The Burger Court Opinion Writing Database

Richardson-Merrell Inc. v. Koller

472 U.S. 424 (1985)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1985

Re: No. 84-127 - Richardson-Merrell v. Koller

Dear Bill:

Would you be interested in doing a dissent on this case?

Regards,

WEB

Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 10, 1985

Re: No. 84-127 - Richardson-Merrell v. Koller

Dear Bill and John:

I, too, find myself less concerned about the result Sandra reached and I could very likely leave it up to Congress. Unless Bill Brennan makes out a strong case in dissent, I can "go along" with a reversal.

Regards,

Justice Brennan
Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 11, 1985

Re: No. 84-127 - Richardson-Merrell v. Koller

Dear Sandra:

I join.

Regards,

Justice O'Connor

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: JUN 11 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-127

RICHARDSON-MERRELL, INC., PETITIONER *v.*
ANNE ELISABETH KOLLER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June ——, 1985]

JUSTICE BRENNAN, concurring.

A fundamental premise of the adversary system is that individuals have the right to retain the attorney of their choice to represent their interests in judicial proceedings. To be sure, that right is qualified. A court need not, for example, permit an individual to retain anyone at all, regardless of qualifications, to represent him in open court. Nor must a court continue to permit an individual to be represented by an attorney who by his misconduct in open court has threatened the integrity of the proceedings. Nonetheless, if an attorney is adequately qualified and has not otherwise acted so as to justify disqualification, the client need not obtain the permission of the court or of his adversary to retain the attorney of his choice.

I share the view of the Court and the Court of Appeals below that the tactical use of attorney-misconduct disqualification motions is a deeply disturbing phenomenon in modern civil litigation. When a trial court mistakenly disqualifies a party's counsel as the result of an abusive disqualification motion, the court in essence permits the party's opponent to dictate his choice of counsel. As the court below recognized, this result is in serious tension with the premises of our adversary system, see 737 F. 2d, at 1057, and some remedy must therefore be available to correct the error. The question before the Court today is whether that remedy

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 28, 1985

84-127 - Richardson-Merrell, Inc. v. Koller

Dear Sandra,

Please join me.

Sincerely yours,

Byron

'84 MAY 30 P1:30

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 12, 1985

Re: No. 84-127-Richardson-Merrell v. Koller

Dear Sandra:

Please join me.

Sincerely,

T.M.

Justice O'Connor

cc: The Conference

HAB

June 4, 1985

Re: No. 84-127, Richardson-Merrell, Inc. v. Koller

Dear Sandra:

I have just joined your opinion by separate note. It seems to me, however, that in the first line on page 4 the word "respondent" should be "petitioner." This confused me, and perhaps you will wish to check it out.

Sincerely,

HAB

Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 4, 1985

Re: No. 84-127, Richardson-Merrell, Inc. v. Koller

Dear Sandra:

Please join me.

Sincerely,

Harry

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 24, 1985

84-127 Richardson-Merrell, Inc. v. Koller

Dear Sandra:

Please add at the end of the next draft of your opinion that I took no part in the consideration or decision of the above case.

Sincerely,

Lewis

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 3, 1985

Re: No. 84-127 Richardson-Merrell, Inc. v. Koller

Dear Sandra,

Please join me.

Sincerely,

WM

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 7, 1985

Re: 84-127 - Richardson-Merrell v. Koller

Dear Chief:

You, Bill Brennan, and I were in dissent when this case was discussed at Conference. I have read Sandra's opinion with some care and, frankly, find it extremely persuasive. I would also note that much of its reasoning is consistent with Bill Brennan's writing on the question of appealability in the Mitchell case, with which I am in basic agreement, even though I have not joined him because I am persuaded that former Attorney General Mitchell is entitled to absolute immunity. In all events, I thought I should let you, Bill, and Sandra all know that I will probably end up joining her unless a dissenting opinion brings me back to where I was at Conference.

Respectfully,

The Chief Justice

cc: Justice Brennan
Justice O'Connor

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: JUN 13 1985

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84-127

RICHARDSON-MERRELL, INC., PETITIONER *v.* ANNE ELISABETH KOLLER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June ——, 1985]

JUSTICE STEVENS, dissenting.

Everyone must agree that the litigant's freedom to choose his own lawyer in a civil case is a fundamental right. The difficult question presented by this case is whether the denial of that right by a district court's disqualification order can effectively be reviewed following a judgment on the merits.[1]

In my opinion, *Flanagan* v. *United States*, —— U. S. —— (1985), does not control the decision in this case. The strong public interest in the prompt disposition of criminal charges—an interest shared by both the prosecutor and the defendant—is not present to the same extent in the civil context where the defendant's interest in delay may motivate a motion to disqualify in a borderline case.[2] Moreover, in a criminal case an erroneous order disqualifying the lawyer chosen by the defendant should result in a virtually automatic reversal; review after trial on the merits is therefore "effective" to protect the right.

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[1] See *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978) (matters "effectively reviewable" after final judgment not subject to interlocutory appeal).

[2] See 237 U. S. App. D. C. 333, 346, 737 F. 2d 1038, 1051 (1984) (while "tactical use of motions to disqualify counsel" recently have become prevalent in civil cases, "[w]e are aware of no comparable phenomenon in criminal cases").

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: _____

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SUPREME COURT OF THE UNITED STATES

No. 84-127

RICHARDSON-MERRELL, INC., PETITIONER *v.*
ANNE ELISABETH KOLLER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 17, 1985]

JUSTICE STEVENS, dissenting.

Everyone must agree that the litigant's freedom to choose his own lawyer in a civil case is a fundamental right. The difficult question presented by this case is whether the denial of that right by a district court's disqualification order can effectively be reviewed following a judgment on the merits.[1]

In my opinion, *Flanagan* v. *United States*, 465 U. S. 259 (1984), does not control the decision in this case. The strong public interest in the prompt disposition of criminal charges—an interest shared by both the prosecutor and the defendant—is not present to the same extent in the civil context where the defendant's interest in delay may motivate a motion to disqualify in a borderline case.[2] Moreover, in a criminal case an erroneous order disqualifying the lawyer chosen by the defendant should result in a virtually automatic reversal; review after trial on the merits is therefore "effective" to protect the right.

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[1] See *Coopers & Lybrand* v. *Livesay*, 437 U. S. 463, 468 (1978) (matters "effectively reviewable" after final judgment not subject to interlocutory appeal).

[2] See 237 U. S. App. D. C. 333, 346, 737 F. 2d 1038, 1051 (1984) (while "tactical use of motions to disqualify counsel" recently have become prevalent in civil cases, "[w]e are aware of no comparable phenomenon in criminal cases").

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: MAY 24 1985

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–127

RICHARDSON-MERRELL, INC., PETITIONER *v.*
ANNE ELISABETH KOLLER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[May ——, 1985]

JUSTICE O'CONNOR delivered the opinion of the Court.

Last term, in *Flanagan* v. *United States*, 465 U. S. —— (1984), the Court unanimously held that pretrial orders disqualifying counsel in criminal cases are not subject to immediate appeal under 28 U. S. C. § 1291. In this case, the Court of Appeals for the District of Columbia Circuit held that § 1291 confers jurisdiction over interlocutory appeals of orders disqualifying counsel in a civil case. —— U. S. App. D. C. ——, 737 F. 2d 1038 (1984). Because we conclude that orders disqualifying counsel in a civil case are not collateral orders subject to immediate appeal, we reverse.

I

Respondent Ann Koller was born without normal arms or legs in a District of Columbia hospital in 1979. She filed suit in the United States District Court for the District of Columbia, alleging that petitioner Richardson-Merrell, Inc., is liable for her birth defects. The complaint alleged that respondent's mother, Cynthia Koller, had taken the anti-nausea drug Bendectin during the early stages of her pregnancy, and that the drug had caused Ann Koller's injuries. Petitioner is the manufacturer of Bendectin.

Respondent was initially represented by Cohen & Kokus, a Miami law firm, and by local counsel in Washington. As discovery progressed into 1981, however, a Los Angeles law

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 4, 1985

No. 84-127 Richardson-Merrell, Inc. v. Koller

Dear Harry,

As usual you are correct; I will make the change on page 4. Thank you.

Sincerely,

Sandra

Justice Blackmun

Stylistic Changes Throughout

pp. 4

SDO
Please join me
JPS

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: JUN 6 1985

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 84–127

RICHARDSON-MERRELL, INC., PETITIONER *v.*
ANNE ELISABETH KOLLER, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June ——, 1985]

JUSTICE O'CONNOR delivered the opinion of the Court.

Last Term, in *Flanagan* v. *United States*, 465 U. S. 259 (1984), the Court unanimously held that pretrial orders disqualifying counsel in criminal cases are not subject to immediate appeal under 28 U. S. C. § 1291. In this case, the Court of Appeals for the District of Columbia Circuit held that § 1291 confers jurisdiction over interlocutory appeals of orders disqualifying counsel in a civil case. 237 U. S. App. D. C. 333, 737 F. 2d 1038 (1984). Because we conclude that orders disqualifying counsel in a civil case are not collateral orders subject to immediate appeal, we reverse.

I

Respondent Anne Koller was born without normal arms or legs in a District of Columbia hospital in 1979. She filed suit in the United States District Court for the District of Columbia, alleging that petitioner Richardson-Merrell, Inc., is liable for her birth defects. The complaint alleged that respondent's mother, Cynthia Koller, had taken the anti-nausea drug Bendectin during the early stages of her pregnancy, and that the drug had caused Anne Koller's injuries. Petitioner is the manufacturer of Bendectin.

Respondent was initially represented by Cohen & Kokus, a Miami law firm, and by local counsel in Washington. As discovery progressed into 1981, however, a Los Angeles law

HAB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 14, 1985

No. 84-1192, GAF Corp. v. Cheng.

MEMORANDUM TO THE CONFERENCE

This case was held for Richardson-Merrell, Inc. v. Koller, No. 84-127. In Koller the Court held that disqualification orders in civil cases were not subject to interlocutory appeal under 28 U.S.C. §1291. In this case, the CA2 accepted an interlocutory appeal of a disqualification order pursuant to §1291 and affirmed the DC. Consistent with Koller, I will vote to GVR with instructions to dismiss the appeal for want of jurisdiction.

Sincerely,

Sandra