

FILED
SUPREME COURT
STATE OF WASHINGTON
2/3/2025 1:24 PM
BY ERIN L. LENNON
CLERK

SUPREME COURT
OF THE STATE OF WASHINGTON

RUTH SCOTT, individually, and
as personal representative of the
ESTATE OF MIKAEL SCOTT,
a deceased individual; JEFF
MUHLEMAN, individually, and
as personal representative of the
ESTATE OF TYLER
MUHLEMAN, a deceased
individual; and CINDY CRUZ,
individually,

Petitioners,

v.

AMAZON.COM, INC., a
Delaware corporation,

Respondent.

MARY-ELLEN VIGLIS,
individually, and as personal
representative of the ESTATE OF
DEMETRIOS VIGLIS, a
deceased individual; JAMES
PASSANNANTI, individually,
and as personal representative of
the ESTATE OF AVA
PASSANNANTI, a deceased
individual; and ANNETTE
GALLEGO, individually,

No. 103730-9

PETITIONERS'
OPPOSITION TO
AMAZON'S
MOTION TO
INCLUDE
EXTRARECORD
MATERIALS
IN APPENDIX

Petitioners,

v.

AMAZON.COM, INC., a
Delaware corporation,

Respondent.

A. INTRODUCTION

Amazon.com, Inc. (“Amazon”) tries to side step compliance with RAP 9.11 in providing new evidence on appeal by slipping new evidence into the appendix to its answer to the families petition for review accompanied by its RAP 10.3(a)(8) motion. The rules for the form of briefs apply to the form of petitions for review. RAP 13.4(e). Specifically, RAP 10.3(a)(8) applies to petitions for review and answers to same. Amazon should not be permitted to submit new evidence on review in its answer.

This Court should deny Amazon’s RAP 10.3(a)(8) motion insofar as such a motion is not a substitute for compliance with

RAP 9.11. Amazon's new evidence fails the strict requirements of RAP 9.11. Thus, this Court should deny Amazon's motion, and strike its answer, insofar as it relies on extrarecord evidence. RAP 10.7. Amazon should submit an answer confined to the trial court record.

B. STATEMENT OF THE CASE

The extrarecord evidence that Amazon asks this Court to consider in its appendix was never submitted or considered by the trial court or Division I. The appendix materials come from an entirely different case brought against Amazon. These materials are new, substantive evidence under RAP 9.11.

By contrast, the materials that were in the appendix to petitioners' petition, to which Amazon did not object, are the type of materials that properly should be a part of an appendix. They were not new evidence with the meaning of RAP 9.11. One part of that appendix was not evidence but legal citations – a compilation of the various sodium nitrite cases against Amazon that could have been cited in the text of the petition but were

provided to the Court in the appendix for its convenience. Another part of the appendix was evidentiary, but not new – they were full copies of documents referenced in the record and considered by the lower courts.

As will be discussed *infra*, Amazon’s appendix was new evidence.

C. ARGUMENT

(1) RAP 9.11 Allows New Evidence on Review in Rare Circumstances

Only in *rare* circumstances may evidence generated after the trial court’s decision be made part of the appellate record pursuant to RAP 9.11. *Mission Ins. Co. v. Guarantee Ins. Co.*, 37 Wn. App. 695, 702, 683 P.2d 215 (1984) (the taking of additional evidence on appeal is confined to “unusual circumstances”). Such efforts to expand the appellate court record are *disfavored*. As cogently noted in the WSBA’s *Washington Appellate Practice Deskbook* (4th ed.) § 9.13 at 9-27: “In practice, new evidence is rarely considered by the

appellate court.”¹ The *Deskbook* reaffirms the fact that RAP 9.11 motions are granted only in “rare circumstances.” *Id.*

Amazon’s declaration from the *Jenks* case is new evidence in this case. Plainly, it was *evidence* in *Jenks*. The Miller declaration in the appendix to Amazon’s response to the petition for review was never presented to the trial court or Division I. As new, substantive evidence, RAP 9.11, not RAP 10.3(a)(8), governs its inclusion in the record before this Court.

RAP 9.11 is precise in setting forth the criteria to be met before new evidence may be considered on review. That rule contains six conditions under which new evidence will be received on appeal.

(1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party’s

¹ Washington courts have routinely *rejected* requests to provide new evidence on appeal. *E.g.*, *State v. Fuentes*, 179 Wn.2d 808, 826-27, 318 P.3d 257 (2014); *Freeman v. State*, 178 Wn.2d 387, 406-07, 309 P.3d 437 (2013); *Retired Public Employees Council of Wash. v. Charles*, 148 Wn.2d 602, 613, 62 P.3d 470 (2003).

failure to present the evidence to the trial court, (4) the remedy available to a party through postjudgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court.

RAP 9.11(a). *All* six factors must be satisfied before new evidence is admissible under RAP 9.11(a). *In re Recall Charges Against Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003); *Wash. Fed’n of State Employees Council 28 v. State*, 99 Wn.2d 878, 884, 665 P.2d 1337 (1983). Amazon cannot document that its “new evidence” meets all six criteria, nor does it even attempt to do so in its motion. Further, Amazon has no explanation for its failure to make this evidence, readily available to it, a part of the trial court record.

In addition to the fact that this new evidence is not necessary for the Court’s review decision, there is nothing about Amazon’s newly proffered evidence that would probably change the decision being reviewed. *Ha v. Signal Electric, Inc.*, 182 Wn.

App. 436, 456, 332 P.3d 991 (2014), *review denied*, 182 Wn.2d 1006 (2015) (rejecting effort to include exhibits in brief as failing to meet RAP 9.11 criteria). There is also nothing “inequitable” about rejecting Amazon’s belated presentation of this information. Amazon cannot meet the stringent criteria of RAP 9.11.

(2) A RAP 10.3(a)(8) Motion Is Not a Substitute for Compliance with RAP 9.11

RAP 10.3(a)(8) mandates that a party seek the Court’s permission to include extrarecord materials in the appendix of its brief. *ZDI Gaming, Inc. v. State ex rel. Wash. State Gambling Comm’n*, 151 Wn. App. 788, 816-17, 214 P.3d 938 (2009), *aff’d*, 173 Wn.2d 608, 268 P.3d 929 (2012) (striking appendix in brief with materials that were not part of the record); *Hensrude v. Sloss*, 150 Wn. App. 853, 860 n.12, 209 P.3d 543 (2009) (striking extrarecord material from appendix, noting proper procedure for adding new evidence to record was RAP 9.11 motion).

Petitioners are prejudiced by Amazon’s effort to argue its

new evidence for the first time in this case. Petitioners would have responded to that new evidence below, but Amazon's submission of that evidence not only foreclosed a response to the evidence at trial and at Division I, petitioners are further denied a fair opportunity to respond to its new-found evidence at this stage of the case. RAP 13.7(d) (replies to petitions for review are restricted).

Amazon's back door expansion of the appellate record deprives the petitioners of any opportunity to provide countervailing evidentiary materials on the deficient warnings to sodium nitrate users, particularly vulnerable young people, to the Court. Those warnings said nothing about the resulting agonizing, gruesome death that sodium nitrate ingestion causes, or that the effect of the poison is irreversibly fatal.

Amazon's effort to belatedly inject new evidence into the record at this late stage is particularly inappropriate in a CR 12(b) review. Amazon *chose* to file a CR 12(b)(6) motion to dismiss. The record for that motion was confined to the facts set forth in

the petitioners' complaints. It cannot now expand the record beyond the confines of CR 12(b)(6) at this late stage of review.

Amazon fails to meet the test for inclusion of new extrarecord evidence in its answer. RAP 10.3(a)(8).

D. CONCLUSION

Amazon's submission of new evidence for the first time on appeal is improper. A RAP 10.3(a)(8) motion does not allow Amazon to sidestep compliance with RAP 9.11, particularly where petitioners cannot respond to Amazon's arguments in its answer to the petition for review predicated upon that new evidence. RAP 13.7(d). This Court should deny Amazon's RAP 10.3(a)(8) motion; the Court can readily see through its transparent effort to seek admission of new evidence without meeting the criteria of RAP 9.11. The Court should further reject Amazon's answer, RAP 10.7, and order it to submit a proper answer.²

² In addition to this new evidence in the appendix to its response, Amazon makes reference to facts not of record in its

This document contains 1,357 words, excluding the parts
of the document exempted from the word count by RAP 18.17.

DATED this 3rd day of February, 2025.

Respectfully submitted,

/s/ Philip A. Talmadge

Philip A. Talmadge, WSBA #6973

Gary W. Manca, WSBA #42798

Talmadge/Fitzpatrick

2775 Harbor Avenue SW

Third Floor, Suite C

Seattle, WA 98126

(206) 574-6661

Corrie Yackulic, WSBA #16063

Corrie Yackulic Law Firm PLLC

110 Prefontaine Place S., #304

Seattle, WA 98104

(206) 787-1915

Carrie Goldberg

Naomi Leeds

C.A. Goldberg, PLLC

16 Court Street, 33rd Floor

Brooklyn, NY 11241

(646) 666-8908

Attorneys for Petitioners

answer, a studied effort to circumvent the record. RAP 10.3(a)(5)(requiring citation to the record for facts). For example, the information Amazon cites at 1, regarding customers' alleged purchases of units of sodium nitrate on Amazons' virtual marketplace is not in the record anywhere. Such "facts" should not be cited in any revised answer.

Opposition to Motion to Include - 10

Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Petitioners' Opposition To Amazon's Motion to Include Extrarecord Materials in Appendix*** in Supreme Court Cause No. 103730-9 to the following parties:

Gregory F. Miller
W. Brendan Murphy
Michelle L. Maley
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099

Carrie Goldberg
Naomi Leeds
C.A. Goldberg, PLLC
16 Court Street, 33rd Floor
Brooklyn, NY 11241

Corrie J. Yackulic
Corrie Yackulic Law Firm PLLC
110 Prefontaine Place So., # 304
Seattle, WA 98104

Original electronically filed with:
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: January 3, 2025 at Seattle, Washington.

/s/ Brad Roberts
Brad Roberts, Legal Assistant
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

February 03, 2025 - 1:24 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 103,730-9
Appellate Court Case Title: Ruth Scott, et al. v. Amazon.com, Inc.

The following documents have been uploaded:

- 1037309_Answer_Reply_20250203132137SC596665_9559.pdf
This File Contains:
Answer/Reply - Objection
The Original File Name was Opposition to Motion to Include Extrarecord Materials in Supplemental Appendix.pdf

A copy of the uploaded files will be sent to:

- bmurphy@perkinscoie.com
- brad@tal-fitzlaw.com
- christine@tal-fitzlaw.com
- corrie@cjylaw.com
- ekoehler@perkinscoie.com
- gary@tal-fitzlaw.com
- gmiller@perkinscoie.com
- matt@tal-fitzlaw.com
- mmaley@perkinscoie.com
- patricia@cjylaw.com

Comments:

Opposition to Motion to Include Extrarecord Materials in Appendix

Sender Name: Brad Roberts - Email: brad@tal-fitzlaw.com

Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:

2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

Note: The Filing Id is 20250203132137SC596665