

ORIGINAL

IN THE SUPREME COURT OF OHIO

STAMMCO LLC d/b/a THE POP SHOP, et al.,

Plaintiffs-Appellees,

v.

UNITED TELEPHONE COMPANY OF OHIO AND SPRINT NEXTEL CORPORATION,

Defendants-Appellants.

: Case No.: 2012-0169  
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: On Appeal From the  
: Fulton County Court  
: of Appeals, Sixth  
: Appellate District,  
: Case No. F-11-003  
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FILED  
FEB 22 2013  
CLERK OF COURT  
SUPREME COURT OF OHIO

APPELLANTS UNITED TELEPHONE COMPANY OF OHIO AND SPRINT NEXTEL CORPORATION'S RESPONSE TO APPELLEES' MOTION FOR LEAVE TO SUBMIT DOCUMENTS FIRST REFERRED TO DURING ORAL ARGUMENT

Michael K. Farrell (0040941)  
Counsel Of Record  
John B. Lewis (0013156)  
Karl Fanter (0075686)  
BAKER & HOSTETLER LLP  
PNC Center  
1900 East Ninth Street, Suite 3200  
Cleveland, OH 44114-3485  
Telephone: (216) 861-7528  
Facsimile: (216) 696-0740  
mfarrell@bakerlaw.com

Counsel for Appellants  
United Telephone Company of Ohio and  
Sprint Nextel Corporation

Dennis E. Murray, Sr. (0008783)  
Counsel of Record  
Donna J. Evans (0072306)  
Murray & Murray Co., L.P.A.  
111 E. Shoreline Drive  
Sandusky, Ohio 44870  
Telephone: (419) 624-3000  
Facsimile: (419) 624-0707

Counsel for Appellees Stammco, LLC d/b/a The Pop Shop, Kent Stamm, and Carrie Stamm

Stammco's motion to submit documents that its counsel mentioned during oral argument should be denied. The documents are not part of the record below. For this reason alone, submitting them would be improper. "[A] bedrock principle of appellate practice in Ohio is that an appeals court is limited to the record of the proceedings at trial." *Morgan v. Eads*, 104 Ohio St.3d 142, 2004-Ohio-6110, 818 N.E.2d 1157, ¶ 13; *State v. Davis*, 63 Ohio St.3d 44, 46 fn. 2, 584 N.E.2d 1192 (1992) ("the law of Ohio expressly prohibits a reviewing court from adding matters to the record on appeal"). For example, in *In re Contested Election of Nov. 2, 1993*, this Court unanimously struck materials from the appellee's appendix that were not in the record. "It is axiomatic that a reviewing court cannot add matter to the record before it, which was not part of the trial court's proceedings." 72 Ohio St.3d 411, 413, 650 N.E.2d 859 (1995); see also *State v. Ishmail*, 54 Ohio St.2d 402, para. one of syl., 377 N.E.2d 500 (1978) (same).

This rule is particularly important where, as here, an appellate court reviews the trial court's decision under an abuse of discretion standard. To determine if a trial court abused its "broad discretion in determining whether a class action may be maintained," an appellate court should only consider the record that was before the trial court. *Schmidt v. Avco Corp.*, 15 Ohio St.3d 310, 313, 855 N.E.2d 444 (1984) (denial of class action not abuse of discretion if record supports it); see also *Ishmail*, 54 Ohio St.2d at 406 (appellate court may only reverse "if it finds error in the proceedings," so review is "limited to what transpired in the trial court as reflected by the record"). Stammco's

attempt to supplement the record on appeal—after briefing was long closed and after oral argument—is improper under black-letter Ohio law. Tellingly, Stammco cites no rule or other authority in support of its motion.

Even if supplementing the record after oral argument were permissible, which it is not, it should not be allowed here. Stammco argues that it should be permitted to submit documents in response to an argument that United Telephone made in its reply brief—namely, that absent a manual review, United Telephone cannot identify which customers received third-party charges or the third parties initiating those charges. (Mot. for Leave 2.) *But United Telephone has for years made this exact same point, based on uncontradicted evidence in the record, including in its opening brief to this Court, to the Sixth District, and to the trial court.* (Merits Br. 31; United Telephone June 15, 2011 Sixth District Br. 19-20; Opp. to Amend the Class Def. 23). Stammco’s belated (and insufficient) response is years too late.

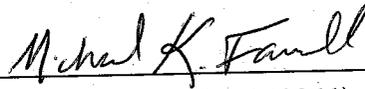
Stammco reviewed hundreds of pages of documents, took several depositions, and was free to challenge the evidence submitted to the trial court that United Telephone is “unable to identify by name which of UTO’s local telephone customers received third-party charges or to identify the specific third-party service providers from which a given customer received such charges.” (Affidavit of Dennis Davis, ¶ 13, Supp. 113.). Stammco did not do so then, because that evidence was—and still is—undisputed.

Of course, even if United Telephone had such information at its fingertips, that information would not change the central reason class certification would be inappropriate: whether a particular charge was authorized requires individualized proof that almost exclusively is in the hands of the customers and third parties. This is why every other court in the country deciding this exact issue has unequivocally denied class certification. (See Merits Br. 8-10, 13-14; Reply Br. 9-11.) Similarly, in *Wal-Mart Stores, Inc. v. Dukes*, the United States Supreme Court rejected the "Trial by Formula" method suggested by Stammco as a way to avoid the individualized proof problems inherent in putative class actions such as theirs. 131 S.Ct. 2541, 2561 (2011).

The years-old documents referenced by Stammco do not change this fact. Had Stammco introduced the 2006 Embarq document when moving for class certification, United Telephone would have explained to the trial court why it is not germane to the Rule 23 issues here. The 2011 document is even more tangential. It relates to the billing practices of the wireless industry, not those of a local exchange, land line carrier like United Telephone. These kinds of inadmissibility issues are why appellate courts universally reject newly proffered evidence on a direct appeal.

Stammco's improper and untimely motion for leave should be denied.

Respectfully submitted,



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Michael K. Farrell (0040941)

John B. Lewis (0013156)

Karl Fanter (0075686)

BAKER & HOSTETLER LLP

1900 East Ninth Street, Suite 3200

Cleveland, OH 44114-3485

Telephone: (216) 861-7528

Facsimile: (216) 696-0740

*Counsel for Appellants United Telephone Company  
of Ohio and Sprint Nextel Corporation*

**PROOF OF SERVICE**

I certify that a copy of the foregoing was sent by ordinary U.S. mail to the following counsel on this 22nd of February, 2013:

Dennis E. Murray, Sr.  
Donna J. Evans  
Murray & Murray Co., L.P.A.  
111 E. Shoreline Drive  
Sandusky, Ohio 44870

*Counsel for Appellees Stammco, LLC d/b/a The  
Pop Shop, Kent Stamm, and Carrie Stamm*

Linda S. Woggon  
Vice President, Governmental Affairs  
Ohio Chamber of Commerce  
230 East Town Street  
Columbus, Ohio 43215-0159

*Counsel for Amicus Curiae Ohio  
Chamber of Commerce*

  
\_\_\_\_\_  
*Counsel for Appellants United Telephone Company  
of Ohio and Sprint Nextel Corporation*