
No. S178241

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

MAR 12 2010

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

OPENING BRIEF ON THE MERITS

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

OPENING BRIEF ON THE MERITS

I

INTRODUCTION

Williams-Sonoma Stores, Inc. (herein “Williams-Sonoma”) is deceptively obtaining its customers’ home addresses during credit card transactions. Williams-Sonoma collects its customers’ zip codes under the false pretense that the information is required to process credit card transactions. It then utilizes the customers’ names (captured from the credit cards) and zip codes to acquire the customers’ respective home addresses. This is accomplished with the help of one or more third-party credit reporting agencies with proprietary databases that “match” a credit card customer’s name and zip code with the customer’s home address. Simply

put, knowing a customer's zip code allows Williams-Sonoma to specifically identify the customer's address from the haystack of people with the same name. Through this process, Williams-Sonoma has obtained hundreds of thousands, if not millions, of its credit card customers' home addresses during the proposed class period.

The California Legislature long ago recognized the dangers associated with collecting and maintaining consumers' personal identification information, finding that the practice put the physical safety of consumers at risk and jeopardized consumers' financial security due to identity theft and credit card fraud. The Legislature was also concerned that consumers were mistakenly being led to believe that the requested information was necessary to complete their credit card transactions, when in fact, it was not. (See Appendix of Exhibits at Tab 3, pp. 85, 106, 107, 135.) In response, the Legislature enacted California Civil Code § 1747.8 *et seq.* in 1990 (herein "Section 1747.08").

To accomplish the remedial purposes of Section 1747.08, the Legislature intentionally defined "personal identification information" broadly to prohibit the requesting and recording of any information "concerning" the cardholder that was not set forth on the credit card. Cal. Civ. Code § 1747.08(b) (emphasis added). Section 1747.08's black letter definition of "personal identification information" includes a customer's zip code. The fact that Williams-Sonoma actually uses its credit card customers' zip codes to specifically identify them and obtain their home addresses further mandates that the express definition be interpreted to include zip codes in this case. Williams-Sonoma is engaging in the exact conduct the Legislature sought to prohibit.

II

ISSUE PRESENTED

Does a retailer violate the Song-Beverly Credit Card Act of 1971 (Civ. Code, §1747 et seq.), which prohibits a retailer from recording a customer's "personal identification information" when the customer uses a credit card in a transaction, by recording a customer's zip code for the purpose of later using it and the customer's name to obtain the customer's address through a reverse search database?

III

FACTUAL AND PROCEDURAL HISTORY

A. The Facts

Williams-Sonoma (1) deceptively requests its credit card customers' zip codes under the guise of needing them to process their credit card transactions, which customers are accustomed to providing at gas stations for legitimate verification purposes, (2) covertly captures customers' names from their credit cards, and (3) utilizes all of this information to pinpoint and specifically identify the customers' respective home addresses with the help of one or more third-party credit reporting agencies.

The Court of Appeal accurately stated the factual recitations alleged in the complaint and assumed the truth of the following facts pursuant to Palacin v. Allstate Ins. Co., (2004) 119 Cal.App.4th 855, 861:

Jessica Pineda visited a store in California owned by Williams-Sonoma and selected an item to purchase. Opinion, p. 2. She then went to the cashier to pay for the item with her credit card. Id. The cashier asked for her zip code, but did not tell her the consequences if she declined to provide the information. Id. Believing that she was required to provide her zip code to complete the transaction, Pineda provided the information. Id. The cashier recorded it into the electronic cash register and then completed

the transaction. Id. At the end of the transaction, Williams-Sonoma had Pineda's credit card number, name and zip code recorded in its databases. Id.

Williams-Sonoma then used customized computer software to perform reverse searches from databases that contain millions of names, e-mail addresses, residential telephone numbers and residential addresses, and are indexed in a manner that resembles a reverse telephone book. Id. Williams-Sonoma's software then matched Pineda's now-known name, zip code or other personal information with her previously unknown address, thereby giving the Store access to her name and address. Id. Williams-Sonoma then maintains all this information in a database. Id.

B. Procedural History

Pineda filed her Complaint against Williams-Sonoma on June 18, 2008. (Exhibit 1¹, pp. 1-14.)

On or about July 12, 2008, Williams-Sonoma filed a demurrer to the Complaint arguing (1) that zip codes can never constitute "personal identification information" as that term is defined in Section 1747.08, and (2) that Pineda did not, and could not, allege a protectable privacy right, or a reasonable expectation of privacy in her home address, or any other information acquired by Williams-Sonoma. (Exhibits 2-4, pp. 15-314.) Pineda filed her Opposition to Williams-Sonoma's Demurrer (Exhibits 5-6, pp. 315-361), Williams-Sonoma filed its Reply Brief (Exhibits 7-8, pp. 362-370), and the hearing on the Demurrer was held on October 2, 2008. On October 3, 2008, the Trial Court entered an Order sustaining the Demurrer. (Exhibit 11, pp. 386-389.)

¹ For the purposes of convenience, all references to "Exhibit" shall refer to the Appendices submitted by Pineda to the Court of Appeal, unless otherwise noted.

The Trial Court sustained Williams-Sonoma's demurrer to Pineda's Section 1747.08 claim on the grounds that zip codes can never constitute Personal Identification Information for purposes of that section. *Id.* The basis for the Trial Court's ruling is set forth in the transcript of the October 2, 2008 hearing, which has been designated under the California Rules of Court, Rule 8.130, as the Reporter's Transcript on Appeal. Judgment was entered by the Trial Court on October 29, 2008. (Exhibit 13, pp. 395-401.) The Notice of Entry of Judgment was served on Pineda by mail on October 31, 2008. (Exhibit 14, pp. 402-411.)

Pineda filed her Notice of Appeal from Judgment on December 22, 2008, along with her Notice of Election to Proceed Under California Rules of Court, Rule 8.124, and Notice Designating Reporter's Transcript Under California Rules of Court, Rule 8.130. (Exhibit 15, pp. 412-414.)

The Fourth District Court of Appeal filed its Opinion in this matter on October 8, 2009. On October 23, 2009, before this decision became final, the Court of Appeal filed an Order Certifying Opinion for Publication. Pursuant to California Rules of Court, Rule 8.264(b)(3), the decision of the Court of Appeal became final on November 22, 2009. Pineda filed her Petition for Review in the Supreme Court of California pursuant to California Rules of Court, Rule 8.500(e)(1) on November 25, 2009. The Supreme Court Granted Pineda's Petition for Review on February 10, 2010.

IV

ARGUMENT

A. The Express Definition Of Personal Identification Information Found In Section 1747.08 Includes Zip Codes

Section 1747.08's definition of "personal identification information" is clear and unambiguous. "Personal identification information" is

expressly defined 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 setting forth the two specific examples, however, the Legislature was careful not to limit the breadth of the statute. “Use of the language ‘including, but not limited to’ in the statutory definition is a phrase of enlargement rather than limitation.” People v. Gonzalez, (2004) 116 Cal.App.4th 1405, 1414. Like an address and telephone number, a cardholder’s zip code “concerns” the cardholder. Further zip codes are not written or otherwise set forth on credit cards. Because zip codes 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).²

Instead of this straight forward express definition set forth in Section 1747.08(b), the Trial Court and the Court of Appeal applied a much more restrictive definition of “personal identification information.” Specifically, the Trial Court and Court of Appeal inserted additional criteria into the definition and required 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.

² Civil Code section 1747.08(d) further provides that retailers may request “reasonable forms of positive identification, which may include a driver’s license or a California state identification card...*provided that none of the information contained thereon is written or recorded...*” Cal. Civ. Code § 1747.08(d) (emphasis added). Zip codes are set forth on all California Driver’s Licenses, as well as on all California state identification cards. As such, subpart (d) specifically prohibits retailers from recording zip codes, which further evidences that the Legislature intended zip codes to fit within the definition of “personal identification information.”

The Fourth District Court of Appeal further relied on its prior decision in Party City Corp. v. Superior Court, (2008) 169 Cal.App.4th 497, wherein it stated that zip codes were not “unique” and were not “similar” to addresses or telephone numbers, because zip codes are not specific to an individual. Opinion, p. 5. Importantly, none of these additional criteria are found anywhere in Section 1747.08. If the Legislature had wanted to use this standard, it would have expressly defined personal identification information to be “information that is unique to the cardholder, similar to an address or telephone number.”³ The additional criteria of being “unique” and the subjective criteria of being “similar to an address or telephone number” simply do not apply as they are not found in the express definition of “personal identification information,” which includes any information “concerning” the cardholder that is not set forth on the credit card. Cal. Civ. Code § 1747.08(b)

B. The Reality That Williams-Sonoma Is Actually Using Credit Card Customers’ Zip Codes To Identify Them And Obtain Their Respective Home Addresses Confirms That Zip Codes Constitute “Personal Identification Information” For The Purposes Of Section 1747.08

Williams-Sonoma argues tongue-in-cheek that zip codes are not “personal identification information” despite that its sole purpose for requesting and recording them is to specifically identify its credit card customers and obtain their respective home addresses. To the extent Section 1747.08’s broad definition of “personal identification information” is unclear, surely information that is actually being used to specifically

³ Of course, addresses and telephone numbers are often not unique to an individual and are typically shared, albeit by family or group living arrangements.

identify customers must fall within the intended definition. As the old saying goes “if it walks like a duck, quacks like a duck, and looks like a duck, it must be a duck.” Williams-Sonoma has obtained hundreds of thousands, if not millions, of its credit card customers’ home addresses by requesting and recording their zip codes during credit card transactions.

C. The Legislative History Behind Section 1747.08 Confirms The Legislature Specifically Intended To Prohibit Retailers From Engaging In The Very Conduct At Issue In This Case

The Background Summary for AB 2920, which became California Civil Code section 1747.8 and was subsequently renumbered to Section 1747.08, articulates the problem to be addressed by the statute regarding retailers’ collection of unnecessary personal information from consumers during credit card transactions. Under the heading “**The Problem,**” the Legislature found that:

Consumers are led to mistakenly believe that such additional information is a necessary condition to complete the credit card transaction, when, in fact, it is not. Retailers acquire this additional personal information for their own business purposes – for example, to build a mailing list which they can subsequently use for their own in-house marketing efforts, or sell to direct mail specialists or to others.

(Exhibit 3, pp. 85, 135.)

This is exactly what Williams-Sonoma does. Williams-Sonoma preys on its credit card customers who are accustomed to providing their zip codes for legitimate verification purposes at gas stations during “pay at pump” transactions and mistakenly assume that Williams-Sonoma is

requesting their zip codes to process their credit cards.⁴ But in reality, Williams-Sonoma's sole intent is to use its customers' zip codes to obtain their home addresses for its own business purposes, including to build a marketing database. It would defeat the express purpose of Section 1747.08 if retailers were prohibited from collecting customers' telephone numbers and addresses 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.

The Court of Appeal failed to consider what the Florez Court found to be the Legislature's "obvious purpose" for enacting Section 1747.08 – to "prevent retailers from 'requesting' personal identification information and then *matching* it with the consumer's credit card number." Florez v. Linens 'N Things, (2003) 108 Cal.App.4th 447, 453 (emphasis added).⁵ In Florez, the Court described retailers' efforts to obtain information about consumers as "[a]ssembling the various pieces of the puzzle" to create a record of the respective consumer's name, credit card number, telephone

⁴ Most gas stations require cardholders to provide their zip codes to verify the billing address tied to the credit card in an effort to prevent against credit card fraud during "pay at pump" transactions (this information is processed through the issuing bank and not actually shared with the gas stations). The conduct of gas stations in engaging in this practice does not violate Section 1748.08(a), as the conduct would fall under the exceptions set forth in Section 1747.08(c), which will be more fully explained through expert testimony in the Trial Court if this matter is allowed to proceed.

⁵ See Florez, 108 Cal.App.4th at 451 ("This bill would prohibit requesting or requiring' personal information '[s]ince the card issuer already has that information, there is no need for the retailer to request it (some retailers request it for mailing list purposes).'" (quoting Enrolled Bill Report of the California Department of Consumer Affairs, Assembly Bill No. 1477 (1991-1991 Reg. Sess.)).

number, and address. Florez, 108 Cal.App.4th at 449.

Section 1747.08 must be interpreted to further the statute's purpose and cannot be interpreted in a way that allows retailers to circumvent the statute. "An 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 American River Hospital, (2003) 31 Cal.4th 709, 715-16 (*citing* Manufacturers Life Ins. Co. v. Superior Court, (1995) 10 Cal.4th 257, 274). Section 1747.08 would be rendered void, meaningless and inoperative if retailers are able to obtain customers' home addresses by requesting their zip codes during credit card transactions.

D. Section 1747.08 Should Be "Liberally Construed" To Further Its Remedial Purpose

The Court of Appeal's strict construction of Section 1747.08 is contrary to (1) California case law finding that the Song-Beverly Credit Card Act in general, as well as the specific section at issue here, must be liberally construed, (2) controlling California precedent that remedial statutes are to be liberally construed, and (3) the California Supreme Court's holding in People ex rel. Lungren v. Superior Court, (1996) 14 Cal.4th 294, 305, that the rule of strict construction of penal statutes applies to criminal not civil statutes.

First, the Court of Appeal followed Party City in finding that "the definitions in the Act that give rise to exposure to this mandatory civil penalty should be strictly construed." Party City Corp., 169 Cal.App.4th at 511. The Court of Appeal ignored California authority *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 further 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 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, 108 Cal.App.4th at 450 (citing Young, 141 Cal.App.3d at 114) (emphasis added) (internal quotations omitted). The Court of Appeal should have followed the same liberal construction principles and concluded that a zip code does constitute “personal identification information” or “information concerning the cardholder” as defined in the statute; especially considering that Williams-Sonoma is actually utilizing its customers’ zip codes to obtain their respective home addresses.

Second, in strictly construing this remedial statute, the Court of Appeal also ignored controlling California precedent that remedial statutes are to be liberally construed. *See, e.g., People ex rel. Dep’t. of Transp. v. Muller*, (1984) 36 Cal.3d 263, 269 (“The rule of law in the construction of remedial statutes requires great liberality, and wherever the meaning is doubtful, it must be so construed as to extend the remedy.”) (quoting Continental Cas. Co. v. Phoenix Constr. Co., (1956) 46 Cal.2d 423, 434-35). The “remedy” the Legislature was seeking when it enacted Section 1747.08 was to stop retailers from collecting unnecessary customer information during credit card transactions, including, but not limited to, home addresses and telephone numbers. By allowing Williams-Sonoma to collect zip codes, which it quickly converts into home addresses, the Court

of Appeal is not “extending the intended remedy.” It is destroying the intended remedy. “Moreover, the contrary rule requiring strict construction of statutes which impose new liability does not apply where strict construction would thwart ‘the palpable intent of the Legislature to impose a new liability consonant with new conditions.’” Dep’t. of Transp., 36 Cal.3d at 269 (*quoting Peterson v. Grieger, Inc.*, (1961) 57 Cal.2d 43, 50-51 and Continental Cas. Co., 46 Cal.2d at 434).

Finally, the Court of Appeal ignored the Supreme Court’s instruction as to the preferred construction of civil penalty statutes. In Lungren, the Supreme Court was tasked with interpreting the Safe Drinking Water and Toxic Enforcement Act which imposed a *mandatory* civil penalty “not to exceed” \$2,500 per day for violations of the Water Act. *See* Cal. Health & Safety Code §25249.7(b)(1). Defendants argued that the Act was “penal” and should be strictly construed. The Supreme Court found that argument “unconvincing” for two reasons. First, the Act was not “reasonably susceptible” to defendants’ interpretation “in light of the language and purpose of the Act.” The Court noted that the “rule of strict construction of penal statutes is not an inexorable command to override common sense and evident statutory purpose.” Lungren, 14 Cal.4th at 312 (citations omitted) (internal quotations omitted). Second, the Court noted that “the rule of strict construction of penal statutes has generally been applied in this state to criminal statutes, *rather than statutes which prescribe only civil monetary penalties*” because criminal penalties are “particularly serious and opprobrious” and “merit heightened due process.” *Id.* at 312-13 (emphasis added). Here, by contrast, the civil penalties are capped at \$1,000 per violation, but could be as little as a penny or the “proverbial peppercorn.” *See The TJX Companies, Inc. v. Superior Court*, (2008) 163 Cal.App.4th 80, 86-87. In Lungren, the Supreme Court found no authority

that would “alter the general rule that civil statutes for the protection of the public are, generally, broadly construed in favor of that protective purpose.” Lungren, 14 Cal.4th at 313.

A person’s particular zip code constitutes information “concerning” that person under either a liberal or strict interpretation of the express definition of “personal identification information.” There is no authority or reason to strictly construe the definition in a way that destroys the legislative intent behind Section 1747.08. Rather, the statute should be liberally construed to foster and further its intended remedies.

V

CONCLUSION

The important protections provided by Section 1747.08 are at a cross road. A rule allowing retailers to collect zip codes, which are easily used to obtain home addresses, would destroy the protections provided by the Legislature through Section 1747.08. Retailers will be free to build their marketing databases with unsuspecting consumers who provide their zip codes under false pretenses believing they are necessary as a security measure to complete their credit card transactions. Indeed, Williams-Sonoma has obtained hundreds of thousands, if not millions, of its customers’ home addresses by collecting their zip codes during credit card transactions. This practice exposes California consumers to the risks of identity theft, credit card fraud and harassment; as the information in these databases remains available and vulnerable to employees that want to harass customers or steal their information, and to computer hackers that may steal the entire database.

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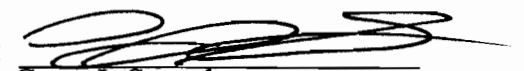
For the foregoing reasons, Plaintiff and Appellant, Jessica Pineda, respectfully requests that the Appellate Court Opinion be reversed, the Trial Court's Judgment be vacated and that this case be remanded to the Trial Court for further proceedings, and for all further appropriate relief.

DATED: March 11, 2010

Respectfully submitted,

STONEBARGER LAW, APC

By:



Gene J. Stonebarger

Attorneys for Plaintiff and Appellant

CERTIFICATE OF WORD COUNT

I, Gene J. Stonebarger, hereby certify as follows:

1. I am one of the attorneys for Jessica Pineda, Appellant herein.
2. The word count of this document is 3,670 words, according to the word count function of the computer program used to prepare it.
3. I certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief and would competently testify to such if called as a witness.

Executed this 11th day of March, 2010, at Folsom, California.



GENE J. STONEBARGER

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 75 Iron Point Circle, Suite 145, Folsom, California 95630.

2. That on March 11, 2010, declarant served the **OPENING BRIEF ON THE MERITS** on the interested parties listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid:

Via Federal Express
Original and 13 copies:
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Court of Appeal, Fourth District, Division One
Symphony Towers
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San Diego, CA 92101

Honorable Ronald S. Prager
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I declare under penalty of perjury that the foregoing is true and correct. Executed on March 11, 2010, at Folsom, California.


Yvonne Sabolboro

