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*The Court of Appeals
of the
State of Washington
Division III*



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CASE # 390390
Banner Bank v. Reflection Lake Community Association, et al
SPOKANE COUNTY SUPERIOR COURT No. 2020319932

Counsel:

Enclosed is your copy of the Commissioner's Ruling which was filed by this Court today.

If objections to the ruling are to be considered, RAP 17.7, they must be made by way of motion to modify and filed in this Court within **30 days** from the date of this ruling, by April 12, 2023. The answer, if any, to a Motion to Modify will be due **10 days** after the motion is served on the answering party. The moving party may submit a written reply to the answer to the motion to modify no later than **3 days** (excludes Saturdays, Sundays, and legal holidays) after the answer is served on the moving party. RAP 17.4(e) Please file the original; serve a copy upon the opposing attorney and file proof of such service with this office.

The Respondents/Cross-Appellants' Brief is now due within 10-Days from the date of this letter, by March 23, 2023.

Sincerely,

Tristen Worthen
Clerk/Administrator

TLW:jr

The Court of Appeals
of the
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FILED
Mar 13, 2023
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

BANNER BANK,

Plaintiff,

v.

REFLECTION LAKE COMMUNITY
ASSOCIATION, and RICK SMITH,

Respondents,

JAMES POWERS,

Appellant.

No. 39039-0-III

COMMISSIONER'S RULING

Pursuant to RAP 10.3(a)(8), Respondents Reflection Lake Community Association and Rick Smith (collectively, "Smith") ask the court for permission to include materials not contained in the record on review in an appendix to Respondents' Brief. Appellant James Powers opposes Smith's request, moves to strike the appendix to Respondents' Brief, and asks for the imposition of a \$500 monetary sanction under RAP 10.7. Smith opposes Powers' motion to strike.

FACTS

This is the second appeal to arise from an interpleader action initiated by Banner Bank to determine rights to bank accounts it held for Reflection Lake Community Association – a

homeowners' association in northeast Spokane. The homeowners' association had two competing boards of directors when the interpleader action began; one board was appointed, and one board was elected. On summary judgment, the trial court concluded that undisputed evidence showed the elected board's election complied with association bylaws and relevant statutes. Powers unsuccessfully appealed the trial court's decision, and, because the appeal was frivolous, Reflection Lake Community Association was awarded attorney fees and costs on appeal. *Banner Bank v. Reflection Lake Cmty. Ass'n*, unpub. op'n no. 38048-3-III, 2022 WL 214604, at *7 (Wa. Ct. App. Jan. 25, 2022) ("*Banner Bank I*"). A commissioner of this court ordered Powers to pay Reflection Lake Community Association \$140.88 in costs and \$14,637.50 in attorney fees. Commissioner's Ruling, *Banner Bank I*, no. 38048-3-III, at 3 (Apr. 13, 2022). After the mandate issued on *Banner Bank I*, the trial court reduced the award to a money judgment. Powers now appeals that money judgment and an order denying his request to stay entry of the judgment pursuant to a settlement agreement. Smith cross-appealed the same two decisions.

Powers' opening appellant's brief contends the trial court erred by refusing to enforce the settlement agreement and by entering the money judgment. Smith's proposed respondents' brief¹ argues that the judgment on the appellate fees and costs award from *Banner Bank I* should be affirmed because the trial court could not refuse to enter a judgment on this court's sanction order and because Powers waived his arguments and is estopped from attempting to avoid the judgment based on representations he made to this court in *Banner Bank I*, which are contrary to the terms of the settlement agreement he relies upon to avoid entry of judgment.

¹ The clerk of this court is holding the proposed respondents' brief pending entry of this ruling. In other words, the brief has yet to be accepted for filing.

On cross-appeal, Smith argues that the trial court erred by refusing to award fees for the time Smith spent entering the money judgment. Smith has attached nine documents outside the record on appeal to the proposed respondents' brief. Those nine documents fall into two categories. Five of the documents were filed in this court in *Banner Bank I*: a motion for stay of review pending implementation of settlement agreement, a withdrawal of motion for stay of review, two attorney fee declarations, and the *Banner Bank I* mandate. The remaining four documents were filed in a separate declaratory judgment action between the competing boards.

In addition to the interpleader action, Powers and appointed board members filed a separate declaratory relief action against the homeowners' association and members of the elected board. In that separate action, Powers and the appointed board members requested a judgment declaring the election invalid, declaring that the board lacked control over the water association serving Reflection Lake homes, and declaring a reorganization of the homeowners' association into two separate community associations. That matter ultimately settled after the trial court granted Powers' motion to enforce the settlement agreement he seeks to enforce in this case. Reflection Lake Community Association opposed enforcement by filing a response, a sur-response with an offer of proof, and two declarations. These responses and declarations are the remaining four documents in the appendix to the proposed Respondents' brief.

PARTIES' ARGUMENTS

Smith asks this court for permission to attach the nine documents described above in an appendix to respondents' brief.

Smith argues that the nine documents are relevant to demonstrate that Powers' arguments on appeal are frivolous, subject to estoppel, and omit key facts present in *Banner Bank I*. He relies

upon RAP 1.2(a) and asks the court to liberally interpret RAP 10.3(a)(8)² and permit inclusion because all nine documents have been publicly filed in either *Banner Bank I* or the parties' declaratory relief action. Finally, Smith alleges that the nine documents would be subject to judicial notice under ER 201.

Powers opposes Smith's motion and requests that it be denied because none of the nine documents in the appendix were filed in, submitted to, or considered by the trial court. Powers insists that the nine documents are irrelevant to the issue on appeal, i.e., the enforcement of the parties' mediated settlement agreement. He contends that, if Smith wishes to supplement the record on appeal, he must file a motion for additional evidence on review under RAP 9.11. Ultimately, Powers requests that respondents' brief be stricken for failing to "obtain prior permission" to attach the documents in an appendix to the brief pursuant to RAP 10.3(a)(8).

In reply, Smith requests that the court deny Powers' motion to strike as baseless and reiterates that the documents in the appendix to respondents' brief are subject to judicial notice and will help the court review the issues before it on appeal. Smith's reply also raises several new arguments for the first time. He argues that the appendix should be allowed because Powers – as the appellant – was obligated to provide a sufficient record for review and failed to do so by excluding the mandate in his designation of clerk's papers. He argues that the contents of its appendix should be permitted because Powers' appellant's brief allegedly references documents

² RAP 10.3(a)(8) states in relevant part: "An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c)."

filed in *Banner Bank I* and in the declaratory judgment action but not provided to this court. And he argues that the record on appeal can be supplemented under RAP 9.10 and RAP 9.11.

ANALYSIS

“An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).” RAP 10.3(a)(8).³

Five Documents Filed in *Banner Bank I*

The court will permit Smith to attach to Respondents’ Brief the five documents filed in this court in *Banner Bank I*, i.e., the motion for stay of review pending implementation of settlement agreement, the withdrawal of motion for stay of review, the two attorney fee declarations, and the *Banner Bank I* mandate. Because this case is supplementary to *Banner Bank I*, the five documents filed in *Banner Bank I* are subject to judicial notice in any event. *See Swak v. Dep’t of Labor & Indus.*, 40 Wn.2d 51, 53–54, 240 P.2d 560, 561–62 (1952) (holding that a Washington court “will take judicial notice of the record in the cause presently before it or in proceedings engrafted, ancillary, or supplementary to it” and citing for support, among other cases, *Perrault v. Emporium Department Store Co.*, 83 Wash. 578, 145 P. 438 (on second appeal, after new trial awarded on first appeal, facts in record of first trial noticed)). In *Perrault*, as in this case, “the nature of the proceeding was such that . . . the appellate court could infer that prior proceedings had taken place in the case before it . . . The record of those proceedings was then noticed judicially.” *Swak*, 40 Wn.2d at 53-54.

³ RAP 10.4(c), which encourages a party to attach “a statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like . . . in an appendix to the brief” does not apply here. The documents attached to the appendix to respondents’ brief do not include “a statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like.”

Four Documents Filed in Declaratory Judgment Action

The court will not permit Smith to attach to Respondents' Brief the remaining four documents, i.e., documents filed in Spokane County Superior Court Cause No. 20-2-03213-32. The record in the parties' declaratory judgment action is not entitled to judicial notice in this appellate matter even if documents in the declaratory judgment record are relevant and publicly filed. "[C]ourts of this state cannot, while trying one cause, take judicial notice of records of other independent and separate judicial proceedings even though they be between the same parties. The record, though public, must be proved." *Swak*, 40 Wn.2d at 54. The parties' declaratory judgment action is an independent and separate judicial proceeding. This court cannot take judicial notice of the records on file in that action.

Smith's remaining arguments raised for first time in reply will not be considered. "An issue raised and argued for the first time in a reply . . . is too late to warrant consideration." *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549, 553 (1992).

Accordingly, IT IS ORDERED, Respondents' motion is granted in part and denied in part. Respondents' Brief shall be returned to Smith for correction or replacement consistent with this ruling within 10 days after the date of this ruling. RAP 10.7. Appellant's motion to strike and request for sanctions are denied because Respondents' Brief was never accepted for filing but held in abeyance pending this ruling.



Hailey L. Landrus
COMMISSIONER