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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 APPELLANT**

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## I. INTRODUCTION

Intervenor/Appellant D. Edson Clark ("Clark") is challenging the December 5, 2008, Order by the Honorable Jim Rogers that denied 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 additional sealings and redactions of court filings.

The sealings and redactions in the underlying case were allowed without a sealing motion by either party, without a hearing, without review of the records by a judge or written findings by the trial court justifying the actions, without a meaningful opportunity for those opposing the actions to be heard, and without the trial court considering less restrictive alternatives. Approximately 4,000 pages of records were produced by the Defendants in discovery, all of which were designated "confidential" pursuant to a Stipulated Protective Order. That Order required the parties to file all such designated records under seal. Numerous records were thereafter filed under seal by the parties without a sealing motion, sealing order, court review, hearing or findings. The materials included records reviewed by the court in connection with hearings and others allegedly not reviewed by the court prior to the case settling.

The parties also entered into a subsequent agreement, granted by the trial court on the same day Clark's Motion to Unseal was denied, that likewise replaced previously-filed court files with redacted versions and sealed the originals. This Order was also entered without sufficient written findings by the trial court justifying the sealing and redaction of court documents.

Clark contends (1) all the sealings were improper and violated state and federal constitutional laws, the court's own General and Local Rules, and the common law of court access; (2) that the records cannot be lawfully sealed or remain sealed in accordance with these authorities; and (3) that denial of his motion to unseal was error.

## II. ASSIGNMENT OF ERROR

Assignment of Error: The trial court erred in issuing the December 5, 2008, Order denying Clark's Motion to Unseal court documents and the accompanying order sealing additional documents.

Issues Pertaining to Assignment of Error:

- No. 1 Whether Clark has a right, as a member of the public, to access to civil case filings and proceedings under Article I, Section 10 of the Washington State Constitution, the First Amendment of the United States Constitution, and the common law.
- No. 2. Whether the trial court failed to perform the required analysis under *Seattle Times v. Ishikawa*, *infra*, in deciding

whether or not to seal case filings and whether or not to keep those filings sealed.

- No. 3 Whether the records at issue should have been ordered sealed and should have remained sealed had the court performed the requisite *Ishikawa* analysis.
- No. 4 Whether the trial court failed to comply with the requirements for sealing under GR 15 and local rule KCLGR 15.
- No. 5 Whether sealing by a party pursuant to a Stipulated Protective Order based on solely the confidential designation of documents by a party without a motion to seal and order to seal and judicial review of the proposed sealed documents violates Article I, Section 10 of the Washington Constitution, the First Amendment of the U.S. Constitution, the common law, and GR 15.
- No. 6 Whether the *Ishikawa* test and presumption of access applies to court records filed in anticipation of a court decision but allegedly not considered by a trial court in ruling on a motion.

### III. STATEMENT OF THE CASE

#### A. Background

On October 5, 2007, Rondi Bennett and her father Gerald Horrobin filed a lawsuit against Smith Bunday Berman Britton, PS (“Smith Bunday”), their former accounting firm, and Sharon Robertson, their former CPA at Smith Bunday, for accounting malpractice, breach of fiduciary duty, fraud, and multiple statutory violations. *See* Complaint, Dkt. #1.<sup>1</sup> Smith Bunday and Robertson provided accounting services to Ms. Bennett and her then-husband Todd Bennett during their marriage and separation as well as to several businesses jointly owned by Ms. Bennett

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<sup>1</sup> *See* Supplemental Designation of Clerks Papers filed 4/23/09. Clark will refer to the sub-docket number for those documents not yet assigned a Clerk’s Paper designation.

and Mr. Bennett or Horrobin and Mr. Bennett. The complaint alleges that Robertson and Smith Bunday “advised and facilitated fraudulent accounting practices for the benefit of Mr. Bennett” and knowingly aided Mr. Bennett in wrongfully distributing funds related to the joint businesses to Mr. Bennett or others instead of Horrobin and Ms. Bennett as joint owners. *Id.* at 1-6. In short, Plaintiffs allege that the Defendants aided Mr. Bennett in embezzling money from his former wife and her father and hiding it in the books. Ms. Bennett and Horrobin also alleged that Smith Bunday refused to provide accounting and tax records to them on request in violation of accounting rules when they discontinued their relationships with Smith Bunday. *Id.* at 6-8.

Two months after the suit was filed, the parties entered into a Stipulation and Protective Order signed by the Honorable Dean Lum on December 11, 2007. CP 1-5. The Stipulated Order allowed the parties to stamp as “confidential” any documents they produced that they deemed to contain confidential or proprietary information. CP 2. Documents stamped confidential could only be referenced in motions, briefs or other court papers if the “document , or the portion of the court paper where the document is revealed, is appropriately marked and separately filed under seal with the Clerk” of the trial court. CP 3. The Stipulated Order allowed parties to move for the court to remove the confidential

designation from a particular document, to seek modification of the Order and to designate already-produced documents as confidential. CP 4. The Defendants thereafter produced approximately 4,000 pages of materials in discovery, every single page of which they designated as “confidential” pursuant to the Stipulated Order. CP 57.

On May 27, 2008, Plaintiffs filed the Second Declaration of Wright Noel in connection with Plaintiff’s Supplemental Brief in Support of Ms. Bennett’s Request for Discovery. CP 24, 55, 191-203. The Declaration contained two exhibits filed under seal solely because the records had been stamped confidential by the Defendants. *Id.* There was no sealing motion or sealing order or judicial review of these sealed records prior to their sealing.

Defendants filed a Motion for Summary Judgment, necessitating a response from Plaintiffs. Hence, on October 29, 2008, Plaintiffs filed a Motion asking the trial court to remove the confidential designation of some of the documents so they could be referenced in Plaintiffs’ response materials and at oral argument. CP 56-76. Plaintiffs stated that they needed these materials to rebut several allegedly false statements made in a declaration supporting the Defendants’ Motion for Summary Judgment. CP 57-58. The Defendants refused to allow the Plaintiffs to use the documents or discuss them openly in court filings or hearings. CP 57, 72.

Plaintiffs attached copies of the sealed documents to be undesignated to its Motion to Remove. CP 73-76; Dkt. #140A. The records were filed under seal by the Plaintiffs without any sealing motion, review by a judge, or sealing order and instead were sealed solely based on the Defendants' "confidential" designation pursuant to the Stipulated Protective Order. CP 73-76; Dkt. #140A.

The trial court had a hearing without oral argument the Motion to Remove Documents from the Protective Order on November 6, 2008, but deferred ruling on November 10, 2008. Dkt. #151.

Intervenor D. Edson Clark ("Clark") is a CPA. He was retained by Plaintiffs as a consulting expert and then later as a testifying expert in this lawsuit and prepared a Declaration, filed on November 14, 2008, in support of Ms. Horrobin's Response to the Defendants' Motion for Summary Judgment. *See* CP 204-26 (sealed Declaration of Ed Clark).

After Clark filed his Declaration, non-party Todd Bennett and the Defendants objected, alleging that the Declaration and Plaintiffs' Response Brief discussed material from some of the 4,000 pages of records marked "confidential" by the Defendants and were not filed under seal. CP 168.

On November 24, 2008, the parties filed another agreement, a Stipulation and Proposed Order where the parties agreed to redact and seal

previously-filed court documents. CP 120-21. Specifically, the proposed order sought to (1) replace Horrobin's Response To Defendants' Motion for Summary Judgment with a redacted version; (2) replace Clark's Declaration in Opposition To Defendant's Motion for Summary Judgment with a redacted version; and (3) order Horrobin to file a copy of the original Plaintiffs' Response and CR 56(f) Motion for Continuance and a copy of the original Clark Declaration under seal. CP 121.

On November 19, 2008, Clark filed a Motion to Intervene in the matter, seeking to assert his right as a member of the public to open access to court records, to oppose the proposed sealing or redaction of court records, including his own declaration, and also to move to unseal previously-sealed documents. CP 103-09. On November 25, 2008, after the new Stipulation was filed, Clark filed a Motion to Unseal Records, moving the court to unseal all previous sealings and redactions of court records, including, but not limited to, the attachments to his Declaration. CP 123-33.

Clark argued in his Motion to Unseal that (1) Washington State has a constitutional mandate for open courts; (2) that the public has a First Amendment and common law right of access to civil case filings and proceedings; (3) that Clark has a right to be heard as a member of the public; and (4) that the records at issue were improperly sealed. CP 127-

33. Clark also stated in his Motion to Unseal that he learned at least thirteen documents on the trial court docket were sealed, in addition to attachments to his Declaration. CP 124.

For example, docket number 85 is described as “Declaration Of Exs & P/sealed Per Sub 15.” It was filed on May 27, 2008. Docket number 85 is sealed, and is still not available on-line or in the public file. CP 113, 191-203.

Docket number 83 is described as “Declaration of Wright Noel.” It is the Second Declaration of Wright Noel (the Plaintiffs’ former counsel), and it was filed by the Plaintiffs on May 27, 2008. CP 6-9. Two exhibits in docket number 83, Exhibits I and P, are sealed and are not available in the public file or on-line. CP 24, 55, 191-203. Exhibit I is a group of documents Smith Bunday redacted prior to producing. CP 8-9, 191-203. Exhibit P is a copy of the journal entry of a \$100,000 check written to Mr. Horrobin. CP 9, 113, 191-203.

Docket number 137 is described as “Mtn Remove Documents Protec Ord.” Docket number 137 is the Plaintiffs’ Motion to Remove Documents from the Protective Order referenced above. Nine exhibits in the Motion to Remove Documents from the Protective Order, Exhibits 1-5 and 7-10, are sealed and are not in the public file or available on-line. CP 73, 75; Dkt. #140A.

Exhibit 1, according to the Plaintiffs' Motion to Remove, is an email from Sharon Robertson to Todd Bennett "in which Ms. Robertson makes recommendations regarding the equity of allocations between entities that are at the center of this lawsuit and in direct contradiction of the assertions made in Ms. Robertson's declaration." CP 59; Dkt. #140A.

Exhibit 2, according to the motion, comprises of two invoices from Smith Bunday to Mr. Bennett in which Robertson bills Mr. Bennett for services that Robertson and Mr. Bennett assert Smith Bunday never provided. CP 59; Dkt. #140A.

Exhibit 3, according to the motion is "an email from Ms. Robertson to Mr. Bennett in which Ms. Robertson advises Mr. Bennett on how to allocate funds to the equity account so that the equity holders, including Mr. Horrobin, do not receive a 'net deduction flowing through their K-1 and capital account.'" CP 59-60; Dkt. #140A.

Exhibit 4, according to the motion, is "a ledger showing adjusting journal entries for Heritage Corporate Center." CP 60; Dkt. #140A.

Exhibit 5, according to the motion, is "another invoice in which Ms. Robertson bills Mr. Bennett for services they both now claim never occurred." CP 60; Dkt. #140A.

Exhibit 7, according to the motion, is "an email from Ms. Robertson apparently to the bookkeeper for the Bennett entities

demonstrating that not only did Ms. Robertson help calculate equity distributions, but that she had read the LLC agreement and knew how the agreement required the equity distributions to be made among the members of the LLC.” CP 60; Dkt. #140A.

Exhibit 8, according to the motion, contains handwritten notes regarding Mr. Horrobin’s ownership interest in Bennett Arnold Associates, establishing that “contrary to her assertion, Ms. Robertson knew of the existence of Bennett Arnold prior to this lawsuit; and also that Smith Bunday knew it was not a loan, like they are currently claiming.” CP 61; Dkt. #140A.

Exhibit 9, according to the motion, consists of documents that “establish that Smith Bunday was aware that the check was never received by Mr. Horrobin and that Robertson was asked about who received the money,” and that “Ms. Robertson and Smith Bunday were fully aware of Mr. Horrobin’s equity interest in the Bennett Arnold entity and that Ms. Robertson was asked about how this transaction was handled on the Bennett entity books.” CP 61; Dkt. #140A.

Exhibit 10, according to the motion, is “a letter by which Smith Bunday acknowledged that Smith Bunday had been terminated as the accounting firm for the Horrobins.” CP 61; Dkt. #140A.

Further, in his Motion to Unseal, Clark challenged the aforementioned Stipulation and Proposed Order (eventually filed November 24, 2008) between the parties that would allow for two additional records to be sealed based, again, upon only an agreement between the parties, and not written findings by the trial court justifying the infringement on the public's right of access. CP 126.

**B. December 5, 2008, Order Denying Clark's Motion to Unseal**

The trial court dealt with Clark's Motion to Intervene and Motion to Unseal in the same order. CP 231-33. In the order signed December 5, 2008, Judge Rogers granted Clark's Motion to Intervene in the matter, because "[a]ny member of the public may move to unseal a document in a court of this State in any case." CP 232. However, Clark's ability to intervene was limited only to the unsealing issue, and expressly not for all purposes. CP 232. On the unsealing issue, however, the trial court cited *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 114 P.3d 1182 (2005), and held that *Rufer* does not explicitly refer to procedures allowing access to information gleaned through pre-trial discovery, and because the trial court had never considered the documents filed in connection with the response to the Summary Judgment Motion nor had it made a decision based upon them, the court held that the Motion to Unseal must be denied.

CP 232-33. The trial court concluded that “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 233. The court did not explain its reasoning for continuing sealing of records it had considered in connection with the Motion to Remove. Finally, the trial court ordered that some of the summary judgment documents not filed under seal by the parties—and thus in the public court file for several weeks—be ordered sealed, and that all documents in three additional docket numbers which had been filed openly be sealed in their entirety. CP 233, 204-226; Dkt. #153.

Intervenor Clark timely appealed, and on March 9, 2009, Commissioner William Ellis of the Court of Appeals at Division I, ruled by notation that Clark was able to appeal as a matter of right under Rule of Appellate Procedure 2.2(a)(3).

#### **IV. STANDARD OF REVIEW**

The standard of review for an appellate court’s review of a trial court’s decision to seal records is *de novo*; the abuse of discretion standard is only appropriate if the trial court applied the proper legal standard in deciding whether or not to seal. *In re Marriage of R.E.*, 144 Wn. App. 393, 399 n.9, 183 P.3d 339 (2008) (citations omitted). Moreover, because

it is an issue of constitutional magnitude, the denial of the right to open courts “is one of the limited classes of fundamental rights not subject to harmless error analysis.” *State v. Easterling*, 157 Wn.2d 167, 181, 137 P.3d 825 (2006); *see also In re Detention of D.F.F.*, 144 Wn. App. 214, 226, 183 P.3d 302 (2008), *review granted*, 164 Wn.2d 1034 (2008) (same).

## V. LEGAL AUTHORITY AND ARGUMENT

The trial court erred in denying Clark’s motion to unseal because it failed to perform the required analysis necessary to justify overriding the public’s right of access to court records under Article I, Section 10 under the Washington State Constitution, the First Amendment of the United States Constitution, the common law, and GR 15, because it also failed to apply the correct standard in deciding whether to keep the records sealed, and because when such standards are properly applied these records should not be sealed and remain sealed.

### A. Article I, Section 10 of the Washington State Constitution

Under Article I, Section 10 of the Washington State Constitution, “[j]ustice in all cases shall be administered openly.” This provision is mandatory. *State v. Duckett*, 141 Wn. App. 797, 804, 173 P.3d 948 (2007) (citation omitted). The provision has been interpreted to mean that the public and the press have a right of access to judicial proceedings and

court documents—in both civil and criminal cases. *Dreiling v. Jain*, 151 Wn.2d 900, 908, 915, 93 P.3d 861 (2004) (“[T]he policy reasons for granting public access to criminal proceedings apply to civil cases as well.... These policies relate to the public's right to monitor the functioning of our courts, thereby insuring quality, honesty and respect for our legal system.”) (citation omitted); *see also Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993) (affirming that “it is the right of the people to access open courts where they may freely observe the administration of civil and criminal justice”). This right extends to pretrial proceedings, such as voir dire, suppression hearings, and motions to dismiss. *Easterling*, 157 Wn.2d at 174 (citations omitted); *see also Beuhler v. Small*, 115 Wn. App. 914, 920, 64 P.3d 78 (2005) (“[Article I, Section 10] generally provides a right of access to trials, pretrial hearings, transcripts of trials or pretrial hearings, and exhibits introduced at these proceedings.”) (emphasis added) (citation omitted); *see also Federated Publ'n Inc. v. Kurtz*, 94 Wn.2d 51, 60, 615 P.2d 440 (1980) (Article I, Section 10 applies to all judicial proceedings). It also applies to all materials filed with a court in anticipation of a decision, whether filed in connection with a dispositive or non-dispositive motion, whether or not those materials are ever reviewed by a judge or relied upon by a judge in connection with a ruling. *In re Marriage of Treseler and*

*Treadwell*, 145 Wn. App. 278, 284-85, 187 P.3d 773 (2008); *Dreiling*, 151 Wn.2d at 916-18 (applying *Ishikawa* to non-dispositive motions).

The strong policy and rationale behind the public's constitutional right to open court proceedings and records has been repeatedly recognized by the Washington and United States Supreme Courts. The United States Supreme Court articulated the general policy behind keeping courts open:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

*Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (“*Press-Enterprise I*”) (citation omitted); *see also Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 604 (1980) (Blackmun, J., concurring) (“[T]he public has an intense need and a deserved need to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, other public servants, and all the actors in the judicial arena....”) (citation omitted). Further, absence of public scrutiny “breed[s] suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the

law[.]” *Id.* at 595 (Brennan, J., concurring). This policy has been echoed by the Washington State Supreme Court:

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; *see also Duckett*, 141 Wn. App. at 803 (Article I, Section 10 “secures the public’s right to open and accessible proceedings”) (citation omitted); *see also Federated Publication*, 94 Wn.2d at 66 (“[T]he judiciary must preserve the public right of access to proceedings to the maximum extent possible.”) (Utter, C.J., concurring and dissenting).

Although the public’s right to court documents is not absolute, restrictions on access are to be granted only in rare circumstances. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995) (“[P]rotection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances.”). Because courts are presumptively open, the party seeking to restrict access bears the burden of justifying any infringement on the public’s right to access. *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 558-59, 569-70 (1976);

*Seattle Times v. Ishikawa*, 97 Wn.2d 30, 37, 640 P.2d 716 (1982) (“The burden of persuading the court that access must be restricted to prevent a serious and imminent threat to an important interest shall be on the proponent .....”); *see also Dreiling*, 151 Wn.2d at 909 (same). To meet this burden, the party must meet the following five-part test:

- (1) The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a “serious and imminent threat” to that right;
- (2) Anyone present when the closure motion is made must be given an opportunity to object to the closure;
- (3) The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests;
- (4) The court must weigh the competing interests of the proponent of closure and the public;
- (5) The order must be no broader in its application or duration than necessary to serve its purpose.

*Dreiling*, 151 Wn.2d at 913-15 (citing *Ishikawa*, 97 Wn.2d at 37-39).

The trial court must find the compelling need necessary to allow closure.

*Bone-Club*, 128 Wn.2d at 261. Reviewing courts have not hesitated in overruling rules or statutes that do not comply with the above constitutional inquiry mandated by *Ishikawa*. *See Allied Daily Newspapers*, 121 Wn.2d at 212 (preventing enforcement of bill that could close certain court proceedings involving minors because it did not comply with *Ishikawa*); *see also In re Detention of D.F.F.*, 144 Wn. App. at 220 (holding mental health proceeding rule unconstitutional for failing

to comply with *Ishikawa*'s Article I, Section 10 test). Further, a member of the public has standing to assert the right to access. *Cohen v. Everett City Council*, 85 Wn.2d 385, 388, 535 P.2d 801 (1975).

In order for a sealing of court records to be valid it must comply with the procedural and substantive requirements shown above. The trial court must "weigh the competing constitutional interests and enter appropriate findings and conclusions that should be as specific as possible." *Duckett*, 141 Wn. App. at 805 (citation omitted). Indeed, the proponent of sealing must make a showing of need, and in demonstrating that need, the movant should state the interest or rights which give rise to that need with specificity, without endangering those interests. *Ishikawa*, 97 Wn.2d at 37; *Bone-Club*, 128 Wn.2d at 260-61. Additionally, the sealing order must be limited in its duration. *Ishikawa*, 97 Wn.2d.at 39.

**B. First Amendment and Common Law Rights of Access**

The United States Supreme Court has held on numerous occasions that the public and press also have a First Amendment right to open court proceedings and records. *See, e.g., Richmond Newspapers*, 448 U.S. at 575-77; *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 610-11 (1982) (striking down state rule mandating court closure in certain circumstances); *Press-Enterprise I*, 464 U.S. at 512-13 (ruling that blanket suppression of voir dire transcript in violation of public's right to

court access). The Washington State Supreme Court has also recognized a First Amendment right of access to court documents. *See Seattle Times Co. v. Eberharter*, 105 Wn.2d 144, 148-150, 713 P.2d 710 (1986). This right applies to “pretrial documents filed in civil cases, including materials submitted in connection with motions for summary judgment.” *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003) (citations omitted).

The United States Supreme Court has further explained that the policy considerations favoring open justice apply regardless of the nature of the proceeding—specifically, by stating that “historically both civil and criminal trials have been presumptively open.” *Richmond Newspapers*, 448 U.S. at 580 n.17. A majority of the federal circuits have followed this reasoning and found a First Amendment right to open proceedings and court records in a wide variety of civil cases.<sup>2</sup>

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<sup>2</sup>*See, e.g., Rushford v. New Yorker Magazine*, 846 F.2d 249, 253 (4th Cir. 1988) (public access to documents filed in civil case governed by First Amendment standards for open court proceedings, not by less protective common law access to records); *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23 (2d Cir. 1984) (“we agree... that the First Amendment does secure the public and to the press a right of access to civil proceedings...”); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984) (after exhaustive historical analysis of public access to civil cases, finding both First Amendment and common law right of access to civil proceedings); *In re Continental Illinois Sec. Litig.*, 732 F.2d 1302, 1308-10 (7th Cir. 1984) (policy reasons for public access to criminal proceedings apply to civil cases as well); *Newman v. Graddick*, 696 F.2d 796, 802-04 (11th Cir. 1983) (pretrial and post trial hearings and records in civil case subject to First Amendment test); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983) (finding a First Amendment right of access to contempt proceeding); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir.

The United States Supreme Court in *Waller v. Georgia*, 467 U.S. 39 (1984), applied the test established in closure cases brought under the First Amendment to the Sixth Amendment right to a public trial held by a defendant. *Id.* at 44-46. The test adopted by *Waller* states, in part, that:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

*Id.* at 45 (citation and internal quotation marks omitted). Following this, the Washington State Supreme Court also applies the aforementioned five-part test developed under Article I, Section 10 to cases brought under the “speedy public trial” provision of Article I, Section 22 of the Washington State Constitution. *Bone-Club*, 128 Wn.2d at 261 (holding that trial court violated defendant’s speedy trial right because there was nothing on the record justifying closure under the five-part test).

Additionally, the United States Supreme Court has also recognized a common law right of access to court records. *See Nixon v. Warner Comms, Inc.*, 435 U.S. 589, 597 (1978) (“[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.”) (citations

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1983) (“[t]he Supreme Court’s analysis of the justification for access to the criminal courtroom apply as well to the civil trial”).

omitted). The Ninth Circuit has also interpreted this common law right of access broadly, stating that the right “[requires] courts to start with a strong presumption in favor of access,” which may be overridden only on the basis of “articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture.” *Hagestad v. Tragesser*, 49 F.3d 1430, 1434-35 (9th Cir. 1995) (citations omitted) (court reversed and remanded “because the district court failed to articulate any reason in support of its sealing order, [making] meaningful appellate review [ ] impossible.”); *see also Valley Broad. Co. v. U.S. Dist. Court of Nevada*, 798 F.2d 1289, 1293 (9th Cir. 1986) (“The common-law right of access has historically developed to accomplish many of the same purposes as are advanced by the first amendment. For example, courts have recognized that exercise of the right helps the public keep a watchful eye on public institutions, and the activities of government.”).

The Washington State Supreme Court has likewise recognized that under the common law, open public access to court records is presumed:

The common law presumption of open judicial records is grounded in the generalized belief that maximum public access to all governmental information provides the people, the governed, with the information to understand the functioning of their government and to evaluate the performance of public servants. Furthermore, an informed public is in a better position to exercise the freedom to choose intelligently those who will govern.

*Cowles Publ'g. Co. v. Murphy*, 96 Wn.2d 584, 589, 637 P.2d 966 (1981).

This policy of openness has been held as especially important in the context of the courts, as opposed to other branches of government. *See id.* at 590 (“The public's interest in an open legal process convinces us that our judicial process is best served by ordering that these records should be available to the public.”). Further, the Washington State Supreme Court has also recognized that this right is “fundamental to a democratic state.” *Nast v. Michels*, 107 Wn.2d 300, 303, 730 P.2d 54 (1986) (citation and internal quotation marks omitted); *see also Beuhler*, 115 Wn. App. at 919 (“[T]he public has an interest in the openness of the judicial process and the neutrality of the judiciary.”).

Under the common law, filed court records are presumptively open to the public. *Cowles*, 96 Wn.2d at 588-90. That presumption may be overcome only if the party arguing in favor of sealing or redacting can show that there exists a substantial threat to safety or personal privacy that overrides the public's interest in the documents. *Id.* However, *Cowles* has been interpreted to imply that any trial court judge issuing a sealing or redaction order must “file a transcript of the in camera proceeding, the sealing order, and written findings of fact and conclusions of law immediately after the decision to seal is made.” *Eberharter*, 105 Wn.2d at 148. Moreover, the above procedural mechanisms “[become] meaningless

unless the decision to seal a document can be publicly and judicially scrutinized.” *Id.* at 147-48. This means that the sealing or redaction order and the underlying rationale justifying it must be available for public inspection. *Id.* at 148.

### **C. Court Rules for Sealing**

General Rule (“GR”) 15 contains the procedures for the sealing of court records at the trial court. In a civil case, under GR 15(c)(1), “the court or any party may request a hearing to seal or redact the court records.” The next subsection, (c)(2), states

[a]fter the hearing, the court may order the court files and records in the proceeding... to be sealed or redacted if the court makes and enters 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 [.]

Read together, subsections (1) and (2) show that a hearing is required, and, to comply with the rule, the court must make written findings detailing with specificity how the public interest in open access to the court record is outweighed by competing interests. While the hearing may not be required to be in person, due process “requires... that a party receive proper notice of proceedings and an opportunity to present its position before a competent tribunal.” *Woo v. Fireman’s Fund Ins. Co.*, 137 Wn. App. 480, 494, 154 P.3d 236 (2007). Moreover, subsection (2) states that

“[a]greement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records.”

Further, GR 15(c)(3) states that “[a] court record shall not be sealed under this section when redaction will adequately resolve the issues presented to the court pursuant to subsection (2).” Subsection (4) states, in part, that “[t]he order to seal and written findings supporting the order shall also remain accessible to the public [.]” This is reemphasized in subsection (5), where the rule states, in subpart (C), that “the order to seal and the written findings supporting the order to seal” are to both remain open to the public.

King County Local General Rule (“KCLGR”) 15(b) requires that

Any 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; the clerk’s office is directed to return any order that is not so captioned to the judicial officer signing it for further clarification. See also LCR 26(c), LCR 79 (d)(6), LFLR 5(c) and LFLR 11. The clerk is directed to not accept for filing and to return to the signing judicial officer any order that is in violation of this order.

KCLGR 15(a) also states that

Motions to destroy, redact or seal all or part of a civil or domestic relations court record shall be presented, in accordance with GR 15 and GR 22, to the assigned judge or if there is no assigned judge, to the chief civil judge . . . .

**D. The December 5, 2008, Orders**

The trial court erred in issuing the December 5, 2008, Order denying Clark's Motion to Unseal and the accompanying order sealing records for at least five reasons discussed below, each grounds for reversing the Orders.

**1. The trial court failed to perform the *Ishikawa* analysis in deciding whether or not to seal or redact the court records.**

The sealing of the records in this case violates the clear mandates under Article I, Section 10 of the Washington State Constitution, and the First Amendment of the United States Constitution. Sealing of court records requires a court to follow the five-part test specified in *Ishikawa* and *Dreiling*. See *Ishikawa*, 97 Wn.2d at 37 (stating that "courts must" apply the five factors when deciding whether to allow restrictions on court access); see also *Bone-Club*, 128 Wn.2d at 258 ("To assure careful, case-by-case analysis of a closure motion, the trial court must perform a weighing test consisting of five criteria[.]"). This is not in dispute, as the Defendants conceded that *Ishikawa* must be applied in this case. CP 172.

Here, however, there was no sealing order prior to sealing and records were sealed by the parties based solely on their own confidential designations. There was no motion to seal records, no hearing, no judicial review, and no findings and no showing of a need to seal particular

records nor the particular harm or threat posed by keeping the records public. In other words, it is grounds for reversal for the trial court to fail to apply the *Ishikawa* test to each document filed under seal and for failing to apply the test when Clark asked the trial court to unseal. *See Dreiling*, 151 Wn.2d at 918 (holding that *Ishikawa* test applied when sealing material submitted in support of securities action and remanding to trial court to apply the test).

**2. The trial court failed to comply with the requirements for sealing under GR 15.**

Additionally, the trial court violated the recently revised GR 15 and its own local rule KCLGR 15. *See, e.g., In re Marriage of R.E.*, 144 Wn. App. at 399-400 (discussing how GR 15 was significantly amended in 2006, in wake of *Rufer* and *Dreiling*); *see also See State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325, 332 (2009) (noting that the comments to the rule suggest that revision was a result of *Rufer* and *Dreiling*). Failure to comply with the provisions in GR 15 is reversible error. *See In re Marriage of R.E.*, 144 Wn. App. at 405 (“In these aspects the order does not comply with GR 15. We therefore remand to the court commissioner for further review in light of the above discussion.”).

First, the lack of written findings by the trial court justifying sealing is a clear violation of GR 15(c)(2), which demands that the trial

court “[make] and [enter] written findings that the specific sealing or redaction is justified by identified compelling privacy or safety concerns that outweigh the public interest in the court record.” 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). All of these requirements are missing in the immediate case.

Second, the sealings and redactions were allowed without a motion brought by either party, in violation of GR 15(c)(1) and (2), and also KCLGR 15(a), which clearly states that motions to redact or seal all or part of a civil record must be presented to the assigned judge. Nor was there a hearing. Instead, the parties here agreed between themselves how to determine what documents should be filed under seal, away from public view, and the trial court sanctioned those agreements without reviewing the documents or taking into account the public’s constitutional interest in accessing the documents.

Third, under GR 15(c)(3), the trial court must consider redaction when deciding to seal or unseal—there is no indication this was done here. The trial judge must also identify with specificity the rights at risk and the less restrictive alternatives considered—neither of which occurred here as the trial court essentially allowed the parties to contract around the state and local court rules and the State and Federal Constitutions. The fact that

the trial judge agreed to the parties' stipulated redactions in some instances, rather than full sealings, does not equate to written findings by the trial court showing that a less restrictive alternative could not have met the alleged interest of the parties urging secrecy, nor does it show that redaction would not have been sufficient for the records that were sealed. The absence of this high level of specificity makes meaningful review impossible—which is exactly why compliance with *Ishikawa* is required. Because courts are presumed open, the propriety of the sealing is presumptively invalid if there are no specific findings justifying it.

Additionally, GR 15(c)(2) clearly states that an agreement by the parties cannot be the lone basis for sealing—this is exactly what occurred in the immediate case. The first agreement of the parties allowed court records to be filed under seal, without the necessary judicial oversight to protect the public's constitutional right to access the records. The second agreement allowed for the replacement of several court filings with redacted versions, without the trial court examining whether that was warranted. This is not consistent with court rules or analogous federal and state case law. *See Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (“The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it)....

He may not rubber stamp a stipulation to seal the record.”) (citations omitted); *see also In re Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F.Supp.2d 1353, 1363 (N.D. Ga. 2002) (recognizing *Citizens’* holding against stipulated protection orders). All of these violations of GR 15 are grounds for reversal.

There was also a violation of KCLGR 15(b) in that the December 5, 2008, Order denying Clark’s Motion to Unseal also ordered the sealing of the summary judgment documents. CP 233. This is a clear violation of KCLGR 15(b) which states: “Any 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[.]” On its face, the December 5, 2008, Order is in violation of this rule as the Order caption does not mention sealing or redaction other than in the “Clerk’s Action Required” section, and because the order applies to multiple issues apart from the additional sealing and redaction it ordered. CP 231.

The fact that the trial court issued an Order to Seal (directed at docket number 159) on the same day it issued the December 5 Order denying Clark’s Motion to Unseal is of no moment—the order denying Clark’s Motion to Unseal ruled on all sealed documents and ordered the documents to be sealed, in violation of KCLGR 15(b). The language of the December 5, 2008, Order to Seal makes this clear, specifically under the

“Findings” section of the sealing form, which states: “See Order entered today dated 5 Dec. 2008 which rules on all sealed documents.” CP 234.

Even if this Court were to conclude that the procedures used by the trial court in the immediate case somehow complied with GR 15, that conclusion would not equate to a finding that such procedures pass the constitutional standard established in *Ishikawa*. See *Waldon*, 202 P.3d at 333. In *Waldon*, this Court concluded that the standard for court closure or sealing, both before and after the significant 2006 amendments to GR 15, was set in *Ishikawa*. *Id.* This Court methodically delineated the deviations between GR 15 and *Ishikawa*, and concluded that the revised GR 15 “cannot constitutionally serve as a stand-alone alternative to *Ishikawa*.” *Id.* However, this Court also ruled that GR 15 can be harmonized with *Ishikawa* in order to remain constitutional—but in doing so, made clear that it is not sufficient for a party advocating closure or sealing to comply only with GR 15. *Id.* Thus, *Ishikawa* is the proper standard for determining whether documents should be sealed or unsealed; to the extent that the Defendants argue that they complied with GR 15, in wake of *Waldon*, this is not adequate, even if true.<sup>3</sup>

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<sup>3</sup> It is important to note that *Waldon* also expressed dissatisfaction with the trial court’s use of sealing “forms,” concluding that the sealing form in that case was insufficient because it “misstates the legal standard to be applied when deciding motions to seal. For example, the current form fails to include the ‘serious and imminent threat’ and temporal factors.” *Id.* at 333, n.9. Similarly, in the immediate case, the trial court’s order to seal

**3. The parties agreeing to sealing could not have met their burden justifying sealing or in keeping the records sealed under *Ishikawa***

Besides the procedural deficiencies of the sealings and redactions, the parties agreeing to seal could not have met their *Ishikawa* burdens even if the trial court had applied it properly, nor could the parties have met their burdens to keep the records sealed. The trial court is entitled to no deference on review. *See Rufer*, 154 Wn.2d at 540 (citation omitted).

First, neither party in the immediate case made a showing of a compelling interest justifying the need for sealing. Even if they had, this Court has interpreted that even a showing of a compelling interest in favor of closure is insufficient. *See Waldon*, 202 P.3d at 330, n.4 (clarifying that *Ishikawa*'s first factor requires that the proponent of closure or sealing show a "*serious and imminent threat*," not merely a compelling threat) (emphasis added). "[*Ishikawa*'s first factor] requires a showing that is more specific, concrete, certain and definite than a 'compelling' concern." *Id.* at 331. As stated above, the burden is on the party seeking to infringe on the public's constitutional right to access. *See Dreiling*, 151 Wn.2d at 914 (citation omitted). This means that the trial court can only seal or

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docket 159 is on a form that misstates the proper standard for sealing, as it references only the "compelling circumstances" standard held by this Court in *Waldon* as inconsistent with the heightened standard established in *Ishikawa*. This Court should conclude, as it did in *Waldon*, that the sealing form used in the immediate case should be revised to reflect the proper test specified in *Ishikawa*.

redact if the party or parties moving to do so show a serious and imminent threat, which there is no indication they did.

In the immediate case, there is no clear need for sealing, as the records do not contain personal information that is not already disclosed in public filings. The Plaintiffs, parties to the Stipulated Protective Order, argued the same in trying to remove the effect of the Order. CP 61. There are no trade secrets in the records. Further, the records regard business ventures that no longer exist—therefore, there is no risk of a competitive disadvantage to any business should the records be unsealed. Indeed, it is highly improbable that every single document produced by the Defendants could be redacted or sealed because of a “serious and imminent threat” that overrides a member of the public’s constitutional right to access the documents. Despite this, the parties’ agreement mandated that anything marked “confidential” be automatically filed under seal. CP 3. Again, judicial oversight is necessary to ensure that parties seeking to limit public access meet their burden of showing that a serious and imminent threat justifies judicial secrecy for each one of the redacted or sealed documents. Not only did the parties in the immediate case not meet their burdens, the trial court did not require the parties to make an effort to do so.

The second factor, that interested persons are given a chance to object when the sealing is made, is also missing. “For 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.” *Dreiling*, 151 Wn.2d at 914; *see also United States v. Brooklier*, 685 F.2d 1162, 1168 (9th Cir. 1982) (stating that under First Amendment, court access restrictions may only be granted after the objecting party is “afforded an opportunity to state their objections before exclusion is ordered”) (citation omitted). The parties here were allowed to file records under seal merely because of a “confidential” stamp on the documents and not after a motion and hearing. This lack of notice and specificity fails to comply with the constitutional mandate specified above.

Instead of evaluating the propriety of the prior sealings and redactions, the trial court side-stepped the issue because it mistakenly believed that there are no constitutional protections for access to filed court records that the court does not use in making a ruling, in direct conflict with this Court’s holding in *Treadwell*. The court’s reasoning further fails to explain why it allowed sealing of records filed and reviewed by the court in connection with the Motion to Remove.

Additionally, the provisions of an agreement between parties regarding discovery designations do not trump the State and Federal Constitutions. *See Foltz*, 331 F.3d at 1138 (parties' reliance on confidentiality provisions of protective order did not foreclose independent discovery by intervenors); *see also Dreiling*, 151 Wn.2d 900 (adopting the same principle).

In *Citizens First National Bank*, the Seventh Circuit found that it was improper for the trial court to issue a stipulated order, agreed to by the parties, authorizing the parties to designate as confidential any document believed to contain trade secrets or other confidential or governmental information, including information held in a fiduciary capacity. 178 F.3d at 944-45. In finding that the stipulated order was improper, the court noted that "the parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding." *Id.* at 944. Further, the court held that boundaries of the protective order at issue were "so loose that it amounts... to giving each party carte blanche to decide what parts of the record shall be kept secret. Such an order is invalid." *Id.* at 945 (citations omitted); *see also Confederated Tribes of Siletz Indians of Oregon v. Weyerhaeuser Co.*, 340 F.Supp.2d 1118, 1121-22 (D. Or. 2003) (court reviewed a stipulated order agreed to by the parties allowing "confidential" designation on discovery documents to be

lone grounds for filing under seal—court criticized the lack of a judicial determination and concluded that because the judge never made a showing justifying sealing and the parties never had to meet their burden, the court “must decide de novo whether each document should be sealed”). The facts from those cases are remarkably similar to what occurred in the immediate case, and this Court should therefore interpret *Citizens* and *Confederated Tribes* as instructive. *See also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 789 (3d Cir.1994) (holding that trial court erred in granting blanket protective order).

Third, sealing was not the least restrictive means in protecting the interests that were allegedly threatened—the Defendants produced over 4,000 pages of documents, all stamped by them as “confidential,” and the trial court allowed this to serve as the basis for sealing or redaction of court filings, instead of an actual finding that any limitation on the access to the filed documents was appropriate. There is no indication that the court considered redaction of the documents sealed, or anything short of a total sealing. Again, the fact that the trial court eventually rubber stamped a stipulation of the parties involving filing of some redacted records as opposed to totally sealed is irrelevant to whether the court considered redaction when deciding to seal. There remains the lack of written findings upon which to review the propriety of the decisions of the trial

court. *See In re Marriage of R.E.*, 144 Wn. App. at 404-05 (remanding trial court refusal to unseal court records, in part, because “there is nothing in the record to suggest that redaction was considered”); *see also E.E.O.C. v. Erection Co., Inc.*, 900 F.2d 168, 170 (9th Cir. 1990) (appellate court reverses trial court’s sealing of a consent order because of the trial court’s failure to adequately articulate any findings justifying the sealing).

Fourth, there is nothing on the record indicating that the trial court weighed the competing interests of the parties and the interests of the public in sealing or keeping the records sealed. The Washington State Supreme Court has noted that “[the trial court’s] consideration of these issues should be articulated in its findings and conclusions, which should be as specific as possible rather than conclusory.” *Dreiling*, 151 Wn.2d at 914 (citation omitted). Not only are the findings not specific—they do not exist. Neither stipulated order made any mention of the public’s interest in having access to the documents, nor was the trial court presented with any legal authority or factual justification that would allow the sealing.

Also, any argument that the trial court made its grounds for sealing clear in the December 5, 2008, Order is equally without merit. The trial court described the summary judgment documents that the parties agreed to seal on November 24, 2008, as “tax returns of the parties and witnesses.” CP 233. To somehow equate this description of what is being

sealed as the written findings justifying sealing or redaction under the State and Federal Constitutions, the common law, and GR 15, is, at a minimum, a gross misinterpretation of the law. There is no indication that the trial court looked at the actual documents being sealed, and the written description above, which contains none of the specificity mandated under the law, cannot be deemed adequate in any circumstances.

Moreover, the trial court erroneously concluded that because “this court did not review or consider the summary judgment papers or supporting documents involved, made no decision based upon these [decisions]” and because the parties “settled the very day of the filing of the documents seeking to be unsealed,” the public had no interest to the documents. CP 232-33. This conclusion was based on the trial court’s mistaken interpretation of *Rufer*, discussed *infra*, in Section V, Part 5.

Fifth, the stipulated orders cannot meet the final factor of the *Ishikawa* test: that any restricting order cannot be any broader in its application or duration than necessary to serve its purpose. This means that a sealing order “shall apply for a specific time period with a burden on the proponent to come before the court at a time specified to justify continued sealing.” *Dreiling*, 151 Wn.2d at 914 (citation omitted). The sealing here is overly-broad by the fact that the subjective beliefs of the parties were allowed to serve as the justification for sealing—with no

showing in the record of a particular harm or threat posed by having the records remain or be made public. Again, all of the several thousand documents produced by the defendants were labeled “confidential,” which under the terms of the first Stipulation and Protective Order mandated that the parties were to automatically file the documents under seal without having the court apply *Ishikawa*—and also precluded the use of the documents by the other party without unfettered redaction. The sealings are also overbroad in that there appears to be no set time limit, and the records are still sealed after the conclusion of the underlying case, a clear violation of *Ishikawa*. 97 Wn.2d.at 39.

The Defendants argued belatedly that the Internal Revenue Code gives all taxpayers a right of privacy, and that that right trumps the public’s constitutional right to the open access of court records. CP 170. The Defendants specifically cited 26 U.S.C. §§ 6713 and 7216 as precluding them from disclosing confidential tax information. CP 170. 26 U.S.C. § 6713 generally provides penalties for those who prepare taxes if they disclose information related to preparing a tax return; it states in part:

(a) Imposition of penalty—If any person who is engaged in the business of preparing, or providing services in connection with the preparation of, returns of tax imposed by chapter 1, or any person who for compensation prepares any such return for any other person, and who--

(1) discloses any information furnished to him for, or in connection with, the preparation of any such return, or

(2) uses any such information for any purpose other than to prepare, or assist in preparing, any such return, shall pay a penalty of \$250 for each such disclosure or use, but the total amount imposed under this subsection on such a person for any calendar year shall not exceed \$10,000.

However, subsection (b) indicates that there are exceptions to this rule; it states: “(b) Exceptions—The rules of section 7216(b) shall apply for purposes of this section.” 26 U.S.C. § 7216(b) states that

(b) Exceptions.--

(1) Disclosure.--Subsection (a) shall not apply to a disclosure of information if such disclosure is made—(A) pursuant to any other provision of this title, or (B) **pursuant to an order of a court.**

(2) Use.--Subsection (a) shall not apply to the use of information in the preparation of, or in connection with the preparation of, State and local tax returns and declarations of estimated tax of the person to whom the information relates.

(3) Regulations.--Subsection (a) shall not apply to a disclosure or use of information which is permitted by regulations prescribed by the Secretary under this section. Such regulations shall permit (subject to such conditions as such regulations shall provide) the disclosure or use of information for quality or peer reviews.

(Emphasis added).

From even a cursory reading of the statutory language, it is clear that the Defendants' reliance on these provisions is misplaced. First, there is no indication that these statutes were cited by either party as a justification for sealing or redacting any court document—or at any point prior to their brief in response to Clark's Motion to Unseal, filed on December 3, 2008 (almost a year after the first Stipulation was entered). Likewise, neither party cited any statute in defending the continued sealing of the records at issue—again, the trial court did not require either party to meet their burden in restricting the public's access.

Second, under the terms of the statute, a party would not be criminally or civilly liable if a court ordered disclosure of the information referenced in the statute. Case law interpretation has made this principle clear. In *Mitsui & Co. (U.S.A) Inc. v. Puerto Rico Water Resources Authority*, 79 F.R.D. 72 (D.C. Puerto Rico 1978), the court expressly held:

This Section 7216 is primarily oriented to discourage the misuse of confidential information received by nonprofessionals preparing tax returns. It does not apply to information used in the preparation of, or in connection with, the preparation of state tax returns, nor does it apply when the disclosure is ordered by the court.

*Id.* at 80 (emphasis added). Moreover, the *Mitsui* court stated: “The statute [§ 7216] does not limit the Court's power to require disclosure of tax related information under appropriate circumstances.” *Id.*; *see also*

*S.E.C. v. Cymaticolor Corp.*, 106 F.R.D. 545, 547 (D.C.N.Y 1985)

(“Clearly, a court may order the disclosure of tax returns pursuant to the statute.”) (citation omitted). The Defendants’ reliance on these statutes is thus in error and does not provide a basis for non-disclosure, even if the trial court had actually used these statutes as the basis for sealing or keeping records sealed—which there is no indication that it did.

Also, at least some of the records at issue were provided voluntarily by Todd Bennett to Clark outside of the litigation—meaning that Todd Bennett has waived any privacy interest in those documents.

Additionally, one of the records at issue is an email between Smith Bunday and Todd Bennett that is completely out of the purview of the federal tax regulations cited by the Defendants. More importantly, however, the parties were allowed to file under seal without having a trial court judge make an independent determination, supported by written specific findings, that has precluded the public from knowing which of the records contained actual “confidential” material. Again, the burden is on the party seeking to keep sealed records sealed and on the party seeking to have records sealed. The parties here failed to meet their burdens in both instances, and the trial court erred in allowing and continuing the sealing.

**4. The parties are not allowed to circumvent the public's constitutional right to access court records by stipulated agreement**

It is well established that parties cannot circumvent the public's constitutional right to court access by agreeing to stipulations that allow parties to automatically file court documents under seal. The failure to do the requisite analysis, or to comply with court rules that provide the mechanism for said analysis, is grounds for reversal. Even if the parties stipulate to sealing, as the Plaintiffs and Defendants did here twice, the court must make an independent determination, using the *Ishikawa* factors, to determine whether the interests in favor of sealing or closure outweigh the public's right of access under the Constitution—the constitutional protections of the public's right apply whether or not the parties have agreed to a blanket sealing of records, or only portions, as here. *See Rufer*, 154 Wn.2d at 546 n.11 (“[T]here is nothing in *Dreiling* to suggest we intended to limit the application of *Ishikawa* and the compelling interest test to situations where there was a ‘blanket protective order agreed to by the parties.’ In fact, restricting *Dreiling* to that limited set of facts would undermine the constitutional principle of openness.”). The trial court allowed the parties' stipulated orders to dictate whether court records were filed under seal or redacted—without performing the required *Ishikawa* analysis to any of the documents for which sealing and

unsealing was requested. The trial court's reliance upon stipulated orders as the lone basis for sealing is unquestionably a violation of the public's Constitutional right to access court records, and GR 15(c)(2).<sup>4</sup>

**5. The public has a constitutional right to access filed court records regardless of whether a trial court uses those records in its decision making**

The trial court judge was mistaken in concluding that there is no public interest involved with the sealed documents because he did not make a decision based on them or consider some of the documents in his rulings. CP 232-33. This reasoning has been explicitly rejected on multiple occasions, including this Court. *Treadwell*, 145 Wn. App. at 285. Moreover, this reasoning is not supported by *Rufer*, and the trial court's erroneous interpretation of that case is grounds for reversal.

In *Rufer*, the State Supreme Court dealt with this issue directly, as there was a dispute between the parties over whether the court should

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<sup>4</sup> The Washington State Supreme Court in *Dreiling* expressly adopted the ruling and reasoning used by the Ninth Circuit in *Foltz*, where the court held that "blanket protective orders" should generally not be granted by the trial court, whether or not agreed upon by the parties. 331 F.3d at 1131 (noting that such orders "[make] appellate review difficult"). Specifically, in *Foltz*, the trial court granted two protective orders agreed by the parties that sealed all discovery documents. *Id.* at 1311. Public interest groups intervened and challenged the order—the appellate court ruled that a party requesting sealing bears the burden of overriding the public right to the court records. *Id.* at 1130. This burden can only be overcome by showing more than unsubstantiated allegations, and must be supported by affidavits showing actual need—the court must consider redaction, and make particularized findings to support the order. *Id.* at 1135-37. Relevant here as well, is *Foltz*' conclusion that when an intervenor challenges the propriety of a blanket protective order that treats all discovery material as "confidential," "reliance will be less with a blanket [protective] order, because it is by nature overinclusive." *Id.* at 1138 (citation and internal quotation marks omitted).

apply the *Foltz* rule from the Ninth Circuit stating that documents filed in relation to non-dispositive motions may be sealed with only a showing of good cause, or whether, as the plaintiffs argued, *Dreiling* must be extended to mean that sealing any court records must meet the *Ishikawa* test. 154 Wn.2d at 548. The Court ultimately refused to apply *Foltz*, and rejected the argument that the compelling interest test (*i.e.*, *Ishikawa*) should only apply to records upon which the court relied in making dispositive decisions—it specifically held that “our prior case law does not limit the public’s right to the open administration of justice.” *Id.* at 549.

The Court further stated:

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.* (emphasis added); *see also Foltz*, 331 F.3d at 1134 (holding that material not yet filed is not a “[traditional public source of information,” but when discovery material is filed with the court “its status changes”).

This Court, in *Treadwell*, further clarified the holding in *Rufer*. In *Treadwell*, the petitioner sought dissolution of her marriage—she amended her petition to include at least two temporary restraining orders and show cause orders against her husband. 145 Wn. App. at 281. After a

dispute revolving around a personal jurisdiction issue, the parties agreed to a dismissal with prejudice in 2004. *Id.* Two years later, the husband moved for an order to show cause why certain documents filed in the dissolution should not be redacted and sealed—the trial court judge denied the motion to seal or redact, and the husband appealed. *Id.*

On appeal, the husband argued that the trial court abused its discretion in refusing to seal and redact because he alleged for “irrelevant” documents and for documents that are not used by the court to make a decision, his burden for sealing or redaction was to only show that there was good cause for the restrictions. *Id.* at 282.

This Court expressly rejected this argument—the same argument asserted by the Defendants here and used by the trial court as justification for denying Clark’s Motion to Unseal. *See id.* at 285 (“[The husband] asks us to apply the *Rufer* court’s reasoning and adopt a good cause standard for documents that were never part of the trial court’s determination, similar to unused discovery documents. We decline that invitation.”). *Treadwell* reiterated that all court documents filed in anticipation of a court decision, in a dispositive or non-dispositive motion, and whether or not the court uses the documents, can only be sealed if a compelling interest is shown under the *Ishikawa* factors. *Id.* at 284-85; *see*

also *Woo*, 137 Wn. App. at 486 (this Court recognizing *Rufer*'s rule that *Ishikawa* applies to all documents filed in anticipation of a court decision).

Additionally, this Court in *Treadwell* explained that adopting the reasoning of the appellant in that case would be inconsistent with the presumption of openness created by filing court records, and would also be impractical in that it would require speculation as to whether the trial court used all, or any, of a filed document. 145 Wn. App. at 285.

*Treadwell* goes even further, and directly rebuts the trial court's interpretation of *Rufer* in the immediate case:

[*Rufer*] 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.... *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.* at 285 (citations omitted) (emphasis added). Additionally, the relevance of the court documents, according to *Treadwell*, does not determine whether the *Ishikawa*, or only the good cause standard, applies—the relevance of the documents is subsumed as part of the *Ishikawa* test the trial court must consider. *Id.* at 286 (“[T]he *Ishikawa* factors themselves allow the trial court to take into account the level of confidentiality and relevancy of a document in balancing the competing

interest involved.”). For the reasons explained above, the trial court’s interpretation of *Rufer* is erroneous, and thus grounds for reversal.

**E. Clark’s Motion to Unseal was Not Untimely Nor is His Appeal Mooted by the Conclusion of the Underlying Action**

To the extent the Defendants continue to argue that Clark’s Motion to Unseal was untimely, and thus his appeal should not be heard, they are mistaken. Courts have heard issues related to sealing well after the underlying trial has concluded. In *Ishikawa*, the newspapers challenged a motion to exclude the public from the courtroom at the trial level, and moved twice to open the records of the pretrial hearing of the defendant’s motion to dismiss—once during trial, and once after the defendant’s conviction. 97 Wn.2d at 33, 44. The petitioners moved to unseal the sought records after the trial, and the court dealt with the issue while the defendant appealed her conviction. *Id.* Likewise, in *Rufer*, at the close of the underlying medical malpractice trial, the defendant moved to seal a trial exhibit, several pretrial and deposition exhibits and portions of deposition testimony. 154 Wn.2d at 538. The State Supreme Court granted discretionary review to deal with the sealing issues—after the trial had already concluded. *Id.* at 539.

The fact that the underlying action upon which Clark originally intervened has concluded does not change the fact that the records at issue

were improperly sealed and need to be unsealed; nor does it change the fact that the records sealed via the same order should not have been sealed without applying *Ishikawa*—as shown above, sealing disputes are often dealt with at the appellate level, whether or not the underlying action has concluded. Clark’s and the public’s constitutional interest continue to the present day regardless of the status of the underlying case. *See also Treadwell*, 145 Wn. App. at 281 (party moves to seal two years after conclusion of underlying case). Therefore, any argument that Clark’s motion should not be heard as moot is without merit.

**F. Clark Seeks Attorney’s Fees and Costs**

If this Court deems Clark the prevailing party in this matter, he respectfully seeks attorney’s fees under RCW 4.84.080 and RAP 18.1. If the Court determines that Clark is the substantially prevailing party, he respectfully seeks an award of costs under RAP 14.2 and RAP 14.3.

**VI. CONCLUSION**

Clark was denied his constitutional and common law rights to access court documents when the trial court denied his Motion to Unseal and sealed records based only on stipulations by the parties. Impeding public access to the courts through the sealing or redactions of court records without applying the requisite *Ishikawa* test is a constitutional violation, a violation of the common law, and a violation of multiple

provisions within the General and Local Rules for the sealing and redaction of court records. Clark asks that this Court reverse the trial court's issuance of the December 5, 2008 Order, and order all the records sealed in violation of the procedures mandated in *Ishikawa* be unsealed and available for public inspection.

Respectfully submitted this 23rd day of April, 2009

By: \_\_\_\_\_  
Michele Earl-Hubbard, WSBA #26454  
David Norman, WSBA #40564  
Chris Roslaniec, WSBA #40568



**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on April 23, 2009, I caused the delivery by legal messenger of a copy of the foregoing Brief of Appellant to:

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Plaintiff, *pro se*/Respondent

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Attorney for Non-Party Todd Bennett

Dated this 23rd day of April, 2009 at Seattle, Washington.

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David M. Norman

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**ALLIED**  
LAW GROUP

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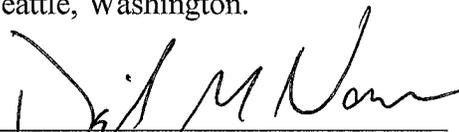
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