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COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

ENCARNACION IGNACIO AND KARLA FARRAS,

Respondent,

v.

KING COUNTY SUPERIOR COURT CLERK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES CAYCE

**REPLY BRIEF OF APPELLANT TO BRIEF OF AMICUS
CURIAE AMERICAN CIVIL LIBERTIES UNION OF
WASHINGTON**

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ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. ARGUMENT.....	2
1. Longstanding Precedent Already Establishes the Requisite Analytical Framework for Reviewing The Public’s Right to Access Court Records.....	2
2. <i>Ishikawa</i> and GR 15 Properly Balance the Right to Open Records and Other Constitutional Rights Such as Privacy.....	6
3. Correctly Ruling That GR 15 Does Not Authorize Removing a Party’s Name From Court Indices Would Not Preclude Other Means For Addressing Respondent’s Policy Concerns.....	8
III. CONCLUSION.....	9

TABLE OF AUTHORITIES

Table of Cases

	Page
<u>State Cases</u>	
<i>Allied Daily Newspapers v. Eikenberry</i> , 121 Wn.2d 205, 848 P.2d 1258 (1993).....	2
<i>Dreiling v. Jain</i> , 151 Wn. App. 900, 908, 93 P.3d 861 (2004).....	2,3
<i>Indigo Real Estate Services v. Rousey</i> , 151 Wn. App. 941, 953, 215 P.3d 861 (2009).....	3, 6
<i>In re Dependency of J.B.S.</i> , 122 Wn.2d 131, 139, 856 P.2d 694 (1993).....	3
<i>In re Marriage of Treseler and Treadwell</i> , 145 Wn. App. 278, 287, 187 P.3d 773 (2008).....	3
<i>In re Pers. Restraint of Orange</i> , 152 Wn.2d 795, 822, 100 P.3d 291 (2004).....	2
<i>Rufer v. Abbott Labs.</i> , 154 Wn.2d 530, 540, 114 P.3d 1182 (2005).....	3
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30, 640 P.2d 716 (1982).....	passim
<i>State v. Bone-Club</i> 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995).....	2
<i>State v. Duckett</i> , 141 Wn. App. 797, 808, 173 P.3d 948 (2007).....	3

<i>State v. McEnry</i> 124 Wn. App. 918, 925-26, 103 P.3d 857 (2004).....	3
<i>State v. Waldon</i> 148 Wn. App. 952, 958, 202 P.3d 325 (2009).....	2, 3

Washington Constitutional Provisions

Article I, section 10.....	passim
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Washington Statutes

RCW 42.30	5
RCW 42.56	5

Washington Rules and Regulations

General Rule 15	3, 6, 8
General Rule 15(c)(2)	3, 6
General Rule 31	3
General Rule 31(c)(4)	6

I. INTRODUCTION

Appellant respectfully submits this brief in reply to the Brief of *Amicus Curiae* American Civil Liberties Union of Washington (Amicus).

Amicus states that it supports the arguments of Respondent, but “write[s] separately to respectfully urge the Court to provide an analytical framework for balancing public access and privacy in court records of open proceedings.” Amicus Brief, at 4. However, such a framework already exists. The constitutional standard governing public access to court records was established by the Supreme Court nearly thirty years ago in *Ishikawa*¹. It has been consistently applied in numerous appellate decisions involving court records since that time. In each case, the public interest in access to court records must be balanced against the competing concerns of the moving party, which may include privacy concerns.

Contrary to Amicus’ claims, the parties and the Court are not free to disregard *Ishikawa* and its progeny, invent a new standard based on an artificial distinction between judicial proceedings and court records, and characterize the change as mere “interpretation”. More importantly, resolution of this case requires no such departure from binding precedent. Neither Appellant nor Respondent has even remotely suggested that the

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

existing constitutional framework is inadequate to address the issues in this case.

Accordingly, Appellant asks the Court to decline Amicus' invitation to use this case as a platform for rewriting Article I, § 10 jurisprudence.

II. ARGUMENT

1. Longstanding Precedent Already Establishes the Requisite Analytical Framework for Reviewing the Public's Right to Access Court Records.

Article I, §10 guarantees the public and the press a right of access to court records as well as judicial proceedings. *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). In *Ishikawa*, the Supreme Court set forth five factors that a trial court must consider in deciding whether a motion to restrict access to court proceedings or records meets constitutional requirements.² *Ishikawa*, 98 Wn.2d at 37-39; *State v. Waldon*, 148 Wn. App. 952, 958, 202 P.3d 325 (2009) (citing *Ishikawa*).

As this Court recently observed, "For nearly three decades, *Ishikawa* has served as the benchmark constitutional analysis regarding attempts to restrict access to courtroom proceedings or records." *Waldon*, 148 Wn. App. at 960-961 (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 822, 100 P.3d 291 (2004); *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325

² These factors are set forth in the parties' main briefs and for brevity, are not repeated here.

(1995); *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993).

Further, “Washington courts have repeatedly construed the standard for sealing court documents under GR 15 – both before and after the 2006 revisions [to the rule] – as subject to the five-part *Ishikawa* analysis.” *Id.* (citing *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005) (documents filed with the court in anticipation of a court decision, whether dispositive or not); *Dreiling*, 151 Wn.2d at 915 (documents filed in support of dispositive motions); *In re Dependency of J.B.S.*, 122 Wn.2d 131, 139, 856 P.2d 694 (1993) (appellate review of a dependency proceeding); *In re Marriage of Treseler and Treadwell*, 145 Wn. App. 278, 286-87, 187 P.3d 773 (2008) (documents filed in dissolution proceeding); *State v. Duckett*, 141 Wn. App. 797, 808, 173 P.3d 948 (2007) (reading GR 31’s juror privacy interest in accord with GR 15); *State v. McEnry*, 124 Wn. App. 918, 925-26, 103 P.3d 857 (2004) (sealing file after all judicial proceedings have concluded)).

In *Waldon*, this Court held that the factors in GR 15(c)(2) governing motions to seal or redact court records cannot constitutionally serve as a stand-alone alternative to *Ishikawa*. *Id.* 966, 967. Rather, GR 15 and *Ishikawa* must be read together when ruling on a motion to seal or redact

court records. *Id.*; *see also*, *Rousey*, 151 Wn. App. at 953 (motion to redact name from the SCOMIS index remanded for application of *Ishikawa*).

Despite this longstanding analytical framework, Amicus urges the Court to fashion a new constitutional standard for access that distinguishes between court proceedings and court records. According to Amicus, the public interest in accessing court records decreases over time, while privacy interests in the same records increase. As such, Amicus claims the Court should “interpret” *Ishikawa* and create a separate standard for accessing court records that lowers the burden placed on moving parties who file motions to seal or redact. Amicus Brief, at 18.

As an initial matter, neither the Appellant nor Respondent has asserted that the existing legal framework set forth in *Ishikawa* is inadequate to resolve motions to redact or seal court records. Accordingly, even if this Court was an appropriate forum for rewriting thirty years of Supreme Court jurisprudence, resolution of this case does not require it.

Additionally, the basic claims made by Amicus are flawed in several respects. As noted above, Amicus claims that after conclusion of the open public hearing required by Article 1, §10, the need for continued public scrutiny of the underlying court records fades over time, thus rendering full application of *Ishikawa* unnecessary. However, Article 1, §10 requires more than momentary transparency. Court records are an integral part of the open

administration justice. Indeed, they are often the only source of information that remains once a hearing has concluded to document what took place at the hearing and why. The public and press have a constitutional right of access regardless of how much time has passed.

Amicus also cites the Open Public Meetings Act, chapter 42.30 RCW, and Public Records Act, chapter 42.56 RCW, as support for the differences between court proceedings and records. Amicus notes that the list of exemptions is considerably longer in the Public Records Act than in the Open Public Meetings Act. "This is only natural[,] Amicus claims, [because the] need for government oversight is highest at the time of government action, which emphasizes the need for open proceedings." Amicus Brief, at 6.

This is a meaningless comparison. Court records and judicial proceedings are directly related - they are two parts of the same case. A public agency's open meetings do not necessarily have any connection with that agency's public records. Also, the universe of public agencies and public records is vastly larger than the universe of courts and court records. Of course there are going to be more exemptions under the Public Records Act. Accordingly, the statutes cited by Amicus are inapposite.

Amicus next hints that the court indices may not even fall within the purview of Article 1, §10. Amicus Brief, at 11. This claim is refuted by court rule and case authority. The Supreme Court defines the term "court

record" to include "(i) Any document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding, and (ii) Any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created or prepared by the court that is related to a judicial proceeding." GR 31(c)(4). This Court has found that electronic indices meet both prongs of this definition for purposes of a motion to redact under GR 15, and that such a motion is subject to review under the *Ishikawa* standard. *Rousey*, 151 Wn. App. at 947-48.

2. *Ishikawa* and GR 15 Properly Balance the Right to Open Records and Other Constitutional Rights Such as Privacy.

In every motion to seal or redact court records, *Ishikawa* and GR 15 require the trial court to balance the public interest in access to court records against the competing concerns of the moving party, which may include privacy concerns. *Ishikawa*, 97 Wn.2d at 39 (discussing fourth factor); GR 15(c)(2). Under the former, if sealing or redaction is sought to protect the defendant's right to a fair trial, the moving party must show only a "likelihood of jeopardy" to that right. *Id.* However, if sealing or redaction "is sought to protect any right or interest besides the defendant's right to a fair trial, a 'serious and imminent threat to some other important interest' must be shown." (Emphasis supplied). *Id.*

Amicus does not dispute that the privacy rights of the moving party, when raised, are a part of the requisite balancing test. Rather, Amicus urges this Court to hold that privacy interests, like fair trial rights, should be subject to the less burdensome "likelihood or jeopardy" standard, not the more rigorous "serious and imminent threat" threshold. Amicus Brief, at 18. According to Amicus, the "best reading" of *Ishikawa* is to read the reference to "fair trial rights" as shorthand for "constitutional rights."

However, any reading of *Ishikawa* must be based on the actual language in the decision. In this regard, the opinion more fully states:

The quantum of need which would justify restrictions on access differs depending on whether a defendant's Sixth Amendment right to a fair trial would be threatened. When closure and/or sealing is sought to protect that interest, only a "likelihood of jeopardy" must be shown. However, since important constitutional interests would be threatened by restricting public access, a higher threshold will be required before court proceedings will be closed to protect other interests. If closure and/or sealing is sought to further any right or interest besides the defendant's right to a fair trial, a "serious and imminent threat to some other important interest" must be shown.

Id. at 39 (emphasis supplied)(citations omitted). This language makes clear that the defendant's right to a fair trial is the only instance when the less burdensome "likelihood of jeopardy" showing applies. It is the single exception to the rule in the last sentence, which governs motions based on any other right or interest. There is no basis to conclude that the Court did not mean what it said when it authored this text, and precedence since then

further confirms this conclusion. The reading proffered by Amicus is without basis.

3. Correctly Ruling That GR 15 Does Not Authorize Removing a Party's Name From Court Indices Would Not Preclude Other Means For Addressing Respondent's Policy Concerns.

This case asks the question of whether removing a party's name from court indices and replacing it with "Name Redacted" is a remedy authorized under GR 15. For the reasons stated in Appellant's opening and reply brief, the correct answer to this question is "No."

Amicus and Respondents argue extensively that the harm to the Respondents justifies the remedy ordered by the trial court. Ultimately, however, the remedy is not to disregard the court rule or rewrite the constitutional standard set by the Supreme Court. Rather, it is to seek amendment of the court rules or revise the statutory law. Even Amicus allows that this may be necessary and asks the Court not to rule in a way that precludes subsequent policy discussion:

Just as the Legislature and Supreme Court have adopted bright line rules in the variety of circumstances listed above, it may well be appropriate for them to consider some form of bright line rule to protect the interest of individuals similarly situated to [Respondent]. Amicus respectfully requests this Court to avoid a decision that would foreclose such consideration.

Amicus Brief, at 16.

III. CONCLUSION

For the foregoing reasons, Appellant respectfully asks this Court to decline Amicus' invitation to use this case as a platform for rewriting Article I, § 10 jurisprudence. Rather, as requested in Appellant's principle briefing, the Court should hold that removing a party's name from court indices amounts to the destruction of a public record. Additionally, whenever a court record is destroyed, sealed or redacted, a record of that action must be publicly available, and this requires the court indices to bear the party's full name.

DATED this 20th day of December, 2011.

RESPECTFULLY submitted,

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THE COURT OF APPEALS
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KING COUNTY SUPERIOR)
COURT,)
) NO66428-0 I
Appellant,)
) DECLARATION OF
vs.) MAILING
)
ENCARNACION IGNACIO AND)
KARLA FARRAS,)
)
Respondent.)

Gail E. Behan, Paralegal for the King County Prosecuting
Attorney's Office, declares under penalty of perjury of the laws of
the State of Washington that the following is true and correct:

On December 20, 2011, I did cause to be delivered
electronically a copy of the Reply Brief of Appellant to Brief of
Amicus Curiae American Civil Liberties Union of Washington and
this Declaration of Mailing to the names and electronic addresses
indicated below:

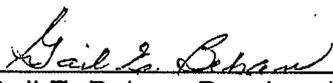
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