

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Apr 05, 2011, 4:29 pm
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

No. 84903-0

SUPREME COURT
OF THE STATE OF WASHINGTON

D. EDSON CLARK,

Appellant/Intervenor/Petitioner,

v.

SMITH BUNDAY BERMAN BRITTON, P.S., *et al.*,

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENTS

SMITH GOODFRIEND, P.S.

PREG O'DONNELL
& GILLETT, PLLC

By: Catherine W. Smith
WSBA No. 9542

By: Mary C. Eklund
WSBA No. 12416

1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974

1800 Ninth Avenue, Suite 1500
Seattle WA 98101-1340
(206) 287-1775

Attorneys for Respondents

FILED
APR 05 2011
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

TABLE OF CONTENTS

I. INTRODUCTION 1

II. SUPPLEMENTAL ARGUMENT..... 2

III. CONCLUSION..... 7

TABLE OF AUTHORITIES

CASES

Drelling v. Jain, 151 Wn.2d 900, 93 P.3d 861
(2004).....2-4

Marriage of Treseler and Treadwell, 145 Wn.
App. 278, 187 P.3d 773 (2008), *rev. denied*,
165 Wn.2d 1026 (2009)4-6

Rhinehart v. Seattle Times Co., 98 Wn.2d 226,
654 P.2d 673 (1982), *judgment aff'd*, 467 U.S.
20, 104 S. Ct. 2199, 81 L.Ed.2d 17 (1984).....7

Rufer v. Abbott Laboratories, 154 Wn.2d 530
114 P.3d 1182 (2005)3-4

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640
P.2d 716 (1982)passim

RULES AND REGULATIONS

CR 267

CONSTITUTIONAL PROVISIONS

Washington Constitution Article 1, Section 10.....passim

I. INTRODUCTION

The Court's website frames the issue for review as:

Whether sealed documents appended to a summary judgment motion and filed with the trial court but not considered by the court in reaching its decision may be ordered to remain sealed only upon consideration of the five-part test articulated in ***Seattle Times Co. v. Ishikawa***, 97 Wn.2d 30, 640 P.2d 716 (1982).

The answer to this question is "no." This Court developed the ***Ishikawa*** test to insure the public's right to access to *court proceedings* under Article 1, Section 10 of our State Constitution ("Justice in all cases shall be administered openly. . ."). The ***Ishikawa*** test has no application to discovery documents, produced pursuant to a valid protective order, that were never considered by the court in making any decision, dispositive or otherwise. Where, as here, the trial court judge who presided over the proceedings finds, based on his personal knowledge, that the documents filed under seal had nothing to do with any decision made by the court, there is no judicial proceeding, open or otherwise, to which Article 1, Section 10 and the ***Ishikawa*** test applies.

II. SUPPLEMENTAL ARGUMENT

The plain language of Article 1, Section 10, limits its applicability to cases in which "justice . . . [is] administered." Further, the limitations of this constitutional mandate are apparent from the court closure and sealing that was at issue in the *Ishikawa* case itself. Having held that the trial court judge erred in closing pretrial hearings from the public in a murder prosecution, this Court promulgated the *Ishikawa* test to guide the courts' determination whether records of the hearings should be unsealed. The Court focused on the "active role of the court in managing closure motions . . . [w]hen a perceived clash between a [criminal] defendant's fair trial right and the right of free speech arises . . ." *Ishikawa*, 97 Wn.2d at 45.

In *Drelling v. Jain*, 151 Wn.2d 900, 93 P.3d 861 (2004), the Court held that documents sealed in connection with a motion to terminate a shareholders' derivative suit were presumptively open. Once again, the Court focused on the need for openness in judicial proceedings in holding that records considered in the courts' administration of justice in civil, as well as criminal cases, were subject to the *Ishikawa* test: "Our founders did not countenance

secret justice. . . . Open access to government institutions is fundamental to a free and democratic society. . . . Proceedings cloaked in secrecy foster mistrust and, potentially, misuse of power. Again, the operations of the courts and the judicial conduct of judges are matters of utmost public concern.” *Drelling*, 151 Wn.2d at 908.

Finally, this Court held that “the public must – absent any overriding interest – be afforded the ability to witness the complete judicial proceeding, including all records the court has considered in **making any** ruling, whether ‘dispositive’ or not” in *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 549, ¶ 30 114 P.3d 1182 (2005) (italics in original; bold emphasis added). This Court once again applied Article 1, Section 10 and the *Ishikawa* test to documents filed and considered in making decisions in court – “documents considered by the Court and discussed openly during these proceedings (both trial and pretrial)” and “depositions, limited portions of which were utilized at trial” before a jury that relied on this evidence in reaching its verdict against defendant Abbott Laboratories, which resisted unsealing the records. *Rufer*, 154 Wn.2d at 537-38.

The corollary of the rules announced in *Dreiling* and *Rufer* is that the *Ishikawa* test does not apply when the public's right to the open administration of justice is not implicated because the court has not considered filed documents or in any way conducted a proceeding in which the documents were considered. This Court noted in *Rufer* that it had "already held that article I, section 10 is not relevant to documents that do not become part of the court's decision making process." 154 Wn.2d at 548 ¶ 27, citing *Dreiling*, 151 Wn.2d at 909-10. Under this Court's decisions in *Rufer* and *Dreiling*, the Court of Appeals in this case properly held that once the trial court confirmed that it had not considered the materials at issue here, its formal inquiry into whether the documents should remain sealed properly ended. 156 Wn. App. at 308 ¶ 27.

Division One's decision in *Marriage of Treseler and Treadwell*, 145 Wn. App. 278, 187 P.3d 773 (2008), rev. denied, 165 Wn.2d 1026 (2009), is not to the contrary, and in fact demonstrates the proper application of the *Ishikawa* test when documents have been considered by the court in ruling on a matter before it. In *Treseler*, a defendant sought to seal pleadings relied

upon by the court in entering temporary restraining and show cause orders. Noting that "it is beyond dispute that the documents were all filed in anticipation of a court decision," 145 Wn. App. at 284 ¶ 13, and that "the court commissioner who entered the show cause orders expressly incorporated into her findings material from the declaration supporting the request for the order" that was among the documents the defendant sought to seal, 145 Wn. App. at 285 ¶ 15, the Court of Appeals affirmed the superior court's decision denying the motion to seal.

Significantly, the court in *Treseler* determined that the documents had in fact been considered in making a judicial ruling before holding that the *Ishikawa* test applied. The case demonstrates the wisdom of a rule that a proponent of continued sealing should have the initial burden of proving that the court did not in fact consider the documents at issue in making a decision. This presumption that anything filed is presumptively open and that the person seeking to seal has to show the materials were not part of any decision-making process properly protects the public in its right to the open administration of justice.

In *Treseler*, for instance, the documents at issue had initially been filed without seal and open to public access in an action that was later dismissed. The defendant brought his motion to seal two years after the action was dismissed. The motion to seal was considered by a superior court judge who had not been involved in making the earlier decisions in which the documents the defendant sought to have sealed had "beyond dispute" been considered. *Treseler*, 145 Wn.2d at 284 ¶ 13. Thus, the defendant could not prove that the documents at issue had not been considered by the court in making a decision.

Here, however, the same superior court judge who had presided over the underlying action declined to unseal the documents, in the certain knowledge that he had not considered them in making a decision in the case. (See CP 231-33, *quoted* 156 Wn. App. at 301-02 ¶ 12) Under these circumstances, the public's constitutional right to the open administration of justice that the *Ishikawa* test is intended to protect was not implicated, and the trial court was not obligated to make formal findings on the *Ishikawa* factors before declining to unseal records filed pursuant to a valid protective order.

The public, and the press, have a legitimate interest in how the courts go about their business. Here, however, because there was no judicial business concerning the documents, they were not relevant to the public's interest in the open administration of justice under Article 1, Section 10. The materials at issue were obtained pursuant to a protective order in discovery, and attached by an intervenor to a declaration filed after the parties had settled the case. The public had no interest in these records, and the parties were entitled to keep them confidential:

Inherent in CR 26(c), providing for protective orders, is a recognition that parties generally are not eager to divulge information about their private affairs, and that when called upon to do so in a lawsuit, will be even more reluctant if they are not assured that the information which they give will be used only for the legitimate purposes of litigation.

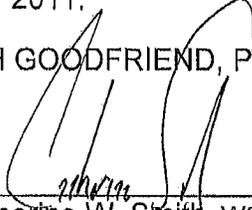
Rhinehart v. Seattle Times Co., 98 Wn.2d 226, 255, 654 P.2d 673 (1982), *judgment aff'd*, 467 U.S. 20, 104 S. Ct. 2199, 81 L.Ed.2d 17 (1984).

III. CONCLUSION

Because the trial court never considered the documents at issue in making any decision, no countervailing public interest in the open administration of justice required explicit analysis of the ***Ishikawa*** factors. This Court should affirm.

DATED this 5th day of April, 2011.

SMITH GOODFRIEND, P.S.

By: 
Catherine W. Smith, WSBA No. 9542
Attorneys for Respondents

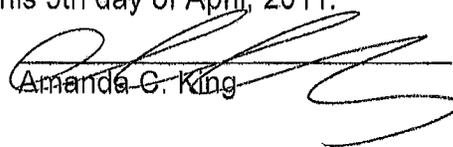
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 5, 2011, I arranged for service of the foregoing Supplemental Brief of Respondent, to the court and to the parties to this action as follows:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Mary C. Eklund Preg O'Donnell & Gillett, PLLC 1800 Ninth Avenue, Suite 1500 Seattle WA 98101-1340	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Michele Earl-Hubbard Allied Law Group 2200 Sixth Avenue, Suite 770 Seattle, WA 98121	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Rondi Bennett P.O. Box 53224 Bellevue, WA 98015	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail
Gerald Horrobin 116 Fairview Avenue No., #1126 Seattle, WA 98109	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail
Kathleen Benedict Frelmund Jackson Tardif & Benedict Garratt 711 Capitol Way S Ste 605 Olympia, WA 98501-1236	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Katherine George Harrison Benis & Spence LLP 2101 Fourth Avenue, Suite 1900 Seattle, WA 98121	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Michael T. Callan Peterson Russell Kelly, PLLC 10900 N.E. 4th Street, Suite 1850 Bellevue, WA 98004-8341	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 5th day of April, 2011.


Amanda G. King

OFFICE RECEPTIONIST, CLERK

To: Tara Friesen
Cc: michele@alliedlawgroup.com; meklund@pregodonnell.com; bschmidt@pregodonnell.com; benedict@benedictlaw.com; kgeorge@hbslegal.com; mcallan@prklaw.com
Subject: RE: Clark v. Smith Bunday Berman Britton, P.S., et al., Cause No. 84903-0

Rec. 4-5-11

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Tara Friesen [<mailto:taraf@washingtonappeals.com>]
Sent: Tuesday, April 05, 2011 4:36 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: michele@alliedlawgroup.com; meklund@pregodonnell.com; bschmidt@pregodonnell.com; benedict@benedictlaw.com; kgeorge@hbslegal.com; mcallan@prklaw.com
Subject: RE: Clark v. Smith Bunday Berman Britton, P.S., et al., Cause No. 84903-0

Attached for filing in .pdf format is the Supplemental Brief of Respondents, in *Clark v. Smith Bunday Berman Britton, P.S., et al.*, Cause No. 84903-0. The attorney filing this document is Catherine W. Smith, WSBA No. 9542, e-mail address: cate@washingtonappeals.com.

Tara Friesen
Legal Assistant
Smith Goodfriend, P.S.
1109 First Avenue, Suite 500
Seattle, WA 98101
(206) 624-0974
taraf@washingtonappeals.com