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No. 85581-1

SUPREME COURT OF THE STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT IN

JARED PECK,

Plaintiff,

and JAMES BOWDEN, a Washington resident, individually and on
behalf of all the members of the class of persons similarly situated,

Plaintiff-Appellant,

v.

AT&T MOBILITY, aka CINGULAR WIRELESS LLC, et al.,

Defendants-Appellees.

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ARGUMENT 2

 A. In RCW 82.04.500, the Legislature Prohibited
 Sellers From Construing B&O Taxes as Taxes
 on Customers..... 2

 B. Cingular Admits it Construed its B&O Taxes as
 Taxes on Customers. 3

 C. “Disclosure” Does not Alter the Statutory
 Mandate. 3

 D. Businesses Must Include the B&O Tax in Their
 Quoted Prices. 5

III. CONCLUSION 10

TABLE OF AUTHORITIES

Cases

<i>Nelson v. Appleway Chevrolet, Inc.</i> , 129 Wn. App. 927, 121 P.3d 95 (2005)	4
<i>Nelson v. Appleway Chevrolet, Inc.</i> , 166 Wn.2d 173, 157 P.3d 847 (2007)	passim
<i>Peck v. Cingular Wireless Services, LLC</i> , 535 F.2d 1053 (9th Cir. 2008)	9
<i>Robinson v. Avis Rent A Car Sys. Inc.</i> , 106 Wn. App. 104, 22 P.3d 818 (2001)	6, 7
<i>Smale v. Cellco Partnership</i> , 547 F.Supp.2d 1181 (W.D. Wash. 2008)	7

Statutes

RCW 82.04.500	passim
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I. INTRODUCTION

Washington's Business and Occupations (B&O) tax statute, RCW 82.04.500, prohibits sellers from construing B&O taxes as taxes on purchasers. If this proscription means anything, it is that merchants cannot set the prices for goods and services and then add to those prices an extra charge for the B&O tax. That is precisely what this Court's RCW 82.04.500 jurisprudence requires.¹ Yet here, Cingular takes an entirely different view, urging the Court to read into the statute an amorphous and impractical "disclosure" standard that would not inform consumers and would render the statute superfluous.

Cingular plainly misapprehends and misapplies the law. This Court should affirm *Appleway* and hold that RCW 82.04.500 prohibits sellers from adding B&O taxes to the price, whether they disclose that they will do so or not.²

¹ *Nelson v. Appleway Chevrolet, Inc.*, 166 Wn.2d 173, 180, 157 P.3d 847 (2007) ("*Appleway*").

² Oddly, Cingular devotes much of its brief arguing that Plaintiff's slightly reformulated question is "entirely different" than the certified question, which Plaintiff "completely ignores." Opposing Brief at 1-3, 17-19. This is obviously hyperbole; as Plaintiff explained, the questions are largely the same, with only two differences that affect clarity, not result. Opening Brief at 10-11.

II. ARGUMENT

A. In RCW 82.04.500, the Legislature Prohibited Sellers From Construing B&O Taxes as Taxes on Customers.

The statute at issue is straightforward and unambiguous. It states that B&O taxes shall not be construed as taxes on customers but rather should be treated as part of the seller's overhead costs. RCW 82.04.500. As this Court explained in *Appleway*, the "plain meaning" of this provision "prevents [a seller] from directly imposing B&O tax on its customers." *Appleway*, 160 Wn.2d at 180. The rule is simple: B&O taxes cannot be added to the price of goods and services as if it were a tax on the purchaser. Instead, businesses have to price their goods and services to include the cost of B&O taxes, just like they do with all other forms of "overhead," such as rent, insurance, and utilities. *Id.* at 180-81. As the Court explained, this makes the B&O tax different from the sales tax, which sellers routinely add to the price of goods and services as a direct tax on the purchaser. "[U]nlike a sales tax, [the seller] cannot add a B&O tax to the purchase price." *Id.* at 185.

B. Cingular Admits it Construed its B&O Taxes as Taxes on Customers.

There is no dispute about the material facts in this case.

Cingular treated its B&O taxes exactly like it treated sales taxes. *See* Excerpt of Record (ER) 137. It admitted in deposition that it added the B&O tax to the price of mobile phone service, imposing it directly on its customers, just like sales tax:

If you had an account that has a monthly recurring charge, let's say 39.95 a month or whatever it is, *you would be charged the [B&O] tax on that recurring charge the same way you would be charged sales tax, federal excise tax at the time or any other taxes.*

ER 107; *see also* ER 129 (“And so it was very much like a transactional tax, which you would think that was a sales tax, et cetera.”).

C. “Disclosure” Does not Alter the Statutory Mandate.

In its response brief, Cingular attempts to re-cast *Appleway* to focus on disclosures about the B&O tax. Cingular argues that the Court found the “controlling question” under the B&O tax statute to be whether the seller “disclosed” its B&O tax to the consumer “prior to finalizing a sale.” Opp. at 10. In fact, the Court found “disclosures” to be unimportant to understanding and applying the

B&O tax statute, because “RCW 82.04.500 says nothing about disclosure.” *Appleway*, 160 Wn.2d at 185. Disclosure is purely elective; what matters, said the Court, is whether the B&O tax is included in the price, or added to the price.

Appleway can disclose or itemize costs associated with the purchased item, but unlike a sales tax, it cannot add a B&O tax to the purchase price.

Appleway, 160 Wn.2d at 185. Cingular’s attempt to cast the legal issue in terms of disclosure is simply wrong.³

Cingular similarly mischaracterizes the pertinent factual inquiry under *Appleway*. Cingular acknowledges that in *Appleway*, the defendant violated the B&O tax statute because it “passed the ‘B&O tax’ on to a customer after the parties had reached agreement on the total sales price.” Opp. at 20 (emphasis in original). Then, attempting to distinguish the facts in this case, it contends “Cingular

³ Cingular similarly attempts to elide the pertinent statutory language, asserting that “the critical text, for present purposes, is the latter half of the statute, which makes clear that the B&O tax ‘shall constitute a part of the operating overhead.’” Opp. at 10 (quoting RCW 82.04.500). The first half of the statute, however, is the part which explicitly forbids B&O taxes to be “construed as taxes on the purchasers.” RCW 82.04.500. *Appleway Chevrolet* similarly attempted to focus only on the more opaque “overhead” clause, which the Court of Appeals rebuffed: “[W]e must also read the statute to give meaning to the language stating that the B&O tax should not be construed as a tax on purchasers and customers.” *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 942-43, 121 P.3d 95 (2005).

disclosed the B&O surcharge to Bowden before finalizing the sale.” Opp. at 21 (emphasis in original). This compares apples to oranges. If the comparison is drawn correctly, the two cases are identical. Cingular “passed on” the B&O tax after a sales price was set, just like Appleway.⁴ Appleway “disclosed” the B&O charge to Mr. Nelson just as Cingular did to Bowden.⁵ The facts are materially identical.

D. Businesses Must Include the B&O Tax in Their Quoted Prices.

Having mischaracterized the factual and legal issues before this Court, Cingular wanders far afield in its legal argument. First it declares that “the law is clear” that businesses “need only disclose the fact of the B&O surcharge and not the specific amount of the surcharge.” Opp. at 13. This bold pronouncement is completely at

⁴ Compare ER 164, 136-137 (Cingular contract listing agreed sale price, without B&O tax; Cingular bill adding B&O tax to agreed price) with *Appleway*, 160 Wn.2d at 178 & nn. 2-3 (describing Appleway contract which added B&O tax to agreed sale price).

⁵ In fact, as noted previously, Appleway far better informed Mr. Nelson of the B&O tax than Cingular informed Mr. Bowden. Compare *Appleway*, 160 Wn.2d at 178 & n. 3 (contract listed sales price, sales tax, and B&O tax amounts and contained express statements about the B&O tax), with ER 164 (contract does not list tax amounts or even name the B&O tax surcharge). In *Appleway*, the plaintiff had signed his initials indicating he was aware of the B&O tax and its amount prior to finalizing the purchase of his car. *Id.*

odds with this Court's analysis of RCW 82.04.500 as a proscription against treating it as a tax on consumers rather than including it with overhead as a cost of doing business. What would be the point of RCW 82.04.500 if businesses could simply say "plus B&O tax" next to their prices?

Cingular claims businesses cannot be required to state the "specific dollar amount" of the B&O tax, citing cases that have nothing to do with the B&O tax. In fact, Cingular flatly misrepresents the only Washington case it cites. *Robinson v. Avis* involved claims against car rental companies for failing to disclose a 10% "concession fee" that they charged customers. *Robinson v. Avis Rent A Car Sys. Inc.*, 106 Wn. App. 104, 22 P.3d 818 (2001). *Robinson* does not consider the B&O tax or RCW 82.04.500. To the extent the Court considers *Robinson*, it supports Bowden's argument.

In that case, the Court of Appeals never said—as Cingular asserts—that it was sufficient to disclose the fact of an additional fee but not the amount of the fee. In fact, the court said the opposite:

We first note that quoting a car rental price that does not include a concession fee that is also charged would

have the capacity to deceive the purchasing public, absent disclosure of that fee. That is because the lack of disclosure *would fail to apprise consumers of the true price* of the car rental.

Id. at 115-16 (emphasis added). This is exactly the logic of this Court's analysis of RCW 82.04.500 in *Appleway*. To the extent *Robinson* is applicable at all, it supports Mr. Bowden.⁶

Cingular attempts to bring a practical concern into this Court's RCW 82.04.500 jurisprudence, claiming it would be too difficult for Cingular to "predict and then state months in advance the precise amounts of the variable B&O surcharges." Opp. at 14 (quoting district court order, ER 17-18 n. 6.).⁷ This argument is a straw man. As this Court explained in *Appleway*, Cingular is free to

⁶ The other case Cingular relies upon for its contention that it must only disclose the fact that it adds a B&O tax surcharge, not the amount, is *Smale*, a federal district court decision. *Smale v. Cellco Partnership*, 547 F.Supp.2d 1181 (W.D. Wash. 2008). *Smale* has absolutely no bearing on this case because the claims it addressed were "limited to those arising from Verizon's alleged failure to disclose the Effect of City Tax" to prospective customers. *Smale*, 547 F.Supp.2d at 1185. Unlike the B&O tax, there was no statute that expressly forbade Verizon to construe the Effect of City Tax as a tax on consumers, or that expressly required that it be treated as overhead instead. As this Court explained in *Appleway*, RCW 82.04.500 makes the B&O tax different than other taxes and fees. *Appleway*, 160 Wn.2d at 181. *Smale* is irrelevant to the question before this Court.

⁷ In the same breath, Cingular also insists that the B&O tax rate is "readily ascertainable" by Mr. Bowden, so he could easily get all the information he wished if he only looked for himself. Opp. at 14-15. This, too, is completely beside the point of the statute, which requires that B&O taxes not be imposed directly on purchasers but treated as overhead instead.

charge customers whatever the market will allow, and it can tell customers whatever it wants about the part that B&O tax plays in that price. *Appleway*, 160 Wn.2d at 180 n. 5, 184. Subject to market forces, if it wishes to raise its prices in order to account for B&O taxes, it may do so.⁸ Cingular's complaint is a policy concern that should be addressed to the state legislature, not a legal argument for this Court.

Furthermore, there is nothing unique to Cingular's business that makes this more difficult or unreasonable. The fact that customers' bills may vary from month to month due to variable usage does not change the rates that Cingular charges them, which are written into the customer's contract at the time of the sale. *See* ER 164 (listing fixed rates for "Monthly Service Fee," "Price per Add'l Min.," and "Text.>"). Just like *Appleway Chevrolet*, Cingular can set these rates at whatever the market will allow, and it can account for its B&O tax however it chooses.

⁸ Cingular suggests that it cannot be expected to disclose the amount of the B&O tax because its rate is variable. In fact, the rate does not appear to have changed for many years. *See* ER 126 (rate was .00417% in 2006); <http://dor.wa.gov/Content/FindTaxesAndRates/BAndOTax/BandOrates.aspx> (same rate today).

Finally, Cingular offhandedly suggests that forcing Cingular to “absorb” the B&O tax “as an item of overhead” would mean “passing on to subscribers in other states overhead costs that are unique to Washington,” which would “raise additional preemption concerns because of the resulting nationwide impact on wireless customers.” Opp. at 16-17 (emphasis in original). Cingular does not explain or substantiate why this would be so, but it has apparently managed the problem; it voluntarily suspended charging a B&O tax surcharge after this suit was filed five years ago. ER 130.

Cingular’s protestation is tantamount to an admission that it does not treat the B&O tax “as an item of overhead” as the statute requires. Indeed, it admitted in deposition that federal preemption is the reason it decided to impose a B&O tax surcharge in the first place, in the belief that RCW 82.04.500 did not apply to it. ER 130. And, the Ninth Circuit has already held, in this case, that RCW 82.04.500 is not preempted by federal law. *Peck v. Cingular Wireless Services, LLC*, 535 F.2d 1053, 1058 (9th Cir. 2008). Cingular’s practice violates that statute, and this Court should so hold.

III. CONCLUSION

For the reasons stated above and in his Opening Brief, Plaintiff respectfully requests that the Court find that RCW 82.04.500 prohibits a seller from imposing a surcharge on its customers to recoup its B&O taxes, even where the seller discloses that it will add such a surcharge, if the advertised price does not include the B&O tax surcharge.

DATED this 21st day of March, 2011.

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Certificate of Service

I, Amber Siefer, hereby certify that on March 21st, 2011, I electronically filed the foregoing with the Clerk of the Court for the Washington Supreme Court via Email to Supreme@courts.wa.gov.

I certify that all participants listed below have been served in the manner indicated below.

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