

HON. JEFFREY RAMSDELL
Noted for Consideration: March 17, 2008
Without Oral Argument

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STOKES LAWRENCE, P.S.

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

SANDY JUDD, TARA HERIVEL and
ZURAYA WRIGHT, for themselves, and
on behalf of all similarly situated persons,

Plaintiffs,

v.

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY; GTE
NORTHWEST INC.; CENTURYTEL
TELEPHONE UTILITIES, INC.; NORTH-
WEST TELECOMMUNICATIONS, INC.,
d/b/a PTI COMMUNICATIONS, INC.;
U.S. WEST COMMUNICATIONS, INC.;
T-NETIX, INC.,

Defendants.

NO. 00-2-17565-5 SEA

(gmr)
~~PROPOSED~~ Denying
ORDER GRANTING PLAINTIFFS'
MOTION TO VACATE ORDERS
GRANTING DEFENDANTS'
MOTIONS FOR SUMMARY
JUDGMENT AND TO REINSTATE
REFERRAL TO WUTC

Granting
Motion *(gmr)*

Plaintiffs have moved to vacate the Court's Order granting defendants' motion for summary judgment and to reinstate the primary jurisdiction referral based on the decision issued by the Court of Appeals on December 18, 2006, and the Washington Supreme Court's denial of T-Netix' petition for review. After consideration, it is

ORDERED that ~~plaintiffs' motion is GRANTED.~~ *(gmr)*

ORDER VACATING ORDERS FOR SUMMARY JUDGMENT
AND REINSTATING REFERRAL TO WUTC - 1

SIRIANNI YOUTZ
MEIER & SPOONEMORE
719 SECOND AVENUE, SUITE 1100
SEATTLE, WASHINGTON 98104
TEL. (206) 223-0303 FAX (206) 223-0246

ORIGINAL

(gmr)

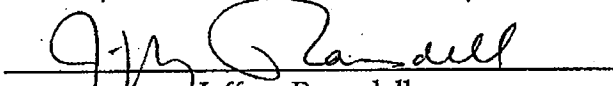
Plaintiff's motion to vacate this Court's prior orders:

1 The Court's (1) Order Granting T-Netix' Motion for Summary Judgment,
2 filed September 6, 2005, (2) Order Granting AT&T's Motion for Clarification of the
3 September 7, 2005 Order Granting T-Netix's Motion for Summary Judgment, dated
4 September 4 [sic], 2005, and (3) Order Granting T-Netix, Inc.'s Motion for Clarification
5 of Order, dated October 17, 2005, are ~~VACATED~~ Denied. (gmr)

6 The primary jurisdiction referral of this matter to the Washington Utilities
7 & Transportation Commission is REINSTATED for determination of the issues
8 originally before it in Docket No. UT-042022: (1) whether AT&T or T-Netix were OSPs
9 and (2) whether they violated the WUTC disclosure regulations. This motion is

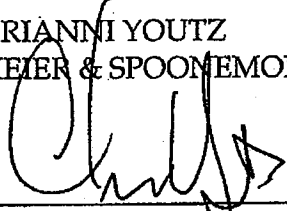
10 DATED: March 21st, 2008 (gmr)

11 granted consistent with the express and unambiguous
12 decision of the Court
13 of Appeals.

(gmr)

Jeffrey Ramsdell
Superior Court Judge

15 Presented by:

16 SIRIANNI YOUTZ
17 MEIER & SPOONEMORE

18 
19 Chris R. Youtz (WSBA #7786)
20 Attorneys for Plaintiffs (gmr)

* Plaintiff's assertion that vacation
is warranted because "non-vacation
of those orders will only serve to
create confusion in this complex case
involving numerous judicial and
administrative decision makers" provides
no substantive justification for the
relief requested. Vacation of
prior orders simply based on
the complexity of the case would be
the functional equivalent of erasing
complex appellate court decisions
from the appellate reporters if the
Supreme Court reverses their decision.
The risk of confusion is offset by need
for historical context.

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ORDER VACATING ORDERS FOR SUMMARY JUDGMENT
AND REINSTATING REFERRAL TO WUTC - 2

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury and in accordance with the laws of the State of Washington, that on March 7, 2008, I served a copy of the foregoing document on all counsel of record as indicated below:

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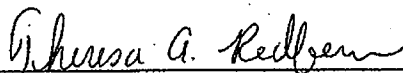
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DATED: March 7, 2008, at Seattle, Washington.



cc - Chip Peters

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

SANDY JUDD and TARA
HERIVEL, for themselves, and on
behalf of all similarly situated
persons,

Appellants,

and

ZURAYA WRIGHT,

Plaintiff,

v.

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY and T-
NETIX INC.,

Respondents,

and

GTE NORTHWEST INC.;
CENTURYTEL TELEPHONE
UTILITIES, INC.; NORTHWEST
TELECOMMUNICATIONS, INC.,
d/b/a PTI COMMUNICATIONS,
INC.; U.S. WEST
COMMUNICATIONS, INC.,

Defendants.

No. 57015-3-1

MANDATE

King County

Superior Court No. 00-2-17565-5.SEA

R E C E I V E D
JAN 28 2008

STOKES LAWRENCE, P.S.

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

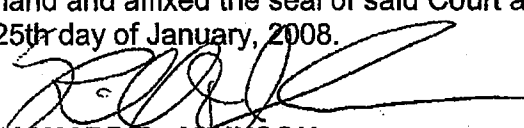
This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on December 18, 2006, became the decision terminating review of this court in the above entitled case on January 25, 2008. An order denying a petition for review was entered in the Supreme Court on December 4, 2007. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

Pursuant to RAP 14.4 costs in the amount of \$727.50 are awarded in favor of judgment creditor SANDY JUDD against judgment debtors AMERICAN TELEPHONE AND TELEGRAPH COMPANY and T-NETIX INC.

c: Jonathan Meier, Chris Youtz
Michael McGinn, Kelly Noonan, Carl Marquardt
Donald Mullins, Sandrin McEwan, Duncan Turner
Glenn Manishin, Stephanie Joyce
Hon. Jeffrey Ramsdell



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 25th day of January, 2008.


RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

Westlaw

Not Reported in P.3d

Not Reported in P.3d, 136 Wash.App. 1022, 2006 WL 3720425 (Wash.App. Div. 1)

(Cite as: Not Reported in P.3d, 2006 WL 3720425 (Wash.App. Div. 1))

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H**Judd v. American Tel. & Tel. Co.**

Wash.App. Div. 1,2006.

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040Court of Appeals of Washington, Division 1.
Sandy **JUDD** and Tara Herivel, for themselves, and
on behalf of all similarly situated persons, Appel-
lants,
and Zuraya Wright, Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY and T-Netix, Inc., Respondents,
and GTE Northwest Inc.; Centurytel Telephone
Utilities, Inc.; Northwest Telecommunications, Inc.,
d/b/a PTI Communications, Inc.; U.S. West Com-
munications, Inc., Defendants.

No. 57015-3-I.

Dec. 18, 2006.

UNPUBLISHED OPINION

AGID, J.

*1 Appellants Sandy **Judd** and Tara Herivel sued American Telephone and Telegraph Company (AT & T) and T-Netix claiming they received inmate-initiated collect phone calls from Washington prisons that lacked the audible rate disclosures required by the Washington Utilities and Transportation Commission (WUTC) in violation of the Washington Consumer Protection Act (CPA), chapter 19.86 RCW. The trial court granted the phone companies' summary judgment motion, finding that **Judd** and Herivel lacked standing because they could not show injury attributable to either phone company. We hold that appellants presented evidence raising material issues of fact that could not be resolved on summary judgment and reverse and remand to the trial court.

FACTS

Between August 1, 1996, and August 1, 2000, appellants Sandy **Judd** and Tara Herivel both received telephone calls from former inmates at four Washington State prisons. Neither **Judd** nor Herivel heard rate information before choosing to accept these inmate-initiated collect calls. When they received these calls, respondent AT & T had a contract with the Washington Department of Corrections (DOC) to provide telephone service to state prisons. AT & T subcontracted with other companies, including respondent T-Netix, to provide certain services in connection with these calls.

I. *Regulatory Framework*

After the break-up of the Bell System in the 1980s, the Legislature enacted statutes to protect consumers of collect telephone calls. RCW 80.36.520 directs the WUTC to make rules that:

require, at a minimum, that any telecommunications company, operating as or contracting with an alternate operator services company, assure appropriate disclosure to consumers of the provision and the rate, charge or fee of services provided by an alternate operator services company.

A violation of these WUTC disclosure rules is a violation of the CPA, resulting in presumed damages equal to the cost of the service provided plus two hundred dollars.^{FN1}

FN1.RCW 80.36.530.

In 1991, the WUTC required all alternate operator service companies (AOSCs) to disclose their rates for collect calls.^{FN2} Local exchange companies (LECs), which provide only local and intraLATA FN3 long distance (local long distance) service but not interLATA or out-of-state long distance, were excluded from the definition of an AOSC.^{FN4} In 1999, the WUTC changed the rules to require all

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operator service providers (OSPs)^{FN5} to verbally disclose the rates for inmate-initiated collect calls.^{FN6} Although the new rules applied to LECs as well, the WUTC granted time-limited waivers exempting many LECs from the disclosure requirement. Consequently, from 1996 to 2000, the relevant time period in this case, most calls for which LECs served as OSPs were exempt from the WUTC disclosure requirements.

FN2. Former WAC 480-120-141(5)(a)(iv) (1991).

FN3. LATA stands for local access and transport area. IntraLATA calls are long distance calls within one LATA. Inter-LATA calls are long distance calls between LATAs. WAC 480-120-021 (2006).

FN4. Former WAC 480-120-021 (1991).

FN5. The term OSP replaced AOSC. Former WAC 480-120-021 (1999).

FN6. Former WAC 480-120-141(2)(b) (1999).

II. Procedural History

In 2000, appellants filed this lawsuit as a putative class action in King County Superior Court against five telephone companies, alleging that the failure to disclose rates on inmate-initiated collect calls violated the CPA. The trial court dismissed three of those companies (Qwest, Verizon, and CenturyTel) because they were LECs exempt from the disclosure requirements. This court and the Washington Supreme Court affirmed.^{FN7}

FN7. *Judd v. Am. Tel. & Tel. Co.*, 116 Wn.App. 761, 66 P.3d 1102 (2003), *aff'd*, 152 Wn.2d 195, 95 P.3d 337 (2004).

*2 AT & T and T-Netix also moved to dismiss, but the trial court denied their motions and referred two questions to the WUTC for determination under the

doctrine of primary jurisdiction: (1) whether AT & T and T-Netix were OSPs, and (2) whether they had violated WUTC regulations requiring OSPs to disclose rates for collect calls. The court stayed further proceedings pending determination by the agency and retained jurisdiction over matters outside of the referral.

Respondents moved for summary determination in the WUTC, arguing that appellants lacked standing. The Administrative Law Judge (ALJ) denied the motions. She determined that there were issues of fact precluding summary determination and ruled that she lacked jurisdiction to decide the standing issue because it was beyond the superior court's narrow referral. AT & T and T-Netix filed an interlocutory appeal in the WUTC and moved for summary judgment in the superior court, asking the court to lift the stay. The WUTC affirmed the ALJ on the jurisdiction ground.

The superior court granted T-Netix's summary judgment motion. It later clarified that its ruling applied to AT & T as well and rescinded its primary jurisdiction referral to the WUTC. *Judd* and *Herivel* appeal, seeking remand to the superior court with directions to remand the case to the WUTC to determine whether respondents were OSPs and whether they violated the WUTC's regulations.

DISCUSSION

We review a summary judgment order de novo, making the same inquiry as the trial court and considering all facts and reasonable inferences from those facts in the light most favorable to the non-moving party.^{FN8} Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.^{FN9}

FN8. *Suquamish Indian Tribe v. Kitsap County*, 92 Wn.App. 816, 827, 965 P.2d 636 (1998) (citing *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wn.2d

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337, 341, 883 P.2d 1383 (1994)).

FN9.CR 56(c); *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261, 138 P.3d 943 (2006).

To survive summary judgment, appellants must present sufficient evidence of injury to raise material issues of fact about standing.^{FN10} To show injury, they must show that they received an inmate-initiated call without an audible pre-connect rate disclosure in violation of former WAC 480-120-141 and that either AT & T or T-Netix is liable for the violation.^{FN11} Appellants argue they can do this in two ways: (1) by presenting sufficient evidence that they received a call in violation of the WUTC disclosure rule for which AT & T or T-Netix was the OSP or (2) by showing that AT & T or T-Netix could be liable for contracting with non-disclosing OSPs, even if they were not OSPs themselves.

FN10.*Suquamish Indian Tribe*, 92 Wn.App. at 832 (reversing summary judgment because plaintiffs demonstrated an issue of material fact about whether they would be injured by defendants proposed actions).

FN11.RCW 80.36.530; *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986).

I. Call in Violation of WUTC Disclosure Rule for Which AT & T or T-Netix was the OSP

We hold that Judd and Herivel have presented one disputed issue of material fact and one mixed question of fact and law which survive summary judgment. The factual issue is whether Herivel received an interLATA phone call without rate disclosure in violation of WUTC rules for which either AT & T or T-Netix was the OSP. The mixed question is whether T-Netix or AT & T is liable under the CPA for functioning as an OSP for any of the phone calls

Herivel and Judd received. These issues can be resolved on summary judgment only if "reasonable minds can reach but one conclusion on them."^{FN12}

FN12.*Allen v. State*, 118 Wn.2d 753, 760, 826 P.2d 200 (1992).

A. InterLATA Call

*3 Herivel, a Seattle attorney, claims she received an interLATA phone call from Don Miniken while he was incarcerated at Airway Heights Correction Center, sometime between August 26, 1997 and January 1999. Neither side disputes that a phone call from the Spokane area to Seattle is an interLATA phone call and thus was not exempt from the WUTC disclosure requirements. Because the LECs did not carry interLATA calls, either AT & T or T-Netix must have been the OSP. The only issue on summary judgment is whether Herivel presented sufficient evidence that the call occurred. Respondents assert her only evidence is an allegation in the pleadings that is insufficient as a matter of law.

T-Netix relies on *Retail Store Employees Local 631 v. Totem Sales, Inc.*, in which we affirmed summary judgment where the plaintiff admitted that there were "no facts before the court except the allegations in the pleadings, and the contract between the parties."^{FN13} But Herivel presents more than mere allegations in the pleadings. She provides her own and Miniken's declarations that he made the call sometime between August 26, 1997 and January 1999. Herivel was writing an article about Miniken's recent suit against the DOC. The summary judgment order in his suit was filed on August 26, 1997,^{FN14} and the Washington Free Press published her article in its January-February 1999 issue. Therefore, the reasonable inference is that the call occurred between August 1997 and January 1999.

FN13.20 Wn.App. 278, 281, 579 P.2d 1019 (1978).

FN14.*See Miniken v. Walter*, 978 F.Supp.

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1356 (E.D.Wash.1997).

AT & T relies on *Allen v. Washington* for its holding that "factual questions may be decided as a matter of summary judgment if reasonable minds can reach but one conclusion on them."^{FN15} Respondents argue that because Herivel has been unable to produce a record of the phone call from Miniken, the court should not believe her testimony. In her declaration, Nancy Lee, T-Netix's Director of Billing Services, states that she could not find a record of any call from Airway Heights to Herivel between June 1, 1998 and December 31, 1998. But this evidence falls short of proving the call did not take place both because the search does not cover the entire relevant time period and, even if it did, it presumes T-Netix's recordkeeping is infallible.

FN15.118 Wn.2d 753, 760, 826 P.2d 200 (1992).

This is a classic factual dispute, with each side producing some evidence to support its position. We cannot weigh evidence or testimonial credibility.^{FN16} And we must view the evidence presented in the light most favorable to appellants as the nonmoving party.^{FN17} Because respondents' evidence leaves 10 months unaccounted for and Herivel's affidavits contain more than mere allegations, we hold that reasonable minds could differ about whether the call happened. Herivel has presented a disputed issue of material fact which cannot be resolved on summary judgment.

FN16.*No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.*, 71 Wn.App. 844, 854 n.11, 863 P.2d 79 (1993), *review denied*, 124 Wn.2d 1002 (1994).

FN17.*Suquamish Indian Tribe*, 92 Wn.App. at 827.

B. OSP Status

Both AT & T and T-Netix assert that they were not the OSPs for any of the calls Judd and Herivel received. Both argue that LECs were the OSPs for the

intraLATA calls, and each claims the other would have been the OSP for the one alleged interLATA call. In response, appellants contend that their expert's testimony raises issues of material fact about whether respondents functioned as OSPs.

*4 Both parties' arguments are highly technical and fact-based and thus not properly resolved on summary judgment. The original trial court judge, acknowledging these factual issues required expertise to resolve, referred them to the WUTC under the primary jurisdiction doctrine.^{FN18} Significantly, the ALJ denied summary determination because she found:

FN18.*See Vogt v. Seattle-First Nat'l Bank*, 117 Wn.2d 541, 554, 817 P.2d 1364 (1991) (explaining that agencies should be allowed to make initial determinations under the primary jurisdiction doctrine when an issue is highly technical, requiring expertise to resolve).

Complainant's affidavits and pleadings raise questions as to the role of T-Netix and AT & T in connecting the calls between the correctional institutions and the Complainants. The parties' dueling and numerous affidavits identify several issues of fact concerning AT & T and T-Netix's network and their involvement in the calls in question.

The summary determination motion before the WUTC and the later summary judgment motion before the superior court both suffer from the same circular reasoning. Each appears to have been brought essentially to avoid discovery on the issue of whether T-Netix and AT & T are OSPs. But, for summary judgment to be appropriate, a court must decide, without the benefit of that discovery, that AT & T and T-Netix were not OSPs as a matter of law.

The superior court was troubled by this and mentioned its concern at the hearing on the summary judgment motion:

I guess part of my being perplexed is, I have got a

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person who purportedly has expertise in this rather esoteric area [the ALJ], who tells me that with regard to this particular motion that is now pending before me she sees material issues of fact.

....

... [S]houldn't I defer to the expertise of this individual to say, well, if you think there are material issues of fact, and God knows you understand this esoterica far better than I do, I'm sure, shouldn't I defer t that?

The superior court's order granting summary judgment does not disclose why it chose not to be persuaded by the expertise of the ALJ. But it must have determined that reasonable minds could only conclude that AT & T and T-Netix were not the OSPs for any of the calls appellants received, despite appellants' expert's declaration to the contrary. But both this court and the trial court must consider all facts and reasonable inferences from those facts in the light most favorable to the nonmoving party.^{FN19}The trial court erred in granting summary judgment because to do so it had to ignore both appellant's expert's testimony that AT & T and T-Netix could have been the OSPs for the calls in question and the ALJ's determination that this issue could not be decided as a matter of law.

FN19. *Suquamish Indian Tribe*, 92 Wn.App. at 827.

II. "Contracting with" Liability Under RCW 80.36.520

Appellants assert that they can establish standing under RCW 80.36.520 for violations of the CPA not only against OSPs who violate the WUTC regulations but also against parties who contract with OSPs that violate the rules. They base this argument on the mandatory language of RCW 80.36.520 requiring the WUTC to promulgate rules that "require, at a minimum, that any telecommunications company, operating as or contracting with an alternate operator services company [OSP], as-

sure appropriate disclosure."

*5 AT & T and T-Netix, relying on the Supreme Court's holding in *Judd I*,^{FN20} argue that because the regulation, former WAC 480-120-141, does not include a "contracting with" clause, we cannot imply one. In *Judd I*, the court held that "in order for there to be a failure to disclose that is actionable under the CPA, the failure must violate the rules adopted by the WUTC."^{FN21} It went on to explain that challenges to an agency's regulation must be brought under the Administrative Procedure Act, chapter 34.05 RCW, by making the agency a party to the proceeding.^{FN22} Because this appeal is not the proper proceeding for appellants to challenge the validity of the agency's decision to exclude "contracting with" liability from the regulations, we decline to address the issue.

FN20. For clarity, we refer to *Judd*, 152 Wn.2d 195 as *Judd I*.

FN21. 152 Wn.2d at 204 (quoting *Judd*, 116 Wn.App. at 770).

FN22. *Id.* at 205.

We reverse and remand this case to the superior court with directions to reinstate the primary jurisdiction referral to the WUTC to determine the issues originally before it: (1) whether AT & T or T-Netix were OSPs and (2) whether they violated the WUTC disclosure regulations.

WE CONCUR: Agid, J., Baker, J., and Coleman, J.
Wash.App. Div. 1, 2006.
Judd v. American Tel. & Tel. Co.
Not Reported in P.3d, 136 Wash.App. 1022, 2006 WL 3720425 (Wash.App. Div. 1)

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