S203561

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

In re the MARRIAGE OF GREEN

Julie R. Green,
Appellant,

v.

Timothy P. Green,
Respondent.

First District Court of Appeal, Division Four
(Case No. A129436)

Contra Costa County Superior Court (Case No. D0801292)
Honorable Charles B. Burch

APPELLANT JULIE GREEN'S OPPOSITION TO RESPONDENT TIMOTHY GREEN'S MOTION FOR JUDICIAL NOTICE

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Pursuant to California Rules of Court, rule 8.54(a)(3), Appellant Julie R. Green respectfully submits this opposition to Respondent Timothy P. Green's Motion for Judicial Notice (hereafter Motion). Mr. Green's Motion, which was filed after he submitted his opening brief on the merits, seeks judicial notice of documents that were neither presented to the trial court nor mentioned in his opening brief. Further, Mr. Green's contention that these documents are relevant is based upon new arguments that were not raised in his opening brief. Accordingly, Mr. Green's request for judicial notice should be denied.

I. Background

In his Motion, Mr. Green seeks judicial notice of excerpts of two reports published by the State Controller (Exhibits 1 and 2) and a report issued by the California Public Employees' Retirement System (CalPERS) (Exhibit 3). Exhibits 1 and 2 state the CalPERS retirement benefit formulas in effect in fiscal years 1988-1989 and 2008-2009. (Motion (hereafter Mot.), Exhibits 1 & 2.) Exhibit 3, dated July 2011, sets forth CalPERS's views regarding the circumstances under which changes to the CalPERS system could be made without violating the Contract Clause of the state constitution. (*Id.*, Exhibit 3.)

Although Exhibits 1 and 2 were in existence at the time of trial, Mr. Green did not ask the trial court to judicially notice them. (Mot. at p. 5.) He did ask the Court of Appeal to take judicial notice of the two exhibits, but the court rejected his request. The court found no exceptional circumstances to justify deviating from the rule that "[r]eviewing courts generally do not take judicial notice of evidence not presented to the trial court," and questioned the relevance of the documents. (*In re Marriage of Green* (2012) 205 Cal.App.4th 1475, 1484, fn. 5 [140 Cal.Rptr.3d 915], review granted Aug. 29, 2012, S203561 (hereafter *Green*].)

Mr. Green filed his opening brief on the merits in this Court on September 26, 2012, relying on the brief that he filed in the Court of Appeal. Although all three exhibits were in existence by the time his opening brief was filed, the brief mentioned none of them. Nearly one month later, Mr. Green filed the instant Motion.

II. Argument

This Court should reject Mr. Green's request for judicial notice because: (1) Mr. Green did not present Exhibits 1 and 2 to the trial court; (2) the Motion was not timely filed; (3) through the Motion, Mr. Green seeks to present new arguments and authorities that he did

not raise in his opening brief; and (4) the Motion does not establish that the documents are relevant.

First, the Court should deny the Motion with respect to Exhibits 1 and 2 because Mr. Green did not present those documents to the trial court. While a reviewing court *may* take notice of matters defined in Evidence Code section 452, "as a general rule the court should not take [judicial] notice [of a matter] if ... the matter has not been presented to and considered by the trial court in the first instance." (*People v. Preslie* (1977) 70 Cal.App.3d 486, 493 [138 Cal.Rptr. 828] (hereafter *Preslie*); see also *Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325-326 [48 Cal.Rptr.2d 87, 906 P.2d 1242]; *Hogar v. Community Development Com. of City of Escondido* (2007) 157 Cal.App.4th 1358, 1369, fn. 4 [69 Cal.Rptr. 250] [rejecting request for judicial notice of California Redevelopment Agency report because it was not considered by the trial court].) Here, Mr. Green concedes that Exhibits 1 and 2 were available at the time of trial, but offers no explanation for failing to present them to that court. (See Mot. at p. 5.) Therefore, the Court should deny Mr. Green's belated request for judicial notice of these two documents.

Second, the Court should deny the Motion because it was not timely filed. Although there is no specific time deadline for filing a request for judicial notice, "it is desirable in the interest of orderly judicial procedure" to submit the request "well before" briefs are filed. (*Preslie*, *supra*, 70 Cal.App.3d at p. 494; see also Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶ 5:162 [with motions for judicial notice, "*diligence* is an important factor," original italics].) Here, although all three exhibits were available before this Court granted review in this case, Mr. Green did not seek judicial notice of the exhibits before, or even at the same time that, he filed his opening brief on the merits in this Court. Because his Motion provides no reason for this delay, it should be denied.

Third, Mr. Green's request for judicial notice attempts to raise new arguments that were not presented in his opening brief. Courts generally will not entertain arguments not raised in the opening brief. (See *People v. Barragan* (2004) 32 Cal.4th 236, 254, fn. 5 [9 Cal.Rptr.3d 76, 83 P.3d 480].) And judicial notice should not be used to circumvent "appellate rules and procedures, including the normal briefing process" by introducing arguments that "could have[] and

should have" been cited in the briefs. (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1064 [31 Cal.Rptr.2d 358, 875 P.2d 73], overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257 [63 Cal.Rptr.3d 418, 163 P.3d 106] [rejecting party's request to judicially notice federal court decision submitted after briefing concluded but before oral argument].) "Asking that authority be judicially noticed instead of citing and discussing it in a brief gives the parties no orderly opportunity to argue the relevance of that authority or to distinguish it." (*Id.* at pp. 1064-1065.)

Here, Mr. Green's Motion and its accompanying exhibits seek to present authorities and arguments that he did not raise in his opening brief. More specifically, Mr. Green contends that Exhibits 1 and 2, neither of which was mentioned in the opening brief, support the argument that a "substantial subsidy" enhanced the value of the retirement credits at issue in this case. (Mot. at p. 4.) But Mr. Green's opening brief does not mention "substantial subsidy," much less explain why such a purported subsidy would affect the characterization of those credits as either community or separate property.

Mr. Green asserts that Exhibit 3, also not cited in the opening brief, supports the view that the right to purchase service credits is "vested." (Mot. at p. 6.) But Mr. Green argued in his opening brief that "[c]haracterization of the underlying retirement credit rights does not change, regardless of whether the rights are labeled with such descriptors as 'vested,' 'matured,' 'conditional,' or 'unconditional.'" (Opening Brief at p. 10.) Indeed, in proceedings below, Mr. Green took the *opposite* position: that the right to purchase military credits was "non-vested." (*Green*, *supra*, 140 Cal.Rptr. at p. 1486 ["Timothy characterizes his right to purchase military service credit as a 'nonvested pension right'... ," quotation marks and alteration omitted].) Accordingly, because Mr. Green did not present any of the exhibits or the arguments that those exhibits purportedly support in his opening brief, his request that the Court judicially notice those exhibits now should be rejected.

Finally, Mr. Green has not established that the documents are relevant. (See Cal. Rules of Court, rule 8.252(a)(2)(A) [requiring motion for judicial notice to state why "the matter to be noticed is relevant to the appeal"]; *Ghur v. Cohen* (1979) 93 Cal.App.3d 296, 301 [155 Cal.Rptr. 507] ["judicial notice ... is always confined to

those matters which are relevant to the issue at hand"].) Mr. Green has not demonstrated that Exhibits 1 and 2 are relevant, because Government Code section 21051, the statutory provision on which he bases the "substantial subsidy" argument that Exhibits 1 and 2 purportedly support (Mot. at p. 4), does not apply to the purchase of military service credits like those at issue in this case. Government Code section 21024, the statute permitting the purchase of military service credits, provides that employees "electing to receive credit for that public service shall make the contributions *as specified in Sections 21050 and 21052.*" (Gov. Code, § 21024, subd. (b), italics added.) The statute does not mention section 21051. (See *ibid.*) And as explained above, Mr. Green presents all three exhibits only in the context of arguments that he did not present to this Court in his opening brief. Thus, the Motion fails to establish the relevance of the exhibits.

III. Conclusion

For the reasons stated above, the Motion should be denied.

Dated: November 8, 2012

Respectfully submitted,

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April Rose Sommer

Counsel for Appellant Julie R. Green

PROOF OF SERVICE

I am employed in the County of Contra Costa, California. I am over the age of 18 and not a party to the within action.

On November 8, 2012, I served the foregoing document described as:

APPELLANT JULIE GREEN'S OPPOSITION TO RESPONDENT TIMOTHY GREEN'S MOTION FOR JUDICIAL NOTICE

on the following:

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[X] By Mail: I enclosed a copy of the aforementioned document in a sealed envelope with postage prepaid and deposited it with the U.S. Postal Service.

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

Executed on November 8, 2012, at Moraga, California