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AB

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 REPLY IN SUPPORT OF
MOTION TO STRIKE**

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DAVID J. HACKETT
CINDI S. PORT
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Attorneys for Respondent King County

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King County has moved to strike a portion of Wuthrich's Answer to Amicus Washington State Association of Municipal Attorneys ("Answer Brief") because it contains substantial citation to materials outside the record in violation of the Rules of Appellate Procedure and applicable case law. In response to King County's Motion to Strike, petitioner Wuthrich fails to cite any case or rule justifying his citation to materials outside the record. The County's motion should be granted.

Wuthrich implicitly acknowledges that he cites to a number of sources outside the record. Response at 1-2. He claims that he is free to cite to "government publications" – written materials that range from purported manuals to mere websites – but fails to cite any case law or RAP provisions supporting his position. There is no testimony in the record authenticating these materials, nor is there testimony ensuring that they were in place and applicable at the time of the 2005 intersection redesign, or the accident in this case.

Even with proper authentication, government documents do not fall outside the general rule limiting appellate review to the record established below. *See Dep't of Labor & Indus. v. Lanier Brugh*, 135 Wn. App. 808, 823, 147 P.3d 588, 595 (2006) (Citation to U.S. Postal Service letter regarding the need to pay overtime struck under RAP 9.1, 9.11 and 9.12 because it was outside the record.). The general rule limiting

appellate review to the record is well established. *See, e.g. State v. Kipp*, 171 Wash.App. 14, 35, 286 P.3d 68, 79 (2012)(“This court will not review matters outside the record on direct appeal.”); *State v. Link*, 136 Wash.App. 685, 697, 150 P.3d 610, 617 (2007)(“we cannot review matters outside the record”).

Importantly, in citing to his various websites, Wuthrich fails to address the specific language of RAP 9.12, which applies here because the Court is reviewing a grant of summary judgment by the trial court. The language of this rule could not be plainer: “the appellate court will consider only evidence and issues called to the attention of the trial court.” RAP 9.12. Wuthrich’s citation to various websites outside the record violates this appellate rule.

The RAP 9.12 rule is important because it avoids the problematic approach of reversing trial courts based on materials outside the record and precludes prejudice to the parties on appeal. In this case, King County is prejudiced by Wuthrich’s effort to inject extra record materials into this appeal because (1) there is no opportunity to respond to the Answer Brief, and (2) an adequate response would require testimony and depositions, not just additional citations to even more websites. If Wuthrich had raised these materials below, King County would have had the opportunity – consistent with CR 56 – to establish the record necessary for full

consideration of the claims that Wuthrich now makes in Section II-C and the Conclusion of his answering brief. By waiting until the second level of appellate review before raising these claims and citing these materials, Wuthrich has left King County without the ability to answer; this is prejudicial.

Finally, Wuthrich complains that King County's requested relief encompasses a single sentence in Section II-C where he provides a record cite to CP 502. Answer Br. at 9. A single proper sentence, however, does not save the section. Wuthrich chose to cite extra-record materials and intermix one record citation within the larger context of Section II-C. This Court should not have to parse Wuthrich's Answer Brief line-by-line to save a single sentence; Wuthrich bears the risk. The vast bulk of Section II-C and the Conclusion are outside the record and should therefore be struck.

For these reasons, the Court should grant King County's Motion to Strike.

RESPECTFULLY SUBMITTED this 4th day of November, 2015.

DANIEL T. SATTERBERG
Prosecuting Attorney

By:



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CERTIFICATE OF FILING AND SERVICE

On the 4th day of November, 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

11/4/2015

Date

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Supreme Court Clerk's Office

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Good morning,

Attached please find the following document for filing:

- Respondent King County's Reply in Support of Motion to Strike

Case Name: Guy Wuthrich v. King County and Christa Gilland
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Thank you,

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