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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

JAMES D. BEARDEN

Petitioner,

vs.

DOLPHUS A. MCGILL,

Respondent.

No. 93178-0

MOTION TO STRIKE  
PORTION OF APPENDICES  
TO PETITION FOR REVIEW

**I. IDENTITY OF MOVING PARTY AND  
RELIEF REQUESTED**

Respondent moves to strike Appendix C and Appendix E from the appendices to the Petition for Review pursuant to RAP 10.3(a)(8), RAP 13.4(e), and RAP 9.1(a).

**II. GROUNDS FOR RELIEF AND ARGUMENT**

Appendix C to the Petition for Review is a transcript of the Division I oral argument. Appendix E to the Petition contains legislative history. Neither appendix is allowed under the rules and case law. Therefore, they should be stricken.

**A. APPENDIX C IS NOT PART OF THE RECORD ON REVIEW.**

A petition should comply with RAP 10.3 and 10.4. RAP 13.4(e). RAP 10.3(a)(8) provides an appendix may not include materials not included in the record on review except as provided in RAP 10.4(c). That rule allows a party to put a statute, rule, or "the like" in an appendix. A transcript of the Court of Appeals argument does not fit the RAP 10.4(c)

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provisions. And a transcript of the court of appeals argument is not part of the record on review. RAP 9.1(a) (record on review consists of report of proceedings, clerk's papers, exhibits, and certified administrative record). Appendix C is not a proper appendix and should be stricken.

**B. APPENDIX E CONTAINS MATERIALS CITED IN SUPPORT OF NEWLY RAISED ARGUMENT.**

The Petition for Review cites legislative history and includes it in Appendix E to the petition. The legislative history is cited in support of the argument that, "Insurers (who have effectively limitless resources) will appeal not only meritless causes but also close calls." (Petition 3) Petitioner did not make this argument in his Brief of Respondent at the Court of Appeals. This Court should not consider the argument because it is newly raised. *See Domingo v. Boeing Employees' Credit Union*, 124 Wn. App. 71, 86, 98 P.3d 1222 (2004); *Powers v. Hastings*, 20 Wn. App. 837, 849, 582 P.2d 897 (1978), *aff'd*, 93 Wn.2d 709, 612 P.2d 371 (1980). And it follows that the materials in the appendix should also not be considered.

The legislative history is also cited in support of the argument that, "A long line of cases emphasizes the intent that 'RCW 7.06.060(1) and MAR 7.3's purposes are to ease court congestion, encourage settlement, and discourage meritless appeals.'" (Petition 8) (quoting *Miller v. Paul M.*

*Wolff Co.*, 178 Wn. App. at 966). While Petitioner made this general argument at the Court of Appeals, he did not rely on, cite to, or otherwise provide the legislative history at the Court of Appeals. Therefore, Appendix E should be stricken.

### III. CONCLUSION

For the reasons stated above, Appendix C and Appendix E should be stricken from the appendices to the Petition for Review.

DATED this 24<sup>th</sup> day of June, 2016.

REED McCLURE

By



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- Answer to Petition for Review
- Motion to Strike Portion of Appendices to Petition for Review
- Affidavit of Service

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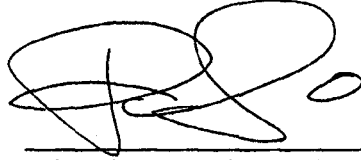
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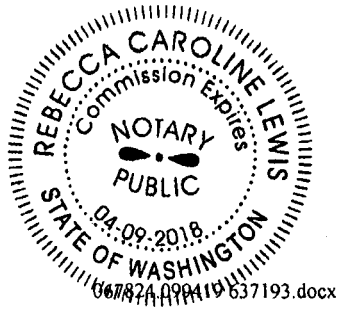


SIGNED AND SWORN to before me on June 24, 2016, by Jessica

Pitre-Williams.



Print Name: Rebecca C. Lewis  
Notary Public residing at: Lynnwood, WA  
My appointment expires: 4-9-2018



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