SUPREME COURT OF THE UNITED STATES

In the Matter of:	)	
	)	
JOSE TORRES,	)	No. 86-1845
	)	
Petitioner,	)	
	)	
v.	)	
	)	
OAKLAND SCAVENGER COMPANY, ET AL.	)	
	)	
	)	

Pages: 1 through 32

Place: Washington, D.C.

Date: February 23, 1988

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IN THE SUPREME COURT OF THE UNITED STATES

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JOSE TORRES,

Petitioner,

v. No. 86-1845

OAKLAND SCAVENGER COMPANY, ET AL.

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Washington, D.C.

Tuesday, February 23, 1988

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:52 o'clock p.m.

APPEARANCES:

B.V. YTURBIDE, ESQ., San Francisco, California; on behalf of the petitioner.

STEPHEN MC KAE, ESQ., Oakland, California; on behalf of the respondent.

I N D E X

P R O C E E D I N G S

(1:52 P.M.)

CHIEF JUSTICE REHNQUIST: We will hear argument next in Number 86-1845, Jose Torres v. Oakland Scavenger Company, et al.

Very well, Mr. Yturbide, you may proceed whenever you are ready.

ORAL ARGUMENT OF B.V. YTURBIDE, ESQ.

ON BEHALF OF THE PETITIONER

MR. YTURBIDE: Mr. Chief Justice, and may it please the Court, I am frank to say to the Court at the outset that I am here today with mixed emotions, thrilled, of course, after some 35 years of practice to have at least the opportunity to appear at our judicial summit, but saddened, too, at least chagrined by the irony that this certainly for me the most memorable appearance in my career should be basically traceable to a lapse in my office marking one of the low points of my career, perhaps, the very nadir of it, or close to it.

The Court will recall that contrary to intention, through inadvertence, Jose Torres, one of 16 Hispanic and Black persons intervening as plaintiffs in a potential class action for employment discrimination,was not specifically named along with the rest, and a notice of appeal from a judgment of dismissal which erroneously threw the entire action out of court and which therefore in the ultimate was

sanction. It was not a theoretical thing of the future.

QUESTION: He didn't expose himself to any possible sanctions as a result of his appeal --

MR. YTURBIDE: No.

QUESTION: -- because he wasn't named as a party.

MR. YTURBIDE: But I think on balance that that would hardly have been a serious matter. The fact is that he wanted to appeal in any event, and would of course have been willing to expose himself to the sanctions. There is some theoretical -- discussion by my opponent to the effect that actually he didn't want to get into the appeal and it was my idea and I engineered it and dragged him in by the heels, and he would have been fearful of the costs and so forth he would have incurred.

Why, that is contrary to the only showing that was made on the motion for summary judgment. It was uncontroverted below, and certainly realistically he was already exposed to that, and perhaps the greater danger on balance would have been that the erroneous dissmisal by becoming final would expose him to that problem.

QUESTION: Mr. Yturbide, suppose the same thing had happened, the same clerical error in omitting the name of one of the plaintiffs at the complaint stage, and you could show the same thing as here, that this individual was really meant to be included, and it was purely a clerical

error that he was not included.

MR. YTURBIDE: I believe that the matter would be somewhat different. We have to face realistically that the complaint is what begins an entire aspect of litigation, but in point of fact, as has been belatedly noted in this matter by my opponent even in this proceeding for the first time, I think that the caption of the complaint did not in fact list Mr. Torres's name, even in the complaint in intervention, although the allegations in the body did list him among the others.

Once you have a complaint that starts the litigation then it seems to me that everything that happens after that is in a different category than the complaint itself.

QUESTION: But the Court of Appeals has separate jurisdictional requirements, Everything that the District Court has jurisdiction over the Court of Appeals does not necessarily have jurisdiction over. It is a jurisdictional act just as the filing of the complaint is a jurisdictional act, isn't it?

MR. YTURBIDE: Well, of course, that's the theory, and that is part of the reason, I suppose, that we are here all together today, is to see whether or not that is or is not a jurisdictional act in this kind of context where at least you have someone who has instituted the notice of appeal with reference to the subject matter that is of common

interest to all of those who were similarly situated, here identically situated below. That is different than the picture presented by the complaint. That is indeed the kind of picture that this Court's own Rule 10.4 seems to contemplate, and that is that once you have a notice of appeal by someone before this Court, then this Court's own rule, contrary to any jurisdictional concept with respect to unspecified persons is automatically all parties below are included as parties.

QUESTION: Yes, but you weren't petitioning for certiorari, Mr. Yturbide. You were appealing from the District Court to the Court of Appeals, which is governed by the Federal Rules of Appellate Procedure.

MR. YTURBIDE: Well, 10.4 is an appellate rule, Your Honor, as 19.6 is the certiorari one. Yes, of course, we were confronting Rule 3(c) of the Federal Rules of Appellate Procedure, but one of the points, of course, that jangles in what has happened below is that a jurisdictional rigid application of the appellant specification requirement in Rule 3(c) is in clash with the policy reflected in 10.4 and for that matter 19.6 of this Court's own rules.

I think that one of the services that this Court can render at this time is to not only comment upon that clash and attempt to resolve it but perhaps beyond this -- opinion I make bold to suggest that the time may have come to affirmatively revise the Federal Rules of Appellate

Procedure to come into conformity with the spirit reflected in 10.4 and 19.6. No such provision now exists in the what I will call FRAP for the sake of simplicity henceforth. There doesn't exist --

QUESTION: There is no provision, Mr. Yturbide, I take it in the Federal Rules of Appellate Procedure to permit a motion to amend the notice of appeal?

MR. YTURBIDE: I am sorry, Your Honor?

QUESTION: I take it there is no provision in the appellate rules for amending a notice of appeal.

MR. YTURBIDE: There is no speicifc one. I think what the courts that have been inclined to adopt what we regard as the unfortunate strict jurisdictional view certainly seem to contemplate even within the confines of that jurisdictional view that amendment can occur at least within the limited time restrictions provided for filing a notice in the first instance, which under Rule 4A presumably would be 30 days plus conceivably another 30 days plus another ten days, maximum 70 days, and that if there is no amendment within that time, then none would be possible.

QUESTION: Well, did you comply with that here, Mr. Yturbide?

MR. YTURBIDE: Certainly not. It was not possible. We didn't know that the thing was missing at all. We are frank to admit that, have always admitted it frankly. By

the time that attention was called to it in the appellees' brief, respondent had briefed there in a footnote where he recognized it was a matter of oversight, why, there would have been no opportunity to amend, and quite frankly, I saw no necessity for it. Nobody thought obviously, since he himself recognized it was a matter of oversight, there was anything of consequence in the matter. Indeed, there wasn't in view of the commonality of issues and generalized nature of them.

The only recognition of oversight certainly --

QUESTION: Why did you think they called attention to it in the footnote? And I mean I --

MR. YTURBIDE: In the footnote, why they called attention to it?

QUESTION: If they didn't intend to rely upon it for anything. I mean, that is what your presentation to this Court suggests, that you thought it was immaterial. They wouldn't have mentioned it if they thought it was immaterial, would they?

MR. YTURBIDE: Well, certainly they had some obligation if they had an intention to be open about the matter and come forthrightly out with the notion that in their view there was a violation of some rule that he was no longer a party interested in the appeal. You know, the remarkable thing is that though that is the mantle which our opponent would like to take up, even after the adverse decision on that

appeal, when the respondent came before this Court on certiorari, he noted the omission of Torres's name in effect by saying there hadn't been a notice of appeal filed on him and so forth. Interestingly enough, however, in his list of interested parties, he included Mr. Torres. That is how far he was at the earlier time in his inoccuous footnote in the appellee's brief in the Court of Appeals, how far he was from forthrightly claiming or even presaging a claim that this man ought not any longer to be regarded as a person with an ongoing interest in this field.

QUESTION: May I ask you a question about the proceeding? When was the class certified, and how big is the class?

MR. YTURBIDE: When was the class certified?

QUESTION: Yes.

MR. YTURBIDE: I believe within about -- my recollection is correct, about four or five months, in February of 1986, I think, something of that kind, which was some time four or five months after the entry of the present summary judgment against Mr. Torres.

QUESTION: So at the time the summary judgment against him was entered, the class had not yet been certified.

MR. YTURBIDE: That's correct.

QUESTION: How big is the class?

MR. YTURBIDE: The class is assumed to be, I don't think that that has been precisly established, but I think it is generally assumed to be as now redefined in the liability opinion that the trial court has come out with and which we have lodged now with the court -- it was decided a couple of months ago in favor of liability on a broad front and covering a 15-year period -- probably encompasses something in the hundreds, 300, 400.

QUESTION: I see. Are they all former employees of this particular -- of the respondent

MR. YTURBIDE: I am sorry?

QUESTION: Are the members of the class former employees? This is a Title VIII case.

MR. YTURBIDE: Yes.

QUESTION: Of the respondent. I see.

MR. YTURBIDE: All of them employees, all of the named intervenors, including Mr. Torres, certainly come within the class. All of the employees who have worked for the company since January 10, 1972, and who have belonged to the defendant union, as well as a group that we call the casual pool, at some point during that period are in the class even as narrowed somewhat in the liability opinion.

QUESTION: And has the District Court decided that if relief is given to the class there will be no relief given to Torres?

MR. YTURBIDE: No.

QUESTION: That is still a question that is open.

MR. YTURBIDE: Well, it was decided that he will not participate as a named intervenor.

QUESTION: He is not --

MR. YTURBIDE: He is out as a named intervenor, has reserved decision, which in itself is somewhat menacing, reserved decision as to whether he may participate as an absent class member.

QUESTION: But it is conceivable, is it not, that -- assume we agree with your opponent. Your client might still get his share of the recovery. It is still possible.

MR. YTURBIDE: Only in this sense, that it is conceivable that he may after running another gauntlet get to the point of equality with absent class members. I think -- I suggest that the Court is probably aware that in this field named plaintiffs sometimes are, because they are the sort of on the firing line people, are given some special considerations --

QUESTION: Yes, but they are on the firing line because they risk liability for costs, is one of the reasons, and I gather your client didn't risk that liability on the appeal.

MR. YTURBIDE: Well, I don't think there's any real --

QUESTION: I mean, normally I thought named plaintiffs

got the same thing as the members --

MR. YTURBIDE: I think there is some -- I don't know what is normal or what isn't. I know that it is certainly not uncommon, as was said, well, in one case which isn't in our briefs, but I happen to know, and I think I might even be able to cite it. I think it is called the League of Martin against City of Milwaukee, and it is Eastern District, I think, Wisconsin, 1984 case, and that is one, 588 Fed Sup. 1004, 1024. And that is a case that recognizes that it is not uncommon in consent decrees and settlement arrangements to give special recognition to the situation of a named plaintiff as opposed to the regular class member.

QUESTION: You are arguing that an unnamed plaintiff should get the special consideration of the named plaintiff, in effect, or an unnamed appellant, rather. It is rather anonymous.

MR. YTURBIDE: I am suggesting that there is an important difference between whether you remain in a case as a named plaintiff or whether even if you are so lucky as to convince the judge that you are entitled to that latter stage or remain in the case only in the same level of participation as an absent class member, there is such a --

QUESTION: There were no absent class members who were in the case at the time of this appeal because the class --

MR. YTURBIDE: Potentially there were, certainly their interests were represented.

QUESTION: To say potentially there were is to say there were not. There was simply no class at the time of this appeal. The class had not been certified.

MR. YTURBIDE: Oh, I think that there is authority for the proposition that even in the absence of certification there is representative effect to what potential representatives do. I think that is the case we have cited in our brief. The United States against McDonald recognizes that. The Romasanta case recognizes that. If indeed, if there couldn't be representative effect for appellate purposes, a denial of class action certification could not itself ever be appealed by anyone on behalf of the class. So obviously there are things, precertification things that would-be representatives do, including the maintenance of appeals, from denial of class action certification that are representative.

QUESTION: Well, does it prove that they are representative, or does it prove than when you are certified as a class you take the case in the status in which it exists, you come into it given all of its frailties and weaknesses, including whatever has been established by a prior appeal before you came in?

MR. YTURBIDE: I suppose that there are -- that that

is another of those areas where characterization can seemingly make a difference. I would suggest that in substance there is no difference in that possible difference in phraseology. The fact remains that there is a benefit of the appeal for the people who are not specified in the notice of appeal any more than Mr. Torres was.

These people would get the benefit of that appeal for certain, but Mr. Torres may not even get let alone equal treatment with the co-intervenors with whom he wished to participate.

I think that the point that we have to keep in mind in this area is, I think, the pre-eminent, paramount in importance to the wholesomeness of the judicial system is the power of all courts, the preservation, the vigilent preservation of the power of all courts, the inherent power to respond to the dictates of substantive justice in a particular case. Being inherent by definition that power is not derived from and ought not to be irrevocably absolutely court-made rules, making any procedural requirement jurisdictional in the sense of the say all, end all measure of whether the litigant is entitled to protection of an appeal or any other judicial relief that may be given is tantamount to a freakish departure from settled doctrine concerning inherent power, frequent application in a variety of situations, some of which we have mentioned in the briefs, and many of

which I am sure the Court is fully familiar with. There isn't any reason to tap the notice of appeal into some special pidgeonhole that immunizes it from the deep scrutiny of that inherent power to do justice. We basically rely on that concept, and it is implicit in the various cases which have in fact, as we have cited, relaxed or overridden noncompliance, excusing noncompliance with appellate rules, including this Court's decision in Foman against Davis, that is reported in 371 U.S. beginning at 178.

That concept of inherent power is also expressed sometimes in some of the cases which have aproached the matter in the constructive fashion that we suggest to the Court is critical. Such a case is the San Diego Commission against Governing Board, 790 Fed 2d. 1471, 1474. It is an utterance which I would commend as worthy for allegiance of this Court in this particular case.

It was said, "We have discretion where the interests of substantive justice require it to disregard irregularities in the form or procedure for filing of a notice of appeal." That is a commendable utterance, one that is in conformity with inherent power and to do justice and certainly that is something which we have occasion in this Court to give impetus to again and I think should be in the context which is in such -- in which seeming disarray and the split among the circuits as to whether there is jurisdictional effect to Rule 3(c) or

not.

I think when all is said and done what it comes down to is, boils down to is, what was said in the Foman case a quarter century ago, namely, that it is too late in the day and entirely contrary to the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. The Federal Rules reject the approach that pleading, even if we call, in conformity with the prior question, even if we call the notice of appeal something similar to a complaint, that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitiate a proper decision on the merits.

Years even before that Justice Black in ordering adoption of the revised decisions of this Court, rules of this Court reported in 346 U.S. at Page 945 put it simply and perhaps just as eloquently when he said "The function of procedural rules is -- should be to serve as useful guides to help, not hinder persons who have a legal right to bring their problems before the courts."

That certainly is Mr. Torres.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Yturbide.

We will hear now from you, Mr. McKae.

ORAL ARGUMENT OF STEPHEN MC KAE, ESQ.

ON BEHALF OF THE RESPONDENT

MR. MC KAE: Mr. Chief Justice, and may it please the Court, the one irreducible fact in this case is that Jose Torres did not file a notice of appeal from the 1981 dismissal of this action. It is not that a notice suggesting that all appellants or all original plaintiffs were appealing was filed. It was a notice that specifically named each of the 15 who made that timely notice, and excluded Jose Torres.

The omission of Mr. Torres's name was noted in Oakland Scavenger Company's brief on appeal. Contrary to what has been suggested about the indication that this may have been the result of clerical error, what the footnote in the brief stated was that Mr. Torres's name had been apparently omitted from the caption in the original complaint by error, but the footnote stated that Mr. Torres had not filed a notice of appeal, and it further stated that he had also not been certified by counsel under Ninth Circuit Rule 13 as a party having an interest in the outcome of the litigation.

So there were two indications in that footnote that Mr. Torres was not participating in that appeal, and despite that indication, counsel did not make mention of this fact in his reply brief to the Court. There was nothing stated on the papers and there was nothing stated at oral argument to suggest that Oakland Scavenger Company was incorrect in its understanding that Mr. Torres did not have an interest and was not participating in this appeal.

After the reversal in the Ninth Circuit a petition for writ of certiorari was filed in this Court, and again, Oakland Scavenger Company noted that failure to file a notice of appeal by Mr. Torres.

Mr. Torres's status was left somewhat indefinite by virtue of the fact that counsel had not responded to the footnote and the Court of Appeal had not made mention of the fact that only 15 of the original 16 plaintiffs had appealed when it issued its decision. We on remand notified the District Court in a status conference statement that a motion for summary judgment would be filed seeking to have the court's statement decision that Mr. Torres was no longer entitled to participate in the case, and that is the order from which counsel has taken an appeal, at least one of the two orders from which counsel has taken an appeal in this case.

A motion was filed in District Court. It concluded that it had no power to amend the notice of appeal, that because Mr. Torres had not appealed, he was no longer a participant in the action, and the District Court awarded summary judgment to Oakland Scavenger Company. Following that decision Mr. Torres filed an appeal with the Ninth Circuit which was timely. At the same time he filed a motion for recall of the mandate from the 1982 decision of the Ninth circuit.

That motion was denied almost a year prior to the -- or better than a year prior to the filing of a petition for writ of certiorari in the matter which is currently before the Court.

The Ninth Circuit upheld the District Court's decision, and Mr. Torres's petition for writ of certiorari from that decision was timely, but it appears that his petition from denial of the recall of mandate was not timely, and that matter should not currently be before the Court. That makes a difference because if the only matter which the Court is currently considering is the summary judgment issued by the District Court, then it would appear that the District Court's ruling was undeniably correct, the District Court did not have power to amend the notice, that Mr. Torres had not filed a notice of appeal, and under Rule 3 he was not a party to the 1982 appeal.

So the issues before the Court are whether the District Court correctly decided that it did not have authority to amend the notice, whether the petition for writ of certiorari from the denial of the motion for recall of mandate was timely, and then, and only if the Court finds that that petition was timely, whether the Court of Appeals clearly abused its discretion in denying the recall of mandate some four years after the earlier appeal.

Now, this Court has said that the requirement for

filing of a timely appeal is mandatory and jurisdictional. The rules, that is, Rule 4 of the Federal Rules of Appellate Procedure does allow for a filing of a motion within 60 days of the decision appealed from seeking to extend the time for filing of notice of appeal for excusable neglect, but Rule 26 states in response to Justice O'Connor's earlier question that the Court of Appeals does not have power to extend the time for filing beyond that time provided in Rule 4. So once that 60 days passes, there is no further opportunity under the rules to seek relief in the way of amendment of the notice of appeal.

QUESTION: Does Rule 2 possibly encompass some authority to suspend any of the rules for good cause shown?

MR. MC KAE: Rule 26 would seem to speak to that explicitly, Justice O'Connor, and it would seem that where there is a direct statement limiting the Court's authority in Rule 26, that a broader authority should not be presumed by general language found elsewhere in the rules.

QUESTION: Would your position be the same if the request to amend the notice had been filed earlier in this case?

MR. MC KAE: If the request to amend the notice had been filed within the 60-day time period, that is, between 30 and 60 days.

QUESTION: How about beyond the 60 days? Would

your response be just as it is now?

MR. MC KAE: Yes, it would.

Counsel had argued for a representative effect, suggesting that if any party, that is, any appealing party in a class action files a timely notice of appeal, that that notice ought to apply to any other. There is no authority for that position in the rules or in the decisional law. The rule, that is, Rule 3 expressly states that the notice of appeal shall specify the party or parties who are filing the appeal. Rule 3 also speaks in terms of multiparty litigation and suggests that if there is more than one appealing party they may file singly or they may file separately, but as named parties in class action litigation they have an obligation to go forward.

There is nothing to suggest that a named party has any different status in a class action than he has in any other multiparty litigation. And he must go forward on procedural matters and he must go forward in making out his case on liability. He cannot count on being included within the framework of class relief if he fails to make out his own case.

Some of the courts based on this Court's 1962 decision in Foman versus Davis have suggested that a somewhat relaxed or more relaxed approach ought to be followed in circumstances which suggest a particular inequity or injustice

or excusable neglect. Foman was concerned with an appeal which -- or two notices of appeal which were filed following a judgment, one filed within the time, the correct time following a judgment, but which was premature because there was a post-judgment motion to vacate the judgment pending, and so the time for filing in Foman was tolled by that motion.

There was also a subsequent notice filed following the decision on the post-judgment motion which itself was timely but which did not mention the earlier judgment, and this Court ruled that the two notices taken together could be taken as a single notice that there was a manifest intent on the part of the appellant to file an appeal, not simply of the denial of the post-judgment motion, but also of the judgment.

But in this case, there was no reaction at all to the note in the brief stating that Jose Torres had not filed a notice of appeal and that he was not listed as a party interested in the outcome of the action. There was no suggestion, as I have already stated, either in the papers or in oral argument that we were mistaken in our understanding of his intent.

So, it would not seem that the notion of manifest intent that is discussed in Foman, not with respect to the naming of the parties, but with respect to the form of the notice of appeal, and the designation of orders appealed

from would seem to have any application in this particular case.

There also does not appear to have been any excusable oversight which would justify an equitable kind of relief if the Court had authority to grant that. The standard in the Ninth Circuit has been clear, at least since 1960, as a result of the Cook and Sons case, that every party appealing must be named in the notice of appeal, and that parties who are omitted from the notice of appeal will not be considered to be participating.

In this particular case counsel has stated in his brief to this Court that the decision to take no action was deliberate, that in balancing the risks of bringing the matter to the Court's attention he made a determination that it would not be in his client's best interest do to so, and he states that he feared that there was a danger that the attempted change, that is, a change in the notice would be perceived or regarded as a self-confession of his failure to comply with the court rules.

The problem with an indefinite standard, contrary to the standard which has been and consistently has been applied in the Ninth Circuit is that it shifts the burden from the appellant to the appellee to make a determination as to who is participating on the appeal. It forces the appellee as occurred in this case at some point to make a motion with

the court either at the appellate level or at the District Court level to obtain a clarification of that individual's status, and in this partiuclar case that has exposed Oakland Scavenger Company to an additional round of appeals, not only the motion, but the fact that we have come on appeal on that item alone where the matter might possibly have been resolved originally on the first petition for certiorari to this Court following the Ninth Circuit's reversal of the District Court's dismissal of the action, so there has been considerable prejudice to Oakland Scavenger in this matter.

The proceedings with respect to what is a collateral issue have been extended over a period of now four years, and that would not have occurred if there were not some encouragement in the decisions of some of the other circuits for the motion that there may be some situations where the use of terms such as "et al" or some other designation to suggest an intent to appeal would be sufficient to meet the requirements of the rule.

Some of the circuits have suggested that there may be a concept of substantial compliance, that use of terms such as "et al" or "all of the plaintiffs" would be sufficient to comply with the requirement of Rule 3(c) despite that requirement stating that all parties shall be specified.

And it certainly is important for this Court to clarify the requirement of the rule and to specify whether --

QUESTION: Mr. McKae, I remember in law school from time to time I would see cases named one of the spouses and it would say "et ux." Do you suppose that would be an adequate notice of appeal, to name a husband et ux?

MR. MC KAE: I am afraid my Latin isn't -- strong enough to --

QUESTION: I think it means "and spouse."

MR. MC KAE: No, I don't think that would under the rule, but clearly "et al" does not even mean "and all others." It simply as I understand it means "and others" and doesn't indicate which among the others are intended to be included in the appeal.

In this case, however, that term was not used either in the body of the notice. It was used in the caption, as is commonly the case following the original complaint.

QUESTION: Isn't the whole purpose to assess costs as to who is going to be responsible for the costs?

MR. MC KAE: Well, the whole purpose is to determine who is before the Court.

QUESTION: That's what I mean.

MR. MC KAE: That would include assessing costs from the appellant's standpoint. That would include a decision as to whether he wished to bear costs not simply awarded by the court but costs which he would have to undertake with respect to his own counsel in pursuing that

appeal, and that, of course, is an obligation under the rules of ethics in California, and I am sure in most if not all other states for the party who is represented. But it is also an obligation so that the court can determine who is before it. In the Ninth Circuit it serves the purpose, at least with respect to the certificate under Rule 13 of advising the court with respect to the possibility of recusal or disqualification, and it certainly avoids the necessity of extended proceedings such as we have had in this case to resolve an issue which could have been resolved clearly by the naming of the party.

There has been a question raised with regard to the res judicata effect of this decision. That was a question which was expressly reserved by the District Court. The District Court declined to make a ruling as to whether Mr. Torres would be entitled to participate in relief if relief should at some time be granted, but I think it is clear that the District Court's decision with respect to that issue will have to be that he is barred, and that the prior decision, having been valid and on the meirts, is a final decision as to him, and that he will not be entitled to participate in class relief.

Of course, there are many people among the --

QUESTION: Well, do you think he stands as though the District Court was never reversed?

MR. MC KAE: I believe he does. Yes, that's correct.

QUESTION: You mean subject to sanctions?

MR. MC KAE: He could be subject to sanctions. Sanctions in these cases are --

QUESTION: Even though the trial court has been reversed?

MR. MC KAE: I think that that would be a consideration on the part of the court in determining whether to award sanctions. But it would not be a consideration with regard to whether he is subject to sanctions.

QUESTION: Liable for attorneys' fees, just as though there had never been an appeal?

MR. MC KAE: Well, I think that's the question as to whether he is liable for attorneys' fees with respect to his own counsel, but certainly Oakland Scavenger Company would have been entitled to make the motion. In his case I think it is unlikely that the motion would have been granted in view of the outcome with respect to the other parties.

QUESTION: That really isn't before us here, is it?

MR. MC KAE: That really isn't, no.

I think unless there are further questions, thank you

CHIEF JUSTICE REHNQUIST: Thank you, Mr. McKae.

Mr. Yturbide, you have five minutes remaining.

ORAL ARGUMENT OF B.V. YTURBIDE, ESQ.

ON BEHALF OF THE PETITIONER - REBUTTAL

MR. YTURBIDE: Yes, sir. I want to straighten out one thing about this notion that no notice of appeal was filed on behalf of Mr. Torres. That is the language which in a calmer day in retrospect our opponents have really emphasized, and of course that begs the question in part with reference to the representative effect of the notice that was filed.

Certain it is that the words "et al" alone in a caption, whether Mr. McKae likes it or not, have been held without more to substantially comply with the rule and constitute a notice of appeal on behalf of an unspecified party. We have cited the Ayres case in our brief. We have cited the Parrish case in our brief. They squarely hold that way. Now it is true that the Van Hoose case holds the other way. Well, that is just a conflict, and the fact that the Ninth Circuit has come out with one view which Mr. McKae would like to embrace does not resolve the conflict and necessarily point the way in which it ought to be resolved.

Now, we have heard again and we have heard throughout respondent's brief in this case something which I must comment on because it is of a factual nature and amounts to what in legislative halls I suppose would be called a point of personal privilege.

It is a red herring type of argument that has been

thrown into this picture recklessly and callously, inspired apparently by the notion so often discredited even on the football field that the best defense is a good offense. It is suggested that rather than wasting all our time here for a good period of our lives on these kind of proceedings, what Mr. Torres ought to have been doing is sue me in a California court for malpractice, deliberate misdeeds and folly, and not seeking to cure an amendment when the omission was -- by amendment when the omission was called to our attention and assertedly the position was clearly made that this man had no ongoing interest further in this case and ought not to be treated in the same boat as the other named plaintiffs.

Now, I defy anyone to read that footnote that is in question and come to the view that it represents a clear position to that effect, and as I suggested in my opening remarks, the fact is that even afterward in the petition for certiorari before this Court the opponents themselves listed Mr. Torres as a person interested in the outcome of the case.

Now, the fact is that you don't have to make an amendment to get the benefit of the kind of cases that favor our position in this matter against the jurisdictional view. You don't have to add a name anywhere. You merely have to hold that the matter was harmless, the omission was harmless, there has been no prejudice, and therefore you should treat

him as an ongoing plaintiff. Such was the fact in the Ayres case. There was no amendment to add his name anywhere. Nor in the Parrish case. Nor in the Williams against Frey case, for instance, all of which we have cited in our -- there is no question about an amendment, and we are continually charged with having failed or having attacked an order here of the Court, an interim order where they denied a motion to recall and to amend and so forth. We are not attacking that order except as a possible alternative, raise the possibility that this Court might think that that is a preferable procedure even if it reverse the Court of Appeals at this time.

We merely say that the Court of Appeals ought not to have affirmed the summary judgment, ought to have reversed the summary judgment, because --

QUESTION: Yes, but in order to do that they would have had to depart from the law of the Ninth Circuit because there was a precedent in your circuit, was there not?

MR. YTURBIDE: There was some law in the Ninth Circuit that touched that specific --

QUESTION: I think there was a --

MR. YTURBIDE: -- matter completely at odds, completely at odds, Your Honor, with --

QUESTION: Cases --

MR. YTURBIDE: -- other cases in the Ninth Circuit if I may say so, which do relax appellate rules without making

them jurisdictional, including, I might say --

QUESTION: I thought there was a case in 1950 in the Ninth Circuit that was right on the nose. Maybe I am wrong.

MR. YTURBIDE: Yes, I have no doubt that Cook against -- Cook and Sons is a case pointing in that direction as well, and others.

CHIEF JUSTICE REHNQUIST: Mr. Yturbide, your time has expired.

The case is submitted.

(Whereupon, at 2:45 o'clock p.m., the case in the above-entitled matter was submitted.)

REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1845

CASE TITLE: Torres v. Oakland Scavenger Co.

HEARING DATE: February 23, 1988

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the UNITED STATES SUPREME COURT.

Date: 2/27/88

Margaret Daly

Official Reporter

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