S202037

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

JOHN W. MCWILLIAMS
Plaintiff and Appellant,

v.

CITY OF LONG BEACH,
Defendant and Respondent.

CITY OF LONG BEACH'S OPPOSITION TO MOTION TO CONSIDER ADDITIONAL EVIDENCE

After a Decision by the Second Appellate District of the Court of Appeal
Case No. B200831

Superior Court of the State of California
for the County of Los Angeles, Case No. BC361469
Honorable Anthony J. Mohr, Presiding

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction

Appellant's Motion to Consider Additional Evidence should be denied because the proffered evidence is irrelevant, and incompetent double hearsay; it will not assist this Court in making factual determinations; and McWilliams does not show the necessary "exceptional circumstances" in which this court of last resort will take new evidence. The motion should therefore be denied as McWilliams fails to show that the additional evidence he offers meets the standards of California Code of Civil Procedure section 909 and California Rules of Court, rule 8.252(c).

II. Appellate Courts Take New Evidence in Rare, Exceptional Circumstances and Primarily to Avoid Retrial

California Rule of Court, rule 8.252(c) provides that "[a] party may move that the reviewing court take evidence." California Code of Civil Procedure section 909 provides, in relevant part:

> The reviewing court may for the purpose of making the factual determinations or for any other purpose in the interests of justice, take additional evidence of or concerning facts occurring at any time prior to the decision of the appeal, and may give or direct the entry of any judgment or order and may make any further or other order as the case may require. This section shall be liberally construed to the end among

> others that, where feasible, causes may be finally disposed of by a single appeal and without further proceedings in the trial court except where in the interests of justice a new trial is required on some or all of the issues.

(*See also LaGrone v. City of Oakland* (2011) 202 Cal.App.4th 932, 946 n.6 (reviewing court grants section 909 "requests only under exceptional circumstances that justify deviating from the general rule that appellate review is limited to the record before the lower court."); *Chinn v. KMR Property Management* (2008) 166 Cal.App.4th 175, 180, n.3 (refusing to consider additional evidence not relevant to issues on appeal); *Hasso v. Hasso* (2007) 148 Cal.App.4th 329, 333 n.3 (taking new evidence which allowed Court to determine case without necessity of remand); *Golden West Baseball Co. v. City of Anaheim* (1994) 25 Cal.App.4th 11, 42 ("The power created by the statute is discretionary and should be invoked sparingly, and only to affirm the case.").)

III. Appellant Makes No Effort to Demonstrate that this is the Exceptional Case Justifying New Evidence on Appeal

A. No Exceptional Circumstances Justify New Evidence on Appeal; This Case Has Not Yet Been Tried and No Risk of Retrial Can Therefore Arise

McWilliams asks this Court to take the extraordinary step of considering new evidence but makes no effort to demonstrate the "exceptional circumstances" necessary to justify doing so. (*In re Zeth S.*

(2003) 31 Cal.4th 396, 405.) McWilliams contends the statute requires this Court to review such motions under a liberal standard. Not so. A liberal standard applies only when evidence is offered under unusual circumstances where an appellate court can fully resolve a case and avoid remand for retrial. (Code Civ. Proc. § 909.)

B. The New Evidence is Incompetent and Inadmissible Double Hearsay

The motion seeks to introduce a statement allegedly made by Long Beach City Attorney Robert E. Shannon on an unknown date at an unknown time, quoted in a **Daily Journal** article published on April 13, 2012. The statement is inadmissible hearsay because the statement and the article reporting it are both statements made out of court offered for the truth of the statement and within no exception to the hearsay rule. Under California Evidence Code section 1201, an out-of-court statement which itself contains other out-of-court statements is admissible only if each out-of-court statement is shown to be within an exception to the hearsay rule.

In his motion, McWilliams offers no hearsay exception to justify admitting the newspaper's hearsay. The **Daily Journal** is no party here and can have made no adverse admission. Rather, McWilliams offers only the feeble claim that the elected City Attorney's alleged statement on a public policy issue is somehow an admission by the City. Of course, even if the alleged statement of Mr. Shannon were admissible, a newspaper's report of it is inadmissible double hearsay. (*See Wolf v. Drew* (1928) 94 Cal.App. 449, 450 (refusing to consider newspaper accounts of post-trial events as new

evidence on appeal because the reports were inadmissible hearsay).)

C. The New Evidence is Irrelevant Because this Appeal Turns on Legal Issues, Not Disputed Facts

The issues before this Court are legal, as McWilliams appeals from an order sustaining the City's demurrer. No subsequent statement by the City can bear on the applicability of the Government Claims Act or the City's claiming ordinances — the trial court either correctly applied the law or it did not and nothing an elected official might have said since can alter that fact. Accordingly, the offered newspaper story is also inadmissible under Evidence Code section 350 as irrelevant. (See *Hill v. San Jose Family Housing Partners, LLC* (2011) 198 Cal.App.4th 764, 769–70 (denying motion to consider additional evidence where proffered evidence did not dispose of the issues in dispute); *Pack v. Vartanian* (1965) 232 Cal.App.2d 466, 476–77 (denying motion to consider additional evidence where "the proffered additional evidence, if received, would serve no useful purpose").)

Even were a post-judgment statement by a single elected official evidence of the motive of the City Council which enacted the local legislation in issue here, those legislative motives cannot be in issue here. Rather, this case turns on the meaning of Government Code section 905, subd. (a) and various provisions of the Long Beach Municipal Code and those meanings are drawn from the collective intent of the respective legislative bodies and not the views of the elected legal counsel to one of them. "It is well settled that the opinion of an individual legislator as to his

or her intent, motive or opinion in sponsoring a particular piece of legislation is inadmissible." (*Vigilant Ins. Co. v. Chiu* (2009) 175 Cal.App.4th 438, 444 fn. 7.) And, of course, the elected City Attorney is not a legislator. (Long Beach City Charter, article II, section 210 ("ordinances and resolutions are the formal acts of the City Council ...."); article VI, section 603 ("The City Attorney shall have the following powers and duties: (a) To be the sole and exclusive legal advisor of the City, the City Council ....").[1])

Nor ought this Court to examine the City Council's motives in any event. The rule of this case will govern the sweep of the Government Claims Act as to all cities, counties and special districts with taxing power throughout our State. The motive of one local government, even if it could be determined with the respect and comity appropriate between the judicial and legislative branches, cannot be relevant to that question. As Justice Tobriner wrote for a unanimous court:

> Given this general rule that the validity of legislation does not turn on legislative motive, the mental processes of individual legislators become irrelevant to the judicial task; hence, we do not peer into these subjective realms.

(*County of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721, 727–28; *Warden v. State Bar* (1999) 21 Cal.4th 628, 650 (quoting *County of Los Angeles*).)

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[1] The Long Beach City Charter may be viewed on-line at <http://library.municode.com/index.aspx?clientId=16854> (as of November 3, 2012).

IV. Conclusion

For the reasons set forth above, the news article which is the subject of this motion is incompetent, irrelevant and inadmissible double hearsay. Accordingly, the City urges this Court to deny McWilliams' motion for consideration of additional evidence.

DATED: November 8, 2012

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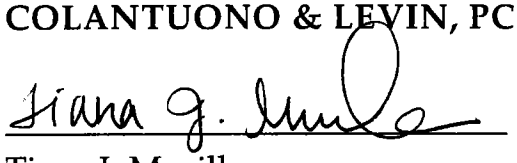

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CERTIFICATE OF SERVICE

I, Kimberly Nielsen, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of 18 years, and not a party to or interested in the within action; that declarant's business address is 300 South Grand Avenue, Suite 2700, Los Angeles, California 90071.

2. That on November 8, 2012, declarant served the **CITY OF LONG BEACH'S OPPOSITION TO MOTION TO CONSIDER ADDITIONAL EVIDENCE** via U.S. Mail in a sealed envelope fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is regular communication between the parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 8th day of November, 2012, at Los Angeles, California.

COLANTUONO & LEVIN, PC

By: _____
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