

88036-1

No. 66428-0

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

King County Superior Court,

Petitioner,

v.

Ignacio Encarnación and N. Karla Farras,

Respondents.

**BRIEF OF AMICI CURIAE KING COUNTY HOUSING JUSTICE
PROJECT AND SNOHOMISH COUNTY HOUSING JUSTICE
PROJECT IN SUPPORT OF RESPONDENTS
IGNACIO ENCARNACIÓN & N. KARLA FARRAS**

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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 (hereinafter "HJP") are legal clinics sited in their respective courthouses that assist low income individuals facing eviction. Volunteers and staff attorneys help tenants by advising tenants of their rights, negotiating with landlords and their counsel, and when necessary, representing tenants in court.

HJP attorneys work with tenants who have received eviction notices where the cases have not yet been filed, with tenants who have been impacted by eviction filings, and with tenants who are facing immediate eviction. The economic downturn over the past few years has significantly increased the demand for HJP's services. Combined, the HJP programs serve between 150 and 300 tenants every month.

Because of the experience the HJP programs have with tenants facing eviction, and the volume of tenants served, the HJP programs have a unique perspective with respect to tenants' compelling privacy concerns and whether the relief sought by respondents in the instant matter will be an effective means of addressing those privacy concerns.

II. INTRODUCTION

Many landlords routinely search court records to see if potential tenants have ever been the subject of an unlawful detainer action, and automatically reject the application of persons who have been the subject of such an action—regardless of whether that action had any merit. Court procedures contribute to the unfairness of this type of landlord action. For when an unlawful detainer action is filed, the defendants' full name appears in the Superior Court Management Information System (hereinafter “SCOMIS”) index of the case, making it easy for a landlord to identify persons against whom an unlawful detainer action has been filed. The appearance of the defendant tenant's name on the court filing index thus hamstring the tenant's ability to find a new residence, even when the tenant has done nothing to warrant eviction.

Thus, any tenant’s ability to acquire new housing is immediately impaired once an unlawful detainer action is filed. The situation is especially unfair when the unlawful detainer action is wrongly filed and actually misrepresents the tenant's rental reputation. In fact, tenants who may have meritorious defenses to an unlawful detainer can be compelled to give up possession of the property upon receiving notice of an alleged breach of lease, without asserting those defenses in litigation for fear of having an eviction filing on their SCOMIS 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.

Here, due to these concerns, Ignacio Encarnación (hereafter Encarnación) and N. Karla Farras (hereafter Farras) seek to have their names redacted from the record of an unlawful detainer action that was wrongfully filed and unfounded in law, that they could not have avoided, and that was solely in response to another person's actions beyond their control. As the trial court correctly found, Respondents have clearly demonstrated that their individual privacy interests outweigh the public's interest in an unredacted SCOMIS index.

Amici HJPs write separately to respectfully suggest that this Court articulate a distinction between situations in which the closing of a hearing or the sealing of a record will impact the public's ability to evaluate the court's administration of justice, and a case like the instant case in which Respondents' request to redact their names from the SCOMIS index and substitute their initials will not hinder the public's ability to evaluate the court's administration of justice. Here, even if the Court were to grant Respondents' request to redact, the entire file would remain publicly accessible such that any individual or organization seeking to review and understand the court's reasoning would be able to do so. Redaction of the tenants' names from the SCOMIS index would reduce the likelihood that a

person wrongly charged with breaching a lease would suffer the consequences of being identified as a defendant in an unlawful detainer action, without regard to the merits of that action.

III. STATEMENT OF THE CASE

Amici adopt the Statement of the Case as set forth in Respondents' brief.

IV. ARGUMENT

A. The unlawful detainer process and the Residential Landlord Tenant Act.

The Unlawful Detainer Act (UDA), RCW 59.12, was adopted in 1890 as an expedited process for landlords to regain possession of their leased property without having to resort to self-help evictions. William B. Stoebuck and John W. Weaver, 17 Washington Practice: Real Estate § 6.80, at 439 (2d ed. 2004). Pursuant to the UDA, a landlord must notify the tenant that the tenant has breached a term of the lease or that the lease term has expired, provide the tenant with a notice period depending on the alleged breach (e.g., 3 day notice to pay rent or vacate), and if the tenant does not vacate the property or cure the breach, then the landlord can immediately initiate an unlawful detainer action. RCW 59.12.030 and 040. Once the landlord files the unlawful detainer action in superior court, the UDA or eviction action shows up under the tenant's name in SCOMIS.

An unlawful detainer action proceeds at a significantly faster pace than a traditional lawsuit. Under RCW 59.12.070, the tenant can have as little as seven days to respond to an unlawful detainer complaint and summons, rather than the traditional 20 days that a defendant has to respond in most other civil actions. CR 4(a)(2). Landlords can schedule a show cause hearing, in essence a summary judgment hearing, as early as the day after the tenant's response is due. RCW 59.18.370. If the tenant loses at the show cause hearing, she could be physically evicted as soon as the fourth business morning after the hearing.

This expedited sequence of events is advantageous for the landlord for several reasons. First, if the tenant moves out of the property on or prior to the date that the tenant's response is due, then the landlord will have successfully regained possession of the property without the expense of paying the filing fee for the lawsuit. Second, landlords and landlord attorneys often understand that the mere filing of an unlawful detainer action so greatly impacts a tenant's ability to obtain future rental housing that it will be in the tenant's interest to move out or hastily agree to a settlement, even if the tenant has a meritorious defense to the alleged violations.

The Residential Landlord Tenant Act (RLTA), RCW 59.18, and common law provide numerous protections to residential tenants including:

1. requiring a landlord to keep the premises fit for human habitation (RCW 59.18.060),
2. prohibiting the rental of condemned property (RCW 59.18.085),
3. prohibiting a landlord from requiring a tenant to waive her rights under the RLTA (RCW 59.18.230),
4. prohibiting retaliation or harassment by a landlord (RCW 59.18.240 and RCW 59.18.570-.575), and
5. prohibiting discrimination by a landlord, *Josephinium Assoc. v. Kahli*, 111 Wn. App. 617 (2002).

However, the rights and protections offered by the RLTA and common law are meaningless if in reality a tenant can be coerced into foregoing those rights based on the threat that the landlord will file an unlawful detainer action and ruin the tenant's rental reputation.

B. A wrongfully filed unlawful detainer action has a significant prejudicial effect on a tenant's privacy right which can be remedied by allowing a tenant to redact her name from the SCOMIS index and substitute her initials.

The very appearance of an unlawful detainer action in a tenant's court record significantly suppresses her ability to procure new rental housing. It is a common practice among landlords and tenant screeners to reject outright any tenant with a mere unlawful detainer filing on her record.¹ Therefore, even a meritless unlawful detainer, such as the instant

¹ See Gary Williams, *Can Government Limit Tenant Blacklisting?*, 24 Sw. U. L. Rev. 1077, 1082-84 (1995); Teri Karush Rogers, *Only the Strongest Survive*, N.Y. Times,

case, or one fully resolved with the tenancy reinstated, can cause a tenant to be rejected down the road. Rudy Kleysteuber, *Note, Tenant Screening Thirty years Later: A Statutory Proposal To Protect Public Records*, 116 Yale L.J. 1344, 1355 (April 2007). The net effect is to use publicly available court records as a blacklist. *See id.* at 1361-62.

The specter of being unable to get a new residence has a negative effect on a tenant involved in any dispute with her landlord: it compels the tenant to avoid litigation and to find a new residence while they still can at the cost of her opportunity to assert her own rights against the landlord. *Id.* at 1363. Amici's attorneys frequently see this dynamic manifest itself on a weekly if not daily basis when an unlawful detainer action has been commenced but not yet filed. Merf Ehman, *Does This Eviction Go On My Record?*, 8 The Writ, (King County Bar Association) (Spring 2008) available at <http://www.kcba.org/pbs/pdf/Writ8.pdf>. This anomalous situation, peculiar to unlawful detainer actions, creates an unusually

Nov. 26, 2006, at Real Estate 1; Texas Low Income Housing Information Service, *Eviction, Blacklisting*, Texas Tenant Advisor, [http:// texastenant.org/eviction.html](http://texastenant.org/eviction.html) ("Of course, if you do not get out when a landlord asks you to, and the landlord files an eviction, win or lose, other landlords may not want to rent to you in the future. Court records are public information, and a landlord might refuse to rent to you just because you have had an eviction filed against you."); Letter to tenant from Preferred Property Management, Los Angeles (Sept. 25, 1978) ("This is to advise that we now subscribe to a service that records all filings on Unlawful Detainer actions. As this service is used by landlords, it will be impossible, in the future, to rent an apartment if you have been served a legal action. We are advising you of this, as the failure to pay your rent on time, will result in your name being placed in the file, and you will be unable to secure any apartment in the future.") (quoted in Robert W. Benson & Raymond A. Biering, *Tenant Reports as an Invasion of Privacy: A Legislative Proposal*, 12 Loy. L.A. L. Rev. 301, 301 (1979)).

oppressive burden for an unlawful detainer defendant. Amici's attorneys must constantly warn tenants of the dire implications of pursuing their defenses in court.

While courts cannot control how landlords and screening agencies use court records, the court system makes an essential contribution to this problem by providing easy electronic public access to a defendant's court record via SCOMIS. As the Court of Appeals, Division II, noted regarding juvenile dependency proceedings, "in light of the increased availability of juvenile dependency records on electronic sources, the Court concludes that additional steps are required to ensure confidentiality of the juveniles." 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).

In the present situation, the Court should likewise protect the legitimate privacy concerns of wrongfully sued tenants by allowing them to clear their smeared names by redacting their names from the SCOMIS index and substituting their initials. This minor redaction would resolve the problem for the tenants and help to decrease the tenants' risk of homelessness.

C. A litigant requesting the redaction of her name from the SCOMIS index should only need to meet the requirements of GR 15.

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). As for the type of restriction granted, the rule favors redaction over sealing or destruction where redaction will provide adequate protection. GR 15(c)(3).

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982), is the seminal case in evaluating a litigant's request to seal significant records or close a courtroom. GR 15 was adopted as a court rule seven years after *Ishikawa* was decided and, as Respondents point out in their brief, 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.

- 1. When a litigant requests a minor redaction, it is similar to other situations where Washington court records are routinely altered or sealed without an analysis of the *Ishikawa* factors.**

Court records are routinely altered or sealed in a way that does not impact the public's ability to evaluate the court's administration of justice.

GR 22 creates a list of documents that should be redacted and sealed in family law and guardianship cases and it provides a process for sealing and redacting those documents with no analysis needed under *Ishikawa*.

GR 22 ensures that social security numbers, detailed financial records, and protected health documents do not become matters of public record. As articulated in the purpose and scope section of the rule:

The policy of the courts is to facilitate public access to court records, provided that such access will not present an unreasonable invasion of personal privacy, will not permit access to records or information defined by law or court rule as confidential, sealed, exempted from disclosure, or otherwise restricted from public access, and will not be unduly burdensome to the ongoing business of the courts.

GR 22(a).

Similarly, all three divisions of the Court of Appeals have issued orders requiring that all dependency cases on appeal be recaptioned by using the juveniles' initials or pseudonyms in place of the juveniles' full names, thus acknowledging the increased availability of electronic records and the need to ensure confidentiality of juveniles. 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 (Superseding General Order 87-1); 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.

These examples show that when the redaction or sealing of a court record does not impinge on the public's ability to evaluate the court's administration of justice, there is no requirement for an individualized assessment under *Ishikawa*.

In the instant case, Amici respectfully request this Court draw a line between those cases in which an individualized assessment under *Ishikawa* is required, and those cases in which more routine redaction or sealing is permitted by general rule or statute. When an entire hearing or motion is closed or sealed, or when a situation in which the public's ability to assess the court's administration of justice is implicated, the court should make an individualized assessment under *Ishikawa*. An individualized assessment under *Ishikawa* should not be required, however, when a litigant merely seeks to protect their privacy in a way that does not implicate the public's ability to assess the court's administration of justice. For instance, when after sealing or redaction, a

member of the public could still review the court file and understand how and why the court ruled the way it did, a general court rule or statutory framework will be sufficient to permit sealing or redaction of the records at issue without resort to an individualized assessment under *Ishikawa*.

Amici acknowledge that such a result would require this Court to overrule its decision in *Indigo Real Estate Services v. Rousey*, 151 Wn.App. 941, 215 P.3d 977 (Div. I 2009). However, *Rousey* is the only reported decision in which a Washington court has required the extensive *Ishikawa* analysis when the requested redaction would not impact the public's ability to evaluate the court's administration of justice. In the instant case, and many like it, even if the court were to grant respondents' request to redact their names from the SCOMIS index, the public had full access to the court file from the inception of the action and full access to any hearings conducted. If redaction is allowed, the public would still have access to that file and all unlawful detainer files, and could monitor the fairness of unlawful detainer proceedings and safeguard the integrity of the process.

2. Redaction of a party's name and substitution of initials is analogous to allowing a party to proceed under a pseudonym and should therefore be permitted under a lesser standard than *Ishikawa*.

Redaction of the Respondents' names from the SCOMIS index, like the sealing of financial source documents in a family law case, or the anonymous prosecution of a case, does not implicate the public's ability to evaluate the court's administration of justice.

Party anonymity does not obstruct the public's view of the issues joined or the court's performance in resolving them. The assurance of fairness preserved by public presence at a trial is not lost when one party's cause is pursued under a fictitious name. These crucial interests served by open trials . . . are not inevitably compromised by allowing a party to proceed anonymously.

Doe v. Stegall, 653 F.2d 180, 185 (5th Cir. 1981) (internal citations omitted). Redaction has effectively the same result for the court record as if the proponent had been allowed during the proceedings to litigate under only their initials. The entire case file will remain publicly available and accessible.

Because of its reduced implication for the public interest, litigating under a pseudonym is generally permissible under a lesser standard than *Ishikawa* or GR 15. There is no direct Washington authority on the standard for allowing a party to proceed pseudonymously. See Karl B. Tegland and Douglas J. Ende, *Handbook On Civil Procedure*, 15A

Washington Practice § 30.2 (2008-09). Nevertheless, Washington courts have permitted parties to proceed pseudonymously. *See Bellevue John Does 1-11 v. Bellevue School District # 405*, 164 Wn.2d 199, 189 P.3d 139 (Wash. 2008).

The central question in the cases litigated in other jurisdictions has been whether the proponent's interest in proceeding pseudonymously outweighs the public interest in knowing the actual names of the litigants. *See Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000); *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981); *M.M. v. Zavaras*, 139 F.3d 798, 803 (10th Cir. 1998); *Doe v. Burkland*, 808 A.2d 1090, 1096 (R.I. 2002). While proceeding under a pseudonym should not be casually or frequently granted, *see John Doe v. Heitler*, 26 P.3d 539 (Colo. App. 2001), these cases show that the standards under which that leave is granted tend not to rise to the "serious and imminent threat" standard of *Ishikawa* or the "identified compelling privacy or safety concerns" of GR 15. *See Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000) ("We join our sister circuits and hold that a party may preserve his or her anonymity in judicial proceedings in special circumstances when the party's need for anonymity outweighs prejudice to the opposing party and the public's interest in knowing the party's identity."). *See also* Joan Steinman, *Public Trial, Pseudonymous*

Parties: When Should Litigants Be Permitted To Keep Their Identities Confidential? 37 Hastings L. J. 1 (Sept. 1985).

Redaction of a party's name from the SCOMIS index places only a minimal imposition on public access to court records. Like a pseudonym, redaction does not restrict the entire court file broadly as does sealing, or permanently as does destruction. With redaction, the threat to the public interest is minimized; it is insignificant in comparison with Encarnación's and Farras' need and right to represent themselves fairly and accurately to future landlords.

D. Redaction of Respondents' names from the SCOMIS index is proper under both GR 15 and the substantive requirements of *Ishikawa*.

Respondents meet the requirements of GR 15, and even if *Ishikawa* applies, Respondents' request for redaction satisfies the five-factor test. The second *Ishikawa* factor, the opportunity for an objection, is not in dispute, and the remaining four weigh in favor of granting the request.

- 1. A Tenant who has been a defendant in a wrongfully filed eviction lawsuit suffers a threat to her future ability to obtain housing.**

The proponent of a restriction on a court record satisfies the first *Ishikawa* factor by demonstrating a need. *Ishikawa*, 97 Wn.2d at 37. If the interest sought to be protected is other than a Sixth Amendment right

to a fair criminal trial, the proponent must demonstrate a "serious and imminent threat to some other important interest." *Id.* Any individual who has been the defendant in a wrongfully filed eviction lawsuit will have a demonstrated need to have their name redacted from the SCOMIS index.

As described above, that individual's interest in obtaining housing will be seriously impacted when tenant screening organizations use the SCOMIS index to search for the individual's name. Tenants consistently report to Amici's attorneys extreme difficulty in finding rental units when they have an eviction filing on their record.

Many property management agencies have blanket policies to follow the recommendations of tenant screening organizations. Tenant screening organizations often have their own blanket policies under which they recommend that property owners reject any tenant with an unlawful detainer record, including the mere filing of an unlawful detainer action, regardless of the outcome of the unlawful detainer case.

It is the experience of Amici's attorneys that contesting information reported by a tenant to a prospective landlord or screening organization has little to no impact, especially because the mere fact of an unlawful detainer filing is often the automatic disqualifier for a tenant. Moreover, because they are rejected over and over again, tenants may 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 lucky few that find housing are often charged higher deposits.

Therefore, assuming that the former tenant remains in the rental housing market, the existence of an unlawful detainer record will not only severely threaten the tenant's right to obtain housing but it will also increase her risk of homelessness, which is sufficient to meet the requirements under the first *Ishikawa* factor.

2. Redaction of a defendant's name from the SCOMIS index is effective and minimally restrictive, without significantly impinging on the public interest.

The third and fifth *Ishikawa* factors place a "narrow tailoring" requirement on the proposed restriction. *See Ishikawa*, 97 Wn.2d at 38-39. The requested restriction must be "both the least restrictive means available and effective in protecting the interests threatened." *Ishikawa*, 97 Wn.2d at 38. It must also "be no broader in its application or duration than necessary to serve its purpose." *Id.* at 39. In accord, GR 15 requires that "[a] court record shall not be sealed under this section when redaction will adequately resolve the issues before the court" GR 15(c)(3).

Redaction in this case would fall well within these requirements. All that is required to protect Respondents' interests is to dissociate their names from the unmeritorious lawsuit in such a way that prevents their

access to housing from being prejudiced. That is exactly what redaction of their names from the SCOMIS index and substitution of their initials will do, and nothing more. Redaction of their names from the SCOMIS index does not affect the physical court file, which would remain intact and publicly accessible. There is no restriction or destruction regarding the physical court file: all that is removed is the convenience of accessing the case through Respondents' names on the Internet.

3. The interests of the wrongfully sued tenant far outweigh the interests of the public.

Under the fourth *Ishikawa* factor “[t]he court must weigh the competing interests of the [proponent] and the public.” *Id.* at 38 (quoting *Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 64, 615 P.2d 440 (1980)). Where the request is for restriction of access to court records, the public interest implicated is the open access to court proceedings. *See* Const. art. I, § 10; *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). Here, respondents are not requesting a restriction on access to court records. The public’s right to access the court records and the public’s ability to evaluate the court’s administration of justice is not at issue. The public had full access to the court file and process from the inception of the action and after the tenants' names are redacted from the SCOMIS index, the public will still have access to the entire court file.

Respondents need show only that their interests outweigh the interests of the public in having the ability to search for that specific case in SCOMIS using Respondents' names. As the trial court found in the instant case, there is very little, if any, public value in public access via a search in SCOMIS to a wrongfully filed eviction lawsuit. The wrongfully filed eviction actually presents inaccurate information regarding the tenant's reputation, and the tenant's interest in redacting their names to protect their reputation outweighs the public's interest in searching for the case in the SCOMIS index.

Therefore, even if this court were to find that respondents can only redact their names from SCOMIS pursuant to an analysis under GR 15 and the *Ishikawa* test, respondents have met that burden.

V. CONCLUSION

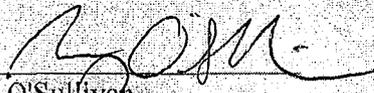
Because of the detrimental reputational effect of a wrongful unlawful detainer filing, landlords hold unilateral power to mar a tenant's reputation in the housing market. This unilateral power is not only a major factor in homelessness because a tenant may be unable to find rental housing after an eviction has merely been filed against her, but it has a chilling effect on a tenant with meritorious defenses who is afraid to assert them because she knows her rental reputation will be ruined before she has had her opportunity to be heard in court.

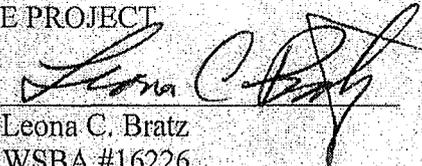
Amici respectfully request that this court articulate a distinction between cases in which court hearings are closed or significant portions of court files are sealed, and cases, like the instant case, where Respondents merely seek redaction of their names and substitution of their initials in the SCOMIS index. In the latter situation, litigants such as Respondents should not be bound by the five-factor test articulated in *Ishikawa*, but should be permitted to obtain relief under GR 15.

Even if this court rules that trial courts are bound by GR 15 and the *Ishikawa* test for the limited redaction request in the present case, Respondents have met their burden and Amici respectfully requests the Court affirm the superior court and order the redaction of Respondents' names from the SCOMIS index.

Respectfully submitted this 21st day of December, 2011.

HOUSING JUSTICE PROJECT

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