FILED
SUPREME COURT
STATE OF WASHINGTON
8/22/2022 8:28 AM
BY ERIN L. LENNON
CLERK

NO. 101047-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

John Earl Erickson and Shelley Ann Erickson,

Appellants

v.

Vanessa Power, et al.,

Respondents

RESPONDENTS' MOTION TO STRIKE APPELLANT'S REPLY AND REQUEST FOR JUDICIAL NOTICE

Anne Dorshimer, WSBA #50363
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
206.624.0900

Attorney for Respondents

I. PARTIES FILING MOTION

This motion is filed by Respondents Select Portfolio Servicing, Inc.; Stoel Rives LLP; and Vanessa Power, John Glowney, and Will Eidson (collectively "Stoel Rives").[1]

II. RELIEF SOUGHT

Stoel Rives seeks an order striking, as improperly filed, Appellants John and Shelley Erickson's reply brief and related request for judicial notice filed on August 19, 2022. *See* Appellants' Reply to Respondents' Answer to Petition for Review of April 25, 2022 Decision of Court of Appeals, Division One, Reconsideration Denied, May 24, 2022 (the "Reply") and Request for Judicial Notice in Support of Reply to Respondents' Answer to Petition for Review (the "Request for Judicial Notice." If the Request for Judicial Notice is not stricken in conjunction with the Reply, Stoel Rives seeks an order denying the request.

[1] The Ericksons previously dismissed their claims against Thomas Reardon and Lance Olsen.

III. RELEVANT PORTIONS OF RECORD

The relevant portions of the record are the Ericksons' Petition for Review, Respondents' Answer to Petition for Review, and the filings at issue under this motion: the Ericksons' Reply and related Request for Judicial Notice.

IV. ARGUMENT

On August 19, 2022, the Ericksons filed a 32-page Reply and a related Request for Judicial Notice attaching eight exhibits. Under RAP 13.4(d), "[a] party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review." Stoel Rives did not seek review of any issues in its answering brief. To the contrary, Stoel Rives argued that there is no basis or need for this Court's review.

Because the answering party did not seek review of any issues not raised by the Ericksons' petition, no reply brief is permitted under RAP 13.4(d). The Reply should be stricken.

The same holds true for the Ericksons' Request for Judicial Notice, which asks the Court, without argument or basis,

to take judicial notice of filings in other cases that were not in the record before the Court of Appeals. The Request for Judicial Notice should be stricken because it is, on its face, filed "in support of" the improperly-filed Reply. Because the Reply is procedurally improper and subject to being stricken, so too is the supporting Request for Judicial Notice.

The Request for Judicial Notice is also legally insufficient. Although the Ericksons style their request as one for judicial notice under ER 201, they offer no grounds for judicial notice and their plain intent is to add evidence to the record. Judicial notice on appeal may be taken "of the record in the case presently before us or 'in proceedings engrafted, ancillary, or supplementary to it.' However, we cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings even though they are between the same parties." *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003) (citations omitted). Applied here, there is no basis for judicial notice.

Further, RAP 9.11 applies in addition to the judicial notice standard. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 549 n. 6, 14 P.3d 133 (2000) ("Even though ER 201 states that certain facts may be judicially noticed at any stage of a proceeding, RAP 9.11 restricts appellate consideration of additional evidence on review."). RAP 9.11 allows supplementation of the record "only in extraordinary circumstances." *E Fork Hills Rural Ass'n v. Clark County*, 92 Wn. App. 838, 845, 965 P.2d 650 (1988). RAP 9.11(a) provides:

> [t]he 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.

All of the six requirements of RAP 9.11 must be satisfied to allow for supplementation of the record on appeal. *Schreiner v. City of Spokane,* 74 Wn. App. 617, 620-21, 874 P.2d 883 (1994). Here, the Ericksons ignore RAP 9.11 and have thus made no showing to support supplementation of the record – in particular in the context of a petition for review – to consider material that was not before the Court of Appeals. The Request for Judicial Notice should be stricken or, in the alternative, denied.

V. CONCLUSION

Because the Respondents did not seek review of issues not raised in the petition for review, the Ericksons are not entitled to a reply. The Ericksons' Reply and related Request for Judicial Notice should be stricken.

This certifies that this Motion contains 823 words pursuant to RAP 18.17.

DATED: August 22, 2022.

STOEL RIVES LLP

/s/ Anne Dorshimer
Anne Dorshimer
WSBA No. 50363

Attorney for Respondents Select Portfolio Servicing, Inc.; Stoel Rives LLP; Vanessa Power; John Glowney; and Will Eidson

CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2022, I caused the foregoing document to be e-filed with the Supreme Court of Washington, which will send electronic notice to:

John Earl Erickson
Shelley Ann Erickson
in propria persona
5421 Pearl Ave S.E. Auburn
Washington 98092
Email: john206erickson@icloud.com;
Email: Shelleystotalbodyworks@comcast.net

/s/Anne Dorshimer
Anne Dorshimer, WSBA No. 50363

Attorney for Respondents Select Portfolio Servicing, Inc.; Stoel Rives LLP; Vanessa Power; John Glowney; and Will Eidson

STOEL RIVES LLP

August 22, 2022 - 8:28 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	101,047-8
Appellate Court Case Title:	John Erickson, et ano v. Stoel Rives, LLP et al

The following documents have been uploaded:

- 1010478_Motion_20220822082736SC490657_4721.pdf
  This File Contains:
  Motion 1 - Strike
  The Original File Name was 2022.08.22 Erickson v Power - Motion to Strike - No 101047-8.pdf

A copy of the uploaded files will be sent to:

- accesslegalservices@gmail.com
- john206erickson@icloud.com
- leslie.lomax@stoel.com
- shelleystotalbodyworks@comcast.net

Comments:

Sender Name: Anne Dorshimer - Email: anne.dorshimer@stoel.com
Address:
600 UNIVERSITY ST STE 3600
SEATTLE, WA, 98101-4109
Phone: 206-624-0900 - Extension 7650

Note: The Filing Id is 20220822082736SC490657