

77985-6

No. 235041

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

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 foreign corporation,

Petitioners

**PLAINTIFF/RESPONDENT HERBERT NELSON'S
ANSWERING BRIEF**

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I. INTRODUCTION

RCW 82.04.500 explicitly states that the Washington State Business and Occupation Tax (“B&O tax”) “[is not intended to] be construed as taxes upon the purchasers or consumers, but that [the B&O tax] shall be levied upon, and collectible from, the person engaging in the business activities herein designated” Respondent/Plaintiff Herbert Nelson purchased a used Volkswagen from Appleway Volkswagen in Spokane, Washington, one of several car dealerships in the Appleway Chevrolet, Inc., group of dealerships (collectively, “Appleway”) and was charged B&O tax on his purchase.

This case does not present complex issues of law or fact. Indeed, as the Superior Court noted, “this is a very straightforward case.” RP 100: 7–8 (8/13/04 Hearing). The language of RCW 82.04.500 is unambiguous and its meaning is clear: Retailers may not charge consumers B&O tax on their purchases. This Court should affirm the Superior Court’s order declaring that Appleway’s practice of collecting B&O tax from consumers violates the laws of the state of Washington and enjoining Appleway from continuing to collect B&O Tax from its customers in Washington State. This Court should also affirm the Superior Court’s class certification order and remand this case to the Superior Court so the litigation may proceed consistent with the Superior Court’s rulings.

II. STATEMENT OF ISSUES

1. This Court should affirm the Superior Court's order denying Appleway's motion for reconsideration of the Superior Court's summary judgment order because:

a. The Superior Court did not err in holding that Appleway's practice of assessing and collecting B&O tax from its customers contravenes the B&O tax statute, RCW 82.04 *et seq.*;

b. The Superior Court did not err by considering and rejecting a "Special Notice" issued by the Washington State Department of Revenue ("DOR") which did not comply with the agency rule-making procedures;

c. The Superior Court did not err in holding that Appleway's practice of assessing and collecting Washington State Business and Occupation tax from its customers presents a justiciable controversy which Mr. Nelson has standing to challenge; and

d. The Superior Court did not abuse its discretion when it affirmed its previous Order granting partial summary judgment for declaratory and injunctive relief in favor of Mr. Nelson.

2. This Court should affirm the Superior Court's order denying Appleway's motion for reconsideration of the Superior Court's class certification order because:

a. The Superior Court did not abuse its discretion

when it held that class certification pursuant to CR 23(b)(2) was appropriate because (1) the requirements of CR 23(a) were satisfied, (2) Appleway acted on grounds generally applicable to the Class, (3) final declaratory and injunctive relief is appropriate with respect to the Class as a whole, and (4) Mr. Nelson's request for restitutionary relief does not affect class certification under CR 23(b)(2); and

b. The Superior Court did not abuse its discretion when it affirmed its previous Order granting Mr. Nelson's motion for class certification.

III. STATEMENT OF THE CASE

A. Factual Background

For over 70 years, Washington State has levied a gross receipts tax, or B&O tax, on businesses. CP 489 (Washington State Department of Revenue, "Tax Reference Manual 2002").¹ For just as long, the legislature has prohibited businesses from assessing and collecting the B&O tax from consumers. RCW 82.04.500.

Washington's "B&O tax is unique; no other state levies a comprehensive gross receipts tax on all businesses." CP 484; 491 ("Tax

¹ The Department of Revenue has since issued a "Tax Reference Manual 2005," which is substantially similar to the 2002 Manual and can be located at http://dor.wa.gov/content/statistics/2005/Tax_Reference_2005/default.aspx?track=TaxesMain.

Reference Manual 2002”). Rather, “[m]ost other states rely upon a corporate net income tax, similar to the federal income tax.” *Id.*

On September 3, 2002, Respondent/Plaintiff Herbert Nelson and his wife purchased a used Volkswagen Cabriolet from Appleway Volkswagen in Spokane, Washington. CP 114 (¶¶ 1,2); CP 117. Appleway Volkswagen is a car dealership within the Appleway Chevrolet, Inc. group of dealerships (collectively, “Appleway”). CP 13 (¶ 1.1).² After the parties agreed upon the price of the car, Appleway’s agent and the Nelsons entered into an Agreement to Purchase. CP 117–118 (“Agreement to Purchase”). The agreed price of the car was \$16,822.00. *Id.* In addition to the agreed sales price, Appleway itemized and charged the Nelsons for a “license estimate” fee (\$61.50), a “lien release fee end of term” (\$9.00), Washington State sales tax (\$1,255.60), and a \$79.23 charge for Washington State B&O tax. *Id.* The Washington State sales

² On information and belief, the Appleway dealerships, including Appleway Volkswagen, are a subsidiary of AutoNation, Inc. (“AutoNation”), a Delaware corporation. CP 6 (¶¶ 2.2.2, 2.2.3). Appellants assert that AutoNation “is not a proper party to this suit.” Brief of Defendants/Appellants (“Appellants’ Brief”) at 3, fn.1. The Superior Court, however, has not yet ruled on this issue or entered any findings as to the relationship between AutoNation and the Appleway dealerships. RP 17:14–19 (8/20/04 Hearing). Indeed, the Superior Court’s Order on the parties’ summary judgment motions explicitly stated that while “[t]he scope of this Order does not presently encompass AutoNation, Inc., except to the extent of its interests, if any, in the other defendants[,]” the “ruling is without prejudice to Plaintiff’s investigating and proceeding against Defendant AutoNation, Inc., and other entities who may be responsible for the conduct this Court has found in this Order to be illegal.” CP 388–89 (¶ 5). For purposes of this appeal, Mr. Nelson will reference Appellants/Defendants collectively as “Appleway” but by such reference does not concede that AutoNation is not a proper party to this suit. Rather, Mr. Nelson wishes the appellate record to accurately reflect the record on review.

tax Appleway collected included additional sales tax it charged the Nelsons on the B&O tax. *Id.*; Appellants' Brief at 3.

It is Appleway's practice to charge all of its Washington customers B&O tax on all purchases, regardless of whether customers purchase a vehicle or parts, merchandise, and other goods and services. CP 130 (Answer to Request For Admission No. 7). Indeed, Appleway's pre-printed form Agreement to Purchase includes a line for "Business & Occupation Tax," just as it does for "State Sales Tax" and other charges it assesses and collects from consumers. CP 117 (Agreement to Purchase).

B. Procedural Background

1. Mr. Nelson's Complaint

Mr. Nelson filed a Complaint for Declaratory and Injunctive Relief and Unjust Enrichment Damages (the "Complaint") against Defendants Appleway Chevrolet, Inc.³ and AutoNation. CP 4-12. Mr. Nelson brought suit on his own behalf and on behalf of "all other similarly situated individuals and entities who were directly charged [the Washington B&O tax] on motor vehicles, parts, merchandise, or services they purchased from Defendants in Washington State" (the "Class").

CP 4. The Complaint alleges that Mr. Nelson's claims are suitable for class treatment pursuant to CR 23(b)(2), because "Defendants have acted or refused to act on grounds generally applicable to the class, thereby

³ Appleway Chevrolet, Inc., is a Washington corporation which does business as several dealerships, including Appleway Volkswagen. CP 6 (¶ 2.2.1).

making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” CP 4.

The Complaint does not allege claims sounding in tort, contract, or for violation of the Washington Consumer Protection Act (the “CPA”). CP 4–12. Rather, Mr. Nelson asks the court to issue a declaratory judgment that Defendants’ assessment and collection of B&O tax (and sales tax on the B&O tax) is “contrary to the laws of the state of Washington” and also to enjoin Defendants from assessing or collecting these taxes from individuals and entities in Washington State. CP 9-10. Specifically, Mr. Nelson’s Complaint alleges that Defendants’ practice of assessing and collecting B&O tax and B&O sales tax is contrary to the laws of the state of Washington because it violates RCW 82.04.500, which provides in pertinent part:

[B&O] Tax Part of Operating Overhead.

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 consumers, but that such taxes shall 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.

CP 9–10.⁴ The Complaint also alleges that Mr. Nelson and the Class of similarly situated individuals “are parties whose financial interests are affected and [who] have suffered injury as a result of Defendants’ illegal assessment and collection of B&O Tax and B&O Sales Tax,” and that Mr. Nelson and the Class will continue to be affected by this practice unless the court provides relief in the form of a declaratory judgment. CP 10.

Finally, Mr. Nelson’s Complaint requests that the court grant further relief pursuant to RCW 7.24.080, which states that “[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper.” CP 10–11. Specifically, the Complaint alleges that because Defendants’ assessment and collection of B&O tax and B&O sales tax is contrary to the laws of the state of Washington, and because Defendants received a financial benefit from such a practice, Defendants have been unjustly enriched and should provide full restitution to Mr. Nelson and the Class. CP 10–11.

2. Proceedings in the Superior Court

Appleway moved for summary judgment, arguing that Mr. Nelson’s claim should be dismissed because “the conduct complained of is lawful.” CP 59-63. Appleway’s summary judgment motion

⁴ For the Court’s convenience, Mr. Nelson notes that Appleway has included a copy of RCW 82.04.500 in the Appendix to Appellants’ Brief at A-2.

presented two arguments. *Id.* First, Appleway argued that “[w]here the conduct complained of is lawful, there can be no violation of the Consumer Protection Act,” citing a Washington State Department of Revenue “Special Notice” as support for its claim that Appleway’s collection of B&O tax was lawful. CP 62–63. Second, Appleway argued that because Appleway’s conduct was lawful, “such conduct could not have caused injury to [Mr. Nelson or the Class],” noting that the CPA requires that a defendant’s conduct proximately cause injury to the plaintiff. CP 63. As noted *supra*, Mr. Nelson did not seek recovery from Appleway pursuant to the CPA in his Complaint. CP 4–12.

Mr. Nelson cross-moved for partial summary judgment, requesting that the Superior Court declare Appleway’s practice of charging customers B&O tax “is contrary to the laws of the state of Washington” and asking that the court enjoin Appleway from continuing its illegal practice. CP 102–113. Mr. Nelson argued that he and the proposed Class had standing to seek such relief, that he had presented a justiciable controversy, and further noted that the court was not bound by the Department of Revenue’s “Special Notice” in its interpretation of the B&O tax statute. CP 107–113. Both parties responded to the other’s summary judgment motions, CP 140–47, CP 174–79, and also filed reply briefs. CP 190–94, CP 236–42.

Concurrent with the summary judgment motions, Mr. Nelson moved for class certification pursuant to CR 23(b)(2). CP 89–101. In response, Appleway challenged the adequacy of Mr. Nelson and Class counsel. Appleway also argued that Mr. Nelson had not satisfied the “predominance” and “superiority” requirements of CR 23. CP 243–252. However, Appleway completely failed to address the requirements of CR 23(b)(2). *Id.* Mr. Nelson filed a reply. CP 315–321.

On the balance of the parties’ briefs and the papers and files on record, and after hearing oral argument on August 13, 2004, the Superior Court denied Appleway’s motion for summary judgment and granted Mr. Nelson’s cross-motion for partial summary judgment for declaratory and injunctive relief.⁵ CP 386–389. The Superior Court held that Appleway’s practice of “itemizing and collecting” B&O tax from its customers and collecting sales tax on that B&O tax “violates the laws of the State of Washington.” CP 388. Finding “there is cause to believe that Defendants’ conduct, if not enjoined, will further injure Plaintiff,” the Superior Court enjoined Appleway from “further collecting, ‘passing through’ or ‘itemizing’” B&O tax and B&O sales tax. *Id.*

⁵ The Court heard additional argument on the wording of the Orders on summary judgment and class certification on August 20, 2004, and a presentment hearing was held on August 27, 2004. Appleway has filed transcripts from all three hearings as part of the Verbatim Report of Proceedings.

The Superior Court also granted the motion for class certification, certifying a class defined 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.⁶

CP 375–76. In support of its Order Granting Plaintiff’s Motion for Class Certification, the Superior Court entered specific findings as to each of the requirements of CR 23(a) and CR 23(b)(2). CP 375–380. With respect to CR 23(b)(2), the Superior Court found that “Defendants have acted on grounds generally applicable to the class because Defendants itemize and collect B&O Tax and B&O Sales Tax on all consumer transactions, including the sales of automobiles, parts, merchandise and service.” CP 379. Further, the Superior Court found that “declaratory and injunctive relief will settl[e] the legality of [Defendants’] behavior with respect to the class as a whole[]” and that “[s]uch relief is appropriate here.” CP 380 (internal marks omitted).

Appleway moved for reconsideration of the Superior Court’s order on summary judgment pursuant to CR 59. CP 390–393. Both parties submitted additional briefing (CP 394–414, CP 459–479, CP 533–568),

⁶ Excluded from the Class are Defendants, any entity in which Defendants have a controlling interest, any entity which has a controlling interest in Defendants, and Defendants’ legal representatives, assigns, and successors. Also excluded are the judge to whom this case is assigned and any member of the judge’s immediate family.

and the Court denied Appleway's motion. CP 578–582. Appleway also moved for reconsideration of the class certification order pursuant to CR 59 (CP 417–419). The parties submitted additional briefing (CP 420–431, CP 440-458, CP 499-522), and the Court denied Appleway's motion (CP 578–582).

Appleway filed a notice of discretionary review, seeking appeal of the Superior Court's denial of the motions for reconsideration. CP 585–595; CP 596–620.⁷ This Court granted review.

IV. ARGUMENT

A. Standard of Review

Appleway appeals from the Superior Court's October 13, 2004 Order denying Defendants' motion for reconsideration of the Superior Court's previous orders on summary judgment and class certification. *See* CP 585–595; 596–620. A trial court's denial of a motion for reconsideration is reviewed under the abuse of discretion standard. *Lund v. Benham*, 109 Wn. App. 263, 266, 34 P.3d 902 (2001), *rev. denied*, 146 Wn.2d 1018 (2002). To the extent this Court reviews the Superior Court's underlying order on summary judgment, the standard of review is

⁷ Appleway filed a Notice of Discretionary Review on October 27, 2004, attaching copies of the Superior Court's October 13, 2004 letter ruling and October 13, 2004 Order Denying Motion for Reconsideration, as well as the Superior Court's October 14, 2004 Order to Revise Stay of Proceedings. CP 585–95. The next day, Appleway filed an Amended Notice of Discretionary Review, which also included copies of the Superior Court's earlier rulings on summary judgment and class certification. CP 596–620.

de novo. See *Okeson v. City of Seattle*, 150 Wn.2d 540, 548–49, 78 P.3d 1279 (2003) (appellate court “engages in the same inquiry as the trial court” with respect to review of trial court’s order on summary judgment; when summary judgment turns wholly on questions of law, e.g., interpretation of a statute, appellate court’s review is *de novo*). To the extent this Court reviews the Superior Court’s class certification order, the standard of review is abuse of discretion. *Lacey Nursing Center, Inc. v. Dep’t. of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995).

The Superior Court’s rulings should be affirmed if this Court determines that there is any legal theory supporting the Superior Court’s conclusions, even if this Court’s theories or reasoning diverge from those of the court below. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 460–61, 45 P.3d 594 (2002) (citing *LaMon v. Butler*, 112 Wn.2d 193, 200–01, 770 P.2d 1027 (1989)) (affirming trial court’s rulings on matter of first impression, noting “we may affirm a trial court on any theory supported by the record and the legal authorities even if the trial court did not consider or mainly consider such grounds”).

B. This Court Should Affirm the Superior Court’s Order Denying Appleway’s Motion for Reconsideration of the Summary Judgment Order

1. The Superior Court Did Not Err In Holding That Appleway’s Practice of Assessing and Collecting B&O Tax Is Contrary To Washington Law

Washington’s B&O tax is “unique; no other state levies a comprehensive gross receipts tax on all businesses.” CP 491. And, as the Superior Court noted, determining whether the B&O tax statute permits businesses to itemize and collect B&O tax from consumers “is not an issue, as far as [the Superior Court] can determine, that has been decided by a Washington court.” RP 52:6–8 (08/13/04 Hearing). The Superior Court also highlighted three key points regarding the B&O tax statute. First, the B&O tax “is a tax on business. It is a tax on doing business in the State of Washington.” RP 52:11–13 (08/13/04 Hearing). Second, the B&O tax “is not a direct tax that can be imposed on the consumer . . . it is not analogous to a sales tax.” RP 52:14–16 (08/13/04 Hearing). Third, the B&O tax “is not a transactional tax. The sales tax is a transactional tax.” RP 52:17–19 (08/13/04 Hearing). The Superior Court then concluded, based on these distinctions between the B&O tax and the retail sales tax, and based on the plain language of the statute, that

[w]hat [the B&O tax statute] says is the cost of doing business, i.e., paying the B&O tax indeed can be a part of the operating overhead of the business. But what it does not say is that you can directly, by “itemization,” pass [the B&O tax] on to the consumer. However, this is the practice that

Appleway Chevrolet is engaging in which is the subject of this litigation.

RP 55:6-13 (08/13/04 Hearing). For the reasons discussed below, the Superior Court's interpretation of the statute is correct and its holding that Appleway's practice of collecting B&O tax from its customers is contrary to Washington law should be affirmed.

a. *The B&O Tax Statute Is Unambiguous and Provides That the B&O Tax Is Imposed on Washington Businesses, Not Consumers*

Where statutory language is not ambiguous, the plain meaning of the statute controls and the Court need not resort to legislative history to interpret the statute. *Sacred Heart Med. Ctr. v. State Dep't. of Revenue*, 88 Wn. App. 632, 639, 946 P.2d 409 (1997) (citing *Bellevue Fire Fighters Local 1604 v. City of Bellevue*, 100 Wn.2d 748, 750, 675 P.2d 592 (1984)). The Washington statute authorizing and imposing the business and occupations tax is explicit. First, the operative section provides that the B&O tax "shall be collected . . . for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be." RCW 82.04.220. Furthermore, the statute specifically provides that the B&O tax is *not* to be "construed as taxes upon the purchasers or consumers":

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 consumers, but that such taxes

shall 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 (emphasis added). Unlike the term “may,” which is permissive and does not necessarily create a statutory duty, the term “shall” creates an imperative obligation “unless a contrary legislative intent is apparent.” See *Erector Co. v. Dep’t. of Labor & Indus.*, 121 Wn.2d 513, 852 P.2d 288 (1993). The use of such mandatory language in the statute (and the lack of any legislative intent to the contrary), manifests the statute’s intent that businesses pay the B&O tax, *not* consumers. Indeed, the statute prohibits businesses such as Appleyway from levying and collecting B&O tax from consumers.

b. The Meaning of The B&O Tax Statute Is Clear When Considered In Light of Washington’s Entire Tax Structure

In *Commonwealth Title Ins. Co. v. City of Tacoma*, 81 Wn.2d 391, 502 P.2d 1024 (1972), the Washington Supreme Court noted the fundamental distinction between a business and occupation tax⁸ and a sales tax. First, “[t]he burden of the business and occupation tax falls on the business itself while the sales tax is normally paid by the customer and merely collected by the business.” 81 Wn.2d at 396. Second, the “very nature” of the taxes is different. *Id.* In order to determine if a sales tax

⁸ The *Commonwealth* court was interpreting a Tacoma city ordinance imposing a municipal B&O tax, modeled on the state tax.

must be assessed on a given transaction, the inquiry focuses on the “nature of the transaction,” *e.g.*, is the transaction a retail sale. *Id.* Resolving the question of whether a B&O tax may be assessed requires a focus on the type of business. *Id.* Indeed, the B&O tax statute contains several provisions exempting particular types of business activity from the state B&O tax, and the majority of reported case law is concerned with interpreting these exemptions. *See, e.g., Stroh Brewery Co. v. Dep’t. of Revenue*, 104 Wn. App. 235, 15 P.3d 692 (2001) (construing exemption for sales to wholesale direct seller’s representative); *Simpson Investment Co. v. Dep’t. of Revenue*, 141 Wn.2d 139, 3 P.3d 741 (2000) (construing B&O tax deduction for investment income of businesses not engaged in “financial businesses”).

When compared to the structure and provisions of the sales tax statute, it is clear that the B&O tax is distinct from the sales tax. The sales tax statute imposes an explicit obligation on the consumer to pay the retail sales tax on taxable transactions. RCW 82.08.050(1) (sales tax “*shall* be paid by the buyer to the seller, and each seller *shall* collect from the buyer the full amount of the tax payable”) (emphasis added). The retailer has a statutory obligation to collect sales tax from the consumer and remit it to the state. *Id.* Consumers refusing to pay sales tax due on their purchases are guilty of a misdemeanor, RCW 82.08.050(4), and the Department of

Revenue “may, in its discretion, proceed directly against the [consumer] for collection of the tax.” RCW 82.08.050(6).

The B&O tax is also distinct from Washington’s “selective business taxes” and “selective sales taxes.” With respect to the “selective business taxes” Washington State levies on specific business activities (which include a petroleum products tax, a public utilities tax, and a soft drinks syrup tax), the Department of Revenue has indicated that the “burden [of these taxes] may be shifted forward to consumers.” CP 484 (Tax Reference Manual 2002). The same is true of the “selective” sales taxes imposed by the state, which include taxes imposed on the purchase of cigarettes, liquor, and motor vehicle fuel, among other items: These taxes are “[t]axes imposed on the purchase of specific items which are either paid by or shifted forward to consumers.” CP 483 (Tax Reference Manual 2002). The statutes concerning these taxes are specific as to the parties from whom the taxes are to be collected, just as the B&O tax statute is explicit as to the prohibition on collecting the tax from consumers. *See, e.g.*, RCW 82.36.020 (motor vehicle fuel users tax; “[t]here is hereby *levied and imposed upon motor vehicle fuel users* a tax . . . on each gallon of motor vehicle fuel”) (emphasis added); RCW 82.24.020 (cigarette tax; “[t]here is levied and there shall be collected . . . a tax upon the consumption, handling, possession or distribution of all cigarettes . . .” notes that wholesalers “*may*, if they wish,

absorb one-half mill per cigarette of the tax and not pass it on to purchasers . . .”) (emphasis added).

Unlike “selective sales taxes,” the B&O tax statute contains no comparable indication that businesses are simply collection agents for taxes ultimately imposed on consumers. Indeed, just the opposite is the case: The B&O tax statute explicitly imposes the B&O tax obligation on businesses, and not on consumers.

Appleway’s attempt to treat the state’s general B&O tax as if it were a sales tax (either general or “selective”) or as if it were a “selective” business tax is contrary to the overall intent of Washington’s statutory tax scheme, which was clearly meant to split the tax burden between businesses and consumers. It is undisputed that businesses incur overhead expenses for B&O taxes and other business costs, but it is also undisputed that Appleway does not “itemize,” charge, or otherwise collect from its customers other elements of its overhead that are its legal responsibility, such as utility costs, advertising, rent, and employee salaries and benefits, to name but a few.

c. Appleway’s Arguments Regarding Disclosure Lead to “Absurd” and “Strange” Results

The Superior Court noted that “issues of disclosure” were irrelevant to the narrow legal issue presented at summary judgment:

The issues of disclosure are just simply not relevant. I am not ruling on whether the mechanics that Appleway Chevrolet [sic]

engaged in in order to do this were, aside from the potential statutory violation, were [sic] appropriate or inappropriate. In other words, that is not before me. Obviously disclosure is a critical issue for consumers but it isn't relevant to what I have to decide. *You might have the absolutely best disclosure policy you might imagine and it still doesn't make an illegal practice legal.*

RP 56:10-21 (8/13/04 Hearing) (emphasis added).

Contrary to Appleway's argument, the Superior Court did not interpret RCW 82.04.500 as preventing Appleway from *disclosing* to consumers that it was collecting B&O tax from them. Rather, the Superior Court held that the B&O tax statute forbids Appleway from the practice of *collecting* B&O tax from consumers. CP 386-89. Appleway argues that the Superior Court's interpretation of the statute is "absurd" and "strange," Appellants' Brief at 37, but if anything is "absurd" or "strange" here, it is Appleway's belief that it is perfectly reasonable to charge consumers a tax, in defiance of the Washington legislature's contrary intent, as long as the illegal practice is "disclosed" to consumers. Washington law favors disclosure to consumers in various different contexts, *see* Appellants' Brief at 40, but there is no amount or type of disclosure that can transform an illegal act into a practice authorized by law.

*d. The Non-Washington Authorities Cited By
Appleway Are Inapposite*

The issue before this Court turns on interpretation of a Washington statute -- RCW 82.04 *et seq.* — that enacts a tax similar to that of no other

state. CP 491. Appleway's citation to decisions interpreting other jurisdictions' tax statutes are unavailing for two reasons. First, none of the cited cases references a tax scheme identical to that of Washington State for the simple reason that Washington's B&O tax is "unique." *See, e.g., Texaco Refining & Marketing Co., Inc. v. Commissioner of Revenue Servs.*, 522 A.2d 771 (Conn. 1987) (construing "Connecticut gross earnings tax on the sale of petroleum products"); *United Nuclear Corp. v. Revenue Div., Taxation & Revenue Dep't.*, 648 P.2d 335 (N.M. App. 1982) (construing New Mexico "severance tax on uranium"); *Pure Oil Co. v. State*, 12 So. 2d 861 (Ala. 1943) (construing Alabama tax on sellers of "illuminating, lubricating or fuel oils"); *Watkins Cigarette Serv., Inc. v. Arizona State Tax Comm'n*, 526 P.2d 708 (Ariz. 1974) (construing Arizona luxury tax on cigarettes).

Second, even assuming the statutes in question concerned an identical tax, the issue before this Court is distinct from the issues on appeal in the out-of-jurisdiction cases cited. *See, e.g., Texaco Refining*, 522 A.2d at 772 (considering "whether moneys collected as a tax from customers are includable in the Connecticut gross earnings tax on the sale of petroleum products"); *Pure Oil*, 12 So. 2d at 862 (considering "[w]hat constitutes 'gross sales' as a basis for computing the tax [on illuminating, lubricating or fuel oils]"); *Ferrara v. Director, Div. of Taxation*, 317 A.2d 80 (N.J. Super. Ct. 1974) (resolving issue of whether federal and state

excise taxes on gasoline should be included in the computation of gross receipts for purposes of New Jersey's Unincorporated Business Tax Act). Appleway quotes selected language from these authorities, apparently asserting that certain "literal words" contained therein control the issues before this Court. However, given that these cases "neither address[] nor consider [] the issue[s]" before this Court, these authorities "[are] not dispositive" and this Court need not, and should not, consider them to have any precedential effect. *See State v. Eaton*, 82 Wn. App. 723, 729, 919 P.2d 116 (1996), *overruled on other grounds*, *State v. Frohs*, 83 Wn. App. 803, 924 P.2d 384 (1996) ("Where the literal words of an opinion appear to control an issue but the opinion neither addresses nor considers the issue, the opinion is not dispositive and a subsequent court may reexamine the issue without violating stare decisis or usurping the role of a higher court."). The out-of-jurisdiction authorities do nothing to explain how the Washington B&O tax statute should be interpreted. They do not interpret the Washington State legislature's express prohibition that businesses such as Appleway shall not assess and collect B&O tax from consumers. They offer no valid reason why this Court should reverse the Superior Court's ruling on the illegality of Appleway's practice of collecting B&O tax from Washington consumers.

2. The Superior Court Did Not Err By Considering and Rejecting the Department of Revenue's "Special Notice."

"Courts retain the ultimate authority to interpret a statute."

Edelman v. State ex rel Pub. Disclosure Comm'n, 152 Wn.2d 584, 590, 99 P.3d 386 (2004). As the Washington Supreme Court recently reaffirmed, "[w]here statutory language is plain and unambiguous, a court will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of a contrary interpretation by an administrative agency." *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). The issue before the Supreme Court in *Burton* was whether a Department of Corrections policy violated a Washington statute. *Id.* at 421. Noting that "the court is the final authority on statutory construction and it need not approve regulations or decisions inconsistent with a statute[.]" the Court refused to defer to the agency's interpretation because "[it] is neither consistent with the plain language of [the statute] nor an official interpretation of that statute." *Id.* at 426, n.4 (quoting *Moses v. Dep't. of Soc. & Health Servs.*, 90 Wn.2d 271, 274, 581 P.2d 152 (1978)) (emphasis added).

In support of its motion for summary judgment, Appleway referenced a "Special Notice" issued by the Department of Revenue, arguing that the DOR "issued a special notice that the passing through of the B&O tax as an overhead expense was lawful if the dealership charged sales tax on that B&O amount as well." CP 61. Appleway raised this

argument again in its motion for reconsideration, asserting that the DOR's "construction of the statute is not merely 'plausible,' it is doubtless correct . . . and is entitled to deference insofar as there is any ambiguity in the statutory language." CP 407. In fact, as the Superior Court noted in its letter opinion on Appleyway's motions for reconsideration:

It does not appear that this "Special Notice" is really a legal opinion. It does not rule that billing a B&O Tax item directly to the customer is legal. It merely suggests a process if the business elects to do so. As part of the materials for this motion plaintiff provided a Department of Revenue "Fact Sheet"⁹ on B&O tax which advises the taxpayer not to bill the B&O tax directly to the customer. It is clear this issue is not well settled at the Department of Revenue level. Accordingly, I did not defer to their publications.

CP 581.

The Superior Court is correct. The "Special Notice" is not a "legal opinion." It is not a legislative rule promulgated by the DOR and codified in the Washington Administrative Code. Nor is it a formal adjudication by the DOR which has been designated by the director of the agency as precedent pursuant to RCW 82.32.410 (describing criteria director uses to "designate certain written determinations as precedents"). It is not even an

⁹ See CP 493-498 (Washington State Department of Revenue, "Business and Occupation Tax Fact Sheet," dated September 2004). The Fact Sheet states that "[t]he 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 498.

“Excise Tax Advisory,” an interpretive statement issued by the DOR under authority of RCW 34.05.230. As such, it is not the type of agency interpretation to which the Superior Court need defer, and the Superior Court did not err when it declined to do so.¹⁰

3. The Superior Court Did Not Err In Holding That Mr. Nelson Presents a Justiciable Controversy and Has Standing To Seek Declaratory Relief.

a. *Mr. Nelson Has Satisfied The Requirements For Justiciability and Standing Under Washington Law*

Washington’s Declaratory Judgments Act “is designed to settle and afford relief from insecurity with respect to rights, status and other legal relations and is to be liberally construed and administered.” *DiNino v. State ex rel Gordon*, 102 Wn.2d 327, 330, 684 P.2d 1297 (1984) (citing RCW 7.24.120). Any person “whose rights, status, or other legal relations are *affected* by a statute . . . may have determined *any question of construction or validity* arising under the . . . statute . . . and obtain a declaration of rights, status or other legal relations thereunder.” RCW 7.24.020 (emphasis added).

¹⁰ The authorities Appleway cites are distinguishable. Neither considered a DOR “Special Notice.” The agency interpretation of the law at issue in *Marquis v. City of Spokane*, 130 Wn.2d 97, 922 P.2d 43 (1996), was a legislative rule promulgated by the agency and published as part of the Washington Administrative Code. 130 Wn.2d at 111. In *Seatoma Convalescent Ctr. v. Dep’t. of Soc. & Health Servs.*, 82 Wn. App. 495, 919 P.2d 602 (1996), Division II reviewed agency interpretations that were the result of an adjudicative process — decisions of administrative law judges and administrative review judges. 82 Wn. App. at 505–511.

“[U]nder the Declaratory Judgments Act, the requirement of standing tends to overlap justiciability requirements.” *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 203, 11 P.3d 762 (2000). A justiciable controversy is (1) “an actual, present and existing dispute,” (2) “between parties having genuine and opposing interests,” (3) involving interests that are “direct and substantial, rather than potential, theoretical, abstract or academic,” and (4) “a judicial determination of which will be final and conclusive.” *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004) (internal citations and marks omitted).

Here, the parties have “an actual, present and existing dispute”: whether Appleway’s practice of charging consumers B&O tax on their purchases is contrary to Washington law. The parties have “genuine and opposing interests” which are both “direct and substantial”: Appleway has a financial interest in passing the burden of the B&O tax to consumers, and Mr. Nelson has an interest in not paying a tax imposed solely on businesses that is not the legal responsibility of consumers. A judicial determination of this dispute would be final and conclusive as the Class has been certified 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 375–76.

With regard to standing, Washington courts have held that “[p]arties whose financial interests are affected by the outcome of a declaratory judgment action have standing.” *Casey v. Chapman*, 123 Wn. App. 670, 676, 98 P.3d 1246 (2004), citing *Yakima County Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 379, 858 P.2d 245 (1993); see also 15 Karl B. Tegland, WASHINGTON PRACTICE: CIVIL PROCEDURE § 42.2 (1st ed. 2003 and 2004 Supp.), citing *Heavens v. King County Rural Library Dist.*, 66 Wn.2d 558, 514 P.2d 137 (1973) (“Economic interests are sufficient to give standing to sue” in a declaratory judgment proceeding). Here, the financial interests of Mr. Nelson and the Class have been adversely affected and will continue to be affected as a result of Appleway’s illegal practice of charging customers B&O tax on purchases.¹¹ Besides Appleway’s unjust retention of the monies collected from Mr. Nelson and the Class,¹² Mr. Nelson alleged below that Appleway has a financial interest in charging

¹¹ Appleway does not dispute that it continues the practice of charging customers for B&O tax on every purchase. Should this illegal practice continue, it will continue to adversely affect the financial interests of Washington consumers, be they individuals patronizing one of Defendants’ dealerships for the first time (who would then become a member of the Class), or Class members, including Mr. Nelson, who previously purchased vehicles from an Appleway dealership and who return in order to have their vehicle serviced or to purchase parts or other merchandise.

¹² Appleway claims, without benefit of any factual support, that “Mr. Nelson did not suffer any injury” as a result of Appleway’s practice of collecting B&O tax from its customers. Appellants’ Brief at 22. However, Mr. Nelson’s claim for restitution was not before the Superior Court on summary judgment and the Superior Court has not ruled on the issue of the amount of Mr. Nelson’s monetary damages, or those of the Class.

consumers B&O tax on two additional grounds. CP 472. First, Appleway may deduct B&O tax from their federal income tax as a business cost. CP 491. By collecting the B&O tax from consumers and then (presumably) claiming it as a deduction on their federal income taxes, Appleway receives an unearned benefit — the tax deduction — at consumers' expense. Second, businesses are required to report and pay the B&O tax on either a monthly, quarterly, or annual basis, depending on the type of business and estimated level of business activity. CP 487. Even if Appleway pays the state the exact amount collected from consumers, they are still (presumably) obtaining interest on the monies collected in the time between reporting dates — a substantial amount when considered in the aggregate.

Mr. Nelson also has standing under the two-part test set forth in *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004): (1) “whether the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute . . .”; and (2) “whether the challenged action has caused injury in fact, economic or otherwise, to the party seeking standing.” 150 Wn.2d at 802 (internal citations and marks omitted). Here, the B&O tax statute explicitly states that “[it] is not the intention of this chapter that [the B&O tax] be construed as taxes upon the purchasers or consumers,” RCW 82.04.500, indicating that the Washington legislature

was concerned with consumers' interests and intended that the tax not be construed as a tax upon them. With regard to the second prong of the *Grant County* test, Mr. Nelson and the Class have been adversely affected by having to pay a tax that is not their responsibility, as discussed above. Like the property owners in *Grant County* who "face[d] different tax rates" should they not prevail in their declaratory judgment action, 150 Wn.2d at 802-03, Mr. Nelson and the Class face, and will continue to face, being subject to a different tax structure than that intended by the Washington State legislature should they not prevail here.¹³

Finally, as the *Grant County* court noted, "when a controversy is of substantial public importance, immediately affects significant segments of the population, and *has a direct bearing on commerce*, finance, labor, industry, or agriculture, [the] court has been willing to take a 'less rigid and more liberal' approach to standing." 150 Wn.2d at 803 (emphasis added). Mr. Nelson submits that this is just such a case: If the Superior Court's determination that Appleway's practice of collecting B&O tax from its customers is illegal is reversed, and given imprimatur by this

¹³ Appleway also cites *Branson* in support of its claim that Mr. Nelson lacks standing. Appellants' Brief at 22-23. In *Branson*, however, the Washington Supreme Court held that Branson lacked standing to challenge a concession fee the Port of Seattle charged rental car companies because he was not the entity whom the Port actually charged. 152 Wn.2d at 876. As the Court noted, "it seems that Branson's complaint would more properly be addressed by a claim against the rental car companies because they, not the Port, actually charged Branson the fee about which he complains." *Id.* at 877-78. Here, Mr. Nelson is bringing a claim against the party charging him and the Class an illegal tax; he is not bringing suit against the state for imposing the tax in the first place.

Court, other businesses will likely follow suit and the result will be a blurring of the line between the B&O tax (a privilege tax on businesses' gross receipts) and the retail sales tax (which consumers are legally obligated to pay), and an erosion of the legislature's decision as to which sectors of the Washington population should bear particular tax burdens. If this Court condones Appleway's actions, Washington consumers should expect to pay an additional B&O transaction tax on everything they purchase from cars to clothes to food. Nothing could be further from the legislature's intent in enacting the B&O tax.

b. Mr. Nelson Need Not Establish a Private Cause of Action Under RCW 82.04.500 to Proceed With His Claims for Declaratory and Injunctive Relief

Under Washington law, once a plaintiff has established the requirements for justiciability and standing, he or she may seek declaratory relief. *See* Section IV.B.3.a., *supra*. Washington law does not require a party seeking declaratory relief to establish that he or she has an independent private cause of action. *See, e.g., Grant County*, 150 Wn.2d at 802–05 (concluding that plaintiffs could seek declaratory judgment because standing and justiciability requirements of the Declaratory Judgments Act were satisfied and proceeding to consider merits of claim); *Biggers v. City of Bainbridge Island*, 124 Wn. App. 858, 863–65, 103 P.3d 244 (2004) (same). For that reason, and because Mr. Nelson has not pled his claims for relief as a tort-like violation of the B&O tax statute, CP 4–

12, Appleway's claims that Mr. Nelson must establish the existence of either an express or implied cause of action under that statute are irrelevant. As the Superior Court noted in its letter opinion on Appleway's motions for reconsideration:

A new issue raised is defendants' assertion that the plaintiff has no private statutory right of action under Washington excise tax law. In this case[,] the plaintiff has asked the court to grant declaratory relief. . . . The plaintiffs seek no tort relief. I have already indicated elsewhere that any monetary relief is incidental to the request for declaratory relief and an injunction. Therefore, plaintiff is properly before the court.

CP 581.

The Superior Court did not err when it considered, and rejected, Appleway's arguments, which are not supported by Washington law. In *Wash. Fed'n of State Emp. v. State Pers. Bd.*, 23 Wn. App. 142, 594 P.2d 1375 (1979), cited by Appleway, Division II held that dismissal of a declaratory judgment action brought by a union seeking review of an agency's action was proper because "[t]o allow separate review of the Board's order under the Declaratory Judgment Act would frustrate the policy of limited review of such agency decisions" *Id.* at 148. The court also noted (and Appleway cites this language to support its argument) that "in order to invoke the declaratory judgment remedy, the plaintiff must assert a legal right capable of judicial protection which

exists in a statute, constitution or common law.” *Id.* No subsequent Washington Supreme Court or Washington Court of Appeals decision has cited *Wash. Fed’n.* to support the proposition that “Washington law require[s] a private cause of action independent of the Uniform Declaratory Judgments Act[,]” Appellants’ Brief at 18, and for good reason: The case simply does not hold what Appleway claims it does.¹⁴ The fact that a plaintiff “must assert a legal *right* capable of judicial protection” is distinct from the notion that a plaintiff must assert a *cause* of action to receive equitable relief. *See Thorgaard Plumbing v. Heating Co. v. County of King*, 71 Wn.2d 126, 132, fn.5, 426 P.2d 828 (1967) (“A ‘right of action’ is not synonymous with ‘cause of action.’ It is a right to enforce a ‘cause of action’ by suit. A ‘right of action’ is the right to pursue a judicial remedy. A ‘cause of action is based on the substantive law of legal liability.’”) (internal citations omitted).

The non-Washington authorities Appleway cites are not relevant to the issue before this Court and do not support Appleway’s claim that Mr. Nelson’s declaratory relief action is barred under *Washington* law. *See, e.g., Van Eck v. Gavin*, 690 A.2d 460 (Conn. Super. Ct. 1996) (court

¹⁴ The other Washington case cited by Appleway, *Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 762 P.2d 356 (1988), is similarly inapposite. Division I affirmed the trial court’s dismissal of plaintiffs’ claims, holding that “this action is barred by res judicata and that there is no private cause of action for the complaints that [plaintiffs] make in this case,” but it did not hold that a plaintiff must establish a private cause of action in order to request declaratory relief. 52 Wn. App. at 538.

did not have subject matter jurisdiction to consider the plaintiff's complaint because plaintiff, who challenged imposition of Connecticut petroleum sales tax on a *non-party*, "is not a 'taxpayer' within the meaning of the statute"); *Blockbuster, Inc. v. White*, 819 So. 2d 43 (Ala. 2001) (Alabama rental tax statute did not create a private right of action for plaintiff who sought damages for contract and tort claims; plaintiff did not seek a declaratory judgment). Appleway also cites authority from Minnesota, Nevada, and a federal district court (Appellants' Brief at 18) but *none* of those cases construes the requirements for a declaratory judgment under Washington law, and they are not binding on this Court.

c. *The Existence of "An Adequate Remedy At Law," Assuming One Exists, Does Not Bar Mr. Nelson's Request For Declaratory and Injunctive Relief*

Civil Rule 57 provides that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." CR 57; *Wagers v. Goodwin*, 92 Wn. App. 876, 880, 964 P.2d 1214 (1998) (citing CR 57 and reversing trial court's dismissal of declaratory judgment action despite defendant's argument that plaintiff had "an adequate remedy at law"). Thus, Appleway's claim that Mr. Nelson is not entitled to declaratory or injunctive relief because he has

“an adequate remedy at law” (Appellants’ Brief at 44) is supported neither by the Washington Civil Rules nor by Washington case law.¹⁵

Furthermore, Appleway has not suggested what Mr. Nelson’s “adequate remedy at law” might be, nor has it cited any authority for the proposition that because Mr. Nelson requests monetary relief, he has such a remedy. Under Washington law, Mr. Nelson’s request for monetary relief in the form of restitution for Appleway’s unjust enrichment is not mutually exclusive of his request for a declaratory judgment. *See* RCW 7.24.080 (“[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper”); *see also United Nursing Homes, Inc. v. McNutt*, 35 Wn. App. 632, 640, 669 P.2d 476 (1983), *rev. denied*, 100 Wn.2d 1030 (1983), *overruled on other grounds, Cascade Vista Convalescent Ctr v. Dep’t. of Soc. & Human Servs.*, 61 Wn. App. 630, 812 P.2d 104 (1991) (noting that monetary damages may be awarded in a declaratory judgment action when doing so would be in the interests of judicial economy). For these reasons, Appleway’s argument that Mr. Nelson is not entitled to declaratory or injunctive relief because he has

¹⁵ The only authority cited by Appleway, *Corrigan v. Tompkins*, 67 Wn. App. 475, 836 P.2d 260 (1992), is distinguishable. *Corrigan* was a *pro se* plaintiff who sued a Court of Appeals commissioner and several judges for “judgment” after his case was dismissed by the Court. 67 Wn. App. at 476–77. The Court held that his complaint did *not* state a claim for declaratory or injunctive relief and that he “had an existing remedy at law because each judge’s and the commissioner’s acts were subject to review on appeal or by petition for review[.]” *Id.*

“an adequate remedy at law” fails, and provides no reason for this Court to reverse the judgment of the Superior Court.

4. The Superior Court Did Not Abuse Its Discretion When It Affirmed Its Previous Order Granting Partial Summary Judgment in Favor of Mr. Nelson

This Court reviews the Superior Court’s denial of Appleway’s motion for reconsideration for abuse of discretion. *Lund*, 109 Wn. App. at 266. “A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons.” *Id.* (quoting *Wagner Dev. Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639, *rev. denied*, 139 Wn.2d 1005 (1999)); *see also In re Marriage of Littlefield*, 133 Wn.2d 39, 46–47, 940 P.2d 1362 (1997) (citations omitted).

Here, Appleway does not claim that the Superior Court made any unsupported factual findings. Rather, Appleway variously claims that the Superior Court’s conclusions “are directly contrary to well-established black-letter law” (Appellants’ Brief at 15), “are directly contrary to Washington law” (*id.* at 23), and that the Superior Court “misunderstood the statutory language [of the B&O tax statute] (*id.* at 30), “erred as a matter of Washington law” (*id.* at 37), and “committed clear legal error” (*id.* at 44). However, with respect to the “very narrow issue that [the Superior Court was] asked to resolve on summary judgment” RP 52:1–5 (8/13/04 Hearing), the Superior Court applied the correct legal standards.

See Sections IV.B.1.–3., *supra*. The Superior Court’s letter ruling on the motions for reconsideration even addressed issues Appleway raised for the first time¹⁶ in its reconsideration briefing (*see* CP 581), despite the fact that CR 59 does not permit parties “to suddenly propose a new theory of the case” in a motion for reconsideration. *JDFJ Corp. v. Int’l Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999); *see also Vaughn v. Vaughn*, 23 Wn. App. 527, 531 (1979) (“The post-trial discovery of a new theory of recovery is not sufficient reason to either grant a new trial or reconsider a previously entered judgment pursuant [sic] under CR 59.”). For the reasons detailed in Sections IV.B.1.–3., *supra*, the Superior Court did not abuse its discretion when it affirmed its original order granting partial summary judgment in favor of Mr. Nelson. The court’s decision was neither “manifestly unreasonable” nor based on “untenable grounds” or “untenable reasons.”

¹⁶ As noted in Section III.B.2, *supra*, Appleway’s summary judgment motion presented only two arguments, both based on the assumption that Mr. Nelson’s Complaint pled a violation of the Consumer Protection Act. CP 62–63. On reconsideration, however, Appleway presented several new legal theories, including whether Mr. Nelson has a “private statutory right of action under Washington’s excise tax law,” and whether Mr. Nelson is “entitled to any form of injunctive [or declaratory] relief, because the alleged violation is in the past.” CP 398. This is not a case where a party “expanded and refined details of an argument already presented” to the trial court.” *See Newcomer v. Masini*, 45 Wn. App. 284, 287, 724 P.2d 1122 (1986) (concluding that issue was preserved for appeal in motion for reconsideration where plaintiff “expanded and refined” theory previously presented to trial court). Rather, Appleway’s motion for reconsideration of the Superior Court’s summary judgment order presented entirely new arguments.

C. This Court Should Affirm the Superior Court’s Order Denying Appleway’s Motion for Reconsideration of the Class Certification Order

1. The Superior Court Did Not Abuse Its Discretion When It Held That Class Certification Pursuant to CR 23(b)(2) Was Appropriate

A trial court’s class certification decision is reviewed for abuse of discretion. *Lacey Nursing Ctr.*, 128 Wn.2d at 47. A class certification order “will be upheld if it appears from the record that the court considered all of the criteria of CR 23.” *Id.* (quoting *Eriks v. Denver*, 118 Wn.2d 451, 467, 824 P.2d 1207 (1992)). “Washington courts favor a liberal interpretation of CR 23 as the rule avoids multiplicity of litigation, ‘saves members of the class the cost and trouble of filing individual suits[,] and . . . also frees the defendant from the harassment of identical future litigation.’” *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 318, 54 P.2d 665 (2002) (quoting *Brown v. Brown*, 6 Wn. App. 249, 256–67, 492 P.2d 581 (1971)). Washington courts “resolve 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). Furthermore, “certification of a class is to be undertaken with no consideration of the merits of the plaintiffs’ claims” *Washington Educ. Ass’n v. Shelton Sch. Dist. No. 309*, 93 Wn.2d 783, 790, 613 P.2d 769 (1980).

Here, the Superior Court did not abuse its discretion when it certified the Class under CR 23(b)(2). The Superior Court “considered all of the criteria of CR 23.” *Lacey Nursing Ctr.*, 128 Wn.2d at 47; CP 377–

380; *see also* CP 582. Specifically, the Superior Court found that the numerosity, commonality, typicality and adequacy requirements of CR 23(a) were satisfied, as were the requirements of 23(b)(2). CP 377–380.

Appleway does not contest that Mr. Nelson has satisfied the four prerequisites to class certification under CR 23(a): (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy. CR 23(a); Appellants' Brief at 45–49. Nor does Appleway contest that Mr. Nelson has met the first requirement of CR 23(b)(2): that Appleway “has acted or refused to act on grounds generally applicable to the class.” CR 23(b)(2); Appellants' Brief at 45–49. Indeed, Appleway has a uniform practice of charging all of its customers B&O tax on all purchases, regardless of whether customers purchase a vehicle or parts, merchandise and other goods and services.

Rather, Appleway seeks to have this Court reverse the Superior Court's class certification order on two grounds, neither of which were argued in its opposition to Mr. Nelson's motion for class certification. CP 243–52. First, Appleway argues that Mr. Nelson lacks the requisite standing to represent a class. Appellants' Brief at 45. Second, Appleway claims that the Superior Court should not have certified the class under CR 23(b)(2) because “Mr. Nelson's claim for monetary relief clearly predominates over his request for declaratory or injunctive relief,” citing

to federal case law. Appellants' Brief at 45–49. Neither argument is supported by the facts of this case or by the applicable Washington Civil Rules or case law, a conclusion also reached by the Superior Court. For the reasons discussed below, the Superior Court's class certification decision should be affirmed.

a. Mr. Nelson Has the Requisite Standing to Represent the Class

As discussed above, Mr. Nelson has met the standing requirements necessary to bring this action for declaratory relief. *See* Section IV.B.3., *supra*. And, the Superior Court found that Mr. Nelson's claims were "typical of those of the Class as a whole" (CP 377), and that Mr. Nelson would "fairly and adequately protect the interests of the [C]lass as a whole" (CP 378). Furthermore, the facts of this case are distinguishable from those in the only legal authority Appleyway offers on this point, *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wn. App. 106, 780 P.2d 853 (1989). In that case, the named plaintiff "admitted in depositions that he had never had contact with [defendants]" and the trial court record "contain[ed] no basis in fact for [Doe] having named appellants as defendants" 55 Wn. App. at 108, 114. Neither circumstance exists here. For these reasons, Mr. Nelson may bring this action on behalf of the Class.

b. The Superior Court Correctly Held that Final Declaratory and Injunctive Relief Is Appropriate With Respect To the Class as a Whole and that

Mr. Nelson's Request for Monetary Relief Does Not Bar CR 23(b)(2) Certification.

Washington law permits certification under CR 23(b)(2) if the plaintiff's "primary claim" is for "injunctive or declaratory relief," and "the monetary damages sought are merely incidental to the primary claim for injunctive or declaratory relief." *Sitton*, 116 Wn. App. at 252 (internal citations and marks omitted). "Incidental damages" are damages "that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive and declaratory relief." *Id.* (internal citations and marks omitted). Such damages "should at least be capable of computation by means of objective standards and not be dependent in any significant way on the intangible, subjective differences of each class members' circumstances." *Id.* at 252–253 (internal citations and marks omitted). Finally, determination of damages should not require the resolution of "new and substantial legal and factual issues." *Id.* (internal citations and marks omitted).

Sitton did *not* hold that the mere fact that plaintiffs seek monetary relief precludes CR 23(b)(2) certification. 116 Wn. App. at 252–53. Nor did it hold that the amount of monetary relief was a factor to be considered when determining whether CR 23(b)(2) certification is appropriate. *Id.* And, while Division I ultimately chose to decertify the class at issue

pursuant to CR 23(b)(2),¹⁷ 116 Wn. App. at 253, it did so based on the particular claims at issue in that case, not because the plaintiff sought monetary relief.¹⁸ Indeed, there is nothing in CR 23(b)(2) that restricts plaintiffs from asserting broader equitable remedies, such as unjust enrichment, equitable accountings, or disgorgement. *See* CR 23(b)(2); *see also* Alba Conte & Herbert Newberg, *Newberg on Class Actions*, § 4.14 (4th ed. 2002) (“[o]nce the conduct of the defendant makes such injunctive or declaratory relief appropriate, the full panoply of the court’s equitable powers is introduced”). Furthermore, as discussed in Section IV.B.3.c., *supra*, Washington’s Declaratory Judgments Statute permits the award of such restitutionary relief.

Here, Mr. Nelson and the Class’ primary claim is for declaratory and injunctive relief, not common law and statutory claims on which he must prevail before seeking declaratory relief. CP 4–12. Determining the amount of restitution due Mr. Nelson and each Class member will not require the Superior Court to make an individualized determination as to

¹⁷ The Court upheld certification of the *Sitton* class under CR 23(b)(3). 116 Wn. App. at 257.

¹⁸ The *Sitton* plaintiffs brought contract and tort claims, as well as a CPA claim, against an insurer based on the insurer’s denial of coverage for medical expenses. 116 Wn. App. at 248–49. They also sought declaratory and injunctive relief, but such relief was available *only* if plaintiffs prevailed on their other claims, which sought individual money damages. *Id.* at 253. The damages sought “require[d] individualized determinations about each class member’s circumstances,” *e.g.*, their medical condition and circumstances surrounding denial of coverage. *Id.*

each Class member's circumstances. Rather, the monetary relief for each will be equivalent to the amount each paid for B&O tax and B&O sales tax on their purchases from Appleway. Such a calculation will not depend on the "subjective differences of each class member's circumstances," but rather on the percentage used to calculate the tax. As the Superior Court noted with reference to this issue:

One of the hallmarks of the (b)(2) class is that damages can be requested but damages are reasonably and fairly easily ascertainable unlike the physical injury or personal injury kinds of cases or even extensive property damages type of property classes like *Firestorm*. Here my interpretation is what's being requested is: Here's a class member, here's the documentation they signed. Here is the item on the B&O line and the B&O "sales tax." That is the damage and in my view it is fairly simple and easy to ascertain. It would not preclude a (b)(2) certification or require a (b)(3) certification.

RP 103:20 – 104:2 (8/13/04 Hearing).

Appleway's additional arguments against class certification are unavailing, as are the authorities on which it relies. First, Appleway argues that "Mr. Nelson's claim for monetary relief clearly predominates over his request for declaratory or injunctive relief" because of the amount of money at issue and the potential size of the class. Appellants' Brief at 46. However, as noted *supra*, Washington case law interpreting CR 23(b)(2) does not focus on the amount of monetary relief sought when

determining whether CR 23(b)(2) certification is appropriate. *See Sitton*, 116 Wn. App. at 252–53.¹⁹

Furthermore, Appleway’s attempt to create individualized issues that will preclude class certification is both irrelevant in the context of a (b)(2) class and not supported by the record in this case. Under CR 23(b)(2), it is the conduct of the defendant — not the effect of defendant’s conduct on plaintiff and the class — that is at issue. *See* CR 23(b)(2) (“The party opposing the class has acted or refused to act on grounds generally applicable to the class . . .”). In contrast with a CR 23(b)(3) class, which focuses on the effect of defendant’s wrongful conduct on individual class members, individualized facts regarding putative class members are simply not relevant to whether the defendant acted on grounds that are generally applicable to the class. *Compare* CR 23(b)(3) (requiring that the court “find[] that the questions of law or

¹⁹ Appleway cites to several federal cases construing Fed. R. Civ. P. 23(b)(2) in support of this argument, all of which are distinguishable. *See Nelsen v. King County*, 895 F.2d 1248, 1253–55 (9th Cir. 1990) (affirming district court’s denial of class certification where plaintiffs’ claims for injunctive relief were based on “speculative contingencies” and the only remaining claims were for money damages); *Fry v. Hayt, Hayt & Landau*, 198 F.R.D. 461, 469 (E.D. Pa. 2000) (denying (b)(2) certification because “the plaintiffs did not seek an injunction in their original complaint”); *Kaczmarek v. Int’l Business Machines Corp.*, 186 F.R.D. 307, 313 (S.D.N.Y. 1999) (denying (b)(2) certification because money damages were the only adequate remedy for plaintiffs’ tort, contract and unfair business practice claims); *Davenport v. Gerber Prods. Co.*, 125 F.R.D. 116, 120 (E.D. Pa. 1989) (denying (b)(2) certification because money damages were the only adequate remedy for product liability claims). Here, Mr. Nelson and the Class do not assert tort or contract claims, and monetary relief is not their only remedy. *See* Section III.B.1, *supra*.

fact common to the members of the class predominate over any questions affecting only individual members . . . ”), *with* CR 23(b)(2).²⁰

Appleway claims that the Superior Court erred in certifying the class because “calculating damages would require thousands of individual mini-trials.” Appellants’ Brief at 12. Appleway then describes several hypothetical scenarios that might affect the Superior Court’s findings as to the monetary relief due each Class member and concludes, citing authority from the Fifth Circuit, that “[t]he mere possibility that any such scenario occurred with respect to any of the class members” would defeat class certification. *Id.* at 47–48 (citing *Robinson v. Texas Automobile Dealers Assoc.*, 387 F.3d 416 (5th Cir. 2004)).

Appleway’s argument fails for several reasons. First, *Robinson* is not binding on this Court. Not only did *Robinson* not reference Washington law on class certification, but it also reviewed a trial court’s Rule 23(b)(3) class certification, not a (b)(2) certification, as is at issue here. *Robinson*, 387 F.3d at 421. Indeed, the issue before the *Robinson* court was “whether the facts and law necessary to sustain a horizontal price-fixing action *predominate* in the proposed class.”²¹ *Id.* at 422

²⁰ Indeed, even under the CR 23(b)(3) standard (which is not at issue here), Washington courts have held that “given [Washington’s] liberal interpretation of CR 23,” “[t]hat class members may eventually have to make an individual showing of damages does not preclude class certification.” *Behr*, 113 Wn. App. at 323.

²¹ *Robinson* was an antitrust case, in which “plaintiffs allege[d] that, by uniformly imposing [the Texas Vehicle Inventory Tax] as a line item, defendants are engaged in

(emphasis added). “Predominance” is not at issue in this (b)(2) case. *See* CR 23(b)(2). In *Robinson*, how class members negotiated the price of their vehicle — “in a top-line or a bottom-line fashion” — was central to plaintiffs’ ability to establish the elements of their price-fixing claim. *Id.* at 422–24 (noting that in a price-fixing case, damage may be shown by proof that plaintiff purchased the item at a price higher than the competitive rate). Here, the central issue on the merits — indeed, the only issue decided by the Superior Court on summary judgment — is whether Appleway’s itemization and collection of B&O tax is unlawful. RP 52:1–5. Thus, the (hypothetical) individualized circumstances Appleway describes are irrelevant to the Court’s determination as to the legality of Appleway’s practice. Second, unlike *Robinson*, the record contains no facts to support Appleway’s allegations regarding Class members’ individualized circumstances. *See Robinson*, 387 F.3d at 423, fn.23, fn.24. There is no evidence in the record indicating that there is even a “mere possibility” that *any* of the hypothetical scenarios described by Appleway occurred or will occur.

2. The Superior Court Did Not Abuse Its Discretion When It Affirmed Its Previous Order Certifying the Class

This Court reviews the Superior Court’s denial of Appleway’s motion for reconsideration for abuse of discretion. *Lund*, 109 Wn. App.

horizontal price-fixing, conspired to create a horizontal price-fixing regime, and have been unjustly enriched.” 387 F.3d at 420.

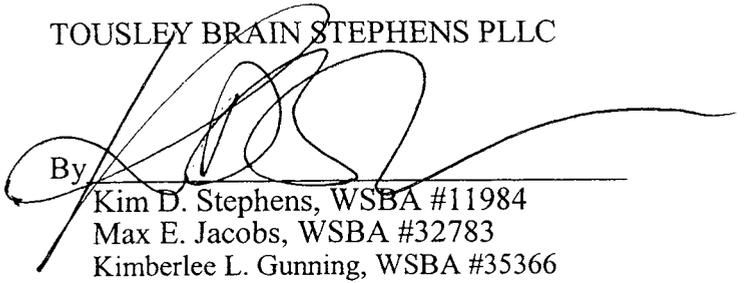
at 266. “A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons.” *Id.* (quoting *Wagner Dev. Inc. v. Fidelity & Deposit Co. of Maryland*, 95 Wn. App. 896, 906, 977 P.2d 639, *rev. denied*, 139 Wn.2d 1005 (1999)). Here, as with the Superior Court’s reconsideration ruling on summary judgment, Appleway does not claim that the Superior Court made any unsupported factual findings. Rather, with respect to the Superior Court’s class certification decision, Appleway asserts that “the Superior Court committed clear legal error,” Appellants’ Brief at 45, and that the Superior Court applied the wrong standard for certification of a CR 23(b)(2) class. *Id.* at 49. For the reasons discussed above, the Superior Court did not abuse its discretion when it affirmed its original order granting partial summary judgment in favor of Mr. Nelson. The court’s decision was neither “manifestly unreasonable,” nor based on “untenable grounds or “untenable reasons.”

V. CONCLUSION

For the foregoing reasons, Mr. Nelson respectfully requests that the Court affirm the Superior Court’s denial of Appleway’s motions for reconsideration of the Superior Court’s summary judgment order and class certification order and remand this case to the Superior Court with instructions that this matter proceed consistent with the Superior Court’s rulings on summary judgment and class certification.

DATED this 9th day of April, 2005.

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