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No. 66428-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

KING COUNTY CLERK,

Appellant,

v.

IGNACIO ENCARNACIÓN and
N. KARLA FARRAS,

Respondents.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
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BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES

UNION OF WASHINGTON

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INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union of Washington (“ACLU”) is a statewide, nonpartisan, nonprofit organization of over 19,000 members, dedicated to the preservation of civil liberties. The ACLU strongly supports the constitutional requirement that court proceedings generally should be open to the public. It also recognizes the competing civil liberties interests—privacy, public oversight of government, and the right to fully participate in society—involved in access to court records. The ACLU has participated in numerous cases involving access to public records (including court records) as *amicus curiae*, as counsel to parties, and as a party itself. The ACLU also has participated in legislative and rule-making procedures surrounding access to a wide variety of public records.

ISSUE TO BE ADDRESSED BY *AMICUS*

Whether a court may order redaction of party names from SCOMIS in order to protect privacy interests of the party while continuing to allow access to the underlying records for purposes of public oversight.

STATEMENT OF THE CASE

This case asks whether redaction of names from court indices is compatible with GR 15 and state constitutional provisions. The facts and procedure of the case are adequately presented by the parties' briefing. A few facts bear repeating, as they are relevant to the argument below:¹

Mr. Encarnación and Ms. Farras were good tenants; they paid their rent consistently and had no problems with their landlord or neighbors. Shortly after they renewed their lease in July 2009 for a one-year term, the apartment building was sold. The new landlords chose to violate the terms of the lease and attempted to terminate the tenancy. When the tenants insisted on enforcing their lease, the landlord's response was to file an unlawful detainer action. The evidence indicates that the action was not justified, as the parties eventually settled on terms favorable to the tenants.

Unfortunately, other potential landlords used the records in the court index system (SCOMIS) to discover that the tenants had been involved in an unlawful detainer action. Those potential landlords used the mere existence in the index of an unlawful detainer action involving the tenants to categorically deny the tenants' application for housing, regardless of the merits or outcome of the action. The tenants therefore moved to temporarily redact their names from SCOMIS, replacing them

¹ This summary is based on the briefs of both parties.

with initials. They presented proof that this redaction would solve the problem that was harming them and that it was the least restrictive means of solving the problem. The trial court, in an open hearing, followed the steps specified in GR 15 and *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). The court concluded that redaction was authorized by the law and facts presented, and issued an order to that effect. The Clerk opposed the tenants' motion and now appeals from the order granting it.

ARGUMENT²

Mr. Encarnación and Ms. Farras have fully shown that temporary redaction of their names in SCOMIS is a reasonable and necessary step to protect their compelling interest in being able to obtain housing. The superior court fully complied with the *Ishikawa* procedure, and issued its order after due consideration of the evidence presented. There is no disagreement on either the merits of the substantive question (whether the harms faced by the tenants outweighs the public interest in the records) or on the procedure followed. The Clerk did not dispute either below, and does not dispute them now. Instead, the Clerk claims that the remedy

² This argument is substantially similar to the one submitted by *amicus* in its Brief in *J. S. v. State*, No. 65843-3-I. The argument is repeated here for the convenience of the Court rather than incorporated by reference.

granted—temporary redaction of the tenants’ names from SCOMIS—is not allowed by GR 15 and violates Article 1, Section 10 of the Washington Constitution. The tenants have ably refuted this claim, and *amicus* fully supports their argument. We write separately to respectfully urge the Court to provide an analytical framework for balancing public access and privacy in court records of open proceedings. This framework must not set the bar too high for Washingtonians to assert their constitutionally protected privacy rights. It should also avoid an overly broad reading and application of case law interpreting Article 1, Section 10; such a reading could unjustifiably perpetuate harms to numerous individuals in a manner never intended by the Constitution. *Amicus* respectfully suggests that the standard for redaction of names in indices is different from that for closure of court proceedings, that both statutes and court rules can establish clear rules to redact or seal records, and that the privacy guarantees of Article 1, Section 7 are coequal to other constitutional rights, including the right to open courts guaranteed by Article 1, Section 10. Both privacy and public oversight can be accommodated, with neither outweighing the other. *See, e.g.*, Access to Justice Technology Principles § 3 (adopted Dec. 3, 2004).

A. Open Administration of Justice Does Not Preclude Redaction of Names in Indices

This Court has held that an order to seal court records must comply with both GR 15 and *Ishikawa* in order to pass muster under Article 1, Section 10. *See State v. Waldon*, 148 Wn. App. 952, 202 P.3d 325 (2009). It must be noted that the temporary redaction requested in this case is a much more limited remedy than the sealing requested in *Waldon*. In addition, *amicus* respectfully suggests that *Waldon* incorrectly equated sealing and redaction of records with closure of court proceedings; as discussed below, its holding is inconsistent with both the language of Article 1, Section 10 and the Washington Supreme Court cases that have interpreted it.

Waldon relied on *Dreiling v. Jain*, 151 Wn.2d 900, 908-09, 93 P.3d 861 (2004) (holding that access to court records is an important part of the openness of the judiciary and is protected by Article 1, Section 10). *Dreiling* in turn was part of a long line of cases interpreting Article 1, Section 10 and establishing Washington rules on closure of court proceedings and sealing of court records, starting with *Cohen v. Everett City Council*, 85 Wn.2d 385, 388, 535 P.2d 801 (1975) (holding that Article 1, Section 10 “entitles the public ... to openly administered justice”). *See also Federated Publications v. Kurtz*, 94 Wn.2d 51, 615

P.2d 440 (1980) (establishing five-step test to justify closure of court proceedings); *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982) (expanding *Kurtz* framework in another closed hearing case); *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993) (holding a statute that effectively required closure of some court proceedings unconstitutional due to failure to incorporate the *Ishikawa* factors); *Rufer v. Abbot Laboratories*, 154 Wn.2d 530, 114 P.3d 1182 (2005) (applying *Ishikawa* factors to sealing of materials filed with nondispositive motions).

It is important to note that *all* of these pre-*Waldon* cases involved closure of proceedings or sealing of records *before they had ever been made available to the public*.³ In other words, the result of a successful closure/sealing motion was, in fact, to prevent the public from ever learning of the operation of the judiciary in a specific instance. As such, there was no question that those cases implicated Article 1, Section 10's command that "justice in all cases shall be administered openly."

In contrast, *Waldon* and the present case are far removed from the ones listed above because they involve sealing or redaction of court records after a fully public proceeding, and after the records themselves

³ There was also a motion in *Rufer* to seal a trial exhibit, but the trial court denied the motion and the Supreme Court opinions summarily affirmed that ruling, discussing only sealing of discovery and the materials filed with nondispositive motions.

were fully public for a period of time; full application of the *Ishikawa* procedure is unnecessary to satisfy the purpose of Article 1, Section 10. As described by this Court, that purpose is to enable public scrutiny of the operations of the judiciary. *See Dreiling*, 151 Wn.2d at 903 (“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.”); *see also Allied Daily Newspapers*, 121 Wn.2d at 211 (“Openness of courts is essential to the courts’ ability to maintain public confidence in the fairness and honesty of the judicial branch of government as being the ultimate protector of liberty, property, and constitutional integrity.”)

Transparency in the judicial system is, of course, a compelling public interest, and one that *amicus* fully supports. Yet, the need for and methods to effectuate transparency depend on the circumstances. In particular, the standards are different for transparency in proceedings and transparency in records. The language of Article 1, Section 10 itself reflects this vision: “Justice in all cases *shall be administered* openly.” This commandment is in the future tense, and shows a need for the actual administration of justice—the proceedings—to be open to the public. Records of past administration of justice are not explicitly addressed. Of

course, some level of access to records is also implied by Article 1, Section 10 as necessary in order to effectuate oversight, but other constitutional provisions, including the privacy protection of Article 1, Section 7, also imply limits on that access; these competing constitutional interests must be balanced.

Having different standards for proceedings and records is a well recognized concept in settings outside the judiciary. For example, the Open Public Meetings Act, Chapter 42.30 RCW, is significantly different in both structure and content from the Public Records Act, Chapter 42.56 RCW—and both effectively support transparency in government operations. It is worth noting that the list of exemptions is considerably longer in the Public Records Act than in the Open Public Meetings Act. *Compare* RCW 42.56.230-480 *with* RCW 42.30.110(1). This is only natural. The need for government oversight is highest at the time of government action, which emphasizes the need for open proceedings. Sensitive personal details are more likely to be contained in records than to be disclosed orally during a proceeding, so there is greater emphasis on privacy interests in records. Moreover, as time passes, the public interest in records for oversight purposes diminishes, while privacy interests in those same records grows. Historically, this shift in interests was handled practically by limitations of technology; as time passed, even open records

became harder to locate and obtain, and privacy interests were effectuated through practical obscurity. In today's electronic world, however, it is as easy to locate a record of a minor peccadillo from decades past as it is to locate records of major actions from yesterday. Consequently, judicial policy must explicitly accommodate the shifting balance between privacy and oversight interests that occurs between court proceedings and court records.

Here (and in *Waldon*), justice *was* administered openly. No hearing was closed, and no records were filed under seal. The public had ample opportunity to scrutinize the operation of the judiciary. It is only after conclusion of the underlying actions—and with no indication of any public interest in the judiciary's handling of the case—that the motion to redact information was made, accompanied by strong proof of harm being done to the individuals by the records remaining public. The constitutional mandate of open administration of justice has been fulfilled, and the full strictures of *Ishikawa* are no longer necessary.

This argument has particular force when applied to the very limited remedy requested in the present case: redaction of names from electronic indices. No actual court records need be sealed or redacted; only the index to those records will be affected. The public will still be able to access all of the underlying records, and examine them to assure themselves that the

judiciary functioned properly. In fact, any examination of records for the legitimate purpose of judicial oversight is unlikely to be affected. Rather than starting with the names of the parties, a person investigating the judiciary is more likely to want to examine all records associated with a particular court or type of action. Even if interested only in the details of that particular case, it is likely that a person will start with some additional information (e.g., date, court, type of action), and will still be able to locate the case by the person's initials. It is only people who are interested in the index for purposes entirely unrelated to oversight of the judiciary, such as the potential landlords in this case, who will be affected—and those private uses are not the province of Article 1, Section 10. The imminent harm facing tenants here clearly outweighs the speculative and hypothetical future need to locate their names in SCOMIS for purposes of judicial oversight. *See also* Respondent's Brief at 29-32.

Arguably the electronic indices do not even fall within the ambit of Article 1, Section 10. They were created for the convenience of the judiciary and public, but are not an essential component of the administration of justice. Nobody would contend that Washington State did not administer justice openly for its first century, before SCOMIS was developed. Nor that we do not administer justice openly today because information about many older cases has never been entered into the

electronic indices. In fact, it is only in the past twenty years, with the development of JIS, that *any* form of statewide index has existed. There is no reason to believe that presence of full names in SCOMIS is constitutionally mandated.

In any event, the relief granted by the superior court is neither permanent nor irreversible. By its terms, the redaction will only last until November 17, 2016. And if, in the meantime, a legitimate need to restore the names arises in order to allow public oversight of the judiciary, any member of the public can move to obtain access upon a showing of need pursuant to GR 15(e). A temporary redaction of names within SCOMIS will in no way affect our state's commitment to open administration of justice.

B. Clear Rules Regarding the Grounds for Redaction are Acceptable to Balance Constitutional Interests

Mr. Encarnación and Ms. Farras are far from alone in their plight; many other equally meritorious tenants are facing similar difficulties in finding housing because their names are associated in SCOMIS with dismissed unlawful detainer actions. While *amicus* fully supports the current redaction motion, we would like to urge the Court to avoid a decision which is limited to this case. Instead, we hope the Court will take

the opportunity to provide guidance to lower courts on the handling of similar motions.

We similarly hope the Court will not feel constrained to avoid bright line rules by a broad reading of *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993). *Allied Daily Newspapers* was a response to legislation enacted specifically to address the disfavored speech of a single newspaper. *Id.* at 204. That legislation did not even provide directly for closure of a court proceeding, but instead required courts to prevent disclosure of the identities of child victims of sexual assaults; as a practical matter, that would necessarily involve closure of proceedings if a judge feared that the identities might be disclosed during those proceedings. *Id.* at 211-12. Such closure, without considering competing public interests, was held to violate Article 1, Section 10.

Allied Daily Newspapers must be viewed as limited to its unusual facts, rather than requiring a case-by-case application of the *Ishikawa* factors to all decisions affecting public access to court proceedings or records. The limited application is apparent because *Allied Daily Newspapers* did not overrule or signal disagreement with any of the preceding line of cases. *Each* of those cases had spoken approvingly of statutes that closed particular types of proceedings to the public. *See*

Cohen, 85 Wn.2d at 388 (finding it “obvious” that adoption hearings are closed by statute, and citing *In re Lewis*, 51 Wn.2d 193, 316 P.2d 907 (1957) for the proposition that statutorily closed juvenile proceedings do not violate Article 1, Section 10); *Kurtz*, 94 Wn.2d at 60 (citing *Lewis* and noting that a contrary interpretation of Article 1, Section 10 could “wreak havoc with established judicial practices”); *Ishikawa*, 97 Wn.2d at 36 (citing *Lewis* for the constitutionality of closed juvenile proceedings). There is no reason to believe that the Supreme Court in *Allied Daily Newspapers* court intended to silently reverse its holding, which had been consistently repeated over decades, that some proceedings may constitutionally be closed as a bright line rule. It was only the particular statute at issue in *Allied Daily Newspapers* that fell short. In fact, while the Legislature has chosen in the meantime to open some juvenile proceedings, other proceedings remain closed to the public to this day under some or all circumstances, without requiring individualized *Ishikawa* findings. *See, e.g.*, RCW 26.33.060 (adoption hearings); RCW 13.32A.200 (Family Reconciliation Act hearings); RCW 10.27.080 (grand jury sessions); *but see In re Detention of D.F.F.*, 172 Wn.2d 37, 41, 256 P.3d 357 (2011) (summarily holding closed involuntary commitment proceedings unconstitutional without discussing prior case law).

Bright line rules are, in fact, common when they concern handling of court records, rather than proceedings. This is recognized by GR 31(d)(1), which provides exceptions to access for instances where bright line prohibitions exist in statute or court rules. Some examples of these bright line rules include:

- RCW 4.24.130(5) (no public access to name change petitions by domestic violence victims)
- RCW 10.27.090 (secrecy of grand jury records)
- RCW 13.50.100 (confidentiality of non-offense juvenile records)
- RCW 26.12.180 (confidentiality of guardian ad litem records)
- RCW 26.26.610(2) (records of parentage proceedings are closed except for final orders)
- RCW 26.33.330 (sealed records of adoption proceedings)
- RCW 71.05.620 (closed records of mental health proceedings)
- RCW 71.34.335 (confidential records of mental health proceedings for minors)
- GR 22(g) (sealed financial, health, and confidential documents in family law and guardianship cases)
- GR 31(j)-(k) (privacy of juror information)

- RAP 3.4 (routinely used to replace names with initials in appellate cases dealing with juveniles)
- District and Municipal Court Records Retention Schedule, Version 6.0 at 6-22 (March 2009) (routine destruction of many district and municipal court records after a few years)

Again, it strains credulity to believe that *Allied Daily Newspapers* was intended to hold that all of these bright line rules, many of long standing, violate Article 1, Section 10—without even mentioning the possibility. Instead, such rules reflect careful consideration of competing important interests by the Legislature or the judiciary, and a determination that some restriction on transparency is necessary to accommodate other interests. This is exactly the type of balancing required by *Ishikawa*, but done on a general, rather than individualized basis. There is no need—and it would be a tremendous waste of resources—for individualized consideration by a judge in each instance, when the result will be the same. For example, the family law courts would be deluged by sealing motions if GR 22(g) were eliminated—and virtually all of the motions would be granted. In the meantime, the financial and medical privacy of every participant in a dissolution action would be at risk.

Just as the Legislature and Supreme Court have adopted bright line rules in the variety of circumstances listed above, it may well be

appropriate for them to consider some form of bright line rule to protect the interests of tenants situated similarly to Mr. Encarnación and Ms. Farras. *Amicus* respectfully requests this Court to avoid a decision that would foreclose such consideration.

C. Privacy Is a Constitutional Interest of Equal Magnitude to Open Administration of Justice

The only constitutional provision cited by the Clerk is Article 1, Section 10. Brief of Appellant; Reply Brief of Appellant. It would therefore appear that the Clerk believes either that no other constitutional interests are implicated by the current case, or that Article 1, Section 10 trumps other constitutional interests. *Amicus* submits that neither belief is correct.

Our Supreme Court has already determined that information divulged in court proceedings and present in court records implicates the privacy rights guaranteed by Article 1, Section 7. *See Allied Daily Newspapers*, 121 Wn.2d at 211. It found that nondisclosure could be necessary to ensure “privacy as guaranteed under Const. art. 1, § 7,” and further found that to be a compelling interest. *Id.*

Similarly, our Supreme Court has held that it is necessary to balance competing interests with regards to open courts. When both competing interests are constitutional in nature, only a “likelihood of

jeopardy” to the second interest is necessary in order to limit open courts. *Kurtz*, 94 Wn.2d at 62 (balancing open court interests against fair trial rights). In contrast, “a serious and imminent threat to some other important interest must be shown” when that other interest is not constitutional in nature. *Ishikawa*, 97 Wn.2d at 37.

Ishikawa described the bifurcation as depending on whether or not “fair trial” rights were at stake, but that appears to be because fair trial rights were the sole constitutional rights at risk in *Ishikawa*. The holding in *Kurtz* was premised on the coequal magnitude of competing constitutional interests. It specifically talked about the “likelihood of jeopardy to his *constitutional* rights,” *Kurtz*, 94 Wn.2d at 62 (emphasis added), and sought “to strike a balance between these two interests which are protected by our state *constitution*,” *Id.* at 65. *Ishikawa* did not discuss any differences between different constitutional interests, nor did it describe any unique characteristics of fair trial rights. The best reading, therefore, is that *Ishikawa*’s bifurcation was intended to distinguish between constitutional and nonconstitutional rights, rather than differentiating between different constitutional rights; it simply used “fair trial rights” as shorthand for “constitutional rights.”

The continued development of Washington’s privacy jurisprudence over the last two decades argues strongly that privacy is a key element of

Washington's constitutional structure, and *Ishikawa's* rule should be interpreted to explicitly recognize that. Although Mr. Encarnación and Ms. Farras have met the higher "serious and imminent threat" standard, future movants attempting to protect their constitutionally guaranteed privacy rights should only be required to meet the same "likelihood of jeopardy" standard as those attempting to protect their fair trial rights.

CONCLUSION

For the foregoing reasons, the ACLU respectfully requests the Court to affirm the superior court and order the temporary redaction of Mr. Encarnación's and Ms. Farras' names from the SCOMIS entry for their unlawful detainer case.

Respectfully submitted this 15th day of November 2011.

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CERTIFICATE OF SERVICE

I, Maly Oudommahavanh, hereby certify and declare that on the 18th day of November, 2011, I sent a copy of the foregoing document:

1. Brief of *Amicus Curiae* American Civil Liberties Union of Washington

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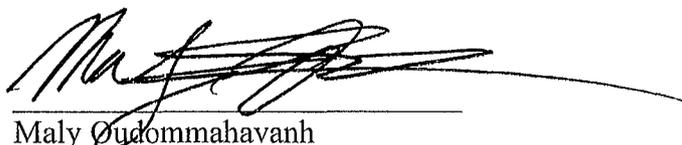
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