SUPREME COURT
OF THE STATE OF WASHINGTON

GARRET SCHIREMAN, in his individual capacity, and as executor for THE ESTATE OF LOREN E. SCHIREMAN, Petitioners, v. CHRISTOPHER P. WILLIAMS, Respondent.	No. 102076-7 ANSWER TO COURT'S MOTION TO STRIKE

A. INTRODUCTION

Petitioner Garret Schireman filed a reply that violates RAP 13.4(d), as this Court's July 3, 2023 letter correctly noted. Because respondent Christopher Williams did not raise a new "issue"[1] seeking additional affirmative relief in his answer to Schireman's petition for review, Schireman's reply is improper. Moreover, Schireman's reply misrepresents the record before

[1] Schireman's reply falsely asserts that Williams raised a "new *claim* never raised in his Division One appeal." Reply at 1 (emphasis added).

Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

this Court. He repeats that misrepresentation in answering the Clerk's motion. This Court should strike Schireman's improper, baseless reply and levy sanctions against Schireman. RAP 10.7; RAP 18.9(a).

B. FACTS RELEVANT TO ANSWER

This Court can readily discern from Williams' answer to Schireman's petition for review that he is not seeking added relief from this Court. He did not file what amounted to a cross-petition for review, raising new issues. Rather, the answer merely sought this Court's denial of review. Answer at 24 ("Because Schireman fails to present any basis under RAP 13.4(b) for review, this Court should deny review, upholding Division I's reversal of the judgment."). While Williams sought costs on appeal in accordance with RAP 14.2, he did not ask the Court to award any relief beyond denial of review of Division I's unpublished opinion. He did not raise contingent issues should review be granted, as respondents sometimes do in this Court. He did not even seek fees under RAP 18.1 or RAP 18.9(a).

Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Plain and simple, Williams sought rejection by this Court of review of Division I's unpublished opinion.

C. ARGUMENT

(1) A Reply Here Is Improper

RAP 13.4(d) states: "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. A reply to an answer should be limited to answering only the new issues raised in the answer." The purpose of this rule was articulated in the drafters' comments to 2006 amendments to RAP 13.4(d):

> … the amendment limits the scope of a reply to an answer to petition for review. Under the current rule, a party may not file a reply to an answer to a petition for review unless "the answer raises a new issue." This provision has been subject to abuse by petitioning parties who attempt to cast an answering party's arguments in response to a petition for review as "new issues" in order to reargue issues raised in the petition. The proposed amendment is intended to clarify the rule's purpose by more clearly prohibiting a reply to an answer that is not strictly limited to responding to an answering party's request that the Court review an issue that was not raised in the initial petition for review.

Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Elizabeth A. Turner, 3 *Wash. Prac. Rules Practice* (9th ed.) at 231. As *Washington Practice* further notes: "…a reply is not warranted simply because the responding party, in the answer, presented arguments not addressed in the petition for review. 'Argument' and 'issue' are not synonymous…" *Id*. at 223-24.

RAP 13.4(d), therefore, has two provisions. First, in order for a reply to be filed it must be in response to a "new issue," not a new argument, surfaced in the answer to the petition for review and not raised in the petition itself. Second, the reply must narrowly focus on that issue alone.

This Court has stricken improper replies on numerous occasions. Ordinarily, those rulings have been made by Supreme Court staff, but the Court has done so as well. *E.g.*, *Doe v. Gonzaga Univ.*, 143 Wn.2d 687, 700 n.8, 24 P.3d 390 (2001) (noting Gonzaga's answer, as here, merely argued that review should be denied and did not ask the Court to address new issues), *reversed on other grounds*, 536 U.S. 273 (2002).

Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Insofar as Williams' answer raised no new issue, Schireman's reply should be stricken.

(2) Schireman Should Be Sanctioned

Although a petition for review is not a brief, the analogous rule for striking an improper brief, RAP 10.7, provides that sanctions will "ordinarily" be imposed against a party filing an improper brief. It is no different for an improper reply under RAP 13.4(d).

But there is an additional basis for sanctions against Schireman – RAP 18.9(a). Schireman's spurious reply failed to comply with the RAP, subjecting him to RAP 18.9(a). A minimal amount of research by his counsel would have revealed that a reply was improper under RAP 13.4(d) as noted above.

Moreover, not only was the reply procedurally improper, its contents seek to perpetuate the fantasy articulated in Schireman's petition for review that Williams' trial counsel failed to preserve for appellate review the determinative issue for Division I that causation involved a question of law for the court

Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

and not an issue for the jury. The jury had no ability, or authority, to pass on what a reasonable judge should have decided as to the interpretation of a prenuptial agreement or the characterization of property under Washington's community property system. Schireman's contention that the error was not preserved is *untrue,* as the answer documented. Williams' counsel argued a CR 12(h) motion and a CR 50(a) motion in which they contended the causation element of the Schireman legal malpractice claim, the "case within a case," should never go to the jury.

Schireman flatly *misrepresents* the record when he asserts that Williams did not tell the trial court that the case-within-a-case causation element was not a jury issue. He repeats that misrepresentation throughout his answer to the Clerk's motion, compounding his sanctionable conduct. For example, Williams' counsel argued in the CR 50(a) motion that Schireman could not, through expert testimony, undercut what Judge Bowden decided as a matter of law. RP 236-37. In arguing the CR 12(h) motion, Williams' counsel *repeatedly* asserted that the causation element

Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

was for the court. *E.g.*, RP 713, 714, 716. For example, counsel stated: "…this is a court issue. This is not a jury issue. A jury should not have this matter." RP 713. Counsel further stated:

> And for this jury to be given this case and be allowed to speculate about, first of all, what the documents mean and, second of all, whether it would have changed a sitting judge's mind is highly improper and impermissible.

RP 714. And if that point was not sufficiently clear (and it was), Williams' counsel objected to Instruction 9 that purported to have the jury decide what a "reasonable judge" would do on the law:

> I've already excepted to the providing their number -- their *Daugert* instruction, which I believe is now number 9. I am concerned about the last sentence specifically in that instruction because it tells the jury that they are to substitute their opinion as to what a reasonable judge would do, and I believe it's improper to both ask the jury to speculate about what a judge would do, and the experts were not permitted to discuss what a reasonable judge would do. So I except to that.

RP 565-66.

Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Finally, ignored by Schireman is the fact that Division I concluded that the error was properly preserved for appellate review. Op. at 11. Schireman has not asserted that Division I's conclusion was error for this Court to address. PFR at 1-2. Nor could he. Such an arcane discretionary ruling in an unpublished opinion fails to meet the criteria of RAP 13.4(b).

In sum, sanctions are merited because Schireman filed an improper reply that continues to make assertions that defy the facts in the record. RAP 10.7/RAP 18.9(a).

D. CONCLUSION

This Court should strike Schireman's improper reply and levy sanctions against him.

This document contains 1,262 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

DATED this 21st day of July, 2023.

Respectfully submitted,

/s/ Philip A. Talmadge
Philip A. Talmadge, WSBA# 6973
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Suzanne K. Michael, WSBA #14072
Ryan R. Jones, WSBA #52566
Fisher & Phillips LLP
1201 Third Avenue, Suite 2750
Seattle, WA 98101
(206) 682-2308

Attorneys for Respondent
Christopher P. Williams

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Answer to Court's Motion to Strike*** in Supreme Court Cause No. 102076-7 to the following parties:

Gregory W. Albert
Jonah Levi Ohm Campbell
Albert Law PLLC
3131 Western Avenue, Suite 410
Seattle, WA 98121

Suzanne K. Michael
Ryan R. Jones
Fisher & Phillips LLP
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101-4416

Original E-filed via appellate portal to:
Supreme Court Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 21, 2023 at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

July 21, 2023 - 9:25 AM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	102,076-7
Appellate Court Case Title:	Garret Schireman v. Christopher Williams
Superior Court Case Number:	18-2-06663-6

The following documents have been uploaded:

- 1020767_Answer_Reply_20230721092424SC006569_0882.pdf
  This File Contains:
  Answer/Reply - Answer to Motion
  The Original File Name was Answer to Court Motion to Strike.pdf

A copy of the uploaded files will be sent to:

- brad@tal-fitzlaw.com
- greg@albertlawpllc.com
- jmatautia@fisherphillips.com
- jonah@albertlawpllc.com
- lwidmer@fisherphillips.com
- matt@tal-fitzlaw.com
- ohmcamj24@gmail.com
- rrjones@fisherphillips.com
- smichael@fisherphillips.com

Comments:

Williams' Answer to Court's Motion to Strike

Sender Name: Matt Albers - Email: matt@tal-fitzlaw.com
Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20230721092424SC006569