

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

HERBERT NELSON, on his behalf and on behalf of all others similarly situated,)

Respondent,)

v.)

APPLEWAY CHEVROLET, INC., a Washington corporation, d/b/a APPLEWAY SUBARU/ VOLKSWAGEN/AUDI, APPLEWAY ADVERTISING, APPLEWAY AUDI, APPLEWAY AUTOMOTIVE GROUP, APPLEWAY CHEVROLET LEASING, APPLEWAY GROUP, APPLEWAY MAZDA, APPLEWAY MITSUBISHI, APPLEWAY SUBARU, APPLEWAY TOWING, APPLEWAY TOYOTA, APPLEWAY VOLKSWAGEN, EAST TRENT AUTO SALES, LEXUS OF SPOKANE, OPPORTUNITY CENTER, and TSP DISTRIBUTORS; and AUTONATION, INC., a Delaware corporation,)

Petitioners.)

No. 77985-6

En Banc

Filed April 26, 2007

SANDERS, J.—Herbert Nelson purchased a used car from Appleway Volkswagen (Appleway). But after negotiating a final purchase price, Appleway added \$79.23 for business and occupation (B&O) tax. Nelson argues Appleway improperly charged this tax as an additional cost above the final price, while Appleway argues it merely disclosed and itemized an overhead expense. Appleway also argues declaratory judgment is improper because Nelson has no standing, there is no justiciable controversy, and there was no private right of action. Appleway also complains the superior court improperly certified the class because Nelson seeks both declaratory and monetary relief. The trial court held for Nelson, the Court of Appeals affirmed, as do we.

We hold Appleway improperly charged Nelson B&O tax on top of the final price, Nelson can seek declaratory judgment, and the superior court properly certified the class.

I

The facts are undisputed. On September 3, 2004, Herbert Nelson purchased a used Volkswagen Cabriolet from Appleway Volkswagen in Spokane.¹ Appleway charged several fees and taxes in addition to the agreed sale price of \$16,822. This included a \$79.23 charge for B&O tax.²

¹ Appleway Volkswagen is a car dealership within the Appleway Chevrolet, Inc., group of dealerships.

Soon after purchase, Nelson filed a class action claim requesting declaratory relief that Appleway's collection of B&O tax, and the sales tax on the B&O tax, violated Washington law.³ He also asked the court to enjoin Appleway's future collection of B&O tax from customers and prayed for monetary relief, claiming Appleway was unjustly enriched. Each party moved for summary judgment. The superior court found for Nelson, concluding Appleway's collection of B&O tax from customers violated RCW 82.04.500. It enjoined Appleway from passing through the tax to its customers and certified the class.⁴ The Court of Appeals affirmed. *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 945, 121 P.3d 95 (2005). We granted review. 157 Wn.2d 1012, 139 P.3d 350 (2006).

II

First, we address whether Appleway could directly impose its B&O tax

² In the same way as it charged a B&O tax, Appleway also charged \$1,225.60 in sales tax, which included sales tax charged on the B&O tax.

³ Nelson paid the B&O tax under protest. It was disclosed at four places in the contract, which stated: "Business and Occupation taxes (B&O tax) have been assessed on the negotiated sales amount." Clerk's Papers (CP) at 51. Additionally, Catherine Nelson initialed a line on the acknowledgement of terms and conditions form that read: "I understand that the dealership is passing through the B&O tax overhead and that I am paying sales tax on the sales price and the B&O tax amounts." CP at 53.

⁴ The superior court defined the class as: "All individuals and entities from whom Defendants itemized and collected B&O Tax on the sale of motor vehicles, parts, merchandise, or service in the state of Washington." CP at 375.

obligation on its customers. Statutory construction is a question of law and is reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). Washington State generates substantial revenue through its B&O tax. This B&O tax is for the privilege of engaging in business and is levied against the value of products, gross proceeds of sales, or gross income of a business. RCW 82.04.220. This tax is levied directly on businesses:

It is not the intention of this chapter that the taxes herein levied upon persons engaging in business be construed as taxes upon the purchasers or customers, but that such taxes be levied upon, and collectible from, the person engaging in the business activities herein designated and that such taxes shall constitute a part of the operating overhead of such persons.

RCW 82.04.500. We apply unambiguous statutes according to their plain language. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). Only ambiguous statutes will be construed. *Id.*

A. The plain meaning of RCW 82.04.500 prevents Appleway from directly imposing B&O tax on its customers

RCW 82.04.500 is not ambiguous and plainly says two things. First, the tax is not a tax on customers. Second, the tax is a tax on business and should be part of the operating overhead. “Overhead” is a well-known and well-understood term.

Webster's Third New International Dictionary 1608 (2002) defines it as: “those general charges or expenses in a business which cannot be charged up as belonging exclusively to any particular part of the work or product (as rent, taxes, insurance,

lighting, heating, accounting and other office expenses, and depreciation).” Overhead is simply the aggregate cost of doing business. By saying “such taxes shall constitute a part of the operating overhead,” the legislature simply considers the B&O tax a cost of doing business. RCW 82.04.500.

Contravening the statute’s plain meaning, Appleway added \$79.23 in B&O tax *after* Appleway and Nelson negotiated a final price of \$16,822.⁵ No other overhead costs—such as rent, insurance, utilities—were itemized and charged above the \$16,822. Appleway treated the B&O tax as a tax on customers. Clerk’s Papers (CP)

⁵ Appleway claims as a practical matter if Nelson does not pay the tax as an added on charge, then Appleway will simply increase its final price by the amount of the B&O tax. But Appleway cannot necessarily receive whatever price it sets; the market determines the fair market value, not the costs of doing business. In *Phoenix v. Kolodziejcki*, the parties stipulated “the amount of money paid as real property taxes is a cost of doing business of the [appellee's] landlord and as such has a material bearing on the cost of the [appellee's] rental payments.” *Phoenix v. Kolodziejcki*, 399 U.S. 204, 210 n.6, 90 S. Ct. 1990, 26 L. Ed. 2d 523 (1970) (alterations in original). But the Supreme Court disputed that characterization: “The extent to which a landlord can pass along an increase in property taxes to his tenants generally depends on how changes in rent levels in the municipality affect the amount of rental property demanded—the less responsive the demand for rental property to changes in rent levels, the larger the proportion of property taxes that will ultimately be borne by tenants. See C. Shoup, *Public Finance* 385-390 (1969); D. Netzer, *Economics of the Property Tax* 32-40 (1966); Simon, *The Incidence of a Tax on Urban Real Property*, in *Readings in the Economics of Taxation* 416 (published by the American Economic Assn. 1959).” *Id.* So while Appleway can negotiate a purchase price with its customers, which may (or may not) include its B&O tax liability, the actual sale price will reflect what the used car market will bear. The \$16,822 negotiated between Appleway and Nelson is presumably that market price; Appleway cannot then add its B&O tax liability on top of this final price.

at 51 (contract stating the B&O taxes “have been assessed on the negotiated sales amount”). Appleway’s practice is explicitly forbidden by the statute.⁶

Appleway’s defense of this add-on practice misconstrues the Court of Appeals holding, mischaracterizes court decisions, and relies on unconstitutional out-of-state statutes and ambiguous Department of Revenue (DOR) notices. Appleway claims the Court of Appeals held Appleway could add on the tax as long as it did not disclose or itemize it to the customer. Pet. for Review at 1 (“[A]fter the court of appeals’ decision, the Appleway dealerships remain free to pass through the B&O tax to consumers . . . *but only so long as they bury the pass-through.*”). Appleway’s reading is flawed. First, the Court of Appeals explicitly found the add-on was improper. *Appleway*, 129 Wn. App. at 945 (“[T]he plain language of the statute states that Appleway must treat the B&O tax as operating overhead and that the B&O tax cannot be treated as a tax on purchasers or customers.”). Second, the Court of Appeals did not prohibit disclosure. Rather it said: “Quite simply, the seller can disclose the B&O overhead charge to the purchaser, but it must be done while setting the final purchase price. The process here involved the negotiation of a price; hence, the information should have been disclosed as part of that process.” *Id.* Appleway

⁶ Appleway argues the Court of Appeals decision “finds no support in the law.” Pet. for Review at 8. Apparently, Appleway believes a statute’s plain meaning is insufficient support.

may itemize the tax if it is part of the final purchase price. In other words, it is lawful for Appleway to disclose a B&O charge to Nelson *during* the course of negotiating a purchase price or later identify any claimed element of overhead. However, Appleway may not add a B&O charge as one of several fees and taxes *after* Appleway and Nelson negotiated and agreed upon a final purchase price.

None of Appleway's cited authority is apposite, and some cases support Nelson rather than Appleway. Appleway relies heavily on *Public Utility District No. 3 of Mason County v. State*, 71 Wn.2d 211, 427 P.2d 713 (1967). This case is not on point.⁷ It concerns whether Mason County Public Utility District (PUD) needed to include taxes levied on utilities customers in its gross income. This court said those taxes must be included in gross income. Appleway's argument seems to be since the court did not disallow the pass-through of utilities taxes there, it should not be concerned with the pass-through of B&O taxes here. But, in a statute entitled "Municipal taxes – May be passed on," the legislature specifically allowed PUD to levy such taxes directly on the customers. *See* RCW 54.28.070 ("Any such district shall have the power to add the amount of such tax to the rates or charges it makes for electricity so sold within the limits of such city or town."). Here, the legislature has

⁷ In its petition for review, Appleway chastises the Court of Appeals for not discussing this case in its opinion. But the Court of Appeals likely ignored it because, like so much of Appleway's cited authority, it is irrelevant, dealing with entirely different tax issues.

said the opposite. RCW 82.04.500.⁸

Appleway also relies on *Texaco Refining & Marketing Co. v. Commissioner of Revenue Services*, 202 Conn. 583, 522 A.2d 771 (1987). This case supports Nelson rather than Appleway. This is the only case Appleway cites concerning statutory language similar to RCW 82.04.500. *See* Conn. Gen. Stat. § 12-599(a) (“It is not the intention of the general assembly that the tax . . . be construed as a tax upon purchasers . . .”). But the Second Circuit Court of Appeals ruled the Connecticut statute unconstitutional in 1981 because it was preempted by federal law regulating oil prices. *See Mobil Oil Corp. v. Dubno*, 639 F.2d 919 (2d Cir. 1981). The *Texaco Refining* court specifically noted this was why Texaco was “able to pass through the tax to its purchasers.” *Texaco Ref. & Mktg. Co.*, 202 Conn. at 585 n.5 (citing *Mobil Oil Corp. v. Dubno*, 492 F. Supp. 1004 (D. Conn. 1980), *aff’d in part, dismissed in part by Dubno*, 639 F.2d 919). But for the Second Circuit’s ruling, the statute would have prevented Texaco from passing the tax on to its customers. Conversely, RCW

⁸ In other authority cited by Appleway there was no statutory language specifically outlawing the tax against customers. In *Sprint Spectrum, L.P./Sprint PCS v. City of Seattle*, 131 Wn. App. 339, 127 P.3d 755 (2006), the court held Sprint must include collected taxes in its gross income. Sprint was assessed a B&O tax and utility taxes by both the State and city of Seattle. It passed the municipal utility excise taxes, but not the B&O tax, on to the customer. There is no language in the law prohibiting a pass-through of utility taxes, like in RCW 82.04.500. *See* RCW 82.16.090 (describing how utility companies should pass-through the tax to customers); Seattle Municipal Code 5.48.020(B).

82.04.500 is still good law and therefore does prevent Appleway from passing the tax on to its customers.

B. The notice from DOR is ambiguous and does not deserve deference

Next Appleway relies on a notice from DOR, which Appleway says allows companies to pass the B&O tax on to its customers. This DOR notice is at worst ambiguous. In April 2002 DOR reissued a special notice that said, “It is not illegal for a seller to itemize the B&O tax. . . .The statute intends the B&O tax to be a part of the seller’s overhead. However, it does not prevent a seller from itemizing and showing the effect of the tax.” CP at 122 (Washington State Department of Revenue Special Notice, “What You Need to Know about Itemizing the B&O Tax,” (reissued Apr. 2002)). The notice then quotes RCW 82.04.500. Appleway claims this means DOR allows businesses to pass the tax on to its customers after a final price has been set.⁹ Or this could mean DOR is suggesting companies can inform customers part of the final price includes the B&O tax.¹⁰ A second DOR notice supports this latter

⁹ An example in the notice might support this interpretation: “Two Seattle retailers selling the same products both make a \$20,000 sale. One retailer doesn’t itemize the B&O tax while the other does.” CP at 123. The example then explains how to calculate the increased B&O charge. This is not necessarily apposite, however, since it is not clear whether the B&O tax was added before or after the buyer and seller agreed to a final price. The notice ends by saying: “The tax simply becomes one of the many overhead costs a prudent businessperson considers when pricing goods and services.” *Id.*

¹⁰ The attorney general’s office has also expressed its concern over car dealerships’ charging B&O tax. CP at 150. A memorandum from Douglas Walsh, Senior Counsel for the Attorney General, to Washington State Independent Automobile Dealers’

interpretation. In September 2004 DOR circulated a B&O tax fact sheet, which states: “The B&O tax is a cost of doing business and should not be billed to your customer as a separately stated item (as is the sales tax).” CP at 497.

Even though the DOR policy is at worst unclear, Appleway claims the Court of Appeals’ decision contravenes the April 2002 notice. The response is threefold: First, the judiciary has ultimate authority to construe statutes; an administrative interpretation may be only given deference, it is never authoritative. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994). Second, this Court will only give deference if the statute is ambiguous. *Id.* Here there is no ambiguity as the statute plainly forbids the tax on customers. See RCW 82.04.500. Third, an agency interpretation that conflicts with a statute is given no deference. *Waste Mgmt.*, 123 Wn.2d at 628. If the April 2002 notice does say businesses can pass through the tax after a final price has been set, then it is wrong and conflicts with the plain language of RCW 82.04.500. In any event, this DOR notice bears no weight on this court’s decision.

C. RCW 82.04.500 does not violate the First Amendment to the United States Constitution

Association says: “Our office is concerned that, in the context of a negotiated vehicle sales or lease transactions, separately charging the B&O tax is fraught with risk of unfairness and deception, which is highlighted by the legislature’s clear expression of intent that the tax not be imposed directly on consumers, but instead be included as part of the overhead.” CP at 151.

Appleway claims its First Amendment rights are violated because it misreads the Court of Appeals' holding to prevent disclosure and itemization. The statute is silent about disclosure, and Appleway is free to disclose and itemize any tax or cost. Appleway was free to inform Nelson that \$79.23 of his final purchase price would be used to pay for the B&O tax. The First Amendment, however, will not insulate Appleway's illegal practice of making customers bear Appleway's tax burden.

A Minnesota case cited by Appleway is, again, inapposite. *Bloom v. O'Brien*, 841 F. Supp. 277 (D. Minn. 1993). The Minnesota Legislature specifically allowed health care tax to be passed through to patients but forbade doctors from informing patients about the tax. *Id.* at 279. The United States District Court for the District of Minnesota ruled this was unconstitutional. *Id.* But RCW 82.04.500 says nothing about disclosure. 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.

III.

Next we address whether Nelson can seek a declaratory judgment concerning his rights under RCW 82.04.500. The Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, grants Nelson the right to seek a declaratory judgment finding Appleway violated RCW 82.04.500.

A person . . . whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of

rights, status or other legal relations thereunder.

RCW 7.24.020. *See also State ex rel. Lyon v. Bd. of County Comm'rs*, 31 Wn.2d 366, 196 P.2d 997 (1948) (holding a party may seek declaratory judgment to construe a statute). Furthermore, the legislature intended for the UDJA to be applied liberally. RCW 7.24.120 (stating the UDJA “is to be liberally construed and administered”).

Appleway raises three challenges to Nelson’s seeking a declaratory judgment. First, Appleway argues Nelson has no standing. Second, Appleway argues there is no judiciable controversy. And third, Appleway argues there is no private right of action, express or implied, in RCW 82.04.500.

A. Nelson has standing to seek a declaratory judgment

To have standing a party must (1) be within the zone of interest protected by statute and (2) suffered an injury in fact, economic or otherwise. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004).

Appleway contends Nelson is a customer and not within the zone of interests protected by RCW 82.04.500 because it is a tax “on *businesses*.” Suppl. Br. of Pet’rs at 13 (emphasis in original). Therefore, Appleway argues, a customer has no rights under the statute. Appleway is right—the B&O tax is meant to be a tax on businesses. But Nelson paid Appleway’s tax for Appleway. This is precisely what RCW 82.04.500 forbids. Therefore, Nelson is within the zone of interest protected by the statute.

Appleway also maintains there is no injury in fact because Nelson would have to pay

the tax as part of the overhead expense. This is incorrect as the market sets the price, not the overhead. *See* discussion *supra* note 5. Nelson paid \$79.23 more than the negotiated price. This is economic injury in fact and Nelson satisfies both standing requirements.

B. This case is a justiciable controversy

The elements of a justiciable controversy under the UDJA are: (1) parties must have existing and genuine rights or interests; (2) these rights or interests must be direct and substantial; (3) the determination will be a final judgment that extinguishes the dispute; (4) the proceeding must be genuinely adversarial in character. *State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 413 P.2d 972 (1966). All elements are easily satisfied. There are genuine rights and interests concerning who must pay Appleway's B&O tax. Both parties are adversarial, each aggressively seeking the other pays the tax.¹¹ And construing the statute will conclusively decide Appleway must pay the tax from its final purchase price.

C. Nelson's restitution claim is a private right of action that allows him to recover the \$79.23 improperly paid as B&O tax

Finally, Appleway maintains Nelson failed to have a private right of action to support

¹¹ Appleway argues Nelson should seek redress from the DOR. This is absurd. Nelson is not maintaining the State overcharged him B&O tax. Rather, Nelson is contending Appleway unlawfully shifted its tax to its consumers. This dispute is only between Nelson and Appleway and does not concern the DOR.

his claim for relief. Of course, no additional private right of action is necessary for parties to seek a declaratory judgment whenever their rights are affected by a statute. RCW 7.24.020 (“A person . . . whose rights . . . are affected by a statute . . . may have determined any question of construction or validity.”). Appleway argues, though, a private right of action is necessary for Nelson to recover the \$79.23 paid as B&O tax.¹² But Nelson does not invoke the UDJA “to obtain monetary relief,” as suggested by Appleway. Pet. for Review at 15. Rather, he brought a private right of action in his unjust enrichment claim.

The new *Restatement (Third) of Restitution* addresses the confusion surrounding unjust enrichment claims. While historically understood as an equity action, restitution has roots in both equity and the law. *See* Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. b (Discussion Draft 2000). The original justification, dating back to Lord Mansfield’s decision in *Moses v. Macferlan*¹³ has given way to a modern understanding, based on a transaction’s legal validity. Specifically, any transaction not adequately supported by law is voidable. *See*

¹² This argument is dubious. RCW 7.24.080 allows further relief to be granted whenever necessary or proper. If a court found Appleway violated RCW 82.04.500 by charging the B&O tax as an additional cost, then it is arguably necessary to force Appleway to remit that payment to Nelson.

¹³ *Moses v. Macferlan*, 2 Burr. 1005, 1012, 97 Eng. Rep. 676, 681 (K. B. 1760) (“In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.”).

Restatement (Third) of Restitution, *supra*, § 1 cmt. b at 3 (“Unjustified enrichment is enrichment that lacks an adequate legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights.”). Because Appleway illegally charged Nelson the B&O tax as an additional cost to the final purchase price, Appleway has been unjustly enriched with money properly belonging to Nelson. In effect, Appleway has made Nelson pay Appleway’s taxes. Furthermore, restitution is more than a simple contract remedy. It is “itself a source of obligations, analogous in this respect to tort or contract.” *Id.* § 1 cmt. h at 12-13.

We need not address whether RCW 82.04.500 implies a private right of action because Nelson brought an independent claim of restitution. Therefore, we hold the superior court properly allowed Nelson to seek a declaratory judgment.

IV

Finally, we address whether the superior court properly certified the class under CR 23(b)(2). CR 23 states:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:

. . . .

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

We review class certification for abuse of discretion and will not disturb a trial

court's certification decision if the record indicates the court properly considered all CR 23 criteria. *Lacey Nursing Ctr. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995) (“A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds.” (quoting *Eriks v. Denver*, 118 Wn.2d 451, 467, 824 P.2d 1207 (1992)). An appellate court resolves close cases in favor of allowing or maintaining the class. *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003).

Appleway concedes the class meets the requirements of CR 23(a) and the explicit requirements of CR 23(b)(2) by acting in a way generally applicable to the class. But Appleway reminds this court any monetary relief must be incidental to the declaratory relief. In *Sitton*, the Court of Appeals examined case law on CR 23's federal counterpart and found:

Classes certified under subsections (b)(1) and (b)(2) are “mandatory” classes; that is, the results are binding on all class members, who may not choose to opt out of the class. Notice to class members under these subsections is left to the trial court's discretion. Mandatory class members thus may be deprived of their rights to notice and an opportunity to control their own litigation. For these reasons, when plaintiffs are seeking monetary damages, certification under (b)(1) or (b)(2) violates due process unless the monetary damages sought are “merely incidental to the primary claim for injunctive or declaratory relief.”

Sitton, 116 Wn. App. at 252 (footnotes omitted) (quoting *Molski v. Gleich*, 307 F.3d 1155, 1165 (9th Cir. 2002), *withdrawn and reprinted as amended* by 318 F.3d 937, 949

(9th Cir. 2003)). Incidental damages ““flow directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief.”” *Molski v. Gleich*, 318 F.3d 937, 949 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). These damages must be cognizable by objective standards and not significantly dependent on each class member’s subjective circumstances. *Sitton*, 116 Wn. App. at 252.

Nelson’s claim for \$79.23 flows directly from Appleway’s liability. Furthermore, computing the monetary relief is simple and relies entirely on objective facts, without need for individual assessments of each class member’s circumstances. The relief is simply the amount of B&O tax Appleway charged customers above the purchase price.¹⁴ There is no threat of a due process violation because all damages can be objectively determined.

Appleway also relies on *Eriks*, 118 Wn.2d 451, where we upheld a trial court’s denial of class certification under CR 23(b)(2). There the plaintiffs moved to recertify under CR 23(b)(2) after the trial court granted partial summary judgment. *Id.* at 465-66 (remaining issue concerned primarily disgorgement of attorney fees). This court found no abuse of discretion when the trial court refused to recertify. The court relied on a federal case, which said “subdivision (b)(2) by its own terms does not apply to

¹⁴ This relief would also include a partial refund of the sales tax because Appleway charged sales tax on the B&O tax.

actions only for damages.” *McDonnell Douglas Corp. v. United States Dist. Court*, 523 F.2d 1083 1087 (9th Cir. 1975) (“[T]he declaratory relief sought by plaintiffs adds nothing to their claim for damages.”). *See Eriks*, 118 Wn.2d at 466-67. The *Eriks* court said, “[w]here the declaration merely forms the basis for monetary relief, a CR 23(b)(2) action is not appropriate.” *Id.* at 466. Here the declaratory judgment is more than a basis for monetary relief; Nelson asks the court to declare his rights under the statute. Lastly, certification under CR 23(b)(2) is inappropriate if the claim relates “exclusively or predominantly” to monetary damages. 3A Lewis H. Orland & Karl B. Tegland, *Washington Practice: Rules Practice CR 23 advisory comm. notes* at 560 (4th ed. 1992). Appleway claims Nelson “seeks millions of dollars.” Pet. for Review at 14. Seventy-nine dollars and twenty-three cents is not millions of dollars, and Nelson’s claim for monetary relief does not dominate his claim for declaratory relief.

CONCLUSION

The superior court properly considered all CR 23 criteria, and its decision is not manifestly unreasonable. All requirements of CR 23(a) are met; Appleway’s improper passthrough of the B&O tax applies to the entire class; and Nelson’s damages are incidental to his declaratory relief and do not predominate the claim. The superior court properly certified the class.

We affirm the Court of Appeals.

AUTHOR:

Justice Richard B. Sanders

WE CONCUR:

Chief Justice Gerry L. Alexander

Justice Tom Chambers

Justice Susan Owens

Justice Mary E. Fairhurst

Justice Bobbe J. Bridge
