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NO. 62824-1-I

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

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D. EDSON CLARK,

Appellant/Intervenor,

v.

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

Respondents

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**BRIEF OF AMICI**  
**ALLIED DAILY NEWSPAPERS OF WASHINGTON AND**  
**WASHINGTON NEWSPAPER PUBLISHERS ASSOCIATION**

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## I. INTRODUCTION

This case highlights the need to clarify what may justify sealing Washington court records. The case law is subject to misinterpretation, reflected in the decision below. Unless the rules are clarified, the public's constitutional right to an open judicial system is threatened, as illustrated here.

Specifically, this Court should clarify that:

- A record becomes “part of the court’s decision-making process,” as referenced in *Dreiling v. Jain*<sup>1</sup>, when the record is filed in court, regardless of whether it is ever used by a judge or jury in making a decision.
- In applying the *Ishikawa* test to determine if a record should be sealed, a court should consider whether the record was relevant to the decisions that were pending when it was filed,<sup>2</sup>
- But the analysis should not hinge solely on whether the court actually used the record to make a decision.

The latter rule is necessary for several reasons. As this Court observed in *In re Marriage of Treseler and Treadwell*,<sup>3</sup> whether a court

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<sup>1</sup> 151 Wn.2d 900, 93 P.3d 861 (2004).

<sup>2</sup> *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

<sup>3</sup> 145 Wn. App. 278, 285, 187 P.3d 773 (2008).

used all, part or none of a record in making a decision is an impractical standard because it requires speculation about a judge's or jury's thoughts. Also, parties could too easily manipulate such a standard by settling a case before it is decided, to keep embarrassing records secret.

Most importantly, allowing a court to seal records solely because it never reviewed or considered them – as happened in this case – ignores the principle that Art. I, Sec. 10 applies as much to the process as to the results of litigation. As the Washington Supreme Court stated so forcefully in *Rufer v. Abbott Laboratories*<sup>4</sup>, explaining why the *Ishikawa* test should not be limited to only those records which a court relies upon in making dispositive decisions:

As previously noted, the right [to open administration of justice] is not concerned with merely whether our courts are generating legally sound *results*. Rather, we have interpreted this constitutional mandate as a means by which the public's trust and confidence in our *entire judicial system* may be strengthened and maintained.<sup>5</sup>

This reasoning recognizes that the public is entitled to observe even the most fleeting or frivolous uses of our justice system, and to evaluate not just rulings but every effort to win, defend, settle, evade, join, amend or dismiss a court controversy.

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<sup>4</sup> 154 Wn.2d 530, 114 P.3d 1182 (2005).

<sup>5</sup> (emphasis in original), citing *Allied Daily Newspapers v. Eikenberry*. 121 Wn.2d 205, 211, 848 P.2d 1258 (1993).

Contrary to the trial court's reasoning here, the public has an especially compelling interest in learning about controversies that elude judicial review. For example, if someone is killed in an unsafe car and the victim's family settles with the car manufacturer, public concerns about the car's safety are more likely to increase than subside, because there is no longer legal pressure to improve safety. Similarly, if a day care provider settles a child abuse suit without any decision on the merits, the lack of court scrutiny may increase fears that a risk to children remains. Or how about the executive who is sued repeatedly for sexual harassment, only to divert everything to private arbitration? Just because parties drop a court issue does not mean it never had, nor will again have, public importance.

In addition to warning of danger, open records from a voluntarily dropped case can vindicate the innocent, perhaps assuring a doctor's patients that a malpractice suit was unfounded, or persuading voters that a politician did not lie or cheat. Open court files also can show who is responsible when court resources are squandered on half-hearted or petty disputes. They can shine a light on the performance of key players in the system including prosecutors and police, and show whether laws or rules are working as intended. All of these

accountability purposes are served whether or not records were used in a court decision.

In sum, a record may be just as important to the public if it never influenced a judge as if it formed the basis for judgment. When parties ask the court system to get involved, they invite the public to scrutinize how the system responds (or fails to respond). For these reasons and to promote clarity in the law of sealing, this Court should hold that a court may not seal a record solely because it was never used in a court decision.

## **II. DISCUSSION**

### **A. The Standard of Review is De Novo.**

Amici agree with Appellant-Intervenor D. Edson Clark that the standard of review is de novo. When the trial court applies an incorrect legal rule in deciding a motion to seal, as in this case, review is de novo. *Treadwell*, 145 Wn.App. at 283.

Here, while it is undisputed that the trial court was required to apply the *Ishikawa* test, the parties disagree as to whether the test was actually applied. Even if the trial court did attempt to apply the *Ishikawa* test, it failed to apply it correctly, as explained below. Therefore, de novo review is required. *Treadwell* at 283; *In re*

*Marriage of R.E.*, 144 Wn. App. 393, 399 n.9, 183 P.3d 339 (2008) (the abuse of discretion standard is appropriate only if the trial court applied the correct legal test for sealing or unsealing).

**B. The Constitutional Test for Sealing a Record Has Always Focused on Whether the Parties, Not the Court, Treated the Record as Relevant.**

1. Background.

Under Article I, Section 10 of the Washington Constitution, “[j]ustice in all cases shall be administered openly.” In the landmark decision, *Seattle Times v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982), the Washington Supreme Court announced a five-part test for sealing records in criminal cases in compliance with Art. 1, Sec. 10. Under parts of the test pertinent here, courts must “weigh the competing interests of the defendant and the public,” and if 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 37-38. The burden is on the proponent of sealing to establish that the interest in secrecy is sufficiently important to outweigh the public’s interest in openness. *Id.*

The Washington Supreme Court subsequently extended the *Ishikawa* test to civil cases. *Dreiling*, 151 Wn.2d at 913-15 (stating

that the test originally was extended “in dicta” in *Allied Daily Newspapers v. Eikenberry*. 121 Wn.2d 205, 211, 848 P.2d 1258 (1993)). While *Dreiling* remains an important precedent today, it is not a model of clarity, as evidenced by the trial court’s confusion in this case. Thus, a close reading of *Dreiling* and its progeny is necessary to illuminate its meaning.

2. *Dreiling* established the public’s right to view what is placed before the court, not what is actually considered by the court.

In *Dreiling*, the Seattle Times intervened in a shareholder derivative suit involving Infospace, Inc., and sought to unseal records related to a motion to terminate the suit. *Id.* at 904. The Court held that the *Ishikawa* test must be applied before sealing dispositive motions or the records supporting such motions. *Id.*

The *Dreiling* court said there are “good reasons to distinguish between” records that are attached to a dispositive motion filed in court, and “mere discovery” material that surfaces before trial and is “unrelated, or only tangentially related, to the underlying cause of action.” *Id.* at 909-10. Referring to the latter category of material that is obtained through pretrial discovery and turns out to be unrelated to the lawsuit, the Court said: “As this information does not become part

of the court's decision making process, article I, section 10 does not speak to its disclosure." *Id.* In making that statement, the Court was simply distinguishing between records at the extreme ends of the public-interest spectrum – those which are not related at all or only tangentially related to a lawsuit, which presumably are not filed in court, and those which are so highly relevant that they are filed in court to justify an ultimate disposition.

The point, apparently lost upon the trial court here, is that *Dreiling* was concerned with the relevance of the record to the lawsuit, not with the record's ultimate impact on the case. *Dreiling* reflects the sound reasoning that if a record is relevant enough to be attached to a dispositive motion, it should be open to public view, unless an important countervailing interest in secrecy outweighs the public interest in openness. *Id.* at 912. *Dreiling* does not say that the public has no interest in a record unless it is actually considered by a court in decision making.

The *Dreiling* court noted that only "good cause" (rather than a compelling interest) is needed to obtain a protective order under CR 26(c), which authorizes various restrictions on parties' use of allegedly confidential materials that are exchanged in pretrial discovery. *Id.* at

909. However, in explaining why the “good cause” standard in CR 26(c) is insufficient for continued sealing of a discovery record once it is attached to a motion, the Court said:

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 (emphasis in original). Thus, in discussing the importance of whether records are filed or not, *Dreiling* set the tone for later decisions clarifying that once any record is filed in court for any reason – even in support of a non-dispositive motion – it is presumptively open to the public and subject to the *Ishikawa* sealing test. *Rufer*, 154 Wn.2d at 549; *Treadwell*, 145 Wn.App. at 284.

3. *Rufer and Treadwell confirmed that the public’s right of access to court records arises from the mere filing of the records in court, not the court’s consideration of them.*

The common theme in the *Ishikawa* line of cases is that the public has a constitutionally protected interest in anything that parties treat as relevant to their controversy. When a party files a record in court, the party is essentially telling the public that the record matters, and inviting public scrutiny. By contrast, the trial court here expressed the erroneous belief that the public has no interest in a record unless a court treats it as relevant, by using it to make a decision. CP 232-33.

That cannot be the test if the public is to maintain its oversight of all aspects of the judicial system, including the handling of cases that are never decided on the merits.

This critical distinction between relevance to a party's lawsuit, and relevance to an actual court decision, is highlighted in *Rufer*.

There, the defendant in a product liability suit moved to seal certain trial and motion exhibits that allegedly contained proprietary information. *Rufer*, 154 Wn.2d at 536-37. The Washington Supreme Court held that the *Ishikawa* test applied to all records filed in court in anticipation of any decision, whether dispositive or not. *Id.* at 549.

Addressing the concern that parties could try to embarrass opponents by attaching confidential but irrelevant documents to motions, the Court said:

If a party attaches to a motion something that is both irrelevant to the motion and confidential to another party, the court should seal it. When there is indeed little or no relevant relationship between the document and the motion, the court, in balancing the competing interests of the parties and the public pursuant to the fourth *Ishikawa* factor, would find that there are *little or no valid interests...* of the public with respect to disclosure of the document.

*Id.* at 547-48 (emphasis in original).

*Rufer* suggests that, in applying the *Ishikawa* test to a record proposed to be sealed, a court may consider whether the record was never used in making a decision, as one factor in weighing competing interests. *Id.* at 548 (“if a record is truly irrelevant... the court would not consider the document...and in applying *Ishikawa* it would likely find that sealing is warranted” if there is a valid interest in secrecy). However, neither *Rufer* nor any other case says that a record must actually be used in decision making to trigger the *Ishikawa* test or to be unsealed pursuant to that test.

In fact, *Treadwell*, which followed *Rufer*, expressly rejected the notion that the public has no interest in a record unless it is “used by the court to make a decision.” 145 Wn.App. at 282, 285. The Court reiterated the *Rufer* rule that a record is presumptively open once it is filed in court. *Id.* at 284. Recognizing that *Rufer* nevertheless appeared to place some importance on whether a record was “never part of a trial court’s determination,” the *Treadwell* court said such reasoning was “inconsistent with the presumption of openness by filing.” *Id.* at 285.

The Court continued:

[W]e believe the more applicable reasoning from *Rufer* to apply here is in that court’s discussion of non-dispositive motions. There, the court recognized that **everything that passes before a trial court is relevant**

**to the fairness of the fact-finding process, even if a document is later deemed inadmissible at trial or unresponsive of a viable claim.** *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.

*Id.* (bold added). Thus, *Treadwell* affirmed that the public has a protected interest in viewing any record “that passes before a trial court,” even if the record is not used in a decision. *Id.* And *Treadwell* suggested, without explicitly holding, that whether a court considers a record in making a decision cannot be the sole basis for sealing or unsealing the record.

### **C. The Trial Court’s Analysis Was Confused.**

In denying Mr. Clark’s motion to unseal records, and in ordering certain records to be sealed, the trial court explained its reasoning as follows:

**The analysis here hinges on the fact that this Court did not review or consider the summary judgment papers or supporting documents involved, made no decision based upon these decisions [sic]. Also, the parties settled the very day of the filing of the documents seeking to be unsealed [sic]. In *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 549 (2005) our Supreme Court stated: ‘In *Dreiling*, we noted that article 1, section 10 ‘does not speak’ to the disclosure of information surfacing during pretrial discovery that does not**

otherwise come before the court because it ‘does not become part of the court’s decision-making process.’ Id at 541. While *Rufer* further articulates factors to be followed in a variety of situations, **there is no public interest involved where this Court has made no decision and has never even considered the documents** (the documents are of a sensitive nature and might be sealed in any case, but the Court does not reach that issue.)

CP 232-33 (bold added). This is confused thinking. As explained above, neither *Rufer* nor *Dreiling* says that there is no public interest in court records unless they are used in making a decision. And *Treadwell* outright rejects such a notion.

1. A Record Becomes “Part of the Court’s Decision-making Process” When it is Filed in Court, Not When It Is Used to Make a Decision.

The trial court apparently misconstrued the following statement in *Rufer*:

In *Dreiling*, we noted that article 1, section 10 ‘does not speak’ to the disclosure of information surfacing during pretrial discovery that does not otherwise come before the court because it ‘does not become part of the court’s decision-making process.’

*Rufer*, 154 Wn.2d at 541, citing *Dreiling*, 151 Wn.2d at 909-10. The trial court must have interpreted this to mean that, if a court does not consider a record in its actual decision-making, Art. 1, Sec. 10 does not require disclosure.

Again, that is not what *Rufer* says. On the contrary, *Rufer* stands for the proposition that once a record is filed in court, it becomes part of the court's "decision-making process" for purposes of triggering the *Ishikawa* test. *Rufer*, 154 Wn.2d at 549.

In fact, *Rufer* expressly rejected the trial court's reasoning, stating:

**If we define this [openness] right narrowly to consist only of the observation of events leading directly up to the court's final decision, then arguably any documents put before the court that were not part of that final decision would be outside of the scope of article I, section 10. Put another way, if the jury does not see it, the public does not see it. But our prior case law does not so limit the public right to the open administration of justice.**

*Id.* (bold added).

2. Public interest arises in anticipation of a decision, not after a decision is made.

In other words, once a record is "put before the court" by filing, it need not be part of a "final decision" to fall within the constitutional presumption of openness. This is underscored by *Rufer*'s emphasis on the mere "anticipation" of a decision:

**We hold that any records that were filed with the court in anticipation of a court decision (dispositive or not) 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.

*Id.* (bold added).<sup>6</sup> Obviously, if a record is presumptively open based on a related anticipated decision, then a related final decision by the court is not necessary to require that the record be open.

As this Court put it: “To the extent documents in court files are **intended to inform a judicial decision**, they are presumed open.” *In re Marriage of R.E.*, 144 Wn.App. at 399 (bold added). In sum, what the parties anticipate or intend, not what the court decides, is what drives the sealing analysis. Accordingly, the trial court's reasoning was wrong and should be reversed.

**D. Sealing of a Record Should Not Hinge Solely on Whether the Court Actually Used the Record to Make a Decision.**

This case highlights the need to clarify that the public has an interest in all records filed in court, whether or not they lead to a court decision. Absent clarification, courts may continue to misapply the *Ishikawa* test as the trial court did here.

Also, there are compelling policy reasons to hold here that, although a court applying the *Ishikawa* test to a record may consider

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<sup>6</sup> *See also, Id.* at 550 (“we hold in this case that **all documents filed with the trial court are open** absent compelling interests to the contrary”) (bold added).

whether it never used that record to make a decision, the court may not seal records based on that fact alone. One reason for such a holding is that, as noted in *Treadwell*,<sup>7</sup> whether a court used a record in decision-making is too speculative to be a workable standard. Here, for example, the parties disagree about which records were reviewed by the trial court.

The better approach is to presume that a judge reviews everything that is filed with his or her court (as to do otherwise is to shirk judicial responsibility), and to focus on whether the records proposed to be sealed were relevant to the decisions that were pending at the time they were filed. This is more consistent with the *Rufer* and *Treadwell* reasoning described above. Besides, allowing a judge to seal records based solely on whether he or she considered them places the public in an untenable position, wherein it cannot obtain records unless it can prove that the judge thought about them – a matter that only the judge knows.

Another reason for not sealing records based on whether a court used them to make a decision is that such a factor is too susceptible to manipulation. It is common for one party to buy the opposing party's

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<sup>7</sup> 145 Wn. App. at 285.

silence by settling a controversy before it is decided. Such manipulation should not, by itself, diminish the public's right to review the parties' filings. Moreover, the right to observe the justice system cannot depend on vagaries of circumstance, such as when a lawsuit is dropped before the merits are decided because the plaintiff runs out of money to litigate, or dies.

Finally, allowing a court to seal records solely because it never considered them defeats a key purpose of Art. 1, Sec. 10 – to permit public oversight of all aspects of the court system, not just the court's decision-making. As the Washington Supreme Court said:

The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history. The right of the public, including the press, to access trials and court records may be limited only to protect significant interests and any limitation must be carefully considered and specifically justified.

*Dreiling*, 151 Wn.2d at 903-04. Because the trial court's reasoning fails to promote that important constitutional policy, it should be rejected.

### **III. CONCLUSION**

For the foregoing reasons, the trial court's order should be reversed and remanded for application of the proper constitutional test for sealing and unsealing records.

Dated this 23rd day of October, 2009.

Respectfully submitted,

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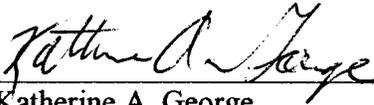
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