

No. S227786  
(Court of Appeal No. F068477)  
(Fresno County Super. Ct. No. 12CECG03718)

**IN THE SUPREME COURT OF  
THE STATE OF CALIFORNIA**

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STEPHEN K. DAVIS,  
*Plaintiff and Appellant,*

v.

FRESNO UNIFIED SCHOOL DISTRICT, ET AL.,  
*Defendant/Respondent and Petitioner*

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After a Decision By the Court of Appeal,  
Fifth Appellate District

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**OPPOSITION TO MOTION FOR JUDICIAL NOTICE**

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Respondent* STEPHEN K. DAVIS

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*Attorneys for Plaintiff/Appellant and  
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## INTRODUCTION

Plaintiff/Appellant and Respondent Stephen K. Davis (“Taxpayer”) respectfully submits this opposition to Defendant/Respondent and Petitioner Fresno Unified School District’s (“District”) motion for judicial notice on the basis that it requests judicial notice of documents that cannot be relied on in this Court. Specifically, Taxpayer opposes District’s motion for judicial notice of Item 2, an unpublished opinion from the Second Appellate District. *See* District’s Motion for Judicial Notice (“MJN”), p. 2, Item 2; Ex. B.

## ARGUMENT

District seeks judicial notice of the *unpublished opinion* from *James D. McGee v. Torrance Unified School District et al.*, Second Appellate District Court of Appeal, No. B25270 (“*McGee v. TUSD*”). MJN, p. 2, Item 2; Ex. B. District seeks to introduce this unpublished opinion in an attempt to manufacture discord among the lower courts. MJN, p. 6 (the case “demonstrate[s] the . . .different treatment courts have given to the issues.”). District’s attempt is misguided; the *published* opinions relating to the issues examined in *McGee v. TUSD* are in harmony.

District’s motion for judicial notice should be denied for the simple reason that unpublished opinions cannot be cited or relied on by any California court. “[A]n opinion of a California Court of Appeal or superior court appellate division that is not certified for publication or ordered published *must not be cited or relied on by a court or a party* in any other action,” with certain limited exceptions. Cal. R. Ct. (“CRC”), Rule 8.1115. The CRC prohibit unpublished opinions from being “cited or relied on” in any way, such that they cannot be considered even persuasive authority. *Id.*

It is also well-settled that a party may not use a request for judicial notice as a way to sidestep compliance with Rule 8.1115. *People v. Webster*

(1991) 54 Cal.3d 411, 428, fn. 4, habeas corpus petition granted on other grounds by *In re Webster* (E.D. Cal. 2014) 2014 WL 4211115, \*1 (denying request for judicial notice of an unpublished opinion and recognizing that judicial notice may not be used to “circumvent” the prohibition against citing unpublished opinions).

District is using its motion for judicial notice as a vehicle to skirt the rules of court and improperly rely on an unpublished opinion. District’s purpose is clear; it knows that in order to gain review by this Court, it must show there is a lack of uniformity in the courts below. *See* CRC, Rule 8.500(b)(1). District is attempting to rely on the unpublished decision to show a great rift among the courts that is simply not there.


Consequently, District’s motion for judicial notice with respect to Item 2 should be denied.

**CONCLUSION**

For the foregoing reasons, this Court should deny District’s motion for judicial notice, specifically Item 2, accordingly.

DATED: August 3, 2015

Respectfully,  
CARLIN LAW GROUP, APC

By:   
\_\_\_\_\_  
Kevin R. Carlin  
Attorneys for Respondent  
Stephen K. Davis

**CERTIFICATE OF COMPLIANCE PURSUANT TO  
CAL. R. CT. 504(d)(1)**

Pursuant to California Rule of Court 8.504(d)(1), and in reliance upon the word count feature of the software used to prepare this document. I certify that the foregoing Opposition to Motion for Judicial Notice contains 452 words, exclusive of those materials not required to be counted under Rule 8.504(d)(3).

DATED: August 3, 2015.



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KEVIN R. CARLIN

**PROOF OF SERVICE**

STATE OF CALIFORNIA     )  
  ) SS  
COUNTY OF FRESNO     )

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen (18) years and not a party to the within-entitled action. My business address is 4452 Park Boulevard, Suite 310, San Diego, CA 92116. On August 3, 2015, I served the within document( s):

**OPPOSITION TO MOTION FOR JUDICIAL NOTICE**



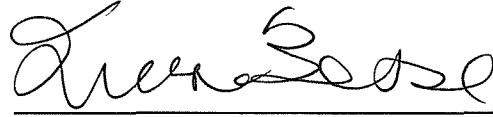
**BY MAIL:** By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California, addressed as set forth below.

<p>Donald R. Fischbach Steven M. Vartabedian Lynne Thaxter Brown Matthew R. Dildine Dowling Aaron Incorporated 8080 North Palm Avenue, 3<sup>rd</sup> Fl. P.O. Box 28902 Fresno, California 93729 (559) 432-4500</p> <p><b>Attorneys for Defendant and Respondent Fresno Unified School District</b></p>	<p>Martin A. Hom and Jennifer Cantrell Atkinson, Andelson, Loya, Ruud &amp; Romo 5260 N Palm Ave # 300 Fresno, CA 93704 (559) 225-6700</p> <p><b>Attorneys for Defendant and Respondent Fresno Unified School District</b></p>
<p>Frank J. Lozoya, Esq. Lozoya &amp; Lozoya 15060 Ventura Blvd., #211 Sherman Oaks, CA 91403 (818) 789-7150</p> <p><b>Attorneys for Defendant/Respondent Harris Construction, Co., Inc.</b></p>	<p>Ryan Keats Sean M. SeLegue Arnold &amp; Porter LLP Three Embarcadero Center, 10<sup>th</sup> Fl. San Francisco, CA 94111 (415) 471-3370</p> <p><b>Attorneys for Defendant/Respondent Harris Construction, Co., Inc.</b></p>

<p>Hon. Donald S. Black  Fresno County Superior Court  Department 502  1130 O Street  Fresno, CA 93724</p>	<p>Clerk of the Court  Fresno County Superior Court  Department 502  1130 O Street  Fresno, CA 93724</p>
<p>Philip J. Henderson  Orbach Huff Suarez &amp; Henderson  1901 Harrison St Ste 1630  Oakland, CA 94612  (510) 999-7908</p> <p><b>Attorneys for California's  Coalition for Adequate School  Housing: Amicus Curiae for  Respondent</b></p>	<p>Fred Fenster  Greenberg Glusker  1900 Avenue of the Stars, 21<sup>st</sup> Fl.  Los Angeles, CA 90067  (310) 785-6866</p> <p><b>Attorneys for Beverly Hills  Unified School District as Amicus  Curiae on behalf of Plaintiff and  Appellant</b></p>
<p>James Richard Traber  Fagen Friedman &amp; Fulfrost  520 Capitol Mall, Suite 400  Sacramento, CA 95814  (916) 443-0000</p> <p><b>Attorneys for California's  Coalition for Adequate School  Housing: Amicus Curiae for  Respondent</b></p>	<p>Anthony N. Kim  Cory J. Briggs  Mekaela M. Gladden  Briggs Law Corporation  99 East C Street, Suite 111  Upland, CA 91786  (909) 949-7115</p> <p><b>Attorneys for Kern County  Taxpayers Association as Amicus  Curiae on behalf of Plaintiff and  Appellant</b></p>
<p>Lawrence H. Kay  Law Office of Lawrence H. Kay  7801 Folsom Blvd., #101  Sacramento, CA 95826  (916) 381-7868</p> <p><b>Attorneys for Construction  Employers Association: Amicus  Curiae for Respondent</b></p>	<p>Court of Appeal  Fifth Appellate District</p> <p><i>(Via e-service pursuant to  California Rules of Court, Rule  8.212 by e-submission to Court of  Appeal, Fifth District)</i></p>

I am readily familiar with the firm's practices of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the United States Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 3, 2015, at San Diego, California.

A handwritten signature in cursive script, appearing to read "Duane Besse", written in black ink. The signature is positioned above a horizontal line.

Duane Besse