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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MARTIN SCHNALL, et al.,

Respondents,

v.

AT&T WIRELESS SERVICES, INC.,

Petitioner.

ANSWER TO BRIEFS OF AMICI CURIAE WASHINGTON
ATTORNEY GENERAL AND WASHINGTON
STATE TRIAL LAWYERS ASSOCIATION

Michael E. Kipling, WSBA #7677
Marjorie A. Walter, WSBA #40078
Kipling Law Group, PLLC
3601 Fremont Ave N, Suite 414
Seattle, Washington 98103
(206) 545-0345

Counsel for Petitioner
AT&T Wireless Services, Inc.

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I. INTRODUCTION

Pctitioner AT&T Wireless Services, Inc. ("AWS"), respectfully submits this brief in answer to the Amicus Curiae Briefs of the Washington State Attorney General ("AG") and the Washington State Trial Lawyers Association Foundation ("WSTLA"). Both of these briefs miss the mark because they take aim at the wrong issue. The premise of each brief is that the trial court was wrong to deny class certification because Plaintiffs supposedly established a *prima facie case* of causation under the Washington Consumer Protection Act. WSTLA, p. 10; AG, p. 4-5. Whether or not Plaintiffs established even a *prima facie case* here is highly debatable, but the point is irrelevant. A *prima facie case* of causation might be sufficient for Plaintiffs to avoid summary judgment, as in *Indoor Billboard/Washington, Inc. v. Integra Telecom, Inc.*, 162 Wn.2d 59, 170 P.3d 10 (2007), but the issue before the trial court here involved class certification, not summary judgment.

In deciding whether to certify a class, the trial court properly considered *all* of the relevant evidence, with reference to the specific elements of CR 23, to determine whether this case satisfies each of those elements. *DeFunis v. Odegaard*, 84 Wn.2d 617, 622, 529 P.2d 438 (1974). Considering all the relevant evidence, the trial court found that it is not possible to conduct a fair trial of the CPA claims in this case on a class-wide basis because essential evidence on the issue of causation is particular to the individual claimants. CP 421 – 22.

This Court's recent decision in *Indoor Billboard* makes it clear that the Court of Appeals was wrong when it concluded that the trial court applied an erroneous legal standard as to CPA causation. *Indoor Billboard* confirms that the trier of fact must be allowed to consider "all . . . relevant evidence on the issue of proximate cause." 162 Wn.2d at 83. Here, the trial court looked at all of the relevant evidence in the extensive evidentiary record, not just the evidence Plaintiffs promoted in their "*prima facie* case," and found "in the context of this case" that proof of but-for causation necessarily involves evidence that is individual, rather than common. CP 422. The trial court's discretionary decision on class certification should be affirmed.

II. RESPONSE TO STATEMENT OF THE CASE

The AG and WSTLA simply presume that the allegations of the Complaint are accurate and complete. But, as Petitioner showed in its Petition for Review, the Complaint (and the Court of Appeals decision) misconstrue and ignore key evidence in the trial court record. Petition for Review, pp. 7-9. The trial court properly considered *all* of the evidence in the record, with specific reference to the elements of CR 23, to determine whether there was "actual, not presumed, conformance with" CR 23. *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160-161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982); *DeFunis*, 84 Wn.2d at 622.

Without repeating the detailed discussion of the trial record that appears elsewhere,¹ it is important to note that, in key respects, this case is unlike many putative consumer class actions. First, the underlying consumer charge at issue here – a line item charge that appeared on AWS’ subscriber bills and was used to recover AWS’ contributions to the Federal Universal Service Fund – is *expressly permitted by federal law*. 47 C.F.R. § 54.712.² This Federal Communications Commission regulation not only permits wireless carriers to recover the cost of their FUSF contributions from subscribers, but expressly allows the cost to be recovered in this manner, i.e., by using a line item charge on the subscribers’ bills. *Id.*

As this Court recently recognized, conflict preemption precludes a state from applying its law where doing so “stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.” *McKee v. AT&T Corp.*, ___ Wn.2d ___, 191 P.3d 845 (2008), quoting *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984). In this case, in order to ensure adequate funding for the beneficial purposes of the FUSF, Congress delegated to the FCC the authority to

¹ The evidentiary record in support of the trial court’s decision is substantial. Petition for Review, pp. 7-9. That record is discussed in detail in earlier briefs. *Id.*; see also AWS’ Brief to the Court of Appeals. To avoid unnecessary repetition, that discussion will not be repeated here.

² “Federal universal service contribution costs may be recovered through interstate telecommunications-related charges to end users. If a contributor chooses to recover its federal universal service contribution costs through a line item on a customer’s bill the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer’s bill times the relevant contribution factor.” 47 C.F.R. § 54.712.

collect FUSF contributions from telephone companies, including wireless carriers. 47 U.S.C. § 254(b)(5), § 254(d). The FCC's authority involves "two distinct but related components; the assessment of contributions on telecommunication providers; and the recovery of contribution payments by providers from their customers." *Further Notice of Proposed Rulemaking and Report and Order*, 17 F.C.C.R. 3752, ¶ 6 (2002).

Pursuant to this authority, the FCC issued an order expressly permitting carriers to recover their USF contributions from customers through a separate line item on customers' bills. 47 C.F.R. § 54.712. State law, therefore, may not conflict with this decision of the FCC because it would thereby "stand as an obstacle" to the Congressional goal of providing a funding mechanism for the FUSF. *Silkwood*, 464 U.S. at 248; *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 368 – 69, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986). In fact, Congress has declared that states may *not* adopt rules that are inconsistent with the FCC's rules regarding the FUSF. 47 U.S.C. § 254(f) ("[a] state may adopt regulations *not inconsistent with* the Commission's rules to preserve and advance universal service.") (emphasis added). Thus, AWS' practice of passing through its FUSF contribution by way of a line item (the Universal Connectivity Charge, or UCC) on its subscribers' bills may not be challenged as a violation of state law. Plaintiffs acknowledge that they are not permitted to challenge the practice of *billing* the UCC; indeed, the only basis for their claims is an allegation that the putative class was injured by *deception* as to the UCC. Answer to Petition for Review, p. 11

(“AWS will be liable in this case for *charging* the UCC only if it did so by *deceptive means*”) (emphasis in original).³

Moreover, as the trial court was well aware, this case is unusual in other respects that greatly complicate the prospect of litigating the CPA causation issue on a class-wide basis. Many consumer transactions involve a relatively simple, one-time purchase of a product or service. But the parties here had an ongoing relationship and the evidence of the parties’ own conduct prior to the time a dispute arose is particularly compelling. In particular, the fact that most AWS subscribers renewed their agreements at a time when they were undeniably on notice that the UCC would appear on each monthly bill shows that no injury was caused by the alleged failure to disclose as to whether it would be charged. At the very least, in the face of this evidence the trier of fact *cannot* simply presume that every subscriber would have avoided paying the UCC had it somehow been disclosed differently.⁴

The trial court properly found that consideration of all the relevant evidence was critical to ensure a resolution of Plaintiffs’ claims in a trial that is fair to *all* parties, and that “in the context of this case” the resolution of those claims would turn on evidence that is individual in

³ In this critical respect, the instant case is the opposite of the PICC charge that was challenged in *Indoor Billboard* and the B&O tax in *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 157 P.3d 847 (2007). Unlike the PICC, the UCC is a direct pass-through of a specific federal charge that is imposed on AWS. Unlike the B&O tax, controlling authority expressly *permits* AWS to pass through the charge.

⁴ As discussed below, the trial record shows that a vast amount of information regarding the UCC was in fact available to consumers, including the information that Plaintiffs allege was omitted.

nature. CP 422. As discussed below, this Court's decision in *Indoor Billboard* confirms that the trial court applied the proper legal standard on the issue of CPA causation.

III. ARGUMENT

A. The AG and WSTLA Briefs Focus On The Wrong Issue

Both the AG and WSTLA briefs frame the issue as whether a private CPA plaintiff may establish a "*prima facie*" causal link between a deceptive act and her injury merely by showing that she paid an allegedly deceptive invoice. WSTLA, p. 10; AG, pp. 4 – 5. Whether that showing would be sufficient to avoid summary judgment under the facts of this case is highly debatable, but in any event it is the wrong question. The trial court here did not decide a dispositive motion, i.e., whether the Plaintiffs had produced enough evidence to be allowed to proceed to trial. Rather, the issue the trial court faced under CR 23 was how that trial would be conducted, and specifically whether it would be possible to conduct a fair trial of the claims of absent class members without considering all the evidence that is relevant to their claims. The AG and WSTLA briefs fail to discuss, let alone resolve, the difficulties inherent in trying the CPA claims on a class-wide basis in a way that takes into account all relevant evidence on the issue of causation.

1. The trial court's decision, based on a substantial evidentiary record, is entitled to deference.

The trial court's decision to deny class certification here came after lengthy litigation, in which the court considered multiple motions on the

merits of the claims.⁵ Because of the trial judge's familiarity with the record and the claims in this case, it is particularly appropriate to defer to his discretion on class certification. *Oda v. State*, 111 Wn. App. 79, 90, 44 P.3d 8 (2002) (decisions on class certification are left to the discretion of the trial court and may be reversed only on a finding that the court abused that discretion.); *Eriks v. Denver*, 118 Wn. 2d 451, 466, 824 P.2d 1207 (1992).

While this Court recently announced a policy to protect class action claims under the CPA (*McKee*, 191 P.3d at 852), it is important to ensure that this policy does not obliterate the requirements of CR 23. A "pro-class-action policy" may not relieve a plaintiff of the burden to show that *each* element of CR 23 is met. "Class actions are specialized types of suits, and as a general rule must be brought and maintained in strict conformity with the requirements of CR 23." *DeFunis*, 84 Wn.2d at 622; *Oda*, 111 Wn. App. at 92. "[A]ctual, not presumed, conformance with Rule 23(a) [is] indispensable" and a "rigorous analysis" of the claims and the elements of the Rule is required before a class may be certified. *General Telephone*, 457 U.S. at 160 – 61; *Oda*, 111 Wn. App. at 92. Adherence to the elements of CR 23 is important to ensure that *all* parties in a putative class action are provided a fair opportunity to litigate their claims.⁶

⁵ See, e.g., CP 743 – 1151, 4470 – 4646.

⁶ Indeed, as discussed in earlier briefs, any effort to change the substantive law governing CPA claims in order to accommodate a policy in favor of consumer class actions would raise constitutional questions. Supplemental Brief of Petitioner AT&T Wire-

2. The amici briefs misconstrue both the trial court's and the appellate court's decisions.

Probably because they focus on the wrong issue, the WSTLA and AG briefs misconstrue the decisions of the trial court and the Court of Appeals. Contrary to their arguments, the trial court did *not* base its denial of class certification on an erroneous legal conclusion that the CPA requires “each class member to establish causation by demonstrating individual reliance on AT&T’s deceptive acts in order to prove injury[.]” *See* WSTLA, p. 3; AG, p. 3. The trial court does not even mention “reliance” in its Memorandum Opinion denying class certification. CP 417 – 422. Instead, the trial court correctly found that “proof of causation is an essential element of a CPA action.” *Id.* The trial court also correctly found that, in order for a CPA claimant to establish the required “causal link” between the alleged deception and injury, the claimant must establish “but for causation.” *Id.* In a case like this one, where the operative CPA claims allege “deception,” the claimant therefore must establish that, but for the alleged deception, claimant would not have suffered injury. This Court reached the same conclusion in *Indoor Billboard*:

We hold that the proximate cause standard embodied in WPI 15.01 is required to establish the causation element in a CPA claim. A plaintiff must establish that, but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.

less, Inc., pp. 10 – 11; Amicus Curiae Brief of Certain Washington-Based Companies, p. 11.

162 Wn. 2d at 84.

WSTLA incorrectly argues that a requirement of actual reliance is “implicit” in the trial court’s decision because it refers to *Nuttall v. Dowell*, 31 Wn. App. 98, 639 P.2d 832 (1982). WSTLA, p. 10; *see also* AG, p. 4 (“Actual reliance was implicit in this ruling[.]”). But the trial court pointedly chose not to quote the portion of *Nuttall* that discusses “reliance”; instead, the Memorandum Opinion cites *Nuttall* for the point that a plaintiff seeking recovery of damages in a private CPA action “must establish some causal link between defendant’s unfair act and his injury.” CP 421 – 422. WSTLA and the AG also ignore that this Court cites *Nuttall* for the same proposition in *Indoor Billboard*. 162 Wn.2d at 79 – 80. The trial court’s citation of *Nuttall* for the general proposition that causation is required does not “imply” that the decision was based on an erroneous standard of law. As discussed above, the trial court applied the same legal standard—but-for causation—as this Court did in *Indoor Billboard*.

WSTLA and the AG likewise misconstrue the Court of Appeals’ decision, arguing that it is consistent with *Indoor Billboard*. WSTLA, p. 3; AG, p. 6 – 7. To the contrary, the Court of Appeals concluded, apparently as a matter of law, that:

[Claimants] cannot be required to prove that they would not have purchased wireless service had they known about [the UCC].

...

Thus, here, as in *Pickett I* [*Pickett v. Holland America Line-Westours, Inc.*, 101 Wn. App. 901, 6 P.3d 63 (2000)], it is enough to establish causation that they purchased the service and AT&T charged them a fee that was not a tax or government surcharge. This is particularly true because deceptive acts or practices are unlawful whether or not they actually deceive anyone. It is sufficient to prove that a practice has the capacity to deceive a substantial portion of the public to prevail on a CPA claim.

Schnall v. AT&T Wireless Services, Inc., 139 Wn. App. 280, 292, 161 P.3d 395 (2007). In support of this holding, the Court of Appeals expressly relied on *Pickett I*. But the same argument, likewise based on a broad reading of *Pickett I*, was made to this Court by the plaintiff in *Indoor Billboard* and it was squarely rejected:

Although we agree the CPA is to be liberally construed, *Pickett I* carries this construction too far. Therefore, we reject Indoor Billboard's argument that causation may be established merely by a showing that money was lost.

162 Wn.2d at 81. It could not be much clearer that the Court of Appeals based its decision to reverse the trial court on an error of law.

3. *Indoor Billboard* confirms that the trial court properly considered all the relevant evidence on CPA causation.

The decision in *Indoor Billboard* not only makes it clear that the Court of Appeals was wrong, it also confirms that the trial court's decision on class certification was correct. *Indoor Billboard* discusses the evidence in that record that bears on the question of CPA causation. Very similar evidence is in the record here, along with substantial additional evidence that the trier fact would have to be allowed to consider.

The plaintiff in *Indoor Billboard* apparently testified that “he relied on and was confused by information provided by Integra in deciding to purchase Integra’s services.” 162 Wn.2d at 84. The plaintiff further argued that, while the PICC was disclosed on his first invoice, he nonetheless paid it only because of his confusion and because he was “reluctant to contest the charge on his very first bill[.]” *Id.* The defendant countered with evidence that information regarding the nature of the PICC was available to the plaintiff and that his belated challenge to the PICC barred his claims, because he could have chosen not to purchase defendant’s services when he became aware of the PICC in the first instance. *Id.* at 85. This Court held that *all* of this evidence was important for the trier of fact to consider because it raised “genuine issues of material fact . . . regarding a causal link between Integra’s unfair or deceptive acts or practices and Indoor Billboard’s injuries.” *Id.*

The trial court in this case was confronted with an evidentiary record that raised even more substantial factual questions regarding causation. The record included evidence that AWS’ advertisements often did not mention price at all, and when they did they disclosed that customers would be responsible for “taxes and other charges,” in addition to the monthly recurring fees. CP 3517. Some advertisements expressly mentioned that the UCC would be included in these other charges. *Id.* AWS’ subscriber agreements likewise disclosed that the customer would be responsible for “taxes, surcharges, fees, assessments, or recoveries” in addition to other charges, and (as the trial court found) the contracts

applicable to many putative class members expressly referenced the UCC as an example of one of the charges for which the customer was responsible. CP 421 – 422.

There was also substantial evidence regarding information that was available at the point of sale. New subscribers activated service through a variety of channels—AWS-owned stores, independent dealers, by phone or the Internet—but in each channel the subscriber received a great deal of information regarding charges for service at the point of sale. CP 3115 – 21. AWS sales representatives were trained to discuss that there would be additional charges on subscribers' bills, above the monthly recurring fees, and to provide an estimated general range of what those charges might be. *Id.* The record also established there was a vast amount of information available to consumers regarding the UCC and the FUSF from other sources, including other information from AWS, from other wireless and landline telecommunications companies (who also contributed to the FUSF and recovered their contributions from their subscribers by way of a line item charge on their bills)⁷ and from government and media sources. CP 1210 – 3071, 3072 – 2096, 3256 – 3275, 3302 – 3392, 3872 – 4054.

The UCC was likewise not concealed from AWS' subscribers after they activated service; it appeared as an individual line item—as permitted by the FCC—on each monthly bill. CP 3396, 3459, 3470. Moreover, on

⁷ The evidentiary record showed that other providers of telecommunications services, both wireless carriers and landline carriers, passed their USF contributions through to subscribers in the same manner. Because many AWS customers had prior experience with other telecommunications companies, they would have been aware of the FUSF pass-throughs before they activated service with AWS.

at least three different occasions during the putative class period, AWS sent its customers bill messages specifically regarding the UCC, which described the FUSF and the manner in which AWS computed the UCC. CP 3396 – 98. On the issue of CPA causation, perhaps the most important fact is that the vast majority of customers, including all but one of the Named Plaintiffs, paid the itemized UCC without question or protest. CP 4264, 4272, 4275-76, 4289, 4298 – 99, 4301. Indeed, most AWS customers renewed their agreements with AWS on at least two occasions, committing to a new contract notwithstanding that they had been charged the UCC on a monthly basis. CP 31 – 32.

In the face of this evidence, it is conceivable that a particular claimant could convince the trier of fact that some misrepresentation by AWS regarding the UCC caused her injury and that she would not have paid the UCC had she known more about the charge. But in order to resolve her claim fairly, the trier of fact would necessarily be required to take into account her particular circumstances, including the specific misrepresentations she claims to have seen or heard, her prior experience with AWS and other telecommunications carriers and her knowledge of the fact that the FUSF recovery and other government charges routinely appear on wireless bills, why she chose AWS as opposed to another carrier, whether she questioned the UCC and when she did so, what she thought she was paying by way of the UCC when she paid her bills, and whether she renewed her agreement with AWS or, upon termination, chose another carrier that also passed through its FUSF contribution. *See,*

e.g., *Kelley v. Microsoft Corp.*, 251 F.R.D. 544, 558 (W.D. Wash. 2008) (denying class certification of a CPA deception-based claim in light of *Indoor Billboard*). Ultimately, resolution of this issue is likely to turn on her credibility and her state of mind. That evidence, and the great majority of the other evidence on the issue of causation, is individual to her, rather than common to the class.⁸

This Court found in *Indoor Billboard* that similar evidence created “genuine issues of material fact” as to whether the plaintiff suffered injury as a result of the alleged deceptive practices. 162 Wn. 2d at 64. Here, too, the trial court found that the trier of fact must be allowed to take into account *all* of the relevant evidence regarding causation. And, as he properly found, “[i]n the context of this case . . . [t]his proof must necessarily be individual for each potential class member.” CP 421 – 422.

⁸ WSTLA’s argument that AWS “misapprehend[s]” the injury Plaintiffs claim is a vain attempt to recast the claims to circumvent the problem of causation. WSTLA, p. 11. Plaintiffs have pursued this case from the beginning as a “deceptive advertising” case; indeed, WSTLA describes it in those terms. *Id.* at 2. In any event, this recharacterization of the injury does nothing to undermine the trial court’s decision. As noted above, Plaintiffs cannot challenge the act of passing through the UCC by way of a line-item charge on subscribers’ bills because that practice was expressly permitted by controlling federal regulations. To the extent Plaintiffs argue that putative class members were injured by the way the UCC was described on the bills, they have to show that “but for” the allegedly deceptive labels they would not have paid the UCC. This implicates the same type of individualized evidence discussed above, requiring an inquiry into whether a particular claimant saw the UCC on her bills, what she understood it to be, why she paid the charge, etc. *Indoor Billboard* makes it clear that all of this evidence is relevant to the issue of proximate causation, no matter how Plaintiffs now try to recast their claims.

DATED this 20th day of October, 2008.

KIPLING LAW GROUP PLLC

By: 
Michael E. Kipling, WSBA #7677
Marjorie A. Walter, WSBA #40078

*Counsel for Petitioner AT&T Wireless
Services, Inc.*

CERTIFICATE OF SERVICE

I do hereby certify that on this 26th day of October, 2008, I caused to be served a true and correct copy of the foregoing *Answer to Briefs of Amici Curiae Washington Attorney General and Washington State Trial Lawyers Association* via e-mail addressed to the following:

David E. Breskin, Esq.
Daniel F. Johnson, Esq.
Breskin Johnson & Townsend, PLLC
1111 Third Avenue, Suite 2230
Seattle, WA 98101
dbreskin@bjtlegal.com
djohnson@bjtlegal.com
Counsel for Respondents

William W. Houck
Houck Law Firm
4045 – 262nd Avenue SE
Issaquah, WA 98029
Houcklaw@comcast.net
Counsel for Respondents

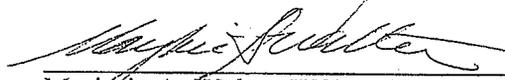
Stephen M. Rummage
Fred B. Burnside
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045
steverummage@dwt.com
fredburnside@dwt.com

Shannon E. Smith
Senior Counsel
Office of the Attorney General
800 5th Avenue, Suite 2000
Seattle, WA 98104
shannons@atg.wa.gov
Counsel for Attorney General of Washington

Paul J. Lawrence
K&L Gates, LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104-1158
paul.lawrence@klgates.com
Counsel for Amicus Curiae Chamber of Commerce of the United States of America and for Certain Washington-Based Companies

Bryan Harnetiaux
Winston & Cashatt
1900 Bank of America Bldg.
601 W. Riverside
Spokane, WA 99201
amicuswstlaf@winstoncashatt.com
*Counsel for Washington State Trial
Lawyers Association Foundation*

Seth L. Cooper
1101 Vermont Ave NW, 11th Flr
Washington, DC 20005
sethcooper@alec.org
*Counsel for Amicus Curiae
American Legislative Exchange
Council*


Marjorie A. Walter, WSBA #40078