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NO. 58515-1-II

The motion to strike is parallel to
the merits to be decided at the
same time the merits of the appeal
are considered.

COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

J. V. Walker
Pltln

Curtis A. Beaupre, Plaintiff/Respondent

v.

Pierce County, Defendant/Appellant

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 JAN 10 PM 4:02

MOTION TO STRIKE

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Rules

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I. IDENTITY OF MOVING PARTY

Pierce County, appellant herein, respectfully requests the relief designated in Part II below.

II. STATEMENT OF RELIEF SOUGHT

The Court of Appeals should strike from the Clerk's Papers those documents relating to plaintiff's unsuccessful trial court motion to supplement the record with material not previously offered or considered at summary judgment, as well as references to and attachments of those documents contained in plaintiff's Motion on the Merits.

III. FACTS RELEVANT TO MOTION

A month after this Court's Commissioner granted Discretionary Review of the summary judgment order, plaintiff on October 24, 2006, moved in the trial court to supplement the record and modify its order pursuant to RAP 7.2(b) and RAP 9.12 by including a reference to part of a discovery document. See CP 213-223. Defendant opposed the motion on the ground the new material previously had never been offered or consid-

ered by the trial court on summary judgment and did not support plaintiff's mischaracterizations of them. See CP 224-235. On November 29, 2005, the trial court agreed with defendant and denied plaintiff's motion to supplement the record or modify its order. See CP 236-237.

Without appealing or objecting to that order, plaintiff thereafter simply designated those same rejected post summary judgment documents as Clerks Papers and attached them to his Motion on the Merits. See P's Mot. on Merits. Accordingly, defendant now moves to strike those documents and any reference thereto in plaintiff's briefing.

IV. GROUNDS FOR RELIEF AND ARGUMENT

Plaintiff has included in his Clerk's Papers -- and as part of his Motion on the Merits -- the aforementioned partial discovery document, but he nowhere mentions that: 1) it was not presented or considered at summary judgment; and 2) the superior court already has ruled it is improper to include it as part of the appellate record. Compare e.g. Mot. on Merits, pp. 4, 23 &

ex. "A" with CP 236-37. As a matter of law, plaintiff's use on appeal of the documents in question is improper and violates the Court's rules.

A. Rules Preclude Inclusion of New Document on Appeal

RAP 7.2(b) in pertinent part provides that the "trial court has authority to settle the record as provided in Title 9 of these rules," while RAP 9.12 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.

Here plaintiff never attempted to offer the document in question into evidence before the summary judgment order was entered and the trial court expressly refused to supplement the record on

appeal. CP 236-237.

Such a ruling was required because a “party seeking to avoid summary judgment . . . must affirmatively present the factual evidence upon which he relies.” Brown v. People’s Mortgage Co., 48 Wn. App. 554, 558, 739 P.2d 1188, 1191 (1987); Mackey v. Graham, 99 Wn.2d 572, 576, 663 P.2d 490, 492 (1983). This is so because CR 56(e) expressly requires that presentation of evidence entails the submission of “affidavits . . . made on personal knowledge” that “set forth such facts as would be admissible in evidence, and . . . show affirmatively that the affiant is competent to testify to the matters stated therein,” while “[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” Here the subject discovery responses -- much less “sworn or certified copies” -- were never presented in plaintiff’s opposing affidavit, at oral argument or at any time prior to the Court’s summary judgment order. Compare CP 179-212. Hence, the document at issue was not “called to the

attention of the trial court before the order on summary judgment was entered” as required. See e.g. Mithoug v. Apollo Radio, 128 Wn.2d 460, 462-463, 909 P.2d 291, 291-292 (1996) (documents “were called to the attention of the trial court” when “the court entered an order allowing them to be filed and the plaintiffs referred to them by page and line numbers in their memorandum.”); Skeie v. Mercer Trucking Co., 115 Wn.App. 144, 147, 61 P.3d 1207, 1209 (2003) (document was “called to the attention of the trial court and is properly before this court in the record on appeal” where plaintiff “filed [it] along with other affidavits on the same day he filed his response to Mercer’s motion for summary judgment.”)

Likewise, on appeal it is well settled that the purpose of RAP 9.12 “is to effectuate the rule that the appellate court engages in the same inquiry as the trial court.” Mithoug v. Apollo Radio of Spokane, 128 Wn.2d 460, 462, 909 P.2d 291, 292 (1996) (quoting Wash. Fed’n of State Employees v. Office of Fin. Mgmt., 121 Wn.2d 152, 157, 849 P.2d 1201, 1203

(1993))(emphasis added). See also Cowlitz Stud Co. v. Clevenger, 157 Wn.2d 569, 573, 141 P.3d 1, 3 (2006) (In reviewing an order of summary judgment, “this court engages in the same inquiry as the trial court.”) Hence, “RAP 9.12 codifies the requirement that the order on summary judgment specifically set forth those documents presented to the trial court in support of or in opposition to the motion” See 1 Washington Appellate Practice Deskbook, §15.11 at p. 15-19 (Third Ed., 2005)(emphasis added). Hence, as a matter of law a “record on appeal may not be supplemented by material which has not been included in the trial court record.” Snedigar v. Hodderson, 114 Wn.2d 153, 164, 786 P.2d 781, 786 (1990).

Pursuant to this Court’s rules and the trial court’s express ruling, the document relied upon by plaintiff is not properly included in the Clerk’s Papers or as an attachment to, or citation in, plaintiff’s Motion on the Merits.

B. Documents Improperly Before Court Should Be Stricken

In Nelson v. McGoldrick, 127 Wn.2d 124, 141, 896 P.2d 1258, 1266 (1995), the plaintiff submitted evidence not provided to the trial court or considered by it at the time of the summary judgment. When defendant moved to strike “on the basis the brief referred to evidence not on the record before the trial court at the time of the summary judgment,” the Supreme Court held the motion was proper and struck the document in question because it “was never considered by the trial court nor submitted to the court in deciding the summary judgment.” Id., at 141. Similarly, in Whatcom County v. State, 99 Wn.App 237, 246, fn 25, 993 P.2d 273, 278 (2000), the Court of Appeals ruled that though a party to the appeal “urges us to consider facts and arguments presented in its supplemental clerk’s papers, which were not presented to the trial court below” it “decline[d] to do so” because a “party may not supplement the record on appeal of a motion for summary judgment with materi-

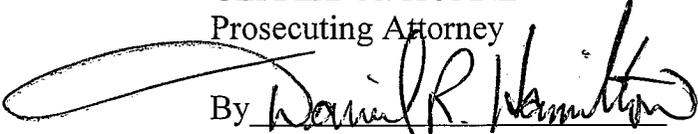
als not presented to the trial court.” See also State v. Skiggin 58 Wn.App 831, 839, 795 P.2d 169, 174 (1990) (Matters asserted in a brief not supported by the record are subject to a motion to strike).

V. CONCLUSION

For the above stated reasons, defendant respectfully requests this Court strike from the Clerk’s Papers all documents relating to plaintiff’s unsuccessful trial court motion to supplement the record with material not previously offered or considered at summary judgment, as well as strike references to and attachment of those documents contained in plaintiff’s Motion on the Merits.

DATED: January 14, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2007, a true copy of Motion to Strike by Appellant Pierce County was forwarded by United States Mail, postage prepaid, to:

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