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Supreme Court No. 88036-1

*RC* *CRB*

Court of Appeals No. 664280-I

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**SUPREME COURT OF THE STATE OF WASHINGTON**

Aaron Hundtofte and Kent Alexander,

Plaintiffs,

v.

Ignacio Encarnación and N. Karla Farias,

Defendant/Petitioner,

v.

King County Superior Court Office of Judicial Administration,

Intervenor /Respondent.

**RESPONDENT'S ANSWER IN OPPOSITION TO  
PETITIONER'S PETITION FOR DISCRETIONARY REVIEW**

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**ORIGINAL**

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I. IDENTITY OF RESPONDENT/INTERVENOR

Respondent/Intervenor, the King County Superior Court Clerk (“Clerk”), seeks the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

This Court should deny the Petition for Discretionary Review (“Petition”) filed by Ignacio Encarnación and N. Karla Farias (collectively “Petitioners”). However, if the Petition is granted, the Clerk seeks review of the issue raised in Part V, pursuant to RAP 13.4(d).

III. COURT OF APPEALS DECISION

The Court of Appeals issued its decision on July 16, 2012; a motion for reconsideration was denied on August 22, 2012.<sup>1</sup> The Court reversed a trial court order directing the Clerk to delete Petitioners’ full names from all electronic court databases, including SCOMIS, and to replace them with the Petitioners’ initials. The Court held that the trial court failed to properly apply the constitutional standard for redaction of court records.

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<sup>1</sup> Copies of the opinion and order on reconsideration are attached as Appendices A and B to the Petition.

IV. COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals determination that Petitioners' purported privacy interests were insufficient to overcome the presumption of openness under Wash. Const. article I, section 10 conflict with another Court of Appeals decision, as required by RAP 13.4(b)(2)?

2. Do Petitioners' purported privacy interests, which are indistinguishable from any other defendant in an unlawful detainer action who is not ultimately evicted, raise an issue of substantial public interest under Wash. Const. article I, section 10 and GR 15 that should be determined by the Supreme Court, as required under RAP 13.4(b)(4)?

V. ADDITIONAL ISSUES NOT RAISED IN THE PETITION

1. In the event discretionary review is granted, does a trial court's order to redact Petitioners' full names from all court databases, including SCOMIS, and replace them with the Petitioners' initials, effectively eliminate the ability of the public and Clerk's staff to learn of the existence of the case and access court records, contrary to GR 15?

VI. STATEMENT OF THE CASE

Petitioners were defendants in an unlawful detainer action filed in King County Superior Court. *See* King County Superior Court Cause No.

09-2-33205-3. On November 12, 2009, the trial court entered a stipulation and agreed order dismissing the case.

In April 2010, Petitioners moved for entry of an order directing the Clerk to redact their names in the caption of the case from the Superior Court Information System ("SCOMIS") and to substitute the Petitioners' initials, "I.E." and "N.F." CP 24-30, 36. On May 26, 2010, Commissioner Nancy Bradburn-Johnson granted the motion without opposition. CP 36A.

The public and Clerk's office personnel commonly access court files by searching for the names of parties in electronic records maintained by the Clerk. Upon reviewing the Commissioner's order to redact SCOMIS and the court databases, the Clerk became concerned the order did not comply with GR 15 because it erased all meaningful reference to the case. In effect, the order resulted in the destruction of a court record without statutory authority, as required by GR 15(h), because it eliminated reference to the case. The order also conflicted with other parts of GR 15 that require the parties' names to be accessible to court personnel and the public to be able to learn of the case's existence along with the reasons cited by the court for restricting access. GR 15(c)(4) and GR 15(c)(5), GR 15(d), and GR 15(h).

In light of these concerns, the Clerk, in an effort to place the matter back before the commissioner, filed a limited notice of appearance and briefing opposing Petitioners' request to alter the court database. CP 41-42.

Eventually, the issue was set before King County Superior Court Judge James Cayce. Judge Cayce requested that Petitioners and the Clerk submit briefing on the Clerk's standing to challenge the motion for relief. CP 65-66. Judge Cayce found that the Clerk had standing and considered the Clerk's objections. CP 77.

After hearing argument and considering briefing from both parties, and applying the constitutional standard for redaction of court records<sup>2</sup> and the standard in GR 15(c)(2), Judge Cayce concluded in a written order issued November 17, 2010:

19. The Clerk shall delete the Defendants' full names, "Encarnation Ignacio," "Ignacion Encarnacion," "Norma Karal Farias" and "N. Karla Farras," from the SCOMIS database under cause number 09-2-33205-3 KNT (for King County Superior Court) and replace, or cause to be replaced, their full names with their initials, being "I.E." and "N.F."

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<sup>2</sup> *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982) (listing constitutional "Ishikawa" factors to be applied).

20. The Clerk shall also delete, or cause to be deleted, the Defendants' full names, "Encarnation Ignacio," "Ignacio Encarnacion," "Norma Karla Faris," and "N. Karal Farras" from any other databases maintained by this Court, and replace, or cause to be replaced, their full names with their initials, being "I.E." and "N.F."

CP 77.

The Clerk appealed, reiterating its contentions under GR 15. Additionally, at the Court of Appeals invitation, Allied Daily Newspapers of Washington, Washington Newspaper Publishers Association and Washington Coalition for Open Government appeared as amicus curiae in the case. They raised the separate issue of whether the trial court abused its discretion by finding that Petitioners satisfied the *Ishikawa* factors.

In July, the Court of Appeals reversed the trial court. *Hundtofte v. Encarnacion*, \_\_\_ Wash.App. \_\_\_, 280 P.3d 513 (2012). The panel concluded the trial court abused its discretion in determining that Petitioners' asserted interests outweighed the presumption of openness mandated by Wash. Const. article I, section 10. *Encarnacion*, \_\_\_ Wash.App. \_\_\_, 280 P.3d at 521. The Court reasoned:

(1) The trial court's finding that Petitioners "were not culpable and did nothing improper to cause their removal from the [rental] property" was not supported by substantial evidence in the record;

(2) Because nothing distinguished Petitioners from other defendants in unlawful detainer actions who were also not ultimately evicted, the relief fashioned by the trial court constituted a de facto automatic (rather than case-by-case) limitation on the public's right to open courts without any constitutional, statutory, court rule or other clear and well-established public policy basis to warrant such extraordinary relief; and

(3) The trial court's order contravened a legislative declaration of public policy set forth in the Fair Credit Reporting Act, chapter 19.182 RCW, allowing consumer reporting agencies to report an unlawful detainer lawsuit within seven years of that lawsuit.

*Encarnación*, \_\_\_ Wash.App. \_\_\_, 280 P.3d at 516, 523-26.

The Court of Appeals did not address the Clerk's contentions that the trial court's decision contravenes GR 15. *Encarnación*, \_\_\_ Wash.App. \_\_\_, 280 P.3d at 521.

Petitioners now ask this Court to accept discretionary review.

## VII. ARGUMENT

Petitioners seek review under RAP 13.4(b)(2) and RAP 13.4(b)(4), claiming that the Court of Appeals decision conflicts with two other

decisions of the Court of Appeals, and raises an issue of substantial public interest that should be determined by the Supreme Court.

Review should be denied. Because the Clerk anticipates continued participation by amicus in this matter it only briefly comments on Petitioners' arguments in support of review. Even at that, it is evident that the Court of Appeals decision is consistent with prior decisions of the Court and that no substantial public interest has been raised that warrants a determination by the Supreme Court.

Nevertheless, in the event review is granted, the Clerk's principal concern with the trial court's order remains; namely, that GR 15, in its current form, does not authorize the redaction of parties names from SCOMIS (or any other electronic database), and, therefore, the trial court's order requires the Clerk to take actions that are contrary to the Rule.

1. RESPONSE TO PETITIONERS' ARGUMENTS IN SUPPORT OF REVIEW

- a. The Court of Appeals decision does not conflict with the prior decisions cited by Petitioners.

Petitioners contend that the Court of Appeals decision in this case conflicts with two prior decisions, *Indigo Real Estate v. Rousey*, 151 Wash.App. 941, 215 P.3d 977 (2009) and *State v. C.R.H.*, 107 Wash. App. 591, 27 P.3d 660 (2001). There is no conflict.

In *Rousey*, a landlord brought an unlawful detainer action against a tenant seeking an order surrendering the tenancy. *Rousey*, 151 Wash.App. at 945. Following a voluntary dismissal of the action, the trial court denied the tenant's motion to replace her full name with her initials in the SCOMIS index. *Id.* The Court of Appeals reversed and remanded the case for further proceedings, concluding that while name redactions in SCOMIS are permitted (a proposition the Clerk challenges in this action), the trial court failed to apply the *Ishikawa* factors and the balancing of interests in GR 15(c)(2). *Id.* at 950, 953.

Petitioners argue that *Rousey* "implicitly" held that protecting a person's ability to obtain rental housing could, in some circumstances, be a compelling interest adequate to support redacting names from superior court databases. Petition at 6. However, the Court in this case expressly addressed and rejected this argument:

We first note that, contrary to Encarnación's and Farias's assertion, we have never held "that protecting such a tenant's housing prospects could be 'compelling enough to override the presumption of openness' in some circumstances." Rather, in *Rousey*, we reversed the trial court's denial of *Rousey*'s motion to redact her full name from a SCOMIS record because the record on appeal did not indicate that the trial court had applied the correct legal standard in considering *Rousey*'s motion to redact.

(Citations omitted.) *Encarnación*, \_\_\_ Wash.App. \_\_\_, 280 P.3d at 521.

To the extent the panel did compare Petitioners' circumstances as defendants in an unlawful detainer suit with Ms. Rousey's, it found them to be clearly distinguishable. Because Ms. Rousey was a victim of domestic violence, the unlawful detainer action in that case violated the victim protection act, RCW 59.18.580(1), which precludes a landlord from terminating a tenancy based on a tenant's status as a victim of domestic violence. *Encarnación*, \_\_\_ Wash.App. \_\_\_, 280 P.3d at 524 (citing *Rousey*, 151 Wash. App. at 945). In contrast, the Court correctly observed here that no statute "currently provides protection for the interest asserted by [Petitioners]." *Id.*

Petitioners next assert that the Court of Appeals decision improperly raised the standard for redaction by requiring "a statute, court rule, or other similar example of a clear and well-established public policy." Petition at 12. They assert that this conflicts with the 2001 holding in *State v. C.R.H.* that statutory authority is not needed to redact or seal court records as long as compelling circumstances are shown. As an initial matter, *C.R.H.* addressed a former and different version of GR 15. GR 15 was substantially rewritten in 2006. "For all practical purposes, the 2006 version of GR 15 is an entirely new rule .... Some of the new provisions are procedural. Others are more substantive and establish standards for determining whether a court file should be destroyed, sealed

or redacted.” 2 Karl B. Tegland, WASHINGTON PRACTICE: RULES PRACTICE GR 15 author’s cmts. at 54 (7<sup>th</sup> ed. 2011).

In addition, Petitioners’ assertion of a conflict is premised on a misreading of the Court’s opinion. In this specific instance it was necessary to find a basis in statute, court rule or other clear and well-established public policy because Petitioners had otherwise failed to demonstrate that their circumstances were compelling enough to override the constitutional presumption of openness. As the Court observed, there was nothing to distinguish Petitioners from other defendants in unlawful detainer actions who were also not ultimately evicted. Consequently, the remedy fashioned by the trial court created a blanket restriction on access that would be available to all similarly situated defendants. And therein lies the problem:

[S]uch 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. Were it not so, the presumption of openness would be turned on its head.

*Encarnacion*, \_\_\_ Wash.App. \_\_\_, 280 P.3d at 524

For the above reasons, the Petitioners have failed to establish a basis for review under RAP 13.4(b) (2).

- b. The Court of Appeals decision does not raise an issue of substantial public interest warranting Supreme Court review.

Petitioners continue to argue at length regarding the overall unfairness of the landlord-tenant screening process, going into detail about how the process works and how the system is tilted against residential clients. Even if one assumes for argument's sake the existence of substantive or procedural flaws in the landlord-tenant screening process, these perceived errors need to be addressed through the legislative process rather than through undermining GR 15 and *Ishikawa*.

Petitioners also attempt to minimize the public interest in the names of innocent unlawful detainer defendants, asserting that party names appearing in court databases are "ministerial data entries" and not relevant to the merits of the case. Petition at 14-16. In support, they point to examples where parties are identified by initials or allowed to proceed anonymously. However, none of the cited cases address a circumstance where a defendant's name has been erased from the caption of a case after it has been commenced. Whether GR 15 applies to situations in which a case has involved a pseudonym or initials at the outset is not an issue this case.

Moreover, none of the cases address a motion which is intended to ensure that the public cannot learn of the existence of a case. Rather, in each matter the parties were seeking to seal/redact documents or portions

of documents other than the caption. Thus, the remedy fashioned did not hamper the public's ability to know the case, document or exhibit exists.

For the foregoing reasons, review under RAP 13.4(b)(4) is not warranted.

2. ADDITIONAL ISSUES RAISED UNDER RAP 13.4(d)

- a. Removal of Petitioners' full names from the court databases, including SCOMIS, effectively prevents the public and court personnel from discovering that an unlawful detainer case ever existed, contrary to GR 15.

After entry of an order to seal or redact, GR 15 contemplates that the public and court staff will be able to learn of the existence of a case and access the Court's GR 15 order to review the basis for the court's decision. Such information is most commonly obtained by conducting a name search. Erasing parties' names and replacing them with initials is not an adequate substitute – people do not search by initials and rarely know the cause number of an action. Accordingly, the effect of the trial court's order is to eliminate all reference to the case.

GR 15(a) "sets forth a uniform procedure for the destruction, sealing, and redaction of court records...." It "applies to all court records, regardless of the physical form of the court record, the method of recording the court record, or the method of storage of the court record." *Id.*

GR 15(b)(3) defines "destroy" as "obliterat[ing] a court record or file in such a way as to make it permanently irretrievable." "Seal[ing]" is defined as "protect[ing] from examination by the public and unauthorized court personnel." GR 15(b)(4). "Redact" means "protect[ing] from examination by the public and unauthorized court personnel a portion or portions or a specified court record." GR 15(b)(5).

Court databases such as SCOMIS are court records. The Judicial Information System ("JIS") is the primary information system for Washington courts. JIS is comprised of several components, including but not limited to a records database specific to individual persons and SCOMIS. *Rousey*, 151 Wash.App. at 947.

Searches within the individual person records database are conducted by entering a person or case number. The system retrieves all of the cases related to that person. Judges, court staff and criminal justice agencies use the database. The public has limited access to the database. The public can retrieve all cases associated with a person's name but cannot access any other personal identifying information. See <http://www.courts.wa.gov/jis/> (last visited September 19, 2012).

As a practical matter, the public does not search court records by case number, they conduct searches using the parties' names. Under the court's order, the record of Petitioners' case would effectively become a

needle in a haystack, permanently irretrievable and thereby “destroyed” under GR 15(b)(3). Indeed, that is the entire point of the Petitioners' request -- to ensure that the public will never (ever) be able to associate their name with the unlawful detainer lawsuit.

GR 15 has established a hierarchy regarding the disposition of court records. The rule creates a presumption in favor of redacting, rather than sealing, a court record. GR 15(c)(3). (“A court record shall not be sealed under this section when redaction will adequately resolve the issues before the court.”) Destruction of a court record is the most extreme action authorized under GR 15. Unlike sealing or redaction, a court is not authorized to “order the destruction of any court record unless expressly permitted by statute.” GR 15(h)(1).

Under GR 15, when a party’s motion to redact or seal a record is granted, the record still maintains the parties’ names as part of its SCOMIS identification. GR 15(c)(5); GR 15(c)(6). When a court redacts records, the original unredacted copy must be sealed. GR 15(c)(6). Again, the order to seal and supporting findings must be publicly-accessible.<sup>3</sup> As a result, the unredacted record exists in a sealed file, which is accompanied by an order to seal supported by written findings, while the order and findings are publicly accessible.

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<sup>3</sup> GR 15(c)(6) requires that when a record is redacted, the original, unredacted, record must be sealed under GR 15(c)(5).

Further, when an order sealing an entire court file is entered, the public still has a right to learn of the file's existence absent a statute expressly stating to the contrary. GR 15(c)(4). The Rule specifically directs the Clerk to include the names of the parties, among other information, on the court indices. GR 15(c)(4); *see also* GR 15(d) (requiring adult and juvenile's name to remain available on public indices when a criminal conviction is vacated and an order to seal is entered).

Finally, even when records are destroyed, the order to destroy and the written findings supporting the order must be publicly accessible. GR 15(h)(4)(C).

Thus, in each action the record documenting the action is available. Whether by redacting or sealing, a court may limit the information that is available to court personnel and the public, but the rule requires the court to guarantee that the public still is able to discover that the record exists.<sup>4</sup> Even in the most extreme situation, when a court orders records destroyed

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<sup>4</sup>Even when a court file is sealed in its entirety, GR 15(c)(4) requires that the file is available for public viewing on court indices. "The information on the court indices is limited to the case number, names of the parties, [and] the notation 'case sealed.'" GR 15(c)(4). Further, the order to seal and the written findings supporting the order must be accessible to the public. GR 15(c)(5)(C).

under GR 15(h)(1), there is still a record documenting the records' destruction that is available to the public.<sup>5</sup>

Because GR 15 treats redaction as a less extreme measure than sealing, it is illogical to conclude that the rule requires a party's name to remain on court indices when sealing an entire court file, but allows a name to be removed when redacting a specific court record or a portion of such record. It is equally illogical to conclude that knowledge of a case's existence is preserved by making an order available that the public and court staff will not be able to find.

The Court of Appeals did not address this question in reaching a decision. It did address the subject in *Rousey*, and to the extent that case sanctions the practice requested by Petitioners here, *Rousey* was incorrectly decided. If this court grants the Petition, the Clerk respectfully requests that this issue also be considered because it involves a matter of substantial public interest. RAP 13.4(b)(4).

#### VIII. CONCLUSION

The Court of Appeals ruling was factually, logically, and legally correct. The Petition should be denied. However, if the Court accepts

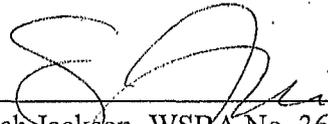
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<sup>5</sup> "The clerk shall ... File the order to destroy and the written findings supporting the order to destroy. Both order and the findings shall be publicly accessible." GR 15 (h)(4)(c).

review, it should also consider the question of whether the redaction of a party's name is permitted under GR 15.

Respectfully submitted this 19 day of October, 2012.

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Attached is Respondent's Answer in Opposition to Petitioner's Petition for Discretionary Review in the following case:

Aaron Hundtofte and Kent Alexander v. Ignacio Encarnacion and N. Karla Farias v. King County Superior Court Office of Judicial Administration  
Supreme Court No. \_\_\_\_\_ (none assigned yet)  
Court of Appeals No. 66428-1-I  
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