

[Cite as *Capital One Bank, USA, N.A. v. Essex*, 2014-Ohio-4247.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

CAPITAL ONE BANK USA, N.A.	:	
Plaintiff-Appellee	:	C.A. CASE NO. 25827
v.	:	T.C. NO. 12CV8355
SUSAN L. ESSEX	:	(Civil appeal from Common Pleas Court)
Defendant-Appellant	:	
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OPINION

Rendered on the 11th day of April, 2014.

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FROELICH, P.J.

{¶ 1} Susan L. Essex appeals from a judgment of the Montgomery County
Court of Common Pleas, Civil Division, which overruled her motion to seal a civil judgment

related to a credit card debt.

{¶ 2} For the following reasons, the judgment of the trial court will be reversed, and the matter will be remanded for further proceedings.

{¶ 3} In November 2012, Capital One Bank (USA), NA, filed a complaint which alleged that Essex had applied for and used a credit card from the bank and had defaulted on repayment of \$876.46. In December 2012, the parties reached an agreed judgment for repayment of the full amount, plus interest, through the payment of specific amounts each month. Essex had paid the judgment in full by April 2013.

{¶ 4} In June 2013, Essex filed a motion to seal the record of the case, in which she asserted that, as a real estate salesperson, her “ability to attract and retain business may be adversely affected by the records of this credit card collection action.” While acknowledging that Ohio law does not expressly authorize the sealing of civil records, she argued that courts have the inherent authority to do so and that Civ.R. 26(C) “grants to courts broad authority to protect litigants from annoyance and embarrassment” with respect to discovery in civil litigation. She encouraged the court to read Civ.R. 26(C) “broadly” and to apply it to protect her from the annoyance and embarrassment she could suffer due to the record of this case. Capital One did not respond to the motion and has not filed an appellate brief.

{¶ 5} The trial court found that it had “no authority to seal the records in a civil case and further * * * that it would be against public policy to do so.” Based on these conclusions, the trial court overruled the motion.

{¶ 6} Essex appeals, raising two assignments of error.

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THE TRIAL COURT ERRED IN FINDING IT LACKED
JURISDICTION TO SEAL THE RECORDS.

THE TRIAL COURT ERRED IN FAILING TO DETERMINE
WHETHER THE INTERESTS OF APPELLANT OUTWEIGH ANY
GOVERNMENTAL INTEREST IN MAINTAINING THESE RECORDS.

{¶ 7} Essex argues that the trial court incorrectly concluded that it lacked authority to seal the record in a civil case. She relies on *Schussheim v. Schussheim*, 137 Ohio St.3d 133, 2013-Ohio-4529, 998 N.E.2d 446. She also argues that the trial court erred in failing to reach the question whether the “embarrassment and adverse effect” on her reputation and business warranted sealing the record in her case.

{¶ 8} *Schussheim* involved a request to expunge and seal the record of proceedings for a civil protection order (CPO), obtained by the wife in the midst of divorce proceedings, where no domestic violence charges were ever filed. By the time of the application for expungement and sealing the record, both parties asserted that expungement was in the best interest of the wife and children, as well as the husband, due to possible adverse effects on husband’s employment. *Id.* at ¶ 6. The supreme court reviewed the trial court’s denial of the application to expunge and seal the record of the CPO, which the 12th District Court of Appeals had affirmed. *Schussheim v. Schussheim*, 12th Dist. Warren No. CA2011-07-078, 2012-Ohio-2573.

{¶ 9} The supreme court noted that, in *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 421 N.E.2d 1303 (1981), it had recognized that courts have inherent authority to expunge and seal criminal records in “unusual and exceptional circumstances,” based on the constitutional right to privacy. Extending the holding in *Pepper Pike*, the majority found

that, although there was no statutory authorization to expunge and seal records relating to a dissolved CPO in adult proceedings, a court has the inherent authority to do so in unusual and exceptional circumstances. The court apparently extended the holding in *Pepper Pike* to civil matters, where the circumstances warrant such relief, when it concluded:

The inherent authority of a court to expunge and seal a record does not turn on whether a proceeding is criminal or civil. Rather, the determination is whether “unusual and exceptional circumstances” exist and whether the interests of the applicant outweigh the legitimate interest of the government to maintain the record.

Schussheim at ¶ 16.

{¶ 10} Part of the confusion in this area of law stems from courts’ interchangeably using “expunge” and “seal.” Essex’s argument also conflates these terms, to the extent of citing R.C. Chapter 2953, which allows the *sealing* of certain *criminal* matters. *See, e.g., State v. Pariag*, 137 Ohio St.3d 81, 2013-Ohio-4010, 998 N.E.2d 401, ¶ 11-12 (acknowledging the continued use of the term “expungement” to describe the process of sealing convictions).

{¶ 11} “Expunge” can mean “to destroy, delete, and erase as appropriate for the record’s physical or electronic form or characteristic, so that the record is permanently irretrievable.” R.C. 2151.355(A); R.C. 2953.37(A)(1); and R.C. 2953.38(A)(1). However, to “seal a record” may mean “to remove a record from the main file of similar records and to secure it in a separate file that contains records accessible only to the * * * court.” R.C. 2151.355(B). One seems to confine the records under the control of the court, whereas the

other appears to obliterate it altogether, similar to the effect to the “neurolyzer” in the Men in Black movies.

{¶ 12} Every court ultimately has supervisory power over its own records and files. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978). It is not uncommon for a court to seal all or part of a record as a condition of settlement or for other reasons. *See, e.g., Sobczak, To Seal or Not to Seal? In Search of Standards*, 60 Def. Couns. Journal 406 (1993) and, more generally, Bergeron and Eberwine, *One Step in the Right Direction: Ohio’s Framework for Sealing Criminal Records*, 36 U.Tol.L.Rev. 595 (Spring 2005).

{¶ 13} Several justices dissented in *Schussheim*, citing the narrow circumstances in which the legislature has expressly approved expungement of civil records (in juvenile proceedings, R.C. 2151.34(E)(6)), distinctions between this case and *Pepper Pike*, as well as a lack of “unusual and exceptional circumstances.” Although we may share some of these concerns, *Schussheim* unequivocally held that expungement and sealing of a record may be appropriate in civil cases. We must conclude that the trial court erred in its conclusion that, as a matter of law, it had no authority to seal the record in a civil case.

{¶ 14} The trial court also held that it “would be against public policy” to seal the record. It is unclear whether this conclusion reflects the court’s opinion of sealing civil cases generally or the absence of unusual and exceptional circumstances in this case. The court did not discuss any facts particular to this case that would bear on the issue of whether “unusual and exceptional circumstances” existed. We will remand this matter to the trial court for a determination of this issue.

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{¶ 15} The first assignment of error is sustained. Because we are remanding for the trial court to consider whether the circumstances justify all or any part of the relief requested, the second assignment is not yet ripe for our review.

{¶ 16} The judgment will be reversed, and the matter will be remanded for consideration of whether “unusual and exceptional circumstances” warrant the sealing of the record in this case.

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FAIN, J. and WELBAUM, J., concur.

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