

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CENTER FOR AUTO SAFETY, et al., *Intervenors/Appellees*,

v.

GOODYEAR TIRE & RUBBER COMPANY, *Defendant/Appellant*.

No. 1 CA-CV 18-0244
FILED 11-26-2019

Appeal from the Superior Court in Maricopa County
No. CV2013-052753
The Honorable John R. Hannah, Judge

REVERSED AND REMANDED

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OPINION

Chief Judge Peter B. Swann delivered the opinion of the court, in which Presiding Judge James B. Morse Jr. and Judge Paul J. McMurdie joined.

S W A N N, Chief Judge:

¶1 At the request of a third-party intervenor, the superior court vacated a protective order and directed the unsealing of filings that contain trade secrets. The appellant contends that the superior court’s order applied the incorrect standard when it vacated the protective order and unsealed confidential documents. We agree. Neither the court, the appellant, nor the intervenor addressed the correct legal standard, which is set forth in Ariz. R. Civ. P. 5.4. And the court articulated no legal basis for unsealing documents that it found to contain trade secrets. We therefore reverse and remand for further proceedings.¹

FACTS AND PROCEDURAL HISTORY

A. *Haeger I* and *Schalmo*

¶2 In 2005, the Haegers filed a product liability action in Arizona district court against Goodyear Tire & Rubber Company (“Goodyear”), alleging that Goodyear’s model G159 tire was defective when used on motorhomes (“*Haeger I*”). Goodyear produced a large number of documents during discovery that were designated “confidential” pursuant

¹ Appellee Center for Auto Safety filed a motion for leave to file a supplemental brief and the appellant opposed the motion. We grant the motion and accept the supplemental brief.

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to a stipulated protective order. The protective order mandated that confidential information would be available only to the parties and that the Haegers were not allowed to disclose that information to anyone else. The Haegers did not challenge the confidentiality designation, and the case against Goodyear settled on the first day of trial.

¶3 A few months later, another family, the Schalmos, went to trial against Goodyear in Florida, alleging that the G159 tire was defective when used on motorhomes. In *Schalmo v. Goodyear*, the court issued a protective order, which prohibited the Schalmos from disclosing to others confidential information that Goodyear had provided during discovery. The jury found for the Schalmos and found that the G159 tire was defective in design and unsuitable for highway use. After entry of the verdict, the Haegers' counsel found an article that suggested Goodyear had disclosed in *Schalmo* certain test results indicating that the G159 tire gets unusually hot at high speeds, which Goodyear had failed to disclose in *Haeger I*. The Haegers moved for discovery sanctions against Goodyear and its attorneys, alleging discovery fraud. The district court granted the motion and sanctioned Goodyear and its counsel in favor of the Haegers, in the amount of \$2.7 million.

¶4 The Ninth Circuit affirmed the district court's factual determinations that Goodyear and its attorneys perpetrated fraud and deceit on the court, and that Goodyear had acted in bad faith. *Haeger v. Goodyear Tire & Rubber Co.*, 813 F.3d 1233, 1237, 1244–45 (9th Cir. 2016). Goodyear appealed to the United States Supreme Court. That Court determined that the sanctions were punitive, however, and remanded for a determination of the Haegers' actual damages. *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186–90 (2017).

B. *Haeger II*

¶5 While the appeal to the Supreme Court was pending, the Haegers filed an action in the superior court, claiming settlement fraud and abuse of process ("*Haeger II*"). The superior court issued a blanket protective order at the beginning of discovery, allowing Goodyear to designate documents as "confidential" after reasonable inquiry and based on good faith belief that the documents were entitled to protection. The Haegers did not object to the proposed protective order, and the court made no findings at that time regarding whether any of Goodyear's documents were trade secrets.

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¶6 The Haegers moved to require Goodyear to disclose information declared confidential in previous G159 cases so that the Haegers would be able to use that discovery in their own case. The superior court denied the request, finding that Goodyear had a legitimate interest in not disclosing its trade secrets and confidential information, as long as the confidentiality order permitted disclosure to the National Highway Traffic Safety Administration (“NHTSA”). The court ordered Goodyear to produce an unredacted transcript of the *Schalmo* trial, finding that it was reasonably likely to lead to the discovery of evidence that would be admissible in *Haeger II*. The court also ordered that the substance of the protective order from *Haeger I* would apply in *Haeger II*.

¶7 Goodyear produced over 30,000 documents designated “confidential,” covering information related to quality control procedures, protocols, and testing, including the heat rise testing for the G159 tire. Among other things, the protective order covered adjustment data, meaning information concerning customer complaints about a tire and the company’s responses, which is valuable to competitors for marketing purposes. The protective order also applied to Goodyear’s company policies and internal procedures on issues including the adjustment process, warranties, and recalls, as well as some documents containing general financial and commercial information. The court required that if the Haegers filed any motions that contained confidential information, they must move to file them under seal. Both the Haegers and Goodyear filed motions that described some of the documents designated “confidential” by Goodyear, and the court sealed the filings without making the findings required by Maricopa County Local Practice Rule 2.19. *See* Ariz. Local R. Prac. Super. Ct. (Maricopa) 2.19(c) (requiring that the court “make[] and enter[] written findings that the specific sealing or redaction is justified by identified compelling interests that outweigh the public interest in access to the court record”). The Haegers did not challenge Goodyear’s confidentiality designations before they settled with Goodyear.

C. Spartan and CAS Intervention

¶8 The Haegers settled with Goodyear, but Spartan Chassis, Inc., (“Spartan”) which was Goodyear’s co-defendant in *Haeger I* and had moved for discovery sanctions against Goodyear in that case, moved to intervene and obtain documents designated “confidential” pursuant to the protective order. The court granted Spartan’s motion to intervene and granted Spartan’s motion to vacate the protective order, but immediately stayed the order vacating the protective order. The court issued an interim order that

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modified the protective order to allow Spartan access to the confidential information on the same terms as the Haegers.

¶9 On the same day that Spartan argued its motion to vacate the protective order, the Center for Auto Safety (“CAS”) intervened, moving to unseal all court records and vacate the blanket protective order. CAS argued that the public has a right to access the court records because the information contained in the sealed documents includes evidence that could demonstrate an ongoing risk to public safety. CAS also contended that the public has an interest in knowing whether Goodyear concealed a dangerous defect from both the public and the government.

¶10 In response to CAS’s motion to unseal, Goodyear argued that the documents should remain sealed and protected, enclosing affidavits declaring that there would be no benefit to public safety if the documents were released and that disclosure of any aspect of Goodyear’s proprietary tire design would give its competitors an unfair advantage. The affidavit provided by Goodyear’s Chief Analysis Engineer, Kevin C. Legge, in support of Goodyear’s position maintained that “[e]ven fragments of a tire specification can offer valuable insight into Goodyear’s confidential design and manufacturing process.” Legge also declared that release of Goodyear’s adjustment information would provide competitors with an unfair advantage because Goodyear categorizes information by the specific reason an adjustment was made.

¶11 Goodyear later admitted that many documents designated “confidential” or filed under seal were not actually confidential. After oral argument, Goodyear delivered a large number of documents to the court that, it contended, were still confidential. The court agreed to review those documents *in camera*.

¶12 The court concluded that many of the documents Goodyear sought to protect were, in fact, trade secrets. After acknowledging Goodyear’s interest in confidentiality regarding information specifically about the G159 tire, the court found that Goodyear’s interests did not outweigh the public’s need for access. The court found that Goodyear had not explained exactly how it would be harmed by the release of any specific document or piece of information, and that it had therefore failed to “particularize its showing concerning its need for confidentiality.” The court also decided that Goodyear’s continued need for confidentiality was reduced by the fact that the G159 tire had been discontinued and the information regarding the tire was old, which suggested no competitors would want to copy it.

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¶13 While CAS’s motion was pending, the Haegers’ counsel wrote a letter to NHTSA, describing in detail why he felt the G159 tire was unsafe for use in motorhomes and why NHTSA should begin an investigation. The 29-page letter quoted deposition testimony, described data from Goodyear’s list of G159 lawsuits, including adjustments, property damage, and personal injury claims, and summarized testing results and temperature limitations of the G159. Counsel attached to his letter confidential documents that he believed supported his position regarding the G159’s safety.

¶14 After the letter was sent, the Haegers filed it with the court under seal and made it part of the court record. The court stayed the order vacating the protective order and partially unsealing the record pending the outcome of Goodyear’s appeal in this court. However, the clerk’s office mistakenly released the NHTSA letter, and the sealed documents attached to it, to a reporter for a daily automotive blog. The court refused to call the reporter and advise him of the protective order’s status, and found that the reporter, as a third party, was not bound by the protective order. The blog posted an article detailing the contents of the NHTSA letter and revealing the full contents of the 29-page letter. Ryan Felton, *Goodyear Knew of Dangerous RV Tire Failures for Over 20 Years: Court Docs*, JALOPNIK (Apr. 4, 2018, 11:20 PM), <https://jalopnik.com/goodyear-knew-of-dangerous-rv-tire-failures-for-over-20-1824997252>.

¶15 Goodyear timely appeals the court’s order vacating the protective order and unsealing Goodyear’s documents.

DISCUSSION

¶16 We review a court’s decision to vacate a protective order or unseal court records for an abuse of discretion. *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 n.3 (9th Cir. 2006). A court abuses its discretion if, “in reaching its decision, it applies an erroneous rule of law.” *Pullen v. Pullen*, 223 Ariz. 293, 296, ¶ 10 (App. 2009). We will not disturb the superior court’s exercise of discretion if it is supported by any reasonable evidence. *Maher v. Urman*, 211 Ariz. 543, 549, ¶ 15 (App. 2005).

I. THE COURT ABUSED ITS DISCRETION WHEN IT FAILED TO APPLY RULE 5.4 AND CONCLUDED THAT THE PUBLIC’S INTEREST IN ACCESS OUTWEIGHS GOODYEAR’S INTEREST IN CONFIDENTIALITY.

¶17 Goodyear argues that the superior court applied the wrong standard for trade secrets when it vacated the protective order. It contends

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that the court improperly devalued Goodyear's interest in protecting its trade secrets, reached unsupported conclusions about how Goodyear used protective orders, disregarded Goodyear's reliance on the protective order, and relied on an erroneous presumption of public access to raw discovery.

¶18 Arizona has adopted the Uniform Trade Secrets Act ("UTSA"), which governs the basic principles of trade secret protection. *Enter. Leasing Co. of Phoenix v. Ehmke*, 197 Ariz. 144, 148, ¶ 16 (App. 1999); A.R.S. §§ 44-401 to -407. A trade secret, by definition, is information that derives independent economic value from not being generally known to or readily ascertainable by others who can economically benefit from its disclosure. A.R.S. § 44-401(4)(a). Here, the superior court found that much of the material subject to the protective orders constituted valid trade secrets.

¶19 The UTSA provides that a court must preserve the secrecy of a trade secret by reasonable means, which may include "granting protective orders in connection with discovery proceedings, holding in camera hearings, sealing the records of the action or ordering a person involved in the litigation not to disclose an alleged trade secret without prior court approval." A.R.S. § 44-405. Generally, any party from whom discovery is sought may move for a protective order and the court may, for good cause, enter the protective order. Ariz. R. Civ. P. ("Rule") 26(c)(1). The protective order can be entered for several reasons, including for the purpose of "requiring that a trade secret or other confidential . . . or commercial information not be revealed or be revealed only in a specified way." Rule 26(c)(1)(G). Before the court may enter the order, however, the party seeking confidentiality has the burden of showing good cause – that is, the burden of showing why the order should be entered. Rule 26(c)(4)(A).

¶20 A party asserting good cause bears the burden, for each document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted. *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1138 (9th Cir. 2003).² Broad allegations of harm will not suffice. *See id.* *Foltz* held that parties may stipulate to a blanket protective order without a particularized showing of good cause, but they may not rely on such an order to hold records in confidence indefinitely. In this case,

² The federal and Arizona rules regarding protective orders are materially similar in that they require good cause. *Compare* Fed. R. Civ. P. 26(c) *with* Rule 26(c)(4)(A).

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the court relied on this holding, and, for these general propositions, we agree with *Foltz*.³

¶21 CAS then relies on federal case law and Rule 26 for its assertion that Goodyear has the burden of demonstrating good cause. We agree that the party seeking confidentiality must make a showing of good cause. *See* Rule 26(c)(1). Existing federal case law, along with Rule 26, imposes no standard for the party seeking to unseal. But a stranger to an action seeking to unseal documents must also show why the public should be granted access to protected information. Rule 5.4 prescribes the governing analysis. The superior court may order documents to be filed under seal only if it finds in a written order that:

- (A) an overriding interest exists that supports filing the document under seal and overcomes the right of public access to it;
- (B) a substantial probability exists that the person seeking to file the document under seal (or another person) would be prejudiced if it is not filed under seal;
- (C) the proposed restriction on public access to the document is no greater than necessary to preserve the confidentiality of the information subject to the overriding interest; and
- (D) no reasonable, less restrictive alternative exists to preserve the confidentiality of the information subject to the overriding interest.

Rule 5.4(c)(2). The court may order documents unsealed based on the standards above and must state the reasons for unsealing documents or reasons for denying the motion to unseal. Rule 5.4(h).

¶22 Neither the parties nor the superior court cited Rule 5.4, instead relying on the “compelling reasons” standard set out in federal case

³ *Foltz* contains a number of broad pronouncements concerning the defeasance of protective orders and the sharing of protected information among litigants that we do not endorse. For example, we reject as a matter of Arizona law the notion that discovery should generally be made available to further the interests of non-parties to the case at hand who are engaged in collateral litigation. *See* 331 F.3d at 1131. But because Arizona has a specific rule on point, we need not further address *Foltz*.

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law. In a supplemental brief following oral argument, CAS argued that the court's decision fully complies with Rule 5.4 because Rule 5.4's requirement for an overriding interest to overcome the public right of access is interchangeable with Maricopa County Local Practice Rule 2.19's requirement for compelling reasons, which the court mentioned in its analysis and which closely resembles Rule 5.4(h). We agree that the grounds for sealing under the two rules are substantially the same, but it does not appear that the court applied those standards to the *unsealing* as required by Rule 5.4.

¶23 The court concluded that Goodyear did not present sufficient need for confidentiality and for keeping documents related to the G159 tire sealed. We disagree. For example, Goodyear argued, and the court found, that materials ordered unsealed were trade secrets.⁴ And while the federal case law is not inconsistent with the Arizona rule, the court did not articulate the public interest in disclosure of trade secrets or the legal basis for such disclosure in the face of the UTSA. Indeed, the UTSA itself articulates no basis for unsealing. And because unsealing is tantamount to destroying trade secret protection, we conclude that a court may expose trade secrets only in extraordinary circumstances, such as when the information has lost the independent economic value created by its secrecy, or when secrecy represents a significant threat to the public welfare.

¶24 The very purpose of trade secret law “is to protect valuable confidential information from discovery.” *Enter. Leasing Co.*, 197 Ariz. at 149, ¶ 16. Therefore, the public disclosure of trade secrets necessarily implies that particularized harm exists because trade secrets derive their value from their secrecy. *See* A.R.S. § 44-401(4)(a). Though the superior court here concluded that Goodyear had a lowered interest in confidentiality because of the age of the G159 tire, old trade secrets are still protectable as long as they have not been publicly disclosed. *Enter. Leasing Co.*, 197 Ariz. at 150, ¶ 18. Goodyear has shown good cause here to keep its confidential documents under seal, and CAS, as a third-party intervenor,

⁴ CAS briefly argues that the superior court's determination of the documents in question as trade secrets was erroneous. But we may modify a judgment to “reduce the rights of the appellant only if the appellee has filed a notice of cross-appeal.” ARCAP 13(b)(2). CAS filed no cross-appeal; therefore, we have no jurisdiction to consider this argument. *See Engel v. Landman*, 221 Ariz. 504, 510, ¶ 17 (App. 2009) (declining jurisdiction when issues raised in an answering brief deprived the appellant of his rights).

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must meet a heavy burden to show why the public needs access to confidential trade secrets.

¶25 Under Rule 5.4, the court is required to analyze the same factors to unseal a document as it is to seal it. Here, the superior court performed a lengthy balancing test regarding Goodyear’s need to maintain confidentiality of information, the public’s need for access, and possible risks to public safety that would occur if the documents remained sealed. But the critical finding—that the materials in dispute contain trade secrets—did not change. Given the inflexible command in the UTSA that courts “shall preserve the secrecy of an alleged trade secret,” we see nothing in the court’s findings to justify the unsealing order. *See* A.R.S. § 44-405.

¶26 CAS argues generally that the public has a right to Goodyear’s confidential information because its interest in access to information regarding the G159 tire outweighs Goodyear’s interest in confidentiality. The public’s interest in access to court records, however, has traditionally served to open *government* activity to public scrutiny. *Lake v. City of Phoenix*, 222 Ariz. 547, 549, ¶ 7 (2009). Therefore, the interest in disclosure is high when the performance of important government functions is involved. *Schoeneweis v. Hamner*, 223 Ariz. 169, 175, ¶ 21 (App. 2009). When scrutinizing the actions of a private party rather than the actions of the government, privacy interests weigh more heavily. *See id.*

¶27 We recognize that the public has a strong interest in safety on the roads and highways and in the prompt removal of a safety hazard. *State v. Parra*, 119 Ariz. 201, 204 (1978). But the court must determine whether the public’s interest has already been vindicated by the information readily available regarding the G159 tire, and whether additional technical documents containing tire specifications and adjustment data would materially advance public safety. And the superior court expressly found that Goodyear’s documents concerning “design, quality control and testing, and adjustment experience of the G159 tire constitute trade secrets under Arizona law,” as did the documents concerning policies and procedures not specifically related to the G159 tire. The Haegers’ counsel’s letter to NHTSA is available online and outlines the complaints and allegations surrounding the G159 tire. The superior court found that the letter to NHTSA “thoroughly summarizes the public safety issues created by the G159 tire and Goodyear’s longstanding, ongoing effort to minimize that issue.” CAS’s motion to unseal also describes the alleged tire defects in sufficient detail. Because the public already is on notice about the dangers of the tire, it is difficult to see what marginal benefit to the public would be achieved by unsealing the remaining trade secrets.

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¶28 Though CAS functions as a consumer rights advocate in the automobile safety field, the same is true of NHTSA. See *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 809 F.Supp. 148, 150 (D.C. 1993). And NHTSA, as a government agency, has the power to request additional documents from Goodyear if it deems it necessary. See *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 464 (D.N.J. 1998) (“[T]he Motor Vehicle Safety Act, 49 U.S.C. § 30101 et. seq., gives NHTSA the authority to investigate complaints concerning automobile defects and to order a recall where appropriate.”). The court concluded that NHTSA’s refusal to keep the submitted documents confidential diminishes Goodyear’s need for confidentiality, reasoning that many of the documents Goodyear seeks to keep secret were included in the NHTSA submission. However, the 29-page letter to NHTSA contains only highlights of the information deemed most important by the Haegers’ counsel; it does not contain the entirety of documents held confidential under seal by the court. Contrary to the superior court’s conclusion, the existence of already-disclosed documents does not diminish the value of the remaining confidential documents.

¶29 It is true that Goodyear’s conduct during previous discovery proceedings has been anything but admirable, but a party’s discovery misconduct (which harms a party to the litigation) is not effectively redressed by the public disclosure of trade secrets at the request of a third-party intervenor. See Rule 37(a)(3)(A) (providing that a party may move for sanctions if the other party fails to make a disclosure). Any unsealing in this case must weigh a valid, unserved public interest against the factors identified in Rule 5.4. We therefore reverse the superior court’s order vacating the protective order, and we remand for application of Rule 5.4.

II. FULL FAITH AND COMITY DO NOT APPLY.

¶30 Goodyear argues that, by vacating the protective order and unsealing records, the superior court failed to accord the *Schalmo* court the comity and respect to which it is entitled. The Full Faith and Credit Clause of the United States Constitution requires states to respect and enforce judgments entered in their sister states. *Oyakawa v. Gillett*, 175 Ariz. 226, 228 (App. 1993). But the Full Faith and Credit Clause does not apply here because it only applies to final judgments, and the protective order at issue here is not a final judgment and is modifiable. See *Pub. Citizen v. Liggett Grp., Inc.*, 858 F.2d 775, 782 (1st Cir. 1988) (holding that protective orders are modifiable).

¶31 Goodyear also contends that the court ignored principles of comity when it interfered with the *Schalmo* and *Haeger I* orders. The

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principle of comity directs that courts of one state will give effect to other states' laws and judicial decisions out of mutual respect. *Gnatkiv v. Machkur*, 239 Ariz. 486, 490, ¶ 12 (App. 2016). We need not apply the principle of comity to the case at hand, however, because both the *Schalmo* and the *Haeger I* protective orders were entered without opposition from either side, and were generally agreed-upon. See *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 501 (D. Md. 2000) ("There is less need for deference and comity when the order involved is really an agreement by counsel approved, almost as a ministerial act, by the court, than an action directed by the court after a full consideration of the merits of a fully briefed dispute.").

CONCLUSION

¶32 For the foregoing reasons, we reverse the superior court's order terminating the protective order and unsealing records, and remand for further proceedings.



AMY M. WOOD • Clerk of the Court
FILED: AA