No. S178241

SUPREME COURT
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IN THE
SUPREME COURT OF CALIFORNIA

JESSICA PINEDA,
Plaintiff and Appellant,

v.

WILLIAMS-SONOMA STORES, INC., a California Corporation
Defendant and Respondent.

After a Decision by the Court of Appeal of the State of California
Fourth Appellate District, Division One
Case No. D054355

On Appeal from the Superior Court of the County of San Diego
The Honorable Ronald S. Prager
Case No. 37-2008-00086061-CU-BT-CTL

REPLY TO ANSWER TO PETITION FOR REVIEW

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JESSICA PINEDA, *Plaintiff and Appellant,* vs. WILLIAMS-SONOMA STORES, INC., *Defendant and Respondent.*	)))))))))

REPLY TO ANSWER TO PETITION FOR REVIEW

INTRODUCTION

Williams-Sonoma Stores, Inc. ("Williams-Sonoma") raises three procedural arguments in an attempt to convince this Court to deny Jessica Pineda's Petition for Review.

First, Williams-Sonoma argues that the Supreme Court sits to resolve only conflicts among appellate districts, not to resolve conflicts among divisions within a single appellate district. *See* Answer to Petition for Review, p.6. Williams-Sonoma is simply wrong. The Supreme Court certainly can, and does, resolve conflicts among divisions within a single appellate district.

Second, Williams-Sonoma argues that the loophole created by the Court of Appeal's decisions in Party City and Pineda, which allows retailers to circumvent the statute by collecting zip codes during credit card transactions and then using them to obtain home addresses, should be presented to the California Legislature, rather than the California Supreme

Court. *See* Answer to Petition for Review, p.14-15. Williams-Sonoma misses the point. The California Legislature broadly drafted the definition of personal identification information as set forth in California Civil Code Section 1747.08(b) to prevent retailers from circumventing the statute. It is the Court of Appeal who has created the loophole in Section 1747.08 by narrowing the definition drafted by the Legislature to exclude zip codes from the definition.

Third, Williams-Sonoma argues that Ms. Pineda's Petition for Review should be denied because she did not first file a Petition for Rehearing with the Court of Appeal. *See* Answer to Petition for Review, p.17. This argument is without any merit. Ms. Pineda's Petition for Review presents the Supreme Court with purely legal issues. There are no material factual issues in dispute. In fact, as Ms. Pineda set forth in her Petition for Review, she has confirmed that the Court of Appeal has accurately set forth the factual recitations alleged in the Complaint and assumed the truth of those facts. *See* Petition for Review, p.7. Because Ms. Pineda has not asserted that the Court of Appeal misstated facts, and because Ms. Pineda presented all of the legal issues set forth in the Petition for Review to the Court of Appeal, it was not necessary for Ms. Pineda to file a Petition for Rehearing with the Court of Appeal.

DISCUSSION

I. The Petition For Review Should Be Granted To Secure Uniformity In The Construction Of Consumer Protection Statutes

Williams-Sonoma cites the People v. Sam Davis, (1905) 147 Cal. 346, for the proposition that the Supreme Court is to resolve only conflicts among the districts, not to resolve conflicts among divisions within a single district. However, the Supreme Court clearly stated in the Davis case that

the Supreme Court has the power to:

> [T]o supervise and control the opinions of the several district courts of appeal, ***each of which is acting concurrently and independently of the others***, and by such supervision to endeavor ***to secure harmony and uniformity in the decisions***, their conformity to the settled rules and principles of law, a uniform rule of decision throughout the State, ***a correct and uniform construction of the Constitution, statutes***, and charters, and, in some instances, a final decision by the court of last resort of some doubtful or disputed questions of law. Davis, 147 Cal. at 348 (emphasis added).

Certainly, the separate divisions within an appellate district act concurrently and independently of the other divisions within any of the district courts of appeal.

The Supreme Court is in fact the proper court to present conflicts among divisions within a single appellate district. In fact, the Supreme Court resolved such an intradistrict conflict in People v. Cornell Cooper Brown, (2004) 33 Cal.4th 892. In the Brown case, the Supreme Court granted a petition for review to resolve a conflict of decisions between different divisions within the Second Appellate District. Specifically, the Supreme Court affirmed the decision of the Second Appellate District, Division Six (holding that expert testimony was admissible) and disapproved language to the contrary contained in the case People v. Gomez, (1999) 72 Cal.App.4th 405, issued by the Court of Appeal sitting in the Second Appellate District, Division Three. Id. at 908. At the time that the Court of Appeal in the Brown case issued its decision, there was a conflict of decision between two courts of appeal sitting in the Second Appellate District in two separate divisions. Brown, 33 Cal.4th at 895. In Brown, the Supreme Court recognized that "[t]wo Court of Appeal decisions have addressed the issue whether expert testimony about the behavior of domestic violence victims is admissible when only one instance

of abuse has occurred: People v. Gomez, (1999) 72 Cal.App.4th 405 (Gomez) held it inadmissible; People v. Williams, (2000) 78 Cal.App.4th 1118 (Williams) held it admissible." The Court of Appeal that decided Gomez sat in the Second Appellate District, Division Three; and the Court of Appeal that decided Williams sat in the Second Appellate District, Division Four.

Further, the Supreme Court has in fact resolved conflicts between Divisions One and Three of the Fourth Appellate District, which are the same divisions of the Fourth Appellate District that are in conflict regarding the statutory interpretation at issue in Pineda's Petition for Review . *See* Howard Jarvis Taxpayers Association v. City of La Habra, (2001) 25 Cal.4th 809. Specifically, in the Howard Jarvis case, the California Supreme Court reversed the Court of Appeal sitting in Division Three of the Fourth Appellate District after said Appellate Court expressly disagreed with the decision rendered by the Court of Appeal sitting in the Fourth Appellate District, Division One, in the case entitled McBrearty v. City of Brawley, (1997) 59 Cal.App.4th 1141, on the same legal issue relating to the accrual of causes of action. Id.

As is clearly established through the Supreme Court's granting petitions for review in both the Brown and Howard Jarvis cases, the Supreme Court certainly can, and does, resolve conflicts among divisions within a single appellate district.

Contrary to Williams-Sonoma's assertion, a conflict absolutely exists between Divisions One and Three of the Fourth Appellate District with regard to whether Section 1747.08 should be "strictly construed" or "liberally construed." "Personal identification information" is specifically defined in Section 1747.08 as "information concerning the cardholder, other than information set forth on the credit card, and including, but not limited to, the cardholder's address and telephone number." Cal. Civ. Code

§ 1747.08(b) (emphasis added). In narrowing this broad definition to exclude zip codes, the Court of Appeal clearly followed the Party City Court which found that "the definitions in the Act that give rise to exposure to this mandatory civil penalty should be strictly construed." Party City Corp. v. Superior Court, (2008) 169 Cal.App.4th 497, 511. In doing so, the Court of Appeal necessarily had to ignore California law ***directly on point*** finding that the Song-Beverly Credit Card Act is "remedial in nature and in the public interest [and] is to be ***liberally construed*** to the end of fostering its objectives." Young v. Bank of America, (1983) 141 Cal.App.3d 108, 114 (emphasis added). In construing ***the identical section of the Credit Card Act that is at issue in this case***, the Florez Court sitting in the Fourth Appellate District, Division Three, surmised that: "Section 1747.8 is part of the Song-Beverly Credit Card Act, designed to promote consumer protection. The [A]ct imposes fair business practices for the protection for the protection of the consumers. Such a law is remedial in nature and in the public interest [and] is to be ***liberally construed*** to the end of fostering its objectives." Florez v. Linens 'N Things, Inc., (2003) 108 Cal.App.4th 447, 450 (*citing* Young, 141 Cal.App.3d at 114) (emphasis added; internal quotes omitted).

The Supreme Court should grant Pineda's Petition for Review to resolve the conflict of whether Section 1747.08, specifically, and consumer protections statutes, generally, should be "strictly construed" or "liberally construed."

II. The Petition For Review Should Be Granted To Close The Loophole Created By The Fourth Appellate District, Division One, Which Allows Retailers To Circumvent California Civil Code Section 1747.08, Rendering It Meaningless

Williams-Sonoma argues that the loophole created by the Court of Appeal's decisions in Party City and Pineda which allows retailers to

circumvent the statute by collecting zip codes during credit card transactions and then using them to obtain home addresses, should be presented to the California Legislature, rather than the California Supreme Court. *See* Answer to Petition for Review, p.14-15. However, it is the Court of Appeal, not the Legislature, that created this loophole. The California Legislature broadly drafted the definition of personal identification information as set forth in California Civil Code § 1747.08(b) to prevent retailers from circumventing the statute. It is the Court of Appeal who has created the loophole in Section 1747.08 by narrowing the definition drafted by the Legislature to exclude zip codes from the definition.

Because zip codes undoubtedly constitute "information concerning the cardholder" that is not set forth on the credit card, they fall squarely within the definition of "personal identification information" supplied in section 1747.08 (b). Instead of this straight forward express definition, both the Trial Court and the Court of Appeal applied a much more restrictive definition of "personal identification information." Specifically, both the Trial Court and Court of Appeal inserted an additional criteria into the definition by requiring that the information be "unique" to the cardholder, rather than merely "concerning" the cardholder as set forth in the express definition. Exhibit 11, pp. 386-389; Opinion, p. 5.

The Court of Appeal has created a loophole in Section 1747.08 by narrowing the definition and creating a situation where retailers are prohibited from collecting customers' telephone number and address information directly, but allowed to covertly obtain this very information through the even more deceptive practice of collecting customers' zip codes under the guise of needing this information to process credit card transactions.

If a retailer is allowed to collect zip codes during credit card transactions to obtain the cardholder's home address, then Section 1747.08 would be made void and meaningless. It is a Maxim of Jurisprudence that "[a]n interpretation which gives effect is preferred to one which makes void." Cal. Civ. Code § 3541. "These canons [of judicial interpretation] generally preclude judicial construction that renders part of the statute 'meaningless or inoperative.'" Hassan v. Mercy Amercian River Hospital, (2003) 31 Cal.4th 709, 715-16 (*citing* Manufacturers Life Ins. Co. v. Superior Court, (1995) 10 Cal.4th 257, 274).

III. Pineda's Petition For Review Presents Pure Legal Issues and Pineda Has Not Alleged That The Court Of Appeal Misstated Facts

Williams-Sonoma contends that Ms. Pineda's Petition for Review should be denied because she did not file a Petition for Rehearing with the Court of Appeal. Williams-Sonoma argues that "if the party asserts that the Court of Appeal misstated facts, then it is *obligated* to first bring it to the Court of Appeal's attention before seeking review." *See* Answer to Petition for Review, p.17. Williams-Sonoma cites California Rules of Court 8.500(c)(2) to support its argument. California Rule of Court 8500(c)(2) states as follows:

> A party may petition for review without petitioning for rehearing in the Court of Appeal, but as a policy matter the Supreme Court normally will accept the Court of Appeal's opinion's statement of the issues and facts unless the party has called the Court of Appeal's attention to any alleged omission or misstatement of an issue or fact in a petition for rehearing. Cal. R. Ct. 8.500(c)(2).

Williams-Sonoma's argument is misplaced, in that Ms. Pineda has not asserted that the Court of Appeal misstated any facts. As Ms. Pineda set forth in her Petition for Review, she has confirmed that the Court of Appeal has accurately set forth the factual recitations alleged in the Complaint and

assumed the truth of those facts. *See* Petition for Review, p.7. The undisputed material facts in this case are that Williams-Sonoma deceptively requests its credit card customers' zip codes under the guise of needing them to process their credit card transactions; covertly captures customers' names from their credit cards; and utilizes all of this information to pinpoint and specifically identify the respective consumers' home addresses; which Williams-Sonoma stores in its databases and uses for its own profit.

Ms. Pineda's Petition for Review presents only pure legal issues, all of which were presented to the Court of Appeal. As such, there was no need for Ms. Pineda to file a petition for rehearing with the Court of Appeal, and in fact any such Petition for Rehearing would have been futile and resulted in unnecessary delay.

CONCLUSION

For the foregoing reasons, Plaintiff and Appellant Jessica Pineda respectfully requests this Court to Review the Court of Appeal's Opinion in this case.

DATED: December 23, 2009

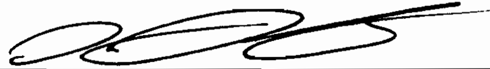
Respectfully submitted,
LINDSAY & STONEBARGER, APC

GENE J. STONEBARGER
Attorney for Plaintiff, Appellant and Petitioner, Jessica Pineda

CERTIFICATE OF COMPLIANCE

Counsel of record hereby certifies that pursuant to rule 8.504(d)(1) of the California Rules of Court, the enclosed REPLY TO ANSWER TO PETITION FOR REVIEW is produced using 13-point Times New Roman type, including footnotes, and contains approximately 2079 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count provided by Microsoft Word word-processing software.

DATED: December 23, 2009



GENE J. STONEBARGER
Attorney for Plaintiff, Appellant and Petitioner, Jessica Pineda

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and employed in the County of Sacramento, over the age of 18 years, and not a party to or interested party in the within action; that declarant's business address is 620 Coolidge Drive, Suite 225, Folsom, California 95630.

2. That on December 23, 2009, declarant served the REPLY TO ANSWER TO PETITION FOR REVIEW on the interested parties listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid:

Court of Appeal, Fourth District, Division One — 1 Copy
Symphony Towers
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I declare under penalty of perjury that the foregoing is true and correct. Executed on December 23, 2009, at Folsom, California.

Gene J. Stonebarger