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Feb 11, 2013, 3:24 pm
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SUPREME COURT
OF THE STATE OF WASHINGTON

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KEMPER FREEMAN, JIM HORN, STEVE
STIVALA, KEN COLLINS, MICHAEL
DUNMIRE, SARAH RINDLAUB, AL
DEATLEY, JIM COLES, BRYAN BOEHM,
EMORY BUNDY, ROGER BELL, and
EASTSIDE TRANSPORTATION
ASSOCIATION, a Washington nonprofit
corporation, MARK ANDERSON,

Appellants,

v.

STATE OF WASHINGTON, CHRISTINE
O. GREGOIRE, Governor, PAULA
HAMMOND, Secretary, Department of
Transportation; CENTRAL PUGET SOUND
TRANSPORTATION DISTRICT,
WASHINGTON STATE HOSPITAL
ASSOCIATION,

Respondents.

No. 87267-8

RESPONSE TO MOTION
TO STRIKE PORTIONS OF
REPLY BRIEF AND
AMICI BRIEFS

Eight days before oral argument, Central Puget Sound Transportation District ("Sound Transit") has moved to strike portions of the appellants' ("taxpayers") reply brief and portions of the briefs of amici who support the taxpayers' position. The motion should be denied.

1. The Motion to Strike Is Untimely

The taxpayers' reply brief in this matter was filed on December 21, 2012, almost two months ago. The amici motions for permission to file and amici briefs were filed 22 days ago, in accordance with the Court

rules. Sound Transit has already filed responses to the amici briefs to which it now objects.

When a party does not object to an appellate brief within 30 days of its filing, a motion to strike is untimely and the objection is waived. *Major Products Co., Inc. v. NW Harvest Products, Inc.*, 96 Wn. App. 405, 408, 979 P.2d 905, 907, review denied, *Major Products Co., Inc. v. NW Harvest Products, Inc.*, 139 Wn.2d 1007, 989 P.2d 1141 (1999).¹

Any objection to a motion to file an amicus brief must be lodged within five days. RAP 10.5(d).

Having failed to timely object to either the reply brief or the amicus briefs, and having already filed responses to the amici briefs, Sound Transit's objections are waived and the motion to strike should be denied in its entirety.

2. Sound Transit Relied Upon Public Documents Not of Record In Its Own Brief, and Cannot Now Complain About the Taxpayers' Documents

Sound Transit relied upon public documents not of record in its response brief, precisely the same practice it now criticizes when committed by its opponents. Sound Transit repeatedly directed this Court

¹ Although courts have discretion to consider such untimely motions, that authority is reserved for cases where the issue raised in the motion relates to "matters of continuing and substantial public interest." *Major Products*, 96 Wn. App. at 408. No such matter is raised in Sound Transit's motion.

to documents at Sound Transit's *website*, rather than to the record. Sound Transit Br. at 12 n.8, 14 n.10, 15 n.12, 16 n.13, 21 n.15.² Sound Transit's lack of transparency in this regard is striking. This Court could just as easily strike Sound Transit's own response brief on the same grounds.

Because these documents were in the public record, and in the interest of having a full and fair hearing on this matter, the taxpayers did not object to Sound Transit's reliance on their self-generated public documents. The taxpayers do not believe public documents relevant to this important case should be hidden from the Court.

By engaging in the same practice to which it now objects, Sound Transit has waived the objection.

3. The Auditor's Report Is Admissible Under RAP 9.11

Even if this Court considers Sound Transit's untimely and hypocritical motion to strike, the Auditor's Report should be admitted under RAP 9.11. Under that rule, new evidence is admissible on appeal if six criteria are met: (1) the facts are needed to fairly resolve the appeal, (2) the evidence would probably change the decision, (3) it is equitable to excuse the failure to introduce the evidence at trial, (4) postjudgment motions are impractical, (5) a new trial is inadequate or unnecessarily

² Unlike the documents upon which Sound Transit relies, which have existed for years, the Auditor's Report the taxpayers have cited was published in October 2012, and thus could not have been part of the record below.

expensive, and (6) it would be inequitable to decide the case solely on the trial court evidence.

With respect to the substantive tests under RAP 9.11, this Court needs to review the Auditor's Report in order render its decision. Sound Transit and WSDOT's entire argument is premised upon their own "factual" determinations that, in the future, the center lanes will be unneeded for highway purposes. A critical element of that claim is Sound Transit's ridership projections, which it claims will alleviate vehicle traffic and thus render the center lanes unneeded. The Auditor's Report contradicts many of Sound Transit's claims.

Sound Transit claims that Auditor's Report unauthenticated hearsay even though it is a public document. Motion to Strike at 4. This argument is baseless. This Court has a long history of routinely examining such public documents, particularly when they are generated by a respected state executive official charged with conducting performance audits. *See, e.g., State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 569, 452 P.2d 943, 952 (1969) (Finley, J., dissenting); *see also, Steel v. Johnson*, 9 Wn.2d 347, 351, 115 P.2d 145, 147 (1941); *State v. Bolen*, 142 Wash. 653, 658, 254 P. 445, 448 (1927). Such public documents fall under an exception to the hearsay rule. Public documents or "official written statements" are admissible even though the party who made the statements

therein contained is not produced in court. *Steel*, 9 Wn.2d at 350. The rule is partially founded upon expediency, but principally upon the presumption that the officer will do his duty. *Id.* This is taken as a sufficient guarantee of trustworthiness. *Id.*

Equally specious is Sound Transit's claim that the Auditor's Report is irrelevant because the "virtues" of light rail are not at issue. Motion at 4. The Auditor's Report relates directly to the issue of whether the center lanes are "not presently needed" and whether Sound Transit's representations that they will not be needed in the future are reliable. The Report is relevant, particularly when Sound Transit has used its own outside-the-record reports to represent otherwise.

Regarding the procedural elements of RAP 9.11, the Auditor's Report was not available until long after the trial court proceedings concluded, so the taxpayers' failure to cite it at trial is excusable. Now, eight days from oral argument, seeking admission in the trial court or a remand is impractical and unnecessarily expensive.

This Court should consider the Auditor's Report and argument based thereon in order to fairly resolve this case.

4. Policy Documents and Public Discussions Referenced By Amici Will Assist this Court in Understanding the Public Impact of Its Decision³

Sound Transit also objects to policy documents and newspaper articles cited by amici. Motion at 6-11. First, Sound Transit objects to amicus' reliance on documents that are, in fact, part of the record: the Declaration of Jim Horn and the Washington Policy Center WPC Report. *Id.* The trial court *denied* Sound Transit's motion to strike them. Second Sound Transit also objects to amicus' reference to newspaper articles. *Id.*

Regarding the Horn declaration and the WPC report, they are part of this record unless and until this Court grants Sound Transit's cross-appeal of denial of its motion to strike. Sound Transit's claim that parties or amici may not rely on documents that are of record simply because this Court *might* strike them later is unsupported by any rule or case. It would create a bizarre Catch-22 where any party could effectively remove evidence from the record on appeal by simply cross-appealing from the trial court's decision to admit it.

If this Court agrees with Sound Transit in its cross-appeal regarding the Horn and WPC documents, it can disregard them then. However, any claim that either the taxpayers or amici are prohibited from

³ Arguments about amici briefs are solely the positions of the taxpayers and should not be imputed to amici. Taxpayers raise these arguments because they believe the legal and policy issues raised by amici are beneficial to this Court.

relying on them is unsupportable.

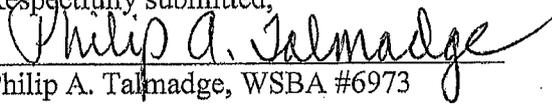
Regarding newspaper articles and other materials Sound Transit deems "hearsay," they do not appear to be offered for the truth of the matter asserted, but rather give this Court policy context regarding the broad public interest in the issues before it.

This Court is not only concerned with matters of pure law, but the intersection of law with the public interest. Part of the inquiry into the public interest in a case can be supplemented by reference to newspaper articles, which this Court occasionally consults *sua sponte*. See, e.g., *O'Connell*, 75 Wn.2d at 569 n.2 (Finley, J., dissenting).

The taxpayers respectfully request that this Court deny Sound Transit's untimely and ill-founded motion to strike.

DATED this 14th day of February, 2013.

Respectfully submitted,


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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of: Response to Motion to Strike Portions of Reply Brief and Amici Briefs in Supreme Court Cause No. 87267-8 to the following parties:

George Kargianis Law Offices of George Kargianis 2121 5 th Avenue Seattle, WA 98121-2510	Kristen L. Fisher Law Offices of Joanne R. Werner 2025 1 st Avenue, Suite 830 Seattle, WA 98121-2179
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Original efiled with:

Washington 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: February 11, 2013, at Tukwila, Washington.



Talmadge/Fitzpatrick

OFFICE RECEPTIONIST, CLERK

To: Irelis Colon
Subject: RE: Kemper Freeman, et al. v. State of Washington, et al. - 87267-8

Rec'd 2/11/13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Irelis Colon [<mailto:irelis@tal-fitzlaw.com>]
Sent: Monday, February 11, 2013 3:23 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Kemper Freeman, et al. v. State of Washington, et al. - 87267-8

Per Mr. Talmadge's request, attached please find a scanned copy of the, "Response to Motion to Strike Portions of Reply Brief and Amici Briefs" on the following case:

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Cause No.: 87267-8
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Sincerely,

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