No. 58881-1-II

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON
DIVISION II

SAVE THE DAVIS-MEEKER GARRY OAK,
Appellant,

v.

DEBBIE SULLIVAN, in her capacity of Mayor of Tumwater,
Respondent.

RESPONDENT MAYOR DEBBIE SULLIVAN'S REPLY IN SUPPORT OF MOTION TO STRIKE

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I. INTRODUCTION

Appellants fail to justify their myriad citations to documents outside the record. Their brief, intertwined with and reliant upon such improper citations should be stricken, at least in all respects that cite to such extra-record materials.

Rather than defend their improper citations to material outside the record, Appellants seize the opportunity to re-argue the merits, and then improvidently and falsely impugn the character of opposing counsel. Appellants overreact and their strident accusations, which are not germane to the motion to strike, are nevertheless without merit.

II. REPLY ARGUMENT

A. APPELLANTS FAIL TO CITE LEGAL AUTHORITY JUSTIFYING THEIR RELIANCE ON MATERIAL OUTSIDE THE RECORD.

As an initial matter, Appellant does not discuss or cite to the Rules of Appellate Procedure to justify their brief's reliance on material outside the record. They do not do so because under the rules, it is clearly improper to do so. RAP 10.3(a)(5), (6);

State v. Harvey, 5 Wn. App. 719, 721, 491 P.2d 660 (1971) (holding that affidavit that was not part of the trial court record could not be considered on appeal).

Appellant's Response to the Motion to Strike cites to the Rules of Appellate Procedure only once, at 23, asserting that an appellate court may issue injunctions. This does not suggest a legal basis to cite materials outside the record in their Reply Brief. Thus, it is evident that the Reply Brief violated the rules.

B. APPELLANT'S ANSWER TO THE MOTION TO STRIKE IMPROPERLY SEEKS TO REWRITE THEIR BRIEF ON THE MERITS.

Appellant spends the first nine pages of his Response to the Motion to Strike regurgitating arguments on the merits rather than supplying a legal basis to allow citation to material outside the record. Appellant argues that material outside the record merely restates parts of the record. This sidesteps the requirement of the rule, which is to cite to material in the record itself, not extra-record material or affidavits submitted after the trial court rendered its decision. RAP 10.3(a)(5).

Appellant cites to portions of the record that he claims "deal with the same overall issues" as the extra-record material cited, even though their reply brief did not cite these parts of the record. Response to Motion to Strike at 8. However, Appellant offers no explanation or justification for why they did not cite such materials in the first instance, as the rule requires. A response to a motion to strike is not the place where citation to the record is to be made. RAP 10.3(a)(5),(6). It is unfair to the court and opposing counsel to expect that they should track down citations from Appellant's response to a motion to strike when the rules required it to be in the brief in the first instance. It is not the Court's job to "substitute" citations to the record for the Appellant. See Response to Motion at 6.

C. PLAINTIFF'S VIOLATION OF THE RULES IS NOT CURED BY JUDICIAL NOTICE.

Appellant attempts to cure his violation of the rules asserting that the Court either should or must take judicial notice. Response at 10-13. However, judicial notice does not apply here.

First, mandatory judicial notice would only apply "if requested by a party." ER 201(d). Here, Appellant's Reply Brief did not request the Court to take judicial notice of the improperly submitted extra-record materials. Thus, the argument that judicial notice is mandatory fails for lack of a proper request.

Secondly, judicial notice is only appropriate for "adjudicative facts," which are those not subject to reasonable dispute and which cannot be verified by unimpeachable sources. Judicial notice may be taken of easily accessible sources of accurate facts. *State ex rel. Humiston v. Meyers*, 61 Wash.2d 772, 779, 380 P.2d 735 (1963). Judicial notice is not taken of local administrative policies. *Id.*; *Kitsap All. of Prop. Owners v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 160 Wn. App. 250, 265, 255 P.3d 696, 704 (2011)

Appellant's Response to the Motion to Strike claims judicial notice should be taken of the local procedures for issuing *ex parte* matters. Judicial notice in not required to cite to local court rules, which are legal authority, but the facts and

administrative processes of the trial court are not proper subjects for judicial notice. *State ex.rel Hermiston, supra.* Appellant seeks judicial notice of its conclusion that their paltry attempt to notify the City's attorney of the TRO proceeding was adequate because of the administrative policies in Thurston County Superior Court. The facts concerning their lack of proper notice must be derived from the record, not judicial notice of a court rule and counsel's conclusions based on that rule. Appellant's argument collapses when the court considers that counsel's voicemail did not even state what court the TRO was being sought from or give any of the details (time, place of application) that is required by RCW 7.40.050. It can hardly be said that notice was adequate when counsel never stated that they were going to Thurston County for the TRO, instead of federal court. Under the court rules, the notice provided must be described in a supporting declaration by the applicant's attorney on the record. CR 65. These topics are subject to reasonable dispute and are not a proper matter for judicial notice.

Appellant seeks judicial notice of statements made in a declaration (Appendix F) concerning the amount of supersedeas bond, and the second opinion being obtained by the City concerning the condition of the tree. Again, judicial notice would be inappropriate to be taken of Appellant's misleading characterization of that declaration.

Appellant claims that the declaration shows the City has abandoned the initial tree report finding that the tree is a "high hazard" and plans to rely on a new risk assessment. Response at 12. This is not what the declarations says, but rather is counsel's misleading conclusion. The declaration cited to merely acknowledges there is a second arborist's opinion being sought and that it will be used in future decisions concerning removal of the tree. However, this does not exclude or "abandon" the initial report, which remains valid. It is like a patient who received a cancer diagnosis seeking a second opinion. Seeking such a second opinion does not invalidate the earlier diagnosis or magically remove the cancer. It provides additional information

that can be used to evaluate next steps. That is all the declaration from counsel in the bond proceedings says. It has no bearing on the issues before the court on appeal, which is the correct dissolution of the improperly obtained TRO.

Counsel for SDMGO speculates that the second opinion will exclusively guide the City's decisions and will support his preferred result. This concerns studies that are ongoing and have not yet made their findings. Again, judicial notice under ER 201 is improper because the "facts" are subject to reasonable dispute.

Appellant does not address the case law under RAP 10.3(a)(7), holding that "an appendix may not include materials not contained in the record on review without permission from the appellate court." *Hill v. Cox*, 110 Wn.App. 394, 409, 41 P.3d 495 (2002). Instead, they submit material not contained in the record to build improper conclusory arguments. The Court's consideration is to be guided by the record. Appendices C-F should be stricken.

D. FALSE ASPERSIONS CAST AT OPPOSING COUNSEL DO NOT JUSTIFY VIOLATION OF THE RULES REQUIRING CITATION TO THE RECORD.

Finally, Appellant argues that their failure to properly cite the record, and inclusion of extra-record materials is justified by RPC 3.3. They cite no authority for this proposition and it is spurious. Their Reply argued that the City's assertions were "false" in several respects. But in each such instance, the City's assertions were buttressed by citations to the record, as RAP 10.3(a)(5) and (6) require. Appellant's burden on appeal, was to argue that such statements are contradicted by the record, not to submit new factual evidence that was not before the trial court. Again, the Appellant treats this Court, not as an appellate body, but like the trial court where new evidence is to be submitted in the first instance.

Appellant asserts, without citation to legal authority to justify their position, that they may cite extra-record declarations to contradict perceived "misrepresentations" in the Respondent's

Brief. They contend that these "misrepresentations" are that the tree is a "known, hazardous tree," that it has been "determined to be hazardous" and that the decision to remove the tree is important to safeguard the public using the adjacent street." Response at 14. All these statements are backed by the record.

These statements in the Respondent's Brief are directly based upon the Mayor's declaration, CP at 34. Her declaration was based on the arborist's report she attached as Exhibit 1 to her declaration, which repeatedly stated that the tree is a "high hazard" in CP 37, 38, 39, 40, 41. These statements are further supported by a declaration from the City's tree professional, Kevin McFarland. CP 109. McFarland concluded that it was difficult for him to recommend removal and he was "sad that this tree "has come to the end of it life span." CP 112.

As advocates for their client's position to the contrary, counsel for SDMGO may disagree and interpret the evidence and facts differently that did the Mayor and City tree professional. However, their disagreement does not justify or permit re-

litigation of the factual issues on appeal, and they do not cite any authority that permits extra-record material to be submitted because they believe factual statements in their opponent's brief are incorrect.

If party may cite extra-record material, such as their own arborist's report prepared a month after the decision by the trial court here, (Reply Brief at 2-4), then the trial court proceedings never really end, and a party may stack the record with new material. That contravenes the entire structure and purpose of appellate review, based on the trial court record. RAP 9.1.

Appellant here cited to these extra-record materials for the first time in his reply brief. An issue raised and argued for the first time in a reply brief is too late to warrant consideration. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). This emphasizes the unfair nature of their briefs and prejudice resulting from such citations as there is no opportunity to respond. This is especially true where legal arguments in correspondence occurring after the fact are

submitted to buttress legal arguments, such as contained in Appendix C.

Likewise, the lack of authority supporting citation to material outside the record shows there is no legal basis for Appellant's arguments seeking to excuse their improper Reply Brief. Arguments not supported by any reference to the record nor by any citation of authority are not considered by appellate courts. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d at 809, citing, RAP 10.3(a)(5); *McKee v. American Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989). If a party fails to support argument with citation to legal authority, the Court may presume none exists. *Or. Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 418, 36 P.3d 1065 (2001).

III. CONCLUSION

The Appellant's Reply Brief made repeated references to material not properly part of the record in violation of the Rules of Appellate Procedure. Judicial notice of contested factual issues is inappropriate. No legal basis for such a violation has

been demonstrated. The Court should strike the Appellant's Reply Brief or alternatively, all parts of the Reply Brief relying on material which is not part of the record designated in this case.

I certify that this brief contains 1,920 words as determined by computer word count in conformity with RAP 18.17.

DATED this 7th day of October, 2024.

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CERTIFICATE OF SERVICE

I hereby certify, under the penalty of perjury, under the laws of the State of Washington that I have caused a true and correct copy of the foregoing document all to be served to the below listed party by the Washington State Court of Appeals e-filing system as well as by electronic mail per service agreement upon the following person(s):

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DATED this 8th day of October, 2024.

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