ORIGINAL

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-738

TITLE ETHEL D. MIGRA, Petitioner v. WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, ET AL.

PLACE Washington, D. C.

DATE October 11, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

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ETHEL D. MIGRA, :

Petitioner, :

v. : No. 82-738

WARREN CITY SCHOOL DISTRICT BOARD :

OF EDUCATION, ET AL. :

- -x

Washington, D.C.

Tuesday, October 11, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 o'clock a.m.

APPEARANCES:

JOHN R. VINTILLA, Esq., Cleveland, Ohio; on behalf of the Petitioner.

JAMES L. MESSENGER, Esq., Youngstown, Ohio; on behalf of the Respondent.

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C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments first this morning in Migra against Warren City School District Board.

Mr. Vintilla, you may proceed whenever you are ready.

ORAL ARGUMENT OF JOHN R. VINTILLA, ESQ.,

ON BEHALF OF THE PETITIONER

MR. VINTILLA: Mr. Chief Justice, and may it please the Court, in this civil rights action brought under Sections 1983 and 85, the Sixth Circuit held that res judicata principles barred the petitioner from presenting her constitutional claims in the District Court because she failed to raise them in a prior state court proceeding.

The central issue before the Court is whether a litigation of statutory issues in a state court precludes a party from pursuing her federal civil rights claims which were not raised, litigated, or decided in the prior state court litigation.

This central question gives rise to two, we believe, two subsidiary questions. First, does the Chic rule of res judicata bar the petitioner from pursuing the instant action in the federal court, and secondly, should a federal court, consistent with the

Congressional policy underlying 1983, deny a civil rights plaintiff a federal forum because he or she litigated, and incidentally prevailed, on a narrow state issue in a state court against the same parties.

The factual history or posture of this case, we believe, is critical to a consideration and determination of the issues before the Court. The petitioner, Ethel Migra, was employed by the Warren City School District Board of Education as a supervisor of elementary education. She was employed on a yearly basis, what is designated in Ohio as a limited contract.

In Ohio, a state board of education is, I imagine, in most jurisdictions, is granted very broad discretion in the renewal or non-renewal of a teacher. Now, in the event that the respondent board determines that a teacher should not be renewed, the board is required under Ohio law to notify the teacher on or before April the 30th of the year in which the contract is to expire.

And then recently our Supreme Court of Ohio in Tracey versus O'Steigel Board, Six Ohio State Third 305, also held that in that notification, the board must set forth the basic reason for the non-renewal, although the teacher is not entitled to what they call cause and a hearing, cause and hearing mandate.

QUESTION: That would be a doctrine of state law that you are --

MR. VINTILLA: Yes, Your Honor, the Supreme Court. It was believed that since non-tenured -- non-tenured teachers are not entitled to reasons for non-renewal, since they are on a yearly basis, and each year, at the end of the school year, their contract terminations unless the school board on or before April 30th determines it should be renewed, and the teacher has until June the 4th, I believe, of that year to determine whether he or she will accept, and then they are entered into a written contract.

In our situation here, the respondent board held a meeting on April the 17th of 1979, and adopted a resolution unanimously to renew the contract of the petitioner for the ensuing year, and subsequent to that resolution or offer to continue her employment, the petitioner duly accepted and notified the board that she accepted the offer to serve for another year.

One week after the initial meeting of April 17th, the board called a special meeting on April the 24th, at which time it rescinded, reconsidered the renewal of the petitioner and rescinded its earlier resolution to renew her, with a majority of three, a three to one vote, and one member was absent because he

was not notified of the -- of the special purpose of the meeting, and he was at that time -- in fact, two members were sent to Florida as delegates of the board at a national education conference.

Now, as a result of the action of the board in terminating the petitioner, she filed suit in the Common Pleas Court of Trumbull County, Ohic, and in that suit she challenged the validity of the board's action in terminating her, and her complaint in essence set forth a breach of contract, and the second count, or second cause of action, a tort action in the nature of a conspiracy to violate her contract of employment.

The trial judge held trial. It was a bench trial. At the trial time he upon his own motion reserved and continued the tort action, the second cause of action, and held trial only on the narrow issue as to whether or not the board, respondent board acted in conformity with the state law as to its non-renewal or termination of the -- of the petitioner.

The court then rendered its judgment, found that the petitioner had a binding contract with the school board, that the school board breached the contract, and therefore granted damages to the petitioner in the amount of the salary she lost for the year and ordered her reinstated to her position, but

inasmuch as the decision was rendered on March the 20th, and her contract expired in June, she never entered into her position again for one reason or another.

QUESTION: Mr. Vintilla, I guess there is no question but that your client could have raised these claims in the state court proceeding, could have filed the 1983 and 1985 claims there?

MR. VINTILLA: Oh, no question about it, under concurrent jurisdiction, and Congress has granted to the states concurrent jurisdiction to entertain a civil rights, and the civil rights suitor, plaintiff obvicusly had a choice. If she felt comfortable with state court --

QUESTION: And you would agree that if under Ohio law your client would thereafter be precluded because she had not brought them, that that would be binding on the district court, the federal district court? Is that right?

MR. VINTILLA: Well, I take the position, we take the position that the Congressional intent in granting plaintiffs -- a civil rights plaintiff the choice to go to federal court or the state court, we believe that that grant by Congress is unconditional. I think as we understand the intent the Congress intended to allow the suitor to determine whether he feels

comfortable in the state court, for whatever reason, for local prejudice problems, and go to federal court.

QUESTION: Despite the clear requirement that federal courts give full faith and credit to state court judgments?

MR. VINTILLA: Well, I believe that if -- although in our case here, we will argue that Ohio res judicata would not preclude, but I would say that -- I would say that if there were a state law to that effect, which I would construe as making it mandatory, taking away this free choice of which court to go to, and making it mandatory, I would say that that law or that policy would clearly contravene this Congrsessional intent of allowing you, a civil rights plaintiff, to choose without explanation.

QUESTION: How do you reconcile that with our decision in Allen against McCurry?

MR. VINTILLA: Well, Allen versus McCurry dealt only with collateral estoppel. Now, I say if a -- as I understand Allen versus McCurry, I say if a civil rights plaintiff voluntarily presents his claims tc a state court or presents some issue that is material or relevant to the determination of a civil rights action, then he certainly has waived it or has foregone the right, or if he is confronted with collateral estoppel,

I agree, he should not relitigate an important material issue.

QUESTION: Well, Allen against McCurry and, I think, Herring against Proceze last year, too, involved -- the original state adjudication was a criminal one, wasn't it, where certainly the appearance of the defendant couldn't be called voluntary.

MR. VINTILLA: Well, it is not voluntary, except in Herring, I think, I think there was a strong motivation for Herring -- or to say in Herring, if you follow that, adopt that rule, there was a strong motivation to say in Herring, here, I am faced with a criminal conviction that is going to go on my record, and I have a constitutional defense. I have a constitutional defense. I am going to raise that defense rather than risk being convicted or -- and having a criminal record, or rather than risk this voluntarily pleading guilty, and I think -- but I think the principle is the same.

I think as Justice Marshall said, that they argued -- the petitioners in that case argued like our respondents are arguing here. They say if the civil rights plaintiff had an opportunity to litigate, to raise, to litigate and decide, then they should be barred and precluded from filing a subsequent civil

action, and Justice Marshall said, if we adopt such a rule, it would be anomalous.

And then Justice Marshall also goes into running afoul of this clear and established Congressional intent, of this grave concern of Congress that a civil rights suitor should have the selection. His very valuable civil rights should be, if he chooses, should be considered by a federal court.

QUESTION: Did Justice Marshall at any time say you could go to both courts?

MR. VINTILLA: Excuse me, Your Honor?

QUESTION: Did Justice Marshall say at any time that the statute gives you the right to go to both courts on the seame point?

MR. VINTILLA: No, Your Honor.

QUESTION: I didn't think so.

(General laughter.)

MR. VINTILLA: Your Honor dealt with the collateral estoppel statute of Virginia, but as a further argument, I would -- I would -- I would, as an answer, like to adopt the statement of Justice Harlan in Monroe versus Pape, where he said, "A deprivation of a constitutional right is significantly different from and more serious than a violation of state right, and therefore deserves a different remedy, even though the

same act may constitute a state tort and the deprivation of a constitutional right."

And in Ohio, incidentally, under the -- not incidentally, it is an important aspect of our case -- the tort, the second count or second cause of action in the complaint in the state action was a tort action in the nature of conspiracy. When the trial judge dismissed that cause of action and -- that is, reserved -- dismissed it, he dismissed it without prejudice, and the language of "without prejudice" in Ohio means that that is to be construed as an adjudication not on the merits.

QUESTION: Well, now, to the extent that you're -- I think you said at the beginning of your argument you were making two points: one, that the Chio law of res judicata would not bar relitigation of your client's claim --

MR. VINTILLA: Yes.

QUESTION: -- and two, that even if it did, the federal statute would prevent it from having that effect. Now, so far as the Chio law of res judicata is concerned, Judge Manos wrote an opinion -- he is an Ohio federal judge. The Court of Appeals for the Sixth Circuit affirmed it. Are you asking us to disagree with their conclusions as to what Ohio law was?

MR. VINTILLA: Of course. Of course. Judge Manos did not consider the legal aspects or legal consequences of a voluntary dismissal without prejudice, and in Ohio that is clear. That is not adjudication on the merits. And I think one of the first and most important elements of traditional res judicata is that you must have a determination on the merits by a court of competent jurisdiction, and if you don't have -- and of course, of course, the -- in Ohio there is no problem.

That's why we brought it in federal court under, under that situation, where a matter is volunarily dismissed, you can immediately turn around and refile it the next day. It is a -- Dismissal without prejudice is not considered a determination on the merits. It is not -- it is not adjudication at all.

So, in Ohio, there is no Ohio -- there is no present rule in Ohio that would bar -- in my understanding, which would bar the petitioner from filing a subsequent state court action or filing a civil rights action in any court of competent jurisdiction which has jurisdiction of the subject matter and jurisdiction over the person.

And this Court can very well, if it agrees with me, just stop there and say, since Ohio doesn't

consider it --

QUESTION: Well, did the district court -- did the district court decide that further litigation in the Ohio courts would have been barred?

MR. VINTILLA: Well, the district court took a very simplistic -- and the court of appeals --

QUESTION: Well, suppose instead of filing this 1983 suit in the federal court, the plaintiff had gone back to the state court and filed a 1983 suit, a separate 1983 suit. Did the district court decide that under Ohio law that suit would be barred by res judicata?

MR. VINTILLA: The district court didn't go that far. It didnt' entertain --

QUESTION: It didn't even address what Chic law would do, did it?

MR. VINTILLA: No. No, though we argued Chio law and argued Norwood versus McDonald, which expresses Ohic law, which is still the law of Chio.

QUESTION: And the court of appeals just affirmed by order?

MR. VINTILLA: One order -- one-page order. One paragraph.

QUESTION: Mr. Vintilla, how do you explain the comment in Justice -- or, rather, Judge Manos's

opinion at C-29 of the petition that the plaintiff could have brought her First Amendment claim in state court, and she is therefore barred from asserting it here, citing Coogan against Cincinnati, which was a Fourth -- rather, a Sixth Circuit case that came out of Ohio?

MR. VINTILLA: Well, as I read Judge Manos's opinion, Judge Manos -- and he cited another Sixth Circuit opinion -- he just was -- took the position that since state courts can entertain constitutional, full constitutional issues, that there is no reason why he should litigate them there, and since they can, you are barred. It is simple as that.

Now, the Coogan case, I mean, there are many areas, and sometimes you have to make a fine distinction where the courts confuse collateral estoppel with res judicata, and there are many areas, and in most cases, as I read them, what really happens is, the plaintiff in the subsequent action or the civil rights plaintiff, he is a disgruntled party. He lost in the first instance. He is seeking some way to get a second trial. And if you analyze it closely, what he is really trying to do, he wants to relitigate the issues that he lost on.

Now, I believe in that situation, if you adopt Allen versus McCurry, he runs into collateral estoppel, and so he lost on the state level, he says, now I am

going to frame the same issue on a constitutional basis and see if I can't get the state court to be more sympathetic, and that is Coogan, too, and I have no quarrel with that. I have no quarrel with that. But I think in a situation like ours, when you have -- where -- what in effect the lower courts have said, as I understand it, they are making it mandatory. They are taking away this choice. They say, since you sued these same people in the state court on state issues, wouldn't it be better if you brought your civil rights case and we wrapped this up all in one, prevent a multiplicity of suits, and that's their position.

QUESTION: Let's assume the district court had addressed state law expressly, and said that any subsequent litigation about a claim you could have raised but you didn't, any subsequent litigation in the state court would have been barred by state law. Suppose that -- or would not have been barred. Would not have been barred. Would that preclude the federal court from saying, well, the state courts might have heard this, but we don't have to? We must give as much full faith and credit to a judgment as the state courts would, but we can't give any less, but we can give more.

MR. VINTILLA: I wouldn't carry that that far. But we are talking about fundamental

constitutional rights, and extend the state authority to contravene federal constitutional rights, and I can say in this situation --

QUESTION: No, the federal court just says, we couldn't care less what the state courts would do, we are going to -- we are going to give full faith and -- we are going to apply res judicata independently to this case.

MR. VINTILLA: Well, unless -- I take the -- the statements this Court has made about Congressional intent to assign to a federal court a paramount rule in protecting, or that the federal court is a primary protector. I think that that is very important.

Now, in our case, Your Honor, in our case especially, I think a lawyer would be remiss if he took the subsequent action in the state court either under a state court action or under federal action in light of the circumstances in that community, the sharp, heated controversy in the community about whether or not this petitioner should be continued or not, and having in mind that you have a state court judge who has to go before perhaps some of these citizens who took the position against the petitioner. He must rely upon those citizens to get re-elected. This judge, I can tell you, that was very reluctant and very disturbed at

having to determine this action, and that is why he confined it to a very narrow statutory issue, because he was --

QUESTION: Will you point to the record for what you are now talking about?

MR. VINTILLA: Please?

QUESTION: Would you point to the record for what you are now talking about?

MR. VINTILLA: Well, I am construing his -- I am construing the state court's --

QUESTION: Is there anything in the record about the judge wouldn't be elected or something?

MR. VINTILLA: I construed that from the fact that he could have.

QUESTION: Well, where is that in the record?

MR. VINTILLA: From the fact that he separated and reserved and didn't indicate any reason why he didn't try both cases.

QUESTION: That is your conclusion.

MR. VINTILLA: That is my conclusion, and also --

QUESTION: Well, are you sure we are interested in your conclusions?

MR. VINTILLA: Not necessarily, Your Honor.

QUESTION: Or are we interested in the record?

MR. VINTILLA: It is not in the record except --

QUESTION: I, for one, am interested in the record.

MR. VINTILLA: Please?

QUESTION: I, for one, am interested in the record, what the record shows.

MR. VINTILLA: The record shows that the state court judge reserved and continued the second count, which reasonable minds would say he should have heard all at once. He should have adopted this theory, this principle, let's decide all things together, let's not have repetitive suits. There is nothing in the record. The judge did not indicate why he did not hear that -- try that second action. Moreover, the defendants did not object. The defendants could have said, Your Honor, as you are saying here, we do not want to be subjected to a second suit, to the expense and the aggravation, the vexation. We want everything, and if the judge had -- judge had overruled them, they could have appealed that. They could have appealed, and as we are saying today, they could have said in the state court.

Now, we -- my argument is that as I understand it when Congress enacted the civil rights, it wanted to remove a civil rights plaintiff from the local

prejudices and the provincial influences.

We were subjected to the same local political prejudices and influences, and therefore we thought, we are not going to get a full and fair hearing if we go here, and we understand the position of the judge. We understand that he is thinking about future election, and that's the realities of life, and if he can avoid antagonizing anybody, and we have no idea how widespread the opposition -- we know that the respondents were vehement in their opposition, but we do not know -- it may very well involve other prominent citizens.

We do know that the state court judge had some -- had some papers that respondent Swan had gathered, and we have a companion related case in the district court, and we felt perhaps those papers may reveal some information or some relevant evidence or may lead us to, give us information, and we have waited two and a half years to have a determination as to whether or not we can have discovery with those papers.

So, there are circumstances here, I think, that could reasonably construe from what is in the record that it would not be wise to go back to a court in that community, and fortunately, the wisdom of Congress said, you have a selection. If you feel, without having to justify, you feel you are not

comfortable there, you feel your rights may not be given consideration as a federal court would, you are free to go to federal court, and that is what we have done. That is what we have done.

And we place great weight on civil rights, on the dignity of the human being. I think there isn't anything more sacred in a person's life than his right to his good name, honor, and reputation, and to his right to make his livelihood in a vocation or profession of his own choosing.

This is what is involved here. These respondents were free and protected by the law. If they felt that the performance or the conduct of the petitioner did not conform to what they thought would be in the best interests of the school district or the best interests of the children and the students, they were free to come to a board meeting and say openly. Even if what they said was not accurate or true, they would have been protected, and I say, I don't think that Dr. Migra ought to be renewed because of this and that, and I don't think she's good for our system, and I don't like her philosophies, and I don't like her political beliefs, or I don't like how she selects books for the curriculum, or I don't like how aggressive she is in desegregation, and they could have said that openly,

because in their heart they were genuine.

They had a right to say that. That is why they were elected, to express what they felt, and they felt, to protect my constituents who put me on this board, I have an obligation to see that we do not continue, we do not continue Dr. Migra. They could have done that, not to call a meeting -- call a meeting when they sent two delegates to Florida, and not to reconsider when they had a contract, they had a binding contract. They had counsel, they had local counsel, the city solicitor. They could have said, counselor, can we call a special meeting? Can we validly reconsider what we did a week ago unanimously and rescind? Can we dc that? They didn't do that. Now, when they had --

CHIEF JUSTICE BURGER: Very well.

Mr. Messenger?

ORAL ARGUMENT OF JAMES L. MESSENGER, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. MESSENGER: Mr. Chief Justice, and Justices of the United States Supreme Court, the issue before this Court is whether or not a state court petitioner who claims that she has had her contract rights violated and files a law suit in state court to get her job back, and also alleges conspiracy among the board members to deprive her of her job, that once

having tried that lawsuit, can then embark upon a second lawsuit in federal court alleging essentially the same facts, the came causes of action, but tacking onto it a First Amendment or 1983 claim.

Both the United States District Court for the Northern District of Ohio and the Sixth Circuit Court of Appeals felt that she should not, and that the preclusive effect of res judicata barred the second lawsuit that was filed in federal court. The U.S. District Court in Ohio applied 1738, the full faith and credit clause, which essentially requires that federal courts give preclusive effect to state court judgments if in fact they would be a bar in federal court.

We believe that both lower federal courts were right, and that this Court should affirm the opinions below. Both the state court action, Your Honors, and the federal court action spawned from the same set cf facts.

The petitioner had her job abolished. The reason her job was abolished was that at this time in northern Ohio, in Youngstown and Warren, we saw the loss of 25,000 or 30,000 jobs in a two-year period of time. All of our schools had to cut back on personnel. At this time, we had one of the finest school systems in Ohio, but jobs like Dr. Migra had, which was a

supervisor of elementary education, had to go by the wayside, because they were a luxury.

Dr. Migra was well respected and well liked in the Warren community. An effort was found to keep her in the school system, but there was no place for her. Simply because of economic, financial reasons, her job had to be abolished.

QUESTION: Is this all in the record?

MR. MESSENGER: Yes, Your Honor. It is not only in the complaint, but also in the answer filed both by the board and by the individual defendants.

Dr. Migra sued in state court to get her job back, alleging a procedural difficulty at the board meeting in which her non-renewal took place. She was right, and she won.

QUESTION: She was reinstated and got back pay?

MR. MESSENGER: She was reinstated, and with back pay, and from that, Your Honor, we appealed to the appellate court and to the Supreme Court of Ohio, and the procedural difficulty that the board encountered was basically held to be too bad. You didn't do it right, the woman is entitled to her job back, and back pay, and in fact she was paid back pay.

QUESTION: Well, just for that year. Just for

that year.

MR. MESSENGER: Just for that one year. The following year, Your Honor, she was non-renewed pursuant to the procedures and the statute, and that was not contested in the state court posture. She won her case. Essentially, she alleged five causes of action, one of which was the board violated the sunshine law. They anticipatorily breached a contract and did other things that were procedurally wrong in the non-renewal of a public employee's contract.

At this time, she had the full opportunity to allege any other types of claims that she may have. She did allege conspiracy to deprive her of her contractual rights. She could have alleged at that time a 1983 action, a Title 7 action, a Title 9 action, or if she wanted, even an age discrimination action, because Dr. Migra was into her fifties at this time, and certainly an argument could be made that one of the reasons that her position of employment was removed was because of age.

QUESTION: Mr. Messenger, now, her conspiracy claim was ultimately dismissed without prejudice.

MR. MESSENGER: That's correct.

QUESTION: What was the effect of that? Did that incorporate any portion of her civil rights claim?

MR. MESSENGER: I don't believe so, Your Honor. I think that the claims that they alleged, that she alleged in the state court was conspiracy to violate contract rights. Being dismissed without prejudice could have, under Ohio's saving statute, been refiled within a one-year period of time, but she could not use the cause of action on conspiracy to deprive of contract rights to then open up the entire spectrum of any other cause of action that she had neglected to file in the first place.

Essentially what we are talking about are policy reasons as to why the lower court judgment should be affirmed. It is certainly within the judicial process to keep all of our claims and all of our cause of action in one place. This is not only, I believe, the feeling of the Ohio state courts, but also of the federal courts.

QUESTION: You mean those claims arising out of the same operative set of facts?

MR. MESSENGER: Yes, Your Honor, same transaction, the same causative effect, in this instance, the non-renewal of a contract of employment. From this springs the rights that the plaintiff claimed were violated. She may allege one or all of the rights that she claims were violated in the state court

action. We have concurrent jurisdiction of 1983 actions in state courts. She could have alleged anything that she wanted in that lawsuit. She didn't miss much, I might say, because there were five particular causes of action that were filed as to why she was entitled to get her job back.

QUESTION: Are you making an argument about what federal res judicata principles should consist of? Or are you saying -- or are you arguing about Ohio law?

MR. MESSENGER: I believe, Your Honor, that you have to look at Ohio law, the federal courts must look at Ohio law to determine whether if the case were in the state court --

QUESTION: What if the Ohio law wouldn't bar it at all? Do you think the United States District Court would have to entertain it?

MR. MESSENGER: I am sorry, Your Honor? I didn't follow the question.

QUESTION: Well, assume Ohio law, under Ohio law this plaintiff would not be barred from relitigating in -- and from filing a 1983 suit in the state court after this first judgment.

MR. MESSENGER: Yes.

QUESTION: Assume that it was not barred by Ohio law. Do you think the United States Supreme -- or

the United States District Court would have to entertain it?

MR. MESSENGER: I think they should follow the Ohio law and allow the suit in.

QUESTION: You mean, either way, whether it is barred or not.

MR. MESSENGER: I think they have to look at the state law. Yes, Your Honor. The state law on res judicata, whether or not that state court --

QUESTION: Well, where did -- tell me, where did the district court consider Ohio law and the effect of 1738? Did it even cite 1738? I'm not sure it did.

MR. MESSENGER: The -- On Page 23 of the petition, where the lower court begins the discussion on res judicata and why it acts as a bar. It continues on Pages 24 and 25, and there is a number of string cites there, Your Honor, that --

QUESTION: Yes.

MR. MESSENGER: And it basically comes to the conclusion that -- and cites Allen versus McCurry also of this court that 1983 actions are subject to the defense of res judicata, and that under the Coogan versus Cincinnati Bar Association, that if --

QUESTION: Yes, but where is it -- does it ever cite 1738? Or consider what the Ohio courts would

do with respect to res judicata?

MR. MESSENGER: I believe that's what the whole opinion is about.

QUESTION: Well, it never says so.

MR. MESSENGER: You mean specifically using --

QUESTION: I figure you can just as well interpret it as an independent res judicata policy announced by the federal court, and what's wrong with that?

MR. MESSENGER: They have federal --

QUESTION: 1738 doesn't on its face prevent the federal court from applying a stricter rule of res judicata than the state courts would.

MR. MESSENGER: Well, I would think, Your Honor, that the federal courts would --

QUESTION: And I would, I suppose, I would think you would take that position.

MR. MESSENGER: I would think, Your Honor, that the federal courts would look at the substantive law of the state courts in determining whether or not the res judicata applies.

QUESTION: Well, this one didn't. This one didn't. It sounds to me like you are confessing error. If a federal court must address Ohio law in 1738 and didn't, it must have made a mistake. I am suggesting

that regardless of what state law would do, the federal court can impose its own stricter rule of res judicata.

MR. MESSENGER: Of res judicata? Well --

QUESTION: Isn't that inherent in the authority of the federal court with respect to its own jurisdiction?

MR. MESSENGER: I think I would have to argue that that is so, that it is, but it seems that the cases appear to state that the federal court will look to what the state law does on a particular matter such as res judicata and then use that to fashion its remedy, but I would certainly think, like in the field of labor law, that the federal courts could fashion their own body of law and their own system of whether or not res judicata in fact would apply, but I believe this would only amplify our position, that if the state court would have --

QUESTION: But it couldn't give any less effect than the state law.

MR. MESSENGER: Right. Yes. Yes, Your Honor.

QUESTION: But is that what the Court did in Allen against McCurry?

MR. MESSENGER: My understanding of Allen and McCurry, Your Honor, was that this Court stated that res judicata principles apply in 1983 actions, that prior to

that time the argument was that only issue preclusion or collateral estoppel applied, but the claim preclusion or res judicata might not apply.

QUESTION: But did it apply a federal rule of res judicata or a Virginia rule?

MR. MESSENGER: I can't answer that, Your Honor. I don't know from memory whether -- whether it was, and I wouldn't want to guess at it, but at least the holding of it seemed to say in our research when we were preparing for this case was that the doctrine of res judicata does apply in 1983 actions, and in fact the petitioner has admitted that in its reply brief, that it applies. So what we are saying is, if in fact it is acknowledged that 1983 actions -- or res judicata applies to 1983 actions, then certainly it should apply in this case, because this was a 1983 action that was filed in the federal courts in Ohio.

If it does apply, then it bars the petitioner's claim in this particular lawsuit, and the lower courts were in fact dead right in dismissing the case. I think there is another policy --

QUESTION: Isn't that oversimplifying it? You say the doctrine of res judicata applies, but there are different doctrines of res judicata. There could be one that requires that the issue be raised in the other case

and one that does not. I mean, your example in your own case of a property damage claim and a personal injury claim arising out of the same accident, one could have different rules on that, and you have said the rule in Ohio is clear, and therefore the case is barred. You have not even argued, as I understand your brief, that there is a federal rule that is more strict than the Ohio rule.

MR. MESSENGER: No, we haven't. We have rested entirely on the Ohio --

QUESTION: You think the statute applies, and you win on Ohio law, but Justice White, it seems to me, is correct in saying the lower court didn't really decide the Ohio law question, though, or do you take issue with that?

MR. MESSENGER: I believe that the lower court, and again, Your Honor, I don't mean to postulate for the Court, but I believe that the district court looked at what the law of Ohio was, the substantive law of Ohio --

QUESTION: But they don't cite a single Ohio case.

MR. MESSENGER: I realize that. They cite the federal cases, and the Coogan versus Cincinnati case. And I do realize that our brief was structured along the

lines of the state law barring the present suit.

QUESTION: Well, if we had -- I would think that if state law is critical to this case, and the district court didn't decide it, nor did the court of appeals, that we would have to remand. We don't normally decide state law questions in the first instance. But it didn't sound to me like the district court, as long as it was going to hold res judicata applied, apparently didn't feel bound by state law. It was just a federal policy.

MR. MESSENGER: Well, that is certainly an argument, Your Honor, but to expand on that, and as Chief Justice Burger said, why couldn't the federal law -- federal courts have their own doctrine of res judicata that may be even more strict than the state?

QUESTION: I am suggesting that is what the district court thought, and did.

MR. MESSENGER: But certainly if it were barred under applying state law, they would even be more barred than under federal law, so that --

QUESTION: You would have to -- Under 1738, you would have to hold it barred then.

MR. MESSENGER: Right.

QUESTION: Your friend's central thesis of his argument, as I got it, was that he was appealing to

federal law, not state law, when he got into the federal courts. Therefore, federal law should take over with respect to all the issues, should it not?

MR. MESSENGER: I don't believe so, Your Honor, for a number of reasons. Number One, I believe that our local courts are perfectly able to determine questions that arise under --

QUESTION: Yes, but you have been in the local courts. You have finished in the local courts. Now he has brought an action in the federal courts, in which no state law question is raised, but only federal law.

MR. MESSENGER: I don't believe that's entirely so, Your Honor. Because of the allegations contained in the federal complaint, they basically rehash the same causes of action that were brought in the state court regarding the procedural deficiencies and the non-renewal, the viclation of the contract rights. The only thing different in the federal court is the First Amendment claim, the constitutional claim, and our case is simply, they could have alleged that in Trumbull County Common Pleas Court.

QUESTION: Of course they could.

MR. MESSENGER: And that judge there could have decided that case, that issue, but for some reason they neglected to do that, and then have filed another

claim in federal court alleging essentially the same thing, emanating from the same facts, the non-renewal of a contract, but this time alleging 1983 rights. That is why the doctrine, I believe, of res judicata, is even present in our legal system. It is to stop doing what the petitioner has done. If that doctrine is not applied to this case, what would prevent the petitioner from filing an ADEA claim in another district court, or a Title 9 or a Title 7 claim in yet another district court? We could hopscotch through the state and the federal forums, depending upon the whims of the counsel for the petitioner.

I think that the public policy arguments dictate that there be an end to litigation, or certainly a streamlining to litigation, that we are not saying to Dr. Migra that you don't have a number of causes of action or a number of claims to allege, but if you have them, put them all in one place. Be fair to both sides. Fairness applies not only to petitioners and plaintiffs, but also to respondents and defendants.

QUESTION: That is what the district judge said, isn't it?

MR. MESSENGER: I think essentially that's what he said, Your Honor. I think that you have to evoke the doctrine of fairness to defendants, too. We

didn't know that we had to prepare a defense for a 1983 claim or a constitutional right claim until approximately 14 and a half months after the first claim was brought. Now, this puts the defendant at a disadvantage. We now have to begin --

QUESTION: That is ordinarily a question of the statute of limitations. I mean, you are protected against that sort of thing not by doctrines of res judicata, but by statute of limitations.

MR. MESSENGER: That is true, Your Honor. That is true. But it would certainly streamline the judicial system, and also for the element of fairness to put, if you will, all your eggs in one basket, or all your claims in one court, but don't subject defendants to defending cases in various courts depending upon the theory of the case when the local courts have the jurisdiction to decide these very issues.

I think, Your Honor, that anything else I might add would just be repetitive. I believe that the issue is clear. We believe that the lower court was absolutely right in applying the doctrine of res judicata, both lower courts, that Dr. Migra could have, if she had wished, alleged her 1983 action in the state court, that she didn't do it, the doctrine of res bars the instant action, and that the lower court judgment

should be affirmed.

CHIEF JUSTICE BURGER: Very well. Do you have anything further, Mr. Vintilla?

ORAL ARGUMENT BY JOHN R. VINTILLA, ESQ.,

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. VINTILLA: May it please the Court, first, I think we must straighten the record out, and I -- with all due respect to counsel, there is nothing in the record as far as a determination by the trial court that the basis for which the board did not renew because they did away with the job or any other reason, that was a very easy way out for them. If that was their position, there was no need for them to engage in this wave of scandal --

QUESTION: That is not before us any more. You prevailed on that issue, didn't you?

MR. VINTILLA: Yes, Your Honor. Yes, Your Honor. I just --

QUESTION: This is a simple contract matter.

MR. VINTILLA: Yes, and we are not seeking to relitigate the contract. We are seeking to litigate rights which were not before the court, federal rights, the right to be notified of charges, and to a fair hearing, to defend, the inviolate right to a person's good name, honor, and reputation in the community, the

right to express one's --

QUESTION: They arise -- They all arise out of the same set of facts, do they not?

MR. VINTILLA: Yes, they were -- it is analogous. If the court had determined the tort action, we would have lost. We would have been in great difficulty, and I don't think it's necessary for this Court to remand to determine Ohio law, this Court and federal courts, unless there is a conflict, there is a reason to abstain. Ohio law is clear as to what voluntary dismissal means, and I think there is no need for that, and so I want to tell this Court it has been a privilege and an honor for me to appear before this Court.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:47 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

ETHEL D. MIGRA, Petitioner v. WARREN CITY SCHOOL DISTRICT BOARD OF EDUCATION, ET AL. # 82-738

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY Dione Hammond

(REPORTER)