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Pierce County's Second Motion to Strike
NO. 58515-1-II

is found to the merits to be decided at the same time
the merits of the appeal are considered.

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

CURTIS A. BEAUPRE, Plaintiff/Respondent

v.

PIERCE COUNTY, Defendant/Appellant

PIERCE COUNTY'S SECOND MOTION TO STRIKE

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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 Brief of Respondent its appendix and references to the materials contained therein, as well as the repetition of its argument opposing Appellant's pending motion to strike.

III. FACTS RELEVANT TO MOTION

On January 10, 2007, defendant moved to strike from the Clerk's Papers and plaintiff's then pending motion on the merits those documents relating to material not previously offered into the record or considered by the trial court at summary judgment. On January 12, 2007, plaintiff filed an answer to that motion, and on January 30, 2007, defendant's reply was filed. Though plaintiff's motion on the merits was denied by this Court on January 24, 2007, defendant's motion to strike is still pending before the panel.

On February 14, 2007, Respondent's Brief was filed and contains: 1) references to and arguments based on the same documents

that were the subject of the pending motion to strike, see e.g. Resp. Br., pp. 4, 7, 17; 2) a repetition of arguments already made in opposition to that motion to strike, id., pp. 37-39; 3) duplicate copies in the appendix of those materials objected to in the aforementioned motion, see Resp. Br., App. "A;" and 4) a copy in the appendix of the unpublished text of Locke v. City of Seattle, 133 Wn.App. 696, 131 P.3d 52 (2006).

Defendant now moves to strike from Respondent's Brief all references to or arguments based on materials that are the subject of the previous motion to strike, all briefing related to that earlier motion and all documents included in the appendix.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. Documents Subject To Previous Motion And All References And Arguments Related Thereto Should Be Stricken

Defendant has previously demonstrated that the documents the trial court refused to include in the appellate record because they had not been offered into evidence or considered by the time of summary judgment, see CP 236-237 -- as well as references to and attachments of those documents -- should be stricken from the

Clerks Papers and plaintiff's then pending motion on the merits. See 1/10/07 Mot. To Strike; 1/30/07 Reply. For the same reasons, those same documents and all references to or arguments based thereon should likewise be stricken from the Respondent's Brief and its Appendix. See e.g. Resp. Brief, pp. 4, 7, 17, App. "A." Indeed, as to the inclusion again of the subject document this time as Appendix "A," RAP 10.3(a)(8) provides in pertinent part that the appendix "may not include materials not contained in the record on review without permission from the appellate court" (Emphasis added).

B. Argument Related To Previous Motion Should Be Stricken

Respondent's Brief for some reason contains a section asserting that "Pierce County's Motion To Strike Lacks Merit" and repeats nearly verbatim arguments made earlier as part of plaintiff's opposition to the pending first motion to strike. Compare 1/12/07 Answer to Mot. To Strike, pp. 4-5 with Resp. Br., pp. 37-39. However, RAP 10.3(a)(6) requires that an appellate brief contain only "argument in support of the issues presented for review," and RAP 10.4(d) expressly prohibits the inclusion in an appellate brief of any motion other than one "which, if granted, would preclude hearing the case

on the merits.” See also RAP 17.4(d).

C. Copy Of Unpublished Text Of Opinion Should
Be Stricken

One of the many cases cited and discussed in Appellant’s brief was Locke v. City of Seattle, 133 Wn.App. 696, 131 P.3d 52 (2006). See App. Br., pp. 37, 41, 44. In its short discussion of Locke, Respondent’s Brief does not similarly just cite to the official report -- as it does for all other cases it discusses -- but unnecessarily attaches “as appendix B for the Court’s convenience” the full unpublished version of that case and thereby provides the part of the opinion that this Court specifically ordered not to be published because it “has no precedential value.” See Resp. Br., App. “B.” Plaintiff then draws the Court’s attention to the unpublished portion of that case by noting that -- though “only a portion of Locke ... is published” -- “no reference will be made to any part of the unpublished portions of the decision” which he nevertheless attaches to his brief. Id., p. 34 n. 8.

Though RAP 10.4(c) provides for inclusion in an appendix of “a statute, rule, regulation ... or the like,” it nowhere authorizes inclusion of an appellate opinion. Rather, pursuant to RAP 10.4(g)

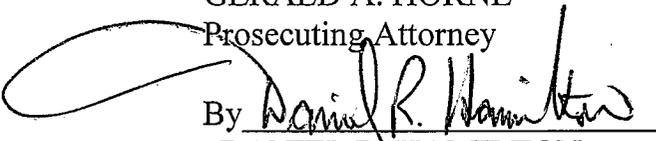
and GR 14, reference to case law is to be made by citation to the official reports. More importantly, RAP 10.4(h) and decisions interpreting that rule expressly prohibit use of such unpublished opinions. See e.g. Johnson v. Allstate Ins. Co., 126 Wn. App. 510, 519, 108 P.3d 1273 (2005)(party's "self-serving comment that it did not submit the [unpublished] opinion as controlling authority under RCW 2.06.040 does not remove the taint from its inappropriate action" of attaching it as "a courtesy copy" and referring to it in its appellate brief).

V. CONCLUSION

For the above stated reasons, defendant respectfully requests this Court strike from Respondent's Brief its appendix and all references to the materials contained therein, as well as the repetition of its argument opposing Appellant's pending motion to strike.

DATED: February 16th, 2007.

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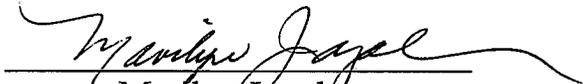
CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of February, 2007, a true copy of Appellant Pierce County's Second Motion to Strike was forwarded by United States Mail, postage prepaid, to:

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