

Supreme Court No. 79884-2

Ninth Circuit Court of Appeals No. 05-35567

SUPREME COURT
OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE
NINTH CIRCUIT COURT OF APPEALS IN

J&J CELCOM, et al.,

Plaintiffs-Appellants,

v.

AT&T WIRELESS SERVICES, INC., et al.,

Defendants-Appellees.

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**MOTION BY AT&T WIRELESS SERVICES, INC. TO STRIKE
NEW EVIDENCE AND ARGUMENT
FROM REPLY BRIEF OF APPELLANTS**

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I. IDENTITY OF MOVING PARTIES.

The moving parties are AT&T Wireless Services, Inc., and the other defendants and appellees herein (collectively "AWS").

II. STATEMENT OF RELIEF SOUGHT.

Attached to the May 10, 2007, Reply Brief of Appellants (the "Reply Brief") is a document that is not part of the record. That document, and all references to it and assertions of fact based on it, should be stricken for the reasons set forth in section IV.A below.

Also included in the Reply Brief is a new argument – asserted for the first time on reply – based on Article 1, Section 10, of the United States Constitution (the Contract Clause). That argument should be stricken for the reasons explained in section IV.B below.

III. FACTS RELEVANT TO THIS MOTION.

This matter is before the Court upon the Order of the United States Court of Appeals for the Ninth Circuit dated March 7, 2007, which certified a question for resolution (the "Certification Order"). Appellants filed their brief in response to the Certification Order on April 9, 2007 (the "Opening Brief"). AWS filed its Answering Brief on April 30, 2007, and plaintiffs filed their Reply Brief on May 10, 2007.

AWS files this motion for two reasons. First, plaintiffs improperly referenced and attached to the Reply Brief as Appendix A a document

entitled "AT&T Wireless Services, Inc. Definitive Proxy Statement dated March 22, 2004." That document is discussed and referenced at page 10 of the Reply Brief. It is not part of the record in this case.

Second, plaintiffs improperly asserted a new argument – raised for the first time in section B.6 of their Reply Brief (pages 18 to 21) – based on the Contract Clause. Plaintiffs did not raise that argument in federal court, and the Ninth Circuit did not identify the issue in its Certification Order.

IV. GROUNDS FOR RELIEF AND ARGUMENT

A. The Proxy Statement, As Well As All References To It And Assertions Of Fact Based On It, Should Be Stricken.

The proxy statement, as well as references to it and assertions of fact based on it appearing at pages 9 and 10 of the Reply Brief,¹ should be stricken for the following independent reasons.

¹ The material in the Reply Brief that should be stricken includes the proxy statement attached as Appendix A, sub-heading B.3 ("AWS Did Profit and Was Planning to Sell at the Time of the Squeeze Out"), and the following text:

However, there is no mystery to the fact that AWS was constantly placing itself in a position to sell itself to the highest bidder. AWS has admitted this in its SEC filings, including the Definitive Proxy Statement filed March 22, 2004. A copy of the relevant pages is attached in Appendix A. The final merger, not coincidentally, landed a huge windfall for AWS executives, also as spelled out in the Proxy Statement, Appendix A.

Reply Brief, at 10.

First, the proxy statement is not part of the record on appeal. Including such documents in an appendix is inappropriate, and all references to the proxy statement should therefore be stricken. *Harbison v. Garden Valley Outfitters, Inc.*, 69 Wn. App. 590, 849 P.2d 669 (1993) (appellants admonished for inappropriately including in an appendix materials not of record). Because the proxy statement is not part of the record, the portions of the Reply Brief that reference or rely on it also violate RAP 10.3(a)(5). That rule states (with emphasis added) that “Reference to *the record* must be included for each factual statement.” Failure to comply with these requirements is sanctionable under RAP 10.7.

Second, plaintiffs failed to request permission to submit the proxy statement as required under RAP 10.3(a)(8).² Even if they had, such a request would have been contrary to the Certification Order, which states: “The Supreme Court of Washington may supplement this statement of facts with any additional information that it deems important *from the*

² RAP 10.3(a)(8) states: “An appendix may not include materials not contained in the record on review without permission from the appellate court, except as provided in rule 10.4(c).”

certified record in order to resolve the certified question.” *Id.* at 2541 n.1 (emphasis added).³

Third, by submitting the proxy statement plaintiffs also violated RAP 9.12, which states: “On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.” The proxy statement was not called to the attention of the federal district court, which dismissed plaintiffs’ claims on summary judgment. ER 386-410. It therefore cannot properly be considered on appeal. *See Nelson v. McGoldrick*, 127 Wn.2d 124, 141, 896 P.2d 1258 (1995) (granting motion to strike evidence “which was never submitted to nor considered by the trial court in deciding the summary judgment motion.”).

Finally, assertions based on the proxy statement should be stricken because they violate the settled rule that new arguments cannot be presented for the first time in a reply brief. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992) (“An issue raised and argued for the first time in a reply brief is too late to warrant consideration.”); *Markall v.*

³ Indeed, the Ninth Circuit specifically addressed this issue, noting that “Counsel [for plaintiffs] admitted at argument that there is no evidence that this particular transaction [the Cingular transaction described in the proxy statement] was under consideration by AWS in 2002 and early 2003, when the buyouts were completed.” 2007 WL 676007 *2. Plaintiffs are essentially asking this Court to reject the Ninth Circuit’s ruling (and their own prior admission) regarding this issue.

Smithway Machinery Co., 34 Wn.2d 749, 757-58 (1949) (declining to consider a theory asserted for the first time in appellant’s reply brief). Based on the proxy statement, plaintiffs argue – incorrectly, out of context, and without a developed fact record concerning this new argument – that AWS has somehow “admitted” that it “plac[ed] itself in a position to sell itself to the highest bidder.” Reply Brief, at 10. This argument is improper and – along with the proxy statement – should be stricken.

B. The New Constitutional Argument Should Be Stricken.

The argument at pages 18 to 21 of the Reply Brief, based on Article 1, Section 10, of the United States Constitution, should also be stricken. As noted above, RAP 9.12 states that “[o]n review of an order granting or denying a motion for summary judgment the appellate court will consider only ... issues called to the attention of the trial court.” Plaintiffs failed to make or even hint at a Contract Clause argument previously, when the parties filed cross-motions for summary judgment before the federal district court. Accordingly, RAP 9.12 bars plaintiffs from raising it now.

The Contract Clause argument should also be stricken because it violates the rule that new arguments cannot be raised for the first time in a reply. *See* authorities cited on page 4 above. Such gamesmanship is improper and serves only to undermine AWS’s ability to assist the Court

in deciding the certified question. For this reason too, the argument should be stricken. If the Court does not strike the argument, AWS respectfully requests that it accept the surreply attached hereto, which briefly addresses plaintiffs' new argument.

V. CONCLUSION

For all of the foregoing reasons, AWS asks that this Court grant the relief requested above.

DATED this 25th day of May, 2007.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on May 25, 2007, I caused to be served via messenger one copy of the foregoing Motion By AT&T Wireless, Inc. To Strike New Evidence And Argument From Reply Brief Of Appellants upon:

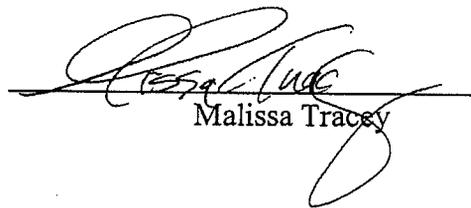
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I also certify that on May 25, 2007, I caused to be filed via electronic delivery the foregoing Motion To Strike New Evidence And Argument From Reply Brief Of Appellants with

Supreme@courts.wa.gov

in accordance with the filing procedures described at:

http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/?fa=atc_supreme_clerks.display&fileID=fax.


Malissa Tracey