136 Wash.App. 1022

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington,
Division 1.

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–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UNPUBLISHED OPINION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 makes 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.[1]

In 1991, the WUTC required all alternate operator service companies (AOSCs) to disclose their rates for collect

calls.[2] Local exchange companies (LECs), which provide only local and intraLATA[3] long distance (local long distance) service but not interLATA or out-of-state long distance, were excluded from the definition of an AOSC.[4] In 1999, the WUTC changed the rules to require all operator service providers (OSPs)[5] to verbally disclose the rates for inmate-initiated collect calls.[6] 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.

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.[7]

***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 nonmoving party.[8] 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.[9]

To survive summary judgment, appellants must present sufficient evidence of injury to raise material issues of fact about standing.[10] 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.[11] 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.

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."[12]

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." '[13] 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,[14] 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.

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."[15] 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.

This is a classic factual dispute, with each side producing some evidence to support its position. We cannot weigh evidence or testimonial credibility.[16] And we must view the evidence presented in the light most favorable to appellants as the nonmoving party.[17] 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.

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.[18] Significantly, the ALJ denied summary determination because she found:

> 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.
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> 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 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.
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> ....
>
> ... [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.[19] 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.

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], assure appropriate disclosure."

***5** AT & T and T–Netix, relying on the Supreme Court's holding in *Judd I,*[20] 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." '[21] 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.[22] 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.

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.

All Citations

Not Reported in P.3d, 136 Wash.App. 1022, 2006 WL 3720425

Footnotes

1 RCW 80.36.530.

2 Former WAC 480–120–141(5)(a)(iv) (1991).

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

[4] Former WAC 480–120–021 (1991).

[5] The term OSP replaced AOSC. Former WAC 480–120–021 (1999).

[6] Former WAC 480–120–141(2)(b) (1999).

[7] *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).

[8] *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 337, 341, 883 P.2d 1383 (1994)).

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

[10] *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).

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

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

[13] 20 Wn.App. 278, 281, 579 P.2d 1019 (1978).

[14] *See Miniken v. Walter,* 978 F.Supp. 1356 (E.D.Wash.1997).

[15] 118 Wn.2d 753, 760, 826 P.2d 200 (1992).

[16] *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).

[17] *Suquamish Indian Tribe,* 92 Wn.App. at 827.

[18] *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).

[19] *Suquamish Indian Tribe,* 92 Wn.App. at 827.

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

[21] 152 Wn.2d at 204 (quoting *Judd,* 116 Wn.App. at 770).

[22] *Id.* at 205.