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No. 88036-1

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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BRIEF OF AMICI CURIAE
LEGAL VOICE AND WASHINGTON STATE COALITION
AGAINST DOMESTIC VIOLENCE

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INTRODUCTION

In the Internet age, being a party to a lawsuit can have far greater consequences than ever before. Case records that were once accessible only in courthouses are now available to anyone in the world with access to a computer. While this technological development has many positive aspects, it also has significant implications for litigants' privacy and safety interests.

This case illustrates the severe consequences that tenants who are sued for unlawful detainer may face as a result of advancing technology and expanded electronic access to court records. Because the Internet and Washington's Superior Court Management Information System (SCOMIS) now make it easy to search case indices online, tenant screening companies and landlords are readily able to determine whether a prospective tenant has been subject to an unlawful detainer action. Having an unlawful detainer action on your record means that many landlords will refuse to rent to you in the future, regardless of the outcome of the action.

While unlawful detainer actions are justified in many cases, there is no serious dispute that some cases are without merit. In such cases, trial courts should have the ability, after conducting an appropriate case-specific inquiry, to order that the innocent tenant's full name be redacted

from the SCOMIS index if necessary to preserve their future housing options. Permitting a court to order such relief is consistent with General Rule 15, Washington law and public policy, and this Court's Access to Justice Technology Principles.

I. IDENTITY AND INTEREST OF AMICI

Legal Voice, formerly known as the Northwest Women's Law Center, is a non-profit public interest organization dedicated to protecting the rights of women and their families through litigation, education, legislation and the provision of legal information and referral services. Legal Voice has long worked to protect women's privacy rights as well as their access to safe housing opportunities, particularly for survivors of domestic violence, sexual assault, stalking, and sexual harassment.

The Washington State Coalition Against Domestic Violence (WSCADV) is a non-profit membership organization comprised of over 70 victim shelter and advocacy organizations committed to eradicating domestic violence in Washington State. WSCADV works to ensure that domestic violence survivors have accessible, affordable and safe housing available to them when they choose to leave abusive relationships.

II. STATEMENT OF THE CASE

Amici adopt the statement of the case presented by Petitioners Ignacio Encarnación and N. Karla Farías in their petition for review filed on September 18, 2012, and in their supplemental brief filed on April 5, 2013.

III. ARGUMENT

This case presents the question of whether a tenant who is improperly sued for unlawful detainer may have her name redacted in SCOMIS if necessary to protect the tenant's ability to secure housing in the future. This issue is of particular concern to women, especially low-income women and women of color, and to survivors of domestic violence.

Tenants may be sued for unlawful detainer for many different reasons, some of which are improper. If a tenant is able to demonstrate that she lacked culpability for the unlawful detainer action, courts must be able to redact the tenant's name in electronic court indices if necessary to preserve their future housing opportunities. In the case at hand, the tenants made such a showing and were appropriately granted relief by the trial court on a case-specific basis.

1. Tenants May Face Unlawful Detainer Actions For Improper Reasons

The impact that an unlawful detainer action has on future housing opportunities is of broad public concern. However, it has a particularly severe impact on women. Multiple studies have found that women, particularly women of color, are disproportionately subject to eviction actions. A recent multi-year study of evictions in Milwaukee, Wisconsin found that women made up 60.6 percent of tenants evicted between 2003 and 2007, with disparity rates highest in predominantly African-American and Latino neighborhoods. See Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 Am. J. Sociology 88, 98-101 (2012). This finding is consistent with results from other studies. See Michael D. Gottesman, *End Game: Understanding the Bitter End of Evictions*, 8 Conn. Pub. Int. L. J. 63, 94 (2008) (noting that eviction data in New Haven, Connecticut “corroborate that evictions disproportionately affect women” and certain racial minorities); Chester Hartman & David Robinson, *Evictions: The Hidden Housing Problem*, 14 Housing Pol’y Debate 461, 467-68 (2003) (noting “[n]umerous studies have shown that those who are evicted are typically poor, women, and minorities” and describing studies).

Women are disproportionately subject to eviction for many different factors. While some reasons are warranted under the law, other factors are improper.

First, survivors of domestic violence, sexual assault, and stalking are often evicted simply because of their status. See Nat'l Law Ctr. on Homeless & Poverty & Nat'l Network to End Domestic Violence, *Lost Housing, Lost Safety: Survivors of Domestic Violence Experience Housing Denials and Evictions Across the Country*, at 7-9 (Feb. 2007), available at www.nlchp.org/content/pubs/NNEDV-NLCHP_Joint_Stories%20_February_20072.pdf. Although Washington and a growing number of jurisdictions have passed laws to prohibit such discrimination against survivors of domestic violence, these laws do not mean that discrimination no longer occurs.

For example, in *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 215 P.3d 977 (2009), a woman was wrongfully sued for unlawful detainer by her landlord simply because she was a victim of domestic violence. In addition, a study in Washington, D.C. found high levels of discrimination against domestic violence survivors by landlords even after the passage of a law to prohibit such discrimination. See Equal Rights Ctr., *No Vacancy: Housing Discrimination Against Survivors of*

Domestic Violence in The District of Columbia (April 2008), available at http://www.equalrightscenter.org/site/DocServer/DV_Report_FINAL_COPY.pdf?docID=152.

There are a number of other situations in which tenants, particularly women, are wrongfully subjected to unlawful detainer actions. For example:

- Tenants may face eviction after refusing requests for sexual favors by their landlords or in retaliation for complaining about sexual harassment by their landlords. *See, e.g.,* Maggie E. Reed et al., *There's No Place Like Home: Sexual Harassment of Low Income Women in Housing*, 11 *Psych. Pub. Pol. & L.* 439 (2005) (describing various forms of sexual harassment in rental housing). This problem is particularly acute among low-income women, who may fear that challenging their landlord will result in eviction or blacklisting. *See* Theresa Keeley, *An Implied Warranty of Freedom from Sexual Harassment: The Solution for Harassed Tenants Where the Fair Housing Act Has Failed*, 38 *U. Mich. J.L. Reform* 397, 400-01 (2005).
- Many landlords seek to evict pregnant or parenting tenants because they do not wish to rent to tenants with children. As the U.S. Department of Housing and Urban Development has warned, “many

facilities evict parents because they are expecting or have given birth to, adopted, or obtained custody of a child.” *See* Press Release, U.S. Dept. of Housing & Urban Development, Five Facts Every Parent Should Know About Their Housing Rights (Mar. 20, 2008), *available at* <http://www.hud.gov/offices/fheo/library/familywkidsfacts.pdf>.

- Lesbian, gay, bisexual, and transgender (LGBT) tenants may receive eviction notices if a landlord learns of their sexual orientation or gender identity. *See, e.g.*, Equal Access to Housing in HUD Programs – Regardless of Sexual Orientation or Gender Identity, 76 Fed. Reg. 4194 (Jan. 24, 2011) (citing examples of housing discrimination against LGBT individuals).

And as this case illustrates, tenants may also face an unlawful detainer action simply because their landlord fails to honor their rights under the terms of their lease and Washington’s Residential Landlord-Tenant Act (RLTA).

To be sure, tenants who face eviction for these improper reasons have remedies under Washington law, and in some cases under federal law as well. *See, e.g.*, RCW 49.60.222 (prohibiting discrimination in real estate transactions based on sex, sexual orientation, and families with children status); RCW 59.18.580 (prohibiting discrimination in rental

housing against survivors of domestic violence, sexual assault, or stalking); 42 U.S.C. § 3601 *et seq.* (prohibiting housing discrimination based on sex). But even if tenants are successful in asserting their legal rights, as a practical matter they may experience impaired rental housing opportunities in the future simply because they have an unlawful detainer action on their record.

This reality significantly frustrates the policies behind our anti-discrimination and landlord-tenant laws. Tenants have a right to be free from unlawful discrimination in rental housing. Tenants also have the right to be secure in their homes during the terms of the leases, provided they comply with their obligations under their rental agreements and the RLTA. But even if tenants are able to win their eviction actions on the merits or to obtain a favorable settlement, their housing opportunities may nonetheless be impaired by the mere fact that they have an unlawful detainer action on their record. This denies tenants the safe and secure housing opportunities that the laws are intended to protect. It also creates a significant access to justice issue by discouraging tenants from asserting their rights under the law to challenge improper eviction actions.

As a result, when a tenant is improperly sued for unlawful detainer, it is a basic matter of fairness that courts should have the ability to order

redaction of the tenants' names from the SCOMIS index if necessary to preserve their future housing opportunities, after conducting an appropriate case-specific inquiry.

2. Redacting A Party's Name In SCOMIS Is Permissible Under GR 15 And Is Consistent With The Access To Justice Technology Principles Adopted By This Court

In *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 949-50, 215 P.3d 977 (2009), the Court of Appeals held that "GR 15 authorizes courts to redact information in SCOMIS." In this case, however, the King County Superior Court Clerk disputes the holding in *Rousey*, arguing that redaction of a party's name in SCOMIS would constitute an impermissible destruction of court records. Mr. Encarnación and Ms. Farías have explained why this argument is untenable under the plain language of GR 15. *See* Pet.'s Reply to Intervenor/Resp.'s Answer to Pet. for Disc. Rev. However, it should also be noted that the Clerk's argument, if accepted, would have significant consequences, particularly for survivors of domestic violence, sexual assault, and stalking.

It is essential for courts to retain the discretion to order redaction of a party's name in SCOMIS if justified to protect compelling privacy or safety concerns. This concern is perhaps most easily understood in the context of domestic violence. For example, a domestic violence survivor

may move to a confidential location to escape her abuser, who threatened to kill her if she ever left him. The abuser is adept at using technology to track her down. The survivor obtains rental housing, but faces eviction several months later. When her landlord files an unlawful detainer action, she fears that her abuser will be able to use electronic court records to find her.

Under these circumstances, there would be a compelling reason to redact the party's name in SCOMIS to protect her safety, consistent with GR 15. But under the arguments advanced by the Clerk, a court would be powerless to enter such an order, regardless of the danger posed to the survivor. This cannot be the proper result.

Permitting redaction of a party's name in SCOMIS to protect privacy and safety concerns is also consistent with this Court's Access to Justice Technology Principles. The Principles include the following statement regarding privacy concerns arising from advancing technologies:

The justice system has the dual responsibility of being open to the public and protecting personal privacy. Its technology should be designed and used to meet both responsibilities.

Technology use may create or magnify conflict between values of openness and personal privacy. In such circumstances, decision makers must engage in a careful balancing process, considering

both values and their underlying purposes, and should maximize beneficial effects while minimizing detrimental effects.

Washington State Supreme Court, *Washington State Access to Justice*

Technology Principles § 3 (Dec. 3, 2004). The Access to Justice

Technology Principles “apply to all courts of law and serve as a guide for all other actors in our state justice system.” *Gendler v. Batiste*, 174 Wn.2d 244, 262, 274 P.3d 346 (2012).

The Principles appropriately direct courts to engage in a “careful balancing process” when technology creates a tension between openness and privacy. To strike a correct balance, commentators have suggested that courts should consider a number of factors, including:

- *Possible harm resulting from the revelation of the information.* When the risk of harm to the individual or society is particularly great, the need for protection from access is higher (e.g., information about health or victims of domestic violence).
- *Risk of aggregation of data.* When there is a particularly high risk that aggregation of data will lead to violations, even if the release of the individual data is not particularly problematic, the need for protection is greater.
- *Social value of access to the particular information.* Where there is greatest need for access to the data, then the balance shifts in favor of access. Examples of such information might include preventing wrongdoing, protecting public safety or public health, or increasing public oversight of government.
- *Risk of hiding wrongdoing.* A particular danger arises when the justice system’s acceptance of secrecy adds to the risk of continued wrongdoing.

- *Purposes to which information is to be put.* As a general matter, the purposes to which information is to be put should play a major role in determining the appropriateness of access.
- *Context.* The general interests served by privacy and access in a particular situation must be considered.

Richard Zorza & Donald J. Horowitz, *The Washington State Access to Justice Technology Principles: A Perspective for Justice System Professionals*, 27 *Justice System J.* 249, 255 (2006).

These considerations strongly favor the trial court's redaction order in this case. Mr. Encarnación and Ms. Farías demonstrated that having their full names appear in SCOMIS created a high risk of harm to them and that redacting their full names would present no risk of hiding wrongdoing. By contrast, the public has a minimal interest in using SCOMIS to learn that Mr. Encarnación and Ms. Farías were sued for unlawful detainer.

“The fundamental right to access to justice may be discouraged and chilled unless there is confidence that privacy and safety are given appropriate weight” in the judicial system. *Id.* at 255-56. Permitting redaction of court records in appropriate circumstances, such as here, will help assure that people will be not deterred from accessing the justice system or from asserting their rights under the law.

3. Substantial Evidence Supports The Trial Court's Finding That Mr. Encarnación And Ms. Farías Lacked Culpability

The trial court specifically found that Mr. Encarnación and Ms. Farías “were not culpable and did nothing improper to cause their removal from the property” and that they “raised a meritorious defense” to the unlawful detainer action. However, the Court of Appeals held that “[s]ubstantial evidence does not support these findings.” *Hundtofte v. Encarnación*, 169 Wn. App. 498, 516, 280 P.3d 513 (2012). The Court of Appeals erred in this determination.

The Court of Appeals properly noted that “[s]ubstantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” *Id.* at 8 (citing *State v. McEnry*, 124 Wn. App. 918, 924, 103 P.3d 857 (2004)). However, “[t]he substantial evidence standard is deferential and requires the appellate court to view all evidence and inferences in the light most favorable to the prevailing party.” *Lewis v. Dep't of Licensing*, 157 Wn.2d 446, 468, 139 P.3d 1078 (2006). In addition, “[e]ven if there are several reasonable interpretations of the evidence, it is substantial if it reasonably supports the finding. And circumstantial evidence is as good as direct evidence.” *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004) (internal citation omitted).

In concluding that the trial court's finding was not supported by substantial evidence, the Court of Appeals observed that the "unlawful detainer action was resolved by stipulation and entry of an agreed order, which nowhere indicates that the action was wrongfully filed." *Hundtofte*, 169 Wn. App. at 516. However, this fact is unsurprising. It would be highly unusual for a settlement agreement to indicate that an action was wrongfully filed. To do so could be tantamount to an admission that the plaintiff or her attorneys violated Civil Rule 11 and potentially open up their attorneys to a malpractice suit. As a result, the fact that a settlement did not explicitly confess wrongdoing should not prevent a court from determining that a party lacked culpability for the purpose of ordering redaction under GR 15. To hold otherwise would undermine Washington's strong public policy favoring settlements of disputes. *See, e.g., City of Seattle v. Blume*, 134 Wn.2d 243, 258, 947 P.2d 223 (1997) ("the express public policy of this state . . . strongly encourages settlement.").

The Court of Appeals also noted that "[i]nculpability is not a necessary conclusion to be drawn from the settlement of a lawsuit." *Hundtofte*, 169 Wn. App. at 516. This observation misses the point. The question is not whether inculpability is a necessary conclusion of the

settlement. Instead, the question is whether the evidence before the Superior Court was sufficient to persuade a fair-minded, rational person that Mr. Encarnación and Ms. Farías lacked culpability and had a meritorious defense.

Here, there was ample evidence to support such a finding. First, Mr. Encarnación and Ms. Farías were sued for unlawful detainer and emerged with a settlement that gave them the equivalent of three months rent and a favorable reference. It is difficult to imagine how a party who obtains such a remarkably positive outcome as a defendant in an unlawful detainer action has anything but a meritorious defense. In addition, the Superior Court was presented with evidence showing that Mr. Encarnación and Ms. Farías had a valid lease and were complying with the terms of their rental agreement. Notably, there was no evidence before the Court to suggest they were culpable in any way.

The Court of Appeals also observed that “the proceedings concerning the motion to redact were far from adversarial” and the defendants did not appear. *Hundtofte*, 169 Wn. App. at 516. However, there is no authority to suggest that the opposing party must appear in order for a factual finding to be supported by substantial evidence.

In short, there was ample evidence in the record to persuade a fair-minded, rational person that Mr. Encarnación and Ms. Farías lacked culpability for the unlawful detainer action and had a meritorious defense.

4. Affirming The Trial Court's Ruling Would Not Require Redaction Of SCOMIS Records In All Cases Where An Unlawful Detainer Action Does Not Result In An Eviction

It appears that the Court of Appeals' primary concern in this case was that affirming the relief provided by the trial court would create a precedent that would be broadly applicable in every unlawful detainer action that does not result in an eviction. The Court of Appeals stated that “[b]ecause nothing distinguishes these particular defendants from other defendants in unlawful detainer actions who were also not ultimately evicted, the relief afforded by the trial court, if deemed appropriate, would be similarly available to all such litigants.” *Hundtofte*, 169 Wn. App. at 502. However, this concern is unwarranted.

As a preliminary matter, a court should not refuse to grant a party relief that is justified by the facts and the law on the grounds that such a ruling may establish a precedent that other litigants could invoke in the future. As this Court has cautioned, determining a legal issue in a case “does not depend upon how many other cases might be affected”; instead, “[t]he judiciary must decide cases on legal principles, and each case must

be decided on its own merits.” *In re Personal Restraint of Andress*, 147 Wn.2d 602, 616 n.5, 56 P.3d 981 (2002), *abrogated by statute*, RCW 9A.36.021(1)(a), *as recognized in State v. Gamble*, 154 Wn.2d 457, 114 P.3d 646 (2005).

In addition, the Court of Appeals’ view that “nothing distinguishes these particular defendants from other defendants in unlawful detainer actions who were also not ultimately evicted” is incorrect. As Mr. Encarnación and Ms. Fariás demonstrated in their briefing, the Superior Court carefully evaluated their request for redaction on an individualized, case-specific basis under GR 15 and the factors set forth in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). The trial court’s analysis included findings on a number of facts that would not be present in every unlawful detainer action in which the defendants were not ultimately evicted. As a result, the Court of Appeals’ concern about the applicability of a ruling in this case to all other cases in which an unlawful detainer defendant is not ultimately evicted is not justified.

5. The Court of Appeals Inappropriately Added New Requirements To GR 15 And The *Ishikawa* Test

GR 15(c)(2) lists a number of circumstances which justify redaction of a court record. The rule also includes a “catchall” provision (GR 15(c)(2)(F)), which authorizes redaction if “justified by identified

compelling privacy or safety concerns that outweigh the public interest in access to the court record.”

In this case, the trial court applied GR 15(c)(2)(F), along with the *Ishikawa* factors, to determine whether to grant the redaction request.

However, the Court of Appeals’ ruling effectively added new requirements for redaction that are not included in GR 15 or in the *Ishikawa* test. The Court held:

Because infringement upon the public’s right to open court records is justifiable only in unusual circumstances, such broad-based relief is improper absent a showing that the identified interest is specifically protected by statute, court rule, or other similar example of clear and well-established public policy.

Hundtofte, 169 Wn. App. at 524.

This holding appears to be based on concerns that affirming the trial court’s redaction order would require courts to grant similar relief to every tenant who is ultimately not evicted as a result of an unlawful detainer action. As discussed above, this concern is unwarranted. But regardless, the holding is inappropriate because it would alter GR 15(c)(2) and the *Ishikawa* test.

This Court “has declined to add to or subtract from the clear language of rules and statutes.” *Ingram v. Dep’t of Licensing*, 162 Wn.2d 514, 526, 173 P.3d 259 (2007). The language of GR 15(c)(2)(F) is clear,

making it inappropriate to add new requirements to the rule. In addition, the *Ishikawa* test has never been framed to require an asserted privacy interest to be protected by statute, court rule, or “other similar example of clear and well-established public policy.”

However, even if the Court were to hold that the redaction sought in this case must be justified by an “example of clear and well-established public policy,” such public policies are present here. As Mr. Encarnación and Ms. Fariás have demonstrated, the redaction order advanced clear public policies related to access to housing and tenant rights. Pet. for Rev. at 12-14. Washington has strong public policies to support access to safe and secure housing, which will be advanced by permitting an innocent tenant to redact her name from SCOMIS if she has a meritless unlawful detainer action filed against her that impairs her ability to obtain housing in the future.

IV. CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals should be reversed and the trial court’s ruling should be affirmed.

Respectfully submitted this 14th day of May, 2013.

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Subject: RE: Filing in Hundtofte v. Encarnación, Case No. 88036-1

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Subject: Filing in Hundtofte v. Encarnación, Case No. 88036-1

Dear Clerk,

Please find attached the following materials for filing in Hundtofte v. Encarnación, Case No. 88036-1:

- Motion of Legal Voice and Washington State Coalition Against Domestic Violence (WSCADV) for Leave to File Amici Curiae Brief
- Proposed Amici Curiae Brief of Legal Voice and WSCADV
- Declaration of Service

The person filing is:

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DECLARATION OF SERVICE

I certify under penalty of perjury that on May 14, 2013, I caused the Motion of Legal Voice and the Washington State Coalition Against Domestic Violence for Leave to File *Amici Curiae* Brief, along with a copy of the proposed *amici curiae* brief, to be served upon the following parties listed below as follows:

| | | |
|---|---|--|
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| Katherine George Harrison Benis & Spence LLP 2101 4 th Ave., Suite 1900 Seattle, WA 98121-2315 kgeorge@hbslegal.com | <input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> E-Mail <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Overnight Mail |
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Dated at Seattle, Washington this 14th day of May, 2013.



David J. Ward