

Case Number S185827

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

ANTHONY KIRBY et al.

Plaintiffs and Appellants,

vs.

IMMOOS FIRE PROTECTION, INC.,

Defendant and Respondent.

SUPREME COURT
FILED

FEB - 2 2011

Frederick K. Ohlrich Clerk

Deputy

Petition for Review of a Decision of the Court of Appeal
Third Appellate District Case Number C062306

**RESPONDENT'S OPPOSITION IN PART TO
APPELLANTS' REQUEST FOR JUDICIAL NOTICE**

Robert L. Rediger, Esq. (CA State Bar No. 109392)
Laura C. McHugh, Esq. (CA State Bar No. 180930)
Jimmie E. Johnson, Esq. (CA State Bar No. 223344)
Rediger, McHugh & Owensby, LLP
555 Capitol Mall, Suite 1240
Sacramento, California 95814
Telephone: (916) 442-0033
Facsimile: (916) 498-1246

Attorneys for Respondent,
IMMOOS FIRE PROTECTION, INC.

**RESPONDENT'S OPPOSITION IN PART TO
APPELLANTS' REQUEST FOR JUDICIAL NOTICE**

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE,
AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE
CALIFORNIA SUPREME COURT:

In a motion filed on January 18, 2011 in the above-captioned matter, Appellants seek judicial notice of several exhibits attached to said motion. Respondent opposes this motion in part.

Evidence Code sections 450 *et seq.* authorize this Court to take judicial notice of certain, enumerated matters. Appellants move this Court to take judicial notice of nine news articles and similar publications appearing on the Internet concerning the Third Appellate District Court of Appeal opinion below. (Appellants' Motion for Judicial Notice ("Appellants' RJN"), p. 2-6, Exhibits A-I; Appellants' Opening Brief on the Merits ("AOB"), p. 42.) Appellants request this Court to take judicial notice of said documents for the purported purpose of evidencing public reaction to the opinion issued by the Third Appellate District and the public's prognostication as to said opinion's affects. (Appellants' RJN, p. 5-6; AOB, p. 42.) This Court should deny the Appellants' request that it take judicial notice of these documents.

A reviewing court may take judicial notice of the existence of publications under Evidence Code section 452, subdivision (h), because the existence of such articles is typically not subject to reasonable dispute (*Seelig v. Infinity Broadcasting Corp., et al.* (2002) 97 Cal.App.4th 798, 808, fn 5); however, said provision does not empower courts to take judicial notice of any "facts" asserted therein. (*Larson v. State Personnel Bd.* (1994) 28 Cal. App. 4th 265, 270, fn. 2 [citing *Shaeffer v. State of California* (1970) 3 Cal. App. 3d 348, 354].) The alleged "facts" asserted

therein are not subject to judicial notice because they are open to dispute.¹ (*Cruz v. County of Los Angeles* (1985) 173 Cal.App.3d 1131, 1134; *Beckley v. Reclamation Board* (1962) 205 Cal.App.2d 734, 741-742.)

Appellants further seek judicial notice of five of these same articles for the additional purpose of evidencing the existence of conditional settlement agreements between them and other defendants in the underlying litigation. (Appellants' RJN, Exhibits A-E; AOB, pp. 4-5.) Again, this Court should decline to take judicial notice of these documents.

First, California Rules of Court, rules 8.252(a)(2)(A) and 8.520(g) provide that this Court will only take judicial notice of matters relevant to the questions under consideration. Whether or not Appellants entered into conditional settlements agreements with other defendants in the underlying litigation is irrelevant to the two legal questions on review before this Court: 1) whether a prevailing defendant is entitled to an award of attorney's fees in an action brought under Labor Code section 226.7; and 2) whether a prevailing defendant is entitled to an award of attorney's fees in an action brought under Labor Code section 226.7 if other causes of action within the same complaint are subject to Labor Code section 1194. (Order, Petition for Review Granted [setting forth questions under consideration].)

Second, the publications in question are hearsay evidence. (Evid. Code, § 300.) A court may not take judicial notice of hearsay allegations of disputable facts – even hearsay allegations set forth in other court opinions. (*Kilroy v. State of California* (2004) 119 Cal.App.4th 140, 146-147.) The

¹ Assumedly, if an asserted "fact" within a publication is, itself, not open to dispute, said "fact" would be subject to judicial notice under Evidence Code section 452, subdivisions (g) and (h). (Evid. Code, § 452, subds. (g), (h).) However, the assertions found within the publications in question are neither "of such common knowledge," or "not reasonably subject to dispute," to satisfy said provisions. (See generally Appellants' AOB, Exhibits A-I.)

Appellants have not proffered any argument or supporting authority that the publications in question come under any exception to the hearsay rule. (See generally, Appellants' RJN; AOB; see also Evid. Code, §§ 1220 *et seq.* [exceptions to the hearsay rule].)

Finally, Appellants seek judicial notice of the Notice of Lodgment in Support of Plaintiffs' Appeal it filed subsequent to the Superior Court's order in question. (Appellants' RJN, p. 7, Exhibit J; AOB, pp. 5-6.) This Notice includes attached copies of the alleged conditional settlement agreements between Appellants and other defendants in the underlying litigations. (Appellants' RJN, Exhibit J.) Again, Appellants request judicial notice for the purpose of evidencing the existence of said agreements. (Appellants' RJN, p. 7; AOB, pp. 5-6.) This Court should decline to take judicial notice of this document because it is outside the record, and therefore not subject to consideration on review. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1183 [review on direct appeal limited to appellate record].) In addition, said document is not subject to judicial notice because evidence of whether Appellants entered into conditional settlement agreements with other defendants is irrelevant to the questions before this Court. (Cal. Rules of Court, rules 8.252(a)(2)(A), 8.520(g).)

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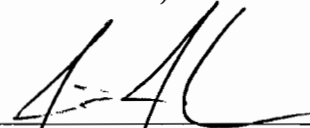
CONCLUSION

For the reasons set forth above, Appellants' request for judicial notice of those documents attached to said motion as Exhibits A through J should be denied.²

DATED: February 1, 2011.

Respectfully submitted,

**REDIGER, McHUGH &
OWENBY, LLP**

By 

JIMMIE E. JOHNSON
Attorneys for Respondent,
IMMOOS FIRE PROTECTION,
INC.

² Respondent does not take any position on Appellants' request for judicial notice of the documents attached to said motion as Exhibits K through P.

CERTIFICATE OF SERVICE

I am a citizen of the United States of America and am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 555 Capitol Mall, Suite 1240, Sacramento, California 95814.

On February 1, 2011, I served the within **RESPONDENT'S OPPOSITION IN PART TO APPELLANTS' REQUEST FOR JUDICIAL NOTICE** in *Anthony Kirby et al. v. Immoos Fire Protection, Inc*; California Supreme Court Case Number S185827 [Third Appellate District Court of Appeal Case Number C062306] by placing a true copy thereof enclosed in a sealed envelope, addressed as follows:

Ellyn Moscowitz, Esq.	Attorneys for Plaintiffs and
Jennifer Lai, Esq.	Appellants, ANTHONY
Law Offices of Ellyn Moscowitz, P.C.	KIRBY and RICK LEECH, JR.
1629 Telegraph Avenue, Fourth Floor	
Oakland, CA 94612	

Scot D. Bernstein, Esq.	Attorneys for Plaintiffs and
Law Offices of Scot D. Bernstein	Appellants, ANTHONY
101 Parkshore Drive, Suite 100	KIRBY and RICK LEECH, JR.
Folsom, CA 95630	

XXXX by placing a true copy thereof in a Federal Express envelope/box for overnight delivery in the receptacle located at 555 Capitol Mall, Sacramento, California 95814.

Sacramento County Superior Court	Appellate Coordinator
720 Ninth Street	Office of the Attorney General
Sacramento, CA 95814	300 S. Spring Street
	Los Angeles, CA 90013

Third Appellate District Court of Appeal
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

XXXX and placing the same with postage thereon fully prepaid in the designated area for outgoing mail. I am readily familiar with Rediger, McHugh & Owensby, LLP's practice of collecting and processing correspondence whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited with the United States Postal Service after the close of each day's business.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 1st day of February 2011, at Sacramento, California.


LORRAINE L. RENFRO