

80572-5

No. 57523-6-I

---

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

---

MARTIN SCHNALL, et al.,

Appellants,

v.

AT&T WIRELESS SERVICES, INC.,

Respondent.

---

**ANSWER TO BRIEF OF *AMICUS CURIAE*  
ATTORNEY GENERAL OF WASHINGTON**

---

Michael E. Kipling  
KIPLING LAW GROUP PLLC  
3601 Fremont Avenue N., Suite 414  
Seattle, Washington 98103  
(206) 545-0345

Counsel for Respondent and  
Cross-Appellant AT&T Wireless  
Services, Inc.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 MAR 6 PM 12:00

## TABLE OF CONTENTS

I.	SUMMARY .....	1
II.	ARGUMENT .....	2
	A. The AG Ignores and Misstates Facts in the Record.....	2
	B. Causation Is Required By RCW 19.86.090 And The Legal Standard Does Not Change Merely Because A Class Is Alleged .....	6
	1. Causation is required by the express language of RCW 19.86.090.....	6
	2. The causation requirement in RCW 19.86.090 is not changed merely because a class action is alleged. ....	9
III.	CONCLUSION.....	11

## TABLE OF AUTHORITIES

### Cases

<i>City of San Jose v. Superior Court</i> , 12 Cal. 3d 447, 525 P.2d 707 (1974).....	10
<i>FTC v. Figgie International, Inc.</i> , 994 F.2d 595 (9 <sup>th</sup> Cir. 1993).....	7, 8
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.</i> , 105 Wn. 2d 778, 719 P.2d 531 (1986).....	6, 11
<i>Nuttall v. Dowell</i> , 31 Wn. App. 98, 639 P.2d 832 (1982).....	7, 9, 10, 11
<i>Pickett v. Holland Am. Line</i> , 101 Wn. App. 901, 6 P.3d 63 (2000).....	10
<i>Pickett v. Holland Am. Line-Westours, Inc.</i> , 145 Wn. 2d 178, 35 P.3d 351 (2001).....	2, 7, 10, 11
<i>Poulos v. Caesar's World, Inc.</i> , 379 F.3d 654 (9 <sup>th</sup> Cir. 2004).....	11
<i>Schmidt v. Cornerstone Investments, Inc.</i> , 115 Wn. 2d 148, 795 P.2d 1143 (1993).....	6
<i>Snyder v. Harris</i> , 394 U.S. 332, 22 L. Ed. 2d 319, 89 S. Ct. 1053 (1969).....	10
<i>Zahn v. International Paper Co.</i> , 414 U.S. 291, 38 L. Ed. 2d 511, 94 S. Ct. 505 (1973).....	10

### Statutes

RCW 19.86.020 .....	6, 7
RCW 19.86.090 .....	6, 7, 10, 11

## I. SUMMARY

The Brief of *Amicus Curiae* Attorney General of Washington (“AG”) uncritically adopts the faulty premise that pervades Appellants’ arguments to this Court and therefore suffers from the same flaw. Contrary to the AG’s argument, the trial court’s decision in this case does not mean that proof of causation will prevent certification of every consumer class under the CPA. Instead, the court ruled that “in the context of this case,” where there is no basis in the record to find that *all* consumers were injured as a result of the alleged deceptive statements, proof of causation will necessarily turn on individual facts. CP 422.

The trial court’s decision is amply supported by the record, with which the court was quite familiar as the result of a number of earlier motions. This evidentiary record shows that, contrary to the AG’s premise, a vast amount of the information that Appellants allege was “undisclosed” was in fact available to AWS’ subscribers. Likewise, the record shows there are substantial questions as to whether any particular subscribers would have acted differently if different disclosures had been made. A class-wide presumption that all AWS subscribers suffered injury as a result of the alleged deceptive acts is simply not appropriate under these circumstances.

The trial court properly conducted a “rigorous analysis” of the claims in the case and the evidence that would need to be considered in order to conduct a fair trial of the claims, and his decision on class certification makes “articulate reference” to the requirements of CR 23.

*See* Brief of Respondent and Cross-Appellant, pp. 14-15. Clearly, it was not an abuse of the trial court’s discretion to decide that class certification was not appropriate “in the context of this case.”

## II. ARGUMENT

### A. The AG Ignores and Misstates Facts in the Record

In characterizing the trial court’s decision, the AG simply adopts the Appellants’ arguments and, in several important respects, relies on “facts” which have no support in the record. This problem pervades the AG’s brief.

The crux of the AG’s Statement of the Case is its assertion that: “The UCC is not a government mandated charge, but instead is an element of AWS’s overhead.” This is not accurate as a statement of fact, because it is clear that the Universal Service Fund assessment against wireless carriers, although labeled a “contribution,” was mandatory. Brief of Respondent, pp. 4-5; CP 991- 995, 1009-10.<sup>1</sup> The Universal Service Fund and the FCC’s role in monitoring the Fund were discussed at some length in AWS’ Motion to Dismiss Certain Claims on Preemption Grounds. CP 991- 995.

Moreover, the point of the AG’s claim that the UCC “is an element of overhead” appears to be that it was somehow improper for AWS to pass

---

<sup>1</sup> Along the same lines, the AG is incorrect when it implies that USF charges were not imposed on AWS. AG’s Brief, pp. 7-8. This distinction is important in light of the AG’s reliance on *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn. 2d 178, 196, 35 P.3d 351 (2001). The basis for the claim in *Pickett* was that defendant charged its customers “port charges and taxes” that were *not* imposed on defendant. This is not the case here.

this charge through to subscribers as a separate line item on their bills. AG Brief, p. 2. The AG would apparently have preferred that the federal USF charge be rolled into AWS' monthly fee. But any claim under state law that it was improper to bill the UCC as a separate line item on subscribers' bills is expressly preempted because the Federal Communications Commission's regulations expressly permit that practice.<sup>2</sup> Brief of Respondent, pp. 4-5; CP 1009-1013. Indeed, when AWS filed a summary judgment motion based on FCC preemption, Appellants made it clear that they do not challenge the decision to pass the UCC through to consumers as a separate line item. *See, e.g.*, CP 1037-38. This is a critical point as to the causation issue because it means that that the subscribers in this case, unlike other cases under the CPA, cannot argue that the use of a separate line item for the UCC is unfair. The only theory of liability that arguably is not preempted in this case is one based in deception, and in order to prove causation, Appellants would have to show, at a minimum, that the subscriber suffered some injury *as a result of the allegedly deceptive statements*.

The AG similarly adopts Appellants' misleading allegations as to the manner in which AWS promoted its wireless services and the supposed lack of disclosure regarding the UCC. AG Brief, p. 2. Like Appellants, the AG implies that AWS uniformly advertised its monthly

---

<sup>2</sup> The FCC debated whether to adopt a regulation that would have forced the wireless industry to treat Universal Service Fund contributions as "overhead," by rolling the cost into monthly rates, but instead the FCC expressly decided to permit carriers to recover their USF contributions through a separate line item charge on customers' bills. Brief of Respondent, pp. 4-5. This decision by the FCC preempts contrary state law. *Id.*

rates in advertisements and other marketing materials, and implies that it uniformly failed to disclose that additional charges such as the UCC would apply. AG's Brief, p. 2.

Once again, the actual record shows the contrary. For example, there is no evidence to support the AG's statement that "AWS did not disclose [the UCC] to new customers at the time of purchase." AG's Brief p. 2. The citation in support of this assertion in the AG's brief is to a newspaper article that does not even mention the UCC. CP 85. To the contrary, AWS submitted evidence that substantial information was made available to subscribers at the point of sale (and elsewhere). Brief of Respondent, pp. 8-14.

It is equally misleading to suggest that the advertisements for AWS' services during the claim period uniformly misstated the price of service. Indeed, many of AWS advertisements made no reference whatsoever to monthly rates because subscribers often choose wireless service for reasons other than price. CP 3140-3201.<sup>3</sup> Those advertisements that made specific reference to service plans, rates and/or prices (such as the advertisement on which the AG relies, CP 80) also included disclosures that subscribers would be subject to taxes and other charges, in addition to their monthly access fees. CP 3517; *see, generally*, Respondent's Brief, pp. 9-10. In fact, as the trial court found, "some agreements, advertising and promotional materials . . . specifically list the

---

<sup>3</sup> Many customers saw and responded to advertising regarding service availability, equipment features or models, equipment pricing, call quality or coverage, or other general advertising themes. CP 3140-41.

‘universal connectivity charge’ as one of the fees, taxes and surcharges for which the customer is responsible for paying.” CP 418. The very advertisement on which the AG relies discloses that “universal connectivity charge, surcharges, taxes and other restrictions and charges apply.” CP 80.<sup>4</sup>

Contrary to the AG’s allegations, this is not a case in which accurate information regarding the UCC was suppressed or withheld from subscribers. The evidentiary record on which the trial court based its decision includes uncontradicted evidence that information regarding fees and charges such as the UCC was available to subscribers from AWS and from other sources.

- At the point of purchase, sales representatives were trained to provide information to subscribers regarding the charges that would appear on their bills and the expected range of the charges. CP 3115-21; 3127-30; 3202-24; 3302-92; Brief of Respondent, pp. 10-11.
- Charges, including the UCC, were separately itemized on subscribers’ monthly bills. CP 3396-97; 3475; 3484; 3489; 3459; 3470; 3476.
- When advertisements mentioned the price of service, they disclosed that other fees, taxes, charges and surcharges would also apply. CP 3517; 80.
- Customer care representatives were trained to respond to questions from subscribers with information regarding the UCC. CP 3098, 3101; Brief of Respondent, pp. 12-13.

---

<sup>4</sup> The trial court properly found that “liability issues would be substantially different for those class members who relied upon an agreement, advertising or promotional materials which explicitly mentioned the universal connectivity charge than the issues presented by those class members who did not see such material.” CP 418.

- Other wireless carriers imposed a similar monthly charge, so that any customer who changed carriers was already familiar with the fact that such charges would be on the bill. CP 3072-96, 3256-75; Brief of Respondent, pp. 13-14;
- In addition, as the trial court also found, there were a number of other sources of information about the UCC, including public websites, news reports and information available to subscribers from other telecommunications carriers. Brief of Respondent, pp. 13-14.<sup>5</sup>

**B. Causation Is Required By RCW 19.86.090 And The Legal Standard Does Not Change Merely Because A Class Is Alleged**

**1. Causation is required by the express language of RCW 19.86.090.**

In adopting RCW 19.86.090, the Legislature provided that a private right of action for CPA violations may be asserted only by a “person who is injured in his or her business or property by a violation of RCW 19.86.020.” *Id.* Thus, proof of a causal link between the deceptive act and the injury has always been required of a private plaintiff who seeks damages for a violation of the CPA. *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.*, 105 Wn. 2d 778, 785, 719 P.2d 531 (1986); *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn. 2d 148, 167, 795 P.2d 1143 (1993). The Legislature might have chosen a different form of remedy, such as a statute that allowed the plaintiff to seek restitution or other equitable relief. For example, Section 13 of the FTC

---

<sup>5</sup> The court concluded that these third party sources of information were not admissible as context evidence, for purposes of interpreting the AWS Subscriber Agreements, but it would certainly be relevant in litigating a claim of deception to inquire as to whether an individual subscriber knew of the UCC from any of these sources prior to the time she subscribed with AWS.

Act allows a U.S. District Court, under certain circumstances, to award the FTC relief based on “rescission or reformation of contracts, the refund of money or return of property” as well as “the payment of damages.” *FTC v. Figgie International, Inc.*, 994 F.2d 595, 605 (9<sup>th</sup> Cir. 1993).<sup>6</sup> Instead, the Legislature chose to adopt a requirement that a private plaintiff must establish that his or her injury was caused by the alleged violation of the CPA. Brief of Respondent, pp. 28-29.

Proof of causation under RCW 19.86.090 requires, at a minimum, proof that the plaintiff would not have been injured “but for” the alleged violation of the CPA. Where, as here, the alleged violation of RCW 19.86.020 is grounded in deception, evidence that the plaintiff relied on the alleged deception is the obvious method to prove causation. *Nuttall v. Dowell*, 31 Wn. App. 98, 111, 639 P.2d 832 (1982) (“We hold that a party has not established a causal relationship with a misrepresentation of fact where he does not convince the trier of fact that he relied upon it.”). As the Washington Supreme Court has noted, *Nuttall* is “the only Washington authority directly on point (i.e., dealing with a money damages claim based on misrepresentation).” *Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn. 2d 178, 196, 35 P.3d 351 (2001).

There may be other cases with different facts in which causation can be established by common, rather than individual, proof. For example, a presumption of reliance might be appropriate where the record

---

<sup>6</sup> Appellants’ reliance on *Figgie* is misplaced for this same reason; the statute in *Figgie*, unlike RCW 19.86.090, allows the court to impose equitable remedies that do not require the same proof of causation as required under the latter statute.

shows that a defendant successfully suppressed all truthful information about the principal features of a consumer product.<sup>7</sup> Reliance might also be presumed in another case where product defects are hidden and the product is so defective in its performance that no reasonable consumer would have purchased it had the truth been known. On the other hand, collective proof of reliance is not appropriate where, as here, Appellants' claims are based on misrepresentations and/or omissions and there is undisputed evidence that the information they claim was omitted was in fact widespread and readily available to consumers.

Causation in a case of alleged deception also requires proof that the claimant would have acted differently "but for" the alleged deception. Here, however, there is no evidence that the small amount of money attributable to the UCC was in any way material to Appellants' purchase decisions. For example, named plaintiff John Girard's monthly bill for wireless services in November 2000 was \$211.96, of which the UCC comprised \$1.62. CP 88. Indeed, the UCC was one of eight itemized charges that he paid without protest, notwithstanding that they were specifically listed on his bill. *Id.* The record on which the trial court based its decision showed that there were substantial individual questions of fact as to whether even the named plaintiffs could prove causation. The record showed:

- None of the named plaintiffs was able to point to any representation about price that led him to enter an agreement with AWS and most of the plaintiffs had no

---

<sup>7</sup> *Figgie, supra*, appears to be such a case.

memory of any representations at the time they initiated service. CP 4273-74, 4289, 4304, 4247.

- With one possible exception, the named plaintiffs voluntarily paid the UCC (which was itemized on their monthly bills) without any protest until the time they were recruited by counsel to be part of this lawsuit. CP 4264, 4275-76, 4289, 4301.
- Some named plaintiffs renewed their contract with AWS when it expired, notwithstanding that they had been charged the UCC throughout the term of their initial contract. CP 4272, 4298-99.<sup>8</sup>
- At least one named plaintiff switched to another carrier that also passed through the USF charges. CP 4275-76.

Under these circumstances, there was no basis in the record for the trial court to find that the UCC was so material an element of consumers' purchase decisions that a presumption of reliance as to all consumers was appropriate. Judge North was well within his discretion when he decided that, in the context of this case, causation is an issue that – if it were to be proved at all – must be proved by individual evidence that consumers relied on the alleged misrepresentations.

**2. The causation requirement in RCW 19.86.090 is not changed merely because a class action is alleged.**

The AG attempts to distinguish *Nuttall* on the ground that only one consumer was involved in that case, whereas a class action is alleged

---

<sup>8</sup> In this, the named plaintiffs are not alone. On average, AWS customers renewed their 1-year contracts two or more times during the claim period. CP 31-32.

here.<sup>9</sup> AG Brief, pp. 11-12. But this is a distinction without a difference. The causation required in *Nuttall* is based on the language of RCW 19.86.090, which is the same statute that applies to each member of the putative class in this case. The AG’s argument appears to be that because a class action is alleged the substantive requirements that each plaintiff must establish under the statute in order to recover damages are changed. There is no support for this argument and it is contrary to the rule that a class action is a procedural device that does not affect substantive rights. “We decline to alter this rule of substantive law to make class actions more available. Class actions are provided only as a means to enforce substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going.” *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 462, 525 P.2d 707, 711 (1974). Federal cases interpreting FRCP 23 are in accord.<sup>10</sup> *Id.*; *Zahn v. International Paper Co.*, 414 U.S. 291, 38 L. Ed. 2d 511, 94 S. Ct. 505 (1973); *Snyder v. Harris*, 394 U.S. 332, 22 L. Ed. 2d 319, 89 S. Ct. 1053 (1969); *see also Poulos v. Caesar’s World, Inc.*, 379 F.3d 654, 664

---

<sup>9</sup> The AG’s reliance on *Pickett v. Holland Am. Line*, 101 Wn. App. 901, 6 P.3d 63 (2000) (“*Pickett I*”) is misplaced. Indeed, the AG does not even discuss the fact that the decision in *Pickett I* was disapproved by the Washington Supreme Court in *Pickett II* (*Pickett v. Holland Am. Line*, 145 Wn. 2d 178 (2001)). In *Pickett II*, the Supreme Court reversed the decision in *Pickett I* and in the process cited *Nuttall* with approval for the proposition that causation/reliance is required for private CPA plaintiffs. The Supreme Court also found that the cases on which the Court in *Pickett I* had relied for the contrary result did not support its conclusion, and held that the question as to whether proof of causation/reliance in that case would involve individual questions of fact that preclude class certification “presented a risk to the plaintiff class” that favored approval of the settlement agreement. *Id.*

<sup>10</sup> Federal cases interpreting FRCP 23 are “highly persuasive” as to CR 23. *Pickett II*, 145 Wn. 2d at 188.

(9<sup>th</sup> Cir. 2004) (“Lumping claims together in a class action does not diminish or dilute [the causation] requirement.”).

### III. CONCLUSION

In light of the clear language of RCW 19.86.090 and the decisions in *Nuttall*, *Hangman Ridge* and *Pickett II*, there can be no doubt that in this case, causation is an essential element of each subscriber’s claim under the CPA. Nor can there be any doubt that, in some CPA cases in which the consumer alleges injury through deception, as here, it will be necessary to prove that the consumer relied to his or her detriment on the alleged deception. There may be other cases in which proof of causation may be made on a classwide basis, but Judge North was well within his discretion when he found this is not such a case.

DATED this 6 day of March, 2007.

KIPLING LAW GROUP PLLC

By:   
Michael E. Kipling, WSBA #7677

Counsel for Respondent and Cross-Appellant AT&T Wireless Services, Inc.

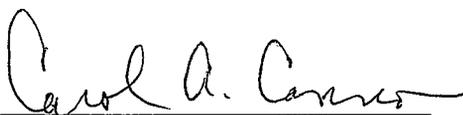
**CERTIFICATE OF SERVICE**

I do hereby certify that on this 6<sup>TH</sup> day of March, 2007, I caused to be served a true and correct copy of the foregoing *Answer to Brief of Amicus Curiae Attorney General of Washington* by method indicated below and addressed to the following:

David E. Breskin  
Daniel F. Johnson  
Short Cressman & Burgess PLLC  
999 Third Avenue, Suite 3000  
Seattle, WA 98104-4088  
*Counsel for Appellants*  
*(Via E-Mail and U.S. Mail)*

William W. Houck  
Houck Law Firm  
4045 – 262<sup>nd</sup> Avenue SE  
Issaquah, WA 98029  
*Counsel for Appellants*  
*(Via E-Mail and U.S. Mail)*

Robert M. McKenna  
Attorney General  
Shannon E. Smith  
Senior Counsel  
800 Fifth Avenue, Suite 2000, TB-14  
Seattle, WA 98104-3188  
*Counsel for Amicus Curiae Attorney*  
*General of Washington*  
*(Via E-Mail and U.S. Mail)*

  
\_\_\_\_\_  
Carol A. Cannon, Legal Assistant

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 MAR -6 PM 12:00