No. 84903-0

STEPHENS, J. (dissenting)—Our state constitution commands that "[j]ustice in all cases shall be administered openly." Wash. Const. art. I, § 10. This provision guarantees the public and press a right of access to court documents. *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004). To safeguard this right, we held in *Rufer v. Abbott Laboratories*, 154 Wn.2d 530, 549, 114 P.3d 1182 (2005), that any records filed "in anticipation of a court decision . . . should be sealed or continue to be sealed only when the court determines—pursuant to *Ishikawa*[1]—that there is a compelling interest which overrides the public's right to the open administration of justice." Because I believe this simple directive compels a result opposite from that of the lead opinion, I dissent.

Analysis

Under article I, section 10 of the Washington State Constitution, "[j]ustice in all cases shall be administered openly." By this pronouncement, the public and press are guaranteed a right of access to judicial proceedings and court documents.

[1] *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).

Dreiling, 151 Wn.2d at 908 (citing *Cohen v. Everett City Council*, 85 Wn.2d 385, 388, 535 P.2d 801 (1975)). We have denounced "[p]roceedings cloaked in secrecy." *Id*. And we have repeatedly recognized open justice as "fundamental to the operation and legitimacy of the courts and protection of all other rights and liberties." *In re Det. of D.F.F.*, 172 Wn.2d 37, 43, 256 P.3d 357 (2011).

Although openness is presumed, the right is not absolute. *Dreiling*, 151 Wn.2d at 909. It may be restricted to protect other fundamental rights. *Id*. But before this is done, the proponent of secrecy must convince the court the restriction is appropriate in light of five factors laid out in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). *Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, 66, 256 P.3d 1179 (2011).

The lead opinion believes that article I, section 10 is not implicated at all with respect to court documents the trial court does not use to make a decision. It reads our opinions in *Dreiling* and *Rufer* as applying only to court records that are actually considered by the trial judge or jury in rendering a decision. Based on this misreading of our precedent, the lead opinion advances the remarkable proposition that court records are no longer public if the case settles before the court rules. This significantly erodes the constitutional guaranty of openness. Moreover, the lead opinion's misstep results in an unworkable rule, requiring courts to distinguish between court records that are subject to article I, section 10 and those that are not based on a determination of which filings are "relevant." Yet, what is relevant will

be impossible to know before the court renders a decision; for example, the very records the lead opinion today concludes may be sealed without regard to the *Ishikawa* test would have been subject to that test had a motion to seal been brought between the time they were filed and the time the case settled and the summary judgment motion was withdrawn.

We have recognized "there are distinctions to be drawn depending on the nature and use of court records." *Yakima v. Yakima Herald-Republic*, 170 Wn.2d 775, 803, 246 P.3d 768 (2011). But, the distinctions we have drawn do not depend on whether submitted documents in fact informed a decision of a court. Instead, the constitutionally mandated presumption of openness attaches when documents are filed with a court and thus deemed relevant to the proceedings. As we stated in *Rufer*, it applies to documents filed "in *anticipation* of a court decision." 154 Wn.2d at 549 (emphasis added).

Although the lead opinion purports to follow our holdings in *Dreiling* and *Rufer*, a proper reading of these cases reveals the lead opinion's holding strays from their guidance. In *Dreiling*, we held "that the same guidelines applied in *Ishikawa* must be applied to documents filed in support of dispositive motions." 151 Wn.2d at 915. We acknowledged a distinction between "[m]ere discovery" and material filed with a court in anticipation of a court decision. *Id*. at 909-10. Because "'[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action,'" such information

may be kept confidential for good cause shown. *Id*. at 909 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984)). In contrast, documents filed in support of a dispositive motion "lose their character as the raw fruits of discovery." *Id*. at 910. These documents may be withheld from the public's view only upon a showing of an overriding interest necessitating secrecy. *Id*.

The court in *Dreiling* distinguished between unfiled discovery and filed documents germane to issues presented in a case. In the context of making this distinction, we stated that article I, section 10 does not "speak to" the disclosure of tangentially related discovery information that "does not become part of the court's decision-making process." *Id*. We cautioned, however, that "the same cannot be said for materials attached to a summary judgment motion." *Id*. Materials of that ilk are presumptively open to the people and may be sealed only upon the demonstration of an overriding interest compelling secrecy. *Id*. A close reading of *Dreiling* reveals that in making this point, we were in actuality defining what material "become[s] part of the court's decision-making process" and is thereby subject to the presumption of openness. *Id*. Documents thought relevant enough by a party to be used in support of a motion are part of the open court process subject to article I, section 10. Unfiled discovery materials are not. Nowhere in *Dreiling* did we suggest that, as a precondition to the application of article I, section 10, documents must in fact result in a decision by the court or jury.

Instead, we endorsed the broader principle that the check of public scrutiny on court proceedings is one of the reasons our constitution demands justice be conducted openly. *See id*. at 903 ("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." (emphasis added)); *see also id*. at 908 ("'[O]perations of the courts *and* the judicial conduct of judges are matters of utmost public concern.'" (quoting *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839, 98 S. Ct. 1535, 56 L. Ed. 2d 1 (1978) (emphasis added))). The premise of article I, section 10 is that open access will cultivate the public's understanding and confidence in the operation of our justice system as a whole. *Rufer*, 154 Wn.2d at 549.

In *Rufer* we were again asked to determine the appropriate standard for sealing records in a civil case. At issue were documents attached to nondispositive motions and deposition testimony that had been published (and thus technically filed). *Id*. at 540.[2] One of the defendants moved to seal several exhibits and selected portions of deposition testimony. *Id*. at 536. The plaintiffs conceded that the deposition testimony not used at trial could remain sealed for good cause but opposed closure of the remaining records. *Id*. at 536-37. The trial court ordered all records in question be made available to the public because a compelling interest

[2] We noted in *Rufer* that "'[t]he publication of a deposition at trial is simply the clerical act of "the breaking of the sealed envelope containing the conditional examination [deposition] and making it available for use by the parties or the court."'" 154 Wn.2d at 540 n.3 (quoting Pet'rs' Suppl. Br. at 17 n.12 (quoting *Augustine v. First Fed. Sav. & Loan Ass'n of Gary*, 270 Ind. 238, 240, 384 N.E.2d 1018 (1979))).

had not been shown. *Id*. at 538.

We concluded the trial court employed the correct legal standard: "any records . . . filed with the court in anticipation of a court decision (dispositive or not) should be sealed or continue to be sealed only when the court determines—pursuant to *Ishikawa*—that there is a compelling interest which overrides the public's right to the open administration of justice." *Id*. at 549. We recognized one exception for "deposition transcripts published but not used in trial or as an attachment to any motion," noting the parties' agreement that the good cause standard applied to such transcripts. *Id*. at 550. We thus affirmed the trial court and remanded for the limited purpose of resealing the depositions that were not presented at trial or used in support of any motion. *Id*. at 553.

Underlying our decision in *Rufer* was recognition that the openness secured by article I, section 10 "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." *Id*. at 549 (citing *Allied Daily Newspapers of Wash. v. Eikenberry*, 121 Wn.2d 205, 211, 848 P.2d 1258 (1993)). In refusing to draw a distinction between dispositive and nondispositive motions, we observed that everything passing before a trial court is relevant to the public interest and, ultimately, the legitimacy of our courts. *See id*. at 542. "[T]he public has an intense need and a deserved right to know about the administration of justice in

general . . . ." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 604, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980) (Blackmun, J., concurring). This interest includes learning about "all the actors in the judicial arena; and about the trial itself." *Id*.

The basis for distinguishing the published depositions from the other documents at issue in *Rufer* was that the published depositions were neither placed before the fact finder nor used in support of a motion, i.e., they did not become part of the court's decision-making process. *See Rufer*, 154 Wn.2d at 550 ("The one exception would be any deposition transcripts published *but not used in trial or as an attachment to any motion*." (emphasis added)). In contrast, all documents at issue in this case were put before the court in anticipation of a judicial decision. Accordingly, they lost their character as mere discovery. As made clear in *Rufer*, it is the "*filing* [that] triggers the analysis of whether records should be opened." *Id*. (emphases added and omitted). Once the presumption of openness arises, the public's right of access cannot be restricted unless the proponent of secrecy shows compelling reasons for closure consistent with the standards articulated in *Ishikawa*. *Tacoma News*, 172 Wn.2d at 66.

The lead opinion believes it would go too far to require adherence to article I, section 10 when a case settles without the judge having reviewed the documents at issue. It suggests such documents are irrelevant because no judicial decision was rendered. Lead opinion at 9. But the lead opinion's notion of when a document is

"relevant" is circular. Its reasoning begs the question: Were the documents *relevant* between the time they were filed in connection with a summary judgment pleading and the time the court received notice to strike the summary judgment hearing? The lead opinion gives no indication of how timing affects its analysis, but it would acknowledge that the *Ishikawa* standard must apply to a motion to unseal records filed while a matter is pending. Otherwise, a court would have to know whether it was going to be required to rule on the matter before it could rule on a motion to seal or unseal.

Herein lies the heart of the problem with the lead opinion's rule. The relevance of a court record—which under the lead opinion's view determines the applicable standard for sealing—cannot turn on what transpires *after* the record is filed in anticipation of a decision. A motion may be pending in court for months before a case resolves. A case may go through an entire trial only to be settled before verdict. But, when a member of the press or public moves to intervene and unseal part of the court file, the court must review the file and make a ruling. It cannot defer ruling on the motion to see if the documents in question will in fact be relevant to a judicial decision.[3]

[3] The lead opinion goes one step further, stating that "[i]n order for documents to become part of the decision making process, there must be a decision." Lead opinion at 9. While the settlement in this case occurred shortly after the documents at issue were filed, this case is not unique in having been resolved without a judicial decision. The lead opinion does not explain what its rule means for entire court files in those cases that wind through the judicial system for months or even years only to have the parties reach an out-of-court settlement and dismiss the case.

Our decisions in *Dreiling* and *Rufer* appropriately treat the question of relevance not as the lead opinion does, but instead as describing documents that are filed with the court in anticipation of a judicial decision. This includes documents relating to both dispositive and nondispositive motions. Beyond this, any further consideration of whether a filed document is relevant *to the merits of the case* is properly factored into the *Ishikawa* analysis when a motion to seal or unseal is brought. As we explained in *Rufer*:

> [T]he potential for abuse is also addressed through the application of the *Ishikawa* factors to a motion to seal. If a party attaches to a motion something that is both irrelevant to the motion and confidential to another party, the court should seal it. When there is indeed little or no relevant relationship between the document and the motion, the court, in balancing the competing interests of the parties and the public pursuant to the fourth *Ishikawa* factor, would find that there are *little or no valid interests* of the party attaching the document to its motion or of the public with respect to disclosure of the document. This is because the interest of the public that we are concerned with in making these determinations is the public's right to the open administration of justice. We have already held that article I, section 10 is not relevant to documents that do not become part of the court's decision making process. *Dreiling*, 151 Wn.2d at 909-10. Thus, if a record is truly irrelevant to the merits of the case and the motion before the court, the court would not consider the document in evaluating the motion before it, and in applying *Ishikawa* it would likely find that sealing is warranted.

154 Wn.2d at 547-48.

The lead opinion quotes a portion of this passage and describes it as holding that "article I, section 10 applies only to documents relevant to the merits of the motion before the court." Lead opinion at 8. But the full passage makes clear that the relevance of a court record is part of the application of the *Ishikawa* analysis, not

an exception from it. *Rufer* does not support the lead opinion's limited view of the reach of article I, section 10.[4]

Like the lead opinion, the trial court believed article I, section 10 does not speak to the records here because the case settled before the court had occasion to review them. It therefore sealed the records without considering the criteria articulated in *Ishikawa*. In fact, it appears the trial court applied no standard at all, relying solely on the previously entered protective order and the parties' stipulation. Under our precedent, this was improper. *See Dreiling*, 151 Wn.2d at 917 ("When third parties move to intervene, the court may not stand on its previous [protective] order."); *see also Rufer*, 154 Wn.2d at 550 (explaining that parties may file records under seal pursuant to the terms of a protective order, but the court should open such records upon motion "unless the party wishing to keep them sealed demonstrates an overriding interest"). Because the trial court reached its decision by applying an improper legal standard, I would remand to the trial court to apply the correct rule and to determine whether the court files in question should be sealed under the *Ishikawa* test.

[4] Given the lead opinion's conclusion that article I, section 10 does not apply to the court records at issue in this case, its extended discussion of the *Ishikawa* factors is meaningless. *See* lead opinion at 9-15. In particular, the lead opinion's suggestion that courts should create document logs and notify nonparties whose interests may be affected by the sealing or unsealing of records has no application to its resolution of this case. Under the lead opinion's holding, the only consideration for sealing the records at issue is "good cause" under CR 26(c) because in its view the documents never became part of the administration of justice. *See* lead opinion at 5.

Conclusion

The lead opinion departs from the standard we adopted in *Dreiling* and *Rufer*, and creates an unworkable rule that undermines the constitutional guaranty of open court records. I would adhere to our precedent and hold that documents filed with a court in anticipation of a decision are presumptively open to public access without regard to whether they are ultimately considered by the court in rendering a decision. With respect to such court files, the people's right of access cannot be restricted unless the proponent of secrecy shows compelling reasons for closure consistent with the standards stated in *Ishikawa*. I respectfully dissent.

AUTHOR:
Justice Debra L. Stephens

WE CONCUR:

Justice Susan Owens

Justice Mary E. Fairhurst

Gerry L. Alexander, Justice Pro Tem.