

No. 19-35470

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DIANE GRUBER and MARK RUNNELS,

Plaintiffs-Appellants,

v.

OREGON STATE BAR, a public corporation, CHRISTINE
COSTANTINO, President of the Oregon State Bar, HELEN
HIERSCHBIEL, Chief Executive Officer of the Oregon State Bar,

Defendants-Appellees.

On Appeal from the United States District Court
For the District of Oregon
No. 3:18-cv-1591-JR
Honorable Michael H. Simon

APPELLEES' SUPPLEMENTAL EXCEPT OF RECORD

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SUPPLEMENTAL XCERPT OF RECORD

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

DIANE L. GRUBER and MARK)
RUNNELS,)

Plaintiffs,)

v.)

OREGON STATE BAR, a public)
corporation, CHRISTINE)
CONSTANTINO, President of the)
Oregon State Bar, HELEN)
HIERSCHBIEL, Executive Officer)
of the Oregon State Bar,)

Defendants.)

Case No. 3:18-cv-01591-JR

March 13, 2019

Portland, Oregon

ORAL ARGUMENT

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JOLIE A. RUSSO

UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

SER 2

1 public image campaigns as to whether lawyers can be relied on
2 by the general public to uphold the rule of law and for all
3 citizens to believe that they get a fair shake when they come
4 to the Court for resolution of their grievances, that is --
5 that is, under *Keller*, improving the quality of legal services
6 available to the people of the state.

7 MR. WILKER: Your Honor, I just wanted to make one
8 last point. It's actually a procedural point. I wanted to
9 bring it to the Court's attention. When plaintiffs in the
10 Gruber case filed their first amended complaint, we've -- and
11 added parties, we then refiled our motion to dismiss. They did
12 not refile any of their opposition papers. They did not refile
13 their summary judgment papers. As a technical matter, our
14 motion is effectively unopposed.

15 More to the point, their motion no longer -- their motion
16 for summary judgment no longer exists because it's been
17 superseded by a subsequent pleading. And the authority for
18 that, Your Honor, in the Ninth Circuit, include *Rhodes v.*
19 *Robinson*, 621 F.3d 1002, at 1005 -- it's a 2010 case -- as well
20 as *Ramirez v. City of San Bernardino*, 806 F.3d 1002 and at
21 1008, which is a 2015 Ninth Circuit case.

22 Because the new pleading superseded the prior pleading, as
23 a technical matter, the plaintiffs, if they wish to re-present
24 their positions, they needed to actually file -- refile their
25 motion and refile their opposition. They haven't done so. I

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1 just bring that to the Court's attention because it is a
2 technical defect in the pleadings as they stand now.

3 THE COURT: Thank you.

4 Sir?

5 MR. SPENCER: Obviously, this is the first time this
6 has been raised, so I haven't had an opportunity to research
7 our case, and I'm not in a position to argue that one way or
8 the other. If we have to refile, we will refile it. However,
9 I do want to make one final comment, and it goes to quote to
10 *Harris*. The quote properly speaks -- says this decision fits
11 comfortably within the framework applied in the present case.
12 And it's talking about *Keller*. It doesn't say it comfortably
13 fits within exacting scrutiny.

14 Again, we get back to what was the decision based on in
15 *Harris*? It never did an analysis under any scrutiny. It
16 relied on the first part of the test, and that's what our point
17 is. We're not trying to put words into the decision. Look at
18 the exact words in there rather than putting in parentheses
19 exacting scrutiny instead of something else. I think that's
20 very important in reviewing *Harris*.

21 Thank you.

22 THE COURT: Thank you very much. Again, I appreciate
23 everybody's briefing and thoughtful and helpful comments today
24 and argument today. These cases are designated related, and I
25 guess that is sufficient. The other option would be to

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1 consolidate the cases. I don't care, frankly.

2 Do plaintiffs have an opinion about that?

3 MR. HUEBERT: Related is good for us.

4 MR. SPENCER: For us, as well.

5 THE COURT: I'll maintain the related status, then.

6 Thank you. I appreciate your time.

7 DEPUTY COURTROOM CLERK: Court is adjourned.

8 (Hearing concluded.)

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SER 5

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C E R T I F I C A T E

Diane L. Gruber, et al. v. Oregon State Bar, et al.

3:18-cv-01591-JR

and

Daniel Z. Crowe, et al. v. Oregon State Bar, et al.

3:18-cv-02139-JR

ORAL ARGUMENT

March 13, 2019

I certify, by signing below, that the foregoing is a true and correct transcript of the record, taken by stenographic means, of the proceedings in the above-entitled cause. A transcript without an original signature, conformed signature, or digitally signed signature is not certified.

/s/Jill L. Jessup, CSR, RMR, RDR, CRR, CRC

Official Court Reporter
Oregon CSR No. 98-0346

Signature Date: 6/18/19
CSR Expiration Date: 9/30/20

CERTIFICATE OF SERVICE AND FILING

I hereby certify that on November 6, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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