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NO. 88036-1

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SUPREME COURT OF THE STATE OF WASHINGTON

AARON HUNDTOFTE ET AL.,

Respondents,

v.

IGNACIO ENCARNACION ET AL.,

Appellants.

**KING COUNTY DEPARTMENT OF
JUDICIAL ADMINISTRATION'S
RESPONSE TO SELECTED ARGUMENTS OF AMICI**

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ORIGINAL

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A. **ISSUE**

Is it lawful for a county clerk, pursuant to a trial court's order, to refuse to redact the Superior Court Management Information System (SCOMIS) when it cannot do so without disregarding several express requirements of GR 15?

B. **SELECTED RESPONSES TO AMICI**

As noted in its supplemental brief to this Court, the King County Department of Judicial Administration (hereinafter referred to as the Clerk) does not believe it is appropriate for it to address the merits of either the trial court's or the Court of Appeals' analysis of the factors set forth in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). The Clerk asserts no authority or standing to challenge a court's application of the Ishikawa factors, and the Clerk would never contemplate refusing a superior court's order simply because it disagreed with the superior court's discretionary conclusions in that regard.

Rather, the Clerk's concern pertains to its inability to carry out the trial court's order in this case to redact SCOMIS without disregarding the requirements that the Clerk is obligated to follow under GR 15(c). It is this aspect of the trial court's order – i.e., the trial court's direction to the Clerk, as opposed to the court's

conclusion that Encarnacion's personal interests outweigh the public's constitutionally protected interest in the open administration of justice – that is at the heart of the Clerk's intervention in this matter.

Accordingly, this brief is intended to respond succinctly to those points made by amici who submitted briefs in support of Ignacio Encarnacion that touch on the Clerk's position.

1. THE CLERK IS LIMITED TO THE VERSION OF SCOMIS THAT IS CURRENTLY AVAILABLE.

In its brief to this Court, amicus Tenants Union of Washington State asserts that:

[T]he [Clerk] has thrown up its hands in the face of a technological hurdle, and would rather permit a mark to remain on the records of innocent tenants, jeopardizing their access to housing, than adapt its electronic system.

Brief of Amicus Tenants Union of Washington State, at 16-17. Not only does Tenants Union distort the Clerk's position in this case for misleading histrionic effect, it also misunderstands the relationship between the 39 county clerks in this state, and the operators of SCOMIS.

SCOMIS is administered by this Court's Administrative Office of the Courts (AOC) and Judicial Information Systems

Committee (JISC), pursuant to RCW chap. 2.68. See also JISCR 1. County clerks throughout Washington have the authority *to enter information* into SCOMIS, but an individual county clerk does not have the ability *to modify or alter the operating system itself*. In other words, the Clerk cannot, as amicus Tenants Union suggests, simply “adapt its electronic system.” The Clerk is subject to the limitations of the version of SCOMIS made available to it and its county counterparts by AOC and JISC.

In its current form, SCOMIS's operating system does not allow for a clerk to redact the index while also enabling the clerk to adhere to GR 15(c)(5) and (c)(6) by creating and separately maintaining an unredacted version, sealed from public inspection, but available for disclosure in the future should such disclosure be ordered pursuant to GR 15(e). The Clerk does not know whether such technology is available and, if so, at what cost. AOC and JISC are the offices that would have to purchase or develop, and maintain, such new technology. Those entities have not been heard from in this case.

The Clerk does know, however, that the trial court's order to redact the current version of SCOMIS would permanently alter the only copy of that index that is available to all courts and the public.

In other words, the trial court's order effectively directs the Clerk to disregard a number of express requirements within GR 15(c) regarding the designation and maintenance of redacted and unredacted court records, renders GR 15(e) moot as to SCOMIS, and amounts, in essence, to destruction of the existing SCOMIS court record.

2. GR 15 MUST BE INTERPRETED CONSISTENTLY WITH ART. 1, SEC. 10 OF THE WASHINGTON CONSTITUTION

Amici American Civil Liberties Union (ACLU) and Legal Voice and Washington State Coalition Against Domestic Violence (LV-WSCADV) contend that redaction of SCOMIS to conceal from the public the identities of parties in unlawful detainer actions should be routinely allowed because users of SCOMIS would want such information for purposes unrelated to oversight of the judiciary by the public and maintenance of the public's confidence in the fairness of the judicial branch of government. Brief of Amicus ACLU, at 12-13; Brief of Amicus LV-WSCADV, at 12. To take these amici's arguments to their logical conclusion, they suggest that court records should be open to the public only if the interest of a particular member of the public in inspecting particular records passes some inspection for motivational purity.

The Washington Constitution contains no such qualifications. Article 1, sec. 10 provides: "Justice in all cases shall be administered openly." As this Court observed over 50 years ago, the "clerk's file is the court record. It is notice to the world of what it contains and *all interested persons* have access to it." Shumate v. Ashley, 46 Wn.2d 156, 157, 278 P.2d 787 (1955) (emphasis added). Accordingly, the provisions in GR 15 that authorize the Clerk and its counterparts throughout the state to seal or redact must be interpreted consistently with the state constitution's insistence on the open administration of justice as guaranteed in art. 1, sec. 10. See State v. Waldon, 148 Wn. App. 952, 962-65, 202 P.3d 325, rev. denied, 166 Wn.2d 1026 (2009).

Secrecy in the administration of justice fosters mistrust, and the operations of the courts are matters of utmost public concern. Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). In the current manifestation of SCOMIS available to the Clerk, there is no ability to inform users that the index itself has been redacted and is, thus, an incomplete court record.

Typically, when a court record within a case file has been redacted, a person interested in looking at the document is readily aware – both because the court file's list of documents indicates

“redacted” where appropriate and because words are blacked-out in the record itself – that he or she is looking at something less than the whole document. In addition, examination of the court file will quickly reveal that an unredacted version of the same record is maintained by the clerk under seal, and the interested party will have access to the redacting court’s findings and conclusions justifying its directions to the clerk.

However, when the SCOMIS index itself is altered, a county clerk has no ability, within SCOMIS’s current form, to alert users to the fact that the index itself is incomplete, and that it has been deliberately altered to hide information from the public. As Encarnacion has expressly maintained throughout the life of this matter, this is *the very reason* why he wants redaction of SCOMIS to take place – so that users will effectively be misled into believing that he has not been party to a certain action within our public court system.

This is a proposition that alarms the Clerk, who is obligated by statute and court rule to maintain court records, including a docket with the titles of all actions, and to make them publicly available. See, e.g., RCW 2.32.050(10); RCW 36.23.030(2); see also GR 15(c)(4) (requiring clerk, when an entire court file has been

ordered sealed, to continue to maintain within court indices the relevant case number, names of parties, case type, and other specified information). A version of SCOMIS that (a) alerts the public that it is incomplete because it has been redacted, (b) informs the user of the specific cause numbers in which redaction orders were entered that rendered SCOMIS less than whole, and (c) maintains a separate, unredacted index that could be available to a user upon successful motion pursuant to GR 15(e), would, in theory, comply with GR 15 and art. 1, sec. 10 of the state constitution. However, such a version of SCOMIS does not currently exist, and it is beyond the Clerk's authority or ability to create one.

To carry out the trial court's direction to redact SCOMIS under the present circumstances would engender mistrust of the index, which is, generally speaking, the principal, if not sole, mechanism by which the public locates court records. Such suspicion would only increase, and cause the public to deem SCOMIS a dubious tool indeed, should redaction of parties' names become fairly commonplace as, several amici seem to believe, would be appropriate.

Finally, despite its reluctance to argue Ishikawa-related issues, the Clerk feels obligated – due to its role as a named party in the instant matter, and thus afforded the sole ability to reply to amici’s briefs – to note that amicus ACLU’s suggestion that this Court has drawn a distinction between the constitutional significance of court *proceedings* and court *records* lacks any support. Brief of Amicus ACLU, at 5-6. This Court has never so held. In fact, it is well-established that redaction or sealing of both hearings and records are subject to the same scrutiny. See Dreiling, 151 Wn.2d at 908-09; Ishikawa, 97 Wn.2d at 37-38.

Also, amicus Tenants Union attached to its brief to this Court a declaration signed by its executive director, attesting to difficulties that prospective tenants face when court records are open to the public. This case is an appeal, and the rules of appellate procedure apply to amici as well as to parties. Within the director’s declaration are numerous anecdotes, which cannot be verified, analyzed, or tested by this Court. Accordingly, to the extent that this declaration is unsupported by the record before this Court, it should be stricken and disregarded. RAP 9.1; 10.4(f).

Moreover, if amicus Tenants Union and its like-minded amici prevail, and court indices such as SCOMIS could be redacted, a

perhaps-unintended consequence will be that it will become next to impossible for any statistical or scholarly examination of judicial records to take place to verify the thrust of the anecdotal information contained both within Tenant Union's declaration and within the body of several of the other amici's briefs. (A search of SCOMIS by party names associated with certain ethnicities in order to evaluate the nature and judicial treatment of eviction actions brought against members of those ethnicities will be impossible, for instance.) SCOMIS will no longer be useful to scholars, legal advocacy groups, or the public as a whole as an effective portal into the records of the administration of justice. Amici's position proves the wisdom of the position they oppose. Court records and indices must be public if justice is to be administered openly.

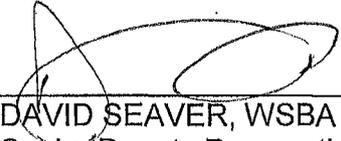
C. **CONCLUSION**

For these reasons, as well as those presented in the Clerk's supplemental brief to this Court and in its submissions to the Court of Appeals, the Clerk respectfully asks this Court to reject the arguments of amici, and to hold that the Clerk cannot lawfully be required to redact SCOMIS in its current form.

DATED this 3rd day of June, 2013.

RESPECTFULLY submitted,

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Good Afternoon:

Attached please find King County Department of Judicial Administration's Response to Selected Arguments of Amici and a Declaration of Service, for filing in the following case:

Aaron Hundtofte and Kent Alexander v. Ignacio Encarnacion and N Karla Farias

Supreme Court No. 88036-1

Submitted by David Seaver, Senior Deputy Prosecuting Attorney, WSBA No. 30390

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Thank you.

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