

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

**OPPOSITION TO APPELLANTS' REQUEST
FOR JUDICIAL NOTICE**

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General
*GEORGE WATERS
Deputy Attorney General
State Bar No. 88295
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 210-6059
Fax: (916) 324-8835
E-mail: George.Waters@doj.ca.gov
*Attorneys for Respondents State of
California, Xavier Becerra, and California
Department of Justice*

Received by Fifth District Court of Appeal

INTRODUCTION

Respondents State of California, Xavier Becerra, and the California Department of Justice, oppose the request for judicial notice filed by Appellants on December 19, 2017. The request was filed in conjunction with Appellants' reply brief.

Appellants seek judicial notice of 170 pages of documents consisting of two recent interim rulings on a separate attorneys' fees motion pending in superior court (Exhs. A & B), and two copies of the National Rifle Association's IRS Form 990 for the fiscal year ending December 2015 (Exhs. C and D). These documents are discussed at length in an introductory section of 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"].) None of the documents were before the trial court when it made the order that is the subject of this appeal.¹

The effect of the new documents, if they were judicially noticed, would be to transform this appeal into an original proceeding where this Court would assess evidence in the first instance. Appellants concede that their goal is to bypass the trial court completely. (Appellants' RJN at 4 [". . . the superior court is unlikely to grant plaintiffs the reasonable amount of attorney's fees to which they are entitled."]) The request for judicial notice reveals a basic misunderstanding of the appellate process. There will be

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

ample opportunity for any aggrieved party to appeal the superior court's final order on the pending fee motion. But the documents of which Appellants seek notice have no relevance to the present appeal.

In the event that the request for judicial notice is denied, Respondent requests that the Court also grant the accompanying Motion to Strike Appellants' Reply Brief.

ARGUMENT

The fundamental reason to deny Appellants' request for judicial notice is that the new documents were not presented to the superior court. Although appellate courts may take notice of matters that were not before the trial court, they generally will not do so absent "exceptional circumstances." (*Haworth v. Superior Court* (2010) 50 Cal.4th 372, 379.)

It is an elementary rule of appellate procedure that, when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered. [Citation.] This rule preserves an orderly system of litigation by preventing litigants from circumventing the normal sequence of litigation.

(*Ibid.*, internal citation and quotation marks omitted.)

Appellants make no showing of exceptional circumstances. The new documents could not have influenced the trial court's 2012 fee order (the order that is the subject of this appeal) because the new documents did not then exist. (See 9 Witkin California Procedure (5th ed.) § 337, p. 388 ("error on the part of the inferior court cannot be predicated by reason of any matter occurring subsequent to its rendition of the judgment, and it is equally evident that it would be irrelevant for the appellate court to entertain any evidence of such subsequent matters")) (quoting *People's Home Sav. Bank v. Sadler* (1905) 1 Cal.App. 189, 193-94).) Even if judicial notice were taken of these documents, the truth of statements

contained in the documents are not subject to judicial notice. (*StorMedia Inc. v. Superior Court* (1999) 20 Cal.4th 445, 456, fn. 9.)

CONCLUSION

For the reasons set forth above, Appellants' request for judicial notice should be denied.

Dated: January 4, 2018

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
THOMAS S. PATTERSON
Senior Assistant Attorney General
MARK R. BECKINGTON
Supervising Deputy Attorney General

[s/George Waters](#)
GEORGE WATERS
Deputy Attorney General
*Attorneys Defendants-Respondents State
of California, Xavier Becerra, and
California Department of Justice*

SA2017105238
12914355.doc

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 **OPPOSITION TO APPELLANTS' REQUEST FOR JUDICIAL NOTICE** 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:

Carl Dawson Michel
Michel & Associates, PC
180 E Ocean Blvd., Ste 200
Long Beach, CA 90802
Attorneys for Plaintiffs/Appellants
(1) Courtesy Copy for Counsel's Client

Anna M. Barvir
Michel & Associates, PC
180 E Ocean Blvd., Ste 200
Long Beach, CA 90802
Attorneys for Plaintiffs/Appellants
(1) Courtesy Copy for Counsel's Client

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

SA2017105238
12890314.docx