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Supreme Court No. 88036-1

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SUPREME COURT OF THE STATE OF WASHINGTON

Aaron Hundtofte and Kent Alexander,

Plaintiffs,

v.

Ignacio Encarnación and N. Karla Farías,

Defendants/Petitioners,

v.

King County Superior Court Office of Judicial Administration,

Intervenor/Respondent.

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
2013 MAY 24 A 10 47  
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ORIGINAL

**BRIEF OF AMICI CURIAE KING COUNTY  
HOUSING JUSTICE PROJECT AND SNOHOMISH COUNTY  
HOUSING JUSTICE PROJECT IN SUPPORT OF  
DEFENDANTS/PETITIONERS IGNACIO ENCARNACIÓN AND  
N. KARLA FARIAS**

Rory O'Sullivan WSBA # 38487 King County Bar Association Housing Justice Project 1200 Fifth Ave, Suite 600 Seattle, WA 98101 (206) 267-7019	Leona C. Bratz WSBA #16226 Snohomish County Legal Services Housing Justice Project 2731 Wetmore Ave., Ste. 410 Everett, WA 98201 (425) 258-9283, ext. 12  Attorneys for Amici Curiae
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TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iii

I. IDENTITIES AND INTEREST OF AMICI CURIAE .....1

II. INTRODUCTION .....1

III. STATEMENT OF THE CASE .....3

IV. ARGUMENT .....3

    A. Eviction filings have an extremely negative impact on a tenant's housing prospects .....3

    B. Redaction of a party's name from SCOMIS does not implicate Article I, Section 10 of the Washington State Constitution.....6

        1. This Court has never found that redaction of a court record requires a constitutional analysis under Article I, Section 10...7

        2. The public trial right is not implicated by Encarnación's requested redaction under the experience and logic test of *Sublett* .....8

        3. Encarnación's requested redaction does not implicate the public trial right because the requested redaction does not inhibit the public's ability to evaluate the court's administration of justice .....12

        4. If the Court finds that redacting a litigant's name from SCOMIS implicates the public trial right, then the constitutionality of many other court rules is called into question .....14

    C. General Rule 15 alone establishes an appropriate test for evaluating a litigant's request to redact, seal, or destroy records when the litigant's request does not implicate the public's ability to evaluate the court's administration of justice .....16

1. General Rule 15 appropriately protects the public's access to court records .....	16
2. Encarnación's request for redaction should be granted under General Rule 15 .....	17
3. Redaction of a litigant's name in a SCOMIS case caption is possible .....	18
V. CONCLUSION .....	19

## TABLE OF AUTHORITIES

### Cases

<i>Allied Daily Newspapers of Wash. v. Eikenberry</i> , 121 Wn.2d 205, 848 P.2d 1258 (1993).....	14
<i>Cohen v. Everett City Council</i> , 85 Wn.2d 385, 535 P.2d 801 (1975).....	7
<i>Dreiling v. Jain</i> , 151 Wn.2d 900, 93 P.3d 861 (2004).....	7,8,13
<i>Hundtofte v. Encarnación</i> , 169 Wn.App. 498, 280 P.3d 513 (2012).....	4,14
<i>In Re Morris</i> , 176 Wn.2d 157, 288 P.3d 1140 (2012).....	13
<i>Press-Enterprise Co. v. Superior Court of California for Riverside County</i> , 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986).....	8,9,11
<i>Rufer v. Abbott Laboratories</i> 154 Wn.2d 530, 114 P.3d 1182 (2005).....	14
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30, 640 P.2d 716 (1982).....	7,17
<i>State v. Bone-Club</i> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	7,9
<i>State v. Paumier</i> , 176 Wn.2d 29, 288 P.3d 1126 (2012).....	13
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012).....	6,7,8,9,13

### Constitutional Provisions

Const. art. I, § 10 .....	passim
Const. art. I, § 22 .....	6

### Rules

GR 15.....	passim
GR 15(c)(2).....	17
GR 22.....	2,14,15
GR 22(b)(4).....	15

GR 22(g)(2).....	14
GR 31.....	2,14,15
GR 31(e)(1).....	15
GR 31(g).....	12

**Other Authorities**

General Order of Division I re RCW 13.34 Juvenile Dependencies dated July 16, 1987.....	15,19
General Order of Division II 2006-1 In Re The Welfare of All Juveniles Found Dependent Under Chapter 13.34 RCW (Superseding General Order 87-1).....	15,16,19
General Court Order of Division III In the Matter of Court Administration Re: the Welfare of All Juveniles Found Dependent Under Chapter 13.34 RCW dated October 8, 2010.....	16,19
King County Judicial Administration Electronic Court Records (ECR) Online, <i>at</i> <a href="http://www.kingcounty.gov/courts/Clerk/Records/ECROnline.aspx">http://www.kingcounty.gov/courts/Clerk/Records/ECROnline.aspx</a> ..	10
Jeanine Blackett Lutzenhiser, <i>An Open Courts Checklist: Clarifying Washington's Public Trial and Public Access Jurisprudence</i> , 87 Wash.L.Rev. 1203, 1236 (2012).....	6
Pierce County Legal Information Network Exchange, <i>at</i> <a href="https://linxonline.co.pierce.wa.us/linxweb/Main.cfm">https://linxonline.co.pierce.wa.us/linxweb/Main.cfm</a> .....	10
Washington Courts Access to Court Records Brochure, <i>at</i> <a href="http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displaycontent&amp;thefile=content/accesstocourtrecords">http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displaycontent&amp;thefile=content/accesstocourtrecords</a> .....	10
Washington Courts JIS-Link Code Manual, <i>at</i> <a href="http://www.courts.wa.gov/jislink/index.cfm?fa=jislink.codeview&amp;dir=cj_manual&amp;file=courts#P1924_18931">http://www.courts.wa.gov/jislink/index.cfm?fa=jislink.codeview&amp;dir=cj_manual&amp;file=courts#P1924_18931</a> .....	9

## **I. IDENTITIES AND INTEREST OF AMICI CURIAE**

The King County Bar Association's Housing Justice Project and the Snohomish County Legal Services' Housing Justice Project ("HJP") are courthouse-based legal clinics that provide free legal services and representation to low-income tenants facing eviction. HJP serves hundreds of tenants each month by advising tenants of their rights, negotiating with landlords and their counsel, and when necessary, representing tenants in court at their eviction hearings. HJP attorneys work with tenants who have received eviction notices where the cases have not yet been filed, with tenants who are contesting an eviction lawsuit, and with tenants who have been impacted by eviction filings.

HJP's extensive experience defending against evictions and counseling clients trying to find housing gives the programs a unique perspective of the compelling privacy concerns of blameless tenants such as Ignacio Encarnación and N. Karla Farías (hereinafter jointly referred to as "Encarnación"), and whether the relief sought by Encarnación will be an effective means of addressing those privacy concerns.

## **II. INTRODUCTION**

Amici HJP contend that the mere redaction of an individual's name from the Superior Court Management Information System (hereinafter "SCOMIS") index does not constitute a court closure or implicate Article

I, Section 10 of the Washington State Constitution. Rather, redaction of names, social security numbers, health records, and other personal identifiers is governed by GR 15, 22 and 31.

This court has repeatedly articulated the value of open courts in terms of the need to ensure that the public is able to evaluate the court's administration of justice. Therefore, when a hearing is closed in a criminal case, when jurors are interviewed or selected outside the public's view, or when an entire dispositive motion is sealed, the public is prevented from understanding how or why a court came to a decision that impacted the outcome of a case. Such decisions must be evaluated in light of the constitutional requirement that justice be administered openly.

However, when a social security number is redacted, an individual's health records are sealed, or a name in a case caption in SCOMIS is redacted, the public retains access to the crucial records that allow individuals to evaluate the court's decision. The public interest in openness regarding social security numbers, health records, and personal identifiers still exists, and the public's interest in access to such records must be weighed against the privacy interest of the party seeking to seal or redact the information pursuant to the applicable court rule. However, the public interest does not rise to the level of an interest protected by Article I, Section 10 of the Washington State Constitution.

### III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case as set forth in the Supplemental Brief of Defendants-Petitioners Encarnación and Farías.

### IV. ARGUMENT

**A. Eviction filings have an extremely negative impact on a tenant's housing prospects.**

The negative impact a wrongful eviction filing has on an innocent tenant like Encarnación is real. Every week, HJP sees the difficulties tenants face locating new rental housing when they have been evicted. Immediately after an unlawful detainer action is filed, the defendant's full name appears in the SCOMIS index, allowing a landlord to identify defendants in an eviction action. It is not uncommon for a tenant who is being sued for unlawful detainer to start applying for new housing prior to the eviction hearing, only to have her multiple applications rejected because the eviction lawsuit is already on her record. HJP has observed that the inability to find new rental housing due to an eviction filing is a major cause of homelessness.

Landlords and tenant screening companies routinely search court records to see if potential tenants have ever been the subject of an unlawful detainer action. Tenants' applications are often automatically

rejected if they have been subjects of such an action—regardless of whether the action had any merit.

The situation is unjust when, as in the present case, the unlawful detainer action is wrongly filed and misrepresents the tenant's rental reputation. HJP attorneys must often warn tenants that although they have meritorious defenses to an unlawful detainer action, they may be better off giving up possession of the property without asserting their defenses in litigation, for fear of having an eviction filing on their record. If the tenant refuses to move out and chooses to defend against the action, she does so at a serious cost to her ability to acquire new housing for a significant period of time. Therefore, the many protections granted to tenants by the Residential Landlord/Tenant Act are often unenforceable in practice. See Brief for King County Housing Justice Project and Snohomish County Housing Justice Project as Amici Curiae at 4-6 in Support of Respondents, *Hundtofte v. Encarnación*, 169 Wn. App. 498, 280 P.3d 513 (Div. I 2012), No. 66428-0.

Many landlords are aware of the severe consequences to a tenant if an eviction is filed, and a number of landlords use the threat of filing an eviction action to their advantage. In a recent case from Snohomish County, SCSC Cause # 13-2-04423-2, docket number 6, pages 10-11, a property management company provided a tenant with a "72-Hour

Warning Notice to Terminate Tenancy and/or Report Unfavorable Information to Consumer Credit and Tenant Reporting Agencies." The notice advised the tenant that:

The reputation you establish here will be with you for many years to come. Every landlord or company who reviews your record in the future will be aware of the unfavorable record you are establishing with us. It may eventually be reported to banks, home mortgage companies, insurance companies and other creditors with whom you wish to do business and who request a report. An adverse credit report and/or tenant report can make it very difficult for you to: - Get employment -Rent a home or apartment of your choice -Buy a future house, new automobile or anything requiring good credit - Get a car loan, credit card, student loan, or home loan for you and your family.

*Id.* There is nothing speculative about the negative consequences of an eviction filing. Landlords are fully aware of the consequences as evidenced by this notice.

Encarnación is suffering the devastating consequences of a wrongful eviction filing. He seeks to have his name redacted from the SCOMIS index for an unlawful detainer action that was wrongfully filed and unfounded in law, that he could not have avoided, and that was solely in response to another person's improper actions beyond his control. As the trial court correctly found, Encarnación demonstrated that his individual privacy interests outweighed the public's interest in an unredacted SCOMIS index.

**B. Redaction of a party's name from SCOMIS does not implicate Article I, Section 10 of the Washington State Constitution.**

This Court has accepted review of many cases recently in order to articulate the bounds and implications of the public trial right as codified in Article I, Sections 10 and 22 of the Washington State Constitution. In cases where a judge closes all or part of a trial to the public, there is no doubt that a court closure occurs. However, this Court has held that some situations require a preliminary analysis in order to determine whether a closure has occurred: "Before determining whether there was a violation, we first consider whether the proceeding at issue implicates the public trial right, thereby constituting a closure at all." *State v. Sublett*, 176 Wn.2d 58, 71, 292 P.3d 715 (2012).

The academic community has also suggested that cases implicating the public trial right should begin with a preliminary analysis regarding whether or not a court closure occurred. Lutzenhiser, Jeanine Blackett, "An Open Courts Checklist: Clarifying Washington's Public Trial and Public Access Jurisprudence," 87 Wash.L.Rev. 1203, 1236 (2012). As Amici HJP argue below, the redaction requested in the instant case does not constitute a court closure implicating the public trial right.

***1. This Court has never found that redaction of a court record requires a constitutional analysis under Article I, Section 10.***

The public trial right has come up most consistently in the criminal context. See e.g. *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995), *State v. Sublett*, 176 Wn.2d 58 (2012). However, the public trial right enunciated in Article I, Section 10 applies to all proceedings, civil and criminal alike. *Cohen v. Everett City Council*, 85 Wn.2d 385, 535 P.2d 801 (1975). Despite the dozens of cases interpreting Article I, Section 10, Amici HJP have been unable to find a single instance in which this Court has found the mere redaction of a court record to constitute a court closure implicating the public trial right.

This Court has made clear that a litigant's request to seal a dispositive motion in a civil case implicates the public trial right. *Dreiling v. Jain*, 151 Wn.2d 900, 918, 93 P.3d 861 (2004). However, the public trial right is not implicated by information obtained during pretrial discovery: "As this [pretrial discovery] information does not become part of the court's decision making process, article I, section 10 does not speak to its disclosure." *Id.* at 909-910.

Conversely, items that are attached to a dispositive motion that is ruled on by the court necessarily become part of the court's decision

making process. *Id.* at 918. Therefore, previously sealed documents attached to a dispositive motion adjudicated by the court must either be unsealed, or the court must engage in the constitutional public trial right analysis in order to determine whether the documents should remain sealed. *Id.*

Like information obtained in pretrial discovery, a litigant's name as it is displayed in SCOMIS does not impact the outcome of a case or the public's ability to evaluate the court's decision making process in the case. Therefore, given this Court's logic in *Dreiling*, Encarnación's request to redact his name does not implicate Article I, Section 10.

***2. The public trial right is not implicated by Encarnación's requested redaction under the experience and logic test of Sublett.***

This court recently articulated a new test for determining when the public trial right is implicated by the facts in a case:

Recognizing that resolution of whether the public trial right attaches to a particular proceeding cannot be resolved based on the label given to the proceeding, in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–10, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (*Press II*), the United States Supreme Court formulated and explained the experience and logic test to determine whether the core values of the public trial right are implicated. The first part of the test, the experience prong, asks “whether the place and process have historically been open to the press and general public.” *Press II*, 478 U.S. at 8, 106 S.Ct. 2735. The logic prong asks “whether public access plays a significant positive role in the functioning of the particular process in question.” *Id.*

If the answer to both is yes, the public trial right attaches and the *Waller* or *Bone-Club* factors must be considered before the proceeding may be closed to the public. *Press II*, 478 U.S. at 7–8, 106 S.Ct. 2735. We agree with this approach and adopt it in these circumstances.

*Sublett*, 176 Wn.2d at 72-73. Although the experience and logic test is designed to assist courts in determining whether the public can be excluded from certain portions of a court proceeding, the test is also useful in evaluating when redaction or sealing implicate the public trial right.

The experience prong of the experience and logic test weighs against a finding that redacting a name from SCOMIS implicates the public trial right. Pursuant to the experience prong, the Court asks whether the place and process have historically been open to the press and the general public. *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 8, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986). There is no specific or consistent historical precedent for being able to locate a case online using only the name of the defendant.

Different counties in Washington State began using SCOMIS at different times. Yakima County was the first county to begin entering data in SCOMIS in 1977; however, Garfield County did not start using SCOMIS until 1993. Washington Courts JIS-Link Code Manual, at [http://www.courts.wa.gov/jislink/index.cfm?fa=jislink.codeview&dir=clj\\_manual&file=courts#P1924\\_\\_18931](http://www.courts.wa.gov/jislink/index.cfm?fa=jislink.codeview&dir=clj_manual&file=courts#P1924__18931). Different counties have adopted

different mechanisms for online access to files. For instance, Pierce County operates a system called LINX that permits electronic access to files and allows users to access files by litigant name. Pierce County Legal Information Network Exchange, *at* <https://linxonline.co.pierce.wa.us/linxweb/Main.cfm>. By contrast, King County operates a system called Electronic Court Records that requires a user to know the case number in order to access documents in a specific case file. King County Judicial Administration Electronic Court Records (ECR) Online, *at* <http://www.kingcounty.gov/courts/Clerk/Records/ECROnline.aspx>. Some counties have not yet adopted a system that permits online access to court documents. Washington Courts Access to Court Records Brochure, *at* <http://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displaycontent&thefile=content/accesstocourtrecords>.

For the first one hundred years of our state's history, the superior courts operated without the benefit of an online information system. Over the past thirty years, online access to information has been developing and changing, and remains different in different counties. There is no overriding experience or historical precedent for the proposition that the public has a right to access cases in an online information system using the name of only one of the parties. In fact, for most of our state's history, the public has had access to court records only by physically traveling to the

courthouse where the records are stored and manually searching through the files.

In the instant case, if the court granted Encarnación's requested redaction, it would still be possible to locate and review the physical case file in the same manner as the file could have been located and reviewed prior to adoption of the SCOMIS system. Therefore, the experience prong weighs against a finding that redaction of a name from SCOMIS implicates the public trial right.

The logic prong of the experience and logic test also weighs against a finding that redacting the case name in SCOMIS constitutes a court closure. The logic prong asks whether public access plays a significant role in the functioning of the particular process in question. *Press-Enterprise Co.*, 478 U.S. at 8, 106 S. Ct. 2735. Because Encarnación is requesting redaction of his name subsequent to the conclusion of the case, and members of the public had the right to be present during any hearing, public access to the proceeding has already played the crucial role of ensuring fairness in the process. The requested redaction will not limit the public's ability to continue evaluating the court's fairness. Even after Encarnación's requested redaction, members of the public would still be able to locate this case in SCOMIS by using the case number or the name of Encarnación's landlord, or a member of

the public could request bulk distributions of cases in order to evaluate unlawful detainer cases generally, or proceedings heard by a specific judge. GR 31(g). Therefore, the public's access to a Defendant's name in SCOMIS does not play a significant positive role in the functioning or the fairness of the process.

Under both prongs of the experience and logic test, redaction of a litigant's name from SCOMIS does not rise to the level of a request that implicates the public trial right. Therefore, Encarnación's requested order to redact should be granted if Encarnación meets the requirements of GR 15, without having to demonstrate the need for redaction under a public trial right analysis.

*3. Encarnación's requested redaction does not implicate the public trial right because the requested redaction does not inhibit the public's ability to evaluate the court's administration of justice.*

While not explicitly articulated in this way, this Court has often resolved questions regarding the applicability of Article I, Section 10, based on an analysis of whether the requested closure or sealing impacts the public's ability to evaluate the court's administration of justice. As noted above, this Court determined that documents obtained as part of discovery could be sealed under a relatively low standard, but once those documents were used in support or opposition to a motion for summary

judgment, the public trial right was implicated. *Dreiling*, 151 Wn.2d at 918. Similarly, when jurors are questioned in private and the answers to the jurors' questions impact whether the jurors are excluded, the decision making process of the court is implicated and by extension Article I, Section 10 of the Washington State Constitution is implicated. *See State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012), and *In re Morris*, 176 Wn.2d 157, 288 P.3d 1140 (2012).

By contrast, when a juror asks the court a question about a jury instruction which is legal in nature, and there is no dispute between the parties regarding the appropriate answer to the question, limiting public access to the discussion regarding how to answer the juror's question does not inhibit the public's ability to evaluate the court's administration of justice. *Sublett*, 176 Wn.2d at 72. Had there been a dispute regarding the appropriate answer to the juror's question, then the party disputing the court's answer could have lodged an objection in public and on the record. *Id.* at 76-77.

In sum, the Washington State Constitution guarantees public access to our courts. Const. art. I, § 10. The fundamental purpose of public access is to ensure fairness and instill public confidence in our system of justice: "We adhere to the constitutional principle that it is the right of the people to access open courts where they may freely observe the

administration of civil and criminal justice.” *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 542, 114 P.3d 1182 (2005), *citing Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993). The circumstances in which the public trial right is implicated could be appropriately evaluated by considering whether a certain closure, sealing, or redaction inhibits the public’s ability to evaluate the court’s administration of justice.

Redacting Encarnación’s name from the SCOMIS index would not inhibit the public’s ability to evaluate the court’s administration of justice, and therefore does not implicate the public trial right articulated in Article I, Section 10.

***4. If the Court finds that redacting a litigant’s name from SCOMIS implicates the public trial right, then the constitutionality of many other court rules is called into question.***

Application of Division I’s reasoning in *Hundtofte v. Encarnación*, 169 Wn. App. 498, 280 P.3d 513 (2012), to this and other cases involving redaction would call into question the constitutionality of General Rules 15, 22, and 31, and orders of all three divisions of the Court of Appeals of this state.

Redaction under GR 22 is permitted without consideration of the public trial right. GR 22(g)(2) requires the clerk to seal all financial source documents, personal health care records, confidential reports, and judicial

information system database records. GR 31(e)(1) requires that parties shall redact from court records personal identifiers, including social security numbers and financial account numbers. The common properties of information that may be redacted are expressed in GR 22(b)(4): redaction is permitted where disclosure “would be highly offensive to a reasonable person” and where the information “is not of legitimate concern to the public.”

It would be unworkable to require a constitutional analysis for each request to seal or redact under GR 22 and GR 31. Yet the decision by Division I in the instant case makes no attempt to distinguish the litigants' request in the instant action from the hundreds of thousands of redactions and sealings that are required under GR 22 and GR 31. Rather Division I appears to assume that each and every request to redact or to seal a document implicates the strictest test for closure of a hearing pursuant to Article I, Section 10 of the Washington State Constitution.

Likewise, Division I's reasoning in the case below would invalidate orders issued by all three Divisions of the Court of Appeals requiring that dependency cases on appeal be recaptioned by using the juveniles' initials in place of the juveniles' full names. General Order of Division I re RCW 13.34 Juvenile Dependencies dated July 16, 1987; General Order of Division II 2006-1 In Re The Welfare of All Juveniles

Found Dependent Under Chapter 13.34 RCW; General Court Order of Division III In the Matter of Court Administration Re: the Welfare of All Juveniles Found Dependent Under Chapter 13.34 RCW dated October 8, 2010.

Amici respectfully request that this Court articulate a standard that allows lower courts and litigants to distinguish between routine redaction of names and personal identifiers, and court closures that require a constitutional analysis.

**C. General Rule 15 alone establishes an appropriate test for evaluating a litigant's request to redact, seal, or destroy records when the litigant's request does not implicate the public's ability to evaluate the court's administration of justice.**

Amici HJP do not argue that redaction or sealing should be liberally granted or permitted without a demonstrated need. Rather, Amici argue that GR 15 articulates the appropriate standard for evaluating when and how redaction should be permitted and that a constitutional analysis is not necessary in this case or in other cases in which the public's ability to evaluate the court's administration of justice is not implicated.

***1. General Rule 15 appropriately protects the public's access to court records.***

General Rule 15 establishes the procedure and the standard for redacting, sealing, and destroying court records. For a restriction to be

granted under GR 15, the court must enter 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.” GR 15(c)(2). GR 15 was adopted as a court rule seven years after *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30 (1982) was decided and was then extensively revised in 2006. Amici respectfully assert that the revisions to GR 15 were meant to codify the procedural and substantive rules for the destruction, sealing, and redaction of court records when such action will not impact the public’s ability to evaluate the court’s administration of justice.

Given the GR 15 standard, a litigant must establish a compelling privacy or safety concern and demonstrate that the litigant’s concern outweighs the public interest in access to the subject record. GR 15(c)(2). While this analysis is not constitutional in nature, it still creates a relatively high bar for the redaction of a court record.

***2. Encarnación’s request for redaction should be granted under General Rule 15.***

The SCOMIS index should be redacted as requested by Encarnación because Encarnación has identified a compelling privacy concern that outweighs the public interest in access to the information. *Id.* It is the experience of HJP that contesting information in SCOMIS has

little to no impact on the likelihood of a prospective landlord offering a tenant housing, especially because the mere fact of an unlawful detainer filing is often the automatic disqualifier for a tenant.

Tenants incur mounting nonrefundable application fees between \$35-\$53 for each application, and are at increased risk of homelessness because of their inability to get approved for a new rental unit. The existence of an unlawful detainer record not only severely threatens the tenant's right to obtain housing, it increases her risk of homelessness. Therefore, Encarnación, an innocent tenant, has demonstrated that his compelling right to housing, and the threat to that right posed by the fact that his name is listed as a defendant in an unlawful detainer action in SCOMIS, outweighs the public's right to access the case by running a search in SCOMIS using his name. It is contrary to the interests of justice and contrary to the standards of GR 15 to allow a blameless and wrongfully sued tenant to suffer such devastating consequences.

***3. Redaction of a litigant's name in a SCOMIS case caption is possible.***

Contrary to the claim of the Clerk, redaction of a litigant's name in a case caption in SCOMIS, and compliance with GR 15, is possible. Case captions are often amended when adding or removing litigants and when juvenile cases are appealed. In fact, such redaction is routine as the caption

in every dependency case is amended such that the names of the children are removed and only their initials are used when dependency cases are appealed. *See* General Order of Division I re RCW 13.34 Juvenile Dependencies dated July 16, 1987; General Order of Division II 2006-1 In Re The Welfare of All Juveniles Found Dependent Under Chapter 13.34 RCW; General Court Order of Division III In the Matter of Court Administration Re: the Welfare of All Juveniles Found Dependent Under Chapter 13.34 RCW dated October 8, 2010. This is the exact same redaction that is requested by Encarnación.

These changes do not obliterate a record or make it permanently irretrievable as the Clerk argues. Subsequent to the requested redaction, the record can still be located in the same manner as dependency cases on appeal can be located, using the case number, using the name of the other parties involved in the case, using the initials of the defendant, by searching the physical court file, or by evaluating court cases in the context of a bulk distribution. Therefore, Encarnación's requested redaction should be granted as he has met the requirements for redaction pursuant to GR 15.

## V. CONCLUSION

Amici HJP respectfully request that this Court distinguish between cases that implicate the public trial right as articulated in Article I, Section

10 of the Washington State Constitution, and cases like the instant case, in which a litigant merely seeks to redact information from the SCOMIS index. Redacting a tenant's name from the SCOMIS index does not implicate the public trial right because the public would remain capable of evaluating the court's administration of justice, even after the requested redaction. Encarnación's request for redaction should be evaluated and granted pursuant to the General Rule governing the redaction of court records, GR 15.

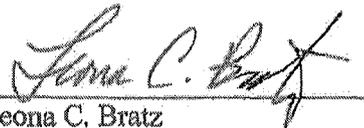
Respectfully submitted this 14<sup>th</sup> day of May, 2013.

HOUSING JUSTICE PROJECT

By



Rory O'Sullivan  
WSBA # 38487  
1200 Fifth Ave  
Seattle, WA 98101  
(206) 267-7019  
Managing Attorney  
Housing Justice Project



Leona C. Bratz  
WSBA #16226  
2731 Wetmore Ave., Ste. 410  
Everett, WA 98201  
(425) 258-9283, ext. 12  
Attorney for Snohomish County  
Housing Justice Project

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**To:** Rory O'Sullivan  
**Cc:** sarah.jackson@kingcounty.gov; thomas.kuffel@kingcounty.gov;  
david.seaver@kingcounty.gov; Allyson O'Malley-Jones; leticiac@nwjustice.org; Eric Dunn;  
klunder@aclu-wa.org; Vanessa Hernandez; kgeorge@hbslegal.com; Leona Bratz  
**Subject:** RE: Filing of Amici Housing Justice Project in 88036-1

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**Sent:** Tuesday, May 14, 2013 4:06 PM  
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**Subject:** Filing of Amici Housing Justice Project in 88036-1

Please accept for filing in *Hundtofte v. Encarnación*, 88036-1, the Attached Motion for Order Granting Housing Justice Project Permission to File Amicus Curiae Brief, the Brief of Amici Curiae King County Housing Justice Project and Snohomish County Housing Justice Project in Support of Defendants/Petitioners Ignacio Encarnación and N. Karla Farías, and the Motion for Order Granting Amici Housing Justice Project Time During Oral Argument.

Thank you.

Rory O'Sullivan  
Managing Attorney  
Housing Justice Project  
King County Bar Association  
206-267-7019