

Supreme Court Case No. S267576

In the Supreme Court

OF THE

State of California

TANIA PULLIAM
Plaintiff and Respondent,

vs.

TD AUTO FINANCE LLC
Defendant and Petitioner.

*After A Decision By The Court Of Appeal For the Second Appellate District
Division Five
2nd Civil No. B293435*

*After An Appeal From the Superior Court of Los Angeles County
Hon. Barbara M. Scheper, Judge
Case Number BC633169*

OPPOSITION TO PLAINTIFF AND APPELLEE'S REQUEST FOR JUDICIAL NOTICE

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CERTIFICATE OF INTERESTED PARTIES

TD Auto Finance LLC is a Michigan Limited Liability Company, and a wholly-owned subsidiary of TD Bank, N.A., a national banking association, which is a wholly-owned subsidiary of TD Bank US Holding Company, a Delaware Corporation, which in turn is a wholly-owned subsidiary of TD Group US Holdings LLC, a Delaware Limited Liability Company, which in turn is a wholly-owned subsidiary of the Toronto-Dominion Bank, a Canadian-chartered bank, the stock of which is traded on the Toronto and New York Stock Exchanges under the symbol “TD.”

DATED: October 18, 2021

Respectfully submitted,

MCGUIREWOODS LLP

By: /s/ Tanya L. Greene

Tanya L. Greene

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TABLE OF CONTENTS

	Page
CERTIFICATE OF INTERESTED PARTIES	2
TABLE OF CONTENTS	3
TABLE OF AUTHORITIES.....	4
I. INTRODUCTION.....	6
II. ARGUMENT	8
A. Appellee Cannot Show That The Requested Documents Are Relevant To, Or Helpful Toward, Resolving Any Issue Raised in the Appeal	8
B. Appellee Cannot Show Exceptional Circumstances To Justify The Court Taking Judicial Notice Of The Documents.....	8
III. CONCLUSION	12
CERTIFICATE OF WORD COUNT	13
PROOF OF SERVICE	14

TABLE OF AUTHORITIES

Page(s)

State Cases

Deveny v. Entropin, Inc.
(2006) 139 Cal.App.4th 408 8

Doe v. City of Los Angeles
(2007) 42 Cal. 4th 531 9

Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort
(2001) 91 Cal. App. 4th 875 8

Mangini v. R. J. Reynolds Tobacco Co.
(1994) 7 Cal. 4th 1057 (overruled on other grounds by *In re Tobacco Cases II* (2007) 41 Cal. 4th 1257, 1276)..... 8

In re Marriage of Brewster & Clevenger
(2020) 45 Cal. App. 5th 481 12

People v. Morrison
(2004) 34 Cal.4th 698 9

People v. Preslie
(1977) 70 Cal. App. 3d 486 8

Reserve Insurance Co. v. Pisciotta
(1982) 30 Cal. 3d 800 10, 11

Schifando v. City of Los Angeles,
(2003) 31 Cal. 4th 1074, 1089, fn. 4..... 9

Vons Companies, Inc. v. Seabest Foods, Inc.
(1996) 14 Cal.4th 434 11

Voris v. Lampert
(2019) 7 Cal. 5th 1141 12

Weiss v. City of Del Mar
(2019) 39 Cal. App. 5th 609 12

State Statutes

Evid. Code § 459 8

Rules

California Rule of Court, Rule 8.500(b)(1)..... 10

Regulations

16 C.F.R. § 433.2..... 7

I. INTRODUCTION

Respondent TD Auto Finance LLC (“TDAF”) opposes the request of Appellee Tania Pulliam (“Appellee”) for the Court to take judicial notice (“Request”) of five post-appeal pleadings from the trial court. Request at 6. These documents purportedly show “the practical implications” of the Holder Rule. TDAF, however, opposes the Request because Appellee has not shown the requisite exceptional circumstances to warrant departing from the well-settled rule that the Court only considers matters that were part of the record at the time the judgment was entered, and the documents are irrelevant to the issues raised on appeal. *Id.*

Appellee’s Request and documents consist of: (1) a Register of Actions dated August 17, 2021 showing post-judgment enforcement and collections proceedings after the notice of appeal, (2) a minute order dated January 31, 2020 issuing, but holding a bench warrant, subject to continued proceedings, (3) an Acknowledgment of Satisfaction of Judgment dated February 10, 2020 by Appellant TD Auto Finance LLC (“TDAF”), (4) a Notice of Ruling granting Appellee post-judgment fees and costs dated September 29, 2020, and (5) a Notice of Ruling dated November 13, 2020 regarding a judgment debtor exam for the principal of Defendant HNL Automotive, Inc. (“HNL”).¹

¹ Although HNL is co-Appellant of the initial appeal of the trial court’s order awarding pre-judgment attorney’s fees and costs, TDAF alone filed a

Appellee fails to establish the existence of exceptional circumstances that warrant judicial notice of these documents. “Practical implications” do not suffice, and cannot satisfy the extremely high burden demanded by this Court particularly where Appellee improperly seeks for the Court to take judicial notice of the truth of the matters asserted in the documents.

Moreover, on appeal, only matters which are both relevant and helpful toward resolving the matters before this Court may be the subject of judicial notice. The principle issues on appeal asks whether the Holder Rule, 16 C.F.R. § 433.2, limits “recovery” and caps attorney’s fees, and whether the Federal Trade Commission’s (“FTC”) interpretation of the Holder Rule that a consumer cannot recover in excess of the amount she has paid under the contract, including for attorney’s fees, is entitled to deference so that it controls the meaning of the Holder Rule if the Rule is otherwise ambiguous. Petitioner Opening Brief at 8. Appellee cannot demonstrate that any of the post-appeal documents encompassed in its Request are either relevant to, or helpful toward, resolving these specific legal issues presented to this Court.

Accordingly, Appellee’s Request for the Court to take judicial notice of post-appeal documents must be denied.

petition for review of the Court of Appeal’s order affirming the trial court’s award.

II. ARGUMENT

A. Appellee Cannot Show Exceptional Circumstances To Justify The Court Taking Judicial Notice Of The Documents

Appellee argues she has established exceptional circumstances for the Court to take judicial notice of these documents. Request at 7. Appellee contends the documents “show what transpired” related to “her continued efforts to enforce the judgment against HNL Automotive [and TDAF]” and the “real-world implications of letting a holder litigate incessantly before paying a consumer’s damages.” Request at 6-7. These are not exceptional circumstances.

As held in *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, n. 3, “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’ . . . No exceptional circumstances exist that would justify deviating from that rule . . .” *See also In re Marriage of Brewster & Clevenger* (2020) 45 Cal. App. 5th 481, 498 (holding that no exceptional circumstances exist that would require the court to deviate from the standard rule).

Here, taking judicial notice of documents that merely “show what transpired” and how that may practically affect litigating parties sets a

dangerous precedent.² Under Appellee’s proposal, the Court must then find that most any post-appeal pleadings would warrant judicial notice. This Court has never held that the standard for establishing “exceptional circumstances” for judicial notice should be this relaxed. *See, e.g., id.* (refusing to take judicial notice of deposition testimony and other documents); *see also Weiss v. City of Del Mar* (2019) 39 Cal. App. 5th 609, 625 (refusing to take judicial notice of documents because it would be improper to consider them “on the purely legal issue” before the court).

Appellee’s Request should be denied because it asks the Court to take judicial notice of matters after the time the judgment was entered. Appellee has also not made a showing of that exceptional circumstances exist that would require this Court to depart from its default rule of only considering matters that were part of the record at the time the judgment was entered.

B. Appellee Cannot Show That The Requested Documents Are Relevant To, Or Helpful Toward, Resolving Any Issue Raised in the Appeal

This appeal is limited to two specific questions regarding the scope of the term “recovery” under the Holder Rule, and the FTC’s interpretation of the Holder Rule. Petitioner Opening Brief at 8. Appellee seeks judicial

² Appellee also improperly seeks for the Court to take judicial notice of the truth of its contents. *Voris v. Lampert* (2019) 7 Cal. 5th 1141, 1147, fn. 5 (refusing to take judicial notice of the truth of the matters asserted in the documents).

notice of documents that are irrelevant and unhelpful to these specific issues on appeal.

Upon a party's request or by the court on its own motion, appellate courts have the same power as trial courts to take judicial notice of a matter properly subject to judicial notice. Evid. Code § 459; *see also Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal. App. 4th 875, 881. Procedurally, although judicial notice may be requested at the time of briefing, "it is desirable in the interest of orderly judicial procedure" to make the request well before the brief-filing stage. *People v. Preslie* (1977) 70 Cal. App. 3d 486, 494.

When a request for judicial notice is made on appeal, the proponent of this request "must demonstrate that the matter as to which judicial notice is sought is both relevant to and helpful toward resolving the matters before this court." *Deveny v. Entropin, Inc.* (2006) 139 Cal.App.4th 408, 418. However, this Court may only take judicial notice of matters if they are relevant to the dispositive issues on appeal. *See, e.g., Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal. 4th 1057, 1063 (*overruled on other grounds by In re Tobacco Cases II* (2007) 41 Cal. 4th 1257, 1276) ("Although a court may judicially notice a variety of matters . . . only *relevant* material may be noticed.") (emphasis in original); *Doe v. City of Los Angeles* (2007) 42 Cal. 4th 531, 544, fn. 4 (denying request where "Plaintiffs fail to demonstrate the relevance of this material"); *Schifando v. City of Los*

Angeles, (2003) 31 Cal. 4th 1074, 1089, fn. 4 (“We do not find the materials particularly supportive of respondent’s cause or relevant to the action, and therefore deny the request.”). Appellee, as the requesting party, bears the burden to show both relevance and helpfulness. *People v. Morrison*, (2004) 34 Cal.4th 698, 724 (“the proponent of proffered testimony has the burden of establishing its relevance . . .”).

Appellee contends the documents are relevant because they show “the practical implications of consumers’ enforcement of the Holder Rule” and “her continued efforts to enforce the judgment against HNL Automotive [and TDAF].” Request at 6-7. Appellee has not met her burden.

Post-appeal records relating to Appellee’s efforts to collect a judgment after HNL and TDAF filed a notice of appeal of the trial court’s order granting attorney’s fees and costs is irrelevant to the legal questions on appeal. These documents do not provide any information directly helpful to answering whether the term “recovery” includes attorney’s fees, or whether the FTC’s interpretation of its own Holder Rule should be entitled to deference.

Even Appellee concedes that taking judicial notice of documents “after a notice of appeal has been filed” is “less common.” Request at 6. Rightfully so, as “[i]t is an elementary rule of appellate procedure that, when reviewing the correctness of a trial court’s judgment [or appealable order], an appellate court will consider only matters which were part of the record at

the time the judgment [or order] was entered.” *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal. 3d 800, 813. While the Court has previously noted that “courts have not hesitated to consider postjudgment events when legislative changes have occurred subsequent to a judgment or when subsequent events have caused issues to become moot,” neither of these circumstances exist in this appeal to warrant deviation from this well-established rule. *Id.* The Request fails to comply within the parameters set by the Court, and does not include any documents concerning legislative changes or for which would render the issues currently on appeal to become moot.

Since the documents in the Request are irrelevant and unhelpful to this appeal, the Court should deny the Request.

III. CONCLUSION

For these reasons, this Court should deny Appellee’s Request for Judicial Notice.

DATED: October 18, 2021

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 1,546 words as counted by the Microsoft Office Word 2010 word-processing program used to generate this brief.

DATED: October 18, 2021 Respectfully submitted,

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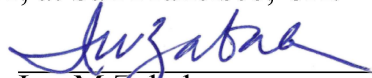
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/s/Tanya L. Greene

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