

No. S143850

IN THE
Supreme Court of California

JODIE BULLOCK,
Plaintiff and Respondent,

v.

PHILIP MORRIS USA, INC.
Defendant and Petitioner.

After a Decision by the Court of Appeal,
Second Appellate District,
Division Three, Case Nos. B164398, B169083,
affirming the judgment of the Los Angeles
County Superior Court, No. BC 249171,
The Honorable Warren L. Ettinger, Presiding

ANSWER TO PETITION FOR REVIEW

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June 20, 2006

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Answer to Petition for Review

Jodie Bullock, respondent here, has filed her own petition for review (“Bullock Pet.”), which Bullock hereby incorporates by reference as raising additional issues for review in the event that only Philip Morris’s petition were granted. Bullock has requested that this Court grant review and transfer the case for further proceedings on Bullock’s cross-appeal, a result that can be achieved through a “grant and transfer” order which minimizes the expenditure of this Court’s resources. Bullock Pet. at 16-17.

If this Court grants Bullock’s request, thereby necessitating further consideration of the case by the Court of Appeal, the points raised in Philip Morris’s own petition for review will then be premature for this Court to consider. Rather than consider reviewing any of these issues at this juncture, this Court should defer evaluation of them until a later time, after the completion of the further proceedings in the Court of Appeal. After the case becomes final in the Court of Appeal, Philip Morris can reassert any or all of these issues in a later petition for review.

It is worth noting, however, that the analysis of Philip Morris on the first issue it presents reinforces Bullock’s argument for a “grant and transfer” order in this case. Philip Morris properly observes in its petition (“PM Pet.”) that its first issue, involving the proper interpretation of the “ratio” guidepost, relates to an issue it has presented in a case currently pending in the U.S. Supreme Court, Philip Morris USA Inc. v. Williams (May 30, 2006), No. 05-1256, 2006 WL 849676. Philip Morris suggests that in light of the pendency of Williams, this Court might grant review and hold the case until a decision is issued in Williams. PM Pet. at 1, 14.

Bullock respectfully suggests that this Court go one step further: because a transfer will be needed in any event for the reasons set forth in Bullock’s petition, and because it appears likely that whatever the result in

Williams, the Court of Appeal will need to engage in further consideration of the case in light of the Williams decision, rather than hold the case in this Court and later transfer it for consideration of Williams, this Court should at this juncture grant review and transfer the case to the Court of Appeal, where it can be held pending the Williams decision, after which the Court of Appeals can address the case in light of the Williams decision and also further address Bullock's cross-appeal as directed by this Court.

A transfer of the case now, to permit the Court of Appeal to give it further consideration immediately after Williams is decided, would appear to be the most efficient means of disposing of the petitions currently pending before the Court. However, if for some reason this Court prefers to hold Philip Morris's petition pending the Williams decision (as Philip Morris suggests), Bullock has no objection.

Although Bullock agrees that in light of the U.S. Supreme Court's recent grant of review in another punitive damages case involving Philip Morris, the first issue presented by Philip Morris is worthy of a grant of review and a transfer by this Court, the parties are not in agreement as to the second and third issues presented by Philip Morris. Although there would appear to be no need for this Court to resolve these points, or discuss them in any "grant and transfer" order, Bullock briefly registers her disagreement with the basic thrust of Philip Morris's analysis of its second and third issues.

Philip Morris asserts that the issue presented by this case concerning "the instructions that should be used to advise a jury that it may not impose punitive damages to punish the defendant for allegedly causing harm to persons who are not parties to the lawsuit" is "virtually identical" to the issue on which the U.S. Supreme Court recently granted certiorari in Williams. PM Pet. at 14-15. Philip Morris cites this "virtually identical"

issue as a further reason for this Court to hold this case pending the outcome in Williams. PM Pet. at 20.

Philip Morris's assertion that the jury instruction issue in this case is "virtually identical" to that in Williams is incorrect. Although the refusal of the specific jury instruction sought in Williams may raise a due process issue (presumably why the Court granted review of the jury instruction issue in that case), the refusal of the specific jury instruction sought by Philip Morris in this case raises no due process issue.

In this case, Philip Morris requested a legally flawed jury instruction regarding the relevance of evidence of harm to others in the jury's deliberation on an amount of punitive damages. Philip Morris requested that the jury be instructed, simply: "You are not to impose punishment for harms suffered by persons other than the plaintiff before you." Opinion at 50 (Appendix A to PM Pet.). This proposed instruction, the Court of Appeal concluded, was "incomplete and misleading and the court properly refused" it, because the proposed instruction failed to reflect the legal principle that "the defendant's similar wrongful conduct towards others is a proper consideration in evaluating the reprehensibility of the defendant's conduct toward the plaintiff and therefore is a proper consideration in determining the amount of punitive damages to award." Opinion at 50-51.

By contrast, the jury instruction which Philip Morris requested in Williams, but which the trial court in that case refused, did not contain the flaw noted by the Court of Appeal in this case. Indeed, Philip Morris's proposed instruction in that case affirmatively noted that evidence of the extent of harm to others could properly be considered by the jury as part of its overall analysis of the appropriate amount of punitive damages — avoiding the precise flaw which the Court of Appeal found in the instruction proposed in this case. Philip Morris's proposed instruction in Williams read in full:

The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable conduct. Although you may consider the extent of harm suffered by others in determining what a reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as those other juries see fit.

Williams v. Philip Morris Inc., 127 P.3d 1165, 1175 (Or. 2006).

As a comparison of the requested jury instructions in each case makes clear, Philip Morris's assertion that the issue regarding its proposed jury instruction in this case, and the issue regarding its proposed jury instruction in Williams, are "virtually identical," PM Pet. at 15, is incorrect.¹ Thus, as to this issue, Williams provides no basis for a grant of review, or even a hold of the case pending the outcome in Williams.

The third issue presented by Philip Morris concerns whether, in reviewing a punitive damages award, courts should consider the defendant's payment of punitive damages in other cases, even if the payments were made after the trial record closed. PM Pet. at 20-25. Although this issue may be an apt one for review by this Court in some future case, it is not an apt one for review in this case, because here the Court of Appeal made clear

¹ Another assertion on which Philip Morris's petition is premised is equally incorrect: that Bullock argued to the jury that it "should impose \$1 million in punitive damages to punish Philip Morris for each of the 28,000 people who supposedly were injured by smoking but never sued Philip Morris on their own (a theory that the jury endorsed by awarding \$28 billion in punitive damages)." PM Pet. at 18. This assertion is groundless. Bullock never argued to the jury that it should award \$28 billion, on this or any other theory. The record is quite clear that the primary figure Bullock's counsel suggested was \$6.7 billion (as PM's counsel noted in his argument), and the secondary figure was \$20 billion, and that the rationale for both figures was predicated largely upon Philip Morris's illicit profits from the fraud scheme it had used to victimize Bullock for decades. See, e.g., RT 4146-47, 4191; Bullock Pet. at 6-8.

that nothing in this case turns on the issue, stating: “our conclusion with respect to the constitutionality of the award in this case would not be altered” by consideration of Philip Morris’s two post-trial payments totaling \$59 million in punitive damages. Opinion at 3.

Philip Morris argues that despite this statement, the decision below on this point should not be left on the books, or else it “will be cited for the proposition that an appellate court reviewing a punitive damages award may not take into account the defendant’s post-trial payment of punitive damages.” PM Pet. at 25. If Philip Morris is correct in this prediction, and this issue does frequently recur, there will be ample opportunity for this Court to address the issue in the future — in a case where this issue is at least arguably important to the outcome, something that is absent in this particular case.

Conclusion

This Court should grant review and transfer the case to the Court of Appeal for further consideration of Bullock’s cross-appeal as suggested in Bullock’s petition for review, and of the decision in Williams as suggested in Philip Morris’s petition for review.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE
WITH CALIFORNIA RULE OF COURT 29.1(f)**

Pursuant to California Rule of Court 29.1(f), I certify that the attached answer is proportionally spaced, has a typeface of 13 points, was produced on a computer and, according to the WordPerfect 12 program used to produce it, has a word count of 1,588 words.

Dated: June 20, 2006

Kenneth Chesebro