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 RESPONSE TO MOTION TO MODIFY RULING GRANTING MOTION TO STRIKE REPLY BRIEF

Jeffrey S. Myers, WSBA #16390
Jakub Kocztorz, WSBA # 61393
Law, Lyman, Daniel, Kamerrer &
Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508
T: (360) 754-3480
F: (360) 357-3511
Email: jmyers@lldkb.com
jkocztorz@lldkb.com

Attorneys For Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Court Rules:

I. INTRODUCTION

The Court should deny the Motion to Modify the Commissioner's ruling upholding the longstanding rule requiring citation to the record and striking the reply brief that persistently violated that rule by citing multiple extra-record materials in violation of RAP 9.1, 10.3 and 10.4.

II. FACTS RELEVANT TO MOTION

Appellant Save The Davis-Meeker Garry Oak (SDMGO) filed its reply brief on September 23, 2024 containing multiple references to material not contained within the record designated pursuant to RAP 9.1. SDMGO did not obtain permission to include such materials, nor are such materials authorized to be submitted as an appendix by RAP 10.3 (a)(8).

SDMGO's Reply Brief made repeated references to declarations which are not part of the clerk's papers. These references permeate the Reply Brief's Reply to Statement of the Case, pages 2-9, and its arguments at pages 15-16, 19-24, 27-28 and 30-31 of the Reply Brief. Respondent moved to strike.

On October 8, 2024, Commissioner Bearse issued a ruling granting the motion to strike. Her ruling noted that such citation was improper and stated:

> But this Court will not accept a brief with extra-record evidence unless that evidence satisfies RAP 9.11(a). Moreover, the time to request this court accept non-record materials under any rule, whether it is ER 201 and/or RAP 9.11(a), is before submitting a brief with these materials, not in response to a motion to strike them.

Commissioner's Ruling at 1.

Commissioner Bearse then allowed Appellant the opportunity to file a corrected brief without the citations to extra-record materials. SDMGO moves to modify this ruling and allow acceptance of the original brief, despite its citations to extra-record material.

SDMGO spends much of its motion arguing its version of the facts and merits of their case in chief, which unsurprisingly disagrees with the view of the Respondent. Motion to Modify at 2-15. In so doing, they raise frequent ad hominem personal attacks on the integrity of their opposing counsel. Disagreement

with another attorney's reading of the facts is why we have lawsuits and bring disputes before the courts. Respondents will not respond in kind as it is proper for counsel on both sides to zealously advocate their positions. As such, this brief will address disagreements with SDMGO's legal interpretations and disregard baseless personal attacks.

III. ARGUMENT

A. THE COMMISSIONER CORRECTLY APPLIED THE RULES REQUIRING CITATION TO MATERIALS IN THE RECORD.

Commissioner Bearse's ruling correctly applied the time honored rule that, as an appellate court, the court reviews the record established in the trial court, not non-record evidence. The Motion to Strike laid out the law requiring citation to the record—clerk's papers and reports of proceedings—and not declarations created after the appeal was filed after the trial court's decision that is the subject of the appeal. Motion to Strike at 3, citing *State v. Harvey*, 5 Wn. App. 719, 721, 491 P.2d 660 (1971). See RAP 10.3(a)(5), (6); RAP 10.4(f).

Commissioner Bearse pointed to RAP 9.11 as a possible basis for allowing additional evidence but rejected that because SDMGO did not seek authorization to submit such evidence prior to filing its improper Reply Brief. On its fact, RAP 9.11(a) does not permit a party to unilaterally submit extra-record materials with a reply brief. To do so allows a party to state allegations as facts based on materials outside the record, thereby prejudicing their opponent by preventing any possibility of response. See also, RAP 9.10 (allowing supplementation of the record "on the motion of a party").

SDMGO fails to explain any lawful basis or cite any case authority allowing it to unilaterally submit extra-record material as appendices or cite to such materials to support its version of the facts. SDMGO ignores the cases cited by the Motion to Strike that prohibit their conduct. They ignore *State v. Harvey, supra*, which held that an affidavit concerning competence of a defendant incorporated into their brief could not be considered because the affidavit was not part of the record. 5 Wn. App. at

721. SDMGO ignores *Hill v. Cox*, 110 Wn. App. 394, 409, 41 P.3d 495 (2002) which held that under RAP 10.3(a)(7), "an appendix may not include materials not contained in the record on review without permission from the appellate court."

Those cases are not alone in striking improper citation to extra-record materials. In *Canal Station North Condo. Ass'n v. Ballard Leary Phase II, LP* 179 Wn. App. 289, 322 P.3d 1229 (2013), the Court of Appeals granted a motion to strike a declaration from defendant's counsel and a summary judgment motion from separate legal proceeding, which were included in defendant's reply brief on appeal, finding that they improperly supplemented the record without Court of Appeals' approval. This supports Commissioner Bearse's ruling that prior approval was required and not sought by SDMGO under RAP 9.11.

A similar result was reached in *Public Hosp. Dist. No. 1 of King County v. University of Washington*, 182 Wn. App. 34, 327 P.3d 1281 (2014) where the court considered and rejected a timely motion to expand the appellate record to allow

consideration of e-mail sent from Valley Medical Center's general counsel to the secretary of the district commissioners after the trial court's grant of summary judgment. The e-mail was not before trial court when it granted summary judgment, was not needed to fairly resolve issues on review, and did not probably change decision being reviewed. Thus, the court denied the motion to allow the extra-record materials.

In each of these cases, the court refused to consider materials that were outside of the trial court's record. SDMGO has neither refuted these cases nor furnished an applicable exception.

B. RAP 9.11 DOES NOT SUPPORT THE MOTION TO MODIFY.

SDMGO cites to RAP 9.11(a) as a basis for allowing its extra-record materials. Motion at 19. The rule states:

> (a) Remedy Limited. The appellate court may direct that additional evidence on the merits of the case be taken before the decision of a case on review if: (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being

> reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

Under the rule, it is up to the Court to direct additional evidence to be taken, not a party to determine that it will unilaterally provide such material without so much as an opportunity for the other party to respond. The requirement of court approval for such additional evidence avoids the prejudice created here, where such material submitted in a reply brief preclude a meaningful opportunity to respond, a talisman of due process.

Moreover, all six criteria of RAP 9.11(a) must be demonstrated to apply to permit the Court to direct such evidence to be taken. Appellate court will not accept additional evidence on appeal unless all six criteria of RAP 9.11(a) are satisfied. *Harbison v. Garden Valley Outfitters, Inc.* 69 Wn. App. 590, 849

P.2d 669 (1993); *Mission Ins. Co. v. Guarantee Ins. Co.* 37 Wn. App. 695, 683 P.2d 215 (1984). Here, SDMGO concludes, without analysis, that it meets RAP 9.11(1) and (6). It does not discuss, much less demonstrate, that the requirements of RAP 9.11(2-5) are established.

Finally, SDMGO does not address RAP 9.11(b) which provides that such additional evidence is ordinarily to be taken by the trial court. Instead, SDMGO prefers to characterize the facts in their preferred fashion by misstating the declarations to claim that the City "needs" a second opinion and to assume the conclusion the decay observed by the city's arborist is therefore non-existent and does not present an emergency. Motion to Modify at 13-15. Instead of filing a motion which would likely result in remand for additional fact-finding in the trial court, if granted, they chose to pre-empt the court's role by unilaterally submitting their version of the "facts" as interpreted from materials wholly outside the record. That is not permitted by RAP 9.11.

None of the materials qualify under all six criteria in RAP 9.11. Appellant's Motion to Modify does not contend that the extra-record material meets subsections 2-5. The declaration of counsel on the supersedeas motion concerning pursuit of a second opinion does not likely change the trial court's original decision. None of the other prongs are met and SDMGO did not bother to address them. Thus, even if a proper motion had been timely raised, the motion for extra-record material would not be allowed under RAP 9.11.

C. SUBMITTAL OF EXTRA-RECORD MATERIAL IN A REPLY BRIEF IS HIGHLY PREJUDICIAL AND IMPROPER.

Commissioner Bearse's ruling relied on a principle of fundamental fairness not addressed by the Motion to Modify. That ruling noted that the time to request acceptance of extra-record materials is before submitting a brief with citation to such materials. SDMGO did not do so, but unilaterally included them and only sought to justify their violation of the rules when a motion to strike was filed.

A second parallel principle of fundamental fairness also arises from inclusion of such materials in a reply brief. This is done with the evident purpose of preventing the Mayor from making a meaningful response to the version of the "facts" that SDMGO claims is supported by these materials.

The evident prejudice is similar to that resulting from raising new arguments for the first time in a reply brief. Appellate courts have clearly never allowed such clearly prejudicial tactics. 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). Similarly, seeking to characterize the facts by adding new evidence unilaterally attached to a reply brief is fundamentally unfair because there is no opportunity to respond. The court should deny the motion to modify.

IV. CONCLUSION

The belated excuses offered by SDMGO for reliance on material outside the record are unjustified and not supported by

law. Commissioner Bearse properly struck the reply brief and generously afforded SDMGO an opportunity to correct their transgressions. This court should affirm the Commissioner's ruling.

I certify that this brief contains 1,734 words as determined by computer word count in conformity with RAP 18.17.

DATED this 31st day of October, 2024.

LAW, LYMAN, DANIEL,
KAMERRER & BOGDANOVICH, P.S.

Jeffrey S. Myers, WSBA #16390
Jakub Kocztorz, WSBA #61393
Law, Lyman, Daniel, Kamerrer &
Bogdanovich, P.S.
P.O. Box 11880
Olympia, WA 98508
(360) 754-3480
jmyers@lldkb.com
jkoctorz@lldkb.com

Attorney for Respondent Debbie Sullivan

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):

Appellant's Attorneys:

Ronda Larson Kramer
LARSON LAW, PLLC
P.O. Box 7337
Olympia, WA 98507-7337
ronda@larsonlawpllc.com

Bryan J. Telegin
Telegin Law PLLC
175 Parfitt Way SW, Ste. N270
Bainbridge Island, WA 98110
bryan@teleginlaw.com

Attorney for Amicus Curiae:
Christopher P. Wright
Assistant Attorney General
Agriculture and Health Division
PO Box 40109
Olympia, Washington 98504
christopher.wright@atg.wa.gov

DATED this 31st day of October, 2024.

/s/ Lisa Gates
Lisa Gates, Legal Asst.

LAW LYMAN DANIEL KAMERRER & BOGDANOVICH

October 31, 2024 - 1:55 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	58881-1
Appellate Court Case Title:	Save the Davis Meeker Garry Oak, Appellant v. Debbie Sullivan, Respondent
Superior Court Case Number:	24-2-01895-3

The following documents have been uploaded:

- 588811_Answer_Reply_to_Motion_20241031135500D2148278_8113.pdf
  This File Contains:
  Answer/Reply to Motion - Response
  The Original File Name was Response to motionto Modify.pdf

A copy of the uploaded files will be sent to:

- bryan@teleginlaw.com
- christopher.wright@atg.wa.gov
- jkocztorz@lldkb.com
- lisa@lldkb.com
- ronda@larsonlawpllc.com

Comments:

Sender Name: Lisa Gates - Email: lisa@lldkb.com
Filing on Behalf of: Jeffrey Scott Myers - Email: jmyers@lldkb.com (Alternate Email: lisa@lldkb.com)

Address:
P.O. Box 11880
OLYMPIA, WA, 98508
Phone: (360) 754-3480

Note: The Filing Id is 20241031135500D2148278