S252035

IN THE SUPREME COURT OF CALIFORNIA

MANNY VILLANUEVA et al.,
Plaintiffs and Appellants,

vs.

FIDELITY NATIONAL TITLE COMPANY,
Defendant and Appellant.

After a Decision by the Court of Appeal
Sixth Appellate District
Case No. H041870
(Santa Clara County Super. Ct. No. 1-10-CV173356)

OBJECTIONS TO AMICUS CALIFORNIA LAND TITLE ASSOCIATION'S MOTION FOR JUDICIAL NOTICE

Service on the Attorney General and District Attorney required by Bus. & Prof. Code § 17209 and Cal. Rules of Court, Rule 8.29

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Manny Villanueva and the class members

Pursuant to Rules 8.54 and 8.520(g) of the California Rules of Court and Evidence Code section 452, subsections (c) and (d), appellants hereby oppose and object to the motion for judicial notice filed by non-party California Land Title Association ("CLTA"), on the following grounds:

GENERAL OBJECTION TO ALL EXHIBITS

Rule 8.520(g) provides that to obtain judicial notice by the Supreme Court, "a party must comply with rule 8.252(a)." (Emph. added.) Rule 8.252(a), in turn, provides that to obtain judicial notice, "a party must serve and file a separate motion with a proposed order." (Emph. added.)

Thus, only a party is authorized to move for judicial notice. There is no corresponding rule which authorizes a non-party to move for judicial notice.

CLTA, as amicus curiae, is not a party to this appellate proceeding. (See, e.g., Rules 8.252 and 8.520, referring separately to "parties' briefs" and "amicus curiae briefs.") Thus, CLTA is not authorized to move for judicial notice. Its motion must be denied on this basis alone.

SPECIFIC OBJECTIONS

1. Objection to Exhibit A: it is already in the record.

CLTA moves to judicially notice the trial judge's Statement of Decision and Judgment in this case. (Motion for Judicial Notice, at p. 2 and Exhibit A.) But the Statement of Decision and Judgment are already part of the appellate record that was delivered to this Court in October 2018. (7AA 1388.) Thus, judicial notice of Exhibit A should be denied as cumulative and unnecessary.

2. Objection to Exhibits B through X: these documents were never submitted to the trial court.

CLTA moves for judicial notice of court records and official acts of judicial departments, pursuant to Evidence Code section 452, subsections (c) and (d).

But as CLTA concedes, Exhibits B through X are all court records or unpublished rulings from unrelated cases involving different parties, and "were not submitted in the trial court in this case." (Motion for Judicial Notice, at p. 4.)

This Court has announced that it will not take judicial notice of matters not presented to the trial court, absent "exceptional

circumstances." (*Vons Cos. v. Seabest Foods* (1996) 14 Cal:4th 434, 444, fn. 3.) No such exceptional circumstances exist here.

3. Objection to Exhibits B through X: these documents are not relevant and thus cannot be judicially noticed.

These uncitable materials from unrelated cases are not relevant to this appeal involving discrete *legal* issues of statutory interpretation. This Court has previously announced it will not take judicial notice of matters irrelevant to the dispositive point on appeal. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544.) "Only relevant material is a proper subject of judicial notice, even where the Evidence Code provides in mandatory terms that matters be judicially noticed." (*Hayward Area Planning Assn. v. City of Hayward* (2005) 128 Cal.App.4th 176, 182.) Here, neither the appellants nor the respondent believed these materials were relevant, and so did not present these materials to the trial court.

Non-party CLTA nonetheless argues that these materials are relevant because they supposedly "complete the backdrop and historic context for the 'unfiled' rate theory advanced by Villanueva." (Motion for Judicial Notice, at p. 4.) But unpublished materials from unrelated cases, involving entirely different parties, simply do not constitute "backdrop and history." CLTA – unsurprisingly – offers no authority that they do.

Moreover, the "backdrop and history" of the unfiled rate theory is not at issue here. Rather, this Court certified the following questions:

(1) Does Insurance Code section 12414.26 provide immunity to an underwritten title company for charging consumers for services for which there have been no rate filings with the Insurance Commissioner? Stated otherwise, by charging unfiled rates, did Fidelity act "pursuant to the authority conferred by Article 5.5?"

(2) Does the Insurance Commissioner have exclusive jurisdiction over any action against an underwritten title company for services charged to the consumer, but not disclosed to the Department of Insurance?

None of the documents in Exhibits B through X which CLTA moves to judicially notice are relevant to these questions. CLTA does not even attempt to argue that they are. Thus, CLTA's motion to judicially notice these documents must be denied.

Exhibits B and C: CLTA moves to judicially notice the Statement of Decision in a case not before this Court, *Kirk v. First American*, and the unpublished opinion in *Kirk* affirming the $5.1 million judgment entered in favor of the class and against the unrelated title company. (Motion for Judicial Notice, at p. 6 and Exhibits B, C.) CLTA's amicus

brief repeatedly cites and relies on these documents. (Amicus Curiae Brief, at pp. 12, 14-20, fn. 8.) But CLTA cites these documents for matters not relevant to the questions certified for review. (See Section 4, below.)

Exhibits D, G, H, J, M, O and Q through U: CLTA repeatedly cites court dockets and filings in five unrelated cases to critique Petitioner's appellate counsel herein, who also happened to represent unrelated parties in those unrelated cases. (Motion for Judicial Notice, at pp. 7-11 and Exhibits D, G, H, J, M, O, Q-U.) These ad hominem criticisms of appellate counsel are entirely devoid of any relevance to the questions certified for review here.

Exhibits E and F: CLTA also moves to judicially notice the Second Appellate District's and this Court's denials of a writ petition involving a third-party discovery dispute in the unrelated *Kirk* case, which again is not before this Court. (Motion for Judicial Notice, at p. 7 and Exhibits E, F.) CLTA nonetheless repeatedly cites these rulings. (Amicus Curiae Brief, at pp. 11, 32-33, fn. 12.) But again, CLTA does not attempt to explain how these discovery rulings, from a case not before this Court, can possibly have any relevance to the questions certified for review in *this* case.

Exhibits I, K, L, N and P: CLTA also cites notices of appeal and the trial court orders appealed from in the unrelated cases against the

unrelated defendants, in an attempt to characterize the theories asserted in those unrelated cases. (Motion for Judicial Notice, at pp. 8-10 and Exhibits I, K, L, N, P.) But theories asserted in unrelated cases against unrelated defendants (regardless of whether those theories were the same as or different from the theories asserted here) are not relevant to this appeal.

Exhibits V through X: Finally, CLTA repeatedly cites court filings in five cases not before this Court just to establish that the Los Angeles Superior Court coordinated them. (Motion for Judicial Notice, at p. 11 and Exhibits V-X.) But that procedural fact is simply irrelevant to the questions certified for review.

Even assuming that Exhibits B through X are relevant (which they clearly are not), this Court may properly decline to judicially notice any matter that should have been, but was not, presented to the trial court for its consideration in the first instance. (*Brosterhous v. State Bar of Calif.* (1995) 12 Cal.4th 315, 325.)

4. Objection to Exhibit B and Exhibits R through U: judicial notice may not be taken of hearsay statements set forth in the documents.

Courts may take judicial notice of the existence of certain documents, but not of the truth of hearsay statements in them.

(*Lockley v. Law Office of Cantrell* (2001) 91 Cal.App.4th 875, 882.) The truth of hearsay statements in court files is not judicially noticeable. (*Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 437.) Thus, judicial notice may be taken of the existence of a factual finding in another proceeding, but not of its accuracy or truth. (*Johnson & Johnson v. Sup. Court* (2011) 192 Cal.App.4th 757, 768.)

CLTA nonetheless repeatedly submits for judicial notice court filings and unpublished decisions from cases not before this Court, not to prove the existence of the documents, but – impermissibly – for the truth of the matters asserted therein.

For example, CLTA repeatedly cites the Statement of Decision in one of the cases not before this Court, *Kirk v. First American*. (Motion for Judicial Notice, Exhibit B.) But CLTA does not cite this document merely to prove its existence. Rather, CLTA impermissibly cites the *Kirk* Statement of Decision for the truth of statements contained therein, e.g., that:

(a) "the Regulated Title Entities in the *Kirk* case had filed a schedule of rates that expressly revised rates for the challenged services before [plaintiffs] filed [their] lawsuits,"

(b) "as recounted by the trial court in *Kirk*, after enactment of the above regulatory scheme in 1973, the Department initially took

the position that no rates were required for Regulated Title Entities' charges for ancillary escrow services such as wire transfers, delivery fees, etc.,"

(c) "the Department did not seek any refund to consumers as a result of the prior charges," and

(d) "the Department's oversight also includes reviewing a Regulated Title Entity's escrow fees during market conduct examinations."

(CLTA's Amicus Curiae Brief, at pp. 14, 17-20.) CLTA concedes that it cites the *Kirk* Statement of Decision "for its real world depiction of this regulatory process" (*id.* at p. 17); in other words, for the truth of the matters asserted therein. These are all matters that simply cannot be judicially noticed.

Similarly, CLTA cites trial court filings in another unrelated case, *Muehling v. First American*, for the truth of the matters asserted therein, i.e., that the unrelated defendant's summary judgment motion supposedly "show[ed] that the challenged charge was in fact for an escrow service that was within the Regulated Title Entity's filed schedule of fees." (CLTA's Amicus Curiae Brief, at p. 14; Motion for Judicial Notice, Exhibits R-U.) This too cannot be judicial noticed.

Finally, even if courts could take judicial notice of the truth of hearsay statements (which they cannot), this Court may properly decline to judicially notice any matter that should have been, but was not, presented to the trial court for its consideration in the first instance. (*Brosterhous v. State Bar of Calif.* (1995) 12 Cal.4th 315, 325.)

5. Objection to Exhibit C: an unpublished opinion cannot be cited or relied on.

An unpublished opinion "must not be cited or relied on" by a party in any other action, except "when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel," or "when the opinion is relevant to a criminal or disciplinary action." (Rules of Court, Rule 8.1115(b).) But this is not a criminal or disciplinary action. And CLTA does not even assert that the unpublished *Kirk* opinion (i.e., Exhibit C) constitutes law of the case, res judicata or collateral estoppel.

Nevertheless, CLTA repeatedly cites and relies on the unpublished *Kirk* opinion, i.e., Exhibit C. (Amicus Curiae Brief, at pp. 12, 20, fn. 8.) This is sanctionable conduct. "Persistent use of unpublished authority may be cause for sanctions." (*People v. Williams* (2009) 176 Cal.App.4th 1521, 1529; see, e.g., *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 885-886.)

As Rutter advises: "Do not, under any circumstances, cite to an unpublished or depublished opinion (or any unpublished part of a published opinion) unless one of the narrow exceptions to the noncitation rule applies." (Eisenberg, et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2019) ¶ 9:59.) Here, none of the narrow exceptions apply. Thus, Exhibit C cannot be cited or relied on for any reason.

Courts will deny judicial notice of unpublished decisions from unrelated cases, even where the unrelated case involves the same plaintiff or defendant. (See, e.g., *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1529, fn. 7.) Here, judicial notice is even less warranted, because the unrelated cases CLTA cites involve completely different parties.

Finally, even if unpublished opinions could be cited or relied on (which they cannot), this Court may properly decline to judicially notice any matter that should have been, but was not, presented to the trial court for its consideration in the first instance. (*Brosterhous v. State Bar of Calif.* (1995) 12 Cal.4th 315, 325.)

CONCLUSION

CLTA's unauthorized motion for judicial notice of irrelevant documents from unrelated cases should be summarily denied.

Respectfully submitted,

DATED: February 26, 2020

THE BERNHEIM LAW FIRM
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SHERNOFF, BIDART, ECHEVERRIA

By: _____

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 11611 Dona Alicia Place, Studio City, California 91604.

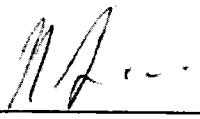
On February 27, 2020, I served a copy of the foregoing **OBJECTIONS TO AMICUS CALIFORNIA LAND TITLE ASSOCIATION'S MOTION FOR JUDICIAL NOTICE** on the interested parties and persons in this action, as follows:

SEE ATTACHED SERVICE LIST

I placed a true copy of the foregoing document in a sealed envelope addressed to the parties set forth on the attached service list. I placed each such envelope, with postage thereon fully prepaid, for collection and mailing at Los Angeles, California. I am readily familiar with the firm's practice of collection and processing correspondences for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on February 27, 2020, at Los Angeles, California.



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