

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

SHERIFF CLAY PARKER, et al.,

Plaintiffs and Appellants,

v.

STATE OF CALIFORNIA, et al.,

Defendants and Respondents.

Case No. F064510

Fresno County Superior Court, Case No. 10-CECG-02116
The Honorable Jeffrey Y. Hamilton, Judge

**MOTION TO STRIKE APPELLANTS'
REPLY BRIEF; [PROPOSED] ORDER**

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Received by Fifth District Court of Appeal

Respondents State of California, Xavier Becerra, and the California Department of Justice, move this Court to strike the reply brief filed by Appellants on December 19, 2017. This motion is filed in conjunction with Respondent's Opposition to Appellants' Request for Judicial Notice. This motion is made on the ground that the reply brief relies heavily on documents that are not part of the record on appeal and are not subject to judicial notice.

In effect, Appellants submitted their reply brief on the assumption that this Court would approve their request for judicial notice of 170 pages of material that concern events that transpired years after the entry of the order that is the subject of this appeal. If the request for judicial notice is denied, Appellants should be ordered to resubmit the reply brief without references to the documents contained in the improper request for judicial notice, and without argument based on those materials. (California Rules of Court, rule 8.204(e)(2)(B).)

MEMORANDUM

The present appeal is from a January 18, 2012 order denying Appellants' motion for trial court fees. (2 AA 682.) This Court stayed the appeal for several years pending resolution of appellate proceedings on the merits. (5/4/12 stay order.) Once the merits were resolved, this Court lifted the stay. (2/3/17 order lifting stay.) Shortly thereafter, Appellants filed a separate motion in the trial court for appellate fees. (RA 174 [3/27/17 superior court docket entry].) At present, there is no final trial court order on the motion for appellate fees.¹

Appellants now seek judicial notice of 170 pages of documents. These documents are discussed at length in an introductory section of

¹ The superior court docket, through November 7, 2017, is located at RA 128-182.

Appellants’ reply. (Reply Brief at pp. 7-12, § I [“Comments on the Trial Court’s Recent Orders Regarding Parker’s Motion for Fees on Appeal”].) As explained in Respondent’s opposition to the request for judicial notice (filed concurrently with this motion), the Court should not take judicial notice of these documents because they are irrelevant; they did not exist at the time the trial court made the order that is the subject of the present appeal.

In some circumstances, “[w]hen an appellate brief contains references to matters not supported by the record on appeal,” appellate courts have chosen to “simply ignore these references rather than strike them.” (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 765.) But in other circumstances, such as when “[c]ounsel’s briefing has unreasonably interfered with and disrupted the orderly process of [the] appeal,” the appellate court has chosen to strike the brief in its entirety with leave to file a new brief. (See *People v. Freeman* (2013) 220 Cal.App.4th 607, 610-611 [granting Attorney General’s motion to strike defective brief in criminal appeal].)

Respondents respectfully request that the Court “strike the brief with leave to file a new brief within a specified time.” (Cal. Rules of Court, rule 8.204(e)(2)(B).) In the alternative, the Court should ignore Section I, pages 7-12, in its entirety.

Dated: January 4, 2018

Respectfully submitted,

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[PROPOSED] ORDER

IT IS HEREBY ORDERED that Respondents' motion to strike Appellants' opening brief is granted. Appellants' reply brief, filed December 19, 2017, is stricken. Within 15 days of the date of this order, Appellants shall file a corrected brief making no reference to Appellants' request for judicial notice unless permitted by separate order.

Dated: January __, 2018

Presiding Judge

DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **Sheriff Clay Parker, et al. v. State of California, et al.**

Fifth District Court of Appeal Case No.: F064510

Fresno County Superior Court Case No.: 10-CECG-02116

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On January 4, 2018, I electronically served the attached **MOTION TO STRIKE APPELLANTS' REPLY BRIEF; [PROPOSED] ORDER** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on January 4, 2018, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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Clerk of Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102
Via Electronic Submission
(Pursuant to Rule 8.212(c)(2))

The Honorable Jeffrey Y. Hamilton
Fresno County Superior Court
B.F. Sisk Courthouse
1130 O Street, Department 402
Fresno, CA 93724

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 4, 2018, at Sacramento, California.

Janice Titgen

Declarant

s/Janice Titgen

Signature