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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

STEPHEN SHAPIRO et al.,  
Plaintiffs and Appellants,

v.

HARBOR FREIGHT TOOLS USA,  
INC.,

Defendant and Respondent.

A164895

(Sonoma County  
Super. Ct. No. SCV263488)

**BY THE COURT:**

Appellants' motion to recall the remittitur and reinstate this appeal is  
denied.

Dated: 09/19/2024

Stewart, P.J. P.J.

Stephen Shapiro and Kerry Barnes  
PO Box 1125  
Cloverdale, CA 95425  
(707) 814-5729

Plaintiffs, In Pro Per

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIRST APPELLATE DISTRICT**

**DIVISION 2**

STEPHEN SHAPIRO AND KERRY BARNES,  
Plaintiff and Respondent,

v.

HARBOR FREIGHT TOOLS, USA, INC.  
Defendant and Appellant.

Court of Appeal  
No. A164895

Superior Court  
No. SCV-263488

**APPEAL FROM THE SUPERIOR COURT OF SONOMA COUNTY**

Honorable Jennifer V. Dollard, Judge

**PLAINTIFFS MOTION TO RECALL THE REMITTITUR  
AND REINSTATE THE APPEAL**

TO THE HONORABLE THERESE M. SEWART, PRESIDING JUSTICE, AND TO  
THE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION 2:

Under California Rules of Court, rules 8.272(c), plaintiffs Stephen Shapiro and Kerry Barnes hereby move to recall the remittitur the court issued on June 13, 2024 and to reinstate their appeal. The grounds for this motion are that Appellant and Petitioner Kerry Barnes was denied access to the courts during her incarceration.

This motion is based upon the California and United States Constitutions, rule 8.272(c)(2) of the California Rules of Court, the accompanying memorandum of points and authorities, the declaration of Kerry Barnes, attached exhibits (attached separately), and the files and records in First Appellate District case number A164895.

Dated: August 17, 2024

Respectfully submitted,

*Stephen Shapiro*

Stephen Shapiro

*Kerry Barnes*

Kerry Barnes

Plaintiffs and Appellants  
In Pro Per

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## **I. INTRODUCTION**

Stephen Shapiro and Kerry Barnes (we), self-represented Plaintiffs and Appellants, request this court to Recall the Remittitur and reinstate their appeal in the matter against Harbor Freight Tools, USA, Inc (HFT).

We have been diligent in our attempt to have this appeal heard, but have experienced numerous setbacks and due to issues beyond our control, the court has issued a remittitur.

The appeal involves a Product Liability case wherein Stephen Shapiro was severely burned by a defective product manufactured and sold by HFT.

The remittitur was based on the courts belief that we failed to procure the record on appeal.

As we will show, we encountered difficulties in procuring the record on appeal due to plaintiff and appellant Kerry Barnes' incarceration from January 8, 2024 to March 26, 2024 and was unable to receive the proper assistance and access to the court, as she requested numerous times.

*A prisoner also has a statutory right under Penal Code section 2601, subdivision (e) to initiate civil actions. In the case of an indigent prisoner initiating a bona fide civil action, this statutory right carries with it a right of meaningful access to the courts to prosecute the action. (Cf. Bounds v. Smith (1977) 430 U.S. 817 [52 L. Ed. 2d 72, 97 S. Ct. 1491].) A prisoner may not be deprived, by his or her inmate status, of meaningful access to the civil courts if the prisoner is both indigent and a party to a bona fide civil action threatening his or her personal or property interests. (Wantuch v. Davis (1995) 32 Cal.App.4th 786 [39 Cal.Rptr.2d 47].)*

We contend the acts and omissions of jail officials and others denied our right to meaningful access to the courts. We shall demonstrate that our statutory right to initiate and prosecute a civil action (Pen. Code, § 2601, subd. (d)) has been infringed.

Specifically, we will show that official acts frustrated Kerry Barnes' attempts to resubmit their submittal of obtaining the record on appeal, and the dismissal of the action caused a miscarriage of justice. We therefore request the court recall the remittitur and reinstate the appeal.



## **II MEMORANDUM OF POINTS AND AUTHORITIES**

### **A. PROCEDURAL AND FACTUAL BACKGROUND**

On March 28, 2022, Plaintiffs and Appellants Stephen Shapiro and Kerry Barnes (we) filed our Notice of Appeal (Exhibit A).

One June 20, 2023, the Court of Appeal filed a Dismissal of Appeal (Exhibit B).

On August 1, 2023, we filed a Petition for Review with the Supreme Court of California (Exhibit C).

October 11, 2023, the Supreme Court granted our Petition for Review (Exhibit D).

On November 3, 2024, we filed our Motion Requesting the Courts Grant Kerry Barnes' Fee Waiver and Allow Additional Time to Procure the Record (Exhibit E).

On December 19, 2023, this court granted our Motion for Additional Time to Procure the Record, granting twenty days to file necessary documents and pay fees, if applicable, to obtain the record (Exhibit F). This would grant us until January 8, 2024.

On January 4, 2024, we filed our Appellant's Notice Designating Record on Appeal (Unlimited Civil Case) Cover Sheet & Table of Contents (Exhibit G).

On January 8, 2024, Plaintiff and Appellant Kerry Barnes attempted to clear an outstanding warrant she was unaware of until a few days before. When she appeared in court to clear the warrant, the court took her into custody (Exhibit H).

During her incarceration, she was unaware of when she may be released, she was only allowed time out of her cell approximately thirty minutes per day, and sometimes not allowed out of the cell at all. During time outside of her cell, she only had enough time to call her husband Stephen, take a shower, and try and contact her attorney.

On January 12, 2024 we received an email from Odyssey eFileCA stating the filing submitted on January 4, 2024 was rejected with the comment "Please resubmit designation without cover sheet and without attached filed designations" (Exhibit I).

Up until this time, Kerry had been the sole person who drafted the filings and filed them with the courts. Stephen had no knowledge of how to do so, yet Kerry gave him as

much instruction as she could over the phone in order for Stephen to resubmit the filing per the courts instructions.

On January 25, 2024, Stephen resubmitted Appellant's Notice Designating Record on Appeal (Unlimited Civil Case) Cover Sheet & Table of Contents (Exhibit J).

On February 29, 2024 we received an email from Lorena Deloza, Senior Legal Processor, Civil & Appeals Division, stating "I am rejecting your designation that was submitted on 1/25/24 in e-file per C.R.C. 8.121. You will need to resubmit an Amended Designation with only the reporter transcript if you are electing to proceed with the reporter transcript. You will need to resubmit without the emails and attachments. If you have any questions, you can reach out to the appeals department at 707-521-5572 or email at [Appealsinfo@sonomacourt.org](mailto:Appealsinfo@sonomacourt.org)."

The following is documentation during the time Kerry was incarcerated from March 11, 2024 to March 23, 2024, and the attempts she made in getting access to the courts (Exhibit L).

On February 20, 2024, Kerry submitted an Inmate Request Form (IRF)<sup>1</sup>, stating "I would like to request access to legal research books, such as Deering's, for checkout while in jail, or any legal research books available to be added to our "library"", our "library" being a portable shelving unit on wheels that held mostly donated fiction books.

On February 23, 2023, Kerry received a response to her IRF of February 20, 2024, with the response "Our legal reference material can be found on the tablets located under "Fastcase"". Inmates are allowed access to a tablet for approximately three hours every other day, although there are numerous times where the service is bad or non-existent. The tablets do now allow access to regular internet.

On March 4, 2024, Kerry spoke with her probation officer via the telephone and stated that she needed access to a civil case.

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<sup>1</sup> An Inmate Request Form (IRF) is a document used by the Sonoma County Main Adult Detention Facility (MADF), for inmates to submit requests. This consists of a top white copy, for filing with the facility, a bottom pink copy to return to the inmate once the IRF has been received, and a middle yellow copy, which is to be returned to the inmate with the facility's answer. .

On March 11, 2024, Kerry spoke with the Correctional Officer at the main desk of the jail stating she needed access to a civil case she was involved in. The officer suggested she contact Friends Outside, a local non-profit that assists inmates with requests. Kerry responded that she had already sent in a request to Friends Outside for something unrelated and had not received any response.

On March 11, 2024, Kerry submitted an IRF, requesting this be sent to her attorney, stating "I have a civil case, SCV-26488, that I need to re-file into as soon as possible in order to not lose our Appeal. Please let me know how I can access the Court's website, my email, & E-Filing, in order to re-file the document for obtaining the record on appeal. This is rather urgent. Thank you." Kerry did not receive any copies back nor did she receive a response.

On March 11, 2024, Kerry submitted an IRF, stating ""URGENT. I need to speak with anyone who can help me (A) access my civil case where I am a pro-per plaintiff. I must file into my case as soon as possible...".

On March 13, 2024, Kerry submitted an IRF stating: "URGENT. 2nd Request. I need to speak with ANYONE who can help me (A) access my civil case where I am a pro-per plaintiff. I must file into my case as soon as possible. 1st Request 03.11.24..." Kerry received a pink inmate copy back on March 13, 2024 signed by a corrections officer.

On March 14, 2024, Kerry received back the IRF submitted on March 11, 2024, requesting urgent assistance. The corrections officer stated that this was found in the mailbox but it was not marked with any designation on who to send it to. Kerry explained what she needed and the officer suggested she designate this to the Program Officer.

On March 14, 20254, Kerry submitted an IRF to the Program Officer stating: "URGENT. I have a civil case in Sonoma County where I am a pro-per plaintiff. It is in the appeals process & I need to re-file a document in order to procure the record on appeal. I need to file this ASAP. Please set me up for access to the courts & e-filing. Thank you." She did not receive any copies back nor any response.

On March 14, 2024, Kerry placed a call to Lorena Del Laroza of the Sonoma County Courts but there was no answer.

On March 15, 2024, Kerry called her attorney and left a message with the receptionist stating she needed to speak with her attorney about a civil case.

On March 19, 2024, Kerry submitted an IRF to the Program Officer, stating: "URGENT - 4th Request\*. I have a civil case in Sonoma County where I am a pro-per plaintiff & is in the appeals process. I have a document which needs to be re-filed immediately & I need access to the courts in order to do so. Please assist me. Thank you. \*1st Request 03.11.24/2nd Request 03.13.24/3rd Request 03.14.24". Kerry received a pink Inmate copy signed by a correctional officer on March 19, 2024.

On March 23, 2024, Kerry received a yellow copy of the IRF dated March 14, 2024. It was dated by the responding staff on March 20, 2024 and had the following explanation/answer: "Ms. Barnes - do you have any documentation to confirm your civil pro-per status? Sgt. Ricega has been on vacation which is the reason for the delay in response. Once we have confirmation we can proceed."

On March 23, 2024, Kerry responded to the above response from the jail stating: "To Program Officer Sgt. Ricega (sp?), Per my IRF dated 03.20.24 (pink copy attached) my case # is SCV-263488 & is Stephen Shapiro & Kerry Barnes v. Harbor Freight Tools, USA, Inc. We are pro per plaintiffs. Please let me know if this is sufficient documentation for my pro per civil case status. Thank you." Kerry did not receive any IRF copies back and was released before she received any response.

On March 15, 2024 we received a Notice of Dismissal from the Court of Appeal (Exhibit M).

On March 26, 2024, Kerry was released from jail (Exhibit N).

On April 2, 2024, we submitted a Petition for review with the Supreme Court, filed a Notice of Errata on April 16, 2024, and a Notice of Errata on April 17, 2024 (Exhibit O).

On June 12, 2024 the Petition for Review was denied by the Supreme Court (Exhibit P).

On June 13, 2024 the Court of Appeal sent the Notice of Remittitur.

**B. ARGUMENT**

**1. THIS COURT SHOULD RECALL THE REMITTITUR AND REINSTATE THE APPEAL BECAUSE APPELLANT AND PLAINTIFF KERRY BARNES WAS DENIED MEANINGFUL ACCESS TO THE COURTS DURING INCARCERATION**

**a. THE COURT HAS AUTHORITY TO RECALL THE REMITTITUR**

Rule 8.272(c)(2) of the California Rules of Court provides: “On a party’s or its own motion or on stipulation, and for good cause, the court may stay a remittitur’s issuance for a reasonable period or order its recall.”

Long-established case law provides for a remittitur to be recalled and an appeal to be reinstated when intervening new law requiring a different result has been issued or similar circumstances undermining the original decision are discovered. (E.g., *People v. Mutch* (1971) 4 Cal.3d 389, 396-397 [recall of remittitur ordered after California Supreme Court reinterpreted statute in subsequent decision]; *In re Grunau* (2008) 169 Cal.App.4th 997, 1002-1003 [recall of remittitur based on ineffective assistance of counsel]; *People v. Valenzuela* (1985) 175 Cal.App.3d 381, 388 [recall of remittitur because of ineffective assistance of counsel on appeal], disapproved on other grounds in *People v. Flood* (1998) 18 Cal.4th 470.)

*In a note in 23 California Law Review, at page 354, which digests numerous authorities on the subject, the following conclusion is expressed: "It would appear from these cases that a remittitur will be recalled when, but only when, inadvertence, mistake of fact, or an incomplete knowledge of all the circumstances of the case on the part of the court or its officers, whether induced by fraud or otherwise, has resulted in an unjust decision." (In re Application of Rothrock (1939) 14 Cal.2d 34 [92 P.2d 634].)*

*For good cause, a remittitur may be recalled (Cal. Rules of Court, rule 8.272(c)(2)) and, other than to correct clerical errors, a remittitur may be recalled "on the ground of fraud, mistake, or inadvertence." (Pacific Legal Foundation v. California Coastal Com. (1982) 33 Cal.3d 158, 165 [188 Cal. Rptr. 104, 655 P.2d 306], italics added.) (People v. Gerson (2022) 80 Cal.App.5th 1067 [296 Cal.Rptr.3d 576].)*

#### **b. A CONSTITUTIONAL RIGHT OF ACCESS TO COURTS**

The Supreme Court has articulated the right to access to the courts in a number of landmark decisions. In *Johnson v. Avery* (1969), the Court held that inmates have a constitutional right to assist each other with legal matters and that prison officials cannot interfere with this right. In *Bounds v. Smith* (1977), the Court held that inmates have a constitutional right of access to the courts, which includes the right to legal resources such as law libraries, legal assistance, and other tools necessary to prepare legal documents and pursue legal claims.

*The policy of appellate courts is to hear appeals on the merits and to avoid, if possible, all forfeitures of substantial rights on technical grounds.*

*Where a prisoner seeking judicial relief fails to take timely action due to an act or restriction of those charged with official responsibility, it has been held that such person cannot be deprived of the right to obtain his relief. (People v. Slobodion, 30 Cal.2d 362 [181 P.2d 868].) Where the acts which cause a late filing are those of a clerk of the court or other administrative officer, the right to file is preserved. (People v. Howard, 166 Cal.App.2d 638 [334 P.2d 105]; People v. Stinchcomb, 92 Cal.App.2d 741 [208 P.2d 396].) (In re Martin (1962) 58 Cal.2d 133 [23 Cal.Rptr. 167, 373 P.2d 103].)*

*The fundamental constitutional right of access to the courts held to require prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law. Younger v. Gilmore, 404 U. S. 15. Pp. 430 U. S. 821-833. 538 F.2d 541 Bounds v. Smith, 430 U.S. 817 (1977)*

*Prisoners have a constitutional right of access to the courts. See Bounds v. Smith, 430 U.S. 817, 821 (1977). Under the First Amendment, a prisoner has both a right to meaningful access to the courts and a broader right to petition the government for a redress of his grievances. See Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir.1995) (overruled on other grounds by Shaw v. Murphy, 523 U.S. 223, 230 n. 2 (2001)). "In some instances, prison authorities must even take affirmative steps to help prisoners exercise their rights." Silva v. Di Vittorio, 658 F.3d 1090 (9<sup>th</sup> Cir. 2011)*

Kerry made every attempt to get assistance while incarcerated but due to the slow responses by the staff and her inability to reach out to someone outside the jail, she was unable to re-file the documents needed to obtain the record on appeal.

**III. CONCLUSION**

For these reasons shown in the motion, good cause exists to recall the remittitur and reinstate defendant's appeal.

Dated: August 18, 2024

Respectfully submitted,

*Stephen Shapiro*

Stephen Shapiro

*Kerry Barnes*

Kerry Barnes

In pro per



## **DECLARATION OF KERRY BARNES**

I, Kerry Barnes, am one of the plaintiffs/appellants in this case.

I have personal knowledge of all facts stated in this declaration, and if called to testify, I could and would testify competently thereto.

These following exhibits are true and correct copies of documents I have in my possession.

**Exhibit A** is a true and correct copy of our March 28, 2022 Notice of Appeal.

**Exhibit B** is a true and correct copy of the June 20, 2023 Dismissal of Appeal from the Court of Appeal, First Appellate District.

**Exhibit C** is a true and correct copy of our August 1, 2023 Supreme Court Petition for Review.

**Exhibit D** is a true and correct copy of the October 11, 2023 Supreme Court Granting of our Petition for Review.

**Exhibit E** is a true and correct copy of our November 3, 2024 Notice of Motion and Motion Requesting the Courts Grant Kerry Barnes' Fee Waiver and Allow Additional Time to Procure the Record.

**Exhibit F** is a true and correct copy of the December 19, 2023 Court of Appeal granting our Motion for Additional Time to Procure the Record.

**Exhibit G** is a true and correct copy of our January 4, 2024 Appellant's Notice Designating Record on Appeal (Unlimited Civil Case) Cover Sheet & Table of Contents.

**Exhibit H** is a true and correct copy of the January 8, 2024 Superior Court of California, County of Sonoma, form showing Kerry Barnes was remanded into custody.

**Exhibit I** is a true and correct copy of the January 12, 2024 email from Odyssey eFileCA.

**Exhibit J** is a true and correct copy of our January 25, 2024 Designating Record Submittal & Table of Contents.

**Exhibit K** is a true and correct copy of the February 29, 2024 email from Lorena Deloza, Senior Legal Processor, Civil & Appeals Division.

**Exhibit L** are true and correct copies from March 11, 2024 - March 23, 2024 of Kerry Barnes' papers and notes while incarcerated in the Sonoma County Jail Main Adult Detention Facility (MADF).

**Exhibit M** is a true and correct copy of the March 15, 2024 Notice of Dismissal from the Court of Appeal.

**Exhibit N** is a true and correct copy of the March 26, 2024 Superior Court of California, County of Sonoma, form showing Kerry Barnes' Release from Jail.

**Exhibit O** is a true and correct copy of the April 2, 2024, Petition for review with the Supreme Court, April 16, 2024 Notice of Errata, April 17, 2024 Notice of Errata.

**Exhibit P** is a true and correct copy of the June 12, 2024 Supreme Courts Denial of Petition for Review.

**Exhibit Q** is a true and correct copy of the June 13, 2024 Notice of Remittitur.

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

Kerry Barnes

Kerry Barnes

August 18, 2024

Date

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

STEPHEN SHAPIRO et al.,  
Plaintiffs and Appellants,  
v.  
HARBOR FREIGHT TOOLS USA,  
INC.,  
Defendant and Respondent.

A164895

(Sonoma County  
Super. Ct. No. SCV263488)


BY THE COURT:

After granting appellants' motion for additional time to procure the record, appellants have failed to timely procure the record as directed in this court's order filed December 19, 2023.

Appellants' appeal filed on March 28, 2022, is dismissed. (Cal. Rules of Court, rule 8.140(a)(1)).

Dated: March 15, 2024

Stewart, P.J. P.J.

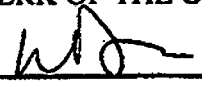
<b>SUPERIOR COURT OF THE STATE OF CALIFORNIA</b> County of Sonoma – Appeals Division 3055 Cleveland Ave. Santa Rosa, California 95403-2878 707-521-6572, <a href="mailto:appealsinfo@sonomacourt.org">appealsinfo@sonomacourt.org</a>	<div style="text-align: center;"><b>FILED</b></div> <div style="text-align: center;">3/6/24</div> <div style="text-align: center; font-size: small;">Clerk of the Superior Court of California County of Sonoma</div>
<b>PLAINTIFF(S)/Appellant (S):</b> Stephen Shapiro & Kerry Barnes	By  <div style="text-align: right; font-size: small;">Deputy Clerk</div>
<b>DEFENDANT(S)/Respondent(S):</b> Harbor Freight Tools	Superior Court #: <b>SCV-263488</b>
<b>CLERK'S DECLARATION</b>	DCA #: A164895

I, Lorena Deloza, hereby certify that I am employed by the Superior Court of Sonoma County as a Legal Processor III, and further certify that Appellant has failed to perform the acts necessary to procure the filing of the record within the time allowed or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or any other party. The deadline of January 18, 2024. The appeal may be dismissed on motion of the respondent or on the reviewing court's own motion.

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

Dated: 3/6/24

Robert Oliver  
CLERK OF THE COURT

by:   
 Lorena Deloza  
Deputy Clerk

Court of Appeal, First Appellate District	
<b>RECEIVED</b>	
MAR 11 2024	
Charles D. Johnson, Clerk	
by _____	Deputy Clerk

PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 3055 Cleveland Ave , Santa Rosa, California, 95403; that I am not a party to this cause; that I am over the age of 18 years; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of the Clerk's Declaration in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: 3/6/2024

Robert Oliver  
CLERK OF THE COURT

by



Lorena Deloza  
Deputy Clerk

-Addressees-

FIRST DISTRICT COURT OF APPEALS  
350 MCALLISTER ST.  
SAN FRANCISCO, CA 94102

Stephen Shapiro  
Po Box 1125  
Cloverdale, CA 95425

Kerry Barnes  
Po Box 1125  
Cloverdale, CA 95425



Kerry Barnes <kerry.barnes.shapiro@gmail.com>

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## California Court of Appeal Case Notification for: A164895

1 message

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Notify@jud.ca.gov <Notify@jud.ca.gov>  
To: kerry.barnes.shapiro@gmail.com

Tue, Jun 20, 2023 at 1:10 PM

kerry.barnes.shapiro@gmail.com, the following transaction has occurred in:  
Shapiro et al. v. Harbor Freight Tools USA, Inc.  
Case: A164895, 1st District, Division 2

Disposition date            2023-06-20  
(YYYY-MM-DD):  
Disposition                Dismissed per rule  
description:                8.140(b)  
Disposition status as of 2023-06-20:    Final

**Notes:**

Appellant having failed to procure the record on appeal within the time allowed or within any valid extensions of time, and having failed to apply for relief from default, the appeal filed on March 28, 2022, is dismissed. (See Cal. Rules of Court, rule 8.140(b).)

For more information on this case, go to:

[https://appellatecases.courtinfo.ca.gov/search/case/disposition.cfm?dist=1&doc\\_id=2380026&doc\\_no=A164895&request\\_token=OClwLSEmLkw5W1BNSCM9WEtIUFG6UVxfJSNeJzNSLDtPCg%3D%3D](https://appellatecases.courtinfo.ca.gov/search/case/disposition.cfm?dist=1&doc_id=2380026&doc_no=A164895&request_token=OClwLSEmLkw5W1BNSCM9WEtIUFG6UVxfJSNeJzNSLDtPCg%3D%3D)

For opinions, go to the following web site: <https://www.courts.ca.gov/opinions-slip.htm>

Court of Appeal opinions are generally available on the web site by 5 p.m. on the disposition date.

Unpublished opinions are generally available on the web site by 5 p.m. on the disposition date or by 5 p.m. on the court workday following the disposition date.

Do not reply to this e-mail. Messages sent to this e-mail address will not be processed.



Kerry Barnes <kerry.barnes.shapiro@gmail.com>

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**Servicing Notification for A164895 - SCV263488 | Shapiro et al. v. Harbor Freight Tools USA, Inc.**

1 message

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truefilingadmin@truefiling.com <truefilingadmin@truefiling.com>  
To: kerry.barnes.shapiro@gmail.com

Tue, Jun 20, 2023 at 11:47 AM

The document listed below is being electronically served to you for case **A164895** by **Attorney Name Not Specified** from the **California Court of Appeal, First Appellate District**.

- Document Title: A164895 - Order - DISMISSAL ORDER FILED - 6/20/2023
- Case Number: A164895
- Description: SCV263488 | Shapiro et al. v. Harbor Freight Tools USA, Inc.
- Link: Click to download document

The following people were electronically served this document.

- **Kevin Sutherland** (kevin.sutherland@clydeco.us)
- **Brandon Franklin** (brandon.franklin@clydeco.us)
- **Douglas Collodel** (douglas.collodel@clydeco.us)
- **Stephen Shapiro** (kerry.barnes.shapiro@gmail.com)
- **S. Wheeler** (truefilingadmin@truefiling.com)

If you are unable to view the document using the hyperlink above, please copy and paste the entire URL into a web browser's address bar.

<https://eservices.truecertify.com/?loc=CAC-P7LJE1-59EADC55&key=16J>

Thank you,

*California Court of Appeal, First Appellate District*

COURT OF APPEAL, FIRST APPELLATE DISTRICT  
350 MCALLISTER STREET  
SAN FRANCISCO, CA 94102  
DIVISION 2

STEPHEN SHAPIRO et al.,  
Plaintiffs and Appellants,  
v.  
HARBOR FREIGHT TOOLS USA, INC.,  
Defendant and Respondent.

A164895  
Sonoma County Super. Ct. No. SCV263488

BY THE COURT:

Appellant having failed to procure the record on appeal within the time allowed or within any valid extensions of time, and having failed to apply for relief from default, the appeal filed on March 28, 2022, is dismissed. (See Cal. Rules of Court, rule 8.140(b).)

Date: 06/20/2023

Stewart, P.J. P.J.



SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SONOMA

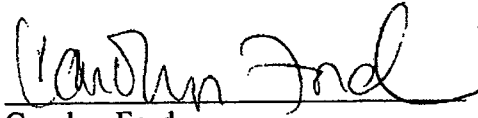
Shapiro, et al.,	:	Case No.: A164895
	:	
Plaintiff/Appellant,	:	Superior Court Case No.: SCV-263488
	:	
vs.	:	
	:	DEFAULT – REQUEST FOR DISMISSAL
Harbor Freight Tools, USA, Inc ,	:	
	:	
Defendant/Respondent.	:	

This is to inform you that the Appellant, Shapiro, et al., has not complied with the Notification of Failure to Comply filed May 1, 2023. The 15 day timeframe has lapsed.

Therefore, it is respectfully requested the above entitled case be dismissed.

Robert Oliver, Clerk of the Court

Dated: 06/12/2023

  
Carolyn Ford  
Appellate Clerk

Default – Request For Dismissal

SUPREME COURT  
**FILED**

DEC 31 2024

Court of Appeal, First Appellate District, Division Two - No. A164895

Jorge Navarrete Clerk

**S287575**

Deputy

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

---

STEPHEN SHAPIRO et al., Plaintiffs and Appellants,

v.

HARBOR FREIGHT TOOLS USA, INC., Defendant and Respondent.

---

The petition for review is denied.

**GUERRERO**

---

*Chief Justice*

**S287575**

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

STEPHEN SHAPIRO et. al.,

Plaintiffs and Appellants,

vs.

HARBOR FREIGHT TOOLS, USA, INC.;

Defendant and Respondent

) Case No.: SCV-263488

) Appeal No.: A164895

) Date Complaint Filed: November 8, 2018

) Date Appeal Filed: March 28, 2022

**PETITION FOR REVIEW**

After a Decision by the Court of Appeal First Appellate District, Division 2,  
Denying Petitioner's Application to Recall the Remittitur and to Reinstate the Appeal

Sonoma County Superior Court Case No. SCV-63488  
Honorable Jennifer V. Dollard, Judge

STEPHEN SHAPIRO AND KERRY BARNES  
P.O. Box 1125  
Cloverdale, CA 95425  
(707) 814-5729  
In Propria Persona

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### **GROUND FOR REVIEW**

Pursuant to Rule 8.500, California Rules of Court, Stephen Shapiro and Kerry Barnes, Plaintiffs and Appellants, hereby petition this Court to grant review of the decision of the Court of Appeal for the First Appellate District, Division 2, filed on September 19, 2024, which denied their motion to recall the remittitur and to reinstate the appeal. A copy of the filed decision of the Court of Appeal is attached as appendix "A".

### **ISSUES PRESENTED FOR REVIEW**

This Supreme Court previously granted Petitioner's request for review on the same issue on October 11, 2023 (S281202) (Appendix B).

Does this Court of Appeal's decision uphold our right to due process if the Appellants were penalized through no fault of their own?

No we also ask, has due process been met if appellants are denied their right to appeal due to a delay caused by an appellants' incarceration?

### **WHY REVIEW SHOULD BE GRANTED**

Review should be granted so the case may be transferred to the Court of Appeal, First Appellate District, Division Two, for further proceedings (Cal. Rules of Court, Rule 8.528(d).)

*No person shall be deprived of life, liberty, or property, without due process of law; U.S. Const. amend. V*

*(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; CA Constitution art I § 7*

### **Self-Representation**

There is still a disparaging number of self-represented litigants who never see their day in court, many times due to technicalities in their filed documents, which is the case here.

*In determining whether to relieve from default we are faced with two conflicting policies. There is, of course, a strong public policy in favor of hearing appeals on their merits and of not depriving a party of his right of appeal because of technical noncompliance where he is attempting to perfect his appeal in good faith. On the other hand, a respondent is likewise entitled to consideration. He is entitled to have the appellant proceed with expedition, and if the appellant fails to comply with the rules, to have the appeal dismissed. But this right to a dismissal is not absolute, except for failure to file the notice of appeal. Under the rules, the trial court may grant extensions not to exceed ninety days, the appellate court may grant additional extensions (rule 45(c)), and the appellate court may relieve from default (rule 53(b)). In determining whether an appellant should be relieved from default, various factors must be considered such as the length of the default, the circumstances surrounding the default, the relative injury that will flow to either*



*party by granting or denying the relief, the nature of the default and other factors. Each case must turn on its own facts, and precedents are of little value. (Jarkieh v. Badagliacco (1945) 68 Cal.App.2d 426 [156 P.2d 969].)*

### **Access to the Courts**

*"(a) Incarcerated person access to the courts shall not be obstructed." Cal. Code Regs. Tit. 15, § 3160*

Many cases have been brought to the courts regarding prisoner's rights and access to the courts.

In 1941, the courts first recognized that incarcerated persons have a constitutional right of access to the courts and that prison officials cannot serve as a barrier between prisoners and the court system (*Ex parte Hull*, 312 U.S. 546, 549 (1941)).

In 1970, the courts deemed the right to access to courts to be a "constitutional imperative" and that prisoners must have some form of assistance necessary to access courts (*Gilmore v. Lynch*, 319 F. Supp. 105 (N.D. Cal. 1970)).

In 1995, the courts held that a prisoner's right of meaningful access to the courts applies to both initiate and prosecute civil actions (*Crane v. Dolihite*, 70 Cal.App.5th 772, 285 Cal. Rptr. 3d 642 (Cal. Ct. App. 2021))

This case brings the question of whether meaningful access to the courts was denied when the appeal was dismissed due to appellant being incarcerated and unable to reach the court in any way, despite numerous requests of the jail staff. This resulted in severe injury to appellants.

Appellants are hereby requesting the Supreme Court send this case back to the Court of Appeals so they can recall the remittitur and reinstate the appeal.

### **STATEMENT OF THE CASE / STATEMENT OF FACTS**

On November 8, 2018 Plaintiffs and Appellants Stephen Shapiro and Kerry Barnes (“we”) filed a complaint against Harbor Freight Tools USA, Inc. (“HFT”), for Strict Product Liability, Strict Liability Failure to Warn, Negligence and Loss of Consortium, for injuries Stephen sustained when a defective generator the defendant manufactured and sold, malfunctioned and severely burned Stephen.

Due to circumstances beyond our control our attorney dropped the case and we were forced to continue in pro per.

On November 30, 2021, the court granted HFT’s Motion for Summary Judgment.

On February 25, 2022, the court denied Plaintiffs Motion for a New Trial.

On March 28, 2022, we filed a Notice of Appeal.

Beginning March 28, 2022, we were diligently attempting to obtain the record on appeal, first filing this on June 17, 2022. We experienced numerous issues with this.

On June 20, 2023, our appeal was dismissed for failing to procure the record on appeal.

On August 1, 2023, we filed a petition for review with this court (S281202).

On August 15, 2023, the Court of Appeal sent a letter to the Supreme Court, stating:

“As more fully explained below, we write to request that the Supreme Court exercise its discretion to grant review of *Shapiro et al. v. Harbor Freight Tools USA, Inc.* on its own motion and transfer the case back to this court to act on appellants' motion to reinstate appeal.

The appeal was dismissed for failure to procure the record on appeal on June 20, 2023. On July 19, 2023, at 7:14 p.m., appellants submitted their motion for relief from dismissal but mistakenly addressed the motion to the superior court, not the court of appeal. On July 20, 2023, the clerk of this division left a voicemail for appellants to place the correct court on their

document and refile the motion, which must be done immediately since it was this court's last day of jurisdiction. Appellants submitted a corrected motion for relief from dismissal on July 24, 2023. The court reviewed the motion but lacks jurisdiction to act on appellant's motion. (See Cal. Rules of Court, rule 8.264(c)(1).) On August 1, 2023, appellants filed a petition for review.

Accordingly, we request that the Supreme Court exercise its discretion under rules 8.512(c) and 8.528(d) of the California Rules of Court to grant review of *Shapiro et al. v. Harbor Freight Tools USA, Inc.* and transfer the case back to the First Appellate District, Division Two, to allow this court to act on appellants' motion."

On October 11, 2023, this court responded to our petition for review stating:

"The petition for review is granted. The matter is transferred to the Court of Appeal, First Appellate District, Division Two, for further proceedings (Cal. Rules of Court, Rule 8.528(d).)" (Appendix B)

On November 3, 2023, we filed a Motion to allow additional time to procure the record on appeal.

On December 19, 2024, the court of appeal granted us 20 days to procure the record.

On January 4, 2024, we again attempted to file our Designation of the Record on Appeal.

On January 8, 2024, On January 8, 2024, Plaintiff and Appellant Kerry Barnes attempted to clear an outstanding warrant for a probation violation she was unaware of until a few days prior. When she appeared in court to clear the warrant, the court took her into custody and was incarcerated at the Sonoma County Main Adult Detention. During her incarceration, she was unaware of when she may be released, she was only allowed time out of her cell approximately thirty minutes per day, and sometimes not allowed out of the cell at all. During time outside of her cell, she only had enough time to call her

husband Stephen, take a shower, and try and contact her attorney. Even with this limited time to communicate, she still attempted to get someone's attention regarding her civil case and the filing of the record on appeal. As Kerry had been the person to create and file every document during this litigation, Stephen had no knowledge of how this system worked.

On January 12, 2024, we received an email from Odyssey eFileCA, rejecting our e-filing, stating:

“Please resubmit designation without cover sheet and without attached file designations.”

Up until this time, Kerry had been the sole person who drafted the filings and filed them with the courts. Stephen had no knowledge of how to do so, yet Kerry gave him as much instruction as she could over the phone in order for Stephen to resubmit the filing per the court's instructions.

On January 25, 2024, Stephen resubmitted our Designation of the Record on Appeal.

On February 20, 2024, Kerry submitted an Inmate Request Form (IRF)<sup>1</sup>, stating:

“I would like to request access to legal research books, such as Deering's, for checkout while in jail, or any legal research books available to be added to our “library”

(Our “library” was a portable shelving unit on wheels that held mostly donated fiction books.)

On February 29, 2024, we received an email from Lorena Deloza, Senior Legal Processor with the Civil and Appeals Division, stating:

“I am rejecting your designation that was submitted on 1/25/24 in e-file per C.R.C. 8.121. You will need to resubmit an Amended Designation with

---

<sup>1</sup> An Inmate Request Form (IRF) is a document used by the Sonoma County Main Adult Detention Facility (MADF), for inmates to submit requests. This consists of a top white copy, for filing with the facility, a bottom pink copy to return to the inmate once the IRF has been received, and a middle yellow copy, which is to be returned to the inmate with the facility's answer.

only the reporter transcript if you are electing to proceed with the reporter transcript. You will need to resubmit without the emails and attachments. If you have any questions, you can reach out to the appeals department..."

On February 23, 2023, Kerry received a response to her IRF of February 20, 2024, with the response:

"Our legal reference material can be found on the tablets located under "Fastcase"."

Inmates are allowed access to a tablet for approximately three hours every other day, although there are numerous times where the service is bad or non-existent. The tablets do now allow access to regular internet.

On March 4, 2024, Kerry spoke with her probation officer via the telephone and stated that she needed access to a civil case.

On March 11, 2024, Kerry spoke with the Correctional Officer at the main desk of the jail stating she needed access to a civil case she was involved in. The officer suggested she contact Friends Outside, a local non-profit that assists inmates with requests. Kerry responded that she had already sent in a request to Friends Outside for something unrelated and had not received any response.

On March 11, 2024, Kerry submitted an IRF, requesting this be sent to her attorney, stating:

"I have a civil case, SCV-26488, that I need to re-file into as soon as possible in order to not lose our Appeal. Please let me know how I can access the Court's website, my email, & E-Filing, in order to re-file the document for obtaining the record on appeal. This is rather urgent. Thank you."

Kerry did not receive any copies back nor did she receive a response.

On March 11, 2024, Kerry submitted an IRF, stating:

"URGENT. I need to speak with anyone who can help me (A) access my

civil case where I am a pro-per plaintiff. I must file into my case as soon as possible....".

On March 13, 2024, Kerry submitted an IRF stating:

"URGENT. 2nd Request. I need to speak with ANYONE who can help me (A) access my civil case where I am a pro-per plaintiff. I must file into my case as soon as possible. 1st Request 03.11.24..."

Kerry received a pink inmate copy back on March 13, 2024 signed by a corrections officer.

On March 14, 2024, Kerry received back the IRF submitted on March 11, 2024, requesting urgent assistance. The corrections officer stated that this was found in the mailbox but it was not marked with any designation on who to send it to. Kerry explained what she needed and the officer suggested she designate this to the Program Officer.

On March 14, 20254, Kerry submitted an IRF to the Program Officer stating:

"URGENT. I have a civil case in Sonoma County where I am a pro-per plaintiff. It is in the appeals process & I need to re-file a document in order to procure the record on appeal. I need to file this ASAP. Please set me up for access to the courts & e-filing. Thank you."

She did not receive any copies back nor any response.

On March 14, 2024, Kerry placed a call to Lorena Del Laroza of the Sonoma County Courts but there was no answer.

On March 15, 2024, Kerry called her attorney and left a message with the receptionist stating she needed to speak with her attorney about a civil case.

On March 15, 2024, the Court of Appeal dismissed our appeal.

On March 19, 2024, Kerry submitted an IRF to the Program Officer, stating:

"URGENT - 4th Request\*. I have a civil case in Sonoma County where I am a pro-per plaintiff & is in the appeals process. I have a document which needs to be re-filed immediately & I need access to the courts in order to do so. Please assist me. Thank you. \*1st Request 03.11.24/2nd Request

03.13.24/3rd Request 03.14.24".

Kerry received a pink Inmate copy signed by a correctional officer on March 19, 2024.

On March 23, 2024, Kerry received a yellow copy of the IRF dated March 14, 2024. It was dated by the responding staff on March 20, 2024 and had the following explanation/answer:

"Ms. Barnes - do you have any documentation to confirm your civil pro-per status? Sgt. Ricega has been on vacation which is the reason for the delay in response. Once we have confirmation we can proceed."

On March 23, 2024, Kerry responded to the above response from the jail stating:

"To Program Officer Sgt. Ricega (sp?), Per my IRF dated 03.20.24 (pink copy attached) my case # is SCV-263488 & is Stephen Shapiro & Kerry Barnes v. Harbor Freight Tools, USA, Inc. We are pro per plaintiffs. Please let me know if this is sufficient documentation for my pro per civil case status. Thank you."

Kerry did not receive any IRF copies back and was released before she received any response.

On March 26, 2024, plaintiff and appellant Kerry Barnes was released from jail.

On April 2, 2024, we filed a Petition for Review with the Supreme Court (S284429).

On April 16 and 17, 2024, we filed Notices of Errata, as per the direction of L. Brooks with the Supreme Court.

On June 12, 2024, our Petition for Review was denied.

On June 13, 2024, we received a Notice of Remittitur.

On August 19, 2024, we filed a Motion to Recall Remittitur and Reinstate Appeal.

On September 13, 2024, at 9:14 AM, we received an email from [truefilingadmin@truefiling.com](mailto:truefilingadmin@truefiling.com) stating:

The document listed below is being electronically served to you for case

A164895 by Attorney Name Not Specified from the California Court of Appeal, First Appellate District.

Document Title: A164895 - Order - ORDER OF DISMISSAL VACATED.  
- 9/13/2024

Case Number: A164895

Description: SCV263488 | Shapiro et al. v. Harbor Freight Tools USA, Inc.

Link: [Click to download document](#)

We were ready to resubmit our request for the record on appeal.

On September 13, 2024, at 9:20 AM, we received an email from Carolyn Ford, Deputy Clerk, Division Five, First District Court of Appeals, stating:

“please ignore the order issued in the above case, it was issued in error.”

When we clicked on the link attached to the earlier email, we found it was for another case.

On September 19, 2024, the court of appeal denied our Motion to Recall Remittitur and reinstate the appeal. (Appendix A)

As you can see, we were given varying directions as to how to submit our documents to obtain the record on appeal (January 12, 2024 and February 29, 2024 emails), and due to Kerry’s incarceration, Stephen, who had no experience, was left trying to interpret these directions from the courts.

*The policy of the law is always to favor, wherever possible, a hearing of an appeal on the merits ( California Nat. Bank v. El Dorado Lime etc. Co., 200 Cal. 452 [253 P. 704]; Waybright v. Anderson, 200 Cal. 374 [253 P. 148]; Manning v. Gavin, 14 Cal.2d 44 [92 Page 6 P.2d 795]; Wood v. Peterson Farms Co., 214 Cal. 94 [3 P.2d 922]; Banta v. Siller, 121 Cal. 414 [53 P. 935]; Labarthe v. McRae, 35 Cal.App.2d 734 [97 P.2d 251].) It is just as essential that an appellant be*



*protected in his right to have his appeal heard on the merits as that a respondent be given the benefit of the presumptions and intendments supporting his judgment. Moreover, a retrial gives both parties another chance, whereas a denial of it absolutely forecloses the appellant. (Caminetti v. Edward Brown & Sons (1943) 23 Cal.2d 511 [144 P.2d 570].) Carter, J., dissent.*

*Relief is based on the principle that "if possible, appeals should be heard and decided on the merits [citation]." (Serrano, supra, 10 Cal.4th at p. 458; see Martin, supra, 58 Cal.2d at pp. 137, 139.) (In re Grunau (2008) 169 Cal.App.4th 997 [86 Cal.Rptr.3d 908].)*

In addition, Kerry was denied access to the court while incarcerated, a clear violation of the constitution.

*The policy of appellate courts is to hear appeals on the merits and to avoid, if possible, all forfeitures of substantial rights on technical grounds.*

*Where a prisoner seeking judicial relief fails to take timely action due to an act or restriction of those charged with official responsibility, it has been held that such person cannot be deprived of the right to obtain his relief. (People v. Slobodion, 30 Cal.2d 362 [181 P.2d 868].) Where the acts which cause a late filing are those of a clerk of the court or other administrative officer, the right to file is preserved. (People v. Howard, 166 Cal.App.2d 638 [334 P.2d 105]; People v. Stinchcomb, 92 Cal.App.2d 741 [208 P.2d 396].) (In re Martin (1962) 58 Cal.2d 133 [23 Cal.Rptr. 167, 373 P.2d 103].)*

*In order to provide inmates a meaningful right of access to the courts,*

*"states are required to provide affirmative assistance in the preparation of legal papers in cases involving constitutional rights and other civil rights actions related to their incarceration, but in all other types of civil actions, states may not erect barriers that impede the right of access of incarcerated persons." Snyder v. Nolen, 380 F.3d 279, 290-91 (7th Cir. 2004) (quotation omitted); see also Green v. Johnson, 977 F.2d 1383, 1389 (10th Cir. 1992) ("Any deliberate impediment to access [to the courts], even a delay of access, may constitute a constitutional deprivation"). Simkins v. Bruce, 406 F.3d 1239, 1242 (10th Cir. 2005)*

**CONCLUSION**

Plaintiffs and appellants pray the court will see that we have been diligent in our efforts to move the appeal process forward. Our efforts have been impeded by unclear direction from the courts and from officials within the county jail.

We are therefore requesting the Supreme Court grant review and return the case to the court of appeals with direction to recall the remittitur and reinstate the appeal so we may finally have our day in court and see justice served.

Thank you.

Dated: October 26, 2024

Respectfully Submitted,

*Stephen Shapiro*

*Kerry Barnes*

In Pro Per

## CERTIFICATE OF WORD COUNT

Word Count		?	×
Statistics:			
Pages	22		
Words	3,702		
Characters (no spaces)	18,522		
Characters (with spaces)	22,147		
Paragraphs	191		
Lines	444		
<input checked="" type="checkbox"/> Include textboxes, footnotes and endnotes			
			Close

# APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

STEPHEN SHAPIRO et al.,  
Plaintiffs and Appellants,

v.

HARBOR FREIGHT TOOLS USA,  
INC.,

Defendant and Respondent.

A164895

(Sonoma County  
Super. Ct. No. SCV263488)

**BY THE COURT:**

Appellants' motion to recall the remittitur and reinstate this appeal is  
denied.

Dated: 09/19/2024

Stewart, P.J. P.J.

# APPENDIX B

SUPREME COURT  
**FILED**

OCT 11 2023

Court of Appeal, First Appellate District, Division Two - No. A164895

Jorge Navarrete Clerk

S281202

Deputy

**IN THE SUPREME COURT OF CALIFORNIA**

**En Banc**

STEPHEN SHAPIRO et al., Plaintiffs and Appellants,

v.

HARBOR FREIGHT TOOLS USA, INC., Defendant and Respondent.

The petition for review is granted. The matter is transferred to the Court of Appeal, First Appellate District, Division Two, for further proceedings. (Cal. Rules of Court, rule 8.528(d).)

GUERRERO

*Chief Justice*

CORRIGAN

*Associate Justice*

LIU

*Associate Justice*

KRUGER

*Associate Justice*

GROBAN

*Associate Justice*

JENKINS

*Associate Justice*

EVANS

*Associate Justice*

OCT 13 2023

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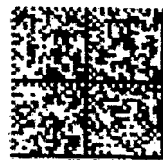


[illegible]

**he Court**

**isco, CA 94102-4797**

**S281202  
Stephen Shapiro  
5800 Northgate Drive  
Suite 200  
San Rafael, CA 94903**



**US POSTAGE**  **PITNEY BOWES**



ZIP 941D2 \$000.63<sup>0</sup>  
02 4W  
0000342017 OCT 11 2023

RECEIVED

OCT 13 2023

**PROOF OF ELECTRONIC SERVICE (Court of Appeal)**

**Notice:** This form may be used to provide proof that a document has been served in a proceeding in the Court of Appeal. Please read *Information Sheet for Proof of Service (Court of Appeal)* (form APP-009-INFO) before completing this form.

Case Name: Stephen Sgapiro et al. v. Harbor Freight Tools USA, Inc.

Court of Appeal Case Number: A164895

Superior Court Case Number: SCV-263488

1. At the time of service I was at least 18 years of age.
2. a. My ☒ residence ☐ business address is (specify):  
PO Box 1125, Cloverdale, CA 95425  
  
b. My electronic service address is (specify): kerry.barnes.shapior@gmail.com
3. I electronically served the following documents (exact titles):  
Petition for Review
4. I electronically served the documents listed in 3. as follows:
  - a. Name of person served:  
On behalf of (name or names of parties represented, if person served is an attorney):
  - b. Electronic service address of person served:
  - c. On (date):  
☒ The documents listed in 3. were served electronically on the persons and in the manner described in an attachment (write "APP-009E, Item 4" at the top of the page).

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

Date: Oct 26, 2024

Kerry Barnes

(TYPE OR PRINT NAME OF PERSON COMPLETING THIS FORM)

Kerry Barnes

(SIGNATURE OF PERSON COMPLETING THIS FORM)

SHORT TITLE:  
Petition For Review

CASE NUMBER:  
SCV-263488

# ATTACHMENT TO PROOF OF ELECTRONIC SERVICE (PERSONS SERVED)

(This attachment is for use with form POS-050(EFS-050).)

## NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:

<u>Name of Person Served</u> (If the person served is an attorney, the party or parties represented should also be stated.)	<u>Electronic Service Address</u>	<u>Date of Electronic Service</u>
Superior Court of California, County of Sonoma	<a href="https://california.tylertech.cloud/OfsEfsp/ui/landing">https://california.tylertech.cloud/OfsEfsp/ui/landing</a>	Date: 10/26/24
California Court of Appeals, 1st District, Division Two	<a href="https://tf3.truefiling.com/login?ReturnUrl=%2Fcases&amp;TimeOut=False">https://tf3.truefiling.com/login?ReturnUrl=%2Fcases&amp;TimeOut=False</a>	Date: 10/26/24
Douglas Collodel, Attorney for Harbor Freight Tools	Douglas.Collodel@clydeco.us	Date: 10/26/24
		Date: _____
		Date: _____
		Date: _____
		Date: _____
		Date: _____
		Date: _____
		Date: _____
		Date: _____
		Date: _____

SUPREME COURT

FILED

Court of Appeal, First Appellate District, Division Two - No. A164895

JUN 12 2024

S284429

Jorge Navarrete Clerk

IN THE SUPREME COURT OF CALIFORNIA

Deputy

En Banc

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STEPHEN SHAPIRO et al., Plaintiffs and Appellants,

v.

---

HARBOR FREIGHT TOOLS USA, INC., Defendant and Respondent.

---

The petition for review is denied.

GUERRERO

*Chief Justice*

RECEIVED JUN 24 2024

APPENDIX G

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

## Defendants

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## GROUND FOR REVIEW

Pursuant to Rule 8.500, California Rules of Court, Stephen Shapiro and Kerry Barnes, Plaintiffs and Appellants, hereby petition this Court to grant review of the decision of the Court of Appeal for the First Appellate District, Division 2, filed on March 15, 2023, which denied their appeal of judgment in favor of defendants. A copy of the filed decision of the Court of appeal is attached as appendix "A".

We are requesting this Court to toll the time authorized to review the denial due to plaintiff Kerry Barnes being incarcerated from January 8, 2024 to March 26, 2024. Plaintiff Kerry Barnes (Kerry) has been the person to file all prior documents in this case. Plaintiff Stephen Shapiro (Stephen) did not have the knowledge of how to do so, although he attempted to re-submit the documents as shown herein.

We are requesting the tolling be extended to April 5, 2024, which would be ten days following Kerry's release from the county jail, and will show that Kerry did in fact try to get the attention of the jail authorities in regards to this matter.

*The federal and state Constitutions guarantee the right of access to the courts to all persons, including prisoners. (Smith v. Ogbuehi (2019) 38 Cal.App.5th 453, 465 [251 Cal. Rptr. 3d 185] (Smith).) In addition, a California statute grants state prisoners the right "[t]o initiate civil actions" as plaintiffs. (Pen. Code, § 2601, subd. (d).) This statute has been interpreted to afford state prisoners a right of meaningful access to the courts to both initiate and prosecute civil actions. (Smith, supra, at p. 465.) Under Penal Code section 2601, subdivision (d), "a prisoner may not be deprived, by his or her inmate status, of meaningful access to the civil courts if the prisoner is both indigent and a party to a bona fide civil action threatening his or her personal or property interests." (Smith, supra, at p. 465.) (Crane v. Dolihite (2021) 70 Cal.App.5th 772 [285 Cal.Rptr.3d 642].)*

*The reference to a bona fide civil action threatening the prisoner's interest is derived from a Supreme Court decision in which the prisoner was a defendant in a civil action. (See Payne v. Superior Court, supra, 17 Cal.3d at pp. 912, 927 [writ of mandate directed trial court to vacate order denying defendant prisoner's motion for relief from default*



*judgment of \$24,722].) In Payne, the court stated the right of access to the courts “comes into existence only when a prisoner is confronted with a bona fide legal action threatening his interests.” (Id. at p. 924.) This statement was tailored to a prisoner who was a defendant. When a prisoner is a plaintiff in a civil action, we interpret the clause “‘a party to a bona fide civil action threatening his or her personal or property interests’” (Smith, supra, 38 Cal.App.5th at p. 465) to mean a bona fide civil action seeking relief for a nontrivial injury to the prisoner's personal or property interests. (Crane v. Dolihite (2021) 70 Cal.App.5th 772 [285 Cal.Rptr.3d 642].)*

## ISSUES PRESENTED FOR REVIEW

Again, we ask, does this Court of Appeal's decision uphold the Constitution of the State of California's right to Due Process if the Appellants were penalized through no fault of their own?

*As our colleagues noted in Hoversten v. Superior Court (1999) 74 Cal.App.4th 636, 640 [88 Cal. Rptr. 2d 197]: "Prison walls are a powerful restraint on a litigant wishing to appear in a civil proceeding." Given this, all courts have an obligation to ensure those walls do not stand in the way of affording litigants with bona fide claims the opportunity to be heard. (Apollo v. Gyaami (2008) 167 Cal.App.4th 1468 [85 Cal. Rptr.3d 127].)*

*In determining whether to relieve from default we are faced with two conflicting policies. There is, of course, a strong public policy in favor of hearing appeals on their merits and of not depriving a party of his right of appeal because of technical noncompliance where he is attempting to perfect his appeal in good faith. On the other hand, a respondent is likewise entitled to consideration. He is entitled to have the appellant proceed with expedition, and if the appellant fails to comply with the rules, to have the appeal dismissed. But this right to a dismissal is not absolute, except for failure to file the notice of appeal. Under the rules, the trial court may grant extensions not to exceed ninety days, the appellate court may grant additional extensions (rule 45(c)), and the appellate court may relieve from default (rule 53(b)). In determining whether an appellant should be relieved from default, various factors must be considered such as the length of the default, the circumstances surrounding the default, the relative injury that will flow to either party by granting or denying the relief, the nature of the default and other factors. Each case must turn on its own facts, and precedents are of little value. (Jarkieh v. Badagliacco (1946) 75 Cal.App.2d 505 [170 P.2d 994].)*

*The policy of the law is always to favor, wherever possible, a hearing of an appeal on the merits ( California Nat. Bank v. El Dorado Lime etc. Co., 200 Cal. 452 [253 P. 704]; Waybright v. Anderson, 200 Cal. 374 [253 P. 148]; Manning v. Gavin, 14 Cal.2d 44 [92*

*P.2d 795]; Wood v. Peterson Farms Co., 214 Cal. 94 [3 P.2d 922]; Banta v. Siller, 121 Cal. 414 [53 P. 935]; Labarthe v. McRae, 35 Cal.App.2d 734 [97 P.2d 251].) It is just as essential that an appellant be protected in his right to have his appeal heard on the merits as that a respondent be given the benefit of the presumptions and intendments supporting his judgment. Moreover, a retrial gives both parties another chance, whereas a denial of it absolutely forecloses the appellant. (Caminetti v. Edward Brown Sons (1943) 23 Cal.2d 511 [144 P.2d 570].) Carter, J., in dissent.*

The Appellants diligently followed the proper procedures for obtaining the record on appeal, but due to errors by Appellants who did not receive proper assistance, due to errors by the courts, and then due to Appellant Kerry Barnes' incarceration, the Appellants Appeal has been dismissed.

In addition, due to Appellant Kerry Barnes' incarceration, the statutory ten days to petition this dismissal for review have passed.

*When an appellant complies with the jurisdictional requirement of section 953a of the Code of Civil Procedure by filing the notice provided by that section, and there is unreasonable delay in procuring the transcript, either on account of a lack of diligence on the part of the officers of the court or for other reasons, the remedy for such delay is by way of motion in the trial court to terminate the proceedings for procuring the transcript, and until such remedy is exercised and the trial court has determined the matter, the reviewing court will not dismiss the appeal. (Engstrom v. Atkins (1929) 102 Cal.App. 393 [283 P. 79].)*

*Section 473 of the Code of Civil Procedure, providing for relief from defaults, is not applicable to a delay or default in the preparation of a transcript on appeal requested under section 953a of the Code of Civil Procedure, since when proceeding under such section the appellant must rely on the official conduct of the officers of the court, and their delay or default is not that of the appellant. (Mill Valley v. Massachusetts Bonding & Ins. Co. (1922) 189 Cal. 5 [207 P. 253].)*

Appellants are hereby requesting the Supreme Court to deny the Motion to Dismiss the Appeal and reinstate the Appeal, or consider the case on its merits at the Supreme Court level.

## **STATEMENT OF THE CASE / STATEMENT OF FACTS**

As stated in our prior Petition for Review, dated July 30, 2023, and granted on October 11, 2023 (S281202), Appellants (we) encountered many issues while trying to procure the record on appeal.

After this court granted our request for review, the Court of Appeals, 1st District, Division 2, granted our request for additional time to procure the record on appeal on December 19, 2023, and gave us 20 days to file.

Kerry filed our Designation of Record on Appeal on January 4, 2024.

Kerry was incarcerated on January 8, 2024.

On January 12, 2024, the filing was rejected with the following reason:

Please resubmit designation without cover sheet and without attached filed designations.

On January 25, 2024, Stephen re-filed the Designation of Record on Appeal.

On February 29, 2024, the filing was rejected with the following reason:

Resubmit Amended Designations with only Reporter Transcripts.

On March 11, 2024, Kerry submitted an Inmate Request Form (IRF) to her attorney (representing her while in jail), stating "I have a civil case, SCV-26488, that I need to re-file into as soon as possible in order to not lose our Appeal. Please let me know how I can access the Court's website, my email, & E-Filing, in order to re-file the document for obtaining the record on appeal. This is rather urgent. Thank you." I did not receive any copies back nor did I receive a response.

On March 11, 2024, Kerry submitted an IRF stating: "URGENT. I need to speak with anyone who can help me (A) access my civil case where I am a pro-per plaintiff. I must file into my case as soon as possible..."

On March 13, 2024, Kerry submitted an IRF stating: "URGENT. 2nd Request. I need to speak with ANYONE who can help me (A) access my civil case where I am a pro-per plaintiff. I must file into my case as soon as possible. 1st Request 03.11.24..." Kerry received a pink inmate copy back on March 13, 2024 signed by a corrections officer.

On March 14, 2024, Kerry received back the IRF submitted on March 11, 2024. The corrections officer stated that this was found in the mailbox but it was not marked with any designation on who to send it to. Kerry explained what she needed and the officer suggested she designate this to the Program Officer.

On March 14, 2024, Kerry submitted an IRF to the Program Officer stating: "URGENT. I have a civil case in Sonoma County where I am a pro-per plaintiff. It is in the appeals process & I need to re-file a document in order to procure the record on appeal. I need to file this ASAP. Please set me up for access to the courts & e-filing. Thank you."

On March 19, 2024, Kerry submitted an IRF to the Program Officer, stating: "URGENT - 4th Request\*. I have a civil case in Sonoma County where I am a pro-per plaintiff & is in the appeals process. I have a document which needs to be re-filed immediately & I need access to the courts in order to do so. Please assist me. Thank you. \*1st Request 03.11.24/2nd Request 03.13.24/3rd Request 03.14.24" Kerry received a pink Inmate copy signed by a correctional officer on Marcy 19, 2024.

On March 23, 2024, Kerry received a yellow copy of the IRF dated March 14, 2024. It was dated by the responding staff on March 20, 2024 and had the following explanation/answer: "Ms. Barnes - do you have any documentation to confirm your civil pro-per status? Sgt. Aicega has been on vacation which is the reason for the delay in response. Once we have confirmation we can proceed."

On March 23, 2024, Kerry responded to the above response from the jail stating: "To Program Officer Sgt. Ricega (sp?), Per my IRF dated 03.20.24 (pink copy attached) my case # is SCV-263488 & is Stephen Shapiro & Kerry Barnes v. Harbor Freight Tools, USA, Inc. We are pro per plaintiffs. Please let me know if this is sufficient documentation for my pro per civil case status. Thank you."

Kerry was released before she received any response.

*As the California Supreme Court has noted, "there is no dispute that prisoners have a constitutional right of access to the courts (Payne v. Superior Court [(1976)] 17 Cal.3d [908,] 914 [132 Cal. Rptr. 405, 553 P.2d 565]) and that 'absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard' (Boddie v. Connecticut (1971) 401 U.S. 371, 377 [28 L.Ed.2d 113, 91 S. Ct. 780]) ... ." (In re Jesusa V. (2004) 32 Cal.4th 588, 601 [10 Cal. Rptr. 3d 205, 85 P.3d 2].) The Penal Code codifies this right of access to the courts by declaring that incarcerated plaintiffs have the prerogative "[t]o initiate civil actions ... ." (Pen. Code, § 2601, subd. (d).) This means that "a prisoner may not be deprived, by his or her inmate status, of meaningful access to the civil courts if the prisoner is both indigent and a party to a bona fide civil action threatening his or her personal or property interests." (Apollo v. Gyaami (2008) 167 Cal.App.4th 1468, 1483 [85 Cal. Rptr. 3d 127] (Apollo).) Trial courts have broad discretion to implement measures designed to vindicate the right to fair access to the courts. (Id. at pp. 1483–1484, citing Wantuch v. Davis (1995) 32 Cal.App.4th 786, 792–793 [39 Cal. Rptr. 2d 47] (Wantuch).) (Hulbert v. Cross (2021) 65 Cal.App.5th 405 [279 Cal.Rptr.3d 645].)*

*Access to the courts is "a right guaranteed to all persons by the federal and state Constitutions." (Jersey v. John Muir Medical Center (2002) 97 Cal.App.4th 814, 821 [118 Cal. Rptr. 2d 807].)6 The constitutional right of access to the court extends to prisoners. (In re Jesusa V. (2004) 32 Cal.4th 588, 601 [10 Cal. Rptr. 3d 205, 85 P.3d 2] ["there is no dispute that prisoners have a constitutional right of access to the courts"].)*

*In addition to these constitutional foundations, California state prisoners have the statutory right “[t]o initiate civil actions” as plaintiffs. (Pen. Code, § 2601, subd. (d).) This statute has been interpreted “to include within its scope the right to be afforded meaningful access to the courts to prosecute those civil actions.” (Apollo, supra, 167 Cal.App.4th at p. 1483, italics added.) Under this statute, “a prisoner may not be deprived, by his or her inmate status, of meaningful access to the civil courts if the prisoner is both indigent and a party to a bona fide civil action threatening his or her personal or property interests.” (Ibid., citing Wantuch, supra, 32 Cal.App.4th at p. 792.) (Smith v. Ogbuehi (2019) 38 Cal.App.5th 453 [251 Cal.Rptr.3d 185].)*



**CONCLUSION**

As you can see, we have been diligent in our efforts to procure the record in order for the appeal to move forward.

We pray you agree and we respectfully request the courts to deny the Motion to Dismiss the Appeal and reinstate the Appeal, or consider the case on its merits at the Supreme Court level.

Thank you.

Sincerely,

*Stephen Shapiro*

Stephen Shapiro

*Kerry Barnes*

Kerry Barnes

Dated April 3, 2024

## CERTIFICATE OF WORD COUNT

### Word Count

Pages	14
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Words	2768
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Characters	15916
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Characters excluding spaces	13274
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## **APPENDIX A**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

STEPHEN SHAPIRO et al.,  
Plaintiffs and Appellants,

v.

HARBOR FREIGHT TOOLS USA,  
INC.,

Defendant and Respondent.

A164895

(Sonoma County  
Super. Ct. No. SCV263488)

BY THE COURT:


After granting appellants' motion for additional time to procure the record, appellants have failed to timely procure the record as directed in this court's order filed December 19, 2023.

Appellants' appeal filed on March 28, 2022, is dismissed. (Cal. Rules of Court, rule 8.140(a)(1)).

Dated: March 15, 2024

Stewart, P.J.

P.J.

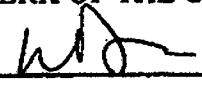
<b>SUPERIOR COURT OF THE STATE OF CALIFORNIA</b> County of Sonoma – Appeals Division 3055 Cleveland Ave. Santa Rosa, California 95403-2878 707-521-6572, <a href="mailto:appealsinfo@sonomacourt.org">appealsinfo@sonomacourt.org</a>	<div style="text-align: center;"><b>FILED</b></div> <div style="text-align: center;">3/6/24</div> <div style="text-align: center; font-size: small;">Clerk of the Superior Court of California County of Sonoma</div>
<b>PLAINTIFF(S)/Apellant (S):</b> Stephen Shapiro & Kerry Barnes	By  <div style="text-align: right; font-size: small;">Deputy Clerk</div>
<b>DEFENDANT(S)/Respondent(S):</b> Harbor Freight Tools	Superior Court #: <b>SCV-263488</b>
<b>CLERK'S DECLARATION</b>	DCA #: A164895

I, Lorena Deloza, hereby certify that I am employed by the Superior Court of Sonoma County as a Legal Processor III, and further certify that Appellant has failed to perform the acts necessary to procure the filing of the record within the time allowed or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or any other party. The deadline of January 18, 2024. The appeal may be dismissed on motion of the respondent or on the reviewing court's own motion.

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

Dated: 3/6/24

Robert Oliver  
CLERK OF THE COURT

by:   
 Lorena Deloza  
Deputy Clerk

Court of Appeal, First Appellate District	
<b>RECEIVED</b>	
MAR 11 2024	
Charles D. Johnson, Clerk	
by _____	Deputy Clerk

PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 3055 Cleveland Ave , Santa Rosa, California, 95403; that I am not a party to this cause; that I am over the age of 18 years; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of the Clerk's Declaration in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: 3/6/2024

Robert Oliver  
CLERK OF THE COURT

by



Lorena Deloza  
Deputy Clerk

-Addressees-

FIRST DISTRICT COURT OF APPEALS  
350 MCALLISTER ST.  
SAN FRANCISCO, CA 94102

Stephen Shapiro  
Po Box 1125  
Cloverdale, CA 95425

Kerry Barnes  
Po Box 1125  
Cloverdale, CA 95425

# **PROOF OF SERVICE**

1. I am at least 18 years old.
  - a. My residence or business address is (*specify*):  
P.O. Box 1125  
Cloverdale, CA 95425
  - b. My electronic service address is (*specify*):  
kerry.barnes.shapiro@gmail.com
2. I electronically served the following documents (*exact titles*):  
Petition for Review

☐ The documents served are listed in an attachment. (Form POS-050(D)/EFS-050(D) may be used for this purpose.)

- 3. I electronically served the documents listed in 2 as follows:**

a. Name of person served:

**On behalf of (name or names of parties represented, if person served is an attorney):**

**b. Electronic service address of person served :**

**c. On (date):**

☒ The documents listed in item 2 were served electronically on the persons and in the manner described in an attachment.  
(Form POS-050(P)/EFS-050(P) may be used for this purpose.)

**Date:** April 3, 2024

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

**Kerry Barnes**

(TYPE OR PRINT NAME OF DECLARANT)

*Kerry Barnes*

(SIGNATURE OF DECLARANT)



SHORT TITLE:

Shapiro et. al. v. Harbor Freight Tools, USA, Inc. Petition for Review

CASE NUMBER:

SCV-263488

**ATTACHMENT TO PROOF OF ELECTRONIC SERVICE (PERSONS SERVED)***(This attachment is for use with form POS-050/EFS-050.)***NAMES, ADDRESSES, AND OTHER APPLICABLE INFORMATION ABOUT PERSONS SERVED:****Name of Person Served****Electronic Service Address****Date of Electronic Service***(If the person served is an attorney,  
the party or parties represented should  
also be stated.)*

Douglas Collodel	douglas.collodel@clydeco.us	Date: April 3, 2024
Sonoma Co. Superior Court	Via Oddysey eFileCA	Date: April 3, 2024
California Court of Appeals	Via TrueFiling	Date: April 3, 2024
		Date: _____
		Date: _____
		Date: _____
		Date: _____
		Date: _____
		Date: _____
		Date: _____
		Date: _____
		Date: _____

SUPREME COURT  
FILED

Court of Appeal, First Appellate District, Division Two - No. A164895

OCT 11 2023

Jorge Navarrete Clerk

S281202

Deputy

IN THE SUPREME COURT OF CALIFORNIA

En Banc

STEPHEN SHAPIRO et al., Plaintiffs and Appellants,

v.

HARBOR FREIGHT TOOLS USA, INC., Defendant and Respondent.

The petition for review is granted. The matter is transferred to the Court of Appeal, First Appellate District, Division Two, for further proceedings. (Cal. Rules of Court, rule 8.528(d).)

GUERRERO

*Chief Justice*

CORRIGAN

*Associate Justice*

LIU

*Associate Justice*

KRUGER

*Associate Justice*

GROBAN

*Associate Justice*

JENKINS

*Associate Justice*

EVANS

*Associate Justice*

OCT 13 2023

**S281202**

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

STEPHEN SHAPIRO AND KERRY  
BARNES,  
Plaintiffs and Appellants,  
vs.

HARBOR FREIGHT TOOLS, USA, INC.;  
Defendants

) Case No.: SCV-263488

) Appeal No.: A164895

) Date Complaint Filed: November 8, 2018

) Date Appeal Filed: March 28, 2022

**PETITION FOR REVIEW**

After a Decision by the Court of Appeal

First Appellate District, Division 2

Court of Appeal Case No. A164895

Appeal from a Judgment Entered in Favor of Defendants

Sonoma County Superior Court

Case No. SCV-63488

Honorable Jennifer V. Dollard, Judge

STEPHEN SHAPIRO AND KERRYBARNES

5800 Northgate Drive, Suite 200

San Rafael, CA 94903

(707) 814-5729

In Propria Persona

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Mill Valley v. Massachusetts Bonding & Ins. Co. (1922)	Page 5

### **GROUND FOR REVIEW**

Pursuant to Rule 8.500, California Rules of Court, Stephen Shapiro and Kerry Barnes, Plaintiffs and Appellants, hereby petition this Court to grant review of the decision of the Court of Appeal for the First Appellate District, Division 2, filed on June 20, 2023, which denied their appeal of judgment in favor of defendants. A copy of the filed decision of the Court of appeal is attached as appendix "A".

### **ISSUES PRESENTED FOR REVIEW**

Does this Court of Appeal's decision uphold the Constitution of the State of California's right to Due Process if the Appellants were penalized through no fault of their own?

*In determining whether to relieve from default we are faced with two conflicting policies. There is, of course, a strong public policy in favor of hearing appeals on their merits and of not depriving a party of his right of appeal because of technical noncompliance where he is attempting to perfect his appeal in good faith. On the other hand, a respondent is likewise entitled to consideration. He is entitled to have the appellant proceed with expedition, and if the appellant fails to comply with the rules, to have the appeal dismissed. But this right to a dismissal is not absolute, except for failure to file the notice of appeal. Under the rules, the trial court may grant extensions not to exceed ninety days, the appellate court may grant additional extensions (rule 45(c)), and the appellate court may relieve from default (rule 53(b)). In determining whether an appellant should be relieved from default, various factors must be considered such as the length of the default, the circumstances surrounding the default, the relative injury that will flow to either party by granting or denying the relief, the nature of the default and other*

*factors. Each case must turn on its own facts, and precedents are of little value. (Jarkieh v. Badagliacco (1946) 75 Cal.App.2d 505 [170 P.2d 994].)*

*The policy of the law is always to favor, wherever possible, a hearing of an appeal on the merits ( California Nat. Bank v. El Dorado Lime etc. Co., 200 Cal. 452 [253 P. 704]; Waybright v. Anderson, 200 Cal. 374 [253 P. 148]; Manning v. Gavin, 14 Cal.2d 44 [92 P.2d 795]; Wood v. Peterson Farms Co., 214 Cal. 94 [3 P.2d 922]; Banta v. Siller, 121 Cal. 414 [53 P. 935]; Labarthe v. McRae, 35 Cal.App.2d 734 [97 P.2d 251].) It is just as essential that an appellant be protected in his right to have his appeal heard on the merits as that a respondent be given the benefit of the presumptions and intendments supporting his judgment. Moreover, a retrial gives both parties another chance, whereas a denial of it absolutely forecloses the appellant. (Caminetti v. Edward Brown & Sons (1943) 23 Cal.2d 511 [144 P.2d 570].) Carter, J., in dissent.*

The Appellants diligently followed the proper procedures for obtaining the record on appeal, but due to errors by Appellants who did not receive proper assistance, and due to errors by the courts, the Appellants Appeal has been dismissed.

*When an appellant complies with the jurisdictional requirement of section 953a of the Code of Civil Procedure by filing the notice provided by that section, and there is unreasonable delay in procuring the transcript, either on account of a lack of diligence on the part of the officers of the court or for other reasons, the remedy for such delay is by way of motion in the trial court to terminate the proceedings for procuring the transcript, and until such remedy is exercised and the trial court has determined the matter, the reviewing court will not dismiss the appeal. (Engstrom v. Atkins (1929) 102 Cal.App. 393 [283 P. 79].)*

Section 473 of the Code of Civil Procedure, providing for relief from defaults, is not applicable to a delay or default in the preparation of a transcript

*on appeal requested under section 953a of the Code of Civil Procedure, since when proceeding under such section the appellant must rely on the official conduct of the officers of the court, and their delay or default is not that of the appellant. (Mill Valley v. Massachusetts Bonding & Ins. Co. (1922) 189 Cal. 52 [207 P. 253].)*

We have noted the most important issues within this petition and they are:

#1 – page 13

#2 – page 16

#3 – page 26 through page 32

Appellants are hereby requesting the Supreme Court to deny the Motion to Dismiss the Appeal and reinstate the Appeal.

#### **STATEMENT OF THE CASE / STATEMENT OF FACTS**

Appellants (we) filed our Appeal on March 28, 2022, along with a request for fee waiver for both Appellants Stephen Shapiro and Kerry Barnes. The fee waiver was granted by the Appeals Court on April 18, 2022.

We first submitted Appellants Notice Designating Record on Appeal on April 7, 2022, at 1:05 PM. Below are the attempts to file these documents and the rejection reasons.

Filed April 7, 2022, 1:05 PM.

Failed April 7, 2022, 1:05 PM

Attachment 4b 1.pdf - Odyssey File & Serve could not accept the pdf file because it is secured by security restrictions. The most common security restrictions include password security not allowing the copying or changing of the document. Please remove the security settings and resubmit the filing.

Certificate of Interested Entities or Persons.pdf - Odyssey File & Serve could not accept the pdf file because it is secured by security restrictions. The most common security restrictions include password security not allowing the copying or changing of the document. Please remove the security settings and resubmit the filing.

Filed April 7, 2022, 3:27 PM

Failed April 7, 2022, 3:27 PM

Attachment 4b 1.pdf - Odyssey File & Serve could not accept the pdf file because it is secured by security restrictions. The most common security restrictions include password security not allowing the copying or changing of the document. Please remove the security settings and resubmit the filing.

Certificate of Interested Entities or Persons.pdf - Odyssey File & Serve could not accept the pdf file because it is secured by security restrictions. The most common security restrictions include password security not allowing the copying or changing of the document. Please remove the security settings and resubmit the filing.

Filed April 7, 2022, 3:42 PM

Failed April 7, 2022, 3:42

Attachment 4b 1.pdf - Odyssey File & Serve could not accept the pdf file because it is secured by security restrictions. The most common security restrictions include password security not allowing the copying or changing of the document. Please remove the security settings and resubmit the filing.”

Certificate of Interested Entities or Persons.pdf - Odyssey File & Serve could not accept the pdf file because it is secured by security restrictions. The most common security restrictions include password security not allowing the copying or changing of the document. Please remove the security settings and resubmit the filing.

Filed April 7, 2022, 3:59 PM



Rejected April 8, 2022, 1:31 PM

Item #1(2)(a) states an order waiving court fees is attached. No order attached.

Item #2b(1)(b) states a copy of the Transcript Reimbursement Fund application is attached. No application is attached. Items #4b & 5b indicate attachment pages, but the additional pages are submitted separately (they must be attached). And The proof of service must be attached.

This document is not sufficient as copy of Transcript Reimbursement Fund application.

No Request to Waiver Court Fees or proposed order have been submitted to the Appeals Division for either party.

Filed April 9, 2022, 9:51 AM

Partially Accepted April 11, 2022, 11:22 AM

Rejected April 11, 2022, 11:25 AM (fee waiver)

No proposed order submitted. Please only attach documents to support your request.

We tried to file just the fee waiver requests, as this seemed to be the problem when filing the designations.

Filed April 11, 2022, 5:32 PM

Rejected April 22, 2022, 1:59 PM

One party can not sign on behalf of another, and no proposed order

Filed April 25, 2022, 2:29 PM

Rejected April 26, 1:27 PM

The proposed order is not the correct type. Final default for failure to submit \$100 fee or appropriate fee waiver documents was issued on 4/19/22. No further appeal documents may be accepted until relief from default is obtained from the First District Court of Appeals. Also, fees waiver documents are required by appellants or the \$100 fee is required.

The following are Defaults we received.

Filed March 29, 2022

Notice of Default for Failure to Procure the Record

Filed April 18, 2022

Notice of Default for Failure to Procure the Record

Received by Appellants April 23, 2022, via USPS

Filed April 19, 2022

Clerk's Notice of Final Default

Received by Appellants 23, 2022, via USPS

We filed our Application for Relief from Default on April 22, 2022.

Filed May 16, 2022

Clerk's Notice of Final Default

Received by Appellants May 20, 2022

We filed another Application for Relief from Default on May 21, 2022, at 6:12 PM, which was accepted May 25, 2022, at 10:47 AM. On June 7, 2022, the Court of Appeal filed and Order Granting Relief from Default on Appeal.

We filed the following waiver requests, with attached documents already filed, hoping this may expedite the process.

Filed June 16, 2022, 6:26 AM

Rejected June 17, 2022, 11:47 AM

This document has already been submitted and filed. (copy of appeal)

A proposed order was not submitted. It must be submitted at the same time but under 'proposed order' so it may be processed.

Filed June 18, 2022, 7:01 PM

Rejected June 21, 2022, 9:39 AM

No proposed order submitted. An order must accompany the request, but under 'proposed order' and not as part of request.

Filed June 22, 2022, 9:01 PM

Rejected June 27, 2022, 10:01 AM

Designations have already been filed, twice (copy of designations)

Rejected July 6, 2022, 1:23 PM

Already received and processed – granted (Stephen Shapiro's fee waiver)

Due to Kerry Barnes' fee waiver request not being ruled upon within the statutory five days, it was granted on July 22, 2022. (#1) We then were in communication with the Sonoma County Courts Appeals Department, with the following:

August 1, 2022, from Kerry Barnes to Sonoma County Appeals:

Good Afternoon,

I am trying to find out the status of my case. I tried calling and could not get through. My Sonoma County case number is above along with my Appeals number. I had satisfied the requirements to get the record for my appeal and have not heard anything since then. Please let me know if the record is being produced or if there is something else I need to do that I have not been notified of. Thank you.

August 2, 2022, from Sonoma County Appeals to Kerry Barnes:

Good morning Ms. Barnes,

I believe we spoke this morning. The appeal is in a waiting status until the Court Reporter Board grants or denies your request for transcript reimbursement. The code indicates that they have 90 days in which to render a decision.

Thank you,

Mala

September 26, 2022, from Kerry Barnes to Sonoma County Appeals:

Please let me know the status of the record. I was in your office over a month ago and was told it would take about a month, so I am just checking the status.  
Thank you.

November 3, 2022 from Sonoma County Appeals to Kerry Barnes;

Good afternoon Ms. Barnes

This appeal is pending costs of court reporter transcripts. We are aware you attached copies of your application to the Transcript Reimbursement Fund onto your Designations, and we followed up with Court Reporters Board to see if your application was granted but they said they are not in receipt of your application. Have you received anything from them directly? You may have to follow up with them to inquire further.

November 4, 2022, from Kerry Barnes to Paula Bruning, CRB:

Good Afternoon,

I filed our Notice of Appeal on March 28, 2022. I have been experiencing a considerable amount of problems in getting this Appeal properly submitted and processed. After receiving numerous errors with the electronic filing system, I understood the appeal was now in the courts hands for assembling the record. I received notice yesterday that your department has no record of our filing of the Transcript Reimbursement Form. Would you please look into this and see if this is correct? If it is correct, what do I have to do to fix this problem?  
The original case was SCV-263488. The Appeal case is A164895. Please contact me at your earliest convenience with any information you may have that will assist me. Thank you for your time.

November 17, 2022, from Paula Bruning, CRB, to Kerry Barnes:

Your application was received 11/15/2022 and placed in the queue for review.  
Sincerely, Paula Bruning, Executive Analyst, Court Reporters Board of California

When the Court Reporter's Board would not accept the Case Information Statement that the fee waiver had been granted on July 5, 2022, Kerry visited the Appeals department in Santa Rosa numerous times and they would tell her they were still looking for it, it may have been filed incorrectly or not at all, and that there were a number of employee turnovers that impeded the fining of this granted waiver. (#2)

February 23, 2023, from Kerry Barnes to Sonoma County Appeals:

Hello,

I have been gratefully assisted by your department before and am hoping to be again. I am trying to get the following information I need for the Court Reporters Transcript Reimbursement Fund.

1. The two plaintiffs in this case are my husband Stephen Shapiro, who I have an approved fee waiver form, and myself, Kerry Barnes. Unfortunately my fee waiver was never approved so apparently it was automatically approved due to it not being addressed within 5 days (please see 07/05/2022 on the Case Information Details). The TRF required me to show more than just this line on the details document, as it does not show my name. How do I go about getting proof of my fee waiver?

2. I received the dates for the court reporters from you office, and now one is stating she was not reporting on that date. This was for a hearing on 07/21/21 from Suzette Camara, CSR #12535. Please let me know if this is correct or not. Thank you so much.

Attachment: Case Information Details Document

We send our Court Reporter's Board Transcript Reimbursement Fund documents on November 10, 2022, via USPS.

On November 21, 2022, we filed a Notice of Delay with both the Sonoma County Appeals Court and the Court of Appeals. On December 17, 2022, we received notice that the Proof of Service to the Sonoma County Courts was rejected due to "This form to be filed with the Appellate Court"

The following is correspondence with the Court Reporters Board and Court Reporters, in an attempt to collect the record.

February 2, 2023, from Paula Bruning, CRB, to Kerry Barnes:

Dear Mr. Shapiro and Ms. Barnes,

Thank you for your application for the Transcript Reimbursement Fund (TRF) in the above-referenced case. A review of your application reveals the following deficiencies:

You did not provide estimates from the court reporter(s) for your proceedings. You may wish to visit the court's website at <https://sonoma.courts.ca.gov/online-services/transcripts-recordings>. You did not identify the of proceeding that you want transcribed from CSR December Moore. You provided an Order on Court Fee Waiver, which was granted to Ms. Shapiro. However, the application was signed by Ms. Barnes. Please either provide a copy of a court fee waiver granted to Ms. Barnes, or resubmit the application forms to me with Mr. Shapiro's signature. We cannot process your application without the above information.

Please provide the required information or make other arrangements within 10 days from the date of this letter. Thank you! Sincerely, Paula Bruning, Executive Analyst, Court Reporters Board of California

February 2, 2023 email from Kerry Barnes to B. Peterson, Court Reporter:

Good Evening,

I need an estimate for the transcript of 05/29/20 in the case Shapiro v. Harbor Freight Tools in Courtroom 18. This was a Motion to Withdraw. Please let me know the estimate at your earliest convenience. Thank you.

February 10, 2023 email from Kerry Barnes to Paula Bruning, CRB:

Please see the attached documents which has been send via overnight mail. Please let me know if you have any questions.. Thank you.

Documents Attached:

02/09/23 Letter to CRB

02/02/23 Email to CR Hentz

02/02/23 Email with CRB

02/02/23 Email to CR Peterson

02/04/23 Transcript Reimbursement Form – Peterson

02/04/23 Transcript Reimbursement Form – Hentz

02/10/23 Email with County of Sonoma Court

02/04/23 Transcript Reimbursement Form – Camara

06/27/22 Fee Waiver Approval – Shapiro

12/20/21 Email re Transcript Request – Moore

02/01/23 Transcript Reimbursement Form – Moore

01/10/23 USPS Label

02/02/23 Case Information Details

February 17, 2023 Email from Paula Bruning, CRB

Dear Mr. Shapiro and Ms. Barnes,

Thank you for your response. Unfortunately we are not able to accept your estimate of \$100 for each date of proceedings you have requested. Please notify me when you receive a response from your emails to CSR Peterson and CSR Hentz. You may find the mailing address to write to CSR Camara here:

[https://search.dca.ca.gov/details/8100/CSR/12535/](https://search.dca.ca.gov/details/8100/CSR/12535/8b9f5b6bad284f427ac5dfd42b616b60)

8b9f5b6bad284f427ac5dfd42b616b60 Additionally, we require itemized invoices for transcripts that you have already paid for. Please request the invoice from CSR Moore for the date of 10/20/2021. I have attached a sample for your reference.

Please note, however, if you are requesting that the date of 10/20/2021 to be part of the appellate transcript, there will be an additional charge from the court reporter. Since the TRF will only pay for each date one time, please let me know how you would like to proceed with this date – either be reimbursed for the cost you paid for the transcript, or include it with the other dates in the provisional approval for the appeal. As a side note, we were not able to use your attachment

of the case summary information as the "Order Granting Application for Waiver of Court Fees & Costs" does not indicate to which party it was granted. Since Mr. Shapiro has now "signed" the application, we will move forward with his fee waiver and address future correspondence to him.

Attachment: CRB Invoice Sample 2022

February 20, 2023 Email to CR Peterson:

Please let me know if you are able to provide this estimate.

February 20, 2023 Email to CR Moore:

The CRB is requiring I include your services on the Transcript Reimbursement Form for purposes of the record. Please fill out the attached receipt for services you supplied, as shown in this email chain, and return at your earliest convenience. Please let me know if you have any questions. Thank you.

Attachment: CRB Invoice

February 20, 2023 Letter send via USPS to CR Camara:

Hello, I am in need of an estimate for the transcript of 07/02/21 in the case Shapiro v. Harbor Freight Tools in Courtroom 18. This was a Summary Judgment Hearing. Please let me know the estimate at your earliest convenience so I can turn this in with the TRF Request. If you have any questions, please contact me at (707) 814-5729. Thank you.

Email from CR Moore to Kerry Barnes:

Good morning, Ms. Barnes.

I have attached the CRB form that you have requested. In preparing the form, I discovered what appears to be an error in my calculations. Unfortunately, I no longer have my working notes from this time and can only go by our email chain below, so I'm not sure why the discrepancy, but the outcome is that I owe you a refund of \$15.76 and a very large apology for this error. Please advise if you'd like me to return this amount via Zelle or send you a cashier's check. Thank you, December

February 22, 2023 Email from CR Camara to Kerry Barnes:

Hello. I just received your letter requesting a transcript of a 7/21/21 hearing. However, I didn't report a hearing on that particular date. Kind regards, Suzette Camara, CSR #12535

February 23, 2023 email from Kerry Barnes to CR Moore:

A cashier's check would be fine. Thank you.

March 7, 2023 email from Kerry Barnes to CR Camara:

I apologize – it was 10/06/21.

March 7, 2023 email from Kerry Barnes to CR Peterson:

Please let me know if you are able to provide this estimate.  
Thank you.

March 7, 2023 email from CR Camara to Kerry Barnes:

The transcript cost is \$21 (7 pages @ \$3/page)

March 8, 2023 email from CR Peterson to Kerry Barnes:

Good afternoon,  
I have reviewed the requested proceedings and the cost for preparation of  
the record is \$45.  
Becki

March 9, 2023 email from Kerry Barnes to CR Camara:

Please fill out the attached form and return at your earliest convenience.  
Thank you.  
Attachment: CRB Invoice

March 13, 2023 email from CR Camara to Kerry Barnes:

To whom am I to return this form?

March 14, 2023 email from Kerry Barnes to CR Peterson:

Would you please fill this out and return to me? Thank you so much.  
Attachment: CRB Invoice

March 14, 2023 email from Kerry Barnes to CR Camara:

Please return to me. Thank you.

March 17, 2023 email from CR Peterson to Kerry :Barnes



Ms. Barnes,

I am uncomfortable putting my ss# on this document and having it sent to you and then sent to the CRB. I would much rather just give you the transcript at no charge. It will get to you much faster as well and I would be more comfortable doing that since it's not a big transcript. If that is agreeable with you, I can have the transcript to you by midweek next week. Please let me know. Becki

March 18, 2023 Email from Kerry Barnes to CR Peterson:

That is fine. Thank you.

March 27, 2023 email from Kerry Barnes to CR Camara:

I have not received a copy yet. Please advise. Thank you.

March 27, 2023 email from CR Camara to Kerry Barnes:

I have provided an estimate to the Court Reporters Board of California. Please contact them with any further inquiries and additional information regarding this matter. Thank you.

A Notice of Default for Failure to Cure the Record was filed May 1, 2023, which we received May 4, 2023.

We filed our Application for Relief from Default on May 14, 2023. (#3)

Filed May 14, 2023, 8:57 PM

Accepted June 12, 2023, 10:07 AM

After numerous visits to the Appeals Department at the Sonoma County Courts to see if they had found the granted waiver of July 5, 2022, and they had not, Kerry once again submitted her Request to Waive Court Fees.

Filed May 3, 2023, 7:06 PM

Rejected May 8, 2023, 10:26 AM

Rejected due to both documents being submitted in the same pdf. Please submit two separate pdfs, one with your request and one for the Order.

Filed May 9, 2023, 1:12 PM

Accepted May 11, 2023, 12:55 PM

On May 22, 2023, we received in the mail the Order on Court Fee Waiver, which was stamped Received by the courts on May 5, 2023, stamped Filed by the courts on May 17, 2023, and signed as granted on May 17, 2023.

On May 22, 2023, we resubmitted the Transcript Reimbursement Fund documents to the Court Reporters Board.

On June 12, 2023, we received the following email from [truefilingadmin@trufiling.com](mailto:truefilingadmin@trufiling.com)

This is an order for Case No. SCV-263488, ShapirovHarbor Freight Tools, USA, Inc. This order was Denied on 5/18/2023 2:43 PM PST.  
Comments: Filing ode: Order Denying Application for Waiver of Additional Court Fee

The document attached was an Order on Court Fee Waiver which was court stamped May 18, 2023, and Signed May 18, 2023, denying the waiver.

On June 20, 2023, we filed a Request for Hearing on About Court Fee Waiver Order.

Filed June 20, 2023, 7:20 PM

Rejected June 26, 2023, 10:59 AM

The Fee Waiver was denied 5/18/23. A Request for Hearing About Court Fee Waiver needs to be filed within 10 days of the denial.

How could we have submitted a Request for Hearing when we did not even know the waiver had been denied until we were notified via email on June 12, 2023?

On June 20, 2023, we received the following emails.

From [truefilingadmin@trufiling.com](mailto:truefilingadmin@trufiling.com)

The document listed below is being electronically served to you for case A164895 by Attorney Name Not Specified from the California Court of Appeal, first Appellate District.

Document Title: A164895 – Order – DISMISSAL ORDER FILED – 6/20/23

Case Number: A164895

Description: SCV263488 / Shapiro et al. v. Harbor Freight Tools USA, Inc.

From [Notify@jud.ca.gov](mailto:Notify@jud.ca.gov)

[kerry.barnes.shapiro.com](mailto:kerry.barnes.shapiro.com), the following transaction has occurred n:

Shapiro et al. v. Harbor Freight Tools USA Inc.

Case: A164895, 1<sup>st</sup> District, Division 2

Disposition date: 2023-06-20

Disposition description: Dismissed per rule 8.140(b)

Disposition status as of 2023-06-20: Final

Notes: Appellant having failed to procure the record on appeal within the time allowed or within any valid extensions of time, and having failed to apply for relief from default, the appeal filed on March 28, 2022, is dismissed. (See Cal. Rules of Court, rule 8.140(b).)

We filed our Motion for Relief from Dismissal on July 18, 2023, but it was rejected on July 19, 2023, due to “The trial Court does not have jurisdiction for this motion to be heard here. The Dismissal was issued from the District Court.

We then refiled it in the Appeals Court on July 19, 2023. This was accepted on July 20, 2023.

On July 22, we looked on the California Courts Case Information page and found the following:

07/20/23 Voice Mail message for: Appellant K. Barnes, re: motion for relief from dismissal and reinstatement of appeal will be received only because the motion and exhibits show the superior court in the heading and not this court, please correct and resubmit asap since the court only has jurisdiction until July 20, 2023.

We did not receive this message, nor any other communication regarding our Request for Relief. We resubmitted our amended Request on July 22, 2023, which was filed July 24, 2023. On July 24, 2023, we received two letters from the Court Reporters Board, one stating our Transcript Reimbursement Fund has been approved, and one that our TRF has been provisionally approved.

### **CONCLUSION**

We do not know if the State of California 1<sup>st</sup> District Court of Appeals will rule on our Motion for Relief from Dismissal and Reinstatement of Appeal, and from what we understand, the time to file this Petition for Review runs out today, July 30, 2023. Therefore, we feel we must file this.

As you can see, we have been diligent in our efforts to procure the record in order for the appeal to move forward.

We pray you agree and grant our Motion for Relief from Dismissal and reinstate our appeal.

Thank you.

### **CERTIFICATE OF WORD COUNT**

Word Count		?	X
Statistics:			
Pages	25		
Words	4,746		
Characters (no spaces)	23,156		
Characters (with spaces)	27,760		
Paragraphs	330		
Lines	756		
<input checked="" type="checkbox"/> Include textboxes, footnotes and endnotes			
			Close

# APPENDIX A

COURT OF APPEAL, FIRST APPELLATE DISTRICT  
350 MCALLISTER STREET  
SAN FRANCISCO, CA 94102  
DIVISION 2

STEPHEN SHAPIRO et al.,  
Plaintiffs and Appellants,  
v.  
HARBOR FREIGHT TOOLS USA, INC.,  
Defendant and Respondent.

A164895  
Sonoma County Super. Ct. No. SCV263488

BY THE COURT:

Appellant having failed to procure the record on appeal within the time allowed or within any valid extensions of time, and having failed to apply for relief from default, the appeal filed on March 28, 2022, is dismissed. (See Cal. Rules of Court, rule 8.140(b).)

Date: 06/20/2023

Stewart, P.J.

P.J.

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SONOMA

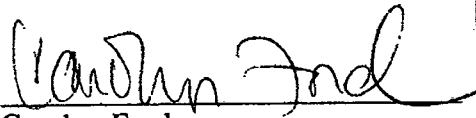
Shapiro, et al.,	:	Case No.: A164895
	:	
Plaintiff/Appellant,	:	Superior Court Case No.: SCV-263488
	:	
vs.	:	
	:	DEFAULT – REQUEST FOR DISMISSAL
Harbor Freight Tools, USA, Inc ,	:	
	:	
Defendant/Respondent.	:	

This is to inform you that the Appellant, Shapiro, et al., has not complied with the Notification of Failure to Comply filed May 1, 2023. The 15 day timeframe has lapsed.

Therefore, it is respectfully requested the above entitled case be dismissed.

Robert Oliver, Clerk of the Court

Dated: 06/12/2023

  
Carolyn Ford  
Appellate Clerk

Default – Request For Dismissal

Document received by the CA 1st District Court of Appeal.



Kerry Barnes &lt;kerry.barnes.shapiro@gmail.com&gt;

---

**Notification of order Granted for Case No. SCV-263488 (ShapirovsHarbor Freight Tools, USA, Inc.)**2 messages

---

no-reply@efilingmail.tylertech.cloud <no-reply@efilingmail.tylertech.cloud>  
To: kerry.barnes.shapiro@gmail.com

Thu, Dec 2, 2021 at 5:28 PM

**This message was automatically generated. Do not reply to this e-mail.**

This is an order for Case No. SCV-263488, ShapirovsHarbor Freight Tools, USA, Inc..

The order was Granted on 11/30/2021 2:15 PM PST.

Comments:

Filing Code: Judgment - Entire Action

The following are service contacts on this filing: Other Service Contacts not associated with a party on the case:

Patricia Inabnet (patricia.inabnet@clydeco.us)

John Miller (jmiller@millerlawinc.com)

Kerry Barnes (kerry.barnes.shapiro@gmail.com)

Kathy Matulewicz (kmatulewicz@ropers.com)

Caroline Pfahl (caroline.pfahl@clydeco.us)

Kevin Cody (kevin.cody@ropers.com)

Stephen Shapiro:

Stephen Shapiro (kingofthehill776@yahoo.com)

Kerry Barnes:

Kerry Barnes (kerry.barnes.shapiro@gmail.com)

Harbor Freight Tools, USA, Inc.:

Brandon Franklin (brandon.franklin@clydeco.us)

Kevin Sutherland (Kevin.Sutherland@clydeco.us)

Download Document

**APPENDIX K**

The link above will remain active for 45 days from the date of acceptance of the eFiling. If that link is not accessible, copy this URL into your browsers address bar to view the document: <https://california.tylerhost>.



net/ViewServiceDocuments.aspx?ADMIN=0&SID=10b27776-92f5-49e5-83cf-54da87f8c905



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eFileCA

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no-reply@efilingmail.tylertech.cloud <no-reply@efilingmail.tylertech.cloud>  
To: kerry.barnes.shapiro@gmail.com

Thu, Dec 2, 2021 at 5:28 PM

**This message was automatically generated. Do not reply to this e-mail.**

This is an order for Case No. SCV-263488, ShapirovsHarbor Freight Tools, USA, Inc..

The order was Granted on 11/30/2021 2:15 PM PST.

Comments:

Filing Code: Judgment - Entire Action

The following are service contacts on this filing: Other Service Contacts not associated with a party on the case:

Patricia Inabnet (patricia.inabnet@clydeco.us)

John Miller (jmillier@millerlawinc.com)

Kerry Barnes (kerry.barnes.shapiro@gmail.com)

Kathy Matulewicz (kmatulewicz@roppers.com)

Caroline Pfahl (caroline.pfahl@clydeco.us)

Kevin Cody (kevin.cody@roppers.com)

Stephen Shapiro:

Stephen Shapiro (kingofthehill776@yahoo.com)

Kerry Barnes:

Kerry Barnes (kerry.barnes.shapiro@gmail.com)

Harbor Freight Tools, USA, Inc.:

12/25/23, 7:09 PM

Gmail - Notification of order Granted for Case No. SCV-263488 (ShapirovsHarbor Freight Tools, USA, Inc.)

Brandon Franklin (brandon.franklin@clydeco.us)

Kevin Sutherland (Kevin.Sutherland@clydeco.us)

Download Document

The link above will remain active for 45 days from the date of acceptance of the eFiling. If that link is not accessible, copy this URL into your browsers address bar to view the document: <https://california.tylerhost.net/ViewServiceDocuments.aspx?ADMIN=0&SID=f18bc5a8-4664-445c-9eb5-8ed78a3cb263>

[Quoted text hidden]

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SONOMA

3 HONORABLE JENNIFER V. DOLLARD, JUDGE

4 DEPARTMENT 18

5  
6  
7 ----oOo----

8  
9 STEPHEN SHAPIRO, KERRY BARNES, )

10 Plaintiffs, )

11 vs. )

12 HARBOR FREIGHT TOOLS, USA, INC., )

13 Defendants. )

COPY

NO. SCV-263488

14  
15  
16 REPORTER'S TRANSCRIPT OF PROCEEDINGS

17 OCTOBER 20, 2021

18  
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26  
27 Reported by:

28 DECEMBER MOORE, CSR No. 8718  
(Via Zoom)

A P P E A R A N C E S

For the Plaintiffs:

STEPHEN SHAPIRO  
In Propria Persona  
(Via Zoom)

KERRY BARNES  
In Propria Persona  
(Via Zoom)

For the Defendants:

CLYDE & CO  
Four Embarcadero Center, Suite 1350  
San Francisco, CA 94111

BY: BRANDON FRANKLIN, ESQ.

OCTOBER 20, 2021

3:45 P.M.

P R O C E E D I N G S

THE COURT: Okay. Let's move on to Shapiro and Barnes and Harbor Freight Tools. That's SCV-263488.

I'll invite counsel to come back up to the table in the courtroom.

And I'd like to start by noting that plaintiffs Kelly (sic) Barnes and Stephen Shapiro are appearing through Zoom. They are on the telephone. And Counsel Franklin is here for the moving party. He is present in the courtroom. And we checked before we went on the record, and everybody was able to hear everybody else, but I'll just ask plaintiffs if they could say hello again to make sure that's all still working.

MS. BARNES: Yes, we're still here. Thank you.

MR. SHAPIRO: Hello.

THE COURT: Very good. And, Counsel, would you like to re-state your appearance for the record.

MR. FRANKLIN: Yes, Your Honor, Brandon Franklin from Clyde & Co, US, LLP, for defendant Harbor Freight Tools USA, Inc.

THE COURT: And I'll tell you, it will help our court reporter immensely if you can pull that microphone over to about ten inches away from you. It's totally adjustable. Pull it right over there.

MR. FRANKLIN: Sure.

THE COURT: Thank you.

Okay. So you were here when I explained to the

1 parties on the last case kind of the specifics of oral  
2 argument. That all applies equally to your matter.

3 In this case the tentative ruling is once again in  
4 favor of the moving party, and so, Mr. Franklin, am I correct  
5 that you would be willing to submit on the tentative ruling,  
6 simply reserving any rebuttal argument?

7 MR. FRANKLIN: That's correct, Your Honor.

8 THE COURT: All right. Then that means that I will  
9 hear from plaintiffs in opposition to the tentative ruling;  
10 that is, why you believe the tentative ruling should be  
11 something other than what I've written. You both represent  
12 yourselves separately, so I'm happy to hear from both of you,  
13 but because we do have the court reporter, I do need to hear  
14 from you one at a time.

15 Who would like to start?

16 MS. BARNES: I will speak first. Stephen Shapiro  
17 may say something afterwards, if anything I forgot.

18 My name's Kerry Barnes. I just want to respond to  
19 some of the things that were in the report.

20 The causation, it's really difficult, because the  
21 discovery -- well, the lack of discovery that we received from  
22 the defendant -- we requested discovery in April.

23 I'm sorry. Hello?

24 THE COURT: Yes, I'm still here.

25 MS. BARNES: I thought I heard something. Okay.

26 We received the defendant's responses in May. They  
27 pretty much didn't say anything, they just objected to all of  
28 them with numerous objections.

1           We sent a letter to them on June 30th requesting  
2   that they send us the additional responses, which they said  
3   they were going to. They then sent them on September 25th,  
4   with denials of every single thing. And then I had to file a  
5   motion to compel on October 3rd, which I'm still -- there was  
6   an error in the filing, so I'm working on that with the  
7   gentleman from IT. So I'm hoping to get that filed today.

8           There was some issues with the depositions and the  
9   requests for us to come down to San Francisco all the time  
10   where I had to do a protective order because we do live over  
11   75 miles away, although I guess the defendant doesn't believe  
12   that, but I can prove it. We live up in northern Sonoma  
13   County on a mountain which is seven miles from, actually,  
14   town.

15           So it's hard for us to get to and from these  
16   depositions. We couldn't -- we couldn't attend many of them  
17   or any of them, and we couldn't obviously get the deposition  
18   paperwork from the defendant, which I'm going to try to get.

19           The issue being that we don't have proof of what  
20   happened, but we can prove what didn't happen, which is what  
21   the defendant is trying to show, that their discovery and  
22   their evidence shows things that could not have happened,  
23   and -- I'm sorry. I'm really nervous.

24           THE COURT: It's okay. You're doing fine.

25           MS. BARNES: Okay. And their failure to warn  
26   does -- can't apply because there was no warning of what  
27   actually occurred on the product, so they did not warn of  
28   something that -- they didn't warn of what actually happened.

1 They may have warned of other things that could happen to that  
2 product, but they didn't warn of what actually happened.

3 The evidence that I submitted, I apologize that it  
4 wasn't proper, but when I read online that I could submit it  
5 electronically, which I did, with bookmarks and table of  
6 contents which was in the memorandum, so I thought I had done  
7 that properly.

8 And expert testimony, I believe and what I've read  
9 is that Stephen is his own expert. He's the person that was  
10 injured. He's the person that saw what happened. His -- his  
11 declarations and his testimony will be -- he's the expert.  
12 There's also case law where expert testimony is not required  
13 or not necessary or not even really relied upon if it's  
14 something that's, you know, normally -- normal consumers would  
15 expect that product to do or not to do.

16 So there's a -- multiple things that I could say  
17 that we -- we were trying to get this resolved in the way that  
18 we would like to. We've tried to discuss this with the  
19 defendant. We've tried to -- we've tried to do everything we  
20 can via the law and doing it properly. It's a little hard for  
21 me because I work full time and I do this on the weekends and  
22 at night, so I apologize if something's not properly filed or  
23 not, you know -- I'm learning as I go along, but I think  
24 everything's proper now.

25 The main problem is that we haven't really received  
26 any discovery from the defendant, and it's hard to prove a  
27 case when you haven't received anything from them of any  
28 value. And there's actually case law where it's -- it would



1 be inequitable to allow moving party to withhold relevant  
2 discovery and then meet its burden on summary judgment, which  
3 is *Weber versus John Crane*.

4 And so it's hard for us to -- and then I -- in the  
5 discovery that we received, they denied any product similar to  
6 this ever doing anything like this, which I found -- how  
7 many -- eight other cases which it has, which I'm working on  
8 that. So there's more discovery that we're trying to get  
9 through the defendants, which is difficult, but that's why I  
10 did the -- the motion to compel.

11 So we're hoping to continue this so we can prove our  
12 case and not have it, you know, basically thrown out because  
13 of some technicalities or things that we might have missed  
14 or -- but we have a case. We can prove what happened. We  
15 have other ways of doing that that we're working on, and we  
16 believe we can have all that done and ready by the time the  
17 trial comes.

18 Stephen, would you like to say anything else?

19 Okay. I think that's all I have.

20 THE COURT: So let me ask you, because there -- I'm  
21 familiar with the law that says essentially when there's  
22 discovery that's essential to oppose a motion for summary  
23 judgment and it has not been obtained, despite the exercise of  
24 due diligence, the opposing party may request a continuance  
25 for that purpose and then the Court generally will grant that.  
26 But that application is generally made when the -- on or  
27 before an opposition is due, and it says with specificity what  
28 it is that's necessary and why it has not yet been obtained

1 through -- despite the exercise of due diligence.

2 But I -- I think what I'm hearing, in part, just now  
3 from you -- well, a couple of things. One, you are  
4 understandably struggling because you are not an attorney.  
5 You are handling this in addition to a lot of other  
6 responsibilities. And while you're learning a lot, you are  
7 faced with responding to a very complex technical legal  
8 proceeding. But, two, I think I also heard a request for a  
9 continuance because of a lack of discovery.

10 Do you want to address if I heard that correctly,  
11 one? And then, two, why you didn't make that request sooner?

12 MS. BARNES: Yes, I -- I did not know -- I did not  
13 read that part of the summary judgment, because it's kind of  
14 a -- complicated and long. I did not know that I could  
15 request a continuance. I was trying to respond to all the  
16 other things that I have been, you know, sent. So it is quite  
17 a lot of -- a lot of paperwork and research and things. So I  
18 did -- if I had known that I could request a continuance, I  
19 would have.

20 I also knew that I had these other things that I was  
21 filing, such as the motion to compel, which I hoped would, you  
22 know, assist me. The protection order, which I had to do.  
23 The motion to exclude testimony. So I thought all these  
24 things would assist me. And then I also know that the  
25 defendant moved the date of the trial, so I thought that would  
26 help, that we'd have more time. I did not know that I could  
27 do that in this actual motion, and I apologize for that.

28 THE COURT: Okay. Well, I have to say, I don't

1 think you need to apologize. That's like somebody apologizing  
2 for not knowing how to tie their shoe when they've never been  
3 shown how to do it. It's something that you'd have no reason  
4 to understand unless you were not only a lawyer, but probably  
5 an experienced lawyer.

6 Ms. Barnes, anything else you would like to address  
7 to the Court?

8 MS. BARNES: Not at this time, thank you.

9 THE COURT: Okay. And, Mr. Shapiro, do you want to  
10 add anything?

11 MR. SHAPIRO: No, not at this time, Your Honor.

12 THE COURT: All right. Thank you, both.

13 Mr. Franklin, rebuttal?

14 MR. FRANKLIN: Yes, Your Honor.

15 So as to the discovery arguments that plaintiffs are  
16 making, you know, it's addressed in our reply brief. I  
17 believe it's on the last page of our reply. We sought an  
18 extension from plaintiffs to respond. We couldn't get in  
19 touch with them, so we served objections. Once we were able  
20 to collect the documents, we served them with -- back in  
21 September, I believe on September 19th, approximately 1500  
22 pages of documents, which we thought were, you know -- and we  
23 answered all plaintiff's discovery they propounded on us. And  
24 so we don't think there's a basis for plaintiffs to request a  
25 continuance or oppose the motion on that basis.

26 Plaintiffs have also had access to the scene of the  
27 fire, you know, since the fire occurred, and they've also had  
28 access to the generator, you know, for the five years since

1 the fire and three years after filing this case.

2 So, you know, I don't think there's anything that  
3 would have prevented them from conducting examination of the  
4 fire scene or the generator that could have supported their --  
5 if they wanted to try to collect evidence that may have  
6 supported the claims. They also had the benefit of two  
7 attorneys who could have checked that evidence they now claim  
8 they need.

9 And the -- a request for continuance, you know, it's  
10 untimely. The case or *Cooksey versus Alexakis*, which is  
11 123 Cal.App.4th 246, said the request made after the  
12 opposition due date is untimely, should be denied. The case  
13 also found that the lack of diligence on the part of  
14 plaintiffs, that same case, is reason to deny a request for  
15 continuance on a motion for summary judgment hearing.

16 You know, I think that those facts, along with the,  
17 you know, the time that this case has been pending and the  
18 time since the fire establishes that there's no basis to grant  
19 plaintiffs a continuance. You know, in addition, they've had  
20 several weeks since the tentative order was posted.

21 You know, as to the merits of the motion itself, we  
22 obviously agree with the Court's tentative. We think that HFT  
23 has met its burden with ample evidence. We have the  
24 declaration from a fire investigator with 30 years' experience  
25 who examined the scene after the fire, Mr. Depeckh, determined  
26 that the generator did not cause the fire. And expert  
27 examination that was conducted by a well qualified expert  
28 retained by Harbor Freight Tools, Mr. Shelp, who examined the

1 generator found that there was no evidence that the generator  
2 caused or ignited the fire.

3 And then we also submitted the declaration from  
4 former co-defendant in this case, Mr. Pirzadeh, who was the  
5 first owner of this generator, who -- his declaration stated  
6 that he used the generator on a daily basis for approximately  
7 eight months without any issue until he sold it to Plaintiff  
8 Shapiro on the day of the fire.

9 And we, of course, have plaintiffs' discovery  
10 responses. They admit they didn't read the manual, didn't  
11 have the manual, so their failure-to-warn arguments are barred  
12 as a matter of law.

13 And, you know, their arguments in the opposition  
14 that the generator didn't really explode but it was -- you  
15 know, vapors ignited, I mean, that's contrary to their --  
16 Plaintiff Shapiro's discovery responses that were made under  
17 oath where he said the fuel cap blew off the generator. It's  
18 also contrary to the complaint -- the operative complaint.

19 So, you know -- and the evidence submitted in  
20 opposition to the motion for summary judgment, aside from  
21 being disorganized, unauthenticated, you know, not qualified  
22 expert testimony, hearsay, so plaintiffs just have not met  
23 their burden to oppose this motion.

24 And, you know, for all those reasons, including the  
25 time it's been pending, the fees that our clients have been --  
26 our client has been forced to expend in defending this  
27 litigation, you know, we think the Court should adopt its  
28 tentative so we can end this litigation.

1 THE COURT: All right. Thank you, everyone.  
2 I'm going to take the matter under submission.  
3 You'll get a written ruling in the next day or two.

4 MR. FRANKLIN: Okay.

5 THE COURT: Otherwise, as with the last case, I do  
6 wish everybody well. We are here on the legal issue before  
7 me, which is not unrelated, but whatever I do will not change  
8 the extremely significant injuries that impact to the lives of  
9 the plaintiffs, which the Court certainly appreciates.

10 So please take care, everyone. Be well. Matter  
11 will stand submitted.

12 MR. FRANKLIN: Thank you, Your Honor.

13 MS. BARNES: Thank you, Your Honor.

14 THE COURT: You're welcome.

15 (Proceedings concluded.)

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1 STATE OF CALIFORNIA )  
2 COUNTY OF SONOMA ) ss:  
3 )

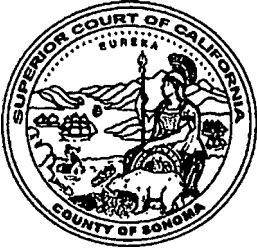
4 CERTIFICATE OF OFFICIAL REPORTER

5  
6 I, December Moore, CSR No. 8718, do hereby certify  
7 that the foregoing transcript, pages numbered 1 through 16,  
8 inclusive, in the matter of STEPHEN SHAPIRO, KERRY BARNES  
9 versus HARBOR FREIGHT TOOLS, INC., No. SCV-263488, was  
10 reported by me, a Certified Shorthand Reporter, on the date of  
11 OCTOBER 20, 2021, via Zoom, and transcribed by computer under  
12 my direction and control, and constitutes a true and complete  
13 transcript of said proceedings.

14  
15  
16  
17 Dated: December 23, 2021.  
18  
19

20 December Moore  
21

22 DECEMBER MOORE, CSR No. 8718  
23  
24  
25  
26  
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28



Superior Court of California, County of Sonoma  
MINUTE ORDERS

**SCV-263488 - SHAPIRO VS HARBOR FREIGHT TOOLS, USA, INC.**

**Date of Hearing**  
October 20, 2021  
3:00 PM

Oral Argument  
Courtroom 18

Judicial Officer: Jennifer V Dollard  
Court Reporter: December Moore

Courtroom Clerk: Melissa J. Waters

**Parties Present:**

BARNES, KERRY                      Plaintiff  
(Via Zoom)  
SHAPIRO, STEPHEN              Plaintiff  
(Via Zoom)  
FRANKLIN, BRANDON              Attorney for Defendant Harbor Freight Tools, USA, Inc

**\*\*The Court notes for all parties appearing on all cases for this calendar, that there is not a Court Reporter available at this time and gives the opportunity to waive a reporter, wait or request the matter be continued to a later date.\*\***

**Law and Motion Calendar**

Issues: Oral Argument on September 29, 2021 tentative ruling

The Court's previously published tentative ruling reads as follows:

**TENTATIVE RULING: APPEARANCES REQUIRED** as oral argument has been requested by plaintiffs.

At 3:13 p.m., the case is called.

The Court notes the appearances and asks if they parties are willing to waive a reporter, would like to wait to see if one becomes available for have the matter continued.

Petitioners indicate they would like to wait.

Matter is passed for the appearance of a Court Reporter.

At 3:48 p.m., the matter is recalled; a Court Reporter is now present.

Appearances are stated for the record.

Plaintiff Kerry Barnes presents oral argument; request a continuance.

Counsel Franklin presents rebuttal argument; no basis for a continuance.

Upon conclusion of oral argument, the Court **ORDERS** as follows:

The matter is taken **UNDER SUBMISSION**.

The Court **RULES** on submitted matter:

The Court's September 29, 2021 published tentative ruling is **ADOPTED** and all future hearing dates are **VACATED** with the exception of the January 11, 2022 Case Management



Conference which will remain set for status of Judgment.

**TENTATIVE RULING:** Plaintiffs' Objections to Evidence Nos. 1, 3, 9-14, 18 are **OVERRULED** and 2, 4-8, 15 are **SUSTAINED** on the ground the evidence lacks foundation. Defendant Harbor Freight Tools, USA, Inc.'s ("Defendant") motion for summary judgment is **GRANTED** and the alternative motion for summary adjudication is **MOOT**.

### 1. Background Facts.

This case arises from Mr. Shapiro's purchase of a gasoline powered generator from defendants Nimah Pirzadeh and Faramarz Pirzadeh ("Pirzadehs"). (Complaint at ¶6.) Plaintiffs allege Defendant manufactured the generator and sold it to the Pirzadehs, who then sold the generator to Plaintiffs from a Craigslist advertisement. The Pirzadehs were initially named as defendants but on July 21, 2021, the Court granted their motion for summary judgment and entered their request for dismissal on August 16, 2021. The complaint alleges that after using the generator for only three hours "and as a result of its defective manufacture and/or design, it caused lit gasoline to spray onto plaintiff, Stephen Shapiro, proximately causing severe injuries." (*Id.* at ¶7.) Based on these underlying facts, Mr. Shapiro asserts causes of action for negligence, loss of consortium, and two causes of action for strict liability against Defendant and Plaintiff Kerry Barnes, Mr. Shapiro's wife, asserts a cause of action for loss of consortium against Defendant. (*Id.* at ¶¶3, 7-30.)

In this motion, Defendant seeks summary judgment, or in the alternative, summary adjudication. Defendant argues that Plaintiffs' claims fail as a matter of law because Plaintiffs cannot establish "causation," which is an essential element for each cause of action asserted. First, Defendant cites to the declaration of expert witness Terence Depackh, an arson investigator with over thirty years of experience with the Los Angeles Fire Department, who testified that the generator did not cause the subject fire and the fire was likely caused by a gas-powered water heater. (Defendant's UMF 6-7, citing Depackh Dec. at ¶4-8.) Second, Defendant cites the testimony of a fire and explosions expert, Dennis Shelp, who concluded that there was no physical evidence indicating the generator caused the subject fire. (Defendant's UMF 9, citing Shelp Dec. at ¶7 and Franklin Dec. at ¶¶10-11.) Based on this evidence, Defendants contend that Plaintiffs cannot prove "causation," which is a necessary element for all causes of action asserted. Defendant also contends that Plaintiffs' strict product liability claim, which is based on a failure to warn, fails as a matter of law because Plaintiff concedes he did not review the product manual or warning labels prior to using the generator. (Defendant's UMF 5, citing Franklin Dec. at ¶¶6, 8-9.) Finally, Defendant argues that even if Plaintiff did read the manual, the strict liability claim fails because, Plaintiffs violated the warning label by operating the generator in an enclosed utility room near a gas-powered water heater. (*Id.* at 4, 10-11, citing Franklin Dec. at ¶¶6-7 at Atta Dec. at ¶¶25-29.)

Plaintiffs oppose the motion primarily on four grounds. First, Plaintiffs contend the motion for summary adjudication is defective and in violation of the Rules of Court because "the specific causes of action, affirmative defenses, claims for damages, or issues of duty" are not "stated specifically in the notice of motion" and are not "repeated, verbatim, in the separate statement of undisputed material facts." (R. Ct. 3.1350(b).) While Plaintiffs are correct that the motion for summary adjudication is defective in that regard, the defect does not affect Defendant's motion for summary judgment. Second, Plaintiffs contend that the motion fails to comply with the Rules of Court because there is no memorandum of points and authorities, as required by Rule 3.1350(c).) Although Plaintiffs are correct that Defendant has not included a separate document titled "memorandum of points and authorities," Defendant's memorandum is attached to Defendant's notice, which is permitted by the Rules, and moreover, Plaintiffs have failed to show any prejudice from this alleged defect. (See, R. Ct. 3.1112(c).) Third, Plaintiffs state that the motion "includes immaterial and irrelevant facts and improper legal arguments" and includes "case law repetitively that is

confusing as to the point they are trying to make, and have introduced evidence that Plaintiffs hereby object to under separate cover." Finally, Plaintiffs contend there are disputed issues of fact regarding the cause of the fire and therefore, Defendant is not entitled to summary judgment.

## **2. General Rules for Summary Judgment and Summary Adjudication.**

"Summary judgment is properly granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law." (Code Civ. Proc. §437c(c).) A defendant seeking summary judgment bears the initial burden of proving the "cause of action has no merit" by showing that one or more elements of plaintiff's cause of action cannot be established or there is a complete defense." (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 67; see also, *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.) "Once the defendant's burden is met, the burden shifts to the plaintiff to show that a triable issue of fact exists as to that cause of action." (*Ibid.*) To show a disputed issue of fact, plaintiff cannot rely on "mere speculation and conjecture [citation], but instead must produce admissible evidence raising a triable issue of fact." (*Crouse v. Brobeck, Phleger & Harrison* (1998) 67 Cal.App.4th 1509, 1524.) "An issue of fact can only be created by a conflict of evidence" and "is not created by...imagination or guess work. [Citation.] Further, an issue of fact is not raised by cryptic, broadly phrased, and conclusory assertions, or mere possibilities. [Citation.] Thus, while the court in determining a motion for summary judgment does not "try" the case, the court is bound to consider the competency of the evidence presented." (*Sinai Memorial Chapel v. Dudler* (1993) 231 Cal.App.3d 190, 196-197.) Therefore, an "opposition to summary judgment will be deemed insufficient when it is essentially conclusory, argumentative or based on conjecture and speculation." (*Trujillo v. First American Registry, Inc.* (2007) 157 Cal.App.4th 628, 635.)

The evidence in favor of the party opposing the motion must be liberally construed, and all doubts concerning the evidence must be resolved in favor of that party. (*Sanchez v. Kern Emergency Med. Transportation Corp.* (2017) 8 Cal.App.5th 146, 152-153, citing *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 460.) Either showing must be supported by admissible evidence, such as affidavits, declarations, admissions, interrogatory answers, depositions, and matters of which judicial notice may be taken. (Code Civ. Proc. §437c(p)(2).) In ruling on the motion, the trial court must draw all reasonable inferences from the evidence in the light most favorable to the opposing party. (*Aguilar, supra*, 25 Cal.4th at 843, 860.)

The California Supreme Court has made clear that the 1992 and 1993 amendments to the summary judgment statute were intended "to liberalize the granting of [summary judgment] motions." (*Lin Joon Oh v. Teachers Ins. & Annuity Assn. of Am.* (2020) 53 Cal.App.5th 71, 81, quoting *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 542.) Thus, "[i]t is no longer considered a 'disfavored' remedy" and "is now seen as a particularly suitable means to test the sufficiency of the plaintiff's or defendant's case." (*Ibid*, citing *Perry, supra*, 2 Cal.5th at 542.)

## **3. Plaintiffs Have Not Presented Any Admissible Evidence to Show a Disputed Issue of Fact on the Element of Causation.**

Plaintiffs' complaint asserts four causes of action: negligence, loss of consortium, strict liability (design and manufacturing defects); and strict liability (failure to warn).

The well-established elements of negligence are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury. (*Paz v. State of California* (2000) 22 Cal.4th 550, 559; see also, *Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 640.) A cause of action for strict product liability may be based in either a defect in the manufacturer or design of the product or a failure to warn. (*Nelson v. Superior Court* (2006) 144 Cal. App. 4th 689, 695, citing *Scott v. Metabolife Internat., Inc.* (2004) 115 Cal.App.4th



appears that Plaintiffs simply repackage the evidence submitted with Defendant's motion and claim that it shows a disputed issue of fact. This is not sufficient. Furthermore, Plaintiffs have not submitted any expert testimony, or any other admissible evidence for that matter, to address the issue of causation or to rebut the conclusions of Defendant's experts. (See, *Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 403 [expert testimony is required where the issue of causation is beyond common knowledge or lay experience.]; see also, *Stephen v. Ford Motor Co.* (2005) 134 Cal.App.4th 1363, 1373-1376 [in a products liability action, expert testimony was required to establish whether defective design caused the accident.].) Indeed, despite the fact that this case was filed nearly three years ago, Plaintiffs have not presented the Court with any discovery responses, deposition testimony, or expert discovery. To the extent Plaintiffs rely on statements made by Donald Perkins, a private investigator with Fire Cause Analysis, this "evidence" is not admissible for many reasons, including it is hearsay, it is not in the form of a sworn declaration, and there is no foundation for the evidence.

Thus, because Plaintiffs have not presented the Court with any admissible evidence to show a disputed issue of fact on the element of "causation," Defendant's motion for summary judgment must be granted.

#### **4. Procedural Defects in Defendant's Alternative Motion for Summary Judgment are Rendered Moot by the Ruling Above.**

The Court notes that Plaintiffs correctly object to Defendant's failure to comply with the Rules of Court with respect to their motion for summary adjudication. Specifically, the Rules of Court state "[i]f summary adjudication is sought, whether separately or as an alternative to the motion for summary judgment, the specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." (R. Ct. 3.1350(b).) Here, Defendant seeks summary adjudication as an alternative to summary judgment but it does not identify any "cause of action, affirmative defense, claims for damages, or issues of duty" in its notice of motion or in its separate statement. Thus, to the extent Defendant seeks summary adjudication, the motion is defective. However, because the Court has concluded that summary judgment is warranted, the motion for summary adjudication is moot.

With respect to Defendant's failure to file a separate document entitled "memorandum of points and authorities," the Rules allow a memorandum of points and authorities to be combined with a notice, "if the party filing a combined pleading specifies these items separately in the caption of the combined pleading." (R. Ct. 3.1112(c).) While Defendant fails to specify that its memorandum of points and authorities is combined with its notice, Plaintiffs have not identified any prejudice from this alleged defect and it does not render the entire motion defective.

Accordingly and for the reasons stated above, Defendant's motion for summary judgment is granted.

Defendant's counsel shall submit a written order to the Court that is consistent with this tentative ruling and in compliance with Rule of Court 3.1312.

#### **Hearing Events/Documents Filed**

- Court announces tentative decision
- The Court adopts its previously published tentative ruling; After Oral Argument

-End of Minute Order-

PROOF OF SERVICE BY MAIL

I certify that I am an employee of the Superior Court of California, County of Sonoma, and that my business address is 600 Administration Drive, Santa Rosa, CA 95403; that I am not a party to this cause; that I am over the age of 18 years; that I am readily familiar with this office's practice for collection and processing of correspondence for mailing with the United States Postal Service; and that on the date shown below I placed a true copy of the attached Minute Orders in an envelope, sealed and addressed as shown below, for collection and mailing at Santa Rosa, California, first class, postage fully prepaid, following ordinary business practices.

Date: October 21, 2021

Arlene D. Junior,  
Clerk of the Court

By: Melissa Waters  
Melissa Waters, Deputy Clerk

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