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STATE OF WASHINGTON
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NO. 91555-5

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SUPREME COURT OF THE STATE OF WASHINGTON

GUY WUTHRICH,

Petitioner,

v.

KING COUNTY AND CHRISTA GILLAND,

Respondents.

**RESPONDENT KING COUNTY'S MOTION TO STRIKE
PORTIONS OF PETITIONER'S ANSWER TO BRIEF OF *AMICUS
CURIAE* WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS**

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ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

I. IDENTITY OF MOVING PARTY AND RELIEF SOUGHT

The Answer Brief filed by Petitioner Wuthrich to the *Amicus* Brief of the Washington State Association of Municipal Attorneys (“Answer Brief”) contains substantial citation to materials outside the record in violation of the Rules of Appellate Procedure and applicable case law. Respondent King County hereby requests that the Court strike the text and footnotes on pages 7-11 of the Answer Brief, which includes all of Section II-C and the Conclusion of the brief. The RAPs do not allow either party to cite and formulate arguments based on materials outside the record.

II. ISSUE

Should the Court strike portions of an Answer Brief that substantially rely on materials outside the record? Yes.

III. GROUND FOR RELIEF AND ARGUMENT

When reviewing an order on summary judgment, the appellate rules emphasize that “the appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12. This is consistent with the well-established rule that “[c]ases on appeal are decided only on evidence in the record.” *State v. Leach*, 113 Wn.2d 679, 693, 782 P.2d 552 (1989); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Under RAP 9.1(a), the record on review is limited to materials that were before the trial court. Supplementation of this basic record is allowed only through the procedures and criteria outlined in RAP 9.11. It has been recognized that "RAP 9.11 is a limited remedy." *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 849 P.2d 669 (1993). No such motion is pending before this court.

Contrary to the plain language of RAP 9.12 and the case law, Petitioner's Answer Brief includes substantial citation to matters outside the record. These citations are contained in footnotes three to eleven and support the extra-record arguments made in Section II-C and the Conclusion of the Answering Brief. The cited materials are not present in the summary judgment record being reviewed by this Court. King County had no opportunity to review or respond to these materials in proceedings below. Petitioner's citation to extra record materials is improper – the cited materials were never before the trial court or the Court of Appeals.

It is not enough to merely strike the footnotes that contain various internet citations. The argument in Section II-C associated with these footnotes is based on the extra record facts. Similarly, the Conclusion summarizes the extra-record materials and associated arguments in violation of the appellate rules.

VI. CONCLUSION

Consistent with the case law and RAP 9.12, the Court should strike pages seven to eleven of Petitioner's Answering Brief, which includes the entirety of Section II-C and the Conclusion, as well as all associated footnotes.

RESPECTFULLY SUBMITTED this 29th day of October, 2015.

DANIEL T. SATTERBERG
Prosecuting Attorney

By:



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CERTIFICATE OF FILING AND SERVICE

On the 29th day of October, 2015, I filed the foregoing via email to supreme@courts.wa.gov and served the same via email per an e-service agreement as follows:

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



Maggie Flickinger, Legal Secretary
Done in Seattle, Washington

10/29/2015

Date

OFFICE RECEPTIONIST, CLERK

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Subject: RE: E-Filing: Guy Wuthrich v. King County and Christa Gilland (No. 91555-5) - Respondent King County's Motion to Strike Portions of Petitioner's Answer to Brief of Amicus Curiae Washington State Association of Municipal Attorneys

Received on 10-29-2015

Supreme Court Clerk's Office

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To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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Good afternoon,

Attached please find the following document for filing:

- Respondent King County's Motion to Strike Portions of Petitioner's Answer to Brief of Amicus Curiae Washington State Association of Municipal Attorneys

Case Name: Guy Wuthrich v. King County and Christa Gilland
Case Number: 91555-5
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Thank you,

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