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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

KENNETH J. SCHMIER,

Plaintiff,

vs.

JUSTICES OF THE CALIFORNIA SUPREME COURT; MEMBERS OF THE JUDICIAL COUNCIL OF CALIFORNIA; SCOTT DREXEL, in his capacity as Chief Trial Counsel for the State Bar of California; COMMISSIONER KENNETH I. SCHWARTZ, in his capacity as Traffic Judge, Dept. C54, Superior Court of California, County of Orange; ANTHONY RACKAUCKAS, District Attorney for the County of Orange; and DOES 1 through 50, inclusive,

Defendants.

CASE NO. CV-09-02740-WHA

PLAINTIFF'S RESPONSE TO ORDER TO SHOW CAUSE ISSUED JULY 27, 2009

On July 27, 2009, this Court issued an order denying Plaintiff's application for a preliminary injunction, and ordering Plaintiff to show cause, by August 5, 2009 at noon, "why this case should not be dismissed and judgment entered for defendants, thus allowing for a prompt appeal." Plaintiff submits this response that his complaint should not be dismissed at this juncture.

The Court denied Plaintiff's application for a preliminary injunction because, in the Court's words, "plaintiff has failed to establish the likelihood of success on the merits of this claim." However, dismissal of this action at this juncture is inappropriate, as the Court reached its conclusion by applying a very different standard and burden of proof than would be applied should the Court hear argument on a motion to dismiss.

Two justifications are advanced by the Court in support of its finding: *res judicata*, and a general lack of merit to Plaintiff's claim. With regard to *res judicata*, although Plaintiff respectfully disagrees that his claim, as presented, has been litigated previously as to him, it is clear that the claim has not been litigated (and is therefore not barred) as to the thousands of other attorneys in California who are similarly affected on a daily basis by the California no-citation rule. Plaintiff will be joined in this suit by other plaintiffs with similar and/or identical claims, presenting no *res judicata* barrier. Dismissing this action now would likely ensure that a case would be brought by a different attorney with a similar claim, and might allow avoidance of decision of merits issues by appellate authorities.

Regarding the general merits of Plaintiff's claims, perhaps most frustrating to Plaintiff about the judicial response to his attack upon no-citation rules has been the refusal of the various judiciaries to subject no-citation rules to the same constitutional tests these judiciaries would apply to any other organization attempting to enforce a similar rule. And particularly frustrating, is the willingness of the tribunals to assume as incontrovertible fact its own perceptions of the necessities of operation of its own, or others, judicial forums, allowing the Judiciaries to avoid public justification of their no-citation rules.

Is there a reason why any American institution should be shielded from justifying a restriction so chilling of legitimate debate? Is there some need of these judiciaries to shield their methods of operation from the people it serves? Are there needs of the system that ordinary people cannot understand or deficiencies they cannot rectify? Are not the people entitled to know exactly how their judicial institutions operate so that the people can determine whether alterations are necessary to actually provide the level of quality and concerned judicial practice now being represented to them as occurring?

Plaintiff raises these questions because despite this Court suggesting "Plaintiff has now fully litigated this matter," Plaintiff has never had so much as a hint of the factual basis for no-citation rules

from the Defendants. Rather, as is the case here, Plaintiff has heard only the Court's own observations of the Defendants' circumstances, without any offers of evidence from Defendants, any opportunity to cross examine or disprove that evidence, any opportunity to discover relevant evidence of contrary facts or admissions, or any opportunity to present alternative methods less burdensome upon First Amendment rights.

Plaintiff objects that this Court intends to dismiss his case upon its unsupported surmisal of facts regarding the operation of the California Judiciary, and also its using every possible inference of those facts to bolster Defendants' case. The court is legally bound to do the exact opposite before sustaining a motion to dismiss or motion for summary judgment. That is, the Court is required to give Plaintiff the benefit of any inference of the facts that are pled, or could be pled by amendment, before dismissing the case.

The court cannot apply *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) to dismiss this case because the Supreme Court held "[w]hen a state regulation implicates First Amendment rights, the Court must balance those interests against the State's legitimate interest in regulating the activity in question." 501 U.S. at 1075, *accord, Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545, 121 S.Ct. 1043 (2001) [restriction precluding federally-funded legal representation from arguing the unconstitutionality of the funding program having the effect of truncating representation held a constitutionally unjustified restraint on attorney speech]. At the very least the Court must balance the need of counsel to cite appellate decisions as a complete defense as a matter of law versus some stated need of the state.

This court has said, "Given that at least some appellate outcomes may be eliminated as precedent, it follows that appellate judges must have discretion to select and deselect those that should or should not be binding." Even were Plaintiff to concede that at least some outcomes may be eliminated as precedent it would not follow that such elimination should occur outside of the determination of a case or controversy determining that which should be followed in its place, for that would encourage anarchy. Nor would it follow from that concession that speech of attributed appellate court opinions be entirely banned. Plaintiff does not suggest that precedent should ever be binding upon a judiciary. Stare Decisis makes no such requirement, nor should it. But to ban mention of relevant precedent is to foreclose the very debate

essential to the moral authority of the common law system. That goes too far.

Further, as cited by Defendant State Bar of California, "[a]lthough courtrooms have always been devoted to debate, they have never been devoted to free debate, but only to debate within the confines set by the trial judge and the rule of law. The First Amendment does not allow an attorney to speak beyond those confines." *Zal v. Steppe*, 968 F.2d 924 (9th Cir. 1992) (Trott, Circuit Judge, concurring). The compliment of this statement from *Zal* is that the First Amendment does allow attorneys to speak when the rule of law requires. The rule of law certainly requires that defendants be allowed to bring to their trial courts' attention law used to acquit others without threat of further sanction. Where judges have the authority to obscure their actions in one case from decision of another, the rule of law is replaced by the rule of men. No mechanism remains by which the rule of law can possibly control the caprice of judges. Therefore, Supreme Court Justice Alito was exactly right in his Report of Advisory Committee on Appellate Rules in stating that "[r]ules prohibiting or restricting the citation of unpublished opinions ... are inconsistent with basic principles underlying the rule of law" and, as such, exempt no-citation rules from *Gentile* and *Zal*, and most certainly should not be given undue inferences at this stage of the proceedings.

In this regard Plaintiff requests that the matter not be dismissed until after a Case Management Conference is held and a discovery plan approved or disapproved. Plaintiff intends to request discovery of the tapes and minutes of the meetings of the California Supreme Court Advisory Committee on Rules for Publication of Court of Appeal Opinions, chaired by Hon. Kathryn Mickle Werdegar, along with all studies, notes, surveys and other records obtained by that committee. If those no longer exist, Plaintiff intends to take the depositions of participants. This discovery is relevant because that committee was solely charged to determine rules by which decisions of California Appellate Courts would be allowed to be cited. This is so because in California that is the sole significance of "Publication."

This discovery was not and is not made available to the public by Defendants despite open government Proposition 59. Plaintiff has made prior efforts to obtain that information. Plaintiff requested to silently attend the meetings of that committee. His request was denied. Plaintiff has attempted to speak with members of the committee before and during the period of its meetings and was informed that

committee members were directed not to speak with him. Now, even though the committee's work is done, the committee members are still instructed not to discuss the work of the committee. Therefore there is no other way to find any real rationale for California's no-citation rule.

Plaintiff respectfully requests that it treat defendants as it would any other government institution. True enough, our courts are entitled to great respect, but they are not "Citizens Above Suspicion." They have enormous power over the people, and as such, they must be forced to respond to legitimate inquiry regarding their uses of power outside the determination of a case or controversy, particularly when they assert, as they have in this case, that such power can be exercised on a completely arbitrary basis.

This Court's quote of Judge Thelton Henderson is inappropriate. The quote read, "To the extent that unpublished cases [announce new rules of law, as is unquestionably the case here] 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." *Hild v. California Supreme Court*, 2008 WL 544469, at *3 (N.D. Cal. 2008), *appeal pending*, No. 08-15785.

The quote is inappropriate because the *Fischetti II* appellate court *did* decide to make the case decision citable as precedent. Further still, there is no process or notice to the public that would allow any ordinary non-litigant to request publication of a decision when required. The initial justification for no citation rules was to protect the public from institutional litigants having better access to unpublished opinions. Now that modern technology has given all equal access to those opinions, the public now needs protection from institutional litigants who have unfair advantage in using publication rules to control the set of operable precedent.

A further criticism of the Judge Henderson quote is that there is no right of direct appeal from the California Supreme Court's decision to depublish, nor, apparently, any standards to argue to gain reversal.

The size of the judicial system of California cannot justify waiving requirements of the rule of law. Would this Court waive exiting or other life safety requirements of our building codes because a building was large and had to accommodate massive numbers of people? No. The magnitude of the problem necessitates more diligence, not less.

The purpose of the rule of law is to force attention respectful of each individual that comes before

each court, assuring each such individual that he or she is judged according to principles that are applicable to all similarly situated. Expediency is not the highest value here. The purpose of precedent is not to make laws (the legislature does that), but to allow each litigant to argue to an impartial court that the same or other courts have logically determined his position to be right under the law. The purpose of allowing Courts to exercise individual judgment in choosing appropriate precedents, selecting those that are relevant, and from those following, distinguishing, or overruling them to arrive at the most logical inference of law with prospective application (by an opinion in writing with reasons stated) is three fold: (1) it creates a result respectful of the litigant because it demonstrates a result carefully thought out and applicable to all; (2) it continually allows all of our precedents to be questioned by equivalent authority – the only test of truth we humans know; and (3) because each precedent potentially affects everyone, it calls for the formation of constituencies to press for the correction of the law, protecting individuals and ultimately perfecting the law. All of this is disconnected by no-citation rules.

Plaintiff's friend, a mother of four and housewife, asked Plaintiff to repair her dishwasher. It ran perfectly, she said, but did not clean the dishes. When he looked into her dishwasher he said, "it appears to be missing something."

She replied, "you mean this?" and produced from the sink cabinet the central water distribution tower.

"Why did you remove it?"

"Because it prevents me from doing all of my family's dishes in one load."

Logical enough, we suppose, except that she failed to appreciate the function of the part was essential to the function of the device.

Similarly, the Court suggests that we abandon the very system that makes our judicial system as truth seeking as humanly as possible, its very claim to greatness, in order to accommodate the volume of work that needs to be done. The alternative is for the courts to take the time to do the job in the right way, with the assumption that if a backlog becomes oppressive to the people, they will implement the necessary changes. Justice Alito discussed his coming around to this position at the symposium entitled "*Have We Ceased to be a Common Law Country? A Conversation on Unpublished, Depublished,*

Withdrawn and Per Curiam Opinions," hosted by Washington and Lee University School of Law on March 18, 2005. No court would excuse a contractor for shoddy work because it could not handle the volume of work undertaken, particularly when it could, as could the government if required to do so, allocate the resources to do the job right.

To refuse to carefully examine this issue and to overlook the traditional constitutional tests is to act like the government agencies tipped to the Madoff problem. Evidence of something terribly wrong was brought to the attention of appropriate agencies, but the individuals approached refused to seriously consider that evidence. Why? Was he above suspicion?

This Court should allow more time to pass to avoid the knee jerk reaction supported only by a status quo only a few decades old and constantly subject to thoughtful criticism. In short time the court may come around, as did Justice Alito and all of the members of federal judicial committees considering Federal Rule of Appellate Procedure 32.1. It may come to see the risk that no-citation rules are akin to policies documented in Barbara Tuchman's book *March of Folly*, where civilizations destroy themselves adopting policies they *knew were wrong at the time* but justified by an unproven expediency.

Plaintiff respectfully requests that the Court not dismiss this matter at this early juncture.

DATED: August 5, 2009

THE AFTERGOOD LAW FIRM

By: _____
Aaron D. Aftergood,
Attorneys for Plaintiff.