Case No. R 08-15785

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

JOSHUA HILD, etc.,
Plaintiff and Appellant,

vs.

CALIFORNIA SUPREME COURT, et al.,
Defendants and Respondents.

APPELLANT'S REPLY BRIEF

On Appeal from a Judgment based on a Motion to Dismiss
of the United States District Court
for the Northern District of California
Case No. C 07-05107 THE
The Honorable Thelton E. Henderson, Senior District Judge

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I. DEFENDANT MISSTATES THE STANDARD OF REVIEW

Defendant agrees with Appellant that the review of a district court's grant of a motion to dismiss based upon Fed.R.Civ.P. Rule 12(b)(6) is *de novo*, yet asserts that the decision of the court of appeals may be affirmed on any ground, *citing, inter alia, Forest Guardians v. U.S. Forest Service* 329 F.3d 1089, 1097 (9th Cir. 2003). However, none of the supporting cases cited for this proposition by Defendant, which assertion is inherently at odds with the *de novo* standard of review, involved the grant of a motion to dismiss under Rule 12(b)(6). Rather, all of these authorities cited involved the review of summary judgment, except for one which involved a writ of error *coram nobis. Matus-Leva v. United States* 287 F.3d 758 (9th Cir. 2002).

II. DEFENDANT HAS FAILED TO REHABILITATE THE TRIAL COURT'S ERROR IN FINDING NO STANDING ON HILD'S PART.

In his opening brief, Appellant asserted the trial court erred in finding he had no standing as a result of its erroneous determination that the "redressibility requirement of Article II standing" could not be met. As Appellant argued, because "standing is determined by the facts that existed at the time the complaint is filed," if the district court had the power, at that time, to prevent the injury then Plaintiff's injury was in fact redressible for Article II standing purposes. *See, American Civil Liberties Union of Nevada v. Lomax* 471 F.3d 1010, 1016 (9th Cir. 2006). The trial court failed to recognize that at the time Hild's original complaint was filed with the district court on October 4, 2007,

Defendant Supreme Court had not yet rejected his Petition for Review (it was not rejected until October 24, 2007, some three weeks after the complaint's filing). (AA:009:8-12) Accordingly, at the time of the filing of the October complaint, had the district court granted the relief sought therein, the Defendant would have had to consider the unpublished opinion and its contents under C.R.C. Rule 8.500(b). Thus, the district court did, in fact, have the power as a matter of law to prevent the injury to the Plaintiff/Appellant at the time his complaint was filed on October 4, 2007. *Lomax, supra*, 471 F.3d at 1016.

Defendant's brief ignores these facts which disclose clear error on the part of the district court below in its standing analysis and ruling adverse to Plaintiff/Appellant. Instead, Defendant shifts course and instead argues that the grant of review would have been speculative. However, that the Plaintiff still may not ultimately have won his underlying petition for review even had the district court granted relief, is not the test by which the "redressibility" component was and is measured for Article III standing purposes: it is sufficient as long as the district court's timely intervention ***could have*** redressed Plaintiff's injury. *Lomax, supra*, 471 F.3d at 1016. The redressibility component was the only element of standing the district court opined Plaintiff lacked. The district court found that Plaintiff had standing on the basis of every other prerequisite prima facie element thereof. Accordingly, district court's clear error in finding that Plaintiff's injury was not redressible, was erroneous and warrants reversal.

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III. THE DISTRICT COURT IMPROPERLY IGNORED THE FACTS PLEADED IN THE FIRST-AMENDED COMPLAINT ("FAC") ON A RULE 12(B)(6) MOTION, WHICH FACTS, IF ULTIMATELY PROVEN TRUE, WOULD AND DID ENUNCIATE A CASE OF SELECTIVE PROSPECTIVITY.

Defendant attempts to support the trial court's ruling by ignoring the facts pleaded in Plaintiff's FAC and instead relying upon prior decisional authority which never specifically addressed or considered the specific factual issue presented in Plaintiff's lawsuit herein. Defendant offered neither response nor rebuttal to the fact that the district court ignored the pleaded facts in the FAC which it was bound, on a Rule 12(b)(6) motion to accept and construe as true "in the light most favorable to Plaintiff." *Love v. United States,* 871 F.2d 1488, 1491 (9th Cir.1989). Defendant further sidesteps the rule of law holding that dismissal under Rule 12(b)(6) is improper unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* The truth of the matter is that the facts pleaded in the FAC at ¶¶ 17, 18, and 21-22(B) (AA:005:25-007:24), mandatorily deemed true at the Rule 12(b)(6) motion stage of proceedings, clearly articulated facts establishing a prima facie case of selective prospectivity held unconstitutional in the seminal Supreme Court case of *James S. Beam Distilling Co. v. Georgia* 501 U.S. 529, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991). As a consequence, the district court's dismissal was therefore unjustified. *Lomax, supra; Gibson v. United States,* 781 F.2d 1334, 1337 (9th Cir.1986), *cert. denied,* 479 U.S. 1054, 107 S.Ct. 928, 93 L.Ed.2d 979 (1987)); *Cahill v. Liberty*

Mutual Ins. Co. 80 F.3d 336, 337-338 (9th Cir. 1978).

IV. THE SCHMIER *RULING* RELIED UPON BY DEFENDANT IS NOT AUTHORITY FOR A PROPOSITION NOT CONSIDERED, AND NEVER SPECIFICALLY ADDRESSED THE FACTUAL QUESTION PRESENTED BY HILD'S ACTION.

Defendants' argument relying upon the *Schmier* state court decision misperceives the fundamental question in this case that has not before been presented in any case, including in *Schmier*. Plaintiff's attack in *Schmier* was aimed solely at the authority of the appellate courts to determine which decisions should be published and which should not. The Court therein did ***not*** consider the question of whether misuse of the "unpublished" mokiner by the court of appeal would automatically preclude a litigant from being eligible to petition the Supreme Court for review as a result of the operation of C.R.C. Rule 8.500(b). This is important and a material distinction from the facts of *Schmier* for the very reason inadvertently gleaned by the district court's decision hereinbelow. Because the publication decision comes only *after* the case has been fully presented to the Court of Appeal and its final decision has been rendered, an unsuccessful appellant receiving an opinion deemed "unpublished" has no rights of due process whatsoever, if that "unpublished" opinion below radically and unconstitutionally departs, as was the case below, from every applicable principle of *stare decisis*. For example, in the case below, the Court to Appeal went so far as to strip Hild of his constitutionally-guaranteed right to a jury trial on disputed issues of fact, and weighing the credibility of witnesses, which

was improperly usurped by the Court of Appeal only upon conclusion of issuance of its "unpublished" opinion. This tactic directly contravened the standing rule of law in California that precluded Courts of Appeal from "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.

By never raising for the parties' consideration, its intent in its final opinion, to disregard this longstanding rule, Plaintiff Hild was never given an opportunity to address the impropriety of adopting such a new rule, because the very issue itself emerged only after the case was finally decided on appeal with the issuance of the opinion.

Now, had that decision been "published," Hild would have had recourse because he would have been eligible under C.R.C. Rule 8.500(b) to have such a manifestly unfair newly-enunciated rule of law reviewed by the Supreme Court it would have created a conflict between the very decisional authority that heretofore prohibited such tactics by a Court of Appeal. But by deeming the decision "unpublished," and therefore noncitable, Hild was totally blind-sided. Because the Court of Appeal awaited its final ruling before changing this rule, Hild was deprived of notice of its intended departure from the standing rule of law, and never given a chance to address it. Then, by also deeming it "unpublished," Hild was denied eligibility of review by the Supreme Court under Rule 8.500(b), because the opinion can never later be cited. Rule 8.1115(a). As a result, that unpublished opinion thus cannot create

"conflicting" law necessary to render the opinion eligible for review under Rule 8.500(b)(a). The Court of Appeal's action further consequently deprived Hild of the opportunity to make a record for review to enable the U.S. Supreme Court, on a writ of certiorari, to appreciate and address the issue.

The district court missed the critical point here. It erroneously concluded that unpublished opinions

> "do not lead the courts to apply a new rule of law to only the case in which it is pronounced. To the extent that unpublished cases do so, it is because the court of appeal misapplied the publication criteria — *an argument to be raised on direct appeal*, and not in a challenge to the citation rule." (AA:183:14-24).

But as shown above, the insidious way this was accomplished only at the very conclusion of the appeal — after issuance of an opinion only at that juncture being deemed "unpublished" for the very first time (axiomatically depriving it of review eligibility under Rule 8.500(b) as a result of the noncitation Rule, 8.1115(a)) — *automatically means the argument can never be raised on any direct appeal.* The noncitation rule thus operates to ensure there is no direct appeal and can never be any direct appeal.

Accordingly, the net effect of the non-citation rule in Hild's case, therefore, was to create two classes of litigants subject to two different and conflicting rules of law — one for every litigant (including the right to jury trial), and one for Hild, which employed the noncitation rule of

C.R.C. Rule 8.1115(a), to be able to enunciate a special set of one-time applicable rules, including a special one-time rule stripping away Hild's right to a jury trial on factually-disputed issues (also ensuring preclusion of any review under Rule 8.500(b) or by the U.S. Supreme Court), thereby burying Hild's decision, and thereafter returning to the previously applicable rule of law for every other litigant. This is precisely what the rule of selective prospectivity under *Beam* expressly forbids.

None of this was either presented to or considered by the Court of Appeal in *Schmier,* which admittedly did not consider the causal effect of the non-citation rule of Rule 8.1115(a) in depriving litigants of due process rights under the fact pattern presented in the Hild action. It is well-settled law in this Circuit, as well as in California, that cases such as *Schmier* are not authority for propositions not considered. *See, N.L.R.B. v. Hotel and Restaurant Employees and Bartenders' Union Local 531,* 623 F.2d 61, 68 (9th Cir. 1980); *People v. Gilbert* 1 Cal.3d 475, 482, fn. 7 (1969), ["It is axiomatic that cases are not authority for propositions not considered."].).

In addition, the 2000 Court of Appeal in *Schmier* relied heavily upon the then-existing parallel rules of the Federal Appellate Judiciary, that previously similarly barred citation to unpublished decisional authority. *Id.*, 78 Cal.App.4th at 711.

Since then, however, this Court is well aware that F.R.A.P. Rule 32-1, specifically precluding the adoption by any Federal Circuit Court of any non-citation rule, has been adopted. The public policy reasons

for the adoption of F.R.A.P. Rule 32-1 find their roots of origin in the very reasons and caveats cited by Hild in this case, for why California's Rule 8.1115(a) is similarly infirm and similarly can no longer stand. While reliant upon *Schmier, supra*, Defendant has conspicuously omitted to address the adoption of F.R.A.P. Rule 32-1 and the ample, overwhelming public policy and due process reasons why this Court is now flatly be prohibited from doing that which the California Appellate courts are so eager to continue to defend.

As for *Schmier v. Ninth U.S. Circuit Court of Appeals* 279 F.2d 817 (9th Cir. 2002), it was decided solely on standing grounds, and this Court therein was never presented with any of the questions pertaining to C.R.C. Rule 8.1115(a) presented by Hild in his action hereinbelow. Once again such cases are not authority for propositions not therein considered. *N.L.R.B. v. Hotel and Restaurant Employees, supra,* 623 F.2d at 68.

V. DEFENDANT CITES NO FACTUAL BASIS IN THE RECORD UPON TO BASE ANY CLAIM THAT HILD IS SOMEHOW SEEKING REVIEW OF THE STATE COURT DECISION, RENDERING THE DISTRICT COURT'S DISMISSAL ON ROOKER FELDMAN IMPROPER

Despite devoting considerable pages of text and many hundreds of words to the argument, Defendant is unable to cite to any factual basis in the record that supports its contention that Hild is seeking to review the State Court's unpublished decision, upon which the district court's concluded the *Rooker-Feldman* doctrine barred Plaintiff's action herein. Defendants does not dispute that the sole fact cited by the

district court for this conclusion was Hild's counsel's suspicion that the California court of Appeals' decision may have been purposeful and politically, and/or ideologically motivated. Yet no basis in law supports a dismissal decision and/or invocation of the *Rooker-Feldman* doctrine on such basis an unpleaded suspicion, and Defendant cites to none.

Neither the district court nor the Defendant have explained or enunciated how any ruling by the district court that Rule 8.1115(a) is unconstitutional, the sole relief sought in this action, would in any way necessitate or constitute review of the underlying merits of the Hild action, any more than did the Plaintiffs' general challenge in *Feldman* to the constitutionality of an underlying D.C. Bar rule precluding waiver of attorney applicants from non-ABA law schools, necessitate substantive district court review of the merits of their waiver petitions.

VI. CONCLUSION

Defendant has failed to cite any factual or legal grounds supporting the district court's grant of dismissal of the underlying action pursuant to Rule 12(b)(6). Appellant respectfully submits that the District Court erred in granting dismissal of Appellant's First-Amended Complaint, and the February 26, 2008 Order of Dismissal and February 27, 2008 judgment dismissing Appellant's underlying action, pursuant to Rule 12(b)(6), must be REVERSED.

Dated: September 22, 2008

Respectfully Submitted,

BISNAR | CHASE

By: _____

BRIAN D. CHASE, Attorneys for Appellant.

CERTIFICATE OF COMPLIANCE (FRAP Rule 28(a)(11))

I hereby certify that the length of this brief does not exceed 2,670 words, based on a word processing macro employed. FRAP Rule 32(a)(7)(B)(I).

Respectfully Submitted,
BISNAR | CHASE

By: _____
BRIAN D. CHASE, Attorneys
for Appellant.

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA)
)
COUNTY OF ORANGE)

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action. My business address is 1301 Dove Street, Suite 120, Newport Beach, CA 92660. On September 22, 2008, I served the foregoing document described as APPELLANT'S REPLY BRIEF upon the interested parties in this action:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on September 22, 2008, at Newport Beach, California.

Nicole C. Michau

Nicole Michau