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NO. 84903-0

SUPREME COURT OF THE STATE OF WASHINGTON

D. EDSON CLARK,

Appellant/Intervenor/Petitioner,

v.

SMITH BUNDAY BERMAN BRITTON, PS, *et. al.*

Respondents.

FILED
OCT 8 2010
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

**AMICUS CURIAE MEMORANDUM OF
ALLIED DAILY NEWSPAPERS OF WASHINGTON and
WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION
SUPPORTING REVIEW PURSUANT TO RAP 13.4**

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original

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I. INTRODUCTION

The Petition for Review should be granted because it involves an issue of substantial public interest – the extent of the public’s constitutional right to an open court system. As this Court said in *Dreiling v. Jain*:

The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public’s understanding and trust in our judicial system and to give judges the check of public scrutiny. This openness is a vital part of our constitution and our history.

Thus, this issue easily satisfies the RAP 13.4(b)(4) criteria for review.

The decision below announces a new rule that the public has no constitutional right to view a court record unless a court “considered” the record and ultimately made whatever decision the record was supposed to influence. This is a departure from the established rule that any record filed *in anticipation of a court decision* is presumptively open and cannot be sealed absent a compelling interest in secrecy. Because the Court of Appeals restricted the right to view court records to only what a court ultimately passes judgment on, regardless of the relevance of the records to the controversy placed before the court, this case merits acceptance under RAP 13.4(b)(4) as a matter of substantial public interest.

The petition also meets other RAP 13.4(b) criteria for discretionary review. It presents a significant question of law under the Washington Constitution: whether the public's right to access court records under Article I, Section 10, depends upon proving that a court actually used the records in making a ruling. Also, granting review would resolve a conflict between the Court of Appeals decision in this case and this Court's decision in *Rufer v. Abbott Laboratories*, which held that any document filed in anticipation of a court decision is presumptively open and subject to the compelling-interest test for sealing. Finally, review would resolve a conflict between the decision below and another Court of Appeals decision, *Marriage of Treseler and Treadwell*, which rejected the notion that the public has no interest in a record unless it is actually used by a court to make a decision. For these reasons, and because newspapers depend on openness in government – including courts - to effectively serve their role as public watchdogs, Amici respectfully urge this Court to accept review.

II. INTEREST AND IDENTITY OF AMICI

Allied Daily Newspapers of Washington (Allied) is a trade association representing 25 daily newspapers across the state. The Washington Newspaper Publishers Association (WNPA) is a trade

association representing 140 weekly community newspapers throughout Washington. Both Allied and WNPA (“The Newspapers”) regularly advocate for public access to records, including court records, to achieve government accountability for the citizens of this state. The Newspapers’ members frequently use civil and criminal court records to inform their readers about issues and controversies of public interest.

The Newspapers are involved in this case partly because they recognize the dangers inherent in requiring citizens to prove that a court actually considered a record in order to unseal the record. This new standard improperly places the burden of proof on citizens, instead of on the proponents of secrecy, flipping the presumption of openness on its head and inviting impractical inquiries into the thought processes of judges. The Newspapers also have a strong interest in rebutting the implication in the Court of Appeals decision that “evaluating the performance of the court” is the only legitimate reason to view court records. The Newspapers submit that, while the actions of judges are certainly of vital interest, the public also has a compelling interest in observing the actions of prosecutors, lawyers, litigants, witnesses, or others who influence the courts and consume their resources. The Newspapers believe that *any* use of our taxpayer-funded court system

invites public scrutiny, unless there is a compelling interest in secrecy outweighing the public interest. For example, voters should be able to assess the performance of elected prosecutors by examining the fairness or wisdom of charging decisions, even if charges ultimately are dropped. Also, citizens have an obvious interest in court records concerning the lawfulness of government activities, such as permitting controversial land developments, restricting speech, assessing property taxes, or condemning private property, regardless of whether a court ultimately decides liability. Litigation involving private parties also can raise compelling public concerns, regardless of what a court does or doesn't decide, such as in product liability or medical malpractice cases implicating public safety. It is common for parties to settle such cases on the condition of secrecy, but public knowledge about safety problems should not depend on whether a court has a chance to act before settlement. In sum, The Newspapers' interest in this case arises from the need to access *all* courts records, not just those known to have influenced a decision, in order to fully inform readers.

III. DISCUSSION

- A. **The Court of Appeals Departed from Precedent in Holding that Records Can be Shielded from Public View, Without a Compelling Interest in Secrecy, Unless They Are Considered in Making a Ruling.**

The Court of Appeals announced a new prerequisite for unsealing records that are filed under seal, pursuant to a protective order, in anticipation of a court decision. Op. at 1. That is, even if there is no compelling interest justifying continued secrecy, unsealing such records is required only “to the extent they enter into the court’s decision-making process *in making a ruling.*” Op. at 1 (italics added).

The Court stated:

Does the public have a constitutional right of access to sealed documents that were filed with the court in anticipation of a decision when the court does not read the documents and does not make the anticipated decision? Following Rufer, we conclude the answer is no because such documents have not become part of the court’s decision-making process.

Op. at 10, referring to *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 114 P.3d 1182 (2005).

This is the first time that the presumption of openness has been limited to records actually affecting an issued ruling. Previously, *any* record filed in court in anticipation of a court ruling was presumptively open, and subject to the compelling-interest test for sealing, regardless of whether the anticipated ruling was made or whether the judge actually read the record. In fact, *Marriage of Treseler and Treadwell*, which followed *Rufer*, expressly rejected the notion that the public has

no interest in a record unless it is “used by the court to make a decision.” *Treadwell*, 145 Wn. App. 278, 282, 285 (2008).

Treadwell reiterated the *Rufer* rule that a record is presumptively open once it is filed in court. *Id.* at 284. Recognizing that *Rufer* seemed to place some importance on whether a record was “never part of a trial court’s determination,” the *Treadwell* court said it is “inconsistent with the presumption of openness by filing” to “adopt a good-cause standard for [sealing] documents that were never part of a trial court’s determination.” *Id.* at 285. The Court continued:

[W]e believe the more applicable reasoning from *Rufer* to apply here is in that court’s discussion of non-dispositive motions. There, the court recognized that **everything that passes before a trial court is relevant to the fairness of the fact-finding process**, even if a document is later deemed inadmissible at trial or unsupportive of a viable claim. ***Rufer* did not hold that only documents that a trial court considered in rendering a decision are subject to the *Ishikawa* test.** Rather, the court held that any document filed in ‘anticipation of a court decision,’ whether or not dispositive of the entire case, triggers the public’s right of access and requires a compelling interest to seal.

Id. (emphasis added).¹ Thus, *Treadwell* affirmed that the public has a protected interest in viewing any record “that passes before a trial

¹ Referring to *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

court,” even if the record is not used in a decision. *Id.*² This Court should accept review to resolve the conflict between the *Rufer* and *Treadwell* decisions and the Court of Appeals decision in this case.

Allowing a court to seal records solely because it never reviewed or considered them – as happened in this case – ignores this Court’s admonition that Article I, Section 10 applies as much to the process as to the results of litigation. As this Court emphasized in *Rufer*: “The open administration of justice is more than just assuring that a court achieved the ‘right’ result in any given case.” 154 Wn. 2d at 542. Discussing “the extent of the public’s right to the open administration of justice,” this Court said:

If we define this right narrowly to consist only of the observation of events leading directly up to the court’s final decision, then arguably any documents put before the court that were not part of that final decision would be outside of the scope of article I, section 10. Put another way, if the jury does not see it, the public does not see it. **But our prior case law does not so limit the public right to the open administration of justice.** As previously noted, the right [to open administration of justice] is not concerned with merely whether our courts are generating legally sound *results*. Rather, we have interpreted this constitutional mandate as a means by which the public’s trust and confidence in our *entire judicial system* may be strengthened and maintained.

² Whether a record is used in decision-making is an impractical standard because it requires speculation about a judge’s thoughts. *Treadwell* at 285.

Id. at 548-49 (italics in original, bold added).

The decision below contradicts the reasoning of *Rufer* that the public is entitled to observe the entirety of our court system, including not just “results” but all court filings offered to influence those results.

Id. Because the decision is inconsistent with *Rufer* and *Treadwell*, and substantially affects the public’s right to open administration of justice, it should be reviewed and reversed.

B. Under Prior Case Law, Courts Considered Whether Records Were Relevant to the Parties’ Motions When Filed, Not What Happened After Filing.

In *Dreiling v. Jain*, 151 Wn. 2d 900, 904, 93 P.3d 861 (2004), this Court held that a compelling interest in secrecy is required to seal dispositive motions or the records supporting such motions. This Court said there are “good reasons to distinguish between” records that are attached to a dispositive motion filed in court, and “mere discovery” material that surfaces before trial and is “unrelated, or only tangentially related,” to the case. *Id.* at 909-10. Referring to the latter category of material that is obtained through pretrial discovery and turns out to be unrelated to the lawsuit, this Court said: “As this information does not become part of the court’s decision making process, article I, section 10 does not speak to its disclosure.” *Id.* In making that statement, the

Court was simply distinguishing between records at the extreme ends of the public-interest spectrum – those which are not even relevant to a controversy (which presumably are not filed in court), and those which are sufficiently relevant that they are filed in court to justify a desired disposition. Thus, it is relevance of the record to the lawsuit - not the record's ultimate impact on the case - that matters in a sealing analysis.

Review is needed here to restore *Dreiling*'s rule that if a record is relevant enough to be attached to a motion, it should be open to public view, unless a compelling interest in secrecy outweighs the public interest in openness. *Id.* at 912. *Dreiling* does not say that the public has no interest in a record unless it is actually considered by a court in decision making. It does not focus only on judges' actions, as if controversies which have consumed court resources are worthy of public attention only if courts have a chance to act before settlement. Because the Court below misconstrued this Court's holding, review is needed to clarify the law.

In opposing review, the respondents assert that only confidential tax information is at stake, which is not true,³ and profess to be concerned about "misuse" of Article I, Section 10 by "strangers to

³ See Petitioner Ed Clark's Motion for Reconsideration, p. 16, explaining in detail the information other than tax filings that is involved.

litigation” pursuing “agendas.” Answer to Petition for Review, p. 1.

But this Court has addressed concerns that parties could use openness requirements to embarrass opponents by attaching confidential but irrelevant documents to motions. In *Rufer*, this Court said:

If a party attaches to a motion something that is both irrelevant to the motion and confidential to another party, the court should seal it. When there is indeed little or no relevant relationship between the document and the motion, the court, in balancing the competing interests of the parties and the public pursuant to the fourth *Ishikawa* factor, would find that there are *little or no valid interests*...of the public with respect to disclosure of the document.

Rufer, 154 Wn.2d at 547-48 (italics in original, bold added). Because the decision below conflicts with *Rufer*, *Dreiling* and *Treadwell* in a matter of substantial and constitutional import, review should be granted. RAP 13.4(b).

IV. CONCLUSION

For the foregoing reasons, this Court should grant review.

Dated this 25th day of September, 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on September 25, 2010, I caused the delivery of a copy of the Motion for Leave to File an Amicus Curiae Memorandum, and related memorandum, to the following:
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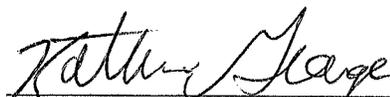
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