

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

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BY C. J. MERRITT

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Supreme Court No. 77985-6

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

*Appellee,*

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,

*Appellants.*

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APPELLANTS' RESPONSE TO AMICI CURIAE BRIEF OF  
CAMP AUTOMOTIVE AND LITHIA MOTORS

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## I. INTRODUCTION

This Court has permitted Camp Automotive, Inc., and Lithia Motors, Inc. (“Camp/Lithia”), to file an amici curiae brief. Because Camp/Lithia apparently misunderstands the core issue before this Court, AutoNation, Inc., and the Appleway automobile dealerships and other businesses indirectly owned by AutoNation (collectively, “dealers”) offer this response to Camp/Lithia’s Amici Curiae Brief.

Contrary to Camp/Lithia’s implication, this case does *not* involve the adequacy or timing of consumer disclosures. Further, the case does *not* present any issue concerning the negotiations between customers and businesses. Rather, Division III in *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 121 P.3d 95 (2005), held that RCW 82.04.500 – which imposes a gross-receipts tax on businesses – *permits* businesses to pass through the tax to consumers but *prohibits* those businesses from disclosing the lawful pass-through on an itemized invoice, without regard to how or when the dealer discloses the pass-through. The holding below would not be altered by evidence that disclosure occurred at any particular point in the negotiation process or by proof of the content of disclosures. Indeed, Mr. Nelson denies that his claim turns on the timing or content of disclosures; instead, he asserts that RCW 82.04.500 forbids itemization of the pass-through, no matter what disclosures a business provides.

On the other hand, to the extent the decision below construes RCW 82.04.500 to regulate disclosure of the Business & Occupation (“B&O”) tax pass-through, as Camp/Lithia suggests, this Court should reject it.

Reading RCW 82.04.500 to limit businesses' truthful disclosures about the B&O tax pass-through would be contrary to the statutory language, the controlling authority, and the First Amendment.

## II. FACTUAL BACKGROUND

The parties' briefs set forth the facts in detail. In short, Mr. Nelson bought a used vehicle from Appleway Volkswagen for \$18,227.33, including a \$79.23 B&O tax, which was (1) itemized as B&O tax "OVERHEAD," CP 50; (2) disclosed in at least three documents signed or initialed by Mr. Nelson or his wife, CP 50, 53, 56; and (3) explained in detail as "a tax on businesses" that is "an overhead expense of the dealership," and, as part of the purchase price, subject to sales tax, CP 51. Mr. Nelson saw the itemized B&O tax *before* he signed the Purchase Agreement, CP 29, and he understood that he could avoid the B&O tax pass-through by "not buy[ing] the car." CP 30-31. Because he was not legally obligated to complete the transaction, nothing prevented Mr. Nelson from further negotiating the price or any other term. But Mr. Nelson "want[ed] the car," CP 30, and he chose to buy it despite the fully-disclosed tax pass-through.

More than a year later, Mr. Nelson sued in Spokane County. Although conceding that it is "perfectly legal" for businesses to "factor the B&O [t]ax into their overall overhead pricing," Mr. Nelson argued that merely itemizing the B&O tax was per se *illegal* under RCW 82.04.500. CP 191. Mr. Nelson did *not* assert that the dealers' itemization was deceptive, CP 36, and he did *not* assert a claim under the Consumer

Protection Act (“CPA”). As a result, when it granted partial summary judgment to Mr. Nelson, the superior court found that itemization would be unlawful *even if* a business has “the absolutely best disclosure policy in the world.” CP 360-61 (superior court’s oral decision). Division III affirmed that ruling in *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 121 P.3d 95 (2005).

Less than one week after Division III decided *Nelson*, a different set of plaintiffs (represented by the same lawyers) sued Camp/Lithia. Like Mr. Nelson, they also claimed unlawful itemization of the B&O tax in connection with an automobile sale and sought yet another declaratory judgment, identical to the one already rendered in *Nelson*, from the same Spokane County Superior Court – but, like Mr. Nelson, they did not allege unfair or deceptive conduct in violation of the CPA. See *Johnson v. Camp Automotive, Inc.*, Spokane County Superior Court, Case No. 05-2-05059-9 (10/19/2005) (Appendix A to Amici Curiae Brief of Camp/Lithia).<sup>1</sup>

According to Camp/Lithia, it disclosed the B&O tax pass-through during

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<sup>1</sup> Other plaintiffs have filed similar actions against other businesses, including (it appears) cable TV companies, cell phone companies, and car dealers. See, e.g., *Brown v. Charter Communications, LLC*, Chelan County Superior Court No. 05-2-01218-2 (11/14/2005); *Johnson v. Town & Country Chrysler Jeep, Inc.*, King County Superior Court No. 06-2-06851-3 (2/23/2006); *Kingsbury v. Rural Cellular*, Chelan County Superior Court No. 05-2-01217-4 (11/14/2005); *Brown v. Sprint Nextel Corp.*, Chelan County Superior Court No. 06-2-00015-8 (1/6/2006); *Morse v. Cingular Wireless*, Chelan County Superior Court No. 06-2-00021-2 (1/9/2006); *Hesse v. Sprint Corp.*, King County Superior Court No. 06-2-09266-0 (3/16/2006); *Olson v. Sprint Spectrum L.P., d/b/a Sprint PCS*, W.D. Wash. No. 06-CV-1127 JCC (7/20/2006). The dealers do not know the current status of these cases, but are aware that *Brown* and *Morse* were dismissed voluntarily, and that *Hesse* has been removed to United States District Court. The dealers do not know whether this list includes every copycat case.

the sales process, so “[t]hat charge and others were subject to negotiation before [the customer] and Camp reached agreement on both the final purchase price and the components of that price.” Camp/Lithia Amici Curiae Brief (“ACB”) at 1.

### III. ARGUMENT

#### A. *Nelson Prohibits Itemization Irrespective of Individualized Disclosures and Negotiations.*

Apparently hoping to avoid the impact of the decision below, Camp/Lithia suggests that the Court should read Division III’s opinion as invalidating itemization only when “customers [a]re bound to a specific purchase price even before the paperwork for the sale [i]s executed.” ACB at 3. In fact, the decision below cannot not be read in the manner Camp/Lithia suggests, for two reasons:

*First*, Mr. Nelson has not claimed that he or anyone else was (to use Camp/Lithia’s words) “bound to a specific purchase price even before the paperwork for the sale was executed.” ACB at 3. As Mr. Nelson acknowledges, the Appleway dealer fully disclosed the B&O tax pass-through to him *before* he executed the sales documents. 129 Wn.2d at 932-33 & n.2; CP 15-21. Further, Mr. Nelson admitted in his deposition that he understood that nothing prevented him from declining to purchase the car and thereby avoiding Appleway’s itemized B&O tax pass-through. CP 30-31. Mr. Nelson did not offer any evidence respecting the disclosures to or negotiations with other class members, and nothing in the record suggests any of these individuals were “bound to a specific

purchase price even before the paperwork for the sale was executed.”

ACB at 3. To the contrary, the only evidence in the record suggests that the dealers made full and prompt disclosure to *all* of their customers, in a variety of ways. *See* 129 Wn.2d at 932-33 & n.2.

*Second*, neither Division III nor the trial court ever ruled on the sufficiency of the dealers’ disclosures or the significance of their negotiations with customers. Instead, after making a series of internally-inconsistent statements regarding the timing and content of disclosures (some of which squarely contradicted the record), *see* Pet. for Rev. at 8, Division III held that liability would not turn on those issues: the court of appeals wrote that “[p]resumably, damages can be obtained with reference to the individual sales agreements. There need not be any inquiry into Appleway’s negotiations with each individual member of the class.” *Nelson*, 129 Wn. 2d at 949. *See* CP 360-61 (trial court’s oral ruling that itemization would be unlawful *even if* a business has “the absolutely best disclosure policy in the world”).

Thus, contrary to Camp/Lithia’s argument, this case squarely presents the issue whether RCW 82.04.500 prohibits itemization *without regard to* whether or how well a business discloses the pass-through, or the content of any negotiations. (Plainly, as the dealers have explained at length, the statute does *not* contemplate any such blanket prohibition.) Issues concerning the timing or sufficiency of disclosures, or the give and take between customers and businesses, must await another case based on a different record and with claims premised on alleged deception.

**B. RCW 82.04.500 Cannot Be Read to Regulate the Timing or Content of Disclosures.**

Consistent with its narrow reading of the decision below, Camp/Lithia also suggests that Division III read RCW 82.04.500 to regulate the timing and nature of disclosures of the B&O tax pass-through. ACB at 2-3. In fact, as the dealers noted in their Petition for Review, Division III conceded that RCW 82.04.500 did “not expressly address itemization,” yet claimed that the statute “set forth the manner in which the pass-through must take place.” Pet. for Rev. at 8 (quoting *Nelson*, 129 Wn. App. at 943-44). But reading RCW 82.04.500 to restrict “the manner” in which the dealers made truthful disclosures respecting the B&O tax would be contrary to the statutory language, the controlling administrative and judicial authority, and the First Amendment.

RCW 82.04.500 does not regulate consumer disclosures or negotiations, let alone prescribe their nature and timing. RCW 82.04.500 “levie[s] upon persons engaging in business” B&O tax and permits businesses to pass through the tax as “operating overhead.” At the same time, RCW 82.04.500 directs that such taxes not “be construed as taxes upon the purchasers or customers.” But “construed” is not a synonym for “disclosed” or “itemized,” terms that the Legislature easily could have used. Cf. RCW 82.16.090 (specifying disclosures that businesses “shall include” on invoices). The word “construe[.]” means “[t]o place a certain meaning on.” Webster’s II *New College* Dictionary 242 (1995). The statute amounts to a directive to courts not to interpret the B&O tax as a

consumer tax – because such an interpretation would have legal consequences. Most prominently, it would allow sellers to exclude the B&O tax from their tax base and thus reduce taxes paid into the public fisc. *See* WAC 458-20-195(4). By directing how the tax should be construed, RCW 82.04.500 forecloses this argument, which many other businesses have made with respect to other gross-receipt tax schemes. *See, e.g., Public Utility District No. 3 of Mason County v. Washington*, 71 Wn.2d 211, 427 P.2d 713 (1967). This is how the Department of Revenue (“DOR”) interpreted RCW 82.04.500 as well. *See* CP 23-24 (DOR Special Notice) (making clear that sellers *may* itemize the B&O tax on consumer invoices but *may not* exclude the itemized portion from their taxable base).

In any event, it would violate the First Amendment to interpret RCW 82.04.500 to restrict “the manner” of a truthful disclosure of a lawful pass-through to consumers who bear the economic burden of the tax. Neither Mr. Nelson nor Division III has ever offered even the slightest justification for limiting the dealers’ truthful speech in this way. *See Bloom v. O’Brien*, 841 F. Supp. 277, 278 (D. Minn. 1993) (enjoining state officials from enforcing statute that permitted health care providers to pass through gross revenue tax, but “prohibited the health care providers from itemizing the cost of the gross revenue tax on invoices”).

#### **IV. CONCLUSION**

RCW 82.04.500 does not govern, let alone prohibit, itemization of the B&O tax pass-through. As explained in prior briefing, the dealers

request that this Court reverse the decision below because the dealers' conduct did not violate RCW 82.04.500; because Mr. Nelson's claim is not justiciable; and because the class should not have been certified.

RESPECTFULLY SUBMITTED on October 6, 2006.

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