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STATE OF WASHINGTON
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No. 87267-8

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SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

STATE OF WASHINGTON,
CHRISTINE O. GREGOIRE,
Governor, PAULA J. HAMMOND,
Secretary, Department of
Transportation, CENTRAL PUGET
SOUND REGIONAL TRANSIT
AUTHORITY,

Respondents.

**RESPONDENT CENTRAL
PUGET SOUND
REGIONAL TRANSIT
AUTHORITY'S MOTION
TO STRIKE PORTIONS OF
APPELLANTS' REPLY
BRIEF AND BRIEFS OF
AMICI CURIAE**

I. IDENTITY OF MOVING PARTY

Respondent Central Puget Sound Regional Transit Authority
("Sound Transit") respectfully moves to strike limited portions of
Appellants' Reply Brief and portions of the briefs of *amici curiae*.

II. STATEMENT OF RELIEF SOUGHT

Sound Transit respectfully requests that the Court strike Appendix A to Appellants' Reply Brief, as well as the following references in the Reply Brief to that Appendix and to other inadmissible materials:

1. At pages 4-6 and 42-43: references to Appendix A; and
2. At pages 4-6, 21, and 28: references to online and newspaper articles.

Sound Transit also requests that the Court strike materials outside the record appended to the brief of *amicus curiae* Haney Truck Line LLC ("Haney"), as well as the following references in the briefs of *amici curiae*:

1. At pages 8-13 of the Brief of *Amicus Curiae* Haney Truck Line LLC: references to Appendices and the Auditor Report; and
2. At pages 5-6, 16, and 19 of the *Amicus Curiae* Brief of Save MI SOV: references to "e-zine" website, the Washington Policy Center Policy Piece, and the Declaration of Jim Horn.

III. GROUNDS FOR RELIEF AND ARGUMENT

A. The Court Should Strike Appellants' References to Materials Outside the Record and to Other Inadmissible Evidence.

1. The Court Should Strike the Auditor Report and All References to the Report.

Appellants' Reply Brief improperly relies on materials outside of the record on appeal. Specifically, Appellants attach as Appendix A to their Reply Brief a publication of the State Auditor's Office ("Auditor Report"), which was not presented to the trial court and is not a part of the record before this Court. Appellants do not identify any grounds on which the Court can or should consider this material, nor do any such grounds exist.

Appellants fail to provide any argument or make any showing under RAP 9.11 that the Court should supplement the record with this new evidence. Supplementation of the record on appeal is appropriate only in an "extraordinary case." *See East Fork Hills Rural Ass'n v. Clark Cnty.*, 92 Wn. App. 838, 845, 965 P.2d 650 (1998). RAP 9.11 sets forth six required elements that must be satisfied before this Court may consider new facts outside the record. *See* RAP 9.11(a). The Auditor Report does not satisfy the six required elements of RAP 9.11 because, among other reasons, the new facts are not "needed to fairly resolve the issues on

review” and the new facts would not “probably change the decision being reviewed.” *See* RAP 9.11(a)(1) and (2).

Here, Appellants rely on the Auditor Report primarily to support their argument that Sound Transit’s ridership forecasts are incorrect. *See* Appellants’ Reply Br. at 4-6, 42-43; *see also* Haney Br. at 8-9. This argument, and the information cited in the Auditor Report, directly conflict with Appellants’ position before the trial court. In their summary judgment briefing to the trial court, Appellants argued that light rail ridership forecasts were not relevant: “the virtues of light rail are not pertinent to the legal issues raised.” CP 2627. RAP 9.12 precludes consideration of issues and facts not raised before the trial court. RAP 9.12 (“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.”).

Moreover, the Auditor Report is not admissible evidence regarding ridership forecasts. The Report is not authenticated, and Appellants fail to lay any foundation as to who prepared the report, his or her knowledge of the matters in the report, or his or her qualifications to provide expert testimony on ridership forecasts. *See* ER 602; ER 901; *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (expert testimony that lacks an adequate evidentiary foundation, or that is speculative or conclusory, is

inadmissible). Additionally, the Auditor Report constitutes inadmissible hearsay. *See* Section III(A)(2), *infra*.

Even if the Court could consider the Auditor Report, however, it is unnecessary to the determination of whether Sound Transit may lease the I-90 center roadway for light rail use after two new HOV and bus lanes are constructed. *See, e.g.*, Sound Transit's Resp. Br. at 41-46 (courts defer to WSDOT's discretionary decision as to whether highway lanes are needed). Appellants use this evidence only to invite the Court to intervene in the policy debate over roads versus transit. *See id.* at 50-52. As the Appellants argued at trial, the ridership information included in the Auditor Report is irrelevant to the constitutional and statutory issues before this Court and, as a result, it should not be added to the record.

In addition to failing to ask this Court to add the Auditor Report to the record pursuant to RAP 9.11, Appellants fail to ask this Court to take judicial notice of the Auditor Report or to set forth any grounds to establish that the report satisfies the standard for judicial notice.¹ ER 201(b) authorizes courts to take judicial notice of a fact that is "not subject to reasonable dispute in that it is ... capable of accurate and ready

¹ Moreover, Appellants have failed to file a separate motion requesting that the Court take judicial notice of this new factual material, as required by RAP 17.4(d) ("A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits.").

determination by resort to sources whose accuracy cannot reasonably be questioned.” *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 726, 189 P.3d 168 (2008). The Auditor Report does not meet this standard because it contains extensive data compiled from other sources that is “subject to reasonable dispute” and is not capable of “accurate and ready determination.” In fact, the Auditor Report itself confirms that Sound Transit does dispute information and conclusions in the report. *See* Reply Brief, App. A at 66-74 (Sound Transit’s initial response to Auditor Report). The Auditor Report simply is not the sort of straightforward factual information that is not subject to dispute and, thus, is amenable to judicial notice. Accordingly, this Court should strike the Appendix and all references to the Appendix in the Reply Brief.

2. The Court Should Strike All Inadmissible Hearsay.

Appellants’ Reply Brief also improperly relies on inadmissible hearsay. Courts may not consider inadmissible hearsay when considering a motion for summary judgment (and this matter is on appeal from summary judgment). *Dunlap v. Wayne*, 105 Wn.2d 529, 535, 716 P.2d 842 (1986) (citing *Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 512 P.2d 1126 (1973)).² At pages 4-6, 21 n.7, and 28 of the Reply Brief,

² Hearsay generally is not admissible. ER 802. “Hearsay” is testimony of an out-of-court statement that a party offers in court to prove the truth of the matter asserted. ER 801(c).

Appellants rely on online,³ newspaper, and journal publications cited for the truth of the matters stated therein, which renders them inadmissible hearsay. *See State ex rel. Pierce Co. v. King Co.*, 29 Wn.2d 37, 45, 185 P.2d 134 (1947) (newspapers are inadmissible hearsay when offered for the truth of the matter asserted); *see also Tortes v. King County*, 119 Wn. App. 1, 13-14, 84 P.3d 252 (2003) (holding *Seattle Weekly* article was properly excluded as hearsay to the extent relied upon for the truth of the matters stated within the article).

Accordingly, the Court should strike all references to this inadmissible hearsay in the Reply Brief.

B. The Courts Should Strike References to Evidence Outside the Record and Other Inadmissible Evidence in the *Amicus* Briefs.

The brief of *amici curiae* Haney and Save MI SOV also rely on materials outside the record and other inadmissible evidence without providing any basis for this Court to consider those materials.

Additionally, both *amicus* briefs are replete with factual assertions that do not include any citation to the record. *See* Haney Br. at 8-14; Save MI SOV Br. at 2-9, 12-19. Inclusion of factual materials without citations to

³ At pages 5-6 of the Reply Brief, Appellants rely on an online “e-zine” edited by a self-identified opponent of light rail. *See* Public Interest Transportation Forum e-Zine, available at <http://www.bettertransport.info/pitf/Pif15.htm> (“[Editor John Niles’] opposition to investments in rail mass transit goes back to the early 1980s and originated in his judgment that Seattle mass transit without any trains worked better than in comparable cities that did have trains.”).

the record violates RAP 10.3(a)(5), which provides that a “[r]eference to the record must be included for each factual statement.”

This Court consistently has held that when an *amicus* brief does not comply with RAP 9.11 or RAP 10.3, it should be stricken from the court record. *See, e.g., Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 469-70, 229 P.3d 735 (2010) (reversing Court of Appeals decision refusing to strike portions of *amicus* brief that did not comply with RAP 9.11 and RAP 10.3); *United States v. Hoffman*, 154 Wn.2d 730, 735 n.1, 116 P.3d 999 (2005) (*amicus* briefs that do not comply with RAP 10.3 and RAP 10.6 should be stricken). Accordingly, for the specific reasons set forth below, portions of the *amicus* briefs of Haney and Save MI SOV should be stricken.

1. Haney’s “evidence” should be stricken.

In addition to failing to provide record citations as required by RAP 10.3, the Haney *amicus curiae* brief includes appendices that are outside the record on review. These appendices include an opinion piece issued by the Washington Policy Center (“WPC Policy Piece”), which has a Board of Directors that includes two of the Appellants. *See* Haney Br. at 11-13, App. B. Sound Transit moved to strike the WPC Policy Piece before the trial court on the grounds that it was not authenticated,

constituted improper expert testimony, and was hearsay. CP 2780-82. Sound Transit's request that the WPC Policy Piece be stricken is included Sound Transit's cross-appeal to this Court. Sound Transit's Resp. Br. at 54-57. The other appendices to the Haney *amicus* brief include two transportation policy reports that are not a part of the record on review before this Court. *See* Haney Br. at 10-11, App. A.

Haney fails to request that these materials be added to the record on appeal pursuant to RAP 9.11 or to make any showing under the six required elements of that rule. As with the Auditor Report discussed above, these appendices relate only to Haney's policy preference for roads over transit and not the constitutional or statutory issues before this Court. Accordingly, the appendices are not "needed to fairly resolve the issues on review" and would not "probably change the decision being reviewed." *See* RAP 9.11(a)(1), (2), and (3).

Haney also fails to submit a motion for the Court to take judicial notice or to provide any basis for the Court to take judicial notice of these materials. All of the appendices contain conclusions and opinions that are "subject to reasonable dispute" and contain extensive data compiled from other sources that is not capable of "accurate and ready determination." *Rodriguez*, 144 Wn. App. at 726. Finally, the Haney *amicus* brief contains

references to the Auditor Report, which for the reasons discussed above, also should be stricken. *See* Haney Br. at 8-9.

Accordingly, in the Haney *amicus* brief, the Court should strike all unsupported factual assertions, the appendices and all to references to those appendices, and all references to the Auditor Report.

2. Save MI SOV's references to inadmissible evidence should be stricken.

Like Haney's brief, Save MI SOV's *amicus curiae* brief fails to provide record citations as required by RAP 10.3, and relies on inadmissible evidence. Save MI SOV relies on the same "e-zine" cited in Appellants' Reply Brief. Save MI SOV Br. at 5-6. As discussed above, references to this e-zine constitute inadmissible hearsay and should be stricken.⁴ Additionally, Save MI SOV relies on the WPC Policy Piece and the Declaration of Jim Horn, which are inadmissible. *See id.* at 16, 19. In addition to moving to strike the WPC Policy Piece, Sound Transit also moved to strike the Horn declaration before the trial court, because it included evidence that lacked foundation, was not authenticated, was hearsay, and was improper expert testimony. CP 3122-23. Again, Sound

⁴ Save MI SOV's citation to the e-zine on page 6 of its brief leads to an error message page. Save MI SOV contends that the link leads to a letter from the Federal Highway Administration ("FHWA"). *See* Save MI SOV Br. at 5-6.

Transit has cross-appealed on that issue. Sound Transit's Resp. Br. at 54-57.

Accordingly, in the Save MI SOV *amicus* brief, the Court should strike all unsupported factual assertions and all references to the e-zine, the WPC Policy Piece, and the Horn declaration.

IV. CONCLUSION

For the foregoing reasons, Sound Transit respectfully requests that the Court strike the evidence outside the record appended to Appellants' Reply Brief and to the Haney *amicus curiae* brief. Sound Transit also requests that the Court strike all references to this and other inadmissible evidence in Appellants' Reply Brief and the *amicus curiae* briefs of Haney and Save MI SOV.

RESPECTFULLY SUBMITTED this 8th day of February, 2013.

PACIFICA LAW GROUP LLP

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Subject: RE: Freeman et al. v. State et al.: Cause No.: 87267-8: Respondent's Motion to Strike Portions of Appellants' Reply Brief and Briefs of Amici Curiae

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From: Dawn Taylor [<mailto:Dawn.Taylor@pacificallawgroup.com>]
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Cc: lisabelden@aol.com; bryceb@atg.wa.gov; scrane@cranedunham.com; george@kargianislaw.com; phil@tal-fitzlaw.com; Paul Lawrence; Matthew Segal; Jessica Skelton; Bill Hill; Dawn Taylor
Subject: Freeman et al. v. State et al.: Cause No.: 87267-8: Respondent's Motion to Strike Portions of Appellants' Reply Brief and Briefs of Amici Curiae

Good afternoon.

Attached for filing, please find Respondent Central Puget Sound Regional Transit Authority's Motion to Strike Portions of Appellants' Reply Brief and Briefs of Amici Curiae in the above-referenced matter.

If you have any difficulties with the attachments, please do not hesitate to contact me.

Thank you.

Dawn M. Taylor
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