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NO. 62824-1-I

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION I

D. EDSON CLARK,

Appellant/Intervenor,

v.

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

Respondents.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Appellant D. Edson Clark (“Clark”) is challenging the denial of his Motion to Unseal Court Records. Clark was allowed to intervene to move to unseal court records previously sealed by the parties pursuant to a Stipulated Protective Order and to oppose sealing or redaction of future records. In the December 5, 2008, Order (“Order”) by the Honorable Jim Rogers that denied his Motion to Unseal Court Records, the trial court ordered that a summary judgment response brief by Plaintiff Gerald Horrobin and the Declaration of Ed Clark (“Clark Decl.”) filed in support of that brief be sealed and that redacted versions of the documents be available for public access. The Order also denied, without discussion, Clark’s Motion to Unseal several other records previously sealed by the parties pursuant to a Stipulated Protective Order.

II. LEGAL AUTHORITY AND ARGUMENT

A. **The Court Should Not Consider the “Joinder” of “Non-party” Todd Bennett**

This Court should not consider the “Joinder” filed by admitted “non-party” Todd Bennett (“Mr. Bennett”) on June 3, 2009. Mr. Bennett provides no authority upon which this Court should consider his brief. Mr. Bennett was granted leave by the trial court to participate in oral argument and briefing related to a discovery motion in an order entered March 18, 2008, but Mr. Bennett did not intervene in the case or become a

party. Mr. Bennett has not sought permission to brief as an Amicus Curiae under RAP 10.6. Mr. Bennett's "Joinder" is in reality, a self-serving Declaration that is being used by Respondents as a *post-hoc* attempted justification for the sealings in this case—making it not only improper, but legally irrelevant. Further, the statements made in Mr. Bennett's brief should also not be considered by this Court because, as out of court statements by a non-party used to prove the truth of the matter asserted, they are hearsay. *See* ER 801(c).

Any new evidence not put before the trial court that Respondents wish this Court to consider must comply with the six-part test delineated in RAP 9.11(a)—a "Joinder" by a non-party to this action cannot suffice, and neither Mr. Bennett nor Respondents offer an adequate legal basis for this Court to consider it.

Plaintiff Horrobin has offered no objection to the unsealing in this case and sought below to have the records at issue removed from the protective order so his lawyer could file them openly and not sealed. CP 56-76. His daughter Rondi Bennett, Mr. Bennett's ex-wife and Mr. Horrobin's original co-plaintiff represented by the same counsel, also has stated no objection to the unsealing. Mr. Horrobin and Ms. Bennett were the tax payers and joint owners and investors in the businesses related to the records in this case. Mr. Bennett has offered no evidence from any

“other investor” or “joint owner” that they object to the release of the records here. Mr. Horrobin and Ms. Bennett sued Respondents because they allege Respondents aided Mr. Bennett in embezzling money from Horrobin’s, Ms. Bennett’s and Mr. Bennett’s joint companies and hiding Mr. Bennett’s embezzlement in the books. CP 260-72. Mr. Bennett and Respondents settled with Mr. Horrobin for payment to Mr. Horrobin of an undisclosed amount of money. CP 136-37, 246-247. The records currently sealed are records Plaintiffs contend illustrate the embezzlement and actions to hide it. It is thus not surprising that the only persons to allege the need for secrecy are the accused embezzler and the firm and CPA accused of aiding him. Mr. Bennett has no right to file a “joinder” brief on the merits in this appeal as he has not intervened, been joined, or sought and been afforded the right to file as an amicus curiae. Should the Court accept nonetheless his improper filing, the Court must also evaluate it and his claims in the context of this case, his alleged wrongdoing, and the absence of any other allegedly interested investor or joint owner asking for secrecy of records related to Mr. Bennett’s alleged embezzlement from their companies.

B. The Appropriate Standard of Review is De Novo

Respondents argue that the appropriate standard of review for this Court is abuse of discretion because “the trial court here applied the

correct standard for sealing/unsealing records.” Resp. Br. at 15. This argument is without merit. The mere fact that the trial court referenced *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 114 P.3d 1182 (2005), in the Order is not the equivalent of applying the proper legal rule. If the trial court fails to apply the proper legal rule, the standard of review on a sealing is de novo. *See Rufer*, 154 Wn.2d at 540 (if the trial court’s decision to seal/unseal “is based on an improper legal rule, we remand to the trial court to apply the correct rule”); *see also In re Marriage of R.E.*, 144 Wn. App. 393, 399 n.9, 183 P.3d 339 (2008) (same); *see also Dreiling v. Jain*, 151 Wn.2d 900, 907, 93 P.3d 861 (2004) (same). The proper legal standard here is the *Ishikawa* test. The trial court erroneously concluded that *Ishikawa* (via *Rufer*) did not apply finding that there is no public interest in court files that are not considered by the court in its decision-making process. *See Order* (CP 232-33). The trial court therefore did not apply *Ishikawa*. The failure to apply *Ishikawa* in deciding whether or not to unseal filed court records or articulate sufficient findings justifying sealing thus warrants a de novo review by this Court and reversal. *State v. Waldon*, 148 Wn. App. 952, 967, 202 P.3d 325 (2009) (remanding because trial court failed to apply *Ishikawa* on motion to seal).

If this Court believes the mere citation and misinterpretation of *Rufer* to be the application of the correct legal rule, Clark respectfully

argues that the trial court abused its discretion nonetheless in sealing the documents at issue pursuant only to party stipulation because its conclusions were on untenable grounds and the sealing was manifestly unreasonable for the reasons set forth in the Brief of Appellant and below. *See In re Marriage of R.E.*, 144 Wn. App. at 399 n.9.

C. Respondents Fail to Address the Failure of the Court to Apply *Ishikawa* to the Other Documents Sought to Be Unsealed in Clark’s Motion to Unseal

In their brief, Respondents only address the new sealings mandated by the trial court’s Order on the issue of the *Ishikawa* analysis, and allege only those new sealings are the subject of this appeal. *See* Resp. Br. at 1-2; *see also id.* at 23 n.6 (arguing that the court clerk sealed “the contested documents” only after the trial court issued the appealed order). Clark’s Motion to Unseal moved to unseal *all* the sealed records related to the underlying action. *See* CP 124-126. This included at least thirteen documents—clearly identified in the Motion and accompanying Declaration—that had already been sealed at the time the Motion was filed on November 25, 2008. *See id.* The trial court’s Order therefore denied Clark’s effort to stop the “re-filing” of documents under seal that were originally filed publicly, but also denied his attempt to unseal all the documents listed in the Motion to Unseal. Respondents fail to address any of Appellant’s arguments as to these records. The trial court made no

findings whatsoever in refusing to unseal and allowing the continued sealing of all the other documents identified in the Motion to Unseal.

D. The Trial Court Erred in Concluding There Is No Public Interest in the Filed Court Records In Deciding Whether to Seal the Documents

The threshold question is whether *Ishikawa* should have been applied before sealing these records, not (as argued by Respondents) whether the trial court “abused its discretion” while applying *Ishikawa*. *See* Resp. Br. at 20. This applies to all the records that the trial court sealed or left sealed in denying Clark’s Motion to Unseal. In their brief, Respondents concede that the trial court failed to discuss “each and every requirement of the *Ishikawa* test” in ordering the sealing of the Clark Declaration and Horrobin response. *Id.* at 20. According to Respondents, this was acceptable because it is analogous to the procedure used by the trial court in *Rufer*, which was “expressly approved” by the State Supreme Court. *Id.* Respondents further assert that only the fourth *Ishikawa* factor needs to be articulated with specificity by a trial court in deciding to seal or in denying an unsealing motion. *Id.*¹

Simply because the trial court mentioned *Rufer* and referred to the public’s interest in the documents (the fourth factor in *Ishikawa*), it does not mean the trial court applied the *Ishikawa* test. Respondents apparently

¹ Again, these arguments presuppose that *Ishikawa* applied to these records, something to which both parties agree.

believe that the trial court's conclusion that *Rufer* "allows for the procedure followed in this case" (CP 232 n.1) was referring to the fact that the trial court in that case did not specifically apply the *Ishikawa* test because it thought previous briefing was sufficient. Resp. Br. at 20. Respondents then try to excuse the fact that the trial court here did not make findings on each and every *Ishikawa* factor by analogizing what the Court approved of in *Rufer*. Resp. Br. at 20.

Respondents fail to grasp that the trial court referred to *Rufer* to indicate that it did not believe Article I, Section 10 (*i.e.*, the public's right to open courts) was implicated by records never considered by the trial court—in other words, the trial court's citation of *Rufer* was to support its conclusion that *Ishikawa* did not apply to these court records at all. *See* Order (CP 233). This is also supported by the statement by the trial court that, "[t]he documents are of a sensitive nature and might be sealed in any case." *See* CP 233. This indicates that the trial court believed that sealing these records *might* have been justified under *Ishikawa*, had the parties not already had an agreement allowing for the sealings. The trial court's willingness to let party agreement be the basis for the sealing stemmed from its belief that *Ishikawa* did not apply to records when a court did not issue a ruling based upon them. Moreover, this erroneous conclusion also

explains why the *Ishikawa* factors are not articulated with specificity in the Order (acknowledged by Respondents on page 20 of their brief).

Respondents' defense of the trial court's conclusion that Article I, Section 10 is not implicated by the sealing of these filed court records is unquestionably in conflict with Respondents' arguments that the trial court somehow complied with *Ishikawa* as to the documents ordered sealed in the Order. *Id.* Respondents cannot have it both ways. The trial judge did not perform the *Ishikawa* test as he believed these records could be sealed solely based on party agreement and good cause. The trial court did not even mention the other previously-sealed records, nor do Respondents make any attempt to show the trial court performed an *Ishikawa* analysis of the other sealed records it refused to unseal.

In his Brief of Appellant, Clark demonstrated how this Court's precedents make it clear that the trial court's conclusion that *Ishikawa* did not need to be applied in sealing and unsealing the records was in error.² In *In re Marriage of Treseler and Treadwell*, 145 Wn. App. 278, 187 P.3d 773 (2008), a party tried to have previously- filed court records in a

² As argued in the Brief of Appellant, the trial court's interpretation of *Rufer*'s ruling was in error, as is Respondents' attempt to justify it. *Rufer* stated that "any records that were filed with the court in anticipation of a court decision should be sealed or continue to be sealed only when the court determines—pursuant to *Ishikawa*—that there is a compelling interest which overrides the public's right to the open administration of justice." 154 Wn.2d at 549.

dissolution action sealed and redacted. 145 Wn. App. at 281.³ The order was denied, and the party urging sealing argued on appeal that only a showing of good cause (not *Ishikawa*) was necessary to seal or redact filed court records that are not used to make a decision. *Id.* at 284. This Court, in no uncertain terms, rejected this argument and reaffirmed the ruling from *Rufer* that a court must apply *Ishikawa* in deciding whether to seal “any records that were filed with the court in anticipation of a court decision (dispositive or not).” *Id.* (citing *Rufer*, 154 Wn.2d at 549).

Respondents argue based on a single sentence in *Treadwell* that because the trial court in that case likely did consider some of the documents at issue, it was “quite different than the situation in the present case.” Resp. Br. at 20. The fact that some of the documents at issue in *Treadwell* were considered by the trial court was not dispositive in that case and was mentioned by this Court only to show that *not* applying the “compelling interest” standard (*Ishikawa*) when deciding whether to seal filed court documents would be impractical and only lead to speculation about what documents a court actually used. *See Treadwell*, 145 Wn. App. at 285.

Even taking Respondents’ argument that the records at issue here were never considered by the trial court at face value, *Treadwell*

³ See Brief of Appellant at pages 44 through 47 for a more complete recitation of the relevant facts and rulings from *Treadwell*.

effectively decides this case.⁴ Once they were filed, the records Clark sought to unseal became part of the public record and took the documents out of the realm of “mere discovery.” *See also Foltz v. State Farm Mut. Auto. Ins. Co.*, 333 F.3d 1122, 1134 (9th Cir. 2003) (holding that when discovery material is filed with the court “its status changes.”). Respondents attempt to obfuscate this fact by emphasizing, as the trial court did, how plaintiff Horrobin and Respondents entered into an agreement after the filing of the trial court records and that the court supposedly never considered any of the filed documents because of this agreement. *See Resp. Br.* at 9-14. *Treadwell* clearly established that the proper delineation is between filed and non-filed court records, and not whether the trial court considered or relied upon the filed records.⁵ In *Treadwell*, like here, records were filed in support of a motion that was not

⁴ However, Defendants concede that at a minimum, the trial court did consider the redacted versions of the Horrobin brief and Clark Declaration. *See Resp. Br.* at 24. Respondents also fail to show that the trial court did not consider at least two sealed exhibits to the Declaration of Wright Noel, which was filed in support of plaintiff’s Request for Discovery on May 27, 2008. *See CP 24, 55.* Moreover, Respondents assert that “the overwhelming majority of the content of the two pleadings is publicly assessable.” *Id.* Even if true, Appellant knows of no authority, nor do Respondents cite any, that concludes that it is relevant if a sealing is only partially against the clear mandate of the State Constitution to keep court records accessible to the public.

⁵ *See Treadwell*, 145 Wn. App. at 285 (“*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.”) (emphasis added). The trial court’s interpretation of *Rufer* was thus expressly rejected by this Court; likewise, Respondents’ argument to the contrary is without legal basis. *See Brief of Appellant* at pages 43 through 47 for a further description of *Rufer* and how it applies to the immediate case.

heard as the case settled and was dismissed. Treadwell asked the trial court and this court to seal those records based on good cause since a court never reviewed them. This Court rejected that request and ruled soundly against the argument being made by Respondents here. This Court's ruling was sound and should be followed here. None of the records that Clark moved to unseal were mere discovery, including his Declaration and the Horrobin brief, but were filed with the trial court, and thus warranted application of the *Ishikawa* test before they could be sealed or when the trial court decided to keep the previous records sealed. Further, there were many records at issue in Clark's Motion to Unseal, and Respondents have not and cannot show that none of them were reviewed by the trial court.

E. The Parties Advocating Sealing Could Not Have Met Their Burden to Justify Sealing or Continued Sealing Had the Court Applied *Ishikawa*

While this Court should rule on whether the trial court should have sealed, or kept sealed, the court files at issue had it applied *Ishikawa*, the conclusion of the trial court that application of *Ishikawa* was not required to seal the records at issue alone is grounds for reversal.⁶ In fact, because the trial court did not think that *Ishikawa* applied, there are no findings that this Court could actually review—this is precisely why the standard of review here is *de novo*. As the trial court misapprehended the

⁶ See *Waldon*, 148 Wn. App. at 967 n.10 (this Court refusing to consider whether sealing was proper under *Ishikawa* because trial court failed to apply the proper rule).

requirements and reach of *Ishikawa* and failed to follow this Court's clear holding in *Treadwell* after it was clearly cited to the trial court, this Court should apply the *Ishikawa* test and rule whether or not records should remain sealed. A remand to apply *Ishikawa* will further deny the public's right of access and will likely require a second trip to this Court.

This case is unusual in that Clark, and apparently every other party, believed that the Clark Declaration and Horrobin brief were filed under seal on November 14, 2008; when Clark moved to unseal, the trial court acknowledged the misunderstanding and only then ordered the records sealed pursuant to party agreement. *See* CP 231, 233. This made the appealed Order not only an order denying a motion to unseal, but also a sealing order. The distinction is largely irrelevant in this context, however, as the burden in a civil case is always on the party asserting the sealing or redacting of records, or the continued sealing of such records, upon either a motion to seal or a motion to unseal. *See Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37, 640 P.2d 716 (1982); *see also Rufer*, 154 Wn.2d at 544 (citing *Dreiling*, 151 Wn.2d at 915).⁷

⁷ Respondents, in previous motions, and in their brief, repeatedly imply that the burden was on Clark to justify unsealing the records rather than the other way around. *See* Response at 20 (emphasizing that trial court did not discuss all the *Ishikawa* factors because the public interest requirement was missing); *see also* CP 169-70 (Respondents arguing that Clark was required to demonstrate his interest in having the records unsealed). The case law cited in the Brief of Appellant, this brief, and all other related motions at the trial level have exhaustively and definitely shown this implication to be contrary to open courts jurisprudence.

As court records filed in anticipation of a court decision, the trial court and the parties were required to comply with the constitutional mandate under *Ishikawa* to justify the sealing—Respondents seem to acknowledge this in further arguing that the “court applied the correct standard under *Ishikawa/Rufer*” in deciding that the records should be sealed—implying that they believed they had the burden, and met that burden. *See* Resp. Br. at 18-19. Again, this argument seems at odds with Respondents’ request to this Court to affirm the trial court’s Order, since the trial court did not believe *Ishikawa* applied to these records.⁸ It is also inconsistent to argue that the trial court never looked at or considered some of the documents at issue, and also argue that it complied with *Ishikawa* by making specific findings justifying the sealing related to those same documents it never saw. It is apparent that Respondents simply want this Court to affirm the trial court’s Order, even when they seem to disagree with the basis for the trial court’s conclusions as well.

A trial court must apply *Ishikawa* in deciding whether to seal or continue sealing filed court records, and the reasons for overriding the public’s interest must be articulated as to each of the five factors. *See*

⁸ To the extent that Respondents believe that the sealing and unsealing of the records at issue implicated *Ishikawa*, Appellant readily agrees. Respondents have also indicated in previous briefing as well that *Ishikawa* applies to these records. *See* CP 172. Oddly, Respondents’ central argument seems to be that *Ishikawa* was complied with by a trial court that did not believe it applied.

Treadwell, 145 Wn. App. at 291 (“[A]rticulating findings on each of the five *Ishikawa* factors is required before a trial court may seal portions of a trial court record.”) (citing *Ishikawa*, 97 Wn.2d at 38, and GR 15(c)(2)). Respondents dispute this, but the lack of findings by the trial court is one of only a multitude of procedural and substantive problems with the Order.⁹ Rather than remanding for an *Ishikawa* analysis, this Court should determine whether *Ishikawa* has been met here and rule on the issue of sealing or unsealing. *Ishikawa* could not have been met below.

Under *Ishikawa*, the proponent of sealing must state “the interests or rights” which give rise to the need for court closure “as specifically as possible.” 97 Wn.2d at 37. This factor demands that the proponent(s) show a “serious and compelling threat,” as recently clarified by this Court in *Waldon*. 148 Wn. App. at 963 n.6 (stating that previous articulations of this factor (including *Rufer* and *Dreiling*) improperly reduced this standard to merely “compelling”). *Waldon* further clarified that “[*Ishikawa*’s first factor] requires a showing that is *more specific, concrete, certain and definite* than a ‘compelling’ concern.” *Id.* (emphasis added). The parties advocating sealing could not meet this test for each document that was filed under seal or ordered sealed by the Order, even if the trial court had

⁹ See Brief of Appellant at pages 25 through 26 for further discussion.

properly required it.¹⁰ This is directly contrary to *Rufer*. 154 Wn.2d at 549 (establishing that upon a motion to unseal documents filed under seal pursuant to pre-trial confidentiality orders, the party opposing disclosure “would...be required to make the requisite showing of a compelling or overriding interest for closure”).

Moreover, the second factor (the “chance to object” factor) could not be found by the trial court or this Court. *Dreiling* made clear that “[f]or this opportunity to have meaning, the proponent [of limiting access] must have stated the grounds for the motion with reasonable specificity, consistent with the protection of the right sought to be protected.” 151 Wn.2d at 914; *see also Rufer*, 154 Wn.2d at 544 (citing *Dreiling*). This requires a motion to seal which did not occur here, nor was either party required to state the grounds for the sealing of each document. The lone basis for sealing all the documents was the stipulated agreements of the parties. Again, the trial court’s Order—which was silent as to the propriety of the previous sealings—made no reference to any “reasonably specific” interest asserted by Respondents that needed to be protected by sealing. Respondents’ attempt to do so after the fact cannot be

¹⁰ *See* Brief of Appellant at page 32 for a further explanation for why the parties here could not meet the first factor in *Ishikawa* in keeping the previously-sealed records sealed or in sealing the Clark Declaration and the Horrobin brief.

sufficient.¹¹ The burden is on the proponent of sealing—the court must describe the justifications for sealing if it does decide to seal or keep documents sealed, but is not required to shoulder the proponent’s burden by speculating on the interest that supposedly needs protecting.¹²

Third, the burden is on the proponents of sealing to show that the sealings were the least restrictive means available and effective in protecting the interests involved. *See Rufer*, 154 Wn.2d at 544.

Respondents do not respond to Appellant’s argument that failing to specify why redaction or some other manner of restriction less than total sealing was not warranted. *See* Brief of Appellant at 35-36. There are no written findings by the trial court articulating why total sealing was still necessary for any of the documents Clark sought to unseal, or that the sealing of the Clark Declaration and Horrobin brief was necessary.

Respondents seem to acknowledge that the Order does not address this factor at all. *See* Resp. Br. at 20 (stating their belief that only the fourth *Ishikawa* factor was discussed by the trial court).

Fourth, there are no indications that the trial court considered the interests of the public to access the records sought—quite the opposite in

¹¹ Respondents’ arguments related to how disclosure of the records at issue would subject them to liability under federal law, raised in their Response and in earlier briefing, are without merit for the reasons already discussed in the Brief of Appellant at pages 38 to 41.

¹² *See* Brief of Appellant at 33-35 for a further discussion of why the second *Ishikawa* factor could not be found by the trial court or this Court.

fact, since the trial court concluded that since Article I, Section 10 was not implicated by sealing the Clark Declaration and Horrobin brief. Respondents also fail to explain how the trial court could consider the interests of the public in documents that the court had not even seen or considered—a fact repeatedly relied upon by Respondents. Again, Respondents misunderstand that, in the Order, the trial court was discussing generally the public interest of documents never considered by a court, not the public interest of *these particular* documents—which is the analysis that would take place if *Ishikawa* applied. The sealing of all the records was based on stipulated agreements, neither of which described with any specificity the public’s interest in the documents that ended up sealed, or how that interest was counterbalanced in favor of sealing any particular document.¹³

Finally, Respondents could not meet their burden of showing that the previous sealings, and the sealings ordered in the Order, are not broader in application or purpose than necessary to serve its purpose. There is no set time frame on the sealings made previous to the Order—nor to the Clark Declaration and Horrobin brief ordered sealed in the Order. Respondents admit that, at a minimum, the sealing of the latter court files was intended to be permanent because the trial court “never

¹³ See Brief of Appellant at 36-37 for a further discussion of the fourth *Ishikawa* factor.

considered the sealed records in its decision making process” and the case is now concluded. Resp. Br. at 25-26. Again, Respondents make no argument, nor could they, that *Ishikawa* was applied as to the records sealed previous to the Order. More importantly, the fundamental flaw in Respondents’ argument on this point is that they are equating the conclusion of the case, with a conclusion of the public’s interest in the sealed documents—a fallacy without basis in law.

F. Defendants Fail to Meaningfully Respond to the Violations of the Local Rules for Sealing

Respondents fail to meaningfully respond to the vast majority of the violations of the local court rules shown by Clark.¹⁴ For instance, Respondents assert that GR 15 does not require a motion to seal, citing GR 15(c)(1).¹⁵ Read in the context of the entire rule, GR 15(c)(1) implies that either the court or a party needs to move for a hearing in order for records to be sealed. A rule stating that either a party or the court may be the one that initiates the sealing cannot reasonably be interpreted to mean that a motion is not necessary from either.

Subsection (2) of GR 15(c) is equally clear that a hearing must take place, upon a motion brought by either a party or the court, and that only after that hearing may the court seal court records. If the trial court orders

¹⁴ See Brief of Appellant at 26-30.

¹⁵ Stating “In a civil case, the court or any party may request a hearing to seal or redact the court records.”

the records sealed, the subsection further demands that the court make “written findings that the specific sealing or redaction is justified by **identified compelling** privacy or safety concerns that outweigh the public interest in access to the court record.” (emphasis in original).

Respondents do not dispute that written findings did not take place for the documents sealed before those ordered sealed in the Order, nor does it adequately argue how the Order articulated the findings justifying sealing under GR 15(c)(2) as to the other documents. Respondents also fail to acknowledge that these written findings must be filed with the trial court under GR 15(c)(5)(C) and remain open to the public under GR 15(c)(4).

Respondents further argue that a motion was not necessary in this context because Clark’s Motion to Unseal dealt with the same issues that hypothetical motions to seal would have—this is completely without basis in law or logic, and cannot be justified under the clear language of GR 15. A party trying to unseal documents sealed under party agreements is not an adequate proxy for the motions to seal that never took place and avoids the issue of whether the sealing was allowable in the first place.

Respondents additionally argue that Clark admits that a hearing on a motion to seal does “not need to be in person.” Resp. Br. at 23. That the motion to seal does not require oral argument does not equate to there being no requirement for a motion to seal.

Most notably, however, Respondents fail to address Clark's argument that the sealings additionally violated GR 15(c)(2) by having party agreement stand as the lone basis for sealing. This is understandable, as Respondents cannot argue on the one hand that a motion to seal is not necessary to seal, but then admit that the parties violated GR 15(c)(2) by having party agreement be the lone basis for the sealing. Again, Respondents cannot have it both ways.

Respondents also argue that the Order does not violate KCLGR 15(b) because the Order is captioned "Order Granting on Motion to Intervene and Denying on Motion to Unseal/Clerk's Action Requiring Sealing Docket Nos. 153, 154, 159." Resp. Br. at 25 (citing CP 231). Respondents argue that somehow an order denying a motion to unseal is the same as a sealing order. *See id.* This gets to the heart of the issue: the Order is in fact both an order denying a motion to unseal (referring to the previous records filed under seal) and an order ordering the additional sealing of the Clark Declaration and Horrobin brief; that this particular order serves both purposes (against the local rules in fact, see below) does not support the argument that a order denying a motion to unseal (which keeps sealed records sealed) is the same as a granting a motion to seal (sealing files that would ordinarily be public).

Respondents also overlook the second portion of KCLGR 15(b), which states that “[a]ny order containing a directive to destroy, redact or seal all or part of a court record must be clearly captioned as such and *may not be combined with any other order.*” (emphasis added). The trial court also directly stated in the *actual sealing order* (CP 234-35), issued on the same day as the disputed Order, that the sealing was pursuant to the “Order entered today... that rules on all sealed documents.” CP 234. Respondents make no argument in response to Clark, nor could they, on the fact that the Order does more than simply seal more documents. As Respondents admit themselves, the Order is “crystal clear” that it also grants Clark’s Motion to Intervene. Resp. Br. at 25. By Respondent’s own admission, the Order violates the local rule.

Respondents also fail to adequately respond to Clark’s argument that the trial court failed to consider redaction under GR 15(c)(3) when directing additional sealing in the Order—this has been discussed above in the context of *Ishikawa*.

Moreover, Respondents wholly fail to address the recent decision by this Court in *Waldon*, where it was held that GR 15 does not constitute a stand-alone alternative to *Ishikawa* when deciding whether to seal or

unseal sealed court records.¹⁶ 148 Wn. App. at 967. A trial court that fails to comply with GR 15 cannot have met the more demanding standard in *Ishikawa* as *Waldon* made clear.

G. Defendants Fail to Address the Propriety of the Blanket Protective Orders

Respondents also fail to address, at all, the propriety of filing documents under seal pursuant to only a blanket protective order meant to protect unfiled documents produced in discovery—which is the basis for the trial court’s refusal to unseal all the previously sealed documents, and for the sealing of the Clark Declaration and Horrobin brief.¹⁷ *Dreiling* directly addressed the propriety of blanket protective orders, making clear that mere discovery need only be sealed “for good cause shown” under CR 26(c), such as information “unrelated, or only tangentially related, to the underlying cause of action.” 151 Wn.2d at 909 (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984)). *Dreiling* concluded that when previously-sealed records are attached to dispositive motions, “they lose their character as the raw fruits of

¹⁶ This Court in *Waldon* ruled that in order for GR 15 to comply with the constitutional mandate established in *Ishikawa*, a trial court must find “that the sealing proponent meets one or more of the listed criteria [in GR 15(c)(2)],” and then must analyze whether that criteria meets the “serious and imminent” threat requirement of *Ishikawa*’s first factor. 148 Wn. App. at 967. If that first hurdle is met by the proponent of sealing, then the trial court must apply the rest of the *Ishikawa* factors—only then will the sealing have complied with GR 15 and Article I, Section 10. *Id.*

¹⁷ See also Brief of Appellant at pages 28 through 29, 34 through 35, and 42 through 43 for a more complete discussion of the propriety of pre-trial blanket protective orders in the context of sealings.

discovery.” *Id.* at 910. Addressing the discovery rule for pre-trial sealing, the Court stated “CR 26(c) applies primarily to unfiled discovery, not documents filed with the trial court in support of a motion that can potentially dispose of a case.” *Id.* at 912. The Court criticized the use of blanket protective orders, like those agreed to by the parties here, stating, “[b]lanket protective orders are disfavored, especially once documents have been filed.” *Id.* In that case, the Court demanded that *Ishikawa* be applied to all documents filed in support of dispositive motions, and criticized the trial court for relying on the protective order to justify the sealings in that case. *Id.* (“No individual assessment was made [by the trial court] until after the Times intervened, and it is unclear what legal standard was applied at that time.”). *Id.*

Rufer subsequently approved of *Dreiling*, but rejected the Court of Appeals’ use of *Foltz*’s rule in the lower court decision that the “compelling interest” test applied only to documents attached to dispositive motions. 154 Wn.2d at 544. *Rufer* quoted the passages from *Dreiling* (adopting *Foltz*) that criticized the use of blanket protective orders, and also explicitly rejected the argument that the “good cause” standard should be applied to documents produced by the other party, that were subject to a protective order, and are attached to any motion or pleadings. *Id.* at 546. The Court also rejected the argument that *Dreiling*

should be limited to mean that *Ishikawa* should apply only in the sealing of court files actually used by the court in making dispositive decisions; *Rufer* ruled that *Ishikawa* must be applied in sealing or keeping sealed “any records that were filed with the court in anticipation of a court decision[.]” *Id.* at 548-49 (emphasis added). This rule was later reaffirmed and clarified in *Treadwell*, cited above.

The above rule has already been cited earlier in this brief, and in the Brief of Appellant, but in the context of blanket protective orders, *Rufer* instructed that the burden (under *Ishikawa*) is on the party seeking to keep records that were filed under seal pursuant to a pre-trial confidentiality order sealed. *Id.* at 550.

H. Attorney’s Fees and Costs

Respondents argue that Clark should not be entitled to attorneys fees and costs because he was bound as an expert by the protective order at issue, and because as a CPA he is aware of the Internal Revenue Code provisions that precluded Smith Bunday from disclosing tax records at issue, and that Clark already allegedly had complete access to the records he “now seeks to have unsealed.” *Resp. Br.* at 29-30.

With respect, these arguments are not irrelevant to whether the court should award Clark attorneys’ fees and costs if he prevails on appeal, nor to whether the records should be unsealed for that matter. It is

axiomatic that a person asserting the public's right to access court records does not need to justify his or her desire to access the documents, nor do Respondents cite any case authority indicating that a person asserting the public's right is precluded from attorneys' fees and costs if he or she had access to some of the requested records. The citation to inapplicable tax codes is also in error, as those same tax codes (assuming they even applied) clearly state that disclosure—without the consent of the persons implicated in those records—may be ordered by a court. *See* Brief of Appellant at 39-40. Further, Respondents admit they voluntarily gave all of the requested records to Plaintiffs pursuant to a Stipulated Protective Order *without* the client permission they contend was required. This weakens the credibility of Respondents' tax-law based argument. Appellant, assuming this Court deems him the prevailing party, therefore reaffirms his request for an award of attorneys' fees and reasonable expenses incurred, under RCW 4.84.080(1), RAP 14.3 and RAP 18.1.

Respectfully submitted this 10th day of August, 2009.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on August 10, 2009, I caused the delivery by U.S Mail a copy of the foregoing Reply Brief of Appellant to:

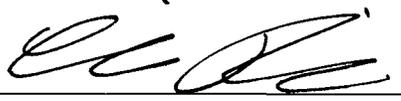
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