Supreme Court No. 1032871
Court of Appeals, Division I No. 85094-6
King Co. Superior Court Cause No. 21-2-08552-7

TRACFONE WIRELESS, INC.,

Plaintiffs-Petitioners,

v.

CITY OF RENTON,

Defendant-Respondent.

ANSWER TO PETITION FOR REVIEW

Kari L. Sand, WSBA #27355
Attorney for Defendant-Respondent
City of Renton
OGDEN MURPHY WALLACE
701 Fifth Avenue, Suite 5600
Seattle, WA 98104-7045
Tel: (206) 447-7000
Fax: (206) 447-0215

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I. INTRODUCTION

This Petition for Review comes before this Court after a four-year effort by TracFone Wireless, Inc. ("TracFone") to reduce its tax liability under the City of Renton's ("Renton") telephone utility tax provision of the Renton Municipal Code ("RMC") chapter 5-11. The City of Renton Hearing Examiner, King County Superior Court, and Court of Appeals have all correctly ruled that: (1) TracFone engages in the "telephone business" under RMC 5-11-1(A)(1) and RCW 35A.82.060, and (2) TracFone's gross income from retailers is taxable and not excluded under the so-called "resale proviso" in RCW 35A.82.060(1). TracFone now invites this Court to review its unsupported interpretation of the relevant statute and case law.

In its Petition for Review ("Petition"), TracFone focuses on the resale proviso, arguing that the Court of Appeals erred in finding that TracFone does not sell network telephone service "for the purpose of resale." *See*. Conspicuously absent from TracFone's petition is any reference to the holding in *TracFone*

Wireless, Inc. v. Washington Dep't of Revenue, in which this Court made several important findings that remain relevant. 170 Wn.2d 273, 296, 242 P.3d 810, n.15 (2010). Most notably, this Court found that "**TracFone itself provides the use of radio access lines to the subscribers of TracFone's wireless service**," and "**TracFone, not the retail store, provides the service**." *Id.* This Court has already decided the crux of the resale proviso issue in the present matter, and, in the fourteen years since this Court's decision in *TracFone Wireless*, TracFone's business model has not changed.

TracFone's Petition presents no new arguments that qualify for Supreme Court review under RAP 13.4(b). TracFone simply disagrees with the rulings of the lower courts and attempts to shoehorn its previously rejected arguments into appealable issues by reference to inapplicable case law and mischaracterizations of the Court of Appeals' holding. This case is not a matter of public importance; rather, it is another attempt by TracFone to reduce its telephone utility tax liability.

II. IDENTITY OF RESPONDENT AND COURT OF APPEALS' DECISION

Respondent City of Renton opposes TracFone's Petition for Review of the Court of Appeals' published decision, *TracFone, Inc. v. City of Renton*, No. 85094-6-I, __ Wn.App.2d __, 547 P.3d 902 (April 29, 2024), *reconsideration denied* (May 29, 2024).

III. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly affirmed the Superior Court's finding that, as a matter of law, TracFone's gross income from its sales through Renton retailers was subject to Renton's telephone utility tax and not exempt under the resale proviso. [*Yes*]

2. Whether the Court of Appeals properly applied the summary judgment standard. [*Yes*]

IV. COUNTERSTATEMENT OF THE CASE

A. TracFone Is a Telephone Business.

TracFone sells TracFone-branded cellular phones and prepaid wireless telephone services. CP 255-56 (Declaration of Nate Malone, Renton Tax & License Manager ("Malone Decl.") at ¶ 8) and CP 298-300 (Declaration of Garth Ashpaugh ("Ashpaugh Decl.") at ¶¶ 3-11). TracFone provides its customers access to network telephone service by purchasing cellular radio service at wholesale from network carriers and then reselling it at retail. CP 300-01; 371-523 (Ashpaugh Decl. at ¶ 12). TracFone contracts for the purchase of cellular radio service with various wireless network carriers (*e.g.*, Verizon, T-Mobile, Sprint, AT&T, etc.), then TracFone resells the service to its customers at retail both directly and through various retailers (*e.g.*, Walmart, Fred Meyer, etc.). CP 255-56 (Malone Decl. at ¶ 8). TracFone sells its prepaid wireless services and branded handsets through more than 80,000 retail locations nationwide, as well as through its website and customer care

toll-free number. CP 255 and 266-68 (Malone Decl. at ¶ 8 & Ex. 2 (TracFone marketing brochure)). TracFone's marketing materials tout: "unlimited talk & text plus unlimited carryover data" and that "TracFone uses the networks of major national wireless carriers. We have a vast national coverage area so you can make calls from almost anywhere in the U.S." CP 266-68 (TracFone marketing brochure).

B. TracFone Provides Network Telephone Service Access to Customers through Retailers.

In addition to its direct sales, TracFone also sells airtime indirectly through various retailers. TracFone's retailers do not offer access to network telephone service; TracFone does. Customers who buy TracFone airtime cards and TracFone-branded handsets from third party retailers must still go through TracFone to "activate" and then use the wireless service. CP 300 (Ashpaugh Decl. at ¶ 9). The airtime cards/codes have no value until activated by TracFone upon sale to the customer. CP 299-300 (*Id*. at ¶ 7). The TracFone-branded equipment is not capable of providing access to network telephone service,

including commercial mobile radio services and wireless service, until "activated" by TracFone and cannot be used to provide service through any wireless service provider except TracFone. *Id*.

TracFone's terms and conditions of service, which apply to all TracFone customers, establish that TracFone, not the retailers, provides TracFone's customers with access to network telephone service. For example, TracFone's terms and conditions explicitly state: "By purchasing, activating, and/or using any TracFone product ("Product") or the wireless services provided by TracFone ("Service"), you acknowledge and agree to these Terms and Conditions of Service." CP 274. Further, the terms and conditions dictate that: "TracFone Service can only be activated where TracFone Service is offered and supported by TracFone." CP 273. Finally, TracFone retains the right to modify or cancel the service for any reason at any time. CP 273, 256-57 (TracFone Terms and Conditions and Malone Decl. at ¶ 10). The terms and conditions illustrate that TracFone, not the

retailers, provides access to network telephone service to TracFone's customers. *Id*. & ¶ 12 & Ex. 6; *see also*, CP 300-01 (Ashpaugh Decl. at ¶¶ 9-12 & Ex. 3; ¶ 15 & Ex. 4). TracFone was unable to present any contradictory evidence to refute the dispositive fact that it alone is the provider of network telephone access to its end users.

C. Procedural History.

On March 12, 2021, the Hearing Examiner issued his Findings of Fact, Conclusions of Law, and Ruling on the parties' summary judgment motions. CP 1517-24 (Ruling). The Hearing Examiner made two key rulings.

First, the Hearing Examiner found that TracFone was subject to Renton's telephone utility tax because it engages in the "telephone business" and provides its customers with "network telephone service" per the applicable statutes. CP 1524 (Ruling) ("TracFone has been engaging in the telephone business in the City of Renton and…its gross income/receipts from that activity is subject to the City's utility tax"). The

Hearing Examiner rejected TracFone's argument that it is not a "telephone business" because it does not own or operate its own network facilities, correctly holding that the key question is whether TracFone *provides access* to such facilities. CP 1520 ("TracFone doesn't need to operate or manage any network telephone facilities to be subject to the RCW 35A.82.060 tax.").

Second, the Hearing Examiner held that the resale proviso under RCW 35A.92.060 does not apply to TracFone's revenue from retailers such as Walmart and Fred Meyer. The crucial factor underpinning this determination was that the retailers and distributors "never at any point have purchased [network telephone] service from TracFone." CP 1630. Accordingly, the Hearing Examiner held that TracFone's gross income derived from its sales through retailers is also subject to the telephone utility tax.

TracFone petitioned the King County Superior Court for a Writ of Review on June 29, 2021. After briefing and oral argument, the Superior Court issued Findings of Fact and

Conclusions of Law. CP 3900-11. The Superior Court affirmed the Hearing Examiner's Order on the same grounds, clarifying that it is *TracFone* reselling the network telephone service, not the retailers. CP 3902 (FOF 4). TracFone subsequently appealed this decision to the Court of Appeals.

D. Court of Appeals' Decision.

On April 29, 2024, after briefing and oral argument, the Court of Appeals issued its decision on TracFone's appeal of the Superior Court's ruling. *TracFone, Inc. v. City of Renton*, 547 P.3d 902 (April 29, 2024), *reconsideration denied* (May 29, 2024). Again, the court affirmed summary judgment in Renton's favor. The Court of Appeals made the same two key findings: (1) TracFone operates as a "telephone business" in Renton and its revenue is therefore taxable; and (2) even TracFone's revenues from retailers like Walmart and Safeway are taxable and not exempt under the resale proviso of RCW 35A.82.060, given the retailers never acquire or sell actual network telephone service.

TracFone filed its Petition before this Court on June 28, 2024.

V. ARGUMENT

A. Issues Raised by Petitioner Do Not Meet the Criteria for Review under RAP 13.4(b).

This Court grants review only if the criteria set forth in RAP 13.4(b) are met:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

TracFone asserts that RAP 13.4(b)(1), (2), and (4) apply in this case. Petition at 1. However, TracFone has failed to identify a conflict with any decision or issue of substantial public interest that would warrant review under RAP 13.4(b), instead asking this Court to overturn the Court of Appeals' application of the proper standards for both summary judgment

and the resale proviso under RCW 35A.82.060. TracFone has already exhausted its opportunities to vindicate such perceived errors. "As the highest court in the state, the Supreme Court is a court of law, 'not a court of error correction.'" Wash. State Bar Ass'n, Washington Appellate Practice Deskbook §18.2(5), at 18-7 (4th ed. 2016), quoting Justice Stephen Breyer, *Reflections on the Role of Appellate Courts: a View from the Supreme Court*, 8 J. App. Prac. & Process 91, 92 (Spring 2006). None of the RAP 13.4(b) criteria are met; thus, review by this Court is unwarranted.

B. The Court of Appeals' Decision Is Consistent with *City of Seattle v. T-Mobile West* and RCW 35A.82.060.

The Court of Appeals correctly affirmed the Superior Court's holding that TracFone's sales revenues through retailers are taxable and are not exempt under the resale proviso in RCW 35A.82.060(1). Underpinning this holding is the finding—which has been affirmed at every level of review in this case—that TracFone does not sell "network telephone service" to retailers like Walmart and Fred Meyer for the purpose of resale.

TracFone, 547 P.3d at 911. TracFone argues that it is inconsistent to simultaneously find that TracFone does not sell network telephone service to retailers and that revenue generated through these sales is subject to Renton's telephone utility tax. Petition at 14. As the Court of Appeals aptly recognized, any "superficial appeal" of this argument is defeated by TracFone's mischaracterization of the true nature of its transactions with the retailers and disregard for controlling precedent established by this Court. *TracFone*, 547 P.3d at 913.

TracFone's belief that the Court of Appeals misapplied RCW 35A.82.060 to its "wholesale" business is not a proper basis for review by this Court under RAP 13.4(b). In an apparent attempt to manufacture a conflict under RAP 13.4(b)(1), TracFone now asserts for the first time that the Court of Appeals' decision on this point conflicts with *City of Seattle v. T-Mobile West Corp.*, 199 Wn. App. 79 (2017).

In *T-Mobile,* the Court of Appeals interpreted RCW 35.21.714, which is identical to RCW 35A.82.060 except the former applies to charter cities, while the latter applies to code cities. *See Qwest Corp. v. City of Bellevue*, 161 Wn.2d 353 363, 166 P.3d 667 (2007), *abrogated on other grounds by Cost Mgmt Servs. v. City of Lakewood*, 178 Wn.2d 635, 310 P.3d 804 (2013). The issue addressed by the Court of Appeals in *T-Mobile* was whether the City of Seattle had authority to impose telephone utility tax on T-Mobile's revenue generated from roaming charges, which are only assessed on international services. *T-Mobile,* 199 Wn. App. at 83. The *T-Mobile* court found that roaming charges were not taxable because RCW 35.21.714 only authorizes taxes on revenue "derived from *intrastate* toll telephone services," and the roaming revenues were derived from international services. TracFone is not asserting that Renton is improperly assessing telephone utility tax on revenues generated from outside Renton, and the *T-Mobile* holding bears no relevance to the present case.

TracFone attempts to extend *T-Mobile* to this case by arguing that the Court of Appeals—by finding that TracFone does not sell network telephone service to retailers for the purpose of resale—effectively held that these sales do not constitute "intrastate toll telephone services," and are therefore not taxable under Renton's telephone utility tax. Petition at 14-15. Apart from being a plain misconception of the Court of Appeals' holding, this argument does not implicate *T-Mobile.* The *T-Mobile* decision clarifies whether RCW 35.21.714 authorizes cities to tax both interstate and intrastate telephone services. *Id.* The decision contains no discussion of the definition of "telephone services," nor does it address the taxation of revenues from retailers for the provision of access to network telephone service to Renton customers.

TracFone's reasoning here is representative of its consistent practice of attempting to reduce taxes by mischaracterizing its business model to obfuscate the taxable incident under RCW 35A.82.060. Under Renton's telephone

utility tax, which is authorized by RCW 35A.82.060, the taxable incident that triggers the tax is the privilege of conducting a "telephone business" within city limits. *See* RMC 5-11-1(A)(1). RCW 82.16.010 defines "[t]elephone business" as "the business of providing network telephone service." RCW 82.16.010(7)(b)(iii). In turn, the statute defines "network telephone service" in part as "the providing by any person of access to a telephone network...." RCW 82.16.010(7)(b)(ii). In other words, a "telephone business" is one that provides "access" to a telephone network. The critical question is therefore whether the business, or which business, provides access to a telephone network.

The Court of Appeals unambiguously held that TracFone's sales made directly to consumers, as well as its sales made indirectly through retailers, constitute "telephone business" revenues and are therefore taxable. *TracFone*, 547 P.3d at 908-11. The court's determination that TracFone does not sell network telephone service to retailers was made in the

context of the resale proviso and was based on its finding that "TracFone, not the retailers, retains control over the end user's access to a telephone network." *Id.* at 911. TracFone's attempt to invert this holding is unsuccessful. Regardless of how TracFone sells its airtime, it is TracFone that provides its customers with network telephone service, and thus, it is TracFone who is subject to telephone utility tax.

This Court has already rejected a nearly identical attempt by TracFone to avoid taxes. In *TracFone Wireless, Inc. v. Washington Dep't of Revenue*, TracFone alleged that it was not subject to taxation from the State of Washington because it believed its business model, selling to subscribers (customers) prepaid wireless telephone services through third party retailers, was not contemplated by the controlling statutes. 170 Wn.2d 273, 242 P.3d 810 (2010) . Specifically, TracFone made the familiar argument that the retailers through which it sold TracFone telephone service were subject to tax, not TracFone. *Id.* at 296. The Washington Supreme Court rejected TracFone's

position and found that TracFone was liable for taxation regardless of how it decided to market and charge for its service. While the tax at issue in *TracFone Wireless*—the state enhanced 911 excise tax (E-911)—is different than the telephone utility tax at issue here, TracFone's arguments mirrored those offered here.

This Court stated in *TracFone Wireless*: "TracFone itself provides the use of radio access lines to the subscribers of TracFone's wireless service … TracFone, not the retail store, provides the service." *TracFone Wireless*, 170 Wn.2d at 296, n.15. It was additionally noted that: "TracFone is responsible for activation and assignment of radio access lines to the subscribers," and "[i]f there are problems requiring service, TracFone, not the retail store, provides the service." *Id.* TracFone has not meaningfully changed its business model since 2010. As this Court acknowledged in *TracFone Wireless*, TracFone's use of retailers to reach end users has no effect on

the fact that TracFone executes and controls the taxable incident: the provision of access to a telephone network.

C. The Court of Appeals' Decision Does Not Limit the Legislature's Power to Set Taxing Authority.

TracFone argues that the Court of Appeals "improperly limits the Legislature's power to set cities' taxing authority" by incorrectly construing the resale proviso as a "tax exemption." Petition at 17. TracFone argues that the resale proviso cannot be an exemption because RCW 35A.82.060 is an authorizing statute, which TracFone believes "cannot create an exemption because it does not impose taxes." Petition at 19. Again, TracFone has failed to identify any valid basis for review of this issue under RAP 13.4(b).

Moreover, the one case TracFone cites on this point does not support its position. *See In re All-State Construction Co.*, 70 Wn.2d 657, 425 P.2d 657 (1967). *All-State* involves an "exemption in a statute imposing a tax," but it contains no discussion of authorizing statutes and does not support the notion that such statutes cannot create exemptions. *See All-*

State, 70 Wn.2d at 665. Crucially, TracFone ignores the fact that this Court has referred to the very provisos in RCW 35A.82.060 at issue in this case as "taxation exemption[s]." *Qwest Corp.*, 161 Wn.2d at 672-75 ("In 1986 the statute was amended to include the exemption regarding telecommunications companies.").

TracFone's assertion that tax exemptions can only be derived from statutes in which the legislature directly "impose[s] taxes and establish[es] exemptions" is also contrary to this Court's precedent. In *Columbia Irr. Dist. v. Benton County*, this Court analyzed whether an irrigation district qualified for the constitutional tax "exemption" that prohibits property taxes from being assessed against municipal corporations. 149 Wash. 234, 240, 270 P. 813, 816 (1928) ("[T]axation is the rule and exemption is the exception, and where there is an exception the intention to make one should be expressed in unambiguous terms."). The Washington State Constitution does not directly impose property taxes on

individuals; it authorizes the legislature to do so. Nonetheless, it contains tax exemptions that this Court construes strictly against the taxpayer. *Id.* In other words, the authorizing authority creates the exemption, just as here. TracFone has presented no authority to support its narrow framing of tax exemptions.

TracFone's argument fails even if this Court were to accept TracFone's theory that the resale proviso is not properly construed as a tax exemption, because there is only one reasonable interpretation of RCW 35A.82.060. *See Estate of Hemphill v. Dep't of Revenue*, 153 Wn.2d 544, 552, 105 P.3d 391 (2005) (holding that statutes must be construed in favor of taxpayers where there are "ambiguities in taxing statutes"). RCW 35A.82.060(1) provides that cities "shall not impose the fee or tax on ... charges for *network telephone service* that is *purchased for the purpose of resale*[.]" RCW 35A.82.060(1) (emphasis added). Again, RCW 82.16.010 defines "network telephone service" in part as "the providing by any person of

access to a telephone network....” RCW 82.16.010(7)(b)(ii) (emphasis added). Thus, it is the “access” to a network that must be “purchased” for “resale.” This statutory language is abundantly clear. As is fully discussed below, Renton presented uncontroverted evidence that TracFone controls access to the network, even when it makes sales through retailers. Regardless of whether the resale proviso is a tax exemption or not (it is), reasonable minds cannot disagree as to its meaning or that it does not apply to TracFone’s revenues from its sales made through retailers.

D. The Court of Appeals Properly Applied the Summary Judgment Standard.

The Court of Appeals correctly held that there is no genuine issue of material fact as to whether TracFone’s indirect sales through retailers are exempt from taxation under the resale proviso in RCW 35A.82.060. In making this determination, the Court of Appeals first found that Renton “met its initial burden to show that there is no genuine issue of material fact in dispute that a retailer does not ‘acquire’ and ‘sell’ ‘access to a

telephone network.'" *TracFone*, 547 P.3d at 911. Renton presented substantial evidence to meet its burden, including TracFone's own terms and conditions of service with its customers, the contracts between TracFone and network carriers, the contracts between TracFone and retailers, and TracFone marketing brochures. CP 3902-4. The Court of Appeals found that this evidence established the following key facts, among others: (1) customers who purchase TracFone services through a retailer are reliant on TracFone alone to activate their service; (2) TracFone alone retains the right to discontinue service in its sole discretion; (3) retailers' role is limited to housing and selling TracFone "airtime codes;" and (4) TracFone's contracts with telephone networks like T-Mobile require that the end user agreement is between TracFone and the user, and do not allow for additional resale. *TracFone*, 547 P.3d at 911. The appellate court then found that TracFone failed to meet its burden to present evidence that

raises a genuine issue regarding any of the material facts listed above. *Id*.

The Court of Appeals explained how TracFone failed to meet its burden:

> None of Dillon's testimony or TracFone's other evidence address the crux of the resale issue, namely, whether a retailer "purchased" and "resold" access to telephone networks, as required under former RMC 5-11-1 and RCW 35A.82.060(1).

Id.

To meet its burden at summary judgment, TracFone was required to present evidence that a genuine issue of material fact exists where reasonable minds could differ on the "facts controlling the outcome of the litigation." *Ranger Ins. Co. v. Pierce County*, 164 Wn.2d 545, 552, 192 P.3d 886 (2008). The Court of Appeals properly found that the evidence presented by TracFone in support of its assertion that the resale proviso applies to its "wholesale" sales was immaterial. *See Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977) ("A 'material fact' is one upon which the outcome of the litigation

depends."). The Court of Appeals accepted TracFone's evidence to be true but determined that it simply bore no relevance to the inquiry controlling the outcome of the litigation: whether retailers or TracFone purchased and resold access to telephone networks. This is the proper analysis at summary judgment. TracFone's disagreement with the Court of Appeals' ruling does not create a genuine issue of material fact, nor does it create an appealable issue under RAP 13.4(b).

1. The Court of Appeals' Decision Is Consistent with *Rho Co., Inc. v. Dep't of Revenue*.

TracFone argues that the Court of Appeals wrongly discredited the evidence presented in support of its argument that TracFone sells airtime to retailers for the purpose of resale. *See TracFone,* 547 P.3d at 912-13. TracFone relied on the declaration of Chesley Dillon, TracFone's Vice President of Corporate Taxation, which included the following assertions: (1) "revenue from its wholesale sales [are internally accounted for] as *airtime* revenue;" and (2) TracFone receives "certificates" from retailers that certify that retailers buy airtime

"for resale" for purposes of retail sales tax, not the telephone utility tax *Id.* at 912. The Court of Appeals found that this evidence was "irrelevant" to the key question of whether the retailers purchased and resold network telephone service. *Id.* at 913. In making this determination, the appellate court cited *Rho Co., Inc. v. Dep't of Revenue* for the concept that the court must "look beyond the contractual labels placed on the parties' relationships." *Id.* (citing *Rho Co., Inc. v. Dep't of Revenue*, 113 Wn.2d 561, 573, 782 P.2d 986 (1989)).

TracFone argues that by citing *Rho*, the Court of Appeals has created a "new, lower standard for summary judgment, under which the nonmoving party cannot cite to its 'internal accounting characterizations, procedures or certifications' to show a material issue of fact." Petition at 25. This is false for two key reasons. First, TracFone misstates the holding of *Rho.* TracFone asserts that *Rho's* holding is limited to the notion that courts cannot rely "exclusively" on contractual labels in determining the relationship of two parties. *Id.* at 23. While this

is an accurate characterization of part of the holding, it omits important nuance. *Rho* held that courts must look to the "manifest conduct of parties" to determine whether they have an agency relationship, as the intent of the parties is not determinative of their legal relationship. *Rho*, 113 Wn.2d at 571. In other words, courts must look beyond contractual labels and evaluate whether the parties' conduct meets the requirements of the legal relationship. The Court of Appeals did just that.

Second, TracFone misrepresents the extent to which the Court of Appeals relied on *Rho*. According to TracFone, the court cited *Rho* to support its conclusion that "all of TracFone's evidence is irrelevant" and that the court was prohibited from considering it. Petition at 24. Nowhere did the Court of Appeals state that *Rho* prohibited it from considering TracFone's contractual labels, much less "all" of its evidence. It merely cited to *Rho* for its finding that the conduct of the parties, not contractual labels, ultimately determines their relationship. In

light of the unrefuted evidence presented by Renton that the retailers never obtain, own, or sell network telephone access, the Court of Appeals correctly found that TracFone's internal accounting labels do not meaningfully address the "crux of the resale issue, namely, whether a retailer 'purchased' and 'resold' access to telephone networks." *TracFone*, 547 P.3d at 913. The Court of Appeals did not rely on *Rho* to establish a new summary judgment standard.

2. The Court of Appeals Properly Analyzed the Record in the Light Most Favorable to TracFone.

TracFone argues that the Court of Appeals also improperly analyzed the evidence in the light most favorable to Renton. However, the Court of Appeals clearly stated that it viewed "all facts and reasonable inferences in the light most favorable to the nonmoving party." *Id.* at 906. In other words, TracFone seeks review not because the Court of Appeals applied the wrong summary judgment standard, but because it disagrees with the court's application of the correct standard. Again, this is not a valid basis for review under RAP 13.4(b).

TracFone has failed to articulate any conflict with appellate or supreme court case law, constitutional issues, or issues of broad public importance. While review should be denied on this basis alone, Renton further responds to the additional issues raised by TracFone.

TracFone asserts that the Court of Appeals erred by disregarding the fact that retailers, not TracFone, pay sales tax and E-911 tax on their own sales. Petition at 25. Citing no authority, TracFone argues that the Court of Appeals "needed to recognize that this evidence is relevant." *Id.* at 26. At summary judgment, the court is only required to make inferences in favor of the nonmoving party that are "reasonable." *Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012). Where, as here, the evidence presented is irrelevant to the material facts underpinning the resale issue, there is no inference to be made. As the Court of Appeals correctly noted, Washington's imposition of wholly separate taxes on a retailer or distributor has no bearing whatsoever on "Renton's ability to

impose a different type of tax (utility) on a different type of activity (the telephone business)." *TracFone*, 547 P.3d at 913.

TracFone similarly argues that the Court of Appeals erred by accepting Renton's interpretation of TracFone's contracts with network carriers, specifically that these contracts prohibited TracFone from selling network telephone access to retailers: "DEALER [i.e., TracFone] may not sell or distribute the [cellular radio service] CRS to End Users for an End User's resale or further commercial distribution of the CRS." *Id.* at 911-12. This language cannot be interpreted merely as a contractual limit on "intervening uses," as TracFone suggests, as opposed to a prohibition on sales to end users for the purpose of resale, as the plain language of the contract reads. The Court of Appeals is not required to accept such an interpretation where reasonable minds cannot differ.

3. TracFone's Reliance on *TracFone v. City of Springfield* Is Misplaced.

TracFone asserts that the "Court of Appeals' misunderstanding of the summary judgment standard is

illustrated by its cursory dismissal … of *TracFone v. City of Springfield*, 557 S.W.3d 439 (Mo. Ct. App. 2018)." Petition at 29. As the Court of Appeals correctly acknowledged, *Springfield* is a decision from a different jurisdiction, applying a different statute, with different facts. *See TracFone*, 547 P.3d at 913, n.15. At issue in *Springfield* was whether TracFone's sales through retailers are "legitimate wholesale sales," a term that is undefined and unexplored in the opinion. *Springfield*, 557 S.W.3d 439. As such, the case includes no analysis that might assist Washington courts in applying their own telephone utility tax. After urging the Court of Appeals to follow *Springfield*'s holding, TracFone now concedes that the decision is neither controlling nor substantively relevant. Petition at 31. TracFone now argues instead that this Court should consider *Springfield* not for its holding, but for the mere fact that a trial was held. *Id.* TracFone cannot manufacture a reviewable issue under RAP 13.4(b) by reference to a non-controlling case from Missouri involving a different statute. The Court of Appeals

properly disregarded *Springfield*, and the outcome of that case is irrelevant to the Court of Appeals' understanding of the summary judgment standard.

VI. CONCLUSION

For the reasons stated above, Renton respectfully requests that the Court reject TracFone's Petition for Review.

RESPECTFULLY SUBMITTED this 21st day of August, 2024.

I certify that the foregoing Answer to Petition for Review contains 4935 words, excluding words contained in the title sheet, tables of contents and authorities, certificate of service, signature blocks, any pictorial images or appendices, and this certificate.

OGDEN MURPHY WALLACE

By */s/ Kari L. Sand*
Kari L. Sand, WSBA #27355
Email: ksand@omwlaw.com
Attorney for Defendant-Respondent
City of Renton

CERTIFICATE OF SERVICE

On said day below I electronically served a true and accurate copy of the Answer to Petition for Review in Supreme Court of Washington, Cause No. 1032871 to the following parties:

TracFone Wireless, Inc.
Scott Edwards
Lane Powell, PC
1420 5th Avenue, Suite 4200
Seattle, WA 98101
EdwardsS@LanePowell.com

Grant S. Degginger
Lane Powell, PC
1420 5th Avenue, Suite 4200
Seattle, WA 98101
DeggingerG@LanePowell.com

Taylor Washburn
Lane Powell, PC
1420 5th Avenue, Suite 4200
Seattle, WA 98101
WashburnT@LanePowell.com

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated this 21st day of August, 2024 at Seattle, Washington.

/s/ Linda J. Vandiver
Linda J. Vandiver
Legal Assistant

OGDEN MURPHY WALLACE, PLLC

August 21, 2024 - 2:08 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	103,287-1
Appellate Court Case Title:	TracFone, Inc. v. City of Renton

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