No. 101531-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DR. AMELIA BESOLA, Administrator and Petitioner,

Appellant,

v.

ERIC PULA, individually and as PERSONAL REPRESENTATIVE OF THE ESTATE MARK L. BESOLA, et al.,

Respondents.

ON PETITION FOR REVIEW FROM COURT OF APPEALS, DIVISION II No. 56205-7-II

ANSWER TO AMENDED PETITION FOR REVIEW

Quentin Wildsmith, WSBA #25644
Attorneys for Julia Besola-Robinson
LASHER HOLZAPFEL
SPERRY & EBBERSON PLLC
601 Union St., Suite 2600
Seattle, WA 98101
(206) 624-1230

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I. IDENTIFICATION OF RESPONDENT

Respondent Julia Besola-Robinson ("Julia") requests that this Court grant the Amended Petition for Review.

II. INTRODUCTION

Julia agrees with the Petitioner that the Court of Appeals' unpublished opinion in *Matter of Estate of Besola, Amelia Besola v. Eric Pula, et al*, 24 Wn.App.2d 1022, satisfies the criteria for acceptance of review. First, the opinion conflicts with the protections of the Washington Constitution and established Washington Supreme Court authority concerning open court proceedings and sealing of court records under GR 15 and *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

Second, the opinion involves issues of substantial public interest because the FormSwift documents that have been sealed from public view were prepared for illegal purposes utilizing a widely available tool in the commercial estate planning industry, and thus this Court's resolution of the issues will impact the Washington public and consumers who utilize these online

resources.

This case raises the unique question of whether estate planning documents – created on-line and utilized by a group of conspirators to defraud Dr. Mark Besola and his sisters – may be kept secret from Mark's family and the public without explanation and when no party requests that the records remain sealed. This Court should reverse the trial court's denial of the Petitioner's motion to unseal. Moreover, the Court should make clear that open court dockets play a unique and significant role in assuring public oversight of the judicial branch.

Julia urges the Court to recognize that sealed court records pose a significant threat to the public's ability to access court proceedings and records. The trial court's order is an improper attempt "to treat sealing orders as if they sealed caskets rather than presumptively open court records." *In re Marriage of Nicholas*, 186 Cal. App. 4th 1566, 1574, 113 Cal. Rptr.3d 629 (2010). Further, the trial court's failure to make the findings required by *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640

P.2d 716 (1982) and General Rule 15 requires reversal. Moreover, in light of the widespread and ever-growing use of on-line estate planning services, the public has a compelling interest in the availability of records related to fraud perpetrated through such services.

III. STATEMENT OF THE CASE

Julia incorporates the Petitioner's Statement of the Case. In addition, it is material to this review to understand the ongoing significance of the sealed records to the investigation into the fraud perpetrated on the estate, and to defend against further efforts by the alleged conspirators to further defraud Mark Besola and his family.

In 2018, Mark Besola was wheelchair bound with significant health problems and, while becoming increasingly isolated from his only family (his sisters Julia and the Petitioner), he became surrounded by people who moved into his home and who relied on him for their own housing and other financial needs. *Petitioner's Amended Petition for Supreme Court Review*,

Appendix F, FF 2-4, 7, 8. These people living at Mark's home had access to Mark's electronic devices and financial information throughout 2018 and early 2019. *Id*., FF 13.

The Court of Appeals' opinion recognized the existence of key facts that tied these people together to the eventual fraud perpetrated on Mark:

> Before Mark's[3] death, Brandon Gunwall, Eric Pula, and Kelly McGraw had been living on Mark's property at Lake Tapps. Mark, who "had significant health problems," died unexpectedly on January 1, 2019. Clerk's Papers (CP) at 187. For several months following Mark's death Pula, Gunwall, McGraw, and others continued to occupy Mark's property.
>
> Two days after Mark's death, Besola was appointed as the personal representative of Mark's estate. In late April, Besola evicted Gunwall, Pula, McGraw, and others from Mark's property.

COA Opinion, p. 2.

Prior to the discovery of the FormSwift evidence, two of the people (Brandon Gunwall and Kelly McGraw) were dismissed from the litigation. Yet even now, appeals involving the claims against Gunwall and McGraw are ongoing, and there is a federal lawsuit brought against Gunwall relating to Mark's non-probate assets that were electronically transferred to

Gunwall in 2018.

IV. ARGUMENT

A. The Decisions by the Trial and Appellate Courts Conflict with Established Constitutional Guarantees and Supreme Court Case Law.

It is the policy of the courts to facilitate access to court records as provided by Article I, Section 10 of the Washington State Constitution. GR 31(a). Put differently, it is always to be assumed that court records will be open to the public: "In determining whether court records may be sealed from public disclosure, we start with the presumption of openness." *Rufer v. Abbott Laboratories,* 154 Wn.2d 530, 540, 114 P.3d 1182 (2005). Under this presumption, the proponent seeking to seal a court record "has the burden of demonstrating the need to do so." *Id*. And protecting the openness of court records even further, even where no party opposes a closure, "the trial court has an 'independent obligation to safeguard the open administration of justice. Article 1, Section 10 is mandatory.'" *Hundtofte v. Encarnacion*, 169 Wn. App. 498, 508, 280 P.3d 513 (2012)

(quoting *State v. Duckett*, 141 Wn. App. 797, 804, 173 P.3d 948 (2007)), *aff'd,* 181 Wn.2d 1, 330 P.3d 168 (2014). *O'Neill v. Anthony Di Re, D.D.S., P.S.*, 13 Wn. App. 2d 1006 (2020).

While it is presumed that court records will be made open and available for public inspection, court records may be sealed "to protect other significant and fundamental rights." *Rufer v. Abbott Laboratories,* 154 Wn.2d at 540 (quoting *Dreiling v. Jain,* 151 Wn.2d 900, 909, 93 P.3d 861 (2004)). The party wishing to keep a record sealed usually has the burden of demonstrating the need to do so. *Id*. The procedure for sealing of court records is provided by GR 15.

To balance the constitutional requirement of the open administration of justice against potentially conflicting rights, the Supreme Court has directed courts to apply the five *Ishikawa* factors. *Rufer* at 544,114 P.3d 1182 (citing *Dreiling,* 151 Wn.2d at 908). *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36, 640 P.2d 716 (1982) "requires a showing that is more specific, concrete, certain, and definite than" the "compelling privacy or safety

concerns" required by GR 15. *State v. Waldon*, 148 Wn. App. 952, 962-63, 202 P.3d 325 (2009). The five *Ishikawa* factors are: (1) the proponent of closure must show need that amounts to a "serious and imminent threat" to a right; (2) anyone present during the motion must be given an opportunity to object; (3) the closure must be the least restrictive means available for protecting the threatened interests; (4) the court must weigh the competing interests of the proponent of closure and the public; and (5) the order must be no broader in its application or duration than necessary to serve its purpose. *State v. Parvin*, 184 Wn.2d 741, 765-66, 364 P.3d 94 (2015).

However, even if these standards are met, the proponent of sealing maintains an ongoing burden to show that sealing remains necessary and effective to protect the interests threatened under the current circumstances and must continue to justify sealing. *State v. Richardson*, 177 Wn.2d 351, 361-62, 302 P.3d 156 (2013) (citing *Ishikawa*, 97 Wn.2d at 39, emphasis added). A file will be unsealed if the proponent of continued

sealing can no longer overcome the presumption of openness under the five-factor *Ishikawa* analysis. *Id.; See also* GR 15(e)(2). In other words, if circumstances change and reasons for sealing no longer outweigh the public interest in openness, the file *must* be unsealed.

GR 15 also demonstrates the presumption that open court records are favored over sealed records. GR 15(c)(2) states that agreement of the parties alone does not constitute a sufficient basis to seal. GR 15(c)(3) dictates that a court record shall not be sealed if redaction will adequately resolve the issues before the court.

Here, the trial court' sealing order is erroneous on multiple fronts. First, it fails entirely to address the five *Ishikawa* factors. Second, it fails to explain why sealing rather than redaction is necessary as required by GR 1 (c)(3). Third, it fails to identify either the proponent of the sealing or the party who has compelling privacy or safety concerns that outweigh the public interest. All of these failures made it impossible for the Court of

Appeals to properly review the actions of the trial court to ensure that justice was done.

B. The Underlying Decisions Improperly Burdened the Proponent of Open Court Records.

At the September 3, 2021 hearing, the trial court asked Mr. Morgan (counsel for Petitioner) to establish why he needed access to the sealed records. COA opinion, p. 4. The trial court also engaged Mr. Shillito (counsel for Petitioner) in a debate about why he needed the records for his case in chief in the Will contest. *Id*. at 5. Thus, the trial court erroneously put the burden on parties seeking open disclosure of records, rather than on anyone seeking to seal the records from public view. Uniquely, the proponent of sealing here was the trial court itself. Without adequate review, how do parties or the public gain access to sealed documents if the proponent of sealing was the Court itself? If the proper standard is that one who wants to seal a court record must carry the burden of proof, how do parties and the public require the Court to show proof?

Importantly, the fifth *Ishikawa* factor requires that any sealing order "shall apply for a specific time period with a burden on the proponent to come before the court at a time specified to justify continued sealing." *State v. Waldon,* 148 Wn. App. 952, 963-64, 202 P.3d 325 (2009), quoting *Federated Publications, Inc. v. Kurtz,* 94 Wn.2d 51, 62-63, 615 P.2d 440 (1980). This is consistent with *Ishikawa's* overarching rule that courts are presumptively open and that any closure or sealing must be justified by "the parties seeking to infringe the public's right" to open justice. *Ishikawa,* 97 Wn.2d at 37-38. Thus, if GR 15(e) is construed, as it was here by the trial court, to require the proponent of unsealing records to prove a particular need for openness, it conflicts with *Ishikawa'* requirement that continued sealing must be justified by the proponent of sealing.

Here the trial court sealed the records under the pretext that it was protecting a non-party (Robyn Peterson) from possible criminal charges. The Court of Appeals never addressed whether this was an appropriate basis for continued sealing, nor

reevaluated when a new request was made to unseal. The Court of Appeals instead held:

> Additionally, Besola cites no authority establishing that GR 15(e)(3) requires the trial court to grant a motion to unseal based solely on a stipulation when the trial court sealed the record to protect a nonparty, Peterson, who was not a party to the stipulation. And when a party does not cite any authority to support an argument, we assume there is none. *Kanam v. Kmet*, 21 Wn. App. 2d 902, 911, 508 93 1071 (2022).

COA opinion, p. 10.

At the conclusion of the trial in the underlying case, the trial court found that Robyn Peterson created the fake will (possibly with the assistance of others), that she created the fake will with an intention to deceive, that her testimony was not credible, and that the fake will was the result of fraudulent conduct. *Amended Petition for Supreme Court Review,* Appendix F, FF 57-59, COL 3. Yet despite these findings involving Robyn Peterson, the trial court erroneously now withholds access to the very records that are part of the proof supporting the findings and conclusions that the court has already issued.

Robyn Peterson was never a "party" to the original

proceedings that resulted in these records being sealed, and yet the trial court required the proponents of open access to show why the records should be unsealed.

Even if Peterson initially had valid privacy concerns, once the trial court made its findings after trial, the public's constitutional interest in the open administration of justice outweighs Peterson's privacy concerns. There is no evidence in the record of imminent criminal proceedings against Peterson to support continued sealing. *See Hundtofte v. Encarnacion*, 181 Wn.2d 1, 330 P.3d 168 (2014). A sealing order must actually be "effective in protecting the interests threatened." *Id.* at 8 (quoting *Federated Publications, Inc. v. Kurtz,* 94 Wn.2d. 51, 62, 615 P.2d 440 (1980)).

Here, the trial court already made findings and conclusions that Robyn Peterson, and possibly others, had committed fraud against the Estate and had in fact deceived the court itself. In sum, these findings describe the bad acts of Peterson which the sealing order was designed to hide. The trial court findings are

part of the court record, and as such can be read by anyone. Continued sealing of the records does not meet the effectiveness test. It serves absolutely no purpose other than to promote mistrust of the courts by preventing a complete understanding of how the fraud was committed and who was involved in the fraud (*i.e.,* the possible other parties).

Accordingly, this Court should hold pursuant to *Ishikawa*, and the Court's independent duty to enforce Article I, Section 10, that the unsealing motion was improperly denied and that the trial court improperly burdened the proponents of open records with proving to the court why secrecy should not continue.

C. Without Sufficient Explanation by the Trial Court, This Court Has No Means by Which to Examine the Continuing Decision to Seal.

The opinion of the Court of Appeals does not address the failure of the trial court to explain its continued refusal to unseal the FormSwift records. A trial court's findings must be sufficiently specific to allow a reviewing court to engage in meaningful review. *Bennett v. Smith Bundy Berman Britton, PS,*

176 Wn.2d 303, 314, 291 P.3d 886 (2013). To be sufficient, the findings and conclusions should allow the reviewing court to determine what material issues the trial court decided, and its decision-making process. *City of Tacoma v. Fiberchem, Inc.,* 44 Wn. App. 538, 541, 722 P.2d 1357 (1986) (citing *Daughtry v. Jet Aeration Co.,* 91 Wn.2d 704, 707, 592 P.2d 631 (1979)). There is no indication that the trial court sealed the records after considering the criteria articulated in *Ishikawa.* In fact, it appears the trial court applied no standard at all, relying solely on the previously entered protective order and the parties' stipulation. Under our precedent, this was improper. *See Dreiling,* 151 Wn.2d at 917, 93 P.3d 861 ("When third parties move to intervene, the court may not stand on its previous [protective] order."); *see also Rufer,* 154 Wn.2d at 550, 114 P.3d 1182 (explaining that parties may file records under seal pursuant to the terms of a protective order, but the court should open such records upon motion "unless the party wishing to keep them sealed demonstrates an overriding interest"). Because the trial

court reached its decision without applying the proper legal standard, this Court should remand to the trial court to apply the correct rule and to determine whether the FormSwift records should be made public under the *Ishikawa* test.

D. Substantial Public Interest in Fraud and Forgery Accomplished Through Downloadable Estate Planning Documents Over the Internet.

During the last tragic year of Mark Besola's life he was in terrible physical health, was using a wheelchair, and was dependent on the people that had moved into his home. During that same year, the beneficiary designation for his financial accounts was changed using an on-line system (*i.e.*, no signatures or physical proof that Mark approved), resulting in house occupant Brandon Gunwall becoming his beneficiary, replacing Mark's family member as beneficiary. After Mark's death, house occupants Eric Pula and James Garrett, along with Robyn Peterson and likely others, used an on-line estate planning website (FormSwift.com) to create a fake will that very nearly was successful in stealing all of Mark's estate from his true

beneficiaries.

Abuse of vulnerable and elderly people through schemes using the internet and on-line resources is running rampant in our state and country. The Washington Attorney General has developed specific services and programs to help protect against this type of fraud due to the ever-increasing volume of scams. *See* https://www.atg.wa.gov/senior-fraud. Concerns about the use of on-line estate planning prompted the American Bar Association Section of Real Property Trust & Estate Law to designate a Task Force to evaluate the use of DIY methods in estate planning. *See* https://www.americanbar.org/groups/real_property_trust_estate/resources/estate_planning/diy_estate_planning/

The fake will in the present case that was created using the online FormSwift templates was particularly convincing. The trial court initially believed the will to be valid, in part because it included sophisticated and detailed sections such as "Digital Executor" and "Pet Care Directive".

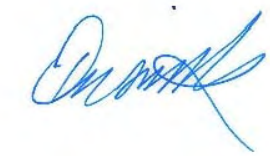
This case presents a real-life example of an internet based fraud and forgery scheme that very nearly succeeded in stealing millions of dollars. The sealed records contain documents used in this scheme. Washington consumers and the public have an overriding interest in examining and understanding how such schemes occur, which will help prevent the commission of similar fraud in the future.

VI. CONCLUSION

Based on the foregoing, Julia respectfully requests that the Supreme Court grant Petitioner's Amended Petition for Review.

Respectfully submitted this 2nd day of March, 2023.

I certify under RAP 18.17(c)(2) that this response contains 2702 words.



Quentin Wildsmith, WSBA #25644
Attorneys for Julia Besola-Robinson
LASHER HOLZAPFEL
SPERRY & EBBERSON PLLC
601 Union St., Suite 2600
Seattle, WA 98101
(206) 624-1230

CERTIFICATE OF SERVICE

I certify that on the 2nd day of March, 2023, I caused a copy of the foregoing document to be served via the Washington State E-Portal, to the following counsel of record:

KARE Kitsap Animal Rescue & Education Dianne Canafax, Registered Agent 12774 NE Seaside Way Seabeck, WA 98380 dianne@nwkare.org	UC Davis Veterinary Catastrophic Need F Thu Nguyen, Counsel 1111 Franklin Street 8th Floor Oakland, CA 94607 thu.nguyen@ucop.edu
Jose F. Vera Vera & Associates PLLC 100 W. Harrison, South Tower, Suite 300 Seattle, WA 98119-4218 josevera@veraassociates.com	Stuart Charles Morgan Grady Heins Ledger Square Law, P.S. 710 Market St Tacoma, WA 98402-3712 stu@ledgersquarelaw.com grady@ledgersquarelaw.com
Charles Tyler Shillito Smith Ailing PS 1501 Dock St Tacoma, WA 98402-3209 tyler@smithalling.com Andrea Brewer Andrea@smithalling.com	

I certify that on March 2, 2023 I sent by first class mail, postage prepaid, to Eric Pula at 435 S. Fawcett, Apt. 104, Tacoma, WA 98402.

The foregoing statements are true and correct and made under penalty of perjury under the laws of the State of Washington, at Seattle, WA, on March 2, 2023.

/s Krystalin Williams
Krystalin Williams

LASHER HOLZAPFEL SPERRY & EBBERSON

March 02, 2023 - 11:47 AM

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- lisaL@smithalling.com
- stu@ledgersquarelaw.com
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Sender Name: Krystalin Williams - Email: williams@lasher.com
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