

Case Number S185827

IN THE SUPREME COURT  
OF THE STATE OF CALIFORNIA

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ANTHONY KIRBY et al.

*Plaintiffs and Appellants,*

vs.

IMMOOS FIRE PROTECTION, INC.,

*Defendant and Respondent.*

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CLERK SUPREME COURT

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

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**RESPONDENT'S OPPOSITION TO PETITIONERS'  
AMENDED REQUEST FOR JUDICIAL NOTICE**

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## INTRODUCTION

Defendant and Respondent Immoos Fire Protection, Inc. (hereinafter “Respondent Immoos”) hereby opposes each request for judicial notice included within the Amended Request for Judicial Notice filed by Plaintiffs and Petitioners Anthony Kirby *et al.* (hereinafter “Petitioners”) in the above-referenced matter on the grounds that said request is procedurally defective in that it fails to comply with the California Rules of Court. Additionally, Respondent Immoos opposes the Petitioners’ amended request that the California Supreme Court take judicial notice of the copies of the news articles and internet blogs included in their Amended Request for Judicial Notice as Exhibits A through I on the grounds that Petitioners inappropriately seek judicial notice of the alleged truths of the matters asserted therein. Respondent Immoos also opposes judicial notice of the court filing attached to the underlying request of Exhibit J on the grounds that said filing regards matters Petitioners admit are outside the record of this case, and said filing is irrelevant to the underlying petition for review.

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## ARGUMENT

### POINT I

THE PETITIONERS' AMENDED REQUEST FOR JUDICIAL NOTICE SHOULD BE DENIED BECAUSE IT IS PROCEDURALLY DEFECTIVE IN THAT IT FAILS TO COMPLY WITH THE CALIFORNIA RULES OF COURT

Rule 8.520, subdivision (g) of the California Rules of Court provides, "To obtain judicial notice by the Supreme Court under Evidence Code section 459, a party must comply with rule 8.252(a)." In turn, Rule 8.252 provides:

- (a) Judicial notice
  - (1) To obtain judicial notice by a reviewing court under Evidence Code section 459, a party must serve and file a separate motion with a proposed order.
  - (2) The motion must state:
    - (A) Why the matter to be noticed is relevant to the appeal;
    - (B) Whether the matter to be noticed was presented to the trial court and, if so, whether judicial notice was taken by that court; and
    - (C) Whether the matter to be noticed relates to proceedings occurring after the order or judgment that is the subject of the appeal.
  - (3) If the matter to be noticed is not in the record, the party must serve and file a copy with the motion or explain why it is not practicable to do so.

A review of the Petitioners' Amended Request for Judicial Notice demonstrates that it is procedurally deficient because it does not comply

with the requirements of Rule 8.252. Accordingly, the request should be denied.

## POINT II

### THE PETITIONERS INAPPROPRIATELY SEEK JUDICIAL NOTICE OF NEWS ARTICLES AND INTERNET BLOGS TO EVIDENCE THE ALLEGED TRUTHS OF THE MATTERS ASSERTED THEREIN

Evidence Code section 459 provides reviewing courts the same power to take judicial notice of documents as trial courts under Evidence Code sections 450 *et seq.* (Evid. Code, § 459.) In turn, Evidence Code section 452, subdivision (h) (hereinafter “Section 452(h)”) provides that a court may take judicial notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.” (Evid. Code, § 452, subd. (h).) Pursuant to Section 452(h), a reviewing court may take judicial notice of the existence of published news articles because the existence of such articles is typically not subject to reasonable dispute. (*Seelig v. Infinity Broadcasting Corp., et al.* (2002) 97 Cal.App.4<sup>th</sup> 798, 808, fn 5.) However, Section 452(h) does not empower the courts to take judicial notice of any alleged truths of the matters asserted within said articles. (*Larson v. State Personnel Bd.* (1994) 28 Cal. App. 4th 265, 270; *Shaeffer v. State of California* (1970) 3 Cal. App. 3d 348, 354, fn 2.)

Despite the clear limits of Section 452(h), Petitioners request judicial notice of news articles and internet blogs (attached to the underlying request as Exhibits A-I) for the purpose of evidencing the Court of Appeal's "misinterpretation of California's public policy concerning workers and minimum labor standards..." ([Petitioners'] Amended Request for Judicial Notice, p. 5) – which, of course, would require the Court to inappropriately notice the alleged truth of the alleged "misinterpretation" described therein. Likewise, Petitioners request judicial notice of these articles for the purpose of evidencing "the impact that the Court of Appeal's decision has had on the wage and hour arena" ([Petitioners'] Amended Request for Judicial Notice, p. 5) – which, of course, would require the Court to inappropriately notice the alleged truth of the alleged "impact" described therein.

Accordingly, whereas Petitioners request judicial notice of the news articles and internet blogs in question for the purpose of noticing the alleged truths of the matters asserted therein, the request should be denied.

### POINT III

PETITIONERS INAPPROPRIATELY SEEK  
JUDICIAL NOTICE OF DOCUMENTS THEY  
ADMIT ARE NOT PART OF THE RECORD IN  
THIS CASE, AND WHICH ARE ALSO  
IRRELEVANT TO THE UNDERLYING PETITION

Petitioners seek judicial notice of the "Lodgment in Support of Plaintiffs' Appeal" they filed with the trial court on July 1, 2009.

([Petitioners'] Amended Request for Judicial Notice, Exhibit J.) However, the trial court issued its order on the attorneys' fee motion in question on June 24, 2009. (3 JA 411-414.) Accordingly, these documents were not before the trial court when it made its decision.

Likewise, Petitioners did not include their "Lodgment in Support of Plaintiffs' Appeal" within the case record provided to the Court of Appeal. (JA Index.) Accordingly, these documents were also not before the appellate court when it made its decision.

Indeed, even Petitioners themselves admit within the instant request that their "Lodgment in Support of Plaintiffs' Appeal" is not a part of the record in this case. ([Petitioners'] Amended Request for Judicial Notice, p. 6 [employing legal analysis for court records outside the record].)

A reviewing court does have the power to take judicial notice of matters outside the record, however, "as a general rule, the court should not take such notice if, upon examination of the entire record, it appears that the matter has not been presented to and considered by the trial court in the first instance." (*Deyoung v. Del Mar Thoroughbred Club* (1984) 159 Cal. App. 3d 858, 863 ("*Deyoung*") [quoting *People v. Preslie* (1977) 70 Cal.App.3d 486, 493].) "Reviewing courts generally do not take judicial notice of evidence not presented to the trial court. Rather, normally '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.’ ” (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4<sup>th</sup> 434, 444, fn 3 [quoting *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal. 3d 800, 813.]) A reviewing court should only take judicial notice of documents outside the record in “exceptional circumstances.” (*Id.*) “California Rules of Court [] and Code of Civil Procedure section 909 authorize the appellate court to take evidence relating to any facts occurring at any time prior to appeal. However, the rule does not contemplate the reviewing court should take original evidence to reverse a judgment [citation] and is not available where there is no good cause shown for the unavailability of the evidence below.” (*Deyoung, supra*, 159 Cal. App. 3d at p. 863, fn. 3.) Accordingly, whereas Petitioners “give[] no explanation for the failure to offer the [“Lodgment in Support of Plaintiffs’ Appeal”] at the [trial court] hearing[, the Court should] decline to exercise [its] power to take additional evidence on this matter.” (*Id.*)

As referenced under POINT I, *supra*, California Rule of Court 8.520 requires that any request for judicial notice to the Supreme Court comply with the requirements set forth in California Rule of Court 8.252, subdivision (a). To this end, “[i]t has long been the general rule and understanding that ‘an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.’ ” (*In re Zeth S.* (2003) 31 Cal.4<sup>th</sup> 396, 404 [quoting *In re James V.* (1979) 90 Cal. App. 3d 300, 304].) Whereas the

“Lodgment in Support of Plaintiffs’ Appeal” proffers only documents which were not in the record for the trial court’s consideration at the time the trial court determined the questions underlying the instant petition for review, they are irrelevant and not subject to judicial notice. Accordingly, the request should be denied.

CONCLUSION


For the reasons set forth above, each of Petitioners’ requests for judicial notice within their Amended Request for Judicial Notice should be denied.

DATED: October 5, 2010.

Respectfully submitted,

**REDIGER, McHUGH &  
OWENSBY, LLP**

By

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



**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 October 5, 2010, I served the within **RESPONDENT'S OPPOSITION TO PETITIONERS' AMENDED 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:

<b>Ellyn Moscowitz, Esq.</b>	<b>Attorneys for Plaintiffs and</b>
<b>Jennifer Lai, Esq.</b>	<b>Appellants, ANTHONY</b>
<b>Law Offices of Ellyn Moscowitz, P.C.</b>	<b>KIRBY and RICK LEECH, JR.</b>
<b>1629 Telegraph Avenue, 4<sup>th</sup> Floor</b>	
<b>Oakland, CA 94612</b>	

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.

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

**Clerk**  
**Third Appellate District Court of Appeal**  
**621 Capitol Mall, 10<sup>th</sup> 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.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on this 5<sup>th</sup> day of October 2010, at Sacramento, California.



LORRAINE L. RENFROE