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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JOSHUA HILD,

Plaintiff,

vs.

CALIFORNIA SUPREME COURT;
CALIFORNIA COURT OF APPEAL,
SECOND APPELLATE DISTRICT,

Defendants.

CASE NO. C 075107 THE

**PLAINTIFF'S OPPOSITION TO
MOTION TO DISMISS FIRST-
AMENDED COMPLAINT.
[Fed.R.Civ.P. Rule 12(b)(6)]¹**

DATE: Jan. 14, 2007
TIME: 10:00 a.m.
CTRM: 12 - 19th Fl.
The Hon. Thelton Henderson

^{1/} Given the interference by the holidays with the briefing schedule and Plaintiff's counsel's continuing engagement in a jury trial in Los Angeles County Superior Court, counsel for Defendant graciously agreed to extend the time for the filing of this brief by several days, for which Plaintiff and its counsel are genuinely appreciative.

1 **I. INTRODUCTION AND FACTUAL BACKGROUND**

2 In the interest of brevity and judicial economy, the Court is respectfully invited to review the
3 Plaintiff's First-Amended Complaint.

4 **II. LIMITATION ON DISFAVORED RULE 12 MOTIONS**

5 Motions to dismiss under Fed.Rules.Civ.P. Rule 12(b)(6) are disfavored. Similar to a common
6 law demurrer, a Rule 12(b)(6) motion tests the legal sufficiency of the claims stated in the complaint.
7 A Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable theory" or "the
8 absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dept.*
9 901 F.2d 696, 699 (9th Cir. 1990). Unless, unequivocally, plaintiff cannot state facts entitling him/her
10 to some form of relief, the motion must be denied. *Conely v. Gibson* 355 U.S. 41, 45-46, 78 S.Ct. 99,
11 102 (1957); *De La Cruz v. Tormey* 582 F.2d 45, 48 (9th Cir. 1978).

12 In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most
13 favorable to the plaintiff; (2) accept all well-pleaded factual allegations as true; and (3) determine
14 whether plaintiff can prove any set of facts to support a claim that would merit relief. *Cahill v. Liberty*
15 *Mut. Ins. Co.* 80 F.3d 336, 337-338 (9th Cir. 1996). "The issue is not whether a plaintiff will
16 ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."
17 *Scheuer v. Rhodes* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686 (1974); *Hydrick v. Hunter* 466 F.3d 676,
18 686 (9th Cir. 2006).

19 **III. PLAINTIFF POSSESSES STANDING BECAUSE THE NONCITATION RULE
20 DEPRIVED HIM OF THE PROCEDURAL GROUNDS FOR JUDICIAL REVIEW OF
21 THE FLAWED UNPUBLISHED SECOND DISTRICT COURT OF APPEAL
22 OPINION.**

22 There can be no question that Plaintiff Joshua Hild, has standing to bring this action seeking
23 a declaration that Cal Rules of Court, Rule 8.1115(a) is unconstitutional under the facts pleaded in his
24 First-Amended Complaint. Our Supreme Court has enunciated the requirement of standing as
25 "whether the *particular plaintiff* is entitled to an adjudication of the *particular claims* asserted." *Allen*
26 *v. Wright* 468 U.S. 737, 752, 104 S.Ct. 3315, 3325 (1984) [emphasis supplied]. The standing doctrine
27 is comprised both of constitutional or "Article III" requirements and "prudential considerations."
28 *Gladstone Realtors v. Village of Bellwood* 441 U.S. 91, 99, 99 S.Ct. 1601, 1607 (1979). The

1 “irreducible constitutional minimum of standing’ contains three parts: (1) injury in fact; (2) causation;
2 and (3) likelihood that the injury will be redressed by a favorable decision.” *Lujan v. Defenders of*
3 *Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); *Schneider v. Chertoff*, 450 F.3d
4 944, 959 (9th Cir.2006). The Ninth Circuit has held that “when evaluating whether these three
5 elements are present, we must look at the facts ‘ as they exist at the time the complaint was filed. ’”
6 *Lujan*, 504 U.S. at 569 n. 4, 112 S.Ct. 2130.

7 Under the strict rule that “[s]tanding is determined by the facts that exist at the time the
8 complaint is filed,” *American Civil Liberties Union of Nevada v. Lomax* 471 F.3d 1010 (9th Cir.
9 2006), citing, *Clark v. City of Lakewood* 259 F.3d 996, 1006 (9th Cir.2001), it clear that Plaintiff has
10 established his standing to maintain this action by meeting all three of these grounds.

11 ///

12 **A. PLAINTIFF HAS SUSTAINED ACTUAL INJURY**

13 As to the first requirement, Article III standing requires a showing that plaintiff has suffered
14 an actual economic or noneconomic injury, or is threatened with impairment of his interests. *Gladstone,*
15 *supra*, 441 U.S. at 100, 99 S.Ct. at 1608. The “injury in fact” requirement must involve “an invasion
16 of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not
17 conjectural or hypothetical.” *Lujan v. Defenders of Wildlife* 504 U.S. 555, 559-560, 112 S.Ct. 2130,
18 2136 (1992). In this case, Plaintiff alleged the following facts comprising the actual harm visited upon
19 him as a result of the operation of the noncitation rule of C.R.C. Rule 8.1115(a):

- 20 ● Plaintiff’s “right to review by the CALIFORNIA SUPREME COURT of the
21 underlying unpublished June 25, 2007 Opinion under C.R.C. Rule 8.500(b)(1), was
22 curtailed by direct causal operation of the non-citation rule of C.R.C. Rule 8.1115(a),
23 which prevented Plaintiff from qualifying for such review under the express
24 prerequisite criteria therefor set forth in C.R.C. Rule 8.500(b)(1),” FAC ¶ 21;
25 ● “The mandatory non-citation rule of C.R.C. Rule 8.1115(a) axiomatically deprives
26 litigants in civil cases resulting in unpublished Opinions of their right to judicial
27 review under C.R.C. Rule 8.500(b) (for other than procedural reasons) as a result of
28 the operation of C.R.C. Rule 8.1115(a), because such litigants cannot meet the review
criteria under Rule 8.500(b) [“when necessary to secure uniformity of decision or to
settle an important question of law”] once an Opinion is unpublished, and Defendant
SUPREME COURT OF CALIFORNIA, as a matter of both policy and empirical fact,
does not grant and has not granted review of such unpublished decisions in civil cases
not presenting an issue already before the Defendant SUPREME COURT OF
CALIFORNIA arising from a previously published Opinion.” FAC ¶ 25(B);
● “Defendant CALIFORNIA SUPREME COURT has a de facto policy of refusing
review of unpublished decisions in civil cases, except in rare cases whether that

1 unpublished decision has implicated an issue already before the CALIFORNIA
2 SUPREME COURT from a published opinion of a Court of Appeal as to which the
3 CALIFORNIA SUPREME COURT has already previously granted review, such that
4 litigants whose appellate decisions would otherwise qualify for review by the Supreme
5 Court under Rule 8.500(b)(1) when the underlying appellate decision is published, are
6 deprived of and denied the right to any such review as a sole, direct, and legal result
7 of the noncitation rule of C.R.C. 8.1115(a) once the appellate court elects to deem the
8 opinion in such case “unpublished.” FAC ¶ 25(E)(3);

9 ● “The operation of Rule 8.1115(a) invites and encourages Courts of Appeal to engage
10 in “selective prospectivity,” by facilitating the rendering of unassailable, unreviewable,
11 result-oriented decisions and outcomes in isolated cases dramatically departing from
12 well-settled principles of stare decisis, *including Plaintiff’s case hereinbelow*, which
13 can neither be reversed nor even qualify for review under the criteria of C.R.C. Rule
14 8.500(b), nor ever subjected to judicial or public scrutiny and/or criticism in the future,
15 after which said Appellate Courts return to standing California precedent for every
16 other case arising on the same facts predating the pronouncement of such unpublished
17 decisions, thus denying citizens and residents of the State of California, and Plaintiff
18 in this case, of their federal constitutional rights guaranteed under the 14th Amendment
19 to due process and further denying such California citizens and residents, including
20 Plaintiff herein, equal protection under the law by applying such new result-oriented
21 rules of law arbitrarily, differently, and exclusively to such litigants, including
22 Plaintiff, than they are applied to all other similarly-situated litigants.” FAC ¶
23 25(E)(4)

● That “the non-citation rule of C.R.C. Rule 8.1115(a) operates to deprive individuals
(*including Plaintiff hereinbelow*) of their constitutionally-protected rights to due
process and equal protection, to wit:

A. Depriving them of the same rights as litigants whose cases were and are
resolved on review in published decisions, by depriving them of the ability to qualify
for review by the California Supreme Court under C.R.C. Rule 8.500(b)(1), and which
did in fact cause Plaintiff’s rights to be so deprived hereinbelow.

B. Exposing them to the unconstitutional doctrine of “selective prospectivity,” by
facilitating the rendering of unassailable, unreviewable, result-oriented decisions and
outcomes in isolated cases dramatically departing from well-settled principles of stare
decisis, *including Plaintiff’s case hereinbelow*, which can neither be reversed nor even
reviewed under the criteria of C.R.C. Rule 8.500(b), nor ever subjected to judicial or
public scrutiny and/or criticism in the future, after which said Appellate Courts return
to standing California precedent for every other case arising on the same facts
predating the pronouncement of such unpublished decisions, thus denying citizens and
residents of the State of California, *and Plaintiff in this case*, of their federal
constitutional rights guaranteed under the 14th Amendment to due process and further
denying such California citizens and residents, including Plaintiff herein, equal
protection under the law by applying such new result-oriented rules of law arbitrarily,
differently, and exclusively to such litigants, including Plaintiff, than they are applied
to all other similarly-situated litigants.

24 Plaintiff also factually supported the allegations that Rule 8.1115(a) had facilitated the Court of
25 Appeal’s “selective prospectivity” in Plaintiff’s own, particular case, as evidenced by its purposeful
26 refusal to publish the opinion despite the directive of C.R.C. Rule 8.1105(c)(1-8), and its dramatic
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28

1 deviation from stare decisis in Plaintiff's specific case.² As a result of all of the foregoing, Plaintiff

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3 ^{2/} "A. The Court of Appeal admittedly violated the very standard of review it cited as the
4 proper standard enunciated in *Perez v. Van Groningen, etc.* (1986) 41 Cal.3d 962,
5 admitting factual issues existed precluding adjudication of scope of employment as a
6 question of law --- yet then did impermissibly so anyway, contrary to *Perez, supra*;

7 B. The Court of Appeal repudiated the jury's actual fact-finding in Mr. Hild's favor,
8 disregarded substantial evidence the jury relied upon supporting the verdict, and instead
9 selectively chose and reweighed the evidence in SCE's favor in order to reverse the
10 judgment for Mr. Hild, contrary to law prohibiting California Courts of Appeal from
11 "substitut[ing] [their] own inferences or deductions" for those of the jury. *People v.*
12 *Barnes* (1986) 42 Cal.3d 284, 303; *People v. Thornton* (1974) 11 Cal.3d 738, 754; *In re*
13 *Estate of Beard* (1999) 71 Cal.App.4th 753, 779.

14 C. The Court of Appeal totally repudiated Defendant CALIFORNIA SUPREME
15 COURT's seminal ruling in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18
16 Cal.4th 1, 12, authorizing trial courts to adapt and impose jury instructions on willful
17 suppression of evidence to remedy parties' acts of spoliation of important evidence
18 prejudicial to their opponents (as merely one alternative to recognizing an independent tort
19 cause of action for intentional spoliation of evidence).

20 D. The Court of Appeal disregarded inferences the jury obviously properly drew
21 against SCE under CACI 204 following SCE's spoliation of the very first handwritten and
22 most critical handwritten account of the incident personally drafted by Ms. Magdaleno,
23 SCE's coverup of that fact in false discovery responses, and the repeated impeachment of
24 Mr. McMillan at trial on the issue. In superimposing its personal belief in SCE's
25 witnesses' credibility over these conflicting adverse inferences arising from the spoliation,
26 Defendant CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT
27 repudiated the primary remedy Defendant CALIFORNIA SUPREME COURT expressly
28 intended be available to Plaintiff in lieu of a cause of action for intentional spoliation of
evidence in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1.

29 E. By totally disregarding all conflicting factual evidence and inferences adverse to
30 SCE subscribed to by the jury, and instead reversing the jury's determination based on its
31 own selection of other evidence favorable to SCE, The Court of Appeal usurped the jury's
32 function and nullified altogether the jury's factfinding on these disputed factual questions,
33 violating Plaintiff's constitutionally-guaranteed right to a jury trial on these factual issues.
34 Cal.Const. Art. I, § 16; U.S. Const. 7th Am.; C.C.P. § 592; Evid.C. § 312; *Cavinin v.*
35 *Pac. Southwest Airlines* (1983) 148 Cal.App.3d 512, 531; *Olivia N. v. NBC* (1977) 74
36 Cal.App.3d 383, 389.

37 F. The Court of Appeal's "unpublished" opinion also dramatically broke new ground
38 holding that, regardless of the admittedly conflicting evidence, the factually disputed
admittedly unintentional accident was indistinguishable as a matter of law from rape/sexual
battery-intentional tort cases in that no amount of disputed facts will bring ever the case
within an employer's scope of employment, citing *Mary M. v. City of Los Angeles* (1991)
54 Cal.3d 202, 219.

39 G. The Court of Appeal asserted that the scores of well-settled cases cited by Plaintiff
40 holding the issue of scope of employment to be a question of fact in a myriad of factually
comparable employer-employee accident cases, quipping "[a]ll of the cases are
distinguishable." However, The Court of Appeal thereafter only addressed a single case

1 alleged that “the operation of Rule 8.1115(a) invites and encourages Courts of Appeal to engage in
2 “selective prospectivity,” by facilitating the rendering of unassailable, unreviewable, result-oriented
3 decisions and outcomes in isolated cases dramatically departing from well-settled principles of stare
4 decisis, including Plaintiff’s case hereinbelow, which can neither be reversed nor even qualify for
5 review under the criteria of C.R.C. Rule 8.500(b), nor ever subjected to judicial or public scrutiny
6 and/or criticism in the future, after which said Appellate Courts return to standing California precedent
7 for every other case arising on the same facts predating the pronouncement of such unpublished
8 decisions, thus denying citizens and residents of the State of California, and Plaintiff in this case, of
9 their federal constitutional rights guaranteed under the 14th Amendment to due process and further
10 denying such California citizens and residents, *including Plaintiff herein*, equal protection under the
11 law by applying such new result-oriented rules of law arbitrarily, differently, and exclusively to such
12 litigants, *including Plaintiff*, than they are applied to all other similarly-situated litigants.” FAC ¶
13 25(E)(4).

14 All of these allegations are presumed true for the purposes of this motion. *Cahill, supra*, 80
15 F.3d at 337-338. These presumptively-true facts clearly enunciate a showing that Plaintiff has suffered
16 actual injury “by direct causal operation of the non-citation rule of C.R.C. Rule 8.1115(a),” i.e., the
17 loss of ***his own right to review*** of the unpublished opinion reversing/*taking away his money judgment*,
18 and *the denial of his due process and his equal protection rights* as a result of the “selective
19 prospectivity” engaged in by the Court of Appeal in its unpublished opinion, and deliberate
20 nonpublication of their opinion in order to use exploit the noncitation rule of C.R.C. Rule 8.1115(a)

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24 cited by Plaintiff, and conspicuously offered no explanation whatsoever as to how or why
25 the scores of other cases cited by Plaintiff which plainly conflicted with its decision, were
26 or are “distinguishable.”

27 H. In never stating, nor apprising Plaintiff of, the revolutionary and controversial new
28 legal grounds replied upon by the Court of Appeal for its unpublished June 25, 2007
Opinion until issuing that Opinion for the very first time, the Court of Appeal further
denied Plaintiff any opportunity to address in writing and/or orally, the new and
revolutionary grounds it intended to apply, and did so apply in issuing said opinion, and
thus denied Plaintiff his due process rights.” (FAC ¶ 17)

1 to effectuate that outcome *against Plaintiff and his due process and equal protection rights*.³

2 **B. RULE 8.1115(A) CAUSED PLAINTIFF ACTUAL INJURY.**

3 These aforementioned allegations also clearly plead a causal nexus between the alleged
4 unconstitutionality of the rule, and the direct injuries personally suffered by Joshua Hild as a result
5 thereof (that the noncitation rule personally cost him his money judgment, denied him the right to
6 review of the decision doing so, and further denied him his due process and equal protection rights
7 to be treated as all other similarly-situated litigants as a result of the “selective prospectivity
8 engaged in by the Second District Court of Appeal).

9 **C. PLAINTIFF’S INJURY WOULD BE REDRESSED BY A FAVORABLE DECISION,
10 MANDATORILY MEASURED AT THE TIME HIS COMPLAINT WAS FILED.**

11 Finally, Defendant argues that the requirement of redressability of injury cannot be met by
12 Plaintiff. However, the very case cited by Defendant, *Lomax, supra*, emphasizes that, by law,
13 “[s]tanding is determined *by the facts that exist at the time the complaint is filed*.” *Id.*, 279 F.3d at
14 1015; *Clark, supra*, 259 F.3d at 1006 [emphasis supplied].

15 Moreover, again by the very case cited by the Defendant, “[i]n determining redressability,
16 courts ‘assume that plaintiff’s claim has merit.’” *Lomax, supra*, 471 F.3d at 1015, citing, *Bonnichsen*
17 *v. United States*, 367 F.3d 864, 873 (9th Cir.2004) (“The question in deciding whether a plaintiff’s
18 injury is redressable is not whether a *favorable decision* is likely but whether a favorable decision
19 *likely will redress* a plaintiff’s injury.”).

20
21 ^{3/} *Schmier v. U.S. Ct. of Appeals for the Ninth Circuit* 279 F.3d 817 (9th Cir. 2002) is inapt,
22 under the well-settled rule that a plaintiff cannot maintain a federal civil action to redress injuries
23 to others, or to assert the rights of third persons, i.e., “the injury that a plaintiff alleges [to meet
24 the standing requirement] must be unique to that plaintiff, one in which he has a “personal stake”
25 in the outcome of a litigation seeking to remedy that harm....Schmier...alleged no facts showing,
26 with specificity, that the prohibition against citing unpublished dispositions will produce an
27 imminent injury personal to Schmier himself (e.g., as when doing so would lead to the imposition
28 of sanctions on Schmier) or even to one of Schmier’s clients (e.g., as when relying on an
unpublished decision that would help that client prevail in a litigation).” *Id.*, 279 F.3d at 821.
here, in stark contrast, Joshua Hild has alleged that the noncitation rule personally cost him his
money judgment, denied him the right to review of the decision doing so, and further denied him
his due process and equal protection rights to be treated as all other similarly-situated litigants,
clearly an injury personally injurious to him (notwithstanding that other litigants may also have
been similarly affected by the rule and will be so affected in the future).

1 Accordingly, as the Ninth Circuit Court did in *Lomax, supra*, this Court must, for the purposes
2 of “redressability,” assume that Plaintiff Hild’s original complaint filed with this Court had merit. *Id.*,
3 471 F.3d at 1015-1016. ***If “the district court had the power to prevent the injury at the time the***
4 ***complaint was filed, the [Plaintiff’s] injury was redressable.”*** *Id.*, 471 F.3d at 1016 [emphasis
5 supplied].

6 Plaintiff’s complaint in this action was filed on October 4, 2007. At that time, the Defendant
7 has not yet ruled on his Petition for Review.

8 Only on October 24, 2007, some three weeks later, did the Supreme Court finally deny that
9 Petition for Review. (FAC ¶ 20)

10 Thus, at the time the Plaintiff’s complaint herein was filed on October 4, 2007, had this Court
11 ruled Rule 8.1115(a) unconstitutional, Defendant CALIFORNIA SUPREME COURT would have had
12 to consider the Court of Appeal’s deliberately unpublished opinion a “published” opinion, which
13 would have qualified that opinion for review under Rule 8.500(b). Specifically, once that opinion was
14 no longer “unpublished” its citeable, dramatic departure of that decision from stare decisis, would
15 have created a clear lack of uniformity of decision among the circuits on the points raised and raised
16 important questions of law.⁴

17
18 ^{4/} The clearly result-oriented “unpublished” opinion at issue:
19 1. Created a new, “one-time” standard of review for “scope of employment,” by
20 repudiating the previous, proper, prevailing standard enunciated set forth by the Supreme
21 Court in *Perez v. Van Groningen, etc.* (1986) 41 Cal.3d 962, despite its obligation to
22 follow the law as set forth by the Supreme Court. *Auto Equity Sales, Inc. v. Superior*
23 *Court* (1962) 57 Cal.2d 450, 455;
24 B. The Court of Appeal repudiated the jury’s actual fact-finding in Mr. Hild’s favor,
25 disregarded substantial evidence the jury relied upon supporting the verdict, and instead
26 selectively chose and reweighed the evidence in SCE’s favor in order to reverse the
27 judgment for Mr. Hild, contrary to law prohibiting California Courts of Appeal from
28 “substitut[ing] [their] own inferences or deductions” for those of the jury. *People v.*
Barnes (1986) 42 Cal.3d 284, 303; *People v. Thornton* (1974) 11 Cal.3d 738, 754; *In re*
Estate of Beard (1999) 71 Cal.App.4th 753, 779.
C. The Court of Appeal repudiated Defendant CALIFORNIA SUPREME COURT’s
seminal ruling in *Cedars-Sinai Medical Center v. Superior Court* (1998) 18 Cal.4th 1, 12,
authorizing trial courts to adapt and impose jury instructions on willful suppression of
evidence to remedy parties’ acts of spoliation of important evidence prejudicial to their
opponents (as merely one alternative to recognizing an independent tort cause of action for
intentional spoliation of evidence), again contravening *Auto Equity Sales, Inc. v. Superior*

1 Thus, for the purposes of “redressability,” as measured as of October 4, 2007, because “*the*
2 *district court had the power to prevent the injury at the time the complaint was filed, the*
3 *[Plaintiff’s] injury was redressable.*” *Lomax, supra*, 471 F.3d at 1016 [emphasis supplied].

4 Consequently, and for all of these reasons, Plaintiff Joshua Hild clearly has standing to
5 maintain this action as against the noncitation rule of C.R.C. 8.1115(a).

6
7 *Court* (1962) 57 Cal.2d 450, 455.

8 D. The Court of Appeal disregarded inferences the jury obviously properly drew
9 against SCE under CACI 204 following SCE’s spoliation of the very first handwritten and
10 most critical handwritten account of the incident personally drafted by Ms. Magdaleno,
11 SCE’s coverup of that fact in false discovery responses, and the repeated impeachment of
12 Mr. McMillan at trial on the issue. In superimposing its personal belief in SCE’s
13 witnesses’ credibility over these conflicting adverse inferences arising from the spoliation,
14 the Court of Appeal repudiated the primary remedy Defendant CALIFORNIA SUPREME
15 COURT expressly intended be available to Plaintiff in lieu of a cause of action for
16 intentional spoliation of evidence in *Cedars-Sinai Medical Center v. Superior Court* (1998)
17 18 Cal.4th 1.

18 E. By totally disregarding all conflicting factual evidence and inferences adverse to
19 SCE subscribed to by the jury, and instead reversing the jury’s determination based on its
20 own selection of other evidence favorable to SCE, The Court of Appeal usurped the jury’s
21 function and nullified altogether the jury’s factfinding on these disputed factual questions,
22 violating Plaintiff’s constitutionally-guaranteed right to a jury trial on these factual issues.
23 Cal.Const. Art. I, § 16; U.S. Const. 7th Am.; C.C.P. § 592; Evid.C. § 312; *Cavinin v.*
24 *Pac. Southwest Airlines* (1983) 148 Cal.App.3d 512, 531; *Olivia N. v. NBC* (1977) 74
25 Cal.App.3d 383, 389.

26 F. The Court of Appeal’s “unpublished” opinion also dramatically broke new ground
27 holding that, regardless of the admittedly conflicting evidence, the factually disputed
28 admittedly unintentional accident was indistinguishable as a matter of law from rape/sexual
battery-intentional tort cases in that no amount of disputed facts will bring ever the case
within an employer’s scope of employment, *citing Mary M. v. City of Los Angeles* (1991)
54 Cal.3d 202, 219.

G. The Court of Appeal asserted that the scores of well-settled cases cited by Plaintiff
holding the issue of scope of employment to be a question of fact in a myriad of factually
comparable employer-employee accident cases, quipping “[a]ll of the cases are
distinguishable.” However, The Court of Appeal thereafter only addressed a single case
cited by Plaintiff, and conspicuously offered no explanation whatsoever as to how or why
the scores of other cases cited by Plaintiff which plainly conflicted with its decision, were
or are “distinguishable.”

H. In never stating, nor apprising Plaintiff of, the revolutionary and controversial new
legal grounds replied upon by the Court of Appeal for its unpublished June 25, 2007
Opinion until issuing that Opinion for the very first time, the Court of Appeal further
denied Plaintiff any opportunity to address in writing and/or orally, the new and
revolutionary grounds it intended to apply, and did so apply in issuing said opinion, and
thus denied Plaintiff his due process rights.” (FAC ¶ 17)

1 **IV. UNDER *ROOKER-FELDMAN* THIS COURT EXPRESSLY HAS THE**
2 **JURISDICTION TO DECLARE A GENERAL COURT RULE, C.R.C. RULE**
3 **8.1115(A), UNCONSTITUTIONAL.**

4 The limited declaratory relief sought in this action is precisely that which the Supreme Court
5 stated in its seminal decision in *District of Columbia v. Feldman* 460 U.S. 462, 486-487 (1983), i.e.,
6 that this Court has jurisdiction over a general challenge to the constitutionality of state court's rule.
7 *Id.* Therein, Marc Feldman and Edward Hickey both filed complaints in U.S. District Court after the
8 District of Columbia Court of Appeals denied their petitions for waiver of the District of Columbia
9 Bar admission rule 46(I)(b)(3) that required attorney applicants to the D.C. Bar to have graduated from
10 a law school approved by the American Bar Association. *Id.* Their complaints not sought federal
11 court substantive review of the final decisions of the District of Columbia Court of Appeals denying
12 those petitions, but also challenged the constitutionality of the Bar admission rule itself.

13 The U.S. District Court dismissed their complaints in their entirety (including the declaratory
14 relief sought to strike down Rule 46(I)(b)(3)), and the D.C. Circuit Court of Appeals upheld that
15 dismissal, under the *Rooker* doctrine. The Supreme Court granted certiorari, and reversed the portion
16 of the dismissal seeking declaratory relief that Rule 46(I)(b)(3) was unconstitutional. As the Supreme
17 Court explained:

18 “The District of Columbia Circuit properly acknowledged that the United States
19 District Court is without authority to review final determinations of the District of
20 Columbia Court of Appeals in judicial proceedings. Review of such determinations
21 can be obtained only in this Court. See 28 U.S.C. § 1257. See also *Atlantic Coast*
22 *Line R. Co. v. Engineers*, 398 U.S. 281, 296, 90 S.Ct. 1739, 1747, 26 L.Ed.2d 234
23 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 416, 44 S.Ct. 149, 150, 68
24 L.Ed. 362 (1923)....

25 “As we have noted, *supra*, at 1311, a United States District Court has no authority to
26 review final judgments of a state court in judicial proceedings. Review of such
27 judgments may be had only in this Court. Therefore, to the extent that Hickey and
28 Feldman sought review in District Court of the District of Columbia Court of Appeals'
denial of their petitions for waiver the District Court lacked subject matter jurisdiction
over their complaints. Hickey and Feldman should have sought review of the District
of Columbia Court of Appeals' judgments in this Court. ***To the extent that Hickey
and Feldman mounted a general challenge to the constitutionality of Rule 46
I(b)(3), however, the District Court did have subject matter jurisdiction over their
complaints....***

“The respondents' claims that the rule is unconstitutional because it creates an
irrebuttable presumption that only graduates of accredited law schools are fit to
practice law, discriminates against those who have obtained equivalent legal training
by other means, and impermissibly delegates the District of Columbia Court of
Appeals' power to regulate the bar to the American Bar Association, do not require
review of a judicial decision in a particular case. The District Court, therefore, has

1 subject matter jurisdiction over these elements of the respondents' complaints..." *Id.*,
2 460 U.S. 476-487.

3 The line of demarcation is that a state court loser may not seek judicial review of a state court decision
4 by the District Court to "overturn an injurious state court judgment." *Exxon Mobil Corp. v. Saudi*
5 *Basic Industries Corp.* 544 U.S. 280, 292, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005); *Kanna v. State*
6 *Bar of California* 505 F.Supp. 633 (N.D. Cal. 2007).

7 In this case, Plaintiff has made it clear that he is not seeking judicial review of the unpublished
8 June 25, 2007 decision of the Second District Court of Appeal, and recognizes that judicial review of
9 its merits now lies solely with a petition for writ of certiorari to the U.S. Supreme Court, *accord*
10 *Feldman, supra*, which is in process. (FAC ¶ 20) Plaintiff is clearly not seeking judicial review of
11 the unpublished opinion at issue, nor is he herein seeking an impermissible order "overturn[ing] an
12 injurious state court judgment," *Exxon Mobil Corp., supra*, 544 U.S. at 292; *Kanna, supra*, 505
13 F.Supp. at 642-643. The actions of the Second District Court of Appeal alleged in the pleading were
14 asserted solely for the purposes of explaining the cause-and-effect relationship between the Rule at
15 issue, C.R.C. Rule 8.1115(a) and the harm to Plaintiff's constitutional rights, and to foundationally,
16 factually establish Plaintiff's standing, discussed in detail above.

17 Thus, the only relief sought herein from this Court is a declaration that the noncitation rule of
18 C.R.C. Rule 8.1115(a) is unconstitutional. Accordingly, "[t]o the extent that [Plaintiff has] mounted
19 a general challenge to the constitutionality of [C.R.C.] Rule [8.1115(a)], however, the District Court
20 d[oes] have subject matter jurisdiction over [his] complaint..." *Feldman, supra*, 460 U.S. at 482.

21 Defendants' argument that Plaintiff is somehow seeking relief that his pleading clearly shows
22 he is not seeking, neither makes it so, nor furnished grounds this motion to dismiss under Rule
23 12(b)(6).

24 **V. THE ABSTENTION DOCTRINE IS INAPPLICABLE, BECAUSE THE STATE COURT PROCEEDINGS ARE CONCLUDED.**

25 Abstention is "an extraordinary and narrow exception to the duty of a district court to
26 adjudicate a controversy properly before it." *New Orleans Pub. Service, Inc. v. Council of City of*
27 *New Orleans* 491 U.S. 350, 359, 109 S.Ct. 2506, 2513. Unless "vital state interests" are at stake,
28 federal courts have an "unflagging obligation" to exercise their jurisdiction. *Id.* Moreover, in this case,

1 the unconstitutional acts occurred at the conclusion of the litigation process, and Plaintiff was never
2 given an adequate forum for litigating the federal claims because those claims arose only at the
3 conclusion of the litigation process, i.e., with the unpublished opinion. Issuance of that opinion as
4 deliberately “unpublished” cut off any chance for review by the California Supreme Court, and that
5 Court in fact denied that petition summarily without consideration of the merits, precisely because it
6 was deemed unpublished. Consequently, Plaintiff never had any opportunity to litigate his
7 constitutional claims before the state courts, or develop a record pertinent thereto, fatal to exercise of
8 abstention. *Middlesex County Ethics Comm'ee v. Garden State Bar Ass'n*. 457 U.S. 423, 431, 102
9 S.Ct. 2515. Furthermore, there are no two (2) appeals in this case, because prospective appeal from
10 this decision does not involve review of the underlying decision, a impliedly contended by Defendant.

11 **VI. THE ELEVENTH AMENDMENT DOES NOT BAR THIS SUIT, BECAUSE NO
12 DAMAGES OR INJUNCTIVE RELIEF IS SOUGHT.**

13 As Defendant is well aware from the amendments to the pleading, Plaintiff is seeking neither
14 damages nor injunctive relief against the Defendant, which are generally barred by the Eleventh
15 Amendment, subject to the exception of *Ex parte Young* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714,
16 recently discussed by the high Court in *Idaho v. Coeur D'Alene Tribe of Idaho* 521 U.S. 216, 117
17 S.Ct. 2028, 138 L.Ed.2d 438 (1997). Under the exception of *Ex parte Young, supra*, claims for solely
18 declaratory relief may proceed in the District Courts to preclude ongoing state conduct violative of
19 individual's federal constitutional rights. As the Ninth Circuit recently concluded in *Agua Caliente
20 Band of Cahuilla Indians v. Hardin* 223 F.3d 1041, (2000):

21 “The *Young* doctrine strikes a delicate balance by ensuring on one hand that states
22 enjoy the sovereign immunity preserved for them by the Eleventh Amendment while,
23 on the other hand, ‘giving recognition to the need to prevent violations of federal law.
24 *Coeur D'Alene*, 521 U.S. at 269, 117 S.Ct. 2028. And while the Supreme Court has
25 recently revisited the scope of both the Eleventh Amendment and the *Young* exception
26 in *Coeur D'Alene* and in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct.
27 1114, 134 L.Ed.2d 252 (1996), the Court has made it clear that it does not ‘question
28 the continuing validity of the *Ex parte Young* doctrine.’” *Coeur D'Alene*, 521 U.S. at
269, 117 S.Ct. 2028.

29 The Supreme Court in *Coeur D'Alene* further emphasized that in cases involving unconstitutional
30 state action, that the suit has personally named the highest-ranking state officer as the Defendant
31 “acting his or her official capacity,” is a meaningless fiction, because “[t]he legal interests served by

1 the Eleventh Amendment are not to be sacrificed to elemental mechanics of captions and pleading.”
2 *Id.*, 521 U.S. at 270.⁵ “There are, in general, two instances where *Young* has been applied. The first
3 is where there is no state forum available to vindicate federal interests, thereby placing upon Article
4 III courts the special obligation to ensure the supremacy of federal statutory and constitutional law.
5 This is a most important application of the *Ex parte Young* doctrine, and is exemplified by the facts
6 in *Young* itself....[¶] Even if there is a prompt and effective remedy in a state forum, a second instance
7 in which *Young* may serve an important interest is when the case calls for the interpretation of federal
8 law....[¶] Our precedents do teach us, nevertheless, that where prospective relief is sought against
9 individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most
10 cases, is not a bar.” *Id.*, 521 U.S. at 276-277. However, the approach to the *Young* doctrine involves
11 a “case-by-case approach...” *Id.*, 521 U.S. at 279.⁶

12 In one of its more recent pronouncements on this issue post-*Coeur D’Alene*, the Ninth Circuit
13 Court of Appeals in 2000 upheld the Plaintiff’s right to seek declaratory relief against the California
14 State Board of Equalization seeking a declaration that California’s sales and use tax violated federal
15 law, rejecting the Defendants’ Eleventh Amendment immunity defense finding, based on *Coeur*
16 *D’Alene, supra*, that the *Young* doctrine is alive and well, and that the Plaintiff’s “requested relief
17 would not affect California’s sovereignty interests in the merits...but would ensure that the state sales
18 and use tax be applied by state officials in a manner consistent with federal law.” *Id.*, 223 F.3d at
19 1949.

20 Under specific of this case, both of the *Young* criteria enunciated by the Supreme Court exist.
21

22 ^{5/} Thus, as this action is clearly brought to seek invalidation of allegedly unconstitutional
23 C.R.C. Rule 8.1115(a), it is an immaterial distinction that the named Defendant is the Supreme
24 Court or California, or Chief Justice, Ron George, in his representative capacity for the Supreme
25 Court of California, and even if form were permitted to prevail over substance, leave to amend
26 to restyle the caption of the action as one against the Chief Justice in his representative capacity,
27 would be obligatory under Fed.R.Civ.P. Rule 15(a) and well-settled case authorities. *See, Allen*
v. City of Beverly Hills 911 F.2d 367, 373 (9th Cir. 1990). This follows whether leave has been
28 requested or not. *Doe v. United States* 68 F.3d 494, 497.

27 ^{6/} It is noteworthy that moving party conspicuously omits any reference to the *Ex parte Young*
28 doctrine, and further cites only Ninth Circuit authorities pre-dating the Supreme Court’s June 23,
2007 in support of its Eleventh Amendment argument.

1 First, “no state forum available [exists] to vindicate [Plaintiff’s] federal interests, thereby placing upon
2 Article III courts the special obligation to ensure the supremacy of federal statutory and constitutional
3 law. This is a most important application of the *Ex parte Young* doctrine, and is exemplified by the
4 facts in *Young* itself.” *Court D’Alene, supra*, 521 U.S. at 276-277. This follows because the very
5 constitutional concerns raised by Plaintiff herein only occurred at the time of publication of the
6 nonpublished opinion, and the very conflict of C.R.C. Rule 8.1115(a) precluded any state court review
7 (then at that late stage by the State Supreme Court), because the act of deeming the opinion
8 “unpublished” deprived Plaintiff, by operation of Rule 8.1115(a), Plaintiff of any right to review under
9 C.R.C. Rule 8.500(b). In sum, there is no there is no state forum remedy at all, let alone a prompt and
10 effective remedy one. The second *Young* factors is also met here, because this case clearly calls for
11 the interpretation of federal law, i.e., the United States constitution. *See, Coeur D’Alene, supra*, 521
12 U.S. at 276-277. Moreover, there has been no showing or suggestion that Plaintiff’s “requested relief
13 would [] affect California’s sovereignty interests on the merits...but would-ensure that the [Rules
14 governing fair treatment of litigants as between the use of published and published opinions under the
15 14th Amendment, equal protection and due process clause of the federal constitution] be applied by
16 state officials in a manner consistent with federal law.” *Id.*, 223 F.3d at 1949. Accordingly, at worst
17 case, and if genuinely necessary Plaintiff should be granted leave to amend as their underlying
18 substantive claims are clearly actionable in thus Court under the *Younger* exception to Eleventh
19 Amendment immunity.

20 **VII. DEFENDANT’S CONTENTION THAT THE NINTH CIRCUIT AND STATE**
21 **COURTS HAVE SOMEHOW FOUND RULE 8.1115(A) CONSTITUTIONAL, IS**
22 **INCORRECT.**

23 Defendant’s assertion that the Ninth Circuit has found C.R.C. Rule 8.1115(a) constitutional
24 is simply wrong. In *Schmier v. Ninth Circuit Court of Appeal*, 279 F.3d 817 (9th Cir. 2002), the Ninth
25 Circuit granted a motion to dismiss Plaintiff’s complaint for lack of standing, where the Plaintiff
26 attorney, without an injured client or a personal stake, could not show a “cognizable injury” suffered
27 as a result of then-extant 9th Circuit Rule 36-3. The constitutionality of C.R.C. Rule 8.1115(a) (based
28 on violation of due process, equal protection, and “selective prospectivity”) was never therein brought
before the Court, and the Ninth Circuit did not even reach the merits of Plaintiff’s constitutional

1 claims, except anecdotally to refer to its decision in *Hart v. Massanari* 266 F.3d 1155 (9th Cir. 2001),
2 as possibly foreclosing “one of the many theories alleged by [Plaintiff] Schmier.” However, the case
3 alluded to, *Hart, supra*, is equally inapt because the only constitutional challenge to Rule 36-3 in *Hart*
4 (alluded to in *Schmier, supra*) was an Article III challenge (i.e., exercise of judicial power precludes
5 federal courts from making rulings that are not binding in future cases.) *Id.*

6 In *Hart, supra*, the attorney in question, defending against a court-imposed order to show cause
7 for the citation of unpublished authority in an opening brief, challenged the rule 36-3 on the grounds
8 that it violated Article III of the constitution, as concluded the Eighth Circuit Court of Appeals in
9 *Anastasoff v. United States* 223 F.3d 898, *vac. as moot on reh'g en banc*, 235 F.3d 1054 (8th Cir.
10 2000). Of course, since December 1, 2006, Fed.R.App.Proc. Rule 36-1 has been in force prohibiting
11 any Circuit Court of Appeals (including the Ninth Circuit) from restricting the citation of unpublished
12 opinions, so the quoted decisions of the Ninth Circuit are of questionable value in any event. But
13 clearly neither case was called upon to consider the question of whether C.R.C. Rule 8.1115(a) was
14 constitutional under the due process, equal protection clauses and/or its facilitation of unconstitutional
15 “selective prospectivity.” It is an axiom that cases are not authority for propositions not considered.

16 In *Schmier v. Supreme Court* 78 Cal.App.4th 703 (2000), the First Appellate District Court
17 of Appeal held that Mr. Schmier, again an attorney without a client or a personal stake, had no
18 standing to attack the validity of California Rules of Court Rules 976-979. Despite Schmier’s lack
19 of standing, the Court went on in the vacuum of any specific facts alleged, to give a broad brush of
20 approval generally to these publication rules, clearly without ever examining or considering the
21 specific factual issue presented by this very case (or the specific rule at issue herein - then Rule 977,
22 now Rule 8.1115(a)): whether application of the “unpublished” moniker by a court of appeal was in
23 fact misused to legitimize unconstitutional selective prospectivity (a denial of equal protection and
24 due process), by axiomatically the case ineligible for review under C.R.C. Rule 8.500(b) as a result
25 of the non-publication decision alone.⁷ Once again, cases are not authority for propositions not
26

27 ^{7/} Similarly, neither *People v. Superior Court* 22 Cal.App.4th 1541 (1994), nor *In re*
28 *Williams* 69 Cal.App.3d 840 (1977) were presented with the question of the federal
constitutionality of C.R.C. Rule 8.1115(a) on due process, equal protection, and/or selective

1 considered.

2 **VIII. THE ANTI-INJUNCTION ACT DOES NOT APPLY AS NO INJUNCTIVE RELIEF**
3 **HAS BEEN SOUGHT.**

4 Again, it is unclear why this argument has even been made, since no such relief has been
5 sought in the FAC.

6 **IX. BEAM CONSTITUTIONALLY PROHIBITS THE MISCONDUCT ALLEGED**
7 **HEREIN.**

8 In its last, confusing argument, Defendant argues that *James B. Beam Distilling Co. v. Georgia*
9 501 U.S. 529 (1991) is somehow inapt, because it was a plurality decision, and somehow does not say
10 what it said. Therein, the majority clearly held that “selective prospectivity,” i.e., a court’s apply[ing
11 of] a new rule in the case in which it is pronounced, then [its] return to the old one with respect to all
12 others arising on facts predating the pronouncement....breaches the principle that litigants in similar
13 situations should be treated the same, a fundamental component of *stare decisis* and the rule of law
14 generally.” *Id.*, 501 U.S. at 537. Plaintiff’s presumptively-true pleaded facts clearly establish a prima
15 facie case of selective prospectivity. Defendant’s self-fulfilling prophesy that selective prospectivity
16 cannot occur here, because the unpublished decision does not create precedent, does not unwind the
17 constitutional injury inflicted upon the Plaintiff outlawed in *Beam, supra*.

18 **IV. CONCLUSION**

19 For all of the foregoing reasons, Plaintiff respectfully submits that this motion must be denied,
20 and/or Plaintiff granted leave to amend as indicated hereinabove.

21 ///

22 DATED: December 26, 2007

BISNAR | CHASE

23 By: 

24 BRIAN D. CHASE
25 Attorneys for Plaintiff

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28 _____
prospectivity grounds.

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