

SUPREME COURT
FILED

JUN 01 2016

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S230104
IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

JAIME A. SCHER, et al., Plaintiffs, Appellants and
Respondents,

v.

JOHN BURKE, et al., Defendants, Appellants and
Respondents.

On Review From The Court Of Appeal For the Second
Appellate District,
Division Three, 2nd Civil No. B235892

After An Appeal From the Superior Court For The State
of California,

County of Los Angeles, Case Number BC 415646,

Hon. Malcolm Mackey

OPPOSITION TO REQUEST FOR JUDICIAL NOTICE OF
RICHARD ERICKSON, WENDIE MALICK, RICHARD B.
SCHRODER AND ANDREA D. SCHRODER

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Attorneys for JAIME A. SCHER and JANE McALLISTER

Plaintiffs, Appellants and Respondents, Jaime A. Scher and Jane McAllister (“Plaintiffs”), oppose the Request for Judicial Notice in Support of Answer Brief of Richard Erickson, Wendie Malick, Richard B. Schroder and Andrea D. Schroder with respect to the following items in that request:

Exhibit A: September 27, 1971 letter from Senator Robert J. Lagomarsino to Governor Ronald Reagan

Exhibit B: March 16, 1971 California Chamber of Commerce, Legislative Issue Report, No. 71-3

Exhibit C: April 1971 letter from Legislative Counsel George Murphy to Assemblyman Paul Priolo

Exhibit E: July 23, 1971 letter from Southern California Rock Products Association to Assemblyman Paul V. Priolo


A memorandum of points and authorities in opposition to the Court’s taking judicial notice of these items is attached.

Dated: May 31, 2016

Respectfully submitted,

ALESHIRE & WYNDER, LLP
JUNE S. AILIN

By:


JUNE S. AILIN

Attorneys for Plaintiffs, Appellants
and Respondents, JAIME A.
SCHER and JANE McALLISTER

MEMORANDUM OF POINTS AND AUTHORITIES

Plaintiffs do not dispute that it is appropriate for this Court to consider legislative history in interpreting Civil Code Section 1009. However, not every scrap of paper generated in the legislative process is a proper subject of judicial notice. As a general rule, in order to qualify as legislative history, a document must shed light on the collegial view of the Legislature as a whole. (*Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 29, 30.) Four of the documents which Defendants, Appellants and Respondents Richard Erickson, Wendie Malick, Richard B. Schroder and Andrea D. Schroder have asked the Court to take judicial notice of are not documents that shed light on the intent of the Legislature as a whole and therefore the Court should not take judicial notice of them.

Exhibit A to the Request for Judicial Notice is a letter to the Governor from State Senator Robert J. Lagomarsino, the author of Senate Bill 504, the legislation that included Civil Code Section 1009. However, because it does not bear any indication that Senator Lagomarsino's views were made known to the Legislature as a whole, it is not legislative history. (*Quintano v. Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1062 [“statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court's task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation”]; *Heavenly Valley v. El Dorado County*

Bd. of Equalization (2000) 84 Cal.App.4th 1323, 1340-1341 [court looks to document that is subject of request for judicial notice to determine whether the views stated were presented to legislators who voted on the bill].)

We learn from the next item, Exhibit B, that the person identified as receiving a copy of Exhibit A, Larry Kiml, was the Director of the Natural & Water Resources Departments of the California Chamber of Commerce. Exhibit B, however, is a Legislative Issue Report from the California Chamber of Commerce, presumably directed at its members, not the Legislature. Because it expresses the views of that organization, not of any legislator or of the Legislature as a whole, and there is nothing to indicate this document was ever shared with the legislators who voted on the bill, it is not legislative history. (*Quintano v. Mercury Casualty Co.*, *supra*, 11 Cal.4th at 1062; *Collins v. Department of Transportation* (2003) 114 Cal.App.4th 859, 870, fn. 11 [“We generally do not consider materials showing the subjective intent of interested parties, or even the subjective intent of a single legislator.”]; *Heavenly Valley v. El Dorado County Bd. of Equalization*, *supra*, 84 Cal.App.4th at 1340-1341.) While the California Chamber of Commerce may have sponsored the bill, to qualify as legislative history, this document still must have been directed to the Legislature at some point. (*Kaufman & Broad Communities, Inc.*

v. Performance Plastering, Inc., *supra*, 133 Cal.App.4th at 36.) There is nothing in this document indicating that was the case.¹

Exhibit C to the Request for Judicial Notice is a brief letter from Legislative Counsel George Murphy to Assemblyman Paul Priolo. It transmits proposed legislation drafted by the Legislative Counsel's office. The letter does not refer to the bill of which Civil Code Section 1009 was the subject, SB 504, nor is the proposed legislation enclosed with it an amendment to that bill. Further, while an opinion from the Legislative Counsel may be appropriately recognized as legislative history (*People v. \$31,500 United States Currency* (1995) 32 Cal.App.4th 1442, 1460–1461), this document is not such an opinion; it is merely a transmittal letter that comments the proposed legislation, as drafted, may be ambiguous. Had the Legislature nevertheless proceeded to adopt it as drafted, without a definition of “recreational purpose,” it would hardly be the only time a client did not heed his lawyer's advice.

¹ The cases cited in the Request for Judicial Notice do not state that every document a bill sponsor produces is cognizable as legislative history. In *Kern v. County of Imperial* (1990) 226 Cal.App.3d 391, 401 fn. 8, the sponsor's statements apparently were contained in a legislative committee report. It is unclear which of the documents the Court took judicial notice of in *Ketchum v. Moses* (2000) 24 Cal.4th 1122, is the subject of the citation in the Request for Judicial Notice. However, there is no indication in that opinion that any of the documents of which the Court took judicial notice came from the sponsor of the legislation involved in that case. Plaintiffs note that the report of which the Court took judicial notice came from the State Bar, an arm of the Supreme Court. It makes sense that the Court would take judicial notice of what was, in effect, its own report.

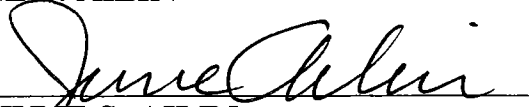
Similar in differing ways to Exhibits A and B, Exhibit E to the Request for Judicial Notice is a letter to a member of the Assembly, Paul V. Priolo, from the general counsel of the Southern California Rock Products Association. It shows that it was copied to the members of the Assembly Planning and Land Use Committee. Such letters, however, are indicative of the author's state of mind, not that of the legislator or legislators to whom it is sent. To put it another way, while the letter may reflect the *author's* desires, it does not reflect the Legislature's intent. (*Quintano v. Mercury Casualty Co.*, *supra*, 11 Cal.4th at 1062, fn. 5; *Heavenly Valley v. El Dorado County Bd. of Equalization*, *supra*, 84 Cal.App.4th at 1340-1341.)

Because the documents attached to the Request for Judicial Notice as Exhibits A, B, C and E do not reflect the intent of the Legislature as a whole, the Request for Judicial Notice should be denied as to those documents.

Dated: May 31, 2016

Respectfully submitted,

ALESHIRE & WYNDER, LLP
JUNE S. AILIN

By: 
JUNE S. AILIN
Attorneys for Plaintiffs, Appellants
and Respondents, JAIME A.
SCHER and JANE McALLISTER

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 2361 Rosecrans Ave., Suite 475, El Segundo, CA 90245.

On May 31, 2016, I served true copies of the following document(s) described as **APPLICATION FOR EXTENSION OF TIME TO FILE REPLY BRIEF ON THE MERITS** on the interested parties in this action as follows:

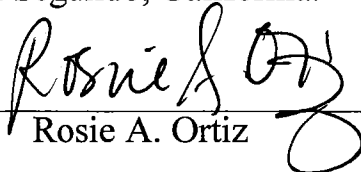
SEE ATTACHED SERVICE LIST

BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed as indicated to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Aleshire & Wynder, LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at El Segundo, California.

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

Executed on May 31, 2016, at El Segundo, California.



Rosie A. Ortiz

SERVICE LIST

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| <p>Court of Appeal – Second District Division 3 Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013</p> | <p align="center"><i><u>Via U.S. Mail</u></i></p> |
| <p>California Superior Court Hon. Malcolm Mackey – Dept. 55 Stanley Mosk Courthouse - LASC 111 North Hill Street Los Angeles, CA 90012</p> | <p align="center"><i><u>Via U.S. Mail</u></i></p> |
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