

2011 IL App (2d) 101020-U
No. 2—10—1020
Order filed August 23, 2011

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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

LADONNA BRYAN,)	Appeal from the Circuit Court
)	of McHenry County.
Plaintiff-Appellee,)	
)	
v.)	No. 07—L—185
)	
MERCY HEALTH SYSTEM)	
CORPORATION, MERCY HARVARD)	
HOSPITAL, INC., JOSEPH LEVENSTEIN,)	
an individual, and MARIA)	
KOSTANTACOS, an individual,)	
)	
Defendants-Appellees,)	
)	
and)	
)	
SHANNON CHAVEZ, ROBERT)	
KANTNER, PAULA SUE SHERMAN,)	
JONATHON WILCOX, and TIFFANY)	
WILCOX,)	Honorable
)	Thomas A. Meyer
Third-Party Intervenors-Appellants.)	Judge, Presiding.

PRESIDING JUSTICE JORGENSEN delivered the judgment of the court.
Justices Burke and Birkett concurred in the judgment.

ORDER

Held: Petitioners have standing to intervene so that they can have a hearing on the issue of whether the trial court improperly sealed public records.

¶ 1 On May 6, 2008, the trial court impounded several documents in the instant, wrongful termination case (No. 07—LA—185, *Ladonna Bryan v. Mercy Health System*). On May 28, 2010, third-party intervenors (petitioners) petitioned to intervene for the limited purpose of challenging the May 6, 2008, impoundment order and to assert their alleged right as citizens to access the documents. On August 25, 2010, the trial court denied on the basis of standing the petition to intervene, and it did not rule on the access to documents issue. We reverse and remand with directions to address the access to documents issue.

¶ 2 I. BACKGROUND

¶ 3 A. The Instant Wrongful Termination Suit
(in which petitioners seek to intervene)

¶ 4 On May 22, 2007, LaDonna Bryan, M.D., filed the instant suit (case number 07—LA—185) against Mercy Health System Corporation, Mercy Harvard Hospital, Inc., individual Joseph Levenstein, M.D., and individual Maria Kostantacos, R.N. (for the purposes of this appeal, referred to collectively as MHS). In this suit, Bryan alleged wrongful termination, breach of employment contract, defamation, and intentional infliction of emotional distress.

¶ 5 Bryan's weight-loss, bariatric surgery patients suffered a higher incidence of death and complications than would be expected, and Bryan's employment was subsequently terminated. However, Bryan alleged facts by which one could infer that her termination was politically motivated, and, critical to the instant appeal, she alleged that MHS required her to accept patients that were not appropriate bariatric surgery candidates.

¶ 6 On May 6, 2008, the court ordered sealed certain amended pleadings and court documents because those documents contained privileged materials under the Illinois Medical Studies Act (IMSA) (735 ILCS 5/8—2101 (West 2008)). In that order, the court stated that an exact determination of which documents would be sealed could not be made at that time because no *in camera* review *had yet* been conducted. However, and although the parties debate the point on appeal, it does appear that the trial court ultimately performed an *in camera* review because, on April 2, 2009, the trial court set forth in a written order exactly which documents were to be sealed.¹ In January 2011, this case was settled and dismissed with prejudice.

¶ 7 B. Petitioners' Respective Med-Mal Suits

¶ 8 Meanwhile, petitioners each initiated their own respective lawsuits against Bryan *and* MHS (Bryan's former employer) for medical malpractice and alleged negligence in the pre-, intra-, and post-operative care while performing bariatric surgery. An allegation common to each of the petitioners' respective lawsuits against Bryan and MHS is that each petitioner, or the decedent whose estate the petitioner represents, was improperly selected as a candidate for bariatric surgery.

¶ 9 Specifically, as alleged in the respective complaints, petitioner Shannon Chavez is the executor of the Estate of Ginny Harris. On February 28, 2006, Bryan performed bariatric surgery on Harris. For the next year-and-a-half, Harris underwent numerous repair surgeries, spending all but two of those days in a hospital or rehabilitative setting. On June 15, 2007, Harris passed away. Chavez is pursuing action against Bryan and MHS in case number 08—LA—67.

¹ At oral argument, the parties clarified that the trial court sealed certain paragraphs in the various pleadings and answers at issue. However, the impounded record given to this court shows that the entire pleadings have been placed under seal, not just the paragraphs ordered to be redacted.

¶ 10 Petitioner Paula Sue Sherman is the executor of the Estate of Pamela Trevino. On July 20, 2006, Bryan performed bariatric surgery on Trevino. On September 16, 2006, Trevino passed away due to complications stemming from the surgery. Sherman is pursuing action against Bryan and MHS in case number 08—LA—347.

¶ 11 Petitioner Robert Kantner underwent bariatric surgery performed by Bryan on September 5, 2006. He suffered complications requiring extensive hospitalization. Kantner is pursuing action against Bryan and MHS in case number 08—LA—368.

¶ 12 Petitioner Jonathon Wilcox underwent bariatric surgery performed by Bryan on July 14, 2006. He suffered complications that required extensive treatment and repair. Petitioner Tiffany Wilcox is Jonathon's wife, and she alleges that her relationship with Jonathon has been damaged as a result of the surgery. The Wilcoxes are pursuing action against Bryan and MHS in case number 08—LA—368.

¶ 13 In July 2008, petitioner Chavez deposed Bryan in furtherance of her own medical malpractice and negligence case (No. 08—LA—67). Before the first amended complaint had been sealed, Chavez's counsel had obtained a copy of it from the courthouse, as it had been available for public review. During the deposition, the following exchange took place:

“COUNSEL: I'd like you to go to page 12, item No. 78, of the exhibit of your complaint. I'm going to read a sentence to you, and I'd like you to tell me whether or not I've read this correctly. Item 78: Many of Dr. Bryan's patients were elderly, or medicare patients, or in otherwise substandard states of health. Did I read that correctly?

BRYAN: You did.

COUNSEL: And the next sentence: Dr. Bryan *did not have authority to select her own patients*, but was instead instructed by [MHS] to perform bariatric surgery on as many patients as possible—even the elderly and ill—so that the [MHS] Bariatric center could become accredited as a ‘Center for Excellence.’

BRYAN: Yes.

COUNSEL: Now, you would agree that you did—Ginny Harris presented and you had an opportunity to determine whether or not she was a candidate for bariatric surgery—

BRYAN: Correct.

COUNSEL: And isn’t it true that you did not have the authority to select your own patients but instead were instructed by [MHS] to perform bariatric surgery on as many patients as possible?

BRYAN: In terms of whatever the hospital’s preferences were, that did not dictate my clinical thinking.

COUNSEL: Ma’am, is it true that you did not have authority to select your own patients; yes or no?

BRYAN: As I stated before, whatever their preferences were or if those pressures were there, it did not affect my clinical decision-making.

COUNSEL: The question that’s posed simply is whether or not—specifically did Dr. Bryan have authority to select her own patients—

BRYAN: Whatever outside pressures there are from administration to make decisions in a certain way, I use my own clinical judgment and don't succumb to those pressures in selecting patients." (Emphasis added.)

¶ 14 In October 2008, petitioner Chavez again deposed Bryan in furtherance of her own medical malpractice and negligence case (No. 08—LA—67). In that deposition, the following exchange took place:

“COUNSEL: I'm showing you what I've marked as Exhibit 'B.' This is your First Amended Complaint in *LaDonna Bryan v. Mercy Health System*, 07—LA—185. Have you had an opportunity to review this First Amended Complaint?

BRYAN: Yes.

COUNSEL: Are the allegations that you made in *LaDonna Bryan v. Mercy Health* true, factual[,] and correct?

BRYAN: Yes.”

¶ 15 C. Petitions to Intervene in the Instant Suit

¶ 16 On April 16, 2010, Chavez petitioned to intervene in the instant case (no. 07—LA—185). 735 ILCS 5/2—408 (West 2010). Shortly thereafter, on May 28, 2010, Sherman, Kantner, and the Wilcoxes joined Chavez's petition to intervene in the instant case.

¶ 17 Petitioners challenged the May 6, 2008, order in the instant case that led to the impoundment of portions of the record. Petitioners cited *People v. Kelly*, 397 Ill. App. 3d 232 (2009), for the proposition that a petition to intervene is the appropriate vehicle to seek access to sealed court proceedings.

¶ 18 Further, petitioners noted that Bryan is on record as having testified to inconsistent positions in the various cases. In the instant case (no. 07—LA—185), she stated in her first amended complaint that she “did not have authority to select her own patients, but was instead instructed by [MHS] to perform bariatric surgery on as many patients as possible—even the elderly and ill.” However, in a deposition taken in petitioner Chavez’s case (no. 08—LA—67), when asked whether she had the authority to select her own patients, Bryan answered, “Whatever outside pressures there are from administration to make decisions in a certain way, I use my own clinical judgment and don’t succumb to those pressures in selecting patients.”

¶ 19 Based on these inconsistent positions, petitioners seek to invoke the doctrine of judicial estoppel in their respective medical malpractice cases. However, since the time that Chavez’s counsel obtained a copy of the first amended complaint in the instant case, the trial court in the instant case has sealed portions of the record (including the first amended complaint). In order to support their theory of judicial estoppel in their own medical malpractice cases, petitioners want access to the sealed portions of the record in the instant case.

¶ 20 Petitioners explained a bit about what they hoped to find in the sealed documents based on information contained in Dr. Bryan’s original complaint, which is still available for public viewing. That complaint allegedly “hints” at the potential for other inconsistent positions; this information includes:

“15. Pursuant to the Physician Agreement, Dr. Bryan was to work for MHS full-time as a surgeon and was to obtain and maintain medical staff privileges and a medical license in Illinois. MHS was to compensate Dr. Bryan \$300,000 annually for her services. [] Dr. Bryan was also to receive ‘incentive compensation,’ or 50% of the sums collected by MHS

from Dr. Bryan's patients that exceeded \$600,000. [] After two years, Dr. Bryan was eligible to receive incentive compensation on all sums MHS received from Dr. Bryan's patients.

63. Although Dr. Bryan is a skilled surgeon, her bariatric patients experience a greater number of complications than her general surgical patients. Many of Dr. Bryan's patients were elderly, or Medicare patients, or in otherwise substandard states of health. Bariatric surgery performed on elderly, Medicare patients who are not in good health results in even higher percentage of deaths and complications than bariatric surgery performed on other types of patients.

127. MHS had no basis to terminate Dr. Bryan, other than its wish to rid the hospital of the conflict between Dr. Bryan and [Bryan's estranged husband, also employed by MHS], and to head off any liability the MHS may have had if Dr. Bryan were battered or assaulted on its premises."

As to *paragraph 15* of Bryan's original complaint, petitioners extrapolated that this allegation provides:

"evidence of an incentive program that would value patient selection for purposes other than using clinical judgment [and] supports Bryan's allegations in this lawsuit that she was 'instructed by [MHS] to perform bariatric surgery on as many patients as possible.' "

As to *paragraphs 63 and 127* together, petitioners extrapolated that these allegations show that:

“[MHS] was aware of Bryan’s substandard level of patient complications and failed to institute peer review until it became uncomfortable for MHS to have both Dr. Bryan and her husband employed at the same institution.”

¶ 21 At the hearing on the petition to intervene, all interested parties (*i.e.*, petitioners, MHS, and Bryan) argued the question of intervention before the trial court. For the court, the question of whether petitioners could intervene turned on whether they had standing to intervene. At the hearing, the court reminded petitioners’ attorney that, generally, in order to establish standing to intervene under the statute (section 2—408), one must show “an enforceable or recognizable right and more than a general interest in the proceeding.” The court then stated it was inclined to find that petitioners’ interest (*i.e.*, the possibility of asserting a judicial estoppel claim in their own respective med-mal cases) was not enough to grant the petition. Petitioners’ attorney then allowed, “under the intervention statute, perhaps, Judge.”

¶ 22 Petitioners’ attorney argued, however, that, under *Kelly* (397 Ill. App. 3d 232), intervention is the proper vehicle by which to assert a right-of-access claim, and, therefore, they had standing to intervene as citizens seeking to assert a right-of-access claim:

“Here, *** all the objectors missed the mark. They want us to look at the statute for intervention and say, well, it doesn’t fit into the statute; therefore, *** petitioners have no standing. ***.

We’re not asking to become part of the litigation. We’re not asking to be present at discovery depositions to ask questions or to tender discovery or to answer discovery. We simply want what’s fair and reasonable given *** that *** the defendants in *our* case are taking two different positions in two different cases.

I would assert, Judge, [that] petitioners have standing to intervene *** as citizens under the holding in [*Kelly*] ***.” (Emphasis added.)

¶ 23 The trial court nevertheless denied the petitions to intervene, stating: “I think the cases you’re relying on are distinguishable from this situation[,] and you haven’t established [standing] under the statute to intervene—you’ve established an interest, but little more than that.” The trial court did not rule on the issue of access to the sealed court records. This appeal followed.

¶ 24 II. ANALYSIS

¶ 25 On appeal, petitioners set forth four arguments challenging the trial court’s denial of their motion to intervene. Specifically, they assert that the trial court erred because: (1) Bryan changed her testimony; (2) petitioners’ interests are unrepresented and restricted by the court’s [May 6, 2008] order [sealing various documents]; (3) the sealing was not narrowly tailored to serve any compelling interest; and (4) petitioners had a right to access the sealed documents (*Zangara v. Advocate Christ Medical Center*, 2011 Ill. App. (1st) 091911 (July 22, 2011)).

¶ 26 Objectors respond with the primary argument that the IMSA prohibits the disclosure of the sealed documents sought by petitioners and that the court otherwise properly sealed the sought-after documents following an *in camera* inspection. Second, objectors assert that, in any case, petitioners did not have standing to intervene under the intervention statute because they did not have an enforceable right that is more than a general interest in the proceedings. *In re Marriage of Perkinson*, 147 Ill. App. 3d 692, 698-99 (1986); 735 ILCS 5/2—408 (West 2008). Third, objectors go back to the topic of access to the documents and argue that a presumption of access (*Skolnick v. Altheimer & Gray*, 191 Ill. 2d 214, 231-32 (2000)) to the impounded record does not apply because

the impounded record contains privileged peer review information that is barred from disclosure by the IMSA.

¶ 27 The *organization* of both petitioners' and objectors' arguments underscores a problem present both in the trial court and now on appeal: the parties have essentially collapsed into one what actually is a staged analysis. This staged analysis consists of: (1) whether to grant intervention (dependent first upon establishing standing to intervene and second upon an exercise of the court's discretion); and (2) whether, on the merits, petitioners may access the documents (itself a staged analysis, as set forth in *Kelly* and described below).² At the trial court level, petitioners moved to intervene as a vehicle by which to challenge the May 6, 2008, order that allowed for portions of the record to be sealed. However, before one may reach the merits of whether the documents were properly sealed or whether any right of access applies to the documents, one must first determine whether intervention is proper. See, e.g., *People v. Kelly*, 397 Ill. App. 3d 232, 248-265 (2009) (intervention is the proper vehicle by which a third party may seek access to closed proceedings, but, upon granting the intervention so as to reach the access issue, the trial court did not err in denying access to proceedings). It is not until intervention is granted in a given case that the trial court may address an intervenor's challenge to an order that seals documents or closes proceedings *in that case*. *Id.* at 248. In other words, the trial court must determine whether the petitioners have a basis or

² Throughout this order, when refer to "access," we mean a right to access public records (stage 2). We do not mean petitioners' motion to *intervene*, or, in the colloquial sense, to "access" the court in general so that the merits of the right-to-access documents argument may be heard (stage 1).

standing to intervene *before* it considers the merits of the petitioner’s challenge to the impoundment of documents.

¶ 28 Here, the trial court expressly ruled only on the issue of intervention, finding that petitioners did not have standing to intervene, and did not reach the question of access to the documents. Therefore, our review on appeal is limited only to the question of intervention. Where a trial court denies a petition to intervene, the petitioner may appeal only the order denying intervention. *In re Associated Press*, 162 F. 3d 503, 506 (7th Cir. 1998). Where a petition to intervene is denied, the petitioners never became a party and, therefore, have no standing to appeal any order other than the denial of the intervention. *Id.* Generally, a trial court’s denial of a petition to intervene is reviewed according to an abuse of discretion. *Argonaut Insurance Co. v. Safeway Steel Products*, 355 Ill. App. 3d 1, 7 (2004).

¶ 29 Case law developed under the intervention statute holds that, in determining whether to allow intervention, the court must first determine whether the movant has standing to intervene. *Argonaut*, 355 Ill. App. 3d at 7; 735 ILCS 5/2—408 (West 2010). To have standing, a party must have an “enforceable or recognizable right,” and “more than a general interest in the subject matter of the proceedings.” *Id.* (internal quotes omitted.) An interest that is speculative or hypothetical is insufficient to support intervention. *In re Marriage of Perkinson*, 147 Ill. App. 3d 692, 698-99 (1986). Likewise, where the interest, if favorably resolved, could merely be advantageous to the intervenor at some future date, it is insufficient to support intervention. *Id.* Once standing is resolved, the court may allow intervention at its discretion, and with consideration of the following factors: timeliness, (in)adequacy of representation, and sufficiency of the interest. *Argonaut*, 355 Ill. App. 3d at 8.

¶ 30 Throughout trial and in their briefs on appeal, the parties (and the trial court, for that matter) refer to two different alleged bases for standing: (1) “standing under the intervention statute,” (*i.e.*, “an enforceable or recognizable right,” as described above), and (2) an alternative standing as citizens under *Kelly*. We do not adopt this distinction. For reasons set forth below, the second stated basis is merely a particular type of “enforceable or recognizable right;” specifically, a right to access public records. The parties nevertheless debate two different alleged bases for standing, *each of which* turn on whether petitioners have asserted an enforceable or recognizable right. The two alleged bases are more appropriately labeled as: (1) petitioners’ enforceable right to assert a judicial estoppel claim in their own respective medical malpractice cases; and (2) petitioners’ enforceable right to bring a right-of-access claim. We reject the first basis but accept the second.

¶ 31 We agree with objectors that petitioners’ hope of potentially bringing a judicial estoppel claim in their own respective cases is a speculative and hypothetical interest that does not support a standing to intervene under the test set forth in *Argonaut* and *Perkinson*. Judicial estoppel provides that a party who asserts a particular position in a legal proceeding is estopped from asserting a contrary position in a subsequent legal proceeding. *Bidani v. Lewis*, 285 Ill. App. 3d 545, 550 (1996). The doctrine of judicial estoppel is aimed at protecting the integrity of the courts by preventing litigants from deliberately shifting positions to suit the exigencies of the moment. *Id.* Judicial estoppel is a flexible doctrine, not generally reducible to a formula; however, the following five elements are generally necessary: (1) the two positions must be taken by the same party; (2) the positions must be taken in judicial proceedings; (3) the positions must be given under oath; (4) the party must have successfully maintained the first position and received some benefit; (5) the two positions must be totally inconsistent. *Ceres Terminals, Inc., v. Chicago City Bank and Trust Co.*,

259 Ill. App. 3d 836, 851 (1994). Petitioners seek to use Bryan’s position in the instant case that she did not have full authority to choose her own patients in their respective medical malpractice cases. Gaining a *potential* winning argument in their own cases simply does not meet the requisite interest-level required by the traditional standing test. An interest in asserting a judicial estoppel claim in their respective medical malpractice cases does not establish standing to intervene.

¶ 32 Hence, the remaining question before this court becomes whether the trial court erred in finding petitioners did not have standing to intervene, and as a result, in denying intervention for the limited purpose of hearing and obtaining a ruling upon petitioners’ access to records argument. Many courts have allowed a third party to intervene for the limited purpose of hearing the third party’s right-of-access argument. See, e.g., *Kelly*, 397 Ill. App. 3d at 259; *People v. Pelo*, 384 Ill. App. 3d 776, 778 (2008); *Coy v. Washington County Hospital District*, 372 Ill. App. 3d 1077, 1078 (2007); and *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1070 (1992). None of these cases have cited to the traditional “enforceable or recognizable right” test for standing in granting the petition to intervene. Still, it may be said that the *opportunity* to bring a right-of-access claim *is itself* the “enforceable or recognizable right” required to establish standing to intervene. We describe this “enforceable or recognizable right” as follows.

¶ 33 The presumption that the public has a right to access court records is rooted in the first amendment, common law, and statute. See, e.g., *In re Marriage of Johnson*, 232 Ill. App. 3d 1068, 1071-73 (1992). Implicit in the guarantees of the first amendment is the public’s right to access criminal proceedings, and many courts have extended this right to civil proceedings as well. *Id.* at 1073. Common law recognizes a right to access public records and documents, including judicial records. Under this right, a presumption of access arises, and establishes that the court files should

be open to the public for inspection and copying. *Id.* at 1071-72. The common law right of access to court records is essential to the proper functioning of a democracy because citizens rely on information about the judicial system in order to form an educated and knowledgeable opinion of its functioning. *Coy*, 372 Ill. App. 3d at 1079, quoting *Skolnick*, 191 Ill. 2d at 230 (internal quotes omitted). The availability of court files for public scrutiny is essential to the public's right to monitor the functioning of the court system to ensure quality, honesty, and respect for our legal system. *Id.* The legislature has codified this common law right in section 16 of the Clerks of the Courts Act, which provides:

“All records, dockets[,] and books required by law to be kept by such clerks shall be deemed public records, and shall at all times be open to inspection without fee or reward, and all persons shall have free access for inspection and examination to such records, dockets[,] and books, and also to all papers on file in the different clerks' offices and shall have the right to take memoranda and abstracts thereto.” 705 ILCS 105/16 (6) (West 2010).

¶ 34 Objectors virtually conceded at oral argument that, if petitioners had been the *media*, then they would have been entitled to be heard on the issue of the right to access public documents. Although the cases we have found where intervention was granted for the limited purpose of addressing a right-of-access claim each involved media intervenors, we do not find this to be a distinguishing factor. *If* a right of access applies, we see no reason why that right would apply exclusively to media and not to other members of the citizenry. See, *e.g.*, *Marriage of Johnson*, 232 Ill. App. 3d at 1074 (the file of a court case is a public record to which the *people* and the press have a right of access). To find otherwise would run counter to the open nature of the right of access, as set forth above.

¶ 35 Similarly, we reject objectors' argument that, because petitioners, unlike the media, can seek the same information through discovery in their own respective cases, they do not have standing to bring a right-of-access claim. A citizen's right to access public records in *this case* should not be limited by whether the citizen, or group of citizens, happens to have another, or several, lawsuit(s) pending against the parties involved in the instant case. That petitioners *may* be able to get the same information through discovery in their own respective cases is not a defense to the alleged improper sealing of public records in this case. Either the right to access applies to the records in this case or it does not. Moreover, we find it more efficient for the trial court that sealed the records to review its own actions (much like a posttrial motion to reconsider) before this court reviews it, rather than to have an indeterminate number of litigants in other cases seek the documents before their respective trial courts.

¶ 36 Granting intervention for the limited purpose of providing petitioners the opportunity to bring their right-of-access claim would lead to findings on the access issue that this court could review, as the courts in *Kelly*, *Pelo*, *Coy*, and *Marriage of Johnson* have done. If, as here, a trial court bases its finding of an "enforceable or recognizable right" in the *merits* of the right-of-access claim rather than simply the *opportunity to bring* a right-of-access claim, the trial court would, paradoxically, have to reach the merits of the right-of-access claim to resolve what should be the *threshold* issue of whether intervention is proper. However, if intervention is denied, an appellate court is without jurisdiction to review the trial court's (implicit) finding on the right-of-access issue. See, *e.g.*, *Associated Press*, 162 F. 3d at 506 (where a petition to intervene is denied, the petitioners never became a party to the suit and, therefore, have no standing to appeal any other order other than the denial of the intervention).

¶ 37 We find it interesting that the trial courts in *Kelly*, *Pelo*, *Coy*, and *Marriage of Johnson* each granted intervention but proceeded to deny access to the sought after documents. *Kelly*, 397 Ill. App. 3d at 259 (right of access did not attach to potential exhibits, discovery, other crimes evidence, or a list of witnesses which had not yet been entered into evidence); *Pelo*, 384 Ill. App. 3d at 783-84 (right of access did not attach to deposition that had not yet been entered into evidence); *Coy*, 372 Ill. App. 3d at 1083-84 (though a presumption of a right of access attached to a settlement agreement between plaintiff doctor and defendant hospital, the trial court did not abuse its discretion in restricting the public’s access to the names of the seven non-party patients referenced in the settlement agreement); and *Marriage of Johnson*, 232 Ill. App. 3d at 1068, 1070-71, 1074-75 (the trial court denied access to the impounded documents, *but the appellate court reversed*, finding that the trial court had abused its discretion in denying media intervenors access to the settlement agreement that had been filed with the court). Still, granting intervention allowed for the trial court to make findings on the access issue that the appellate court could review.³

¶ 38 To evaluate an intervenor’s right-of-access, the trial court must first determine whether the presumption of a right of access applies to the documents at issue. *Kelly*, 397 Ill. App. 3d at 256. If a presumption of a right of access applies, the trial court must next engage in a balancing test of the competing interests at stake in denying or granting access to the impounded documents at issue. *Id.* at 260-61. The common law and statutory presumptions of access are “parallel” to the first

³ To whatever extent the trial court here *implicitly* reached the right-of-access issue and rejected petitioners' claim that they had a right to access documents, we are not saying it erred. We cannot reach that issue because the trial court did not address the right-of-access issue in a manner that this court could review.

amendment presumption and, therefore, they may be analyzed together. *Kelly*, 397 Ill. App. 3d at 256, citing *Skolnick*, 191 Ill. 2d at 231-33. The constitutional presumption applies to court proceedings and records that: (1) have been historically open to the public; and (2) have a purpose and function that would be furthered by disclosure. *Id.* As alluded to above, a right of access is not absolute; the right of access does not abrogate a trial court's inherent power to control its files and impound any part of a file in a particular case. *Johnson*, 232 Ill. App. 3d at 1072.

¶ 39 Objectors argue that, because the instant wrongful termination case between Bryan and MHS has since settled (subsequent to the trial court's denial of intervention), there is no longer a suit in which petitioners could intervene. Perhaps this argument would hold sway if petitioners sought to intervene in the traditional sense, *i.e.*, to participate in the suit itself and to have their legal interests addressed through the resolution of the suit. The suit has been resolved, so there is no longer a possibility of intervening in the suit so as to participate in it. However, we do *not* agree that settlement has rendered moot petitioners' claim concerning a right of access to documents. That a case has been settled or closed does not effect the public nature of a court record, and, therefore, settlement would not render moot a claim concerning a right to access public documents. For example, in *Coy*, the presumption of a right of access on the part of the media attached to a *settlement agreement* between the plaintiff doctor and the defendant hospital. *Coy*, 372 Ill. App. 3d at 1083; see also *Marriage of Johnson*, 232 Ill. App. 3d at 1074-75 (right of access attached to a settlement agreement).

¶ 40 In sum, the trial court erred in finding that these petitioners did not have standing to intervene. We recognize that a trial court, upon acknowledging that a party has standing to intervene for the purpose of challenging the sealing of court records, may nevertheless exercise its discretion

to deny the petition to intervene. See *Argonaut*, 355 Ill. App. 3d at 8 (once standing is resolved, the court may allow intervention at its discretion, and with consideration of the following factors: timeliness, (in)adequacy of representation, and sufficiency of the interest). However, the petition here *was* timely, the first amendment right to access public documents is a strong one, and it does not seem as though petitioners' complaint that entire pleadings and answers have been removed from the public record is frivolous. Therefore, to whatever extent the trial court moved beyond the issue of standing, and chose to deny the parties a chance at a formal ruling on the merits of their argument concerning access to court records, it abused its discretion.

¶ 41 In this order, we have addressed only the issue of whether the trial court properly denied the petition to intervene. We do not express any opinion as to whether the court properly applied the IMSA. Rather, we remand for the specific purpose of allowing the parties to litigate whether access to portions of the sealed record should be granted or denied. We reverse the trial court's finding of no standing and remand for a hearing on the merits of the public right to access, in accordance with the case law set forth herein.

¶ 42

III. CONCLUSION

¶ 43 For the aforementioned reasons, we reverse the trial court's denial of intervention.

¶ 44 Reversed and remanded.

