No. 86084-0

FAIRHURST, J. (dissenting)—GR 15 does not permit a party to withdraw documents submitted to the trial court contemporaneously with a motion to seal if the motion to seal is denied. I therefore respectfully dissent from the majority's analysis, which unjustifiably reads a withdrawal procedure into GR 15.

Our constitution mandates that "[j]ustice in all cases shall be administered openly." Wash. Const. art. I, § 10. Given this mandate, we presume that court records are open to the public. *Rufer v. Abbott Labs.*, 154 Wn.2d 530, 540, 114 P.3d 1182 (2005). To get beyond this presumption of openness, the majority reasons that a motion to seal a document may be preliminary to the actual filing of the document. This is an artificial characterization unsupported by GR 15 and our case law. GR 15(b)(2), the definition section, says that "'[c]ourt record' is defined in GR 31(c)(4)." GR 31(c)(4)(i) defines "'[c]ourt record'" broadly to include "[a]ny document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding." Documents that are submitted

contemporaneously with a motion to seal that is ultimately denied, fit squarely within this definition of a court record. The documents are maintained and considered by the court in connection with the court's ruling on a motion to seal. Indeed, there would be no need to evaluate the propriety of sealing if the documents did not qualify as court records from the outset.

Additionally, we have said that court records include "all records the court has considered in making *any* ruling, whether 'dispositive' or not." *Rufer*, 154 Wn.2d at 549. The phrase, "*any* ruling," encompasses a decision whether to grant or deny a motion to seal. *Id.* We have further held that anything submitted "in anticipation of a court decision" may be sealed only if the *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982), factors are satisfied. *Rufer*, 154 Wn.2d at 549. Documents provided contemporaneously with a motion to seal are submitted "in anticipation" of the court's decision on whether sealing is appropriate. *Id*. Our jurisprudence clearly directs that the documents shall be open to the public if the *Ishikawa* factors are not satisfied.

The majority attempts to support its conclusion by noting there is no language in GR 15 precluding withdrawal. But the absence of preclusion is not evidence of permission. In fact, the converse may be true. GR 15 contains no language

explicitly *permitting* withdrawal. The absence of any language permitting withdrawal, in an otherwise very detailed rule, supports the proposition that GR 15 does not contemplate a withdrawal procedure.

By allowing withdrawal, the public is denied access to documents viewed and ruled upon by a judge. We have emphasized the importance of openness in no uncertain terms:

> The open operation of our courts is of utmost public importance. Justice must be conducted openly to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny. Secrecy fosters mistrust. This openness is a vital part of our constitution and our history. The right of the public, including the press, 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 v. Jain, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004). The majority opinion denies the public access to court records and therefore undermines our constitutional presumption of openness and its fundamental role in our judicial system.

Furthermore, the judicial scrutiny required by a proper application of the *Ishikawa* factors necessarily safeguards the supposed sensitivity of documents

sought to be sealed. *Dreiling*, 151 Wn.2d at 913-15. The *Ishikawa* factors take into consideration the competing interests of the parties' privacy and the public's interest in open government. *Dreiling*, 151 Wn.2d at 913-15. When the trial court denies sealing, it necessarily determines the documents are appropriately subject to open filing. Precluding withdrawal does not put parties to a Hobson's choice as McEnroe claims. Rather, it simply necessitates a tactical decision. We have consistently cautioned that courts should not approve blanket sealing orders and emphasized that "parties requesting closure bear the respective burden for each document they seek to protect." *Rufer*, 154 Wn.2d at 545. Parties must carefully consider what materials, if any, to submit in support of a substantive motion. The consequence of open filing is and should be a consideration in that tactical decision. Otherwise, parties have nothing to lose by submitting voluminous and frivolous motions to seal. The withdrawal procedure approved by the majority threatens to inappropriately burden courts with these preliminary sealing determinations which are, in effect, advisory opinions.

Even assuming a withdrawal procedure is constitutional, the appropriate means of adoption is through our rule-making process. *See* GR 9. We have noted that "[f]oisting [a] rule upon courts and parties by judicial fiat could lead to

unforeseen consequences." *In re Pers. Restraint of Carlstad*, 150 Wn.2d 583, 592 n.4, 80 P.3d 587 (2003). The rule-making process, in contrast, results in substantial input from interested stakeholders and a greater opportunity for careful consideration. *Id*. Foreign jurisdictions that have adopted a withdrawal process have all done so explicitly by court rule. A rule-making process is the most appropriate means to consider the wisdom of allowing parties to withdraw documents previously submitted for a sealing determination. An interlocutory appeal in a criminal case is not the proper context to announce a new sealing procedure.

Our constitutional presumption of openness serves "to foster the public's understanding and trust in our judicial system and to give judges the check of public scrutiny." *Dreiling*, 151 Wn.2d at 903. The withdrawal procedure advocated by Joseph McEnroe and adopted by the majority opinion is a brand of secrecy that "fosters mistrust." *Id*. As the trial court correctly noted, such a procedure "appears anathema to an open and accountable system of justice." Clerk's Papers at 23. I therefore respectfully dissent from the majority's analysis on this issue.[1] Accordingly, I would affirm in part and reverse in part the trial court's order on

[1] I concur with the majority's conclusion that (1) King County Local General Rule 15 does not apply to criminal proceedings and (2) GR 15 does not require open filing of documents submitted contemporaneously with a motion to seal while the trial court considers the motion.

defendant's motion to waive King County Local General Rule 15.

AUTHOR:

Justice Mary E. Fairhurst

WE CONCUR:

Gerry L. Alexander, Justice Pro Tem.