

Supreme Court No. 88036-1

Court of Appeals No. ~~66428-TT~~ 66428-0

**SUPREME COURT OF THE STATE OF WASHINGTON**

Aaron Hundtofte and Kent Alexander,

Plaintiffs,

v.

Ignacio Encarnación and N. Karla Farías,

Defendant/Petitioner,

v.

King County Superior Court Office of Judicial Administration

Intervenor/Respondent.

**FILED**  
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**PETITION FOR DISCRETIONARY REVIEW**

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## **I. Identity of Petitioners**

Ignacio Encarnación and N. Karla Farías were the defendants in the underlying unlawful detainer action. They seek review of a Court of Appeals decision reversing a superior court order to redact a court record.

## **II. Court of Appeals Decision**

The Court of Appeals issued its opinion on July 16, 2012; a motion for reconsideration was denied on August 22, 2012.<sup>1</sup>

## **III. Issues Presented for Review**

1. The publicly-available superior court databases revealed that this unlawful detainer case had been filed against Encarnación and Farías, which prevented them from obtaining rental housing. Did the trial court correctly determine that Encarnación and Farías had a compelling privacy interest in restricting public access to that court record?

2. Did substantial evidence support the trial court's finding that Encarnación and Farías were not culpable in this eviction suit, which was filed for "no-cause" during the middle of an unexpired lease term?

3. Was the trial court's redaction order consistent with public policy?

## **IV. Statement of the Case**

In the modern rental housing market, landlords routinely use court unlawful detainer case records in deciding whether to accept particular

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<sup>1</sup> Appendix at 1-26 (Decision), 27 (Order Denying Reconsideration).

applicants as tenants.<sup>2</sup> Consumer reporting agencies, hundreds of which specialize in “tenant-screening reports” designed for rental admissions, use electronic judicial indices to detect and report unlawful detainer suits to housing providers.<sup>3</sup> Landlords almost universally treat applicants who have such “eviction records” less favorably, and often categorically reject them.<sup>4</sup> This practice substantially reduces the housing opportunities for people who have been sued for unlawful detainer.<sup>5</sup>

Significantly, rental applicants with unlawful detainer records are seldom treated any differently based on the details of their cases—such as basis for eviction (non-payment of rent, lease infraction, no-cause, etc.), the nature and strength of defenses raised, or the disposition of the suit (judgment, dismissal, default, settlement, etc.)—and those details seldom appears in screening reports anyway, since few landlords consider such information.<sup>6</sup> Applicants can dispute incomplete reports (under the Fair Credit Reporting Act) and can even submit supplemental material of their own, but rental properties are usually leased to others well before a FCRA

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<sup>2</sup> See Laws of 2012, Ch. 41, § 1.

<sup>3</sup> See CP at 25-26, 29-37, 97-99, 728, 730-31; see also RCW 59.18.030(23) (defining “tenant-screening report”).

<sup>4</sup> See CP at 27-28, 42, 728, 730-32.

<sup>5</sup> See CP at 42-43, 728.

<sup>6</sup> See Laws of 2012, Ch. 41, § 1 (“[T]enant screening reports purchased from tenant screening companies may contain misleading, incomplete, or inaccurate information, such as information relating to eviction or other court records.”); see also CP at 23-34, 42, 102-116, 728, 730-32.

dispute can be completed.<sup>7</sup> Thus, an unlawful detainer case record harms the rental prospects of a wholly innocent tenant (such as a person sued because of a mistake or other improper reason) about the same as a person who actually failed to pay rent or violated a lease.<sup>8</sup>

The only practical way to keep an eviction record from diminishing a person's housing opportunities is to redact her name from the court indices that tenant screeners use to detect unlawful detainers.<sup>9</sup> In 2009, the Court of Appeals appeared to hold in *Indigo Real Estate Services v. Rousey* that a court could, under some circumstances, redact those indices under GR 15(c) to protect an innocent tenant's access to housing.<sup>10</sup> But in the case below, the Court of Appeals sharply narrowed *Indigo Real Estate*, ruling that a person who depends for housing on the rental market does not have a compelling privacy interest in restricting public access to a court record that diminishes her rental housing prospects.<sup>11</sup>

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<sup>7</sup> See RCW 19.182.090(7) (FCRA consumer disputes); see Laws of 2012, Ch. 41, § 1 ("It is challenging for tenants to dispute errors until after they apply for housing and are turned down, at which point lodging disputes are {sic} seldom worthwhile.").

<sup>8</sup> See CP at 42-43, 728, 730-32.

<sup>9</sup> See CP at 727-32.

<sup>10</sup> See *Indigo Real Estate Services v. Rousey*, 151 Wn. App. 941, 951; 215 P.3d 977 (2009) (reversing the denial of an unlawful detainer defendant's motion to redact her name from the superior court database, in order to protect her future rental prospects, due to trial court's failure to apply the GR 15/*Ishikawa* test).

<sup>11</sup> Appendix at 14-15.

The tenants below, Ignacio Encarnación and N. Karla Farías, were sued for unlawful detainer in September 2009.<sup>12</sup> The apartment building in which they lived was sold to new owners, who chose not to honor the unexpired lease Encarnación and Farías had signed with the prior owner.<sup>13</sup> It is elementary that real estate purchasers acquire title subject to existing leases.<sup>14</sup> But the new owners, who wanted to make renovations that could not be done with the premises occupied, filed an eviction suit anyway.<sup>15</sup>

Encarnación and Farías had a meritorious defense, because their rental agreement entitled them to occupy the premises through July 2010.<sup>16</sup> But they agreed to move out by December 1, 2009, when the new owners offered the equivalent of three months' rent and a favorable reference.<sup>17</sup> The unlawful detainer case was settled and dismissed as a result of this agreement.<sup>18</sup> But when Encarnación and Farías began searching for new housing, they found that they were unable to obtain a new apartment

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<sup>12</sup> See CP at 92-96, 115.

<sup>13</sup> See CP at 38-52, 68.

<sup>14</sup> See 17 Wash. Prac., Real Estate § 6.68 (2d Ed.) (May 2012) (except in rare cases, when a landlord conveys his entire interest, "the grantee takes title to the land subject to the leasehold"); see also *Firth v. Lu*, 146 Wn.2d 608, 615; 49 P.3d 117 (2002) ("A grantor of property can convey no greater title or interest than the grantor has in the property.").

<sup>15</sup> See CP at 39-42, 52.

<sup>16</sup> See CP at 41-42, 49-50; see RCW 59.12.030.

<sup>17</sup> See CP at 41-42, 49-50, 90-96.

<sup>18</sup> See CP at 90-92.

because of the case record.<sup>19</sup> At one property, for instance, Encarnación and Farías submitted applications and paid \$80 for background checks, but were rejected due to the eviction suit.<sup>20</sup> The positive reference they had secured was no help, as the housing provider (to whom they applied) cited a policy of not accepting any applicant who had an unlawful detainer record, regardless of the circumstances or outcome.<sup>21</sup>

Encarnación and Farías therefore filed a motion to have their names redacted from the electronic court indices associated with action.<sup>22</sup> After a series of hearings, the motion was granted on November 18, 2010.<sup>23</sup> Though not a party, the King County Clerk (“the Clerk”) opposed the motion and appealed the redaction order.<sup>24</sup> The Court of Appeals, which termed the Clerk an “Intervenor/Appellant,” reversed the superior court on July 16, 2012;<sup>25</sup> Encarnación and Farías now seek review.

## **V. Argument for Why Review Should Be Accepted**

The Court should grant discretionary review under RAP 13.4(b)(4) because the question of whether courts can redact unlawful detainer case

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<sup>19</sup> See CP at 42-43, 94-95, 730.

<sup>20</sup> See CP at 42-43, 94-95, 730.

<sup>21</sup> See CP at 42-43, 94-95, 730.

<sup>22</sup> See CP at 1-12, 19-37, 97-111.

<sup>23</sup> See CP 648-649, 727-733; see RP 9/28/10; see RP 11/3/10.

<sup>24</sup> See CP at 294-302, 624-631, 734.

<sup>25</sup> Appendix at 27.

records to protect the rental housing opportunities of innocent tenants is of substantial public importance. Public access to court records is intended to uphold the integrity of judicial institutions, not to facilitate private background checks. And while those members of the public who happen to be potential landlords may have a legitimate interest in identifying tenants who have violated their leases or unlawfully held over on rental premises, that interest does not extend to the names of tenants who lack culpability. The Court of Appeals' ruling improperly restricts courts from protecting individuals and families whose privacy is invaded, and whose access to housing is diminished, by inappropriate eviction suits.

Alternatively, the Court should grant review under RAP 13.4(b)(2) because the Court of Appeals' ruling conflicts with two of its own prior decisions: *Indigo Real Estate Services v. Rousey*, which implicitly held that protecting a person's ability to obtain rental housing could, in some circumstances, be a compelling interest adequate to support redacting her name from a superior court database, and *State v. CRH*, which held that a court may seal a judicial record to protect a compelling interest despite a lack of statutory authority—or even despite a conflicting statute.

**A. The Superior Court properly followed GR 15(c).**

Judicial records are presumptively open to the public, but may be redacted (or sealed) to protect other compelling interests, including the

privacy of litigants or others identified therein.<sup>26</sup> A person who asserts such an interest can file a motion to redact a court record under GR 15.<sup>27</sup> The court must hold an open hearing on the motion and permit anyone present to object.<sup>28</sup> To succeed, a moving party must present a compelling privacy interest that outweighs the public interest in access to the relevant record.<sup>29</sup> The proposed redaction must be the least-restrictive effective means of protecting that privacy interest, and may be no broader in scope and duration than necessary.<sup>30</sup> If granted, the court must enter written findings that set forth the basis for the redaction (or sealing).<sup>31</sup>

The superior court applied GR 15 correctly. Encarnación and Farías identified a compelling privacy interest: public access to the eviction case record posed “a serious and imminent threat to their ability to obtain rental housing.”<sup>32</sup> Redacting their names from the court databases was effective, because it made tenant-screeners unlikely to detect the case and report it to potential landlords.<sup>33</sup> The remedy was also the least restrictive means of

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<sup>26</sup> See *Allied Daily Newspapers v. Eikenberry*, 121 Wn.2d 205, 211; 848 P.2d 1258 (1993); see *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 36; 640 P.2d 716 (1982).

<sup>27</sup> See GR 15(c)(1) (“In a civil case, the court or any party may request a hearing to seal or redact the court records.”).

<sup>28</sup> See GR 15(c)(1); see *Ishikawa*, 97 Wn.2d at 38.

<sup>29</sup> See GR 15(c)(2); see *Ishikawa*, 97 Wn.2d at 37-38.

<sup>30</sup> See *Ishikawa*, 97 Wn.2d at 38-39; see also GR 15(c)(3).

<sup>31</sup> GR 15(c)(2); see also *Ishikawa*, 97 Wn.2d at 38-39.

<sup>32</sup> See CP at 730.

<sup>33</sup> See CP at 731-732.

protecting their interest, as limited redaction did “not materially impair members of the public from utilizing the records of this action for other public purposes.”<sup>34</sup> Encarnación’s and Farfas’s privacy interest outweighed the public interest in access (to the database fields) because, as they had not been culpable in the underlying eviction suit, access to the record would not help landlords avoid irresponsible tenants.<sup>35</sup> The court limited the relief in scope (redacting the judicial databases only, leaving the names intact on all other records) and duration (setting the order to expire in 2016, when the suit will become too old to include on a tenant-screening report ).<sup>36</sup> The court held an open hearing, allowed non-parties (i.e., the Clerk) to object, and made detailed written findings.<sup>37</sup>

#### **B. Innocent tenants should be able to redact their names**

The Court of Appeals reversed because it felt redaction should not be available to unlawful detainer defendants who avoid eviction except in “extraordinary circumstances.”<sup>38</sup> The Court of Appeals far overstates the degree to which affirming trial court would make redaction available to others. But more importantly, ensuring that innocent tenants have

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<sup>34</sup> See CP at 730.

<sup>35</sup> See CP at 730.

<sup>36</sup> See CP at 730; see RCW 19.182.040(1)(b) (consumer reports may not contain “[s]uits and judgments that, from date of entry, antedate the report by seven years or until the governing statute of limitations has expired, whichever is the longer period.”).

<sup>37</sup> See CP at 727-733; see also RP 9/28/10; RP 11/3/10.

<sup>38</sup> Appendix at 24-25.

reasonable access to the only viable means of protecting their housing prospects is wholly consistent with the interests of justice.

**1. A person who depends on the rental market for housing has a compelling privacy interest in keeping from public view court records that impair access to rental housing.**

Slightly less than two-thirds (64.8%) of Washington residents own their homes.<sup>39</sup> For the rest of our state's population, there is hardly a more important interest than being able to obtain rental housing—or, therefore, hardly a more compelling privacy interest than in removing from public view a court record which substantially undermines that ability. As our Legislature has recognized, “[s]afe, affordable housing is an essential factor in stabilizing communities [and] is of vital statewide importance to the health, safety, and welfare of the residents of the state.”<sup>40</sup> The inability to buy or rent housing translates to homelessness—a condition that inflicts dire harm on both those who endure it and the surrounding communities.<sup>41</sup> And homelessness is a pressing concern in Washington, as:

“Despite laudable efforts by all levels of government, private individuals, nonprofit organizations, and charitable foundations to end homelessness, the number of homeless persons in

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<sup>39</sup> See U.S. Dept. of Commerce, *U.S. Census Bureau: State and County Quick Facts*, <http://quickfacts.census.gov/qfd/states/53000.html>, last visited Sept. 18, 2012.

<sup>40</sup> RCW 43.185B.005.

<sup>41</sup> See RCW 43.185C.005 (finding that “the fiscal and societal costs of homelessness are high for both the public and private sectors”).

Washington is unacceptably high [and] includes a large number of families with children, youth, and employed persons.”<sup>42</sup>

The Court of Appeals nonetheless ruled that protecting a person’s access to housing can be a compelling interest only if in furtherance of a “statute, court rule, or other similar example of clear and well-established public policy,” which (it found) access to rental housing is not.<sup>43</sup> To recognize such an interest as compelling, the Court of Appeals felt, would make too many court records amenable to redaction.<sup>44</sup>

Of course, it is only the need to obtain safe, affordable housing that is widely shared—only a very small percentage of residential tenants have unlawful detainer case records. Fewer still would be able to meet all of the other criteria for redaction in a particular case—either because they already have stable housing and do not need to relocate, because they cannot show a lack of culpability, because redaction is unlikely to improve their housing prospects, or because of other case-specific factors that enhance the public’s interest or diminish the private.<sup>45</sup> Those who do meet the criteria, however, should not be denied redaction (and effectively

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<sup>42</sup> RCW 43.185C.005.

<sup>43</sup> Appendix at 21-22.

<sup>44</sup> Appendix at 22.

<sup>45</sup> See *Ishikawa*, 97 Wn.2d at 37-38 (in addition to a compelling interest, redaction also requires (i) that the interest outweighs the public interest in access to the record and (ii) that redaction is the least restrictive effective means of protecting the interest).

forced to endure unstable or substandard housing, or homelessness), just because the number of others similarly affected may be significant.

Furthermore, “extraordinariness” has never been a stand-alone requirement for sealing or redacting records.<sup>46</sup> Rather, the already rigorous standards for redaction set forth in *Seattle Times v. Ishikawa*, and reflected in GR 15(c), sufficiently “limit closure to rare circumstances.”<sup>47</sup>

## **2. A compelling privacy interest is adequate for redaction.**

A court’s authority to redact its records to protect individual privacy arises under Wash. St. Cons., Art. I, Sec. 7.<sup>48</sup> Accordingly, two divisions of the Court of Appeals have held that statutory authority is not needed to redact or seal records, one even ruling that the “inherent constitutional authority [to redact or seal records] takes precedence over [a] conflicting statute.”<sup>49</sup> Specifically, Division Two held in *State v. Noel* that a trial judge erred by not considering whether to seal a criminal defendant’s records under GR 15, even though no statute authorized the sealing.<sup>50</sup>

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<sup>46</sup> See generally *Allied Newspapers*, 121 Wn2d at 211-213 (statute that required courts to automatically seal the names of child sexual assault victims was unconstitutional, but courts could still seal those names on a case-by-case basis).

<sup>47</sup> *State v. Bone-Club*, 128 Wn.2d 254, 258; 906 P.2d 325 (1995); see also *Ishikawa*, 97 Wn.2d at 36-38.

<sup>48</sup> See *Allied Newspapers*, 121 Wn.2d at 211 (“privacy as guaranteed under Const. art. 1, § 7 . . . on an individualized basis may be sufficient to warrant court closure.”).

<sup>49</sup> See *State v. C.R.H.*, 107 Wn. App. 591, 593; 27 P.3d 660 (2001).

<sup>50</sup> See *State v. Noel*, 101 Wn. App. 623, 628; 5 P.3d 747 (2000) (“A court may seal a record without express statutory authority, if it finds that ‘there are compelling circumstances requiring such action.’”), citing GR 15(c)(1)(B).

And in *State v. CRH*, Division One ruled that, if compelling circumstances were shown, a court could seal the record of a case that resulted in a deferred disposition after less than one year, even despite a statute purporting to require the files of deferred disposition cases “to be open to public inspection for at least 10 years.”<sup>51</sup>

The Court of Appeals’ pronouncement to the contrary—that a “statute, court rule, or other similar example of clear and well-established public policy”<sup>52</sup> is necessary before an interest can be compelling enough to justify sealing or redacting a court record is incorrect; “[u]nder GR 15, a party must show that *either* closure is permitted by statute *or* compelling circumstances require such action.”<sup>53</sup> GR 15(c) itself provides that any compelling privacy or safety interest—even one not anticipated by a statute or court rule—can support redaction.<sup>54</sup>

### **3. Redacting innocent unlawful detainer defendants’ names from court databases does advance public policies.**

Even if Encarnación’s and Farías’ privacy interest could not have been found compelling without an accompanying statutory or other established

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<sup>51</sup> *State v. C.R.H.*, 107 Wn. App. at 593 (quote), 596 (holding). Note that the *CRH* court seemed to implicitly invoke separation-of-powers as well as privacy as the basis of a court’s authority to seal or redact judicial records.

<sup>52</sup> Appendix at 21-22.

<sup>53</sup> *In re Dependency of J.B.S.*, 22 Wn.2d 131, 137; 856 P.2d 694 (1993) (italics added).

<sup>54</sup> See GR 15(c)(2)(F) (authorizing sealing or redaction based on “[a]nother identified compelling circumstance” not specifically anticipated by a statute or court rule).

public policy, the redaction order advanced several such policies. For instance, the “attainment of a decent home in a healthy, safe environment for every resident of the state” is a major policy objective.<sup>55</sup> Redacting court records that pose barriers to rental housing also “mov[es] individuals and families toward stable, affordable housing” and helps “ensure fair and equal access to the housing market.”<sup>56</sup>

The redaction order also furthers the public policy against landlord retaliation when tenants assert their statutory or contractual rights.<sup>57</sup> And preventing applicants from being denied housing based on unfairly-stigmatizing eviction records advances a policy behind the Fair Tenant Screening Act, in which the Legislature noted that applicants cannot dispute “misleading, incomplete, or inaccurate” tenant-screening reports until after they have already been rejected—by which point consumer disputes are not usually helpful in obtaining housing.<sup>58</sup>

The Court of Appeals did not consider any of these statutes or policies, and misconstrued the one statute it did consider—a provision of the Fair

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<sup>55</sup> See RCW 43.185B.007 (“[T]he goal of the state of Washington [is] attainment of a decent home in a healthy, safe environment for every resident of the state. The legislature declares that attainment of that goal is a state priority.”).

<sup>56</sup> RCW 43.185B.005(1)(b); RCW 43.185B.009(8).

<sup>57</sup> See RCW 59.18.240 (prohibiting “reprisals or retaliatory action against the tenant because of any good faith and lawful: . . . (2) Assertions or enforcement by the tenant of his or her rights and remedies under [the Residential Landlord-Tenant Act]”).

<sup>58</sup> Laws of 2012, Ch. 41, § 1 (“It is challenging for tenants to dispute errors until after they apply for housing and are turned down, at which point lodging disputes are seldom worthwhile.”).

Credit Reporting Act which prohibits the inclusion of old civil actions in consumer reports.<sup>59</sup> That FCRA provision was hardly a “clear legislative declaration of public policy” against redacting innocent tenants’ names from judicial databases; the only public policy that provision does reflect is a policy against reporting outdated civil suits; it cannot reasonably be interpreted for the inverse (i.e., to require the reporting of all recent civil suits no matter what the circumstances).<sup>60</sup>

**4. The public has minimal interest in the names of innocent unlawful detainer defendants.**

Not only does an innocent tenant often have a compelling interest in redacting her name from a court record that impairs her rental housing prospects, but the public has very little interest in access to those same records—particularly when only the electronic index is redacted and the party names remain intact on all other court records.

Public access to court records is based on Art. I., Sec. 10 of the state constitution, which requires that “Justice in all cases shall be administered openly[.]”<sup>61</sup> This constitutional commitment to open courts “assures the structural fairness of the proceedings, affirms their legitimacy, and

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<sup>59</sup> See RCW 19.182.040(1)(b).

<sup>60</sup> Appendix at 22; see RCW 19.182.040(1)(b).

<sup>61</sup> Wash. St. Const., Art. I, Sec. 10; see *Ishikawa*, 97 Wn.2d at 36.

promotes confidence in the judiciary.”<sup>62</sup> Accordingly, the public has great interest in access to court hearings, and to records related to the trial and adjudication of cases.<sup>63</sup> But the public has very little, if any, interest in raw fruits of discovery, ministerial matters, or other records that, even if in the hands of a court, are outside the court's decision-making process.<sup>64</sup>

Party names appearing in court databases are ministerial data entries. They do not become part of a court's decision-making process. They have little or no value to the public in overseeing the performance of the courts. Indeed, redacting a party's name from a court index is akin to allowing a party to proceed under initials or substituting a litigant's real name with an

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<sup>62</sup> *In Re Detention of D.F.F.*, 172 Wn.2d 37, 40; 256 P.3d 357 (2011); *see also Dreiling v. Jain*, 151 Wn.2d 900, 908-09; 93 P.3d 861 (2004) (“access to judicial records, like the openness of court proceedings, serves to enhance the basic fairness of the proceedings and to safeguard the integrity of the fact-finding process.”).

<sup>63</sup> *See D.F.F.*, 172 Wn.2d at 40-41; *see also Dreiling*, 151 Wn.2d at 915.

<sup>64</sup> *See Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, 72; 256 P.3d 1179 (2011) (Art. I, § 10 did not protect public access to a discovery deposition, even though it was conducted in a courtroom with a superior court judge present); *see Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 114 P.3d 1182 (2005) (if a record is truly irrelevant to the merits of the case and the motion before the court, the court . . . in applying *Ishikawa* it would likely find that sealing is warranted. As long as the opposing party has a valid interest in keeping the information confidential, there is very little, if any, interest of the public or the moving party to balance against that asserted interest.”); *see State v. McEnroe*, 174 Wn.2d 795, 805; 279 P.3d 861 (2012) (documents submitted with motion for permission to file them under seal constitute working papers that may be withdrawn and never exposed to public view if permission to file under seal is denied), citing GR 31(c)(4); *see also State v. Bennett*, 168 Wn. App. 197, 204; 275 P.3d 1224 (2012) (“even in proceedings involving purely legal matters, the public's presence may ensure [fairness], although the same cannot be said for ministerial or administrative matters that do not impact the defendant's rights.”), *disagreeing with In Re Detention of Ticeson*, 159 Wn. App. 374; 246 P.3d 550 (2011) (no public right of access to proceedings on purely legal matters).

alias—both of which courts regularly do to protect privacy.<sup>65</sup> Such measures do not prevent observers from understanding, evaluating, or otherwise overseeing judicial processes. Yet the redaction of only a court database is a lesser infringement on public access, since the parties' full, true names remain available in the court file.

This Court has also held in the public records context that the public has no legitimate interest in knowing the identities of people accused of unsubstantiated allegations—even when those allegations concern possible sexual predators teaching in the public schools.<sup>66</sup> By analogy, the public has no legitimate interest in knowing the identities of persons subjected to unsubstantiated unlawful detainer allegations—particularly where the trial court has made an affirmative finding that the tenants lacked culpability.<sup>67</sup>

Tenant-screeners have no greater right of access to court records than the public generally.<sup>68</sup> And the public's minimal interest in knowing the name of a tenant sued for unlawful detainer is easily outweighed when that

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<sup>65</sup> See, e.g., *T.S. v. Boy Scouts of America*, 157 Wn.2d 416, 431-32; 138 P.3d 1053 (2006) (replacing names of alleged child abuse victims and perpetrators with “identifying numbers or codes” was not abuse of discretion); see also *J.B.S.*, 122 Wn.2d at 139.

<sup>66</sup> See, e.g., *Bellevue John Does 1-11 v. Bellevue School Dist. #405*, 164 Wn.2d 199, 221; 189 P.3d 139 (2008) (“When an allegation is unsubstantiated, the [accused’s] identity is not a matter of legitimate public concern.”).

<sup>67</sup> See CP at 730.

<sup>68</sup> See *Cohen v. Everett City Council*, 85 Wn.2d 385, 386-87; 535 P.2d 801 (1975) (“the right of the media to observe and report judicial proceedings is not a special privilege but rather is equivalent to the right of to public in general to have open access to public trials”), citing *Tribune Review Pub. Co. v. Thomas*, 254 F.2d 883, 884 (3d Cir. 1958)

tenant is innocent of the holdover allegations, yet is unable to obtain housing due to the stigma associated with the case record.

**C. Case specific factors were critical to the redaction order.**

Ultimately, the Court of Appeals mischaracterized the superior court's ruling as having created "a de facto 'automatic limitation'" that calls for an unlawful detainer defendant's name to be redacted any time a case does not result in eviction.<sup>69</sup> But the trial court did not enter the redaction order simply because Encarnación and Farías "were not ultimately evicted;" rather, the trial court considered and relied on numerous case-specific factors in determining that redaction was appropriate in this single case.<sup>70</sup>

**1. Encarnación and Farías demonstrated a particularized need for redaction that is not likely to be present in all cases.**

Critically, the superior court observed that the unlawful detainer record posed an especially onerous hardship on Encarnación, Farías, and their children: "[They] are not homeowners . . . currently live in a home that is not suitable for their needs and is facing a bank foreclosure, and . . . will need to change residences in the near future."<sup>71</sup> Indeed, Encarnación and Farías were ultimately able to avoid homelessness only by moving more than twenty miles away, to a different county—a move that dramatically

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<sup>69</sup> Appendix at 22.

<sup>70</sup> See CP at 727-733.

<sup>71</sup> See CP at 730.

increased the distance to their jobs, required their children to change schools, and negatively affected “everything else in [their] lives.”<sup>72</sup>

By comparison, other tenants who avoid eviction may continue living in the same premises long-term. Some may become homeowners, or move to properties or communities where tenant-screening is not required or where admission policies are more forgiving. Others may be better positioned to search for housing in other areas, such as by not having local jobs or children enrolled in the neighborhood schools.<sup>73</sup>

Encarnación and Farías also showed that they had “already attempted to obtain rental housing and were denied by reason of this action having been filed against them.”<sup>74</sup> This showed that the case record was more than just a theoretical barrier to securing housing, but an actual barrier that had already cost them at least one rental opportunity. Requiring parties to show that they have applied for housing and been turned down because of the case record may be one practical way of limiting the remedy to those who truly need it—or, possibly, or making it unavailable to those who cannot benefit from it (due to more significant barriers).

## **2. Encarnación and Farías proved their lack of culpability.**

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<sup>72</sup> See CP 42-43.

<sup>73</sup> *C.f.* RCW 43.185.005 (“Residents must have a choice of housing opportunities *within the community where they choose to live.*”) (italics added).

<sup>74</sup> See CP at 728.

Another key factor in the redaction order was that Encarnación and Farías “were not culpable and did nothing improper to cause their removal from the property.”<sup>75</sup> Not all unlawful detainer defendants who avoid eviction necessarily lack culpability; e.g., a tenant who negotiates a payment plan for delinquent rent may avoid eviction, but cannot deny having defaulted in rent, just as a tenant who prevails on some procedural defense may not be able to prove that she was innocent of the landlord’s substantive claims. Importantly, “[t]he burden of persuading the court that access must be restricted to prevent a serious and imminent threat to an important [privacy] interest shall be on the proponent.”<sup>76</sup>

The Court of Appeals mistakenly surmised that the superior court’s finding of inculpability was based only on inferences drawn from the settlement agreement.<sup>77</sup> In fact, irrefutable documentary evidence showed that Encarnación and Farías were lawfully occupying the premises when the unlawful detainer suit was filed: the notices to vacate that were issued on August 7 and September 9, 2009,<sup>78</sup> the unexpired lease showing that Encarnación and Farías had the right to possession through July 2010

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<sup>75</sup> See CP at 730.

<sup>76</sup> *Ishikawa*, 97 Wn.2d at 37-38.

<sup>77</sup> Appendix at 19.

<sup>78</sup> See CP at 68, 70.

(and, thus, that the notices to vacate were invalid),<sup>79</sup> detailed explanatory declarations from both tenants,<sup>80</sup> and copies of money orders and mail receipts showing their rent was timely paid.<sup>81</sup> The superior court did not abuse its discretion because this evidence was easily enough to convince a fair-minded, rational person that Encarnación and Farías lacked culpability on the underlying unlawful detainer claim.<sup>82</sup>

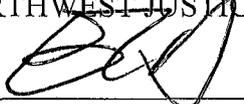
## VI. Conclusion

For all of the foregoing reasons, the Court should grant discretionary review under RAP 13.4(b).

## VII. Appendix

RESPECTFULLY SUBMITTED this 18 day of September, 2012.

NORTHWEST JUSTICE PROJECT

  
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<sup>79</sup> See CP 49-50.

<sup>80</sup> See CP at 38-44, 93-96.

<sup>81</sup> See CP 40-41, 73-75, 80, 82, 84, 86, 88, 317.

<sup>82</sup> See *Bering v. SHARE*, 106 Wn.2d 212, 220; 721 P.2d 918 (1986) (“Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.”).

## APPENDIX

App. 1-26	Court of Appeals Published Opinion, filed on July 16, 2012
App. 27	Order Denying Respondent's Motion for Reconsideration, filed on August 22, 2012



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that the full names of the defendants in an unlawful detainer action be replaced with their initials in the court's electronic records index. Because 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 similarly be available to all such litigants. However, no statutory or constitutional provision protects the interest asserted by the applicants for relief herein. Consequently, such wide-ranging relief is inappropriate. Moreover, such a de facto "automatic limitation" on the public's right to open courts effectively precludes the case-specific analysis mandated by article I, section 10.

The trial court abused its discretion by overvaluing the asserted interest when weighing that interest against the public's constitutional right, in effect negating the presumption of the open administration of justice. Accordingly, we reverse the trial court's order granting the motion to redact.

On September 10, 2009, the owners of an apartment building in Burien, Aaron Hundtofte and Kent Alexander, filed an unlawful detainer action against Ignacio Encarnación and Norma Karla Farias, who were, at the time, building tenants. The parties resolved the case by stipulation and entry of an agreed order on November 12, 2009. Encarnación and Farias were not evicted from the apartment. Pursuant to the agreed order, the tenants agreed to leave the apartment by December 1, 2009; in exchange, they retained their rent payments for the months of September, October, and November. Hundtofte and Alexander

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also agreed to provide Encarnación and Farias with a favorable rental reference.

Encarnación and Farias thereafter filed a motion to redact the court record in the unlawful detainer case. Specifically, they sought an order requiring the substitution of their initials for their full names in the Superior Court Management Information System (SCOMIS), the court's publicly available electronic record index. Encarnación and Farias alleged that they had been denied rental housing based upon the SCOMIS record of the unlawful detainer action, which shows that such an action had previously been filed against them. They contended that redaction of the SCOMIS record was justified because the existence of the record entry impaired their access to rental housing.

Encarnación and Farias filed their motion to redact with the Ex Parte Department of the King County Superior Court. On May 26, 2010, a commissioner of the court granted the unopposed motion, directing the superior court clerk to replace Encarnación's and Farias's names with their initials in the SCOMIS index. An attorney representing the King County Superior Court Office of Judicial Administration<sup>2</sup> thereafter provided briefing to the trial court opposing the ordered redaction. The Clerk contended that such a redaction would be tantamount to destruction of a court record and, thus, improper absent an authorizing statute.

Meanwhile, Encarnación and Farias filed a motion to affirm the commissioner's order in the superior court, apparently because the Clerk had not

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<sup>2</sup> In all other Washington counties, this office is headed by the constitutional county clerk. For clarity, we will refer to this intervening party as "the Clerk."

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yet complied with the redaction order. The motion was denied. Encarnación and Farias appealed from the order denying their motion to affirm the redaction order. A commissioner of this court determined that the order was not appealable as a matter of right and, thus, granted to the superior court the full authority to hear and decide any related motions brought by Encarnación and Farias.

Encarnación and Farias thereafter filed in the superior court a CR 60(b) motion for relief from the order denying their motion to affirm the redaction order, characterizing that order as a denial of a hearing on the motion to redact.

Although the Clerk's office was not a named party in the case, the Clerk submitted a response to the motion to vacate, asserting that the relief requested—redaction of Encarnación's and Farias's full names from the SCOMIS record—effectively constitutes the unlawful destruction of a court record in contravention of General Rule (GR) 15(h). The trial court determined that, although the Clerk did not have standing to oppose the motion for relief, the Clerk would have standing "at the ultimate hearing where the Court may or may not direct the clerk's office to do something." The trial court granted relief in the form of scheduling a hearing on the merits of the motion to redact.

At the subsequent hearing, the trial court granted Encarnación's and Farias's motion to redact the court record. The trial court determined that it was bound by this court's decision in Indigo Real Estate Services v. Rousey, 151 Wn. App. 941, 215 P.3d 977 (2009), and, thus, the court rejected the Clerk's contention that GR 15 prohibits the replacement of a party's full name with the party's initials in the SCOMIS index. The trial court then indicated that, in

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granting the motion for redaction, it had applied GR 15 and the requirements set forth in Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982).

On November 18, 2010, the trial court entered findings of fact and conclusions of law in support of its redaction order. The court found that a prospective future landlord "could readily discover" the unlawful detainer record and that landlords "commonly deny rental housing" to applicants who have such records. Thus, the court determined, the record "present[ed] a significant risk" that Encarnación and Farias would be denied housing in the future. The trial court also found that the unlawful detainer action had been dismissed, that the court had neither entered findings against the tenants nor ordered their eviction, and that Encarnación and Farias had "raised a meritorious defense to the 'eviction' action."

Based upon its factual findings, the trial court determined that Encarnación's and Farias's need to obtain rental housing constituted a "compelling privacy interest," as required by GR 15 for redaction of a court record, because (1) they were not homeowners, (2) they then lived in a home that did not suit their needs, and (3) they had "a good faith expectation that they [would] need to change residences in the near future." The court further determined that the SCOMIS record presented "a serious and imminent threat" to the applicants' abilities to obtain housing because (1) they had already been denied rental housing due to this record and (2) they had "good reason to expect" that other potential landlords would similarly reject them based upon the existence of the record.

In weighing Encarnación's and Farias's asserted interest against the public interest in open court records, the trial court determined that "in this specific action," their interest outweighed the public interest because (1) the applicants "were not culpable and did nothing improper to cause their removal from the property" and, thus, the record would not properly assist landlords in detecting irresponsible tenants, and (2) redaction of the record would not "materially impair members of the public from utilizing the records of this action for other public purposes." The trial court noted that, although Encarnación and Farias "gave timely and proper notice" to Hundtofte and Alexander, neither landlord "presented any written objection to the relief requested." The court acknowledged that "no person [had] appeared on behalf of residential landlords or tenant-screening companies," but noted that it had considered remarks that the Washington Landlord Association (WLA) had previously presented to a state Senate committee regarding the sealing of unlawful detainer records. The trial court additionally noted that, in those remarks, the WLA had "expressed support for sealing unlawful detainer records in some instances."

Finally, the trial court determined that redacting Encarnación's and Farias's names from the SCOMIS record constituted the "least restrictive effective means to preserve [their] rental housing prospects." Thus, the court ordered the Clerk to "delete [Encarnación's and Farias's] full names . . . from the SCOMIS database . . . and replace, or cause to be replaced, their full names with their initials." The trial court noted that the need for redaction would "substantially diminish after seven years, when, under the Fair Credit Reporting

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Act, it will become unlawful for consumer reporting agencies (such as tenant-screening firms) to report this action.” Accordingly, the trial court ordered that the redaction “shall remain in effect until November 12, 2016,” the date on which that statute “will prohibit consumer reporting agencies from reporting this action to prospective housing providers.”

The Clerk appeals.

II

We review a trial court’s decision to redact or seal a court record for abuse of discretion. Rousey, 151 Wn. App. at 946. A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. State v. McEnry, 124 Wn. App. 918, 924, 103 P.3d 857 (2004). “In reviewing a trial court’s findings and conclusions, we determine whether substantial evidence supports challenged findings of fact and, in turn, whether the findings support the conclusions of law.” McEnry, 124 Wn. App. at 924. “Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” McEnry, 124 Wn. App. at 924.

Article I, section 10 of our state constitution requires that “[j]ustice in all cases shall be administered openly.” WASH. CONST. art. I, § 10. This mandate “guarantees the public and the press a right of access to judicial proceedings and court documents in both civil and criminal cases.” Dreiling v. Jain, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). Our Supreme Court has repeatedly iterated the significance of this constitutional guarantee:

The open operation of our courts is of utmost public importance.

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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. This openness is a vital part of our constitution and our history.

Dreiling, 151 Wn.2d at 903-04; see also In re Det. of D.F.F., 172 Wn.2d 37, 40, 256 P.3d 357 (2011) ("The open administration of justice assures the structural fairness of the proceedings, affirms their legitimacy, and promotes confidence in the judiciary."); Allied Daily Newspapers of Wash. v. Eikenberry, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993) ("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.").

Resort to any exception to this "vital constitutional safeguard" is "appropriate only under the most unusual circumstances." D.F.F., 172 Wn.2d at 41. Accordingly, the right of the public "to access trials and court records may be limited only to protect significant interests, and any limitation must be carefully considered and specifically justified." Dreiling, 151 Wn.2d at 904.

"In determining whether court records may be sealed from public disclosure, we start with the presumption of openness." Rufer v. Abbott Labs., 154 Wn.2d 530, 540, 114 P.3d 1182 (2005).

The burden of persuading the court that access must be restricted to prevent a serious and imminent threat to an important interest shall be on the proponent unless closure is sought to protect the accused's fair trial right. Because courts are presumptively open, the burden of justification should rest on the parties seeking to infringe the public's right.

Ishikawa, 97 Wn.2d at 37-38. Moreover, even where no party opposes a closure

or redaction request, the trial court has an “independent obligation to safeguard the open administration of justice. Article 1, section 10 is mandatory.” State v. Duckett, 141 Wn. App. 797, 804, 173 P.3d 948 (2007). Accordingly, the trial court must “conduct an individualized inquiry into whether a sufficient countervailing interest exists to override the public’s constitutional right to the open administration of justice before closing any part of any judicial proceeding.” In re Det. of D.F.F., 144 Wn. App. 214, 217-18, 183 P.3d 302 (2008), aff’d, 172 Wn.2d 37, 256 P.3d 357 (2011).

The standard to be applied in determining whether “exceptional circumstances” exist—thus permitting an exception to the constitutional mandate of open judicial proceedings and records—was established by our Supreme Court in the context of a defendant’s right to a fair trial. Federated Publ’ns, Inc. v. Kurtz, 94 Wn.2d 51, 615 P.2d 440 (1980). In Kurtz, the trial court ordered the closure of a pretrial suppression hearing and the temporary sealing of the suppression hearing file in order to prevent publicity that would have jeopardized the defendant’s article I, section 22 right to an impartial jury. 94 Wn.2d at 53. Our Supreme Court upheld the trial court’s closure and sealing orders, concluding that the circumstances therein “were exceptional enough to justify closure.”<sup>3</sup> Kurtz, 94 Wn.2d at 60. The court determined that article I, section 22,

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<sup>3</sup> The facts of that case were, indeed, exceptional. The defendant was charged with murder in the second degree. Kurtz, 94 Wn.2d at 52. The Bellingham Herald thereafter published 16 newspaper articles concerning the alleged homicide. Kurtz, 94 Wn.2d at 52. Based upon the notoriety of the case, the trial court granted the defendant’s motion for a change of venue. Kurtz, 94 Wn.2d at 63. However, the trial was moved to adjacent Skagit County, where the Herald was also circulated. Kurtz, 94 Wn.2d at 63. Moreover, the Herald had twice violated the Bench-Bar-Press guidelines by publishing reports of proposed ballistics evidence despite the

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at a minimum, required that an accused be provided with an “impartial jury free from outside influences” and that, in weighing the defendant’s right to a fair trial against other constitutional rights, the balance must “never be weighed against the accused.” Kurtz, 94 Wn.2d at 61 (quoting Sheppard v. Maxwell, 384 U.S. 333, 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966)). Thus, the court concluded that “the public’s right of access under [article I,] section 10 must be interpreted in light of these requirements.” Kurtz, 94 Wn.2d at 61.

The standard set forth in Kurtz was expanded in Ishikawa, 97 Wn.2d 30. There, the trial court closed a pretrial suppression hearing involving a motion to dismiss. Ishikawa, 97 Wn.2d at 32. Unlike in Kurtz, however, the trial court, in ordering closure, relied upon asserted interests other than the defendant’s right to a fair trial. Ishikawa, 97 Wn.2d at 36-37. Acknowledging that the propriety of closure, an extreme remedy, depends upon the significance of the asserted conflicting interest, our Supreme Court held that “closure to protect the defendant’s right to a fair trial should be treated somewhat differently from closure based entirely on the protection of other interests.” Ishikawa, 97 Wn.2d at 37. Accordingly, the court, expanding upon the framework set forth in Kurtz, developed a five-step analysis that trial courts must follow in ruling on motions to restrict access to court records or proceedings. Ishikawa, 97 Wn.2d at 37-39.

First, the proponent of closure of court proceedings or sealing of court records “must make some showing of the need therefor.” Ishikawa, 97 Wn.2d at 37. “The quantum of need which would justify restrictions on access differs

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trial court’s request that it refrain from doing so. Kurtz, 94 Wn.2d at 63.

depending on whether a defendant's Sixth Amendment right to a fair trial would be threatened." Ishikawa, 97 Wn.2d at 37. When closure is sought to protect a defendant's fair trial rights, only a "likelihood of jeopardy" need be shown. Ishikawa, 97 Wn.2d at 37 (quoting Kurtz, 94 Wn.2d at 62). However, "a higher threshold will be required" where other interests are at stake. Ishikawa, 97 Wn.2d at 37. Where any interest other than a defendant's right to a fair trial is sought to be protected, a "serious and imminent threat to some other important interest" must be demonstrated. Ishikawa, 97 Wn.2d at 37.

Second, anyone present when the motion for restricted access is made must be given an opportunity to object. Ishikawa, 97 Wn.2d at 38. Third, the court must determine that "the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened." Ishikawa, 97 Wn.2d at 38. Fourth, the court must weigh the competing interests of the proponent of restricted access and the public. Ishikawa, 97 Wn.2d at 38. In so doing, the court must consider any alternative approaches suggested, and its "consideration of these issues should be articulated in its findings and conclusions, which should be as specific as possible rather than conclusory." Ishikawa, 97 Wn.2d at 38. Finally, the court's order "must be no broader in its application or duration than necessary to serve its purpose." Ishikawa, 97 Wn.2d at 39 (quoting Kurtz, 94 Wn.2d at 64).

In addition to complying with the requirements set forth in Ishikawa, a trial court must also adhere to the procedures set forth in General Rule (GR) 15 when ruling on a motion to redact court records. See State v. Waldon, 148 Wn. App.

952, 967, 202 P.3d 325 (2009) (holding that, when ruling on a motion to redact or seal court records, the trial court must apply both the requirements of GR 15 and the five-step analysis set forth in Ishikawa). GR 15 “sets forth a uniform procedure for the destruction, sealing, and redaction of court records.” GR 15(a). Pursuant to this rule, a trial court may order that court records be sealed or redacted “if the court makes and enters 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). The rule sets forth six possible findings that implicate “[s]ufficient privacy or safety concerns that may be weighed against the public interest.” GR 15(c)(2); see GR 15(c)(2)(A)-(F).<sup>4</sup> One such finding is that an “identified compelling circumstance exists that requires the sealing or redaction.” GR 15(c)(2)(F). “Agreement of the parties alone does not constitute a sufficient basis for the sealing or redaction of court records.” GR 15(c)(2).

The determination of whether the asserted interest outweighs the public’s constitutional right to the open administration of justice must be made on a case-by-case basis. This is because, although the right to open court records and

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<sup>4</sup> GR 15(c)(2) lists the following findings as “[s]ufficient privacy or safety concerns that may be weighed against the public interest”:

- (A) The sealing or redaction is permitted by statute; or
- (B) The sealing or redaction furthers an order entered under CR 12(f) or a protective order entered under CR 26(c); or
- (C) A conviction has been vacated; or
- (D) The sealing or redaction furthers an order entered pursuant to RCW 4.24.611; or
- (E) The redaction includes only restricted personal identifiers contained in the court record; or
- (F) Another identified compelling circumstance exists that requires the sealing or redaction.

proceedings it not absolute, "protection of this basic constitutional right clearly calls for a trial court to resist a closure motion except under the most unusual circumstances." State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). Accordingly, the purported threat posed by the open administration of justice must be sufficiently particularized, and the trial court must determine on a case-by-case basis whether the asserted interest outweighs the public's right to open courts. Bone-Club, 128 Wn.2d at 261; Eikenberry, 121 Wn.2d at 211; D.F.F., 144 Wn. App. at 220-21.

It is with these principles in mind—the importance of the public's constitutional right to the open administration of justice, the presumption of openness that may be overcome only by significant countervailing interests, and our Supreme Court's repeated insistence that such determinations be made on a case-specific basis—that we review the trial court's redaction order here.

### III

In the case at hand, Encarnación and Farias contend that the trial court properly applied the requirements set forth in GR 15 and Ishikawa in ordering the redaction of the SCOMIS record.<sup>5</sup> Although the trial court engaged in the five-step Ishikawa analysis in ruling on the motion to redact, the court abused its

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<sup>5</sup> The Clerk appeals from the trial court's decision ordering redaction of the court record in the unlawful detainer action. However, given the Clerk's limited standing, the Clerk contends only that the trial court's order contravenes GR 15 because either (1) it orders the destruction of a court record without statutory authorization or (2) it is inconsistent with the terms and intent of that rule. Because we resolve this case based upon our review of the trial court's application of the standard for redaction of court records, a product of our "independent obligation to safeguard the open administration of justice," Duckett, 141 Wn. App. at 804, we need not further address these contentions. Due to the participation of various amici curiae, all necessary issues have been well and properly briefed.

discretion by determining that Encarnación's and Farias's purported privacy interest is sufficient to overcome the presumption of openness mandated by article I, section 10. Accordingly, the trial court erred by entering the order.

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." Respondent's Br. at 22 (quoting Rousey, 151 Wn. App. at 953). 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. Rousey, 151 Wn. App. at 950.

Nevertheless, our decision in Rousey does provide guidance in our review of the trial court's order herein. There, Indigo Real Estate Services, Rousey's landlord, filed an unlawful detainer action against Rousey following a domestic violence incident in which her former partner came to the home, refused to leave, and became abusive and threatening. Rousey, 151 Wn. App. at 945. Rousey declined to relinquish her apartment, asserting that Indigo "had improperly pressured her to surrender her tenancy in violation of the victim protection act, RCW 59.18.580(1)." Rousey, 151 Wn. App. at 945. The parties thereafter agreed to a voluntary dismissal of the case. Rousey, 151 Wn. App. at 945.

Rousey then filed a motion with the trial court seeking redaction of her full name from the SCOMIS record of the unlawful detainer action, asserting that "her privacy interest in preserving her future rental opportunities outweighed the

public interest in having her full name available in the SCOMIS index.” Rousey, 151 Wn. App. at 945. The trial court denied her motion. Rousey, 151 Wn. App. at 945. In its order, the trial court specifically stated that it had not decided whether Rousey’s asserted privacy interest was compelling, as required in order to justify redaction, or whether her interest outweighed the public’s interest in open records. Rousey, 151 Wn. App. at 945-46. Because we could not determine whether the trial court had applied the correct standard in ruling on the motion to redact, we reversed and remanded for application of that standard. Rousey, 151 Wn. App. at 953.

In so doing, we held that the redaction of a SCOMIS record is subject to the requirements set forth in Ishikawa and, thus, that the five-step Ishikawa analysis must be applied when considering a motion to redact such a record. Rousey, 151 Wn. App. at 949-50. We did not hold, however, that Rousey’s asserted interest—protecting her future housing rental opportunities—was compelling enough to override the presumption of openness of court records. Rousey, 151 Wn. App. at 953 (noting that the trial court on remand “still must exercise discretion to decide whether the interests asserted by Rousey are compelling enough to override the presumption of openness”). Indeed, in providing considerations to facilitate the trial court proceedings on remand, we noted that our Supreme Court

has identified by rule particular records and information to which access is restricted. These include certain health care and financial records filed in family law and guardianship cases. Notably, the court has not established similar general restrictions for unlawful detainer proceedings. Instead, it has emphasized by rule and

decision that requests to restrict access to court records and information must be decided on a case-by-case basis, starting with the presumption of openness.

Rousey, 151 Wn. App. at 952 (footnote omitted). Thus, we observed that the absence of a Supreme Court rule limiting access to such records should be considered in weighing Rousey's asserted interest against the public's constitutional right to the open administration of justice.

Similarly, in Waldon, we reversed the trial court's decision granting a motion to seal based on the court's failure to incorporate into its analysis the requirements set forth in Ishikawa. 148 Wn. App. at 956-57. There, Waldon asserted that "compelling circumstances existed to seal her [vacated criminal conviction record] because she was about to reenter the job market . . . and her theft conviction would severely limit her chances of finding employment."

Waldon, 148 Wn. App. at 956. However, because we determined that the trial court had not applied the proper standard in ruling on the motion to seal, thus necessitating reversal and remand, we did not determine whether the interest asserted by Waldon was sufficiently compelling to overcome the presumption of openness. Waldon, 148 Wn. App. at 967.

In contrast, we addressed the merits of a motion to seal a vacated criminal court record in McEnry, 124 Wn. App. 918. There, McEnry contended that sealing his trial court file was justified because the record "might adversely affect his current or possible future employment." McEnry, 124 Wn. App. at 921. However, the trial court found that McEnry had worked for his current employer for 20 years and that there was no reason to expect the employer to check his

court records or that his employment would be adversely affected thereby.

McEnry, 124 Wn. App. at 921-22. Moreover, McEnry “conceded that potential loss of housing based on his court records was ‘not an issue’ because he owns his home.” McEnry, 124 Wn. App. at 926.

Based upon these facts, we determined that the trial court’s finding that McEnry could be harmed by the unsealed file was not supported by substantial evidence. McEnry, 124 Wn. App. at 926. Thus, we held that McEnry had “failed to show a ‘serious and imminent’ threat to an important interest—he merely argued that his criminal records could affect his employment.” McEnry, 124 Wn. App. at 926 (quoting Ishikawa, 97 Wn.2d at 37). However, because the loss of housing was not a potential consequence of McEnry’s criminal record, we did not address whether such an interest could be sufficient to overcome the presumption of openness of court records.

Here, the experienced trial judge applied the correct legal standard, engaging in the five-step Ishikawa analysis and complying with the procedural dictates of GR 15. The court determined that Encarnación’s and Farias’s need to obtain rental housing constituted a “compelling privacy interest,” as required by GR 15 for redaction of a court record, because the applicants were not homeowners and expected “that they [would] need to change residences in the near future.” The trial court additionally determined that the SCOMIS record presented a “serious and imminent threat” to their ability to obtain housing, as they had previously been denied housing based upon the existence of that record and had “good reason to expect” that they would similarly be denied

housing in the future.

The trial court also weighed Encarnación's and Farias's asserted interest against the public's constitutional right to the open administration of justice, determining that their interest in obtaining rental housing outweighed the public's right. In so concluding, the trial court relied upon its finding that Encarnación and Farias "were not culpable and did nothing improper to cause their removal from the property" and, thus, the court determined that the SCOMIS record would not assist landlords in detecting irresponsible tenants. In addition, the court concluded that redaction was proper because it would not "materially impair members of the public from utilizing the records of this action for other public purposes."

However, "[i]n determining whether court records may be sealed from public disclosure, we start with the presumption of openness." Rufer, 154 Wn.2d at 540. Only "under the most unusual circumstances" may the public's constitutional right to the open administration of justice be infringed. Bone-Club, 128 Wn.2d at 259. The circumstances here are far from unusual—Encarnación and Farias were defendants in an unlawful detainer action who were not ultimately evicted from their rental housing. Although the trial court determined that redaction was appropriate "in this specific action," the circumstances herein cannot reasonably be distinguished from those of any other defendant in an unlawful detainer action who is not ultimately evicted.

This is so notwithstanding the fact that the trial court found that Encarnación and Farias "were not culpable and did nothing improper to cause

their removal from the property” and that they “raised a meritorious defense” to the action. Substantial evidence does not support these findings. The unlawful detainer action was resolved by stipulation and entry of an agreed order, which nowhere indicates that the action was wrongfully filed. Inculpability is not a necessary conclusion to be drawn from the settlement of a lawsuit. Moreover, the trial court acknowledged that the proceedings concerning the motion to redact were far from adversarial—the court found that neither Hundtofte nor Alexander “presented any written objection to the relief requested” and that “no person appeared on behalf of residential landlords or tenant-screening companies.”

Of greater significance, though, is that the relief afforded by the trial court here, were it deemed appropriate on appeal, would be available to all similarly-situated litigants. Neither the Washington legislature (by statute) nor our Supreme Court (by rule or decision) has deemed the asserted interest sufficient for such protection. As we noted in Rousey, our Supreme Court “has identified by rule particular records and information to which access is restricted. . . . Notably, the court has not established similar general restrictions for unlawful detainer proceedings.”<sup>6</sup> 151 Wn. App. at 952. Rather, we recognized, the court

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<sup>6</sup> Both our legislature (by statute) and our Supreme Court (by court rule) have determined that some interests are sufficiently significant to outweigh the presumption of openness of court proceedings and records. See, e.g., RCW 4.24.130(5) (precluding public access to name change petitions by domestic violence victims); RCW 13.50.100 (requiring confidentiality of juvenile records not related to the commission of juvenile offenses); RCW 26.26.610 (allowing for the closure of proceedings, although not for the closure of final orders, in parentage actions); GR 22(g) (restricting access to financial, health, and confidential documents in family law and guardianship cases). This list, although non-exclusive, indicates that our legislature and our

“has emphasized by rule and decision that requests to restrict access to court records and information must be decided on a case-by-case basis, starting with the presumption of openness.” Rousey, 151 Wn. App. at 952. Moreover, because Rousey was a victim of domestic violence, her interests were protected by a statute—a clear legislative declaration of Washington’s public policy. There, the landlord had filed the unlawful detainer action in contravention of 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. Rousey, 151 Wn. App. at 945.

Here, in contrast, no statute currently provides protection for the interest asserted by Encarnación and Farias. Rather, the applicable statute, a provision of the Fair Credit Reporting Act, chapter 19.182 RCW, provides that consumer reporting agencies may not make consumer reports containing information regarding “[s]uits and judgments” that “antedate the report by more than seven years.” RCW 19.182.040(1)(b). Thus, it is not unlawful for a consumer reporting agency to report the existence of a lawsuit within seven years of that lawsuit. In granting Encarnación’s and Farias’s request for redaction of the unlawful detainer record, the trial court found that “[i]t appears that [this provision of the Fair Credit Reporting Act] will prohibit consumer reporting agencies from reporting this action to prospective housing providers on or after November 12, 2016,” seven years following the dismissal of the action. Thus, the court determined, the

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Supreme Court have considered categories of circumstances in which the presumption of openness is outweighed by countervailing interests. No such statute or rule applies here.

applicants' "need for redaction will substantially diminish after seven years." Accordingly, the trial court ruled that the redaction order "shall remain in effect" until that date.

The trial court apparently determined that the absence of protection from the reporting of lawsuits within seven years—and, here, in particular, the fact that the statute does not preclude reporting of the unlawful detainer action until 2016—was a problem to be solved. But this approach improperly disregards the fact that the statute, including its seven-year allowance for the reporting of lawsuits, is a legislative declaration of Washington public policy—as is the statute discussed in Rousey. Here, however, the legislative policy does not support redaction of the SCOMIS record; indeed, redaction in this circumstance contradicts our legislature's determination that the reporting of lawsuits within seven years is *not* contrary to public policy. Thus, the trial court's redaction order not only conflicts with the constitutional presumption of open courts—it also contravenes the legislative policy determination set forth in the Fair Credit Reporting Act. In overriding the constitutional presumption of openness, the trial court also sought to override a legislative declaration of public policy. The court erred by so doing.

The relief afforded by the trial court here—redaction of the record of an unlawful detainer action wherein the defendants were not ultimately evicted—if deemed appropriate, would be widely available to all such similarly-situated litigants. 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. Were it not so, the presumption of openness vital to protecting the public's article I, section 10 right to the open administration of justice would be turned on its head. Moreover, here, the trial court's redaction order contravened a clear legislative declaration of public policy allowing for the reporting of lawsuits by credit reporting agencies within seven years.

The trial court overvalued the interest asserted by Encarnación and Farias in determining that their interest outweighed the public's constitutional right and, in so doing, overrode a public policy determination of our legislature. Thus, the court abused its discretion. Accordingly, the trial court erred by entering the order.

#### IV

An additional difficulty with the trial court's redaction order is that it creates a de facto "automatic limitation" that impermissibly precludes the case-by-case analysis required by article I, section 10. This is because, were the trial court's redaction order deemed appropriate on appeal, all similarly-situated unlawful detainer action defendants would be entitled to the same extraordinary relief. For this additional reason, the relief afforded by the trial court was improper.

In Bone-Club, our Supreme Court reversed the trial court's decision to temporarily close a pretrial suppression hearing, holding that the trial court's failure to engage in a case-by-case weighing of the competing interests prior to

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ordering closure had violated the defendant's right to a public trial.<sup>7</sup> 128 Wn.2d at 256. There, the trial court justified closure of the pretrial hearing on the basis of concerns expressed by the testifying undercover police officer, who "feared public testimony would compromise his undercover activities." Bone-Club, 128 Wn.2d at 257. In affirming the trial court's closure order, this court identified the anonymity of the undercover officer as a compelling interest justifying closure of the proceeding. State v. Boneclub, 76 Wn. App. 872, 876, 888 P.2d 759 (1995), rev'd, 128 Wn.2d 254, 906 P.2d 325 (1995).<sup>8</sup> Our Supreme Court rejected this analysis, recognizing that such a justification for closure would apply to all hearings involving the testimony of undercover officers: "We immediately question the characterization of this generalized evidence as a compelling interest: only evidence of a particularized threat would likely justify encroachment into a defendant's constitutionally guaranteed fair trial rights." Bone-Club, 128 Wn.2d at 261.

Indeed, our Supreme Court has "repeatedly . . . conclude[d] that automatic limitations on the openness of court proceedings violate article I, section 10 because they are not based on a case-specific inquiry." D.F.F., 144 Wn. App. at 220. In Eikenberry, an association of newspapers challenged a statute that,

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<sup>7</sup> There, the court determined that the defendant's article I, section 22 right—not the public's article I, section 10 right—had been violated by closure of the suppression hearing. Bone-Club, 128 Wn.2d at 257-58. However, the same closure standard applies for both section 10 and section 22 rights. Bone-Club, 128 Wn.2d at 259.

<sup>8</sup> The Supreme Court decision and the Court of Appeals decision in this case differently spell the defendant's name, both in the case captions and throughout each opinion. Although the Supreme Court opinion spells the defendant's name "Bone-Club," the Court of Appeals opinion spells his name "Boneclub."

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without exception, prohibited the courts from disclosing to the public or press the identities of child victims of sexual assault. 121 Wn.2d at 207-09. The Supreme Court recognized that the asserted interests—protecting child victims from further trauma and harm and ensuring their constitutionally-guaranteed privacy—were compelling. Eikenberry, 121 Wn.2d at 211. Nevertheless, the high court unanimously held that the challenged statute violated the public's article I, section 10 right to open courts. Eikenberry, 121 Wn.2d at 214. The court determined that, although the asserted interests “on an individualized basis may be sufficient to warrant court closure,” the statute precluded the trial court from engaging in such constitutionally-mandated individualized determinations. Eikenberry, 121 Wn.2d at 211. Thus, the statute was determined to be unconstitutional. Eikenberry, 121 Wn.2d at 211.

Following our Supreme Court's lead, we thereafter held unconstitutional a superior court rule requiring mental illness commitment proceedings to be closed to the public. D.F.F., 144 Wn. App. at 218. We determined that the rule constituted an “automatic limitation” on the openness of court proceedings that precluded the trial court from engaging in the case-specific inquiry mandated by article I, section 10. D.F.F., 144 Wn. App. at 220. Thus, we concluded that the court rule “categorically preclude[d] the type of analysis that might bring such a court closure in line with the constitutional requirements articulated by the Supreme Court.” D.F.F., 144 Wn. App. at 225. The Supreme Court later affirmed this decision. D.F.F., 172 Wn.2d at 47.

Here, the trial court's order grants extraordinary relief based upon ordinary

circumstances. Were the relief afforded by the trial court deemed appropriate, it would be similarly available to all similarly-situated litigants—defendants in unlawful detainer actions who were not ultimately evicted. This effectively precludes the case-by-case analysis required by article I, section 10, creating a de facto “automatic limitation” that discounts the significance of the public's right to the open administration of justice. Such would be contrary to the presumption of openness of court records required by our state's constitution.

V

The trial court abused its discretion in determining that Encarnación's and Farias's purported interest outweighed the presumption of openness mandated by article I, section 10. Were redaction appropriate in these circumstances, this same relief would be properly granted whenever a defendant in an unlawful detainer action is not evicted and thereafter seeks to redact the court record of that action. Absent constitutional, statutory, or court rule protection for unlawful detainer defendants, such extraordinary relief is inappropriate where that relief would thereafter be warranted for all similarly-situated litigants. Here, the trial court's redaction order is particularly problematic, in that it, in the course of overriding the constitutional presumption of openness, also contravened a legislative declaration of public policy set forth in the Fair Credit Reporting Act. Moreover, providing such an exceptional remedy here would create a de facto “automatic limitation” on the openness of court records in any case in which an unlawful detainer defendant sought redaction. Because this is contrary to the presumption of openness of judicial records and proceedings, we reverse the trial

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court's order granting Encarnación's and Farias's request for redaction.

Reversed.

Duyn, J.

We concur:

Speerman, A. C. J.

Cox, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

AARON HUNDTOFTE and KENT  
 ALEXANDER,  
  
 Plaintiffs,  
  
 v.  
  
 IGNACIO ENCARNACIÓN and  
 NORMA KARLA FARIAS and all  
 others in possession,  
  
 Respondents,  
  
 KING COUNTY SUPERIOR COURT  
 OFFICE OF JUDICIAL  
 ADMINISTRATION,  
  
 Intervenor Appellant.

DIVISION ONE  
 No. 66428-0-1

ORDER DENYING  
 RESPONDENTS' MOTION  
 FOR RECONSIDERATION

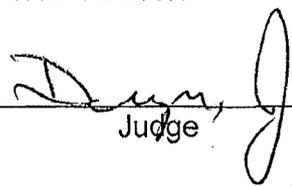
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 COURT OF APPEALS DIV 1  
 STATE OF WASHINGTON  
 2012 AUG 22 AM 8:07

The respondents having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 22<sup>nd</sup> day of August, 2012.

FOR THE COURT:

  
 Judge