already public, the information he seeks to protect are not medical records, but merely the condition relating to the underlying employment discrimination suit.

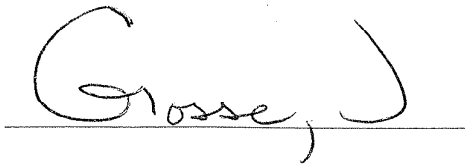
Lahrichi's contention that the federal court recognized the need for privacy in its "heightened" protective provisions of the discovery orders is without merit. First, the provisions of the two discovery orders only apply to the pre-2000 medical records that were to be produced pursuant to the two orders. Second, the order specifically noted that Lahrichi placed his emotional state at issue when he sought compensation for the psychological effects of his discharge. The orders only provided that the medical records themselves be confidential, not any of the pleadings already filed. In any event, at the time that Frank withdrew from representing Lahrichi, no medical records had been filed

[21] Lahrichi, 433 Fed. App'x 519 (9th Cir. (Wash.) May 11, 2011).

under that discovery order.

Lastly, Lahrichi's failure to comply with the local civil rules (LCR) was fatal to his request for an injunction. He failed to comply with the requirements of LCR 7(b)(3)(B)[22] and 7(b)(4)(A), (B),[23] regarding a hearing for injunctions. Here, Lahrichi noted the motion for August 3, 2010 without oral argument and did not serve and file all motions. Lahrichi also provided the trial court and Frank with late declarations. Nevertheless, despite these procedural deficiencies, the court reviewed the materials submitted in support and opposition to the plaintiff's motion to seal and denied the same. The court further found that Lahrichi failed to provide a form of injunction describing "in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained" as required under CR 65(d). The court did not abuse its discretion.

The trial court is affirmed.



WE CONCUR:

[22] LCR 7(b)(3) provides that "[a]ll nondispositive motions and motions for orders of default and default judgment shall be ruled on without oral argument, except for the following: . . . (B) Motions for temporary restraining orders and preliminary injunctions." (Emphasis added.)

[23] LCR 7(b)(4)(A) requires that "[t]he moving party shall serve and file all motion documents no later than six court days before the date the party wishes the motion to be considered."

Leach, C.J. Schindler, J.