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NO. 95551-4

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JENNIFER DREEWES,

Respondent.

AMICUS CURIAE MEMORANDUM OF
ALLIED DAILY NEWSPAPERS OF WASHINGTON and
WASHINGTON COALITION FOR OPEN GOVERNMENT

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I. INTRODUCTION

Jennifer Dreewes argues that taxpayers should pay the costs of this appeal because she cannot afford to. She also argues that her financial assets – which the prosecutor discovered from an open court file – are not the public’s business. She asks this Court to permanently seal entire sections of appellate briefing discussing her disputed financial ability, most of which is just legal argument.

The Court of Appeals properly rejected Ms. Dreewes’ motions to seal briefing. But despite the lack of any sealing order, and contrary to the presumption of openness under article 1, section 10 of the Washington Constitution, she filed a redacted brief omitting her appellate arguments on costs – which remained the only version available to the public from February 2017 until today.¹

Appellate briefs are a vital part of this Court’s decision-making process. Such briefs set forth the facts and legal arguments which inform this Court’s analysis and serve as a basis for precedent-setting opinions. As such, they should not be sealed or redacted based on generalized assertions of privacy such as in this case, where no specific

¹ See August 1, 2018 Letter from Supreme Court Clerk Susan Carlson explaining that an unredacted version of the Reply was just obtained from the Court of Appeals and would be substituted for the redacted version that was posted on the Courts’ web site. The unredacted version appeared online for the first time today.

threat of immediate harm is identified. Nor should appellate arguments be treated the same as unfiled documents, which may remain off limits while review of a sealing denial is pending. Because the public needs to know what arguments are presented in order to understand and evaluate decisions, this Court should affirm the denial of the sealing motions and maintain the highest possible bar for sealing briefs.

II. INTEREST AND IDENTITY OF AMICUS PARTY

Allied Daily Newspapers of Washington (“Allied”) is a trade association representing 25 daily newspapers across the state. The newspapers need full access to court records and proceedings in order to research and report on cases of public interest. Accordingly, Allied regularly advocates for strict limits on the sealing and redacting of court records. This advocacy includes submitting amicus briefs in cases involving the constitutional right to open administration of justice. In general, Allied acts as a voice for the public regarding access to court records and government records.

The Washington Coalition for Open Government (WCOG) is a nonprofit, nonpartisan organization dedicated to promoting and defending the public’s right to know about the conduct of government and matters of

public interest. WCOG's mission is to help foster the cornerstone of democracy: open government, supervised by an informed citizenry.

Allied and WCOG are interested in the case because it may block public access to important information in appellate briefs. Particularly in the state's highest court, appellate briefs have an enormous influence on how our state's laws are interpreted and applied. Allied and WCOG are concerned that if this Court seals appellate arguments on a matter affecting the public purse, it will lead to more redacted briefs, which will shroud the basis for decision-making and diminish public understanding of appeals. In addition, Allied and WCOG have an interest in protecting the public's ability to oversee government spending, such as the costs at issue here. Finally, Allied and WCOG want to clarify the law regarding what happens to briefing that is filed "under seal" once the motion to seal is denied.

III. STATEMENT OF THE CASE

A. Ms. Dreewes Placed Her Financial Condition at Issue.

Jennifer Dreewes appealed her convictions as an accomplice to armed first-degree burglary and second-degree assault with a deadly weapon. *State v. Dreewes*, 2 Wn.App.2d 297, 299, 409 P.3d 1170 (2018). In her opening brief in the Court of Appeals, she argued that

the trial court erred by imposing a \$500 victim assessment fee and a \$100 biological sample fee without determining her ability to pay. App. Op. Brief, pp. 28-29. She claimed to be indigent with “no job, benefits or real property.” App. Op. Brief, p. 29, citing CP 1-3, 60 and Sub. No. 82. She also argued, “in the event the State is the substantially prevailing party on appeal, this Court should decline to award appellate costs,” adding that “imposition of costs on an indigent defendant is contrary to the statutes and constitution.” App. Op. Brief, p. 35. Thus, Ms. Dreewes placed her financial condition at issue.

In response, the State argued that the challenged fees are mandatory regardless of a defendant’s financial condition – which the Court of Appeals agreed with. Brief of Resp., pp. 21-22; *Dreewes*, 2 Wn.App.2d at 325. The State also disputed that Ms. Dreewes is too poor to pay the costs of appeal, using her own testimony and declarations to indicate she has more assets than claimed. Brief of Resp., p. 22 (her declaration of indigence after trial claimed that a 1997 Honda Accord and a \$1,800 IRA were her only assets, but testimony indicated she owned a home and farm in Arlington and a “newer model truck”); p. 23 (in a separate divorce case, her declaration stated that she and her husband “own a business in common” with assets including a

farm, tractors and horse trailers, that they also had a \$31,000 Dodge Ram and “\$10,000 in firearms and ammunition,” and that she owns “PJ Trailer worth \$3,800 and two tractors” as well as the Honda Accord and “her father’s trailer”); p. 24 (arguing “there is sufficient evidence of ability to pay for this court to impose the costs of appeal should the State substantially prevail”).

The State discovered the pending divorce in researching the respondent’s financial situation. Brief of Resp., p. 23. At the time of the State’s research, the financial declaration was part of an open court file in the divorce. *See* Commissioner Ruling (March 13, 2017), p. 2. No account numbers or personal identification numbers were included in the State’s brief. Brief of Resp., pp. 22-24.

B. Ms. Dreewes Sought to Conceal the Dispute About Her Financial Ability.

A month after receiving the response brief, on February 15, 2017, Ms. Dreewes filed a motion “to seal the last section of her reply brief, which relies on the personal financial information filed in this appeal by the State.” Motion to Seal Section of Reply, p. 1. Ms. Dreewes sought to “protect the privacy and confidentiality of” hers and her husband’s “personal financial information” without identifying any specific threat of harm from disclosure. *Id.*, pp. 1-5. She also moved to

seal pages 22-24 of the State's response brief. *Id.*, pp. 1-2. On the same day, she filed her reply brief with the last section redacted. Redacted Reply (February 15, 2017), p. 12 ("ARGUMENT FILED UNDER SEAL"); p. 13 (missing); p. 14 ("ARGUMENT FILED UNDER SEAL").² The unredacted version, not posted on the Courts' web site until today, reveals that pages 12 and 14 contain no details of her assets, income, or account numbers and do not quote the divorce documents that the State had used. Most of Section 5 is argument. Page 13 cited a few details from the divorce documents for the proposition that Ms. Dreewes is still indigent because of debt.

C. The Court of Appeals Repeatedly Denied Ms. Dreewes's Motions to Seal Appellate Arguments.

Sealing was never granted despite multiple attempts by Ms. Dreewes to obtain approval. In a March 13, 2017 notation ruling, Commissioner Masako Kanazawa wrote, "Dreewes's current ability to pay is relevant to this Court's determination as to whether to award the costs on appeal." Commissioner's Ruling, p. 2. The Commissioner authorized the State to submit copies of the divorce documents bearing on finances, with account numbers redacted, in this criminal appeal.

² See also Response to Motion to Seal (Sept. 8, 2017), pp. 3-4 ("That portion of the defendant's reply brief appears to have already been filed under seal").

Id., pp. 2-3. Also, applying the sealing test in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), the Commissioner ruled:

As to Dreewes's motion to seal the sections of the parties' appellate briefs on the appellate cost issue, the briefs address Dreewes's statements in her declaration openly filed in the divorce court about her husband's salary, their business in common, and their community assets. Although Dreewes has privacy interests in keeping her financial information outside public access, the public has a 'fundamental interest in the open administration of justice,' and 'the expenditure of public funds...is of interest to both the State and the public.' State v. Parvin, 184 Wn.2d 741, 771, 364 P.3d 94 (2015). The requested sealing of the entire sections on the appellate cost issue in the parties' appellate briefs would be too broad and would not be justified in light of the competing interests of the State and the public in the open administration of justice and the proper expenditure of public funds.

Id., p. 3.

Although the sealing was denied, Ms. Dreewes was allowed to renew her motion to seal appellate arguments if the trial court in the divorce case sealed her financial declaration. *Id.* Subsequently, Ms. Dreewes did get the divorce declarations sealed - without notifying the State. Response to Motion to Seal a Portion of State's Response Brief, p. 2 (the State "had no opportunity to object" to the sealing in the divorce case). Ms. Dreewes then renewed her motions to seal briefing

in this criminal appeal, citing the divorce court's new sealing as the justification. *Id.*

The State opposed sealing pages 22-24 of its own brief, noting that they did not contain any account numbers, social security numbers or other information that could expose a person to identity theft. *Id.*, p. 4. The State argued that, absent a threat of identity theft, the respondent's interest in secrecy was outweighed by the public's interest in open briefing. *Id.*, pp. 4-5. More specifically, the State said: "The public has great interest in knowing whether a defendant truly is indigent, thereby placing the burden of costs for an appeal on the public, or if a defendant has some resources from which she may be able to contribute to those costs." *Id.*

In reply, Ms. Dreewes argued that a threat of identity theft is not necessary for sealing, and that her financial information should be sealed because it is "personal" and because the State allegedly was misrepresenting it. Reply in Support of Motion to Seal (Sept. 11, 2017), pp. 2-3. She also cited GR 15(g), which says, "Court records sealed in the trial court shall be sealed from public access in the appellate court subject to further order of the appellate court." *Id.*, p. 2.

The Clerk of the Court of Appeals denied the renewed sealing motions, stating: “A review of pages 22-24 of the Brief of Respondent and Section 5 of the Appellant’s Reply reflect that neither document includes any financial account numbers or other personal identification numbers.” Clerk’s Ruling (October 3, 2017). Ms. Dreewes then moved to modify that ruling, which was denied at the same time the criminal appeal was decided. Order Denying Motion to Modify (Jan. 29, 2018). She then moved this Court for discretionary review, but did not move for a stay of the rulings denying sealing. In the meantime, the redacted brief was the only version on the Courts’ web site until today, when the unredacted version was posted in response to an inquiry by Allied Daily Newspapers. Clerk’s Letter (August 3, 2018) (“Based on my review of the file, it appears that the unredacted version of the reply brief should be posted....The Court of Appeals has now provided it”).

IV. ARGUMENT

A. Sealing of a Trial Court Document In an Unrelated Case Should Not Affect Public Access to Appellate Briefing.

Ms. Dreewes’s primary argument, aside from generalized assertions of privacy, is that records sealed in the trial court are presumed to be sealed on appeal. But the rule she relies upon, GR 15(g), does not apply here because the briefs at issue were never sealed

(nor even filed) in the trial court, and the underlying information came from a separate case.

1. GR 15(g) applies to records originating in the trial court, not appellate briefs.

GR 15(g) says:

Use of Sealed Records on Appeal. A court record or any portion of it, *sealed in the trial court* shall be made available to the appellate court in the event of an appeal. Court records *sealed in the trial court* shall be sealed from public access in the appellate court subject to further order of the appellate court.

(Italics added). Interpretation of court rules is reviewed de novo. *State v. Parvin*, 184 Wn.2d 741, 752, 364 P.3d 94 (2015).

This appeal involves the proposed sealing of pages 22-24 of the Brief of Respondent and pages 12-14 of the Appellant's Reply Brief, and not the sealing of the financial declarations that were sealed in the divorce case. Motion for Discretionary Review, pp. 1-2. Obviously those briefs could not have been "sealed in the trial court" because they were filed originally in the Court of Appeals. Accordingly, GR 15(g) does not apply. This Court should hold that records originating in appellate court, such as the briefs at issue here, are not subject to sealing under GR 15(g).

2. GR 15(g) does not shift control of appellate records to trial courts.

Ms. Dreewes seems to interpret GR 15(g) to mean that, if a party can get records sealed in a trial court *after* those records have been cited in appellate briefs, the appellate court must then seal the briefs. That is not what GR 15(g) says. Rather, GR 15(g) simply ensures that the appellate court can review records that were sealed in the trial court and unseal them, if appropriate (records remain sealed “subject to further order of the appellate court”). It does not put trial courts in the driver’s seat, as Ms. Dreewes suggests.

Under her reasoning, a party unhappy with an appellate court’s denial of sealing (such as Ms. Dreewes) can get a trial court to seal information already used in the appeal and then compel the appellate court to don the mantle of secrecy. This puts the trial court in the position of deciding the public importance of information without knowing how it is being used in the appeal, as in this case, where Ms. Dreewes got her financial declaration sealed in the isolated context of a dissolution without notifying the State. In fact, the record in this case does not reveal whether the divorce court was aware of the ongoing dispute concerning Ms. Dreewes’s ability to pay appeal costs.

Also, her reasoning conflicts with the fundamental mission of appellate courts to ensure the fairness and correctness of trial court

decisions, which is particularly important when the general public's interest in open courts is at stake. Ms. Dreewes would have trial courts review the propriety of appellate sealing decisions instead of the other way around. In sum, GR 15(g) does not invite trial courts to second-guess appellate decisions regarding public access to records, or to decide in the first instance whether information used in appellate briefs should be sealed. Trial courts are not in a position to know the importance of information in the appellate court's decision-making.³

3. GR 15(g) relates to designation of clerk's papers within a single case.

In stating that a record "sealed in the trial court shall be made available to the appellate court in the event of an appeal," GR 15(g) refers to "*the* trial court" and "*an* appeal" as if referring to a single case. This interpretation is supported by the March 13, 2017 Ruling which struck the State's designation of clerk's papers from Ms. Dreewes's divorce case, stating they "are not part of the record on review in this criminal case." Ruling, p. 2.⁴

³ Deference to a trial court's sealing decision is especially unwarranted where, as here, the sealing occurred without notice to the opposing party in this appeal.

⁴ While striking the designation of clerk's papers from the separate case, the Court of Appeals nevertheless allowed the State to file the divorce records for consideration on the issue of costs. The Ruling implied, but did not state, that such records would be treated as additional evidence on review under RAP 9.11. Supreme Court Commissioner Michael Johnston subsequently characterized the filing of the divorce records as a supplementation of the record under RAP 9.10. Ruling (April 13, 2018), p. 3.

GR 15(g) should be read in conjunction with RAP 9.6 and RAP 9.7, which provide for transmitting trial court records to the appellate court. RAP 9.6 provides for the parties in an appeal to designate those clerk's papers and exhibits "needed to review the issues presented to the appellate court." RAP 9.7(a) requires the trial court clerk to transmit the designated papers to the appellate court within 14 days of payment for the copies. Thus, the transmission of records is tied to the issues that were decided by the trial court in the case that is being appealed. RAP 9.6 and 9.7. When reading GR 15(g) together with the appellate rules, the logical interpretation is that GR 15(g) defines the trial court clerk's responsibilities when parties in an appeal designate sealed records *in the underlying case* for review. In sum, because the sealing here was in a separate case, GR 15(g) does not apply.

B. The Court of Appeals Properly Applied The Sealing Test.

Under GR 15, a court may redact a record if the specific 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). Courts must also apply constitutional requirements to show a "more specific, concrete, certain and definite" need for sealing than GR 15(c)(2) requires. *Parvin*, 184 Wn.2d at 765, citing *State v. Waldon*, 148 Wn.App.

952, 967, 202 P.3d 325 (2009). More specifically, the sealing test under article 1, section 10, outlined in Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982), requires:

- Where the alleged need for sealing is based on a right other than an accused's right to a fair trial, as in this case, the proponent of sealing must show a "serious and imminent threat to that right."

- Anyone present must have a chance to object to the sealing motion.
- The method for curtailing public access must be the least restrictive available for protecting the threatened interest.

- The court must weigh the competing interests of the sealing proponent and the public.

- Any sealing order must be no broader in its application or duration than necessary to serve its purpose.

Parvin, 184 Wn.2d at 765.

Here, the Court of Appeals was correct that the proposed sealing is overbroad. There are no financial details, nor are the sealed declarations quoted, on pages 12 and 14 of the Reply. Although page 13 discusses debts which Ms. Dreewes believes are evidence of indigence, it is mostly general (i.e., "their debts outweigh their assets"). Neither brief has anything that could be exploited by a thief.

The Court of Appeals was also correct that public's strong interest in the expenditure of public funds outweighs the respondent's interest in making her financial condition private. Ms. Dreewes wants to avoid paying costs of the appeal. This takes her financial status out of the private realm and makes it publicly important, due to the tax dollars at stake. In fact, Amici are concerned that the appellate attorney for Ms. Dreewes, whose funding depends on her client's indigent status, has devoted extensive public resources to hiding information that casts doubt on Ms. Dreewes's indigency. Even if the State does not prevail in this appeal, such that an award of costs is not appropriate under RCW 10.73.160 and RAP 14.2, the debate over Ms. Dreewes's financial status already has consumed the tax-paid resources of her public defender, the State and the appellate courts in this case – making it reasonable for the public to scrutinize what all the fuss was about.

Besides the compelling public interest in overseeing government spending, the public also has a strong interest in seeing appellate briefing. The facts and arguments set forth in appellate briefs are a major consideration in appellate decision-making. This Court has long recognized that open administration of justice includes the *entire* judicial system, including records considered by courts in making

decisions, and not just the ultimate results. *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 549, 114 P.3d 1182 (2005). Addressing the “the extent of the public's right to the open administration of justice,” *Rufer* stated:

If we define this right narrowly to consist only of the observation of events leading directly up to the court's final decision, then arguably any documents put before the court that were not a part of that final decision would be outside of the scope of article I, section 10. Put another way, if the jury does not see it, the public does not see it. But our prior case law does not so limit the public's right to the open administration of justice. As previously noted, the right is not concerned with merely whether our courts are generating legally-sound *results*. Rather, we have interpreted this constitutional mandate as a means by which the public's trust and confidence in our *entire judicial system* may be strengthened and maintained. To accomplish such an ideal, the public must--absent any overriding interest--be afforded the ability to witness the complete judicial proceeding, including all records the court has considered in making *any* ruling, whether "dispositive" or not.

Rufer at 549 (internal citation omitted).

In contrast to the compelling public interest in overseeing courts, Ms. Dreewes's interest in hiding her financial details is limited, especially where the State's description of them has been available online for more than a year without any discernable harm. In fact, Ms. Dreewes has never identified any right to conceal the financial information which the state found in an open court file, let alone a

“serious and immediate threat” to that right. In sum, the Court of Appeals properly balanced interests in favor of public access.

C. This Court Should Clarify What Happens When Documents Are Filed For Consideration On an Issue Other Than Sealing, and When Sealing is Denied Without a Stay.

1. ***McEnroe* involved records that were submitted solely in connection with a sealing motion.**

In *State v. McEnroe*, 174 Wn.2d 795, 798, 279 P.3d 861 (2012), this Court addressed “the proper procedure when a party files documents contemporaneously with a motion to seal.” In that case, a criminal defendant wanted to “seal documents that would be used in support of a separate motion,” which had to do with trying his co-defendant before him. *McEnroe* at 798. Thus, the proposed sealing involved attachments to a planned motion, and not arguments already filed. *Id.* When submitting the allegedly sensitive documents in connection with the motion to seal, the defendant sought permission in advance to withdraw the documents if the sealing was denied. *Id.* The trial court denied permission to withdraw, and warned that a local court rule required immediate filing of the motion and documents in open court if sealing was denied. *Id.* at 800. The trial court also ruled that, if sealing was ultimately denied, the documents would remain sealed for at least 30 days to allow the defendant to seek review. *Id.*

On discretionary review, this Court noted that GR 15 does not expressly address what is to be done with documents which are submitted with a motion to seal once that motion is denied. *McEnroe* at 803. This Court said that documents submitted solely in connection with a motion to seal are not to be treated as “filed.” *Id.* at 803-04. Rather, they are “merely working papers maintained by the judge until the court decides the motion and files the documents with the clerk.” *Id.* at 805.⁵ A majority of this Court held that it does not offend article 1, section 10 of the Washington Constitution to allow withdrawal of documents submitted with an unsuccessful motion to seal because the documents “are not being used to support a motion or introduced as evidence.” *Id.* at 807. The Court said:

Until the party uses the documents in support of a motion, they are not considered a court record, not part of the court file, and not part of the court’s decision-making process.

Id.

Thus, *McEnroe* dealt with documents that had never been offered for court consideration on an issue other than sealing, unlike the situation here where the “sealed” arguments were used to oppose an

⁵ *But see* Fairhurst, J., dissenting, *Id.* at 809 (documents filed with a motion to seal are considered by the court in ruling on the sealing motion, and “fit squarely within” the definition of a court record that is presumptively open to the public).

award of costs to the State. Nor did *McEnroe* address what happens in a case like this, when a sealing motion is denied without any stay pending review.

2. *McEnroe* does not authorize the secrecy that occurred in this case.

This Court stated in *McEnroe* that GR 15 “does not require documents submitted with a motion to seal to be open to the public while the court considers the motion.” 174 Wn.2d at 798. However, as explained above, that holding referred to initial consideration by a trial court of a preliminary motion to seal documents that had not yet been used to support a separate motion. *Id.* at 798, 803-04. This Court made clear that, once documents are filed in pursuit of some other ruling besides sealing, they must be open unless the constitutional sealing test is satisfied. *Id.* at 805.

Here, Ms. Dreewes used Section 5 of her reply brief to seek a ruling from the Court of Appeals that she cannot afford to pay costs on appeal. In doing so, she made the briefing part of the Court’s decision-making process on an issue other than sealing, taking it out of the *McEnroe* realm. 174 Wn.2d at 803-05. Accordingly, Section 5 should not have been redacted in the first place, and should have become public once the sealing motion was denied. The Clerk’s August 1,

2018 letter supports this view, stating that the Court of Appeals sent only the redacted version of the reply brief for review by this Court and the public, and should have sent the unredacted version.

Nothing in *McEnroe* suggests that there's an automatic stay of a sealing denial whenever review is sought, regardless of how the information has been used in the case, and notwithstanding an overriding public interest in accessing the information. An automatic stay is especially illogical here, where the information allegedly contained in Section 5 was already publicly available from the divorce file and the State's brief. This is an attempt to unring a bell which, in addition to being meritless, falls outside of the limited scope of *McEnroe*. In sum, this Court should clarify that *McEnroe*'s temporary shield applies only when documents are submitted solely in connection with a sealing motion, and only until that sealing motion is decided. Once a document is submitted in pursuit of some other ruling, the presumption of openness applies.

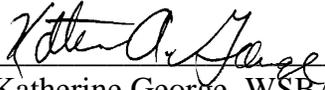
V. CONCLUSION

For the foregoing reasons, this Court should affirm denial of the sealing motions.

Dated this 3rd day of August, 2018.

Respectfully submitted,

JOHNSTON GEORGE LLP

By: 
Katherine George, WSBA 36288

CERTIFICATE OF SERVICE

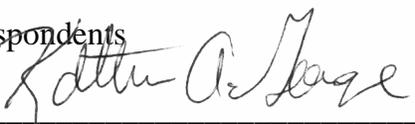
I certify under penalty of perjury under the laws of the State of Washington that on August 3, 2018, I served a copy of the Motion for Leave to File an Amicus Curiae Memorandum and related memorandum to the following registered parties via the Supreme Court's Web portal:

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