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Ct. of Appeals No. 66428-0-I

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IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

AARON HUNDTOFTE AND KENT ALEXANDER,

Plaintiffs,

v.

IGNACIO ENCARNACIÓN AND KARLA FARIAS,

Defendants-Petitioners,

KING COUNTY SUPERIOR COURT,

Intervenor-Respondent.

AMICUS CURIAE MEMORANDUM OF ALLIED DAILY
NEWSPAPERS OF WASHINGTON, WASHINGTON
NEWSPAPER PUBLISHERS ASSOCIATION and
WASHINGTON COALITION FOR OPEN GOVERNMENT
OPPOSING PETITION FOR REVIEW

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I. INTRODUCTION

In reversing the trial court in this case, the Court of Appeals properly applied the well-established Article I, Section 10 test for concealing court records from the public. There was nothing new about that test requiring review. Moreover, the holding was properly based on the factual reality that there are no compelling circumstances justifying concealment of the petitioners' names. Discretionary review would serve no purpose where petitioners failed to demonstrate any specific, imminent threat to a protected interest which would justify the courts' complicity in secrecy. In fact, petitioners offered only generalized fears that, if the Superior Court Management Information System (SCOMIS) index makes it possible to discover they were once defendants in an unlawful detainer suit, *someone someday somehow* might use the information in a manner which petitioners would consider to be unfair. This highly speculative factual underpinning falls far short of meriting this Court's attention.

There must be a real risk of confusion about the law, or some substantial public interest in righting a wrong, to warrant review. Here, the Court of Appeals correctly applied the existing law, consistently with this Court's long history of safeguarding the public's right to open administration of justice. Accordingly, review should be denied.

II. INTEREST OF AMICI

Allied Daily Newspapers of Washington (Allied) is a non-profit trade association representing 25 daily newspapers in Washington. Washington Newspaper Publishers Association (WNPA) is a non-profit trade association representing 140 weekly community newspapers in this state. Washington Coalition for Open Government (WCOG) is a non-profit statewide organization dedicated to promoting and defending the public's right to know about the conduct of public business and matters of public interest. These three nonpartisan organizations advocate for public access to government records, including court records, as part of government accountability to the citizens of this state.

The organizations oppose the petition because, as amici below, they argued in favor of the position taken by the Court of Appeals, and they believe that review would not - and should not - change the outcome. Granting review when there is no error to correct would create uncertainty pending the final outcome, and a contrary decision could jeopardize the public's ability to access a wide variety of court records. The organizations' members often use SCOMIS as a source of information about issues of public interest. Newspapers' ability to fully inform readers about their courts would be impaired if names of any litigants can

be hidden based on speculative, generalized fears of harm, as the petitioners advocate. More generally, Allied, WNPA and WCOG often participate as amici in cases involving Article I, Section 10 and have a strong interest in strictly adhering to the constitutional requirement to limit closures to exceptional circumstances.

III. DISCUSSION

This Court will review a Court of Appeals decision only if it conflicts with a decision of this Court or another decision of the Court of Appeals, involves a significant question of law under the state or federal constitutions, or “involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b). None of these criteria are met here, where the Court of Appeals decision was based on the particular facts of the case, without presenting any novel question of law. The fact-specific nature of the issues is apparent from the Petition’s summary of “Issues Presented for Review,” asking whether substantial evidence supported the trial court’s factual findings and whether the trial court correctly determined that the petitioners need to hide records of an eviction suit in order to obtain rental housing. Pet., p. 1. Because the Court simply applied the well-established rules to the facts of the case, there is no risk of confusion about the law and no reason for review.

A. There is No Conflict with the Rousey Decision.

In Indigo Real Estate Services v. Rousey, 151 Wn.App. 941, 944-945 (2009), a renter brought an uncontested motion to redact her full name from SCOMIS based on the same arguments presented by petitioners in this case – she had settled an eviction suit without being evicted, and she feared that merely being associated with the suit would jeopardize future rental opportunities. The trial court denied the motion. Id. at 945. The Court of Appeals held that SCOMIS is a court record subject to both GR 15 and Article I, Section 10 restrictions on redaction, and remanded the case for application of the proper standards. Id. at 950-951.

As Allied, WNPA and WCOG argued below, the Court of Appeals did *not* hold in Rousey that eviction defendants who avoid eviction are entitled to remove names from SCOMIS. Id. In fact, the Court in this case specifically rejected the petitioners' argument that Rousey embraced the notion of a renter's right to hide landlord suits. Hundtofte v. Encarnacion, 169 Wn.App. 498, 512, 280 P.3d 513 (2012) ("contrary to Encarnación's and Farias's assertion, we have never held "that protecting...a tenant's housing prospects could be 'compelling enough to override the presumption of openness' in some circumstances"). And contrary to

petitioners' assertions, the Court of Appeals opinion in this case is entirely consistent with Rousey. Pet., p. 6.

In both Rousey and this case, the Court of Appeals properly recognized that GR 15 alone does not sufficiently protect the public interest in maintaining open court records because it does not include the constitutional requirement to demonstrate a serious and imminent threat to an important interest justifying closure. Rousey, 151 Wn.App. at 948; Hundtofte, 169 Wn.App. at 510. In both cases, the Court of Appeals held that the renters' name redaction motions were subject to the five-part Ishikawa test¹ as well as GR 15. Rousey at 948; Hundtofte at 509-510. And in both cases, the Court of Appeals stated (unremarkably) that courts must decide on a case-by-case basis whether to erase a renter's name from SCOMIS records of eviction suits. Rousey at 952; Hundtofte at 511. As Rousey explained:

[T]he court has identified by rule particular records and information to which access is restricted. ...Notably, the court has not established...general restrictions for unlawful detainer proceedings. Instead it has emphasized by rule and decision that requests to restrict access to court records and information *must be decided on a case-by-case basis*, starting with the presumption of openness.

¹ Seattle Times v. Ishikawa, 97 Wn.2d 30, 37, 640 P.2d 716 (1982).

Rousey at 952 (italics added). In sum, the Court of Appeals used the same analysis in this case as in Rousey. Thus, there is no conflict with Rousey warranting review by this Court.

B. The Court of Appeals Followed The Constitutional Test Established By This Court.

In deciding this case, the Court of Appeals relied heavily on this Court's interpretation of Article I, Section 10, extensively quoting the following opinions:

- Federated Publ'ns, Inc. v. Kurtz, 94 Wn.2d 51, 60-61, 615 P.2d 440 (1980) (a threat to a defendant's right to a fair trial is an exceptional circumstance justifying closure);
- Seattle Times v. Ishikawa, 97 Wn.2d 30, 37, 640 P.2d 716 (1982) (the propriety of closure, an extreme remedy, depends upon the significance of the asserted conflicting interest, and where any interest other than a defendant's right to a fair trial is sought to be protected, a "serious and imminent threat" to an important interest must be shown);
- Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993) ("Openness of courts is essential to the courts' ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity");
- State v. Bone-Club, 128 Wash.2d 254, 259, 906 P.2d 325 (1995) (although the right to open court records is not absolute, "protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances");
- Dreiling v. Jain, 151 Wn. 2d 900, 904, 93 P.3d 861 (2004) (the right of the public to access court records "may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified");

- Rufer v. Abbott Laboratories, 154 Wn.2d 530, 540, 113 P.3d 1182 (2005) (“In determining whether court records may be sealed from public disclosure, we start with the presumption of openness”); and
- In re Det. of D.F.F., 172 Wn.2d 37, 40-41, 183 P.3d 302 (2011) (“open administration of justice assures the structural fairness of the proceedings, affirms their legitimacy, and promotes confidence in the judiciary,” and resort to any exception to this “vital constitutional safeguard” is “appropriate only under the most unusual circumstances”).

Hundtofte, 169 Wn.App. at 507-510. Ultimately, the Court of Appeals concluded that the petitioners had failed to show the exceptional, case-specific circumstances which are required by Bone-Club, Allied Daily Newspapers and D.F.F. to justify concealment. Hundtofte, 169 Wn.App. at 520-521. This was a correct conclusion because petitioners relied solely on generalized fears of what hypothetical landlords might do in the future, which *any* eviction defendants could offer in *any* case.

In Bone-Club, this Court held that “generalized” fears that an open court proceeding might undermine police undercover operations were not sufficient to justify closure, and that a “particularized threat” was necessary to overcome the defendant’s right to a public trial. 128 Wn.2d at 257, 261.² In Allied Daily Newspapers, this Court struck down a statute

² In Bone-Club, this Court determined that the defendant's Article I, Section 22 right—not the public's Article I, Section 10 right—had been violated by closure of the suppression hearing. 128 Wn.2d at 257–58. However, the same closure standard applies for both Section 10 and Section 22 rights. Id. at 259.

that prohibited courts from disclosing identities of child victims of sexual assault, holding that a generalized prohibition on disclosure in all cases violates the Article I, Section 10 requirement for a case-by-case analysis. 121 Wn.2d at 214. Similarly in D.F.F., this Court struck down a court rule because it “automatically” closed certain mental health proceedings without the particularized analysis required by Article I, Section 10. 172 Wn.2d at 41-42. These decisions compel the conclusion reached by the Court of Appeals that, because there was no specific threat to an important interest making the petitioners’ situation exceptional, redaction of their names from SCOMIS would violate Article I, Section 10.

The petitioners implicitly concede that the Court of Appeals faithfully applied this Court’s decisions, alleging no conflict under RAP 13.4(b)(1). They do not acknowledge, however, that the Court of Appeals *relied on* this Court’s precedents in deciding the case. Hundtofte, 169 Wn.App. at 520-521. Because the Court of Appeals reasoning raises no new question of law, review is unwarranted. RAP 13.4(b).

C. There is No Conflict with State v. C.R.H.

Contrary to petitioners’ assertions, the Court of Appeals did *not* hold in this case that redaction of court records must be justified by a specific statute. Pet., pp. 11-12. The Court correctly described GR 15 and

the Ishikawa test as the applicable standards, and did not create a new test. Hundtofte, 169 Wn.App. at 509-511. The Court merely said that the *particular* relief “afforded by the trial court here” – broadly allowing *any* renters to redact their names from SCOMIS if they have settled unlawful detainer claims – “is improper absent a showing that the identified interest is specifically protected by statute, court rule, or other similar example of clear and well-established public policy.” Id. at 518-519. This statement was expressly intended to implement this Court’s longstanding rule that “infringement upon the public’s right to open court records is justifiable *only in unusual circumstances.*” Id. at 519 (italics added).

The Court’s refusal to create a generalized rule favoring all similarly situated renters, in the absence of some court rule or statute establishing that renters have a recognized privacy interest in hiding eviction suits, underscored the Court of Appeal’s concern that neither this Court’s rulemaking nor the Legislature’s lawmaking has ever recognized such an interest.³ In fact, as the Court of Appeals emphasized, the

³ Courts have recognized two kinds of protected privacy interests: 1) autonomous decisionmaking involving issues of marriage, procreation, family, child rearing and education; and 2) nondisclosure of “intimate” personal information, but only when there is no legitimate government interest in disclosure. O’Hartigan v. Dep’t. of Personnel, 118 Wn.2d 111, 117 (1991). Listing litigants’ names in SCOMIS reveals nothing of an intimate nature and serves a legitimate government interest – implementing Article I, Section 10. Thus, the renters in this case do not assert a recognized privacy interest.

Legislature has rejected petitioners' proposed rule and adopted an opposite policy, RCW 19.182.040(1)(b), *which allows credit reporting agencies to report all eviction suits* – regardless of whether they are settled, won or lost – for seven years after dismissal. Hundtofte at 518.

Moreover, it is not true that the decision conflicts with State v. C.R.H., 107 Wn.App. 591, 596-597, 27 P.3d 660 (2001), in which the Court of Appeals held that the former version of GR 15(c)(1)(B) prevailed over a conflicting statute. Pet., p. 12. First, GR 15 was rewritten in 2006 and therefore C.R.H.'s description of the former rule is irrelevant. Also, C.R.H. does not even mention Article I, Section 10 or the Ishikawa test, as it was decided long before State v. Waldon, 148 Wn.App. 952, 967 (2009), and Rousey held that GR 15 alone is not a substitute for the constitutional test. Finally, the actual holding of C.R.H. was that a court rule takes precedence in a conflict with a statute, which is not an issue in this case and does not collide with the Hundtofte principle that a rule, statute or established policy is needed to support broad-based redactions applicable to all similar cases. Thus, no conflict warrants review.

Dated this 16th day of November 2012.

HARRISON-BENIS LLP

By: s/Katherine A. George
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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on November 16, 2012, I served the foregoing Amicus Curiae Memorandum and related motion by email, per written agreement, to the following:

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Please accept for filing in *Hundtofte v. Encarnacion* (Supreme Ct. No. 88036-1; Ct of App. No. 66428-0-I) the attached Motion for Leave to File Amicus Brief and related Amicus Curiae Memorandum of Allied Daily Newspapers of WA, the WA Newspaper Publishers Association and WA Coalition for Open Government in opposition to the pending Petition for Review. The person filing the document is Katherine George, WSBA #36288, phone 425 802-1052, email kgeorge@hbslegal.com.

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