Blanket Sealing Order Violates First Amendment and NC Open Court Rules

By Jonathan E. Buchan

On December 18, 2018, the North Carolina Court of Appeals, in *John Doe, by and through his Guardian ad Litem et al. v. John Doe et al.*, directed a state trial court to unseal most of a civil court file that had been sealed in its entirety since its commencement in late 2016. The Court of Appeals, after reviewing the sealed file *in camera*, held that the trial court's blanket sealing orders – in a case involving allegations of sexual abuse committed against one or more minors by one of the defendants – violated the First Amendment and the open courts provision of the North Carolina Constitution.

Although the case involved the clear "compelling public interest" in protecting the identities of the minor plaintiffs – an issue uncontested by *The Fayetteville Observer* newspaper which had sought the unsealing of the file – the Court of Appeals held that the sealing of the entire file was not a "narrowly tailored" remedy.

The Court of Appeals' 51-page unanimous opinion provides a detailed analysis of the constitutional standards to be applied in considering the sealing of a civil case file and firmly rejects the trial court's blanket sealing order approach. The opinion should provide strong direction to North Carolina trial courts considering the sealing of court records and closure of related proceedings

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The South Carolina Gag Order

In September 2016, Michael Lallier, a prominent Fayetteville, North Carolina businessman, was charged in South Carolina with felony sexual misconduct for allegedly molesting a 15-year-old Fayetteville boy during a NASCAR race weekend. A South Carolina trial judge promptly entered a sweeping gag order prohibiting anyone connected with the case – including "the Victim, Parents of the Victim, family members of the Victim… and Counsel for Victim and/or Victim's family," as well as the prosecutor and the defendant's counsel – from making any public extrajudicial comments or releasing any documents related to the case. The order even made it difficult for the newspaper to obtain information from court officials about the status of the case. The order was so broad that counsel for the alleged victim and his family was uncertain if they could bring an action in the North Carolina state courts without permission from the South Carolina court.

In early 2017, *The Fayetteville Observer* challenged the South Carolina gag order. After a hearing on the challenge, the South Carolina trial court, on June 5, 2017 reversed itself and dissolved the gag order, noting the "heavy presumption against the constitutional validity of prior restraints or 'gag orders.'" The newspaper also obtained an order from the trial court that effectively rejected the defendant's attempts to keep sealed from public view the search warrant

documents related to the September 2016 arrest which provided details about the alleged molestation.

The Sealed North Carolina Civil Case

In the meantime, *The Fayetteville Observer* learned of a civil case filed in Cumberland County, North Carolina state court - captioned *John Doe, by and through his Guardian ad Litem et al. v. John Doe et al.* That case file bore only a docket number and the notation: "CASE NOT AVAILABLE FOR THE PUBLIC UNTIL FURTHER NOTICE FROM [THE CLERK OF COURT]." Upon inquiry from the newspaper, the county's Senior Resident Superior Court judge explained that because the sealed file involved Mr. Lallier, he had asked the state's Administrative Office of the Courts to assign a special judge from outside the county to handle the matter to avoid any potential conflict of interest by local judges. *The Fayetteville Observer* subsequently reported that Mr. Lallier, the part-owner of a Fayetteville Chevrolet dealership, was a significant contributor to local, state and federal political campaigns, having contributed approximately $90,000 to such candidates in the 2012 through 2016 time period.

Nothing in the public record regarding the case indicated the names of the parties to the sealed action, the names of their attorneys, or the name of the presiding judge. There were no public motions or orders relating to the sealing the file. The newspaper learned that Special Superior Court Judge William Pittman had been assigned to hold court in the county on November 22, 2016 to hear a civil motion in a case in which the Senior Resident Judge had indicated a conflict of interest. The court's computer records indicated the case had been concluded on December 14, 2016.

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After awaiting the outcome of its efforts to have the South Carolina gag order dissolved, *The Fayetteville Observer* in June, 2017 filed its Motion to Intervene and For Access to Court Records in the sealed case. On August 2, 2017, Judge Pittman heard argument from the newspaper's counsel and from lawyers representing plaintiffs and defendants in the sealed case. At that hearing, it was revealed for the first time that the sealed case involved "allegations of sexual abuse committed against minors" and the court's approval of a settlement of claims by minors against one or more defendants. Counsel for the plaintiffs and defendants argued that the sealed records contained information that, if made public, would cause the minors "suffering, embarrassment, emotional distress and trauma." Counsel for plaintiffs in the sealed case stated that "the identifying characteristics of the unnamed minors are inseparably woven throughout the pleadings and general allegations. There is simply no way to unscramble the identifying facts from those that might have no harm to the unnamed minors."

Later that day, the trial court entered its order denying the newspaper's motion and declining to unseal any aspect of the record – not even the names of the defendants, the nature of the claims and defenses, or any information regarding the court-approved settlement of the claims of the minor plaintiffs. The court, noting that the sealed file contained two previous written

orders sealing the file, found that the "identifying characteristics of the minor plaintiffs are inextricably intertwined throughout the pleadings and ancillary documents, including the Court-approved settlements." The trial court found that there were no suitable alternatives to sealing the entire file.

The newspaper promptly appealed, and argument was heard by the Court of Appeals on August 22, 2018.

The North Carolina Court of Appeals Opinion

In its December 18, 2018 opinion, the Court of Appeals, after noting that the sealing of an entire civil case file is "unprecedented in North Carolina,": (1) vacated the original orders sealing the file, finding they were overbroad; (2) held that proper redaction of documents in the file will adequately protect the identities of the minors; (3) reversed the trial court's August 2, 2017 order denying the newspaper's motion for access to the sealed court file; and, (4) remanded the case to the trial court to hold a hearing to consider the proper extent of redaction consistent with the opinion and to enter a new order "opening the file with these limited redactions."

The Court of Appeals rejected the trial court's finding that information identifying the minors was "inextricably intertwined throughout the pleadings." It held instead that "sealing of the *entire* file, even including names of attorneys, names of defendants, and sealing orders, cannot be justified by the interest in protecting the juvenile plaintiffs. The trial court should – and did – use pseudonyms for the juvenile defendants, and on remand should redact specific identifying information" in any documents which include this information.

The Court of Appeals also rejected the trial court's finding that there was a compelling state interest in protecting the identities of so-called "innocent third parties" apparently mentioned in the sealed court records. The opinion held that the "trial court erred to the extent it relied upon the interest of the protection of the defendants or innocent third parties from embarrassment, trauma, or economic loss in sealing any portion of the court file."

The Court of Appeals has provided North Carolina trial courts with a detailed roadmap for addressing the high constitutional bar to the sealing of court records in even the most sensitive situations. In doing so, it has articulated clearly that the North Carolina Constitution guarantees the public a presumptive right of access to court records. To overcome that right of access, a trial court must find that there is a compelling state interest in sealing, that alternatives to sealing have been considered and rejected, and that any sealing must be narrowly tailored to protect the interest at stake. Finally, the Court of Appeals held that any such sealing of court records is subject to review *de novo*, and not reviewed under an abuse of discretion standard.

Jonathan E. Buchan, Natalie D. Potter, and Caitlin Walton of Essex Richards, P.A. in Charlotte, NC represented The Fayetteville Observer*, a Gatehouse Media newspaper, in the trial court and in the Court of Appeals and were accompanied in the Court of Appeals briefing by John J. Korzen of the Wake Forest University School of Law Appellate Advocacy Clinic. Jay Bender of Baker, Ravenel & Bender, Columbia, SC and Mr. Buchan represented the newspaper in its challenge to the South Carolina gag order. Hugh Stevens of Stevens Martin Vaughn & Tadych represented a coalition of news media organizations who were amici in the appeal. Defendants were represented in the civil case by H. Gerald Beaver and James A. McLean, III of Fayetteville, NC. Plaintiffs made no appearance in the appeal.*