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~~CLERK~~ Court of Appeals No. 57523-6-I

SUPREME COURT OF THE STATE OF WASHINGTON

MARTIN SCHNALL, et al.,

Respondents,

v.

AT&T WIRELESS SERVICES, INC.,

Petitioner.

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ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

Respondents Martin Schnell, Kelly Lemons, and Nathan Riensche ("Plaintiffs") sued Petitioner AT&T Wireless Services, Inc. ("AWS") and its successors for breach of contract and violations of Washington's Consumer Protection Act ("CPA") for charging a "universal connectivity charge" ("UCC") without disclosing it in the advertised monthly rate and for misleading customers into thinking it was a mandatory tax, rather than an extra charge created by AWS to recover overhead costs of doing business as a wireless carrier. AWS collected millions of dollars through the UCC but the damages to any individual consumer are so small that private individual suits by consumers would be impracticable. Plaintiffs sought to represent a class of AWS subscribers on their claims but the trial court denied class certification. The Court of Appeals reversed, and AWS petitioned for review in this Court.

Review is not justified under the standards for Supreme Court review set forth in RAP 13.4(b). The Court of Appeals decision is consistent with the rule that all doubts should be resolved in favor of granting class certification, and with the Legislative objectives

embodied in the CPA and with this Court's precedents, and raises no federal constitutional issues. The Petition should be denied.

II. COURT OF APPEALS DECISION

The trial court denied class certification of Plaintiffs' CPA claims based on the erroneous conclusion that the CPA requires the plaintiff consumer to prove that he or she "relied upon" the defendant's deceptive conduct, which raises individualized issues that preclude class certification. Clerk's Papers ("CP") at 421-22. The Court of Appeals reversed, holding that plaintiffs may establish a "causal link" under the CPA by means other than individualized reliance, and class certification was appropriate. *Schnall v. AT&T Wireless Servs., Inc.*, --Wn.App.--, 161 P.3d 395, 2007 Wash. App. Lexis 1667 ¶ 17.

The Court of Appeals affirmed the trial court's conclusion that, under applicable choice-of-law rules, the Washington CPA could be applied to the claims of all putative class members nationwide, because the deceptive practices complained of were undertaken in the State of Washington, providing a significant contacts with every class member's claim. *Id.* ¶ 21.

The Court of Appeals also reversed the trial court's denial of class certification on the Plaintiffs' breach of contract claims because those claims depend on a single, predominant question which is common to all class members, i.e., whether the language chosen by AWS in its standard form contracts permitted AWS to impose a "universal connectivity charge" on its customers. *Id.* ¶ 27.

III. ISSUES PRESENTED FOR REVIEW

The issues presented by AWS's petition are:

(1) Does the decision of the Court of Appeals—holding that a "causal link" under the CPA may be established by means other than reliance—conflict with the decisions of this Court or any other Washington appellate court?

(2) May a Washington court apply Washington law to foreign consumers' claims against a Washington corporation for actions taken in Washington, consistent with this Court's choice-of-law rules and with due process of law?

IV. ARGUMENT

A. The Court of Appeals' Interpretation of the CPA's Causation Requirement Is Consistent with Precedent.

AWS asks the Court to review the decision below under RAP 13.4(b)(1), contending the Court of Appeals decision concerning causation under the CPA “rewrites” the CPA and conflicts with decisions of this Court. Of course, the Court of Appeals did not “rewrite” the CPA, as the CPA does not even expressly require proof of causation, and until this Court’s decision in *Hangman Ridge*, there was no requirement to prove causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 793, 719 P.2d 531 (1986).¹ *Hangman Ridge* held that a plaintiff must prove some kind of “causal link” between the deceptive practice and

¹ Prior to *Hangman Ridge*, the Court required proof of only three elements in a private action under the CPA: (1) an unfair or deceptive act, (2) in trade or commerce, (3) affecting the public interest. *Anhold v. Daniels*, 94 Wn.2d 40, 45, 614 P.2d 184 (1980). The latter prong incorporated a “causation-like” requirement that the defendant “induced” the plaintiff to act or refrain from acting. *Id.* at 46; see *Hangman Ridge*, 105 Wn.2d at 793 (noting that “inducement” element foreshadowed “causal link” element). As discussed further below, this Court expressly declined to require a consumer to prove “inducement” by actual reliance. *Eastlake Construction Co., Inc. v. Hess*, 102 Wn.2d 30, 52, 686 P.2d 465 (1984).

consumer injury, but did not state what type of evidence would be required. *Id.*

After *Hangman Ridge*, the only decision to address the causation question directly was *Pickett v. Holland Am. Line-Westours, Inc.*, 101 Wn. App. 901, 6 P.3d 63 (2000), *reversed on other grounds*, 145 Wn.2d 178, 35 P.3d 351 (2001). There, the Court of Appeals had held, as it did here, that the CPA does not require proof of reliance to prove a causal link. 101 Wn. App. at 920. This Court reversed that decision on the ground that the court should not have overturned the parties' settlement, and did not decide the substantive legal issues, such as causation. This Court commented that, at the time of the parties' settlement, whether actual reliance was required was at least a "debatable" question "without a clear answer under Washington law." 145 Wn.2d at 197. This Court did not disagree with the Court of Appeals' answer to that question, but simply found it unnecessary to the resolution of the case before it.

Thus, it is clear that the causation question decided in this case is not inconsistent with this Court's precedents, as AWS suggests. This Court has never said proving a "causal link" between

a deceptive trade practice and a consumer's injury requires proof of actual reliance, as AWS asserts. *See Pickett*, 145 Wn.2d at 146; *Hangman Ridge*, 105 Wn.2d at 793.

In fact, the Court of Appeals' analysis is perfectly consistent with this Court's precedents. The Court has expressly rejected such a restrictive reading of the statute as incompatible with the CPA's objectives and its express mandate of liberal construction. *See Eastlake Construction Co., Inc. v. Hess*, 102 Wn.2d 30, 52, 686 P.2d 465 (1984) (citing RCW 19.86.920). In *Hess*, the Court rejected the argument that the consumer in a private suit under the CPA had to prove he was actually induced to purchase by the seller's misrepresentations, holding that it was enough that the misrepresentations were the *type* used to induce potential purchasers. *Id.* at 51. As the Court explained, the CPA was designed to protect the public from unfair or deceptive acts or practices; to require proof that each affected consumer was actually induced to act by the defendant would discourage accomplishment of that objective:

A contrary conclusion would exclude from the operation of the act conduct which clearly should be subject to the express legislative purpose of protecting the public from unfair, deceptive, and fraudulent acts

or practices. . . . ***Courts should not readily find an absence of inducement to act in cases where evidence is presented of a pattern of deceptive practices.***

Id. at 52 (emphasis added).

This approach is consistent with the Legislature's mandate of liberal construction, and with the courts' interpretation of the other elements of a CPA claim. As the Attorney General explained in its amicus brief to the Court of Appeals, it would make little sense to require actual reliance on a deceptive act or practice, because one of the core principles in applying the CPA is that the act or practice does not have to actually deceive anyone in order to be unlawful. Brief of *Amicus Curiae* Attorney General of Washington at 14. It is well-established that a practice need only have the "capacity to deceive" the public to violate the CPA. *Nelson v. Nat'l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 392, 842 P.2d 473 (1992). The purpose of this rule is to *deter* deceptive conduct *before* anyone is injured. *Hangman Ridge*, 105 Wn.2d at 785. Thus, a practice is unfair or deceptive if it induces contact through deception, even if the consumer later becomes fully informed, before signing the

contract or completing the transaction. *Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 116, 22 P.3d 818 (2001).

Requiring reliance is tantamount to requiring actual deception. To require a consumer to prove that he relied upon a deceptive act would require him to prove exactly what the law clearly does not require—actual deception and inducement to act—and would render these well-established principles superfluous.

This case concerns the propriety of certifying a consumer class under CR 23. The Court of Appeals decision that reliance is not the only way to establish a causal link in a private CPA action is consistent with and compelled by the critical role that class actions serve in effective enforcement of the CPA. The Legislature deliberately chose a “dual enforcement scheme” by enlisting consumers “to act as private attorneys general in protecting the public’s interest against unfair and deceptive acts and practices in trade and commerce.” *Scott v. Cingular Wireless*, 161 P.3d 1000, 2007 Wash. Lexis 479, ¶ 13 (2007); *see also* Brief of Amicus Curiae Attorney General of Washington at 5. Private CPA suits are “an integral part of CPA enforcement.” *Scott*, 161 P.3d at --, ¶ 13.

Private suits such as this one, however, are not practical on an individual basis, because individual suits are not economically feasible. “As we have noted before, when consumer claims are small but numerous, a class-based remedy is the only effective method to vindicate the public’s rights.” *Scott*, 161 P.3d at --, ¶ 11 (citing *Darling v. Champion Home builders Co.*, 96 Wn.2d 701, 706, 638 P.2d 1249 (1982)). “Class suits are an important tool for carrying out the dual enforcement scheme of the CPA. . . . [A] class action may be the only means that the public interest may be vindicated.” *Dix v. ICT Group, Inc.*, 161 P.3d 1016, 2007 Wash. Lexis 476, ¶24 (2007).

Adopting the position of AWS, that individualized proof of actual individual reliance is necessary to establish a causal link under the CPA, would eliminate the availability of consumer class actions, and with that, bring an end to small consumer claims altogether. This case involves a widespread practice which costs millions of consumers a small amount of money. Because there is no dispute that the price of wireless phone service is not only material but critical to the consumer's initial selection of service, and

AWS misrepresented the price of service by omitting mention of the additional UCC in its marketing and contracts, once the consumer is placed in a position where he or she has to pay this small added charge beyond the advertised price, causation inheres in the fact of paying the added charge. *See Pickett*, 101 Wn. App. at 920. The consumer has now been placed in a position where he or she must pay or go through the inconvenience and added expense of changing wireless carriers. Requiring proof of individual consumer reliance in order to establish a claim under the CPA would conflict with the fundamental objective of the Act, "to protect the public and foster fair and honest competition." RCW 19.86.920.

The Court of Appeals decision in this case is consistent with the statute and this Court's precedents, and is compelled by the dual enforcement scheme prescribed by the Legislature. The Petition for Review does not meet the standard for review in RAP 13.4(b)(1) and should be denied.

B. There is No Other Ground for Accepting Review of the Causation Issue.

AWS argues that each of the other grounds for granting review under RAP 13.4(b) is met in this case, but these arguments

are unavailing. First, there is no “conflict” between the Court of Appeals decision in this case and its decision in *Nuttall v. Dowell*, 31 Wn.App. 98, 639 P.2d 832 (1982). RAP 13.4(b)(2). *Nuttall* was decided before a “causal link” was required in a private CPA action, it is inconsistent with this Court’s subsequent opinion in *Eastlake v. Hess*, and it was decided by Division I, the very same court that decided this case, and that court found it easily distinguishable from this case. *Schnall*, 161 P.3d at -, ¶ 14.

Nor is there a “significant question of law” under the U.S. Constitution in this case to justify review under RAP 13.4(b)(3). AWS suggests the Court of Appeals decision contravenes the FCC’s rule permitting pass-through charges to consumers. In fact, the FCC expressly forbids carriers to disguise such charges to look like a tax rather than a discretionary charge.² AWS will be liable in this case for *charging* the UCC only if it did so by *deceptive* means. It is well

² See *Second Report & Order In the Matter of Truth-in-Billing and Billing Format*, 20 F.C.C.R. 6448, 6461 (2005) (“we reiterate that it is a misleading practice for carriers to state or imply that a charge is required by the government when it is the carrier’s business decision as to whether and how much of such costs they choose to recover directly from consumers through a line item charge.”), *vacated on other grounds*, *Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 457 F.3d 1238 (11th Cir. 2006).

settled that federal law does not preempt state consumer protection laws against deceptive marketing practices. *Tenore v. AT&T Wireless Services, Inc.*, 136 Wn.2d 322, 344, 962 P.2d 104 (1998).

Finally, AWS asserts that further review in this Court is appropriate under RAP 13.4(b)(4) because the Court of Appeals decision essentially removes any causation requirement entirely. To the contrary, the Court of Appeals decision expressly holds that a “causal link” *is* required, but that it need not always be established by proof of individual reliance. *Schnall*, 161 P.3d at -, ¶ 17.

AWS shrilly declares that the Court of Appeals decision will result in “many more such claims” to be filed in Washington, “which will increase the burden on Washington’s courts.” Pet. at 12. AWS posits California’s consumer protection statute, the Unfair Competition Law (UCL), as cautionary tale. Cal. Bus. & Prof. Code § 17200. Until recently, the UCL contained what has been termed a “loophole” that allowed a plaintiff to bring a UCL action on behalf of the abstract “general public,” even though the plaintiff had not purchased the defendant’s product or been damaged or misled. *McAdams v. Monier*, 151 Cal.App. 4th 667, 685 (2007). The CPA

has never contained such a loophole, and has always required injury to support a private cause of action. *See* RCW 19.86.090. The decision below does not change that. *Schnall*, 161 P.3d at --, ¶¶ 11, 17.³ There is no basis under RAP 13.4(b) for review of the Court of Appeals decision, and the Petition should be denied.

C. Both Lower Courts Correctly Applied Washington Law Consistent with Settled Choice-of-Law Principles.

The trial court concluded that it could apply the Washington CPA to the claims of all class members nationwide because all of the allegedly deceptive acts were undertaken in and emanated from Washington. CP 418. When plaintiffs appealed the denial of class certification, AWS cross-appealed this aspect of the court's decision. The Court of Appeals affirmed on this issue, on the same reasoning as the trial court, and AWS petitions this Court for further review.

³ In 2004, the UCL was amended by referendum, and now it contains language similar to the Washington CPA. *Compare id.* (private cause of action under UCL for person who "suffered injury in fact and ... lost money as a result of such unfair competition") with RCW 19.86.090 (private cause of action for "any person who is injured in his or her business or property by a violation" of CPA). Contrary to AWS's suggestion, this amendment did *not* impose a requirement that the plaintiff prove actual reliance in order to establish causation. *McAdams*, 151 Cal.App. at 685 (reversing denial of class certification; evidence of material misrepresentations establishes inference of causation for entire class).

AWS claims the lower courts' reasoning conflicts with this Court's choice-of-law analysis in *Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 635 P.2d 708 (1981), and raises a "significant question" under the United States Constitution, as expressed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 105 S. Ct. 2965, 86 L. Ed. 2d 628 (1985). RAP 13.4(b)(1) & (3). A brief review of these cases shows that AWS badly misconstrues their legal principles, and the courts below employed the correct analysis.

1. The Opinions Below Applied the Correct Choice of Law Analysis and Are Consistent with *Kammerer*.

In *Kammerer*, this Court held that although punitive damages are not allowed in Washington, a Washington court can award punitive damages under the law of California if California has a significant interest in the controversy and that interest would be furthered by application of its law. 96 Wn.2d at 423. The Court applied the well-established "interest analysis" to the choice of law problem before it, and found that California had an interest in permitting an award of punitive damages and Washington had no

interest in preventing such an award. *Id.* at 422.⁴ Under the Court's analysis, it is not a question of which state had the most contacts, as AWS suggests, because often more than one state has significant contacts. *Id.* What matters, if the two laws conflict, is which state's interest is superior?

AWS does not undertake any such balancing of interests, or even identify any conflicts. Instead, it simply argues mechanistically that the "most" significant contacts in each class members' claims in this case are with each class member's home state, because that is where the plaintiff purchased AWS's services. But *Kammerer* does not support this approach; it recognizes that either state's law could be applied where there are significant contacts with each, and the decision should be based upon the relative interests of each state in application of its law. That is precisely what the courts below did in this case. They found that every class member's claim had

⁴ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n. 11, 101 S. Ct. 633; 66 L. Ed. 2d 521 (1981), explains the advent of "interest analysis" to replace the old approach, which focused on where a particular event took place: "For example, in cases characterized as contract cases, the law of the place of contracting controlled the determination of such issues as capacity, fraud, consideration, duty, performance, and the like." That approach, suggested in AWS's analysis, "has scant relevance for today." *Id.*

significant contacts with the state of Washington—all of the deceptive marketing materials originated here, all of the marketing and billing decisions were made here, all of the evidence and witnesses are located here—and Washington has a significant interest in applying its consumer protection laws to deceptive acts undertaken here. *Schmall*, 161 P.3d at --, ¶ 21. The purpose of the CPA is to *deter* deceptive conduct, *Hangman Ridge*, 105 Wn.2d at 785, and application of the CPA to the conduct alleged here would serve that interest. The courts below followed *Kammerer*.

2. The Application of Washington Law Does not Violate Any Federal Constitutional Limits.

This analysis is also consistent with federal constitutional limitations on choice of law. In *Phillips Petroleum*, the Court held that, under the Due Process Clause of the federal Constitution, a Kansas court could not apply its own contract and fraud laws to the claims of non-resident class-members if their claims had no relationship to the state of Kansas. 472 U.S. at 821-22. The Court explained that the federal constitution imposes “modest restrictions” on application of the forum state’s law to the claims of non-residents:

[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.

Id., at 818 (quoting *Allstate*, 449 U.S. at 312-313). The Court acknowledged that “in many situations a state court may be free to apply one of several choices of law,” such as in a nationwide class action. *Id.* at 823 (citing *Allstate*, 449 U.S. 302).

The modest limitation articulated in *Phillips Petroleum* is plainly not implicated here. Unlike the application of Kansas law to foreign plaintiffs' claims in *Phillips Petroleum*, each class member's claim in this case *has* significant contacts with the state of Washington, as both courts below readily found, and Washington has a strong interest in applying its consumer protection law to those claims. Accordingly, there is no federal constitutional concern to speak of, and no basis for further review in this Court.

D. There is No Basis for Review of the Decision on Plaintiffs' Breach of Contract Claims.

AWS does not contend that the Court of Appeals' decision concerning Plaintiffs' breach of contract claims meets any of the applicable standards for review in this Court. This Court ordinarily

reviews only those questions properly raised in the Petition, and if anything, may *limit* the issues it considers. RAP 13.7(b) AWS cites no authority for *expanding* Supreme Court review beyond those issues properly brought before it under the standards set forth in RAP 13.4(b).

There is no basis to review the Court of Appeals' decision concerning the Plaintiffs' contract claims. The court correctly found that the Plaintiffs' claims depend upon interpretation of a single, boilerplate phrase in a standard form adhesion contract AWS used with all of its customers nationwide, creating a single predominant question for all class members. *Schnall*, 161 P.3d--, ¶ 27.⁵ AWS's contention that its standardized contract language could have different meanings for each of its millions of subscribers, based upon some hypothetical "context" evidence is nonsensical. *See id.* ¶ 28:

Having availed itself of the benefits of a standardized, boilerplate contract used across the nation, AT&T cannot now assert that the contracts are to be

⁵ AWS's assertion that some of the class members' contracts contained specific reference to the UCC and others did not is simply false. *See* CP 62 (January 2003 version of Terms & Conditions of Service was first to refer to universal connectivity charge). The proposed class period ends in January 2003. CP 23.

interpreted individually based on the intent of each consumer at the time of purchase.

See also Restatement (Second) of Contracts § 211(2) (standardized agreements to be interpreted “as treating alike all those similarly situated, without regard to their knowledge or understanding of the terms of the writing”). AWS did not expect its customers would even *read* their subscriber agreements, much less formulate an “intent” about the meaning of the language. *See* CP 70. It is properly subject to a single class wide determination of its meaning. *See Mortimore v. FDIC*, 197 F.R.D. 432, 438 (W.D. Wash. 2000) (case involving the use of form contracts “is particularly appropriate to use the class action procedure”).

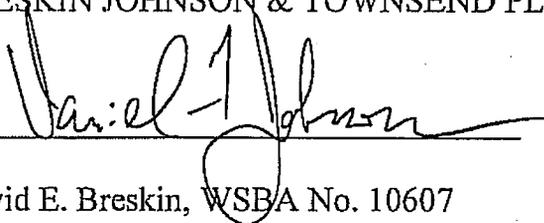
V. CONCLUSION

The Court should deny the Petition for Review in this case because the Court of Appeals decision is consistent with precedent and AWS has failed to meet the standards for Supreme Court review.

DATED this 16th day of August, 2007.

BRESKIN JOHNSON & TOWNSEND PLLC

By

A handwritten signature in black ink, appearing to read "Daniel F. Johnson", written over a horizontal line.

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Importance: High

Please find attached the ANSWER TO PETITION FOR REVIEW in the above referenced case.