

United States District Court

Northern District of California

Before The Honorable William Alsup

Kenneth J. Schmier, )

Plaintiff, )

vs. )

No. C09-2740 WHA

Justices of the )

Supreme Court, )

Defendant. )

San Francisco, California

Friday, July 16, 2009

**Reporter's Transcript Of Proceedings**

**Appearances:**

For Plaintiff:

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**By: Tracey Lynne McCormick, Esquire**

**Reported By:**

**Sahar McVickar, RPR, CSR No. 12963  
Official Reporter, U.S. District Court  
For the Northern District of California**

(Computerized Transcription By Eclipse)

1 Thursday, July 16, 2009

8:00 a.m.

2 P R O C E E D I N G S

3 *THE COURT:* All right, let's go to the Schmier  
4 versus Justices of the Supreme Court of California.

5 *MR. AFTERGOOD:* Good morning, Your Honor.  
6 Aaron Aftergood for the plaintiff, Kenneth Schmier.

7 *MR. BLAKE:* Good morning, Your Honor.  
8 Tom Blake, deputy Attorney General for the  
9 defendants, also appearing for Orange County defendants.

10 *MS. MCCORMICK:* Good morning, Your Honor.  
11 Tracey McCormick appearing on behalf of Scott Drexel  
12 of the State Bar of California.

13 *THE COURT:* All right.  
14 Well, listen, Mr. Schmier has made this argument  
15 before and lost in State Court; isn't that true?

16 *MR. AFTERGOOD:* Your Honor, umm, certain arguments  
17 been made previously, but the court -- the state courts haven't  
18 necessarily considered exactly as this fact pattern has -- has  
19 arisen.

20 The first case, Schmier 1, was dismissed on standing  
21 grounds, and it wasn't the First Amendment issue. The fact  
22 that this rule is a prior -- a prior restraint was not  
23 addressed.

24 Subsequent -- in the two subsequent --

25 *THE COURT:* You're telling me that the State Court

1 ruled on standing grounds and did not reach the merits?

2 **MR. AFTERGOOD:** That's correct, Your Honor.

3 **THE COURT:** Is that true?

4 **MR. BLAKE:** No, Your Honor, what we call Schmier 1  
5 was squarely on the question of the enforceability of the  
6 publication rules. There was a federal case brought by  
7 Mr. Schmier, challenging the then applicable Ninth Circuit rule  
8 on publication that was largely decided on standing grounds,  
9 but the three State Court cases collectively reached the  
10 merits.

11 **MR. AFTERGOOD:** Your Honor, and that federal case,  
12 the Ninth Circuit did invite the plaintiff to -- to bring a new  
13 suit in which he did have standing. And we would argue that he  
14 is a plaintiff that does have standing in this matter, and that  
15 it's not barred by res judicata or collateral estoppel.

16 **THE COURT:** All right, well, I'm totally up to  
17 speed, I don't need much oral argument. I'll give each of you  
18 a couple of minutes to make your main points.

19 Okay, go ahead.

20 **MR. AFTERGOOD:** Clearly, Your Honor, this is a  
21 matter that has -- this matter is addressing a flaw in the  
22 California State Court system that has existed and has been  
23 discussed by many people for some time. Today, Your Honor, you  
24 have before you a plaintiff who has standing, who has a real  
25 injury in fact and real redress-ability. I would merely ask,

1 what is the harm to the defendants if this injunction were to  
2 issue?

3 **THE COURT:** Well, maybe, but maybe it would be a  
4 better rule to allow publication or citation of non-published  
5 decisions, possibly you're right on that point, but that's not  
6 -- that's not the test. The test is not whether or not I think  
7 it's a better or -- rule or not.

8 **MR. AFTERGOOD:** Well --

9 **THE COURT:** The test is whether or not the  
10 Constitution prohibits the state of California from adopting  
11 this rule.

12 **MR. AFTERGOOD:** Your Honor, I would argue that there  
13 absolutely is no test. In this situation, the power of the  
14 courts to withdraw precedent from the body of law is completely  
15 arbitrary; it's without limitation. To have a system where a  
16 court is able to go in, at any time in the future, and  
17 de-publish a case that could potentially -- that had been  
18 precedent is -- is simply absurd. Precedent is -- it's  
19 history, you can't go in and change history retroactively.

20 And that is essentially plaintiff's main argument.

21 **THE COURT:** All right, I understand your argument.  
22 Counsel?

23 **MR. BLAKE:** Yes, Your Honor.

24 First of all, it's -- it's not true that the Court  
25 can withdraw a publication at any time in the future. The rule

1 sets out periods of time during which parties can ask the  
2 California Supreme Court or the appellate courts to publish or  
3 de-publish the opinion.

4 And it's well settled that the appellate courts  
5 decide what is precedent in the state. And in this case, the  
6 California Supreme Court exercises a measure of control over  
7 the published citeable body of law in the state through this  
8 rule. And as Your Honor notes, it's one of several possible  
9 systems, but it's the one that the state has chosen.

10 And as to the question of who's harmed, this is a  
11 statewide rule that applies to all California practitioners in  
12 state courts. And to -- to enjoin its operation of a  
13 particular case would call the whole system of precedent in  
14 California courts at least temporarily into question.

15 **THE COURT:** Thank you.

16 Anything?

17 **MS. MCCORMICK:** Yes, Your Honor.

18 As to the State Bar of California, Mr. Schmier just  
19 does not have any standing. He has presented no actual or  
20 concrete case in controversy, with regard to the State Bar.

21 **THE COURT:** Well, wait a minute he's a lawyer,  
22 right?

23 **MS. MCCORMICK:** He is a lawyer.

24 **THE COURT:** All right. And he wants to cite a case,  
25 not a case, but a decision, there a difference between a case

1 and a decision, he wants to cite a decision that was not  
2 published.

3 **MS. MCCORMICK:** And he wants to have --

4 **THE COURT:** That's standing, isn't it?

5 **MS. MCCORMICK:** No, it's not. If you look at the  
6 Alaska case and you contrast it with the Canatella (phonetic)  
7 case that is cited in our briefs, you can see that this matter  
8 is clearly not ripe. There has been no contact with the State  
9 Bar. There's no threat of any --

10 **THE COURT:** Why don't you just say that the rule is  
11 a good rule and end of story? Why are you making up all these  
12 procedural gimmicks?

13 **MS. MCCORMICK:** Well, I don't think that it's any  
14 sort of a gimmick, Your Honor. It's a question of  
15 justiciability and --

16 **THE COURT:** Well, then, who is going to be able --  
17 how would we ever challenge this rule, then, if -- somebody's  
18 got to be able to challenge it or --

19 **MS. MCCORMICK:** Well, it seems as though he would  
20 have an opportunity to challenge it within the Court system.  
21 And he has taken advantage of that opportunity to a limited  
22 degree, on certain occasions.

23 **THE COURT:** And you would argue he has no standing  
24 there, either.

25 **MS. MCCORMICK:** Well, with regard to the State Bar.

1 In this proceeding, if he wants to challenge any action that  
2 the State Bar might desire to take against him, he has a whole  
3 panoply of rights and due process that are available to him.

4 Right now, there is just not enough out there to say  
5 what that conduct is that the State Bar would be prevented from  
6 disciplining. I mean, on its own, mere citation to the case  
7 that he wants to cite, there is just not enough facts presented  
8 to be able to allow the State Bar fairly to say that that is --

9 **THE COURT:** That's not quite true. He says this is  
10 exactly like some other decision or some other set of  
11 circumstances that he was personally involved in, and he  
12 managed to win that case, but it was unpublished. Now, comes  
13 along the exact same fact pattern, and he thinks the same  
14 result ought to apply here, but he cannot cite to it. Seems to  
15 me that he's got a enough of a grievance that he ought to be  
16 able to raise the issue.

17 But what troubles me the most is he's been raising  
18 this issue and flooding the courts with litigation over this.  
19 I don't even know why -- how did I get into this?

20 This is down in Orange County; you just have been  
21 forum shopping. You have been losing this left and right down  
22 in all these other courts, and now let's go up and try those  
23 judges in San Francisco, maybe they'll bite, and somehow won't  
24 learn that all this other litigation has preceded.

25 **MR. AFTERGOOD:** Your Honor --

1           **THE COURT:** Is that what you had in mind?

2           **MR. AFTERGOOD:** No, it's not. And it's not a  
3 Northern California/Southern California thing.

4           What it is --

5           **THE COURT:** Why did you come up here?

6           **MR. AFTERGOOD:** Well, we came because of a -- the --

7           **THE COURT:** You lost so many times down there,  
8 that's why you came up here.

9                           **(Laughter.)**

10           **MR. AFTERGOOD:** Your Honor, we came up here because  
11 the defendants are up here.

12           But the true distinction between this case -- your  
13 court and other previous courts to have heard this matter is  
14 the fact that we are in Federal Court now as opposed to State  
15 Court. And Mr. Schmier could not possibly get a fair hearing  
16 on these rules when the defendants he is seeking to enjoin are  
17 the ones making the decision in the case.

18           He -- in the previous matters, he had asked the --  
19 the California courts to recuse themselves, and there are --  
20 there are procedures to do that, but it seems -- it seems  
21 impossible for him to get a fair hearing.

22           **THE COURT:** How could that be? There is federal  
23 judges down there. They are not the ones deciding this traffic  
24 case. You could have brought this case in the Central District  
25 or -- I don't know.

1           Look, I'm going to ignore that part. It just  
2 doesn't look right. I'm going to rule on the merits.

3           Is it submitted?

4           **MR. BLAKE:** Submitted, Your Honor.

5           **MS. MCCORMICK:** Submitted.

6           **MR. AFTERGOOD:** Submitted.

7           **THE COURT:** All right, this rule is perfectly  
8 constitutional. I'm going to get out an order explaining why  
9 and denying your application for preliminary injunction.

10           I'm going to also consider whether or not  
11 Mr. Schmier has been abusing the process.

12           That was one of your requests, I believe. So I am  
13 not ruling on that now, but that's a serious issue.

14           **MR. AFTERGOOD:** Your Honor, if -- if you are going  
15 to be considering that, will we have an opportunity to be heard  
16 on that issue?

17           **THE COURT:** Did you raise this in a reply brief?

18           **MR. BLAKE:** We did, Your Honor.

19           **THE COURT:** All right, I'll give you until Monday at  
20 noon to file whatever you want to be heard on that issue.  
21 Monday at noon. And, I'll hold off on anything until then.

22           Okay.

23           **MR. BLAKE:** Thank you, Your Honor.

24           **MR. AFTERGOOD:** Thank you, Your Honor.

25           **MS. MCCORMICK:** Thank you, Your Honor.

(Proceedings adjourned at 8:16 a.m.)

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**CERTIFICATE OF REPORTER**

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/s/ Sahar McVickar

Sahar McVickar, RPR, CSR No. 12963

Friday, July 17, 2009