

1 one. And you have these standards to apply, and -- and
2 the district court will exercise the discretion.

3 And if it's out of the channel of
4 discretion, then the Court can review it on that basis.

5 MR. PHILLIPS: Mr. Chief Justice, I think
6 the problem with that is -- is that it -- unless you
7 come up with -- I mean, I -- you know, recklessness --
8 I -- or egregiousness -- I don't know what
9 "egregiousness" means, and I don't know how you -- how
10 you evaluate that on review.

11 I do know what it means to -- to take an
12 objectively reasonable position. More than simply
13 something that's beyond frivolous, it is a substantial
14 argument that either the patent doesn't extend to -- to
15 my particular product or the patent itself is invalid.
16 And circumstances where -- where that is true, my hope
17 would be that the Court, recognizing the extraordinary
18 importance of limiting patents and the monopolies that
19 flow from there, would drive the legal decision in this
20 context -- of the legal standard in this context exactly
21 where the -- where the Court adopted it in Seagate.

22 That's the court that has the experience and
23 expertise, and I would hope under these circumstances,
24 in this very unusual situation, because patent law in
25 this context I do think is very different than almost

1 any other tort context, I would hope in the one -- in
2 the -- in the decidedly one-sided approach that 284 is,
3 where it only gives to the plaintiffs the ability to do
4 what they can do and what they want, that the Court
5 would adopt the kind of rigorous objective standard that
6 allows both for the -- both for the determination that
7 the -- that the patent is invalid or doesn't infringe,
8 and that that's examined on an objective basis.

9 If there are no further questions, Your
10 Honors, I urge the Court to affirm.

11 CHIEF JUSTICE ROBERTS: Thank you,
12 Mr. Phillips.

13 Mr. Wall, you have four minutes remaining.

14 REBUTTAL ARGUMENT OF JEFFREY B. WALL

15 ON BEHALF OF THE PETITIONERS

16 MR. WALL: Mr. Chief Justice, I have two
17 fairly simple points.

18 The first is, as we and the PTO and many of
19 Respondents' amici recognize, the system as it currently
20 stands is out of balance. And we have tried, and I
21 believe we have succeeded, in crafting an approach that
22 balances the Court's concerns with the need to respect
23 the rights of patentees, including small companies like
24 Halo.

25 And we've done it in a couple of different

1 ways.

2 Reasonable, good-faith efforts to -- to
3 challenge patents are not going to result in enhanced
4 damages. And intent and recklessness are not going to
5 be and should not be easy to show.

6 Now, the Federal Circuit hasn't adopted a
7 contrary approach based on its expertise. It thought it
8 had to in light of this Court's decision in *Safeco*,
9 which it has misread. *Safeco* says if you adopt a
10 reasonable view of the law at the time, you're not
11 acting willfully. It doesn't say if you subjectively
12 and correctly believe that you are violating the law,
13 you are held not to be willful because you have hired a
14 good lawyer and come up with a defense later.

15 And that approach is what has skewed the
16 incentives in the patent system and taken us out of
17 balance.

18 Our approach incentivizes good, commercially
19 reasonable behavior under the full set of circumstances
20 at the discretion of the district court. Their approach
21 is incentivizing good litigation.

22 And the second point I just want to make
23 quickly is we do have the evidentiary burden and
24 standard of review in this case. I think it's clear
25 that the -- there isn't any basis for the clear and

1 convincing standard. On the standard of review, I think
2 Highmark resolves and I think Pierce v. Underwood
3 resolves it.

4 These are determinations bound up with the
5 facts, and just as the Court said in Pierce, whether a
6 litigating position is substantially justified is a
7 mixed question of fact and law. So too the questions
8 here. These should be reviewed for abuse of discretion,
9 and it's very important for the Court to say that.

10 Halo should go back to the district court
11 and be analyzed under the right standard so the
12 evidentiary burden matters.

13 In Stryker the district court actually got
14 to the discretionary way, did it, and on appeal, Zimmer
15 never challenged that as an abuse of discretion. It
16 just argued about the objective prong.

17 When this Court takes that out of the
18 analysis, as it should, there's no basis to disturb the
19 district court's discretionary ruling. As the Court
20 knows from looking at it, it's a thorough and reasonable
21 opinion. So --

22 JUSTICE ALITO: One point Mr. Phillips
23 brought up that you didn't address in your initial
24 argument, maybe you could say a word about it, is
25 Section 298 of the American -- America Invents Act.

1 Under your -- under your reading, could
2 evidence of the failure to obtain or introduce advice of
3 counsel be used to prove that the defendant infringed in
4 bad faith?

5 MR. WALL: No. The patentee cannot put that
6 at issue affirmatively. All 298 does is it dealt with
7 a -- that very narrow problem. And when the patentee
8 comes in and wants to show intent or recklessness, it
9 can point to your copying of the patent. It can point
10 to the fact that it gave you really extensive, very
11 detailed notice. It tried to license with you. You
12 didn't do anything. It cannot put at issue whether you
13 talked to counsel.

14 Now, the defendant maybe --

15 JUSTICE ALITO: How do you get to that point
16 under the language of 298?

17 MR. WALL: Because 298 just says when you're
18 proving of willfulness, whether it's a factor as it is
19 in our approach, whether it's the end-all, be-all as it
20 is in their approach, whenever the patentee is trying to
21 prove that up, you can't affirmatively put that at
22 issue.

23 And as Pulse candidly, and I think honestly,
24 concedes in its brief, you can read 298 to have effect
25 on either side's view of the -- how you ought to treat

1 the enhancement statute. So I don't think 298 cuts
2 either way.

3 And I would just stress for the Court that
4 Congress at the time looked at putting "willfully" in
5 the statute, and it looked at putting something
6 virtually identical to Seagate in the statute. It
7 didn't do either one, so I don't think it can be taken
8 to have ratified the Federal Circuit's current approach.

9 CHIEF JUSTICE ROBERTS: Thank you, counsel.

10 The case is submitted.

11 (Whereupon, at 11:59 a.m., the case in the
12 above-entitled matter was submitted.)

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