Did you notice that this fact was not in the record on appeal?

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EXCEPTIONALLY APPEALING

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Lawyering requires two key ingredients, facts and law. And the world of litigation starkly delineates the realms where each predominates. The shorthand phrasing of this general rule is that trials focus on the facts whereas appeals focus on the law.

The U.S. Supreme Court has put it like this: Factfinding is the "basic responsibility" of trial courts "rather than appellate courts." *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982) (quoting *DeMarco v. United States*, 415 U.S. 449, 450 n.22 (1974)); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969) ("appellate courts must constantly have in mind that their function is not to decide factual issues").

The California Supreme Court's formulation of this "essential distinction between the trial and the appellate court" is that it is "the province of the trial court to decide questions of fact and of the appellate court to decide questions of law." *In re Zeth S.*, 31 Cal. 4th 396, 405 (2003), quoting *Tupman v. Haberkern*, 208 Cal. 256, 262-63 (1929).

A consequence of this division of responsibilities is that an appellate court's review is cabined by the universe of facts that were "before the trial court for its consideration." *Zeth S.*, 31 Cal. 4th at 405. Justice Rebecca Wiseman turned a catchy phrase when she began an opinion with the immortal line: "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." *Protect Our Water v. County of Merced*, 110 Cal. App. 4th 362, 364 (2003). (The 5th District Court of Appeal is so proud of this quip that it has enshrined it on its Practices & Procedures webpage to educate the bar and public about "The Appellate Process.")

This fundamental principle is invoked frequently, and has shut down all manner of attempts -- whether borne out of good-faith ignorance or sneaky tricksterism -- to introduce new facts on appeal. Typically appellate courts dismiss such gambits with something like: "Generally, documents and facts that were not presented to the trial court and which are not part of the record on appeal cannot be considered on appeal." *Truong v. Nguyen*, 156 Cal. App. 4th 865, 882 (2007).

But note the careful hedging reflected by the word "generally." As attentive readers have no doubt gathered, there are situations where appellate courts will in fact accept new facts on appeal. Around these parts, we call those "exceptions" to a general rule -- this column's raison d´être. (Linguistic sidebar: Since we're tossing around some French dressing, a classy legalistic word for something "outside the record" -- our present topic -- is "dehors the record." *See Gostorfs v. Taffre, McCahill & Co.*, 18 Cal. 385 (1861).)

The most common example of an exception to the elementary precept limiting facts on appeal to the record is (... the anticipation builds!) ... the rather prosaic doctrine of judicial notice. (Oh, OK.) *See Fitz v. NCR Corp.*, 118 Cal. App. 4th 702, 719 n.4 (2004).

Judicial notice gets its own division in the Evidence Code (Div. 4, Sections 450-460) and comes in two flavors, mandatory (Section 451) and discretionary (Section 452), though the latter may transform into the former if proper procedure is followed (*see* Section 453). (For a recent riveting romp of judicial notice law, see Hon. Lawrence Riff, "Hey Judge, Did you Happen to Notice ...?" ABTL-LA Report 11-13 (Spring 2018).)

The judicial notice statute directed at appellate courts is Section 459, which requires a "reviewing court" to take judicial notice of matters that were properly already judicially noticed by the trial court and matters that the trial court would have been required to notice under the mandatory Sections of 451 and 453. Appellate courts are also empowered to judicially notice "any matter specified in Section 452," i.e., any matter subject to discretionary notice. The Rules of Court set forth specific requirements for how to properly seek judicial notice. *See* Rules 8.252 (for the Court of Appeal), 8.520(g) (for the Supreme Court), 8.809 (for superior court appellate divisions). The gist of these rules is that the party seeking judicial notice needs to explain why the matter is relevant on appeal and, if the trial court did not take judicial notice, why judicial notice is proper now. In other words, appellate courts are always especially keen to know why they should look at a fact the trial court never looked at.

In line with our basic premise, the California Supreme Court has explained that "Reviewing courts generally do not take judicial notice of evidence not presented to the trial court." *Vons Companies, Inc. v. Seabest Foods, Inc.*, 14 Cal. 4th 434, 444 n.3 (1996); *see also People v. Preslie*, 70 Cal. App. 3d 486, 493 (1977), citing *People v. Superior Court (Mahle)*, 3 Cal. App. 3d 476, 482 n. 3 (1970) ("as a general rule, [an appellate] court should not take [judicial] 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").

That "generally" may be overcome, however, by "exceptional circumstances" that would "justify deviating" from the general rule. *Vons*, *supra*; *Cal. Sch. Bds. Ass'n v. State of Cal.*, 192 Cal. App. 4th 770, 803 (2011) (denying judicial notice for lack of "exceptional circumstances" to "justify a deviation" from the "fundamental principle of appellate law" that review is limited to the trial court's record). So what are such circumstances?

Well, sometimes an appellate court needs or is willing to take judicial notice simply to fill in missing gaps of an appellate record, including post-appeal events. *E.g.*, *Flatley v. Mauro*, 39 Cal. 4th 299, 306 n.2 (2006) (judicial notice of dismissals taken to "help complete the context of this case"); *Panoche Energy Ctr. v. PG&E*, 1 Cal. App. 5th 68 (2016) (judicial notice of post-appeal regulatory developments); *County of Santa Clara v. Escobar*, 244 Cal. App. 5th 555, 559 n.1

(2016) (judicial notice of court record taken to "assist in providing a complete picture of the procedural background for the present appeal").

Another common scenario for judicial notice on appeal is legislative history. *Flatley*, *supra*; *People v. Ansell*, 25 Cal. 4th 868, 881 n.20 (2001); *People v. Jones*, 25 Cal. 4th 98, 106 n.3 (2001); *People v. Epps*, 25 Cal. 4th 19, 24 n.2 (2001). As noted in last month's column, the 3rd District Court of Appeal (in Sacramento) is especially attuned to this sort of judicial notice and has promulgated a local rule directing counsel to comply with its tutorial set forth in *Kaufman & Broad Communities v. Performance Plastering*, 133 Cal. App. 4th 26 (2005).

A more substantive use of judicial notice is to establish (or contest) mootness. Many appellate courts have happily taken judicial notice of new facts as a means to dump a moot appeal. *Center for Bio. Diversity v. Dept. of Conserv.*, 2018 DJDAR 8171, 8173 (Aug. 14, 2018) ("resolving the mootness question constitutes exceptional circumstances warranting our taking the additional documentary evidence for this limited purpose"); *Speirs v. Bluefire Ethanol Fuels, Inc.*, 243 Cal. App. 4th 969, 980 (2015) (same); *Aguiar v. Cintas Corp. No. 2*, 144 Cal. App. 4th 121, 128 n.2 (2006); *Jordan v. Los Angeles County*, 267 Cal. App. 2d 794 (1968); *In re Anna S.*, 180 Cal. App. 4th 1489 (2010); *In re R.V.*, 171 Cal. App. 4th 239, 245 (2009) (judicial notice of postorder reports that respondent contended were relevant to mootness); *In re Karen G.*, 121 Cal. App. 4th 1384, 1390 (2004) ("It is not uncommon for an appellate court to take judicial notice of subsequent proceedings in the juvenile court and find the appeal has been rendered moot.").

Although invoking judicial notice on appeal serves as an exception to the rule confining an appellate court to the trial court record, such notice is rarely dispositive, particularly exciting, or even all that unusual. Thus, while appellate judicial notice may be a conceptual anomaly, it's really not all that strange, and it admittedly lacks pizzazz. To compensate for all the yawning, next month we'll really go unicorn hunting: How can a totally new fact (not just a boring judicially noticeable fact) get injected into an appeal? We'll dial up an excursion to 909-land (and that doesn't mean east L.A. County/San Bernardino) to find out.