

No. 70220-3-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

KEBEDE ADMASU, et al.,

Appellants,

vs.

THE PORT OF SEATTLE,
a Washington municipal corporation,

Respondent.

RECEIVED
COURT OF APPEALS
DIVISION I
SEP 10 2014

**APPELLANTS' RESPONSE TO *AMICUS CURIAE* BRIEF AND
MOTION TO STRIKE**

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I. INTRODUCTION

Amicus curiae Airports Council International – North America (“ACI-NA”) has submitted briefing in support of the trial court’s order granting summary judgment in favor of the Port of Seattle (“Port”) and dismissing all damages claims—whether based on noise or based on vibrations, soot, and fumes—of Appellants whose properties were subject to “noise exposure maps” (“NEMs” and “NEM Appellants”) published by the Port.

But ACI-NA’s briefing contains the same fatal flaws as the trial court’s dismissal of all the NEM Plaintiffs’ claims. Just as the Port violated Washington’s summary judgment procedures by untimely and improperly expanded the scope of its summary judgment motion to include the NEM Appellants’ vibration, soot, and fume-based claims, ACI-NA violates RAP 9.12 by seeking to inject into this appeal evidence not considered by the trial court in entering its summary judgment order. Likewise, ACI-NA also urges the Court to reach the merits of whether the statutory term “noise” within the Aviation Safety and Noise Abatement Act of 1979 (“ASNAA”) includes vibration-based claims—an issue to which the trial court never should have proceeded to under Washington’s summary judgment rules and procedures. Finally, even were the Court to reach the merits on that issue, ACI-NA fails to provide sufficient argument or citation to authority explaining how the extrinsic evidence it offers has any bearing on the meaning of the statutory term “noise,” in violation of

RAP 10.3(a)(6), RAP 10.3(g), and Washington case law on appellate procedures. Therefore, Appellants respectfully move the Court to strike pages 16-18 of ACI-NA's brief and to otherwise refuse to consider ACI-NA's offered arguments and extrinsic evidence regarding whether the term "noise" encompasses vibrations.

II. ARGUMENT

A. Large Portions of the Amicus Brief Violate RAP 9.12 and Should Be Stricken

Because large portions of *amicus curiae* ACI-NA's brief attempt to introduce evidence not considered by the trial court in granting summary judgment against the NEM Appellants, the Court should strike those portions for violating RAP 9.12

RAP 9.12, entitled "Special Rule for Order on Summary Judgment," provides:

On review of an order granting or denying a motion for summary judgment **the appellate court will consider only evidence and issues called to the attention of the trial court.** The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered. Documents or other evidence called to the attention of the trial court but not designated in the order shall be made a part of the record by supplemental order of the trial court or by stipulation of counsel.

Emphasis added. As this Court has observed, "It is not difficult to discern the reason for the existence of these rules. It is the appellate court's task to review a ruling on a motion for summary judgment **based solely on the**

record before the trial court.” *Green v. Normandy Park*, 137 Wn. App. 665, 678, 151 P.3d 1038 (2007) (emphasis added) (citing *Wash. Fed’n of State Employees, Council 28 v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 163, 849 P.2d 1201 (1993); *Gaupholm v. Aurora Office Bldgs., Inc.*, 2 Wn. App. 256, 257, 467 P.2d 628 (1970)); see also *Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 754-55, 162 P.3d 1153 (2007) (“It is our task to review a ruling on a motion for summary judgment based on the precise record considered by the trial court.”). Thus, “The purpose of RAP 9.12 ‘is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.’” *Green*, 137 Wn. App. at 678 (quoting *Wash. Fed’n of State Employees*, 121 Wn.2d at 157).

Here, ACI-NA’s brief is replete with citations to—and arguments based on—evidence never called to the trial court’s attention when ruling on the Port’s summary judgment motion concerning the NEM Appellants. In particular, pages 16 through 18 of ACI-NA’s brief consists of legal argument relying on three documents: a 1985 FAA report; a report of findings made by “an Expert Panel established by the City of Richfield, Minnesota and the Metropolitan Airports Commission”; and an Aviation Noise Abatement Policy. But none of these documents were called to the trial court’s attention during the summary judgment motion regarding the NEM Appellants¹, the trial court did not designate these documents as

¹ CP 3844-3862, CP 4250-4257.

evidence it considered in granting summary judgment for the Port², the trial court did not designate these documents in a supplemental order, and Appellants' counsel did not and does not stipulate to their inclusion in the record. Accordingly, under RAP 9.12, the Court may not consider these documents, and the Court should strike pages 16-18 and any other portions of ACI-NA's briefing that relies on them.

B. The Port Failed to Timely Argue and Meet Its Initial Summary Judgment Burden Regarding Vibrations Below, and ACI-NA May Not Inject The Issue Into This Appeal

ACI-NA's briefing also contains an extended discussion on the merits of whether vibrations are the equivalent of "noise" under ASNAA, but this discussion fails to address the fundamental error in the trial court's grant of summary judgment against the NEM Appellants' vibration-based claims: the trial court never should have proceeded to the merits on that issue. It is a well-settled under Washington law that "[i]t is the responsibility of the moving party" (1) "to raise in its summary judgment motion all of the issues on which it believes it is entitled to summary judgment," *White v. Kent Med. Center, Inc., P.S.*, 61 Wn. App. 163, 168, 810 P.2d 4 (1991), (2) "to clearly state in its opening papers those issues upon which summary judgment is sought," *id.*, and (3) to satisfy its initial burden on summary judgment to submit "affidavits establishing it is entitled to judgment as a matter of law" and otherwise demonstrate the absence of issues of material fact regarding those clearly-stated issues.

² CP 4548-4554

Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008); *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986).

As discussed extensively in Appellants' opening and reply briefing, the Port's opening summary judgment brief offered no argument, authority, or supporting affidavits for the proposition that vibrations are equivalent to "noise" under the plain language of 49 U.S.C. § 47506—the pertinent provision of ASNAA—instead confining its discussion of vibrations to a single, conclusory parenthetical phrase.³ This fleeting, conclusory reference was insufficient to meet the Port's initial summary judgment burden to establish entitlement to judgment as a matter of law on vibration-based claims, and the Port was not permitted under Washington law to cure these deficiencies by submitting supporting evidence, affidavits, and argument for the first time in its reply brief. *See White*, 61 Wn. App. at 163, 169.

Thus, the trial court erred in proceeding to the merits of whether vibrations are included within the term "noise" within 49 U.S.C. § 47506 and whether that statute preempts the NEM Appellants' state law claims based on vibrations. As a result, ACI-NA may not inject the issue into these proceedings as an *amicus curiae*. As a general proposition, Washington courts refuse to consider issues argued by *amicus curiae*

³ CP at 3848-3849 ("Their causes of action (inverse condemnation, nuisance, and trespass) each depend on this alleged increase in operations and the alleged "heightened noise pollution" and vibrations (i.e., low frequency noise) caused by those operations."); Appellants' Opening Brief at 28-32, 36-38; Appellants' Reply Brief at 9-12.

when they were not properly raised before the trial court or properly preserved for appellate review. *See State v. Davis*, 175 Wn.2d 287, 302 n. 1, 344, 290 P.3d 43 (2012) (holding that appellant failed to properly preserve issue for review through cursory discussion before the trial court and refusing to consider amicus arguments on that issue); *City of Lakewood v. Koenig*, 160 Wn. App. 883, 886 n. 2, 250 P.3d 113 (2011) (“The case must be made by the parties and its course and issues involved cannot be changed or added to by friends of the court.”). Accordingly, the Court should consider neither the merits of whether vibrations equate to “noise” under ASNAA’s plain language nor ACI-NA’s arguments on that issue.

C. ACI-NA’s Arguments and Extrinsic Evidence Fail to Address Whether Vibrations are Included Within the Term “Noise” in ASNAA

Finally, even if the Court considers ACI-NA’s arguments, they fail to address the pertinent merits question: whether the plain language of 49 U.S.C. § 47506 includes vibrations within the statutory term “noise.” That statute provides:

(a) General limitations. – A person acquiring an interest in property after February 18, 1980, in an area surrounding an airport for which a noise exposure map has been submitted under section 47503 of this title and having actual or constructive knowledge of the existence of the map ***may recover damages for noise attributable to the airport only if***, in addition to any other elements for recovery of damages, the person shows that—

- (1) after acquiring the interest, there was a significant—
 - (A) change in the type or frequency of aircraft operations at the airport;

- (B) change in the airport layout;
 - (C) change in flight patterns; or
 - (D) increase in nighttime operations; and
- (2) the damages resulted from the change or increase.

Emphasis added.

Tellingly, ACI-NA attempts in a conclusory sleight-of-hand to expand the scope of the precise statutory term “noise” to include “noise-generated” or “noise-related”⁴ claims, but it does so without any analysis of 49 U.S.C. § 47506’s plain language, the plain language of related statutes, legislative history concerning the statutory term “noise,” or any other authority that might shed light on the term’s meaning.⁵ This Court does not consider issues unsupported by argument or authority or given only passing, conclusory treatment. RAP 10.3(a)(6); RAP 10.3(g); *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (passing treatment of an issue is insufficient to merit appellate review). Indeed, ACI-NA offers only citations to a 1985 FAA report, a 1998 Expert Panel report, and a 2000 Aviation Noise Abatement Policy to support its arguments, but it fails to provide any argument or citation to authority that Congress relied on or even considered these materials (which postdated ASNAA’s 1980 enactment date by five, 18, and 20 years, respectively) when drafting 49 U.S.C. § 47506, defining the term “noise,” or making any subsequent amendments to the statute. Therefore, even if the Court considers the merits of the meaning of “noise” within 49 U.S.C. § 47506,

⁴ Indeed, there is a significant difference between the notion that low-level noise causes vibrations and that airport noise—an auditory disturbance—and vibrations—a disturbance characterized by the physical shaking of solid objects—are the same thing.

⁵ *Amicus Curiae* Brief at 13-18.

ACI-NA fails to explain how its extrinsic evidence and arguments are relevant, and the Court should not consider them.

III. CONCLUSION

For the foregoing reasons, Appellants respectfully ask this court to strike pages 16-18 of *amicus curiae* ACI-NA's brief or otherwise disregard its procedurally-improper and unsupported arguments regarding whether the term "noise" within 49 U.S.C. § 47506 encompasses damages claims based on vibrations.

RESPECTFULLY SUBMITTED this 10th day of September 2014.

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CERTIFICATE OF SERVICE

Laura Neal, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

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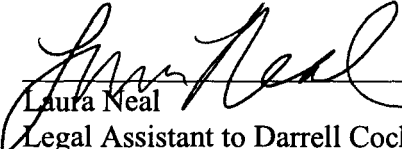
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