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No. 57523-6-I

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

MARTIN SCHNALL, et al.,

Petitioners,

v.

AT&T WIRELESS SERVICES, INC.,

Respondent.

**REPLY BRIEF OF RESPONDENT AT&T WIRELESS SERVICES,
INC. ON CROSS-APPEAL**

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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2006 NOV 7 AM 10:33

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I. INTRODUCTION

On November 22, 2002, nine months before the trial court decided Appellants' motion for class certification, the court denied AT&T Wireless Services, Inc.'s ("AWS") motion for summary judgment. CP 4647-4649. In that motion, AWS sought (among other things) to dismiss Mr. Schnall's claims under the Washington Consumer Protection Act ("CPA") on the ground that his claims for misrepresentation, if any, arose under the laws of another state. CP 748-752. The basis for the Court's decision to deny this summary judgment motion was unclear at the time, but it appears from the Court's Memorandum Opinion Denying Motion for Class Certification that his decision was based on the erroneous conclusion that Washington law applies because Washington has the most significant contacts with Mr. Schnall's misrepresentation claims. CP 421. AWS respectfully submits that this conclusion is incorrect as a matter of law. Thus, Mr. Schnall's appeal of the denial of class certification as to the CPA protection claims should be denied, not only for the reasons stated in Respondent's Brief, but for the further reason that the Washington CPA does not apply to Mr. Schnall's claims.¹

As to Mr. Schnall, the following facts are established:

- He entered into a contract to obtain wireless services in New Jersey. CP 4249 (Schnall Dep., p. 71, ll. 20-25).

¹ Although the parties subsequently settled Mr. Schnall's individual claims, the denial of this summary judgment motion is significant now because, had the motion been granted, Mr. Schnall would not have had standing to move for class certification under the Washington CPA and would therefore have no basis to appeal the denial of class certification on that claim.

- At the time, Mr. Schnall was a resident of Elizabeth, New Jersey and held a New Jersey driver's license. CP 760; *see also* CP 4, 186.
- The contract, by its express terms, is between Mr. Schnall and "the affiliate of AT&T Corp. licensed to provide Service in the area associated with your assigned telephone . . . number." CP 763; *see also* CP 755.
- The contract further provided that "[t]his Agreement is subject to applicable federal and state laws, and tariffs, and the laws of the state associated with the [phone number]." CP 764.
- Mr. Schnall chose a wireless telephone number with a New York area code (917). CP 775.
- The affiliate of AT&T Corp. licensed to provide service in New York was Cellular Telephone Company, a New York partnership, which provided wireless services under the trade name "AT&T Wireless Services" in the New York metropolitan statistical area. CP 756.
- Mr. Schnall provided a New Jersey billing address (CP 760) and there is no evidence that he ever changed this address (*see, e.g.*, CP 771-776).

Based on these facts, there may be a debate as to whether New York or New Jersey law applies to Mr. Schnall's misrepresentation claims, but there certainly is no basis to apply Washington law to his claims.

II. ARGUMENT

A. Under The Restatement (Second) Of Conflict Of Laws § 148 The Law Of New Jersey Applies To Mr. Schnall's Misrepresentation Claims

The parties agree that the Restatement (Second) of Conflict of Laws sets out the applicable choice-of-law principles. Where, as here, it is alleged that “the plaintiff has suffered pecuniary harm on account of his reliance on the defendant’s false representations,” § 148 of the Restatement is the most directly-applicable provision.²

Section 145 of the Restatement, on which the trial court apparently relied, “states a principle applicable to all torts and to all issues in tort and, as a result, is cast in terms of great generality. . . . Title B (Sections 146 to 155) deals with particular torts as to which it is possible to state rules of greater precision.” *Id.*, cmt. a.³ The trial court’s error as to choice of law may have resulted from not recognizing that the principles in § 148 are more pertinent to the misrepresentation claims under the CPA. Memorandum Opinion, p. 5 (CP 421). Section 148(1) of the Restatement sets out “rules of greater precision” that apply to claims of fraud and misrepresentation where it is alleged that a plaintiff has “suffered pecuniary harm on account of his reliance on the defendant’s false representations.”

² Section 148 has been applied in a number of recent cases arising under various state consumer protection acts. *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 230 F.R.D. 61 (2005); *Fink v. Ricoh Corp.*, 365 N.J. Super. 520, 839 A.2d 942, 986 (2003).

³ The trial court did not refer to § 145, but the “relevant criteria” in the Memorandum Opinion are taken from that section. CP 421.

Under § 148, as applied in Washington and elsewhere, the choice of state law is based on an analysis of which state has the most significant contacts, in light of the issues raised by the claim of misrepresentation.

The Restatement lists several important contacts to be considered, including at least four that are particularly significant in this context.

These include:

- “The place, or places, where the plaintiff acted in reliance upon the defendant’s representations.” *Id.*, cmt. f.
- “The place where the plaintiff received the representations.” *Id.*, cmt. g.
- “The plaintiff’s domicile or residence.” *Id.*, cmt. i.
- “The place where the plaintiff is to render performance under the contract.” *Id.*

All four of these significant contacts point to the application of New Jersey law. Plaintiff entered into a contract to purchase wireless services in New Jersey based on statements that were made to him in New Jersey. CP 4249. At that time, and throughout the relevant time period, plaintiff resided in New Jersey. CP 760; *see also* CP 4, 186. His performance, which in his case consisted of paying his wireless service bills, was rendered in New Jersey. CP 760.

Although the Restatement provides that there are no hard-and-fast rules as to the application of § 148,

if any two of the above-mentioned contacts . . . are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues. So when the plaintiff acted in reliance

upon the defendant's representations in a single state, this state will usually be the state of the applicable law, with respect to most issues, if (a) the defendant's representations were received by the plaintiff in this state, or (b) this state is the state of the plaintiff's domicile . . . or (d) this state is the place where the plaintiff was to render at least the great bulk of his performance under his contract with the defendant. The same would be true if any two of the other contacts mentioned [herein] were located in the state in question even though this state was not the place where the plaintiff received the representations.

Id., cmt. j. Here, as noted above, at least four of the critical contacts on which Mr. Schnall's misrepresentation claims are based occurred in New Jersey. Under the Restatement, New Jersey law should apply to any claims based on these alleged misrepresentations.

The only possible alternative choice of law would be New York. Mr. Schnall's contract provided that it was subject to the law of the state associated with his phone number, i.e., New York. CP 764, 775. Although a contractual choice-of-law provision is not necessarily conclusive as to the choice of law for tort claims that arise out of the contractual relationship, it is an important factor in determining which state has the most significant relationship to those claims. *Haberman v. WPPSS*, 109 Wn. 2d 107, 159, 744 P.2d 1032 (1987); *Kammerer v. Western Gear Corp.*, 96 Wn. 2d 416, 423 (1981).

The parties' contractual choice of law, coupled with Mr. Schnall's decision to choose a New York phone number (perhaps because he anticipated that most of the phone calls he would place and receive would be while he was in New York), arguably would make New York law the

most appropriate choice. *Id.*; Restatement (Second) of Conflict of Laws § 148.⁴

B. The Authority Relied On By The Trial Court Does Not Support Its Decision

Notwithstanding the extensive contacts with New Jersey and New York, the trial court apparently believed that Washington law applied because AWS had its headquarters here and because the employees who were in charge of the UCC were based in Washington:

The most significant contacts for the CPA claims are in Washington. All of the marketing materials and service agreements originated in Washington at the direction of Washington employees. All of the billing and disclosure decisions were made by AWS' employees in Washington. All of the relevant documents and most of the witnesses are here. Washington has a strong interest in regulating any behavior by Washington businesses which contravenes the CPA.

Memorandum Opinion, p. 5 (CP 421).⁵

This decision is inconsistent with the evidence that was before the court and erroneous as a matter of law. In fact, at the time Mr. Schnall entered into his contract for wireless services key decisions regarding the UCC were made by AT&T Corporation, the corporate parent of AWS and

⁴ In its Motion for Summary Judgment, AWS reversed the order of these arguments, arguing primarily that New York law should apply because of the choice of law provision in Mr. Schnall's agreement. *See* CP 748-752. Now, based in large part on the recent authority interpreting Restatement (Second) Conflict of Laws § 148, discussed *infra*, AWS believes that New Jersey law should be applied. There has been no change in the argument on which the Motion for Summary Judgment was based, i.e., that there is no basis to apply Washington's CPA to Mr. Schnall's claims.

⁵ As noted above, the court erroneously focused on the criteria in Restatement (Second) of Conflict of Laws § 145.

Cellular Telephone Company. CP 926-929; *see also* CP 979. Moreover, as a matter of law, where a claim is based on misrepresentation “the domicil, residence and place of business of the *plaintiff* [New Jersey] are more important than are similar contacts on the part of the defendant.” Restatement (Second) of Conflict of Laws § 148, cmt. i (emphasis added).

The trial court also cited RCW 19.86.920 for the notion that the Washington CPA was intended by the Legislature to apply to consumer transactions outside the state of Washington. But that statute deals with an entirely different issue: “[I]n deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington.” *Id.*

In the first place, the quoted language applies only in antitrust cases in which it is necessary to decide whether conduct “restrains trade or may substantially lessen competition.” *Id.*⁶ No such issues are involved in this case. Moreover, this language merely provides that the relevant geographic market in such a case is not limited to Washington but may extend beyond the state’s borders. Even where the relevant market extends beyond Washington, however, the Washington law may not be applied unless there is a significant anticompetitive effect within the state. *State v. Sterling Theatres Co.*, 64 Wn. 2d 761, 764 (1964); *Home*

⁶ This would include cases involving restraint of trade claims under RCW 19.86.030, monopolization claims under RCW 19.86.040 and/or anticompetitive mergers or acquisitions under RCW 19.86.060.

Insurance Co. v. Dick, 281 U.S. 397, 410-11, 50 S. Ct. 338, 74 L. Ed. 926 (1930).

The determination of the relevant geographic market in an antitrust case is an entirely different issue than the choice-of-law issue presented here. The quoted language from RCW 19.86.920 says nothing about whether the Washington legislature intended the Washington Consumer Protection Act to apply to transactions—and consumers—outside of the state. Indeed, this Court has held that the Consumer Protection Act is intended to protect *Washington* citizens from unfair and deceptive trade and commercial practices. *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 547-48 (2000). Moreover, the unfair or deceptive acts or practices to which this Court referred in *Dwyer* apply only in the conduct of any trade or commerce. RCW 19.86.020. The terms “trade” and “commerce” are defined in the statute to include the “sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.” RCW 19.86.010(2).

AWS noted in its Respondent’s Brief that the cases cited by the court in its Memorandum Decision do not support application of Washington law to Mr. Schnall’s misrepresentation claims. Respondent’s Brief, pp. 42-43. On the other hand, *Kammerer v. Western Gear Corp.*, *supra*, is a very similar case in which the Washington Supreme Court applied Restatement (Second) of Conflict of Laws § 148. In *Kammerer*, notwithstanding that the defendant was located in Washington, the Supreme Court chose to apply California law, finding that the most

significant relationship to the misrepresentation claims was with California. 96 Wn. 2d at 423. There, as here, the contract was entered in the state where the plaintiff received the alleged misrepresentations. Plaintiff's performance of the contract was in California, not Washington, just as Mr. Schnall performed the contract by paying the bills sent to his New Jersey home. *Kammerer* differs in that the parties chose California law to apply to their contract, but while this factor might lead to application of the law of New York in this case, it certainly does not support the trial court's decision to apply Washington law to Mr. Schnall's claims.

Plaintiffs argue that "*Kammerer* could hardly be more different" than the current case, but the only distinction they are able to draw is that the contract here did not involve negotiations. It is important to recall, however, that the claim here is based on alleged misrepresentation, not breach of contract. Plaintiff certainly does allege that he received misrepresentations in New Jersey, not Washington, and that he acted on those alleged misrepresentations in New Jersey.

C. Recent Decisions Applying § 148 Establish That The Law Of Mr. Schnall's Home State Applies To His Misrepresentation Claims

The trial court did not have the benefit of several recent cases that apply § 148 to claims of misrepresentation arising from interstate (often nationwide) marketing campaigns. *In re Pharmaceutical Industry Average Wholesale Price Litigation*, 230 F.R.D. 61 (2005), the U.S. District Court in Massachusetts analyzed choice-of-law issues in a

putative nationwide class action. Applying Restatement §148 to claims arising under consumer protection laws, the court held that “the most significant factor is where the plaintiff acted in reliance on a defendant’s representation.” *Id.* at 82-83.

Even though the defendants made the alleged misrepresentations in the states of their principal places of business . . . the Restatement § 148 factors point to applying the laws of the home states of the class members. The class members purchased [drugs] in reliance on the published [documents] in states where they were receiving treatments from their physicians, typically their places of residence. Three of the significant contacts in § 148 – the place of action in reliance, the place where misrepresentations were received, and the place of plaintiffs’ domicile – call for application of the law of the home state of each consumer. The conclusion that the home state of the consumer has a more significant relationship to the alleged fraud than the place of business of the defendant is in accordance with the principles of Restatement § 6, since state consumer protection statutes are designed to protect consumers rather than to regulate corporate conduct.

Id. at 83.

Similarly, in *Fink v. Ricoh Corp.*, 365 N.J. Super. 520, 839 A.2d 942, 986 (2003), the court held that § 148 applied to claims of misrepresentation based on allegedly deceptive marketing materials disseminated across the nation from defendant’s principal place of business in New Jersey. Applying the factors set out in § 148, the court concluded that the law of the putative class members’ home state would apply to any claims of misrepresentation because “they are likely to have received the advertising brochure containing the allegedly false

representations in the states of their residence, made their decisions to purchase the camera in those states, purportedly as a result of their having read and relied to a substantial extent on the content of such false representations, and incurred the legal obligation to made (*sic*) payments for the camera in those states.” *Id.*; see also *Lewis v. Horace Mann Ins. Co.*, 410 F. Supp. 2d 640, 655-56 (N.D. Ohio 2005) (plaintiff’s home state of Ohio determined to have not only *more*, but more *important* contacts than Michigan).

D. Washington Must Respect The Interests Of Other States In Applying Their Consumer Laws To Protect Their Citizens From Alleged Misrepresentation

It is widely recognized that “state consumer protection acts are designed to protect the residents of the states in which the statutes are promulgated.” *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206 (E.D. Penn. 2000); *In re Pharmaceutical Industry, supra*, 230 F.R.D. at 83; *In re Relafen Antitrust Litigation*, 221 F.R.D. 260, 277 (D. Mass. 2004); *Dwyer*, 103 Wn. App. at 547-48. Because each of the sovereign states, just like Washington, has a significant interest in protecting its consumers, “[c]ourts have generally rejected application of the law of a defendant’s principal place of business to a nationwide class.” *In re Pharmaceutical Industry, supra*, 230 F.R.D. at 83.

We do not for a second suppose that Indiana would apply Michigan law to an auto sale if Michigan permitted auto companies to conceal defects from customers; nor do we think it likely that Indiana would apply Korean law . . . to claims of deceit in the sale of Hyundai automobiles, in Indiana, to residents of Indiana, or French law to the sale of

cars equipped with Michelin tires . . . [it] follows that Indiana's choice-of-law rule selects the 50 states of multiple territories where the buyers live, and not the place of the sellers' headquarters, for these suits.

In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002).⁷

III. CONCLUSION

Mr. Schnall claims he suffered pecuniary loss in reliance on misrepresentations that he received in New Jersey, the state where he lived. As a result, he claims, he entered a contract in New Jersey pursuant to which he was billed in New Jersey for wireless services.

The company with which he contracted was a New York partnership that was licensed to provide wireless services in the metropolitan New York City area. Mr. Schnall chose a New York phone number because he anticipated using the phone largely in New York. His contract said that it was subject to the law of the state associated with his phone number.

Under these circumstances, there may be a debate as to whether Mr. Schnall's misrepresentation claims are governed by the laws of New Jersey or New York. But there is no basis to conclude that Washington law applies, and the trial court erred in that conclusion.

⁷ It is important to note that due process issues can arise if a state court attempts to impose its law on out-of-state transactions unless the state has significant contacts with the claims. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821-22, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985).

DATED this 27 day of October, 2006.

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CERTIFICATE OF SERVICE

I do hereby certify that on this 27TH day of October, 2006, I caused to be served a true and correct copy of the foregoing *Reply Brief of Respondent AT&T Wireless Services, Inc. on Cross-Appeal* by method indicated below and addressed to the following:

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