

No. 1037309

IN THE 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,

Petitioners,

v.

AMAZON.COM, INC., A DELAWARE CORPORATION,
Respondent.

**Reply to Petitioners' Opposition to Motion to
Include Extra-Record Materials in Appendix**

I. INTRODUCTION

This Court should grant Amazon’s Motion to Submit a Supplemental Appendix. *See* Dkt. #5 (hereafter “Amz. Mot.”). Plaintiffs do not dispute that the additional materials provide a true and accurate copy of the webpage displaying the “Pro-Cure” brand sodium nitrite at issue in the *Jenks* and *Quiroz* cases cited in Plaintiffs’ own Appendix. *See* Supp.App.2; Dkt. #6 (hereafter “Answer to Pet.”) at 6; Pet.App.59. Nor do Plaintiffs dispute that the materials are incorporated by reference into the *Jenks* and *Quiroz* complaints and are public filings—not evidence—of which this Court can take judicial notice. *See* Amz. Mot. at 3. Accordingly, there is no justification for denying this Court “the benefit of understanding the range of products implicated by the products-liability issues that the Petition raises.” *Id.* at 2. That is especially true given that Plaintiffs’ own Petition invoked the *Jenks* and *Quiroz* cases as reasons for this Court to grant review. *See* Pet.3; Pet.App.59.

Plaintiffs’ primary argument is that Amazon’s motion fails to satisfy RAP 9.11. But the rule clearly does not apply because the additional materials are not “evidence on the merits of the case.” RAP 9.11(a). That is confirmed by the fact that Plaintiffs filed their own motion under RAP 10.3(a)(8)—*not* RAP 9.11—to include in their appendix two documents that were never entered in the trial court record or considered by the trial court below. *See* Dkt. #1 (hereafter “Pltfs. Mot.”). Plaintiffs argued that those documents, a news article about sales of sodium nitrite on Amazon.com and a letter regarding possible regulation of sodium nitrite sales, were “legislative facts of which this Court can take judicial notice,” and that Amazon would “not be prejudiced by their inclusion” because they are “public records.” *Id.* at 3. Yet Plaintiffs now insist that what is good for the goose is somehow “improper” for the gander. Dkt. #9 (hereafter “Pltfs. Opp.”) at 9. Both sets of materials should be included in the record as legislative facts bearing on the duty questions presented for review.

Plaintiffs provide no other basis for denying Amazon’s motion. Plaintiffs do not dispute that the materials are judicially noticeable and relevant to the “question of duty” raised by the Petition. Amz. Mot. 2. Instead, they assert—without authority or explanation—that they “are prejudiced” by the additional material. Pltfs. Opp. at 7. Nothing in RAP 10.3(a)(8) or the precedents applying it make an opposing party’s assertions of “prejudice” a reason for refusing to supplement the appellate record. Plaintiffs’ concern seems to be that, by showing that sodium nitrite is used for hobbyist purposes like making custom fishing bait, the supplemental materials further undermines their repeated conclusory assertion—including in the “Issues Presented for Review”—that sodium nitrite has “no household use.” Pet.4. But those assertions are already foreclosed by FDA regulations and Plaintiffs’ own allegations acknowledging sodium nitrite’s use by “home food preservers.” CP14; *see* Answer to Pet. at 6. So even if prejudice were a relevant consideration, Plaintiffs cannot claim any here.

II. ARGUMENT

A. RAP 9.11 does not apply.

In their own motion to supplement the record, Plaintiffs correctly identified the applicable rule as RAP 10.3(a)(8), not RAP 9.11. *See* Pltfs. Mot. at 3. Their argument that RAP 9.11 applies to Amazon’s motion is not just hypocritical but incorrect.

RAP 9.11 provides a method for the appellate court to “direct that additional evidence on the merits of the case be taken” and contemplates that the “appellate court will ordinarily direct the trial court to take additional evidence.” RAP 9.11(a), (b). The text and structure of the rule makes clear that it has no applicability to the briefing on the pending Petition for Review under RAP 13.4.

The materials added by Amazon’s motion are not “evidence on *the merits* of the case.” RAP 9.11(a) (emphasis added). The phrase “on the merits of the case” was added in 1994 “to make it clear that the rule does not restrict the ability to present new evidence on a

motion in the appellate court.” RAP 9.11; 2A Elizabeth Turner, WASH. PRACTICE: RULES PRACTICE RAP 8.11 authors’ cmts. (9th ed. 2022). Accordingly, Division III has held that RAP 9.11 does not apply to material submitted “to support a motion in this [appellate] court.” *M.G. by Priscilla G. v. Yakima Sch. Dist. No. 7*, 24 Wn. App. 2d 703, 720, 524 P.3d 670 (2022). That principle applies here because Amazon has submitted the materials as part of the briefing on whether this Court should grant review under RAP 13.4.

Plaintiffs assert that this case “involves an issue of substantial public interest,” (RAP 13.4(b)(4)), because Amazon is allegedly selling a dangerous product that has “no household uses.” Pet. 1. The supplemental materials submitted by Amazon directly counter this misstatement by demonstrating yet another household use of sodium nitrite: curing fishing bait. That is relevant to Plaintiffs’ argument under RAP 13.4(b)(4), not to the merits of the appeal—which are not currently before this Court.

Additionally, RAP 9.11(b) instructs that the kind of “evidence” covered by the rule should “ordinarily” be introduced by “direct[ing] the trial court to take additional evidence and find the facts based on that evidence.” So the rule is meant to place “restrictions” on the “adjudicative facts” about the specific parties that an appellate court can consider. *Matter of Est. of Sammann*, 17 Wn. App. 2d 1030, 2021 WL 1700849, at *4 (2021) (unpub.). It does not apply to legislative facts bearing on purely legal questions, like whether a court should recognize a novel duty of care. *See infra* at 7-9.

B. Plaintiffs provide no other basis to deny Amazon’s motion.

Plaintiffs offer no relevant authority to justify denying Amazon’s motion under RAP 10.3(a)(8). *See* Pltfs. Opp. 7-9. They ignore the two principles that clearly justify including the additional materials, even though they were not in the record below. And the arguments that Plaintiffs do make are both irrelevant and meritless.

First, it is well-established that “courts may take judicial notice of facts outside the record if they meet the criteria under ER 201.” *M.G. by Priscilla G. v. Yakima Sch. Dist. No. 7*, 2 Wn.3d 786, 804 n.5, 544 P.3d 460 (2024). Plaintiffs do not dispute that the materials in Amazon’s Supplemental Appendix “are public filings of which this Court can take judicial notice.” Amz. Mot. 2 (collecting authorities).

Second, it is also well-established that “courts may take judicial notice of facts outside the record ... if they are considered legislative facts.” *M.G.*, 2 Wn.3d at 804 n.5. Plaintiffs do not dispute that the additional materials provide factual detail bearing on the “question of duty” the Petition raises. Amz. Mot. 2. Nor could they. Plaintiffs’ own motion acknowledges that “this Court can take judicial notice” of “legislative facts” pursuant to ER 201. Pltfs. Mot. at 3. And they make no attempt to explain how the news article in their appendix (about the sale of sodium nitrite) contains “legislative facts,”

but the additional materials Amazon presents somehow do not contain “legislative facts.” *Id.*

That is because the materials in Amazon’s Supplemental Appendix clearly contain legislative facts. That pure sodium nitrite has household uses for hobbyists, including curing fish baits, is a quintessential legislative fact. Legislative facts are “background information a court may take into account when determining the ... proper interpretation of a statute, or when extending or restricting common law rule.” *Ctr. For Biological Diversity v. Dep’t of Fish & Wildlife*, 14 Wn. App. 2d 945, 963, 474 P.3d 1107 (2020) (cleaned up). They are “social, economic, and scientific facts that simply supply premises in the process of legal reasoning.” *Wolf v. State*, 2 Wn.3d 93, 110, 534 P.3d 822 (2023) (cleaned up). As the commentaries to the Washington Rules of Evidence explain, “it is essential that courts have the unrestricted ability to employ judicially noticed ‘legislative facts’ in formulating legal rules.” *Wyman v. Wallace*, 94 Wn.2d 99, 102-03, 615 P.2d 452 (1980); *see also Templeton ex rel.*

Templeton v. Daffern, 98 Wn. App. 677, 687, 990 P.2d 968 (2000) (the existence of a duty of care “is to be answered generally ... in part by taking notice of legislative facts”) (cleaned up).

In determining whether the Washington Product Liability Act requires further interpretation, this Court may judicially notice the “social” fact that hobbyists use sodium nitrite at home for the purpose of preparing fish baits, a purpose for which sodium nitrite is lawfully sold. This is not an adjudicative fact because no element of Plaintiffs’ claims turns on whether or not Amazon sold sodium nitrite to other customers; rather, these facts may aid the Court should it decide to consider a seller’s legal duties under the WPLA with respect to products that have a range of legitimate uses and are not unreasonably dangerous unless they are intentionally misused in an obviously dangerous manner.

Plaintiffs’ arguments for excluding the Supplemental Appendix’s materials are unavailing. Their assertion that they “are prejudiced” by the additional

materials is irrelevant and nonsensical. Pltfs. Opp. 7. An opposing party claiming “prejudice” is not a basis for disregarding legislative facts, nor is it a relevant factor under RAP 10.3(a)(8). What’s more, Plaintiffs’ theory of prejudice makes no sense. They claim to have been “deprive[d]” of the “opportunity to provide countervailing evidentiary materials on the deficient warnings to sodium nitrate [sic] users.” *Id.* at 8. But they do not even attempt to explain what those “materials” would be. *Id.* What’s more, Amazon does not cite the Pro-Cure labels in its argument about the lack of any duty to warn. *See* Answer to Pet. 21-23. And the legislative fact that sodium nitrite *has* household uses (contrary to Plaintiffs’ repeated assertion that it does not) has nothing to do with Plaintiffs’ failure-to-warn theory.

The only “prejudice” Plaintiffs can actually claim is the existence, in documents already referred to in the record, of a legislative fact that undercuts the Petition’s conclusory assertion that sodium nitrite has no household use. But “[e]vidence is not prejudicial merely

because it is harmful to the adversary.” *In re Pac. Fertility Ctr. Litig.*, 2021 WL 1054374, at *5 (N.D. Cal. Mar. 19, 2021) (quoting 1 Federal Rules of Evidence Manual § 403.02). What’s more, Plaintiffs have *already* admitted—through their own complaint’s allegations—that sodium nitrite is used as a “meat preservative” by “home food preservers” and “common consumers.” CP14; CP230. As a matter of law there is no prejudice in admitting evidence establishing the same legislative fact. *Cf. Benna v. Reeder Flying Serv., Inc.*, 578 F.2d 269, 272 (9th Cir. 1978) (holding that “erroneously admitted evidence is not prejudicial if the facts had already been shown by admissible evidence”).

Finally, Plaintiffs’ attempts to fault Amazon for not presenting the additional materials to “the trial court or Division I” is disingenuous. Pltfs. Opp. at 3. The *Jenks* complaint was not filed until March 22, 2024. *See* Pet.App.59. That was more than three months after

Amazon filed its opening brief in Division I.¹ And Plaintiffs did not raise *Jenks* or *Quiroz* until they filed their Petition to this Court. Amazon’s attempt to provide background on the Pro-Cure sodium nitrite at issue in those cases—when Plaintiffs opened the door—is perfectly legitimate.

III. CONCLUSION

For the foregoing reasons, this Court should grant Amazon’s Motion to Submit a Supplemental Appendix.

* * * * *

Pursuant to RAP 18.17(b), I certify that this motion contains 1,897 words. *See* RAP 17.4(g)(1) and 18.17(c)(17).

RESPECTFULLY SUBMITTED this 13th day of February, 2025.

¹ *See* Petitioners Brief, *Scott v. Amazon.com, Inc.*, No. 84933-6-I (Wash. Ct. App. Dec. 15, 2023), *available at* <https://acdportal.courts.wa.gov/PublicAccess/api/Document/AVnjU4TxPGfMzVMjm0S9ReCy2omgvFtHkZU03RSytk%C3%816ePrgA1rY%C3%899xHXrOdkkv1pz3uL7yJZKKLkjg4FpPmvg4%3D/?OverlayMode=View>.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the state of Washington, that on February 13, 2025, I electronically filed the foregoing document via the Washington State Appellate Courts' Secure Portal which will send a copy of the document to all parties of record via electronic mail.

DATED this 13th day of February, 2025.


June Starr

GREGORY

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