No. 77985-6

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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Plaintiff-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,

Defendants-Petitioners

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION III

AMICUS CURIAE MEMORANDUM OF ASSOCIATION OF WASHINGTON BUSINESS IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REASONS TO ACCEPT REVIEW 1

A. The Court of Appeals Erred in Its Reading of Washington State Tax Law 1

1. The Court of Appeals Misapplied RCW 82.04.500 and Erroneously Rejected the Department of Revenue's Longstanding -- and Correct -- Interpretation of the Statute, and Those Errors Warrant Review Under RAP 13.4(b)(4) 1

2. The Decision of Division III in This Case Is Now in Conflict With a Recent Decision of Division I, and This Conflict Warrants Review by This Court Under RAP 13.4(b)(2) 4

3. The Court of Appeals' Decision Involves an Issue of Substantial Public Interest That Should Ultimately Be Decided by This Court 5

B. The Court of Appeals Erred in Holding That Mr. Nelson Has a Private Right of Action Under the Uniform Declaratory Judgments Act 6

C. The Court of Appeals Erroneously Allowed Mr. Nelson to Bypass the More Stringent Showing Required Under CR 23(b)(3) by Invoking CR 23(b)(2), Which Applies Only to Classes Seeking Predominantly Injunctive Relief 9

TABLE OF AUTHORITIES

Page

CASES

Bennett v. Hardy, 113 Wn.2d 912, 784 P.2d 1258 (1990) 7

Braam v. Department of Social & Health Services, 150 Wn.2d 689, 81 P.3d 851 (2003) 6

Camer v. Seattle School District No. 1, 52 Wn. App. 531, 762 P.2d 356 (1988) 7

City of West Richland v. Department of Ecology, 124 Wn. App. 683, 103 P.3d 818 (2004) 3

Eriks v. Denver, 118 Wn.2d 451, 824 P.2d 1207 (1992) 9

Nelson v. Appleway Chevrolet, Inc., 129 Wn. App. 927, 121 P.3d 95 (2005) 2, 7, 9

Sitton v. State Farm Mutual Auto Insurance Co., 116 Wn. App. 245, 63 P.3d 198 (2003) 9

Sprint Spectrum, L.P./Sprint PCS v. City of Seattle, ____ Wn. App. ____, ____ P.3d ____ 2006 WL 240645 (Jan. 30, 2006) 4, 5

Washington State Coalition for the Homeless v. DSHS, 133 Wn.2d 894, 949 P.2d 1291 (1997) 6

Williams v. National School of Health Technology, Inc., 836 F. Supp. 273 (E.D. Pa. 1993), aff'd mem., 37 F.3d 1491 (3d Cir. 1994) 6

STATUTES AND COURT RULES

RCW ch. 7.24 (Uniform Declaratory Judgments Act) 1, 6, 7, 8

RCW ch. 1986 (Consumer Protection Act) 7

RCW 82.04.220 1

RCW 82.04.500 ..... 1, 2, 7, 8

RCW 82.32.060 5

RAP 13.4(b)(2) 4, 5

RAP 13.4(b)(4) 1, 5

CR 23 10

CR 23(b)(2) 1, 9

CR 23(b)(3) 9, 10

REASONS TO ACCEPT REVIEW

The Association of Washington Business ("AWB") respectfully requests that this Court accept review of the petition filed by Defendants-Petitioners Appleway Chevrolet, et al. ("Petitioners"). The decision of the Court of Appeals will: (1) prohibit Washington businesses from itemizing the Business and Occupation tax ("B&O tax") passed through to consumers as an item of overhead, (2) allow Plaintiff Herbert Nelson to recover monetary relief under Washington's Uniform Declaratory Judgments Act ("UDJA"), without first establishing a private right of action under the underlying statute (RCW 82.04.500), and (3) permit Mr. Nelson to bring a CR 23(b)(2) class action for a claim seeking predominantly monetary relief. For the reasons set forth below, AWB submits that these effects warrant review -- and correction -- by this Court.

A. The Court of Appeals Erred in Its Reading of Washington State Tax Law.

1. The Court of Appeals Misapplied RCW 82.04.500 and Erroneously Rejected the Department of Revenue's Longstanding -- and Correct -- Interpretation of the Statute, and Those Errors Warrant Review Under RAP 13.4(b)(4). The State of Washington levies a B&O tax on "every person . . . for the act or privilege of engaging in business activities." RCW 82.04.220. The Court of Appeals' decision precludes businesses from separately stating the B&O on itemized invoices. See

Nelson v. Appleway Chevrolet, Inc., 129 Wn. App. 927, 945, 121 P.3d 95 (2005). In fact, nothing in RCW 82.04.500 prohibits Washington businesses from either passing through B&O taxes to their consumers or separately itemizing the B&O tax on customer bills. To the contrary: RCW 82.04.500 provides that such taxes constitute a part of the operating overhead of the business, which consumers inevitably will pay as part of every purchase, regardless of whether the tax is itemized.[1] The statute simply does not address the propriety of disclosing this permissible pass-through to consumers, or the manner in which such disclosure may be made.

Consistent with RCW 82.04.500's language, the Washington Department of Revenue ("DOR") issued a Special Notice ("Notice") on September 5, 2000, stating that a business may itemize the B&O tax as a separate item on its invoice. (A copy of the Notice is attached as the sole Appendix to this Memorandum.) "Agency interpretations . . . may be

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[1]RCW 82.04.500 provides:

> **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 customers, 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.

(Emphasis added.)

given 'great weight' when a statute is within the agency's special expertise[.]" City of West Richland v. Dep't of Ecology, 124 Wn. App. 683, 691, 103 P.3d 818 (2004) (quoting Postema v. PCHB, 142 Wn.2d 68, 77, 11 P.3d 726 (2000)). The DOR acted in response to "a number of businesses" that had requested guidance, noting that while "[t]he statute intends the B&O tax to be a part of a seller's overhead[,] . . . it does not prevent a seller from itemizing and showing the effect of the tax." See Notice at 3 (emphasis added). The DOR also provided guidance to businesses regarding the tax implications of such itemization, concluding that, if a business were to choose to pass the B&O tax through to the consumer as a separate item on the bill, the amount would be included in the gross proceeds of the sale and would itself be subject to B&O tax -- no differently from any other component of overhead.[2] Itemization of the B&O tax, however, would not change the consumer's obligation.

Like Petitioners here, many Washington businesses have relied on the Notice and have itemized B&O taxes on consumer invoices after the DOR issued the Notice more than five years ago. The AWB respectfully

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[2]The DOR stated that "[a] seller itemizing the B&O tax must be aware that the separately stated amount is a part of the gross proceeds of sale that is subject to tax. This means that the taxable amount for all B&O tax classifications increases by the amount of the itemized tax. If the sale is a retail sale, the amount subject to sales tax likewise increases by the amount of the itemized B&O tax." See Notice at 4.

requests that this Court accept review to make clear that these businesses did not violate Washington tax law by disclosing a lawful tax pass-through on their itemized customer invoices.

2. The Decision of Division III in This Case Is Now in Conflict With a Recent Decision of Division I, and This Conflict Warrants Review by This Court Under RAP 13.4(b)(2). In Sprint Spectrum, L.P./Sprint PCS v. City of Seattle, ____ Wn. App. ____, ____ P.3d ____ 2006 WL 240645 (Jan. 30, 2006), Division I held that a taxpayer that separately itemizes the Seattle gross receipts telephone utility tax on customer invoices must pay the tax on its total gross income including the charge for the utility tax. The court ruled that "Sprint's decision to separately charge its customers for the utility tax cannot change the fact that the tax is part of the sales price Sprint charges for cellular services." 2006 WL 240645 at *1. Division I's decision recognizes the longstanding principle of this state's gross receipts tax laws, that taxpayers may separately itemize gross receipts overhead taxes on customer billings, but if taxpayers do so, those receipts are to be considered taxable income. The decision also underscores that businesses regularly and routinely pass through gross receipts overhead taxes to their customers, just as with all other items of overhead. AWB believes that thousands of businesses in Washington, including many AWB members, itemize the B&O tax on

billing statements or invoices to customers or purchasers, and that the Sprint decision reaffirms the legality of this practice. The resulting conflict between the decision of Division III in the present case and the decision of Division I in Sprint independently warrants this Court's review under RAP 13.4(b)(2).

3. The Court of Appeals' Decision Involves an Issue of Substantial Public Interest That Should Ultimately Be Decided by This Court. The Court of Appeals' decision wreaks havoc on the Department of Revenue, the state budget, and the thousands of Washington taxpayers that regularly and routinely itemize the B&O tax on customer invoices. If the Court of Appeals' decision is allowed to stand, all businesses that itemize the B&O tax would have to refund the charge to their customers, plus the retail sales tax collected on this charge. In turn, these businesses could then, within the applicable limitations period (see RCW 82.32.060), obtain refunds from the Department of Revenue of both the B&O taxes and sales taxes they previously paid to the State, based upon the reduced amount of consideration received by the businesses as gross income. These manifestly disruptive consequences, all following a clearly erroneous application of state tax law by the Court of Appeals, warrant this Court's review under RAP 13.4(b)(4).

B. The Court of Appeals Erred in Holding That Mr. Nelson Has a Private Right of Action Under the Uniform Declaratory Judgments Act.

The Court of Appeals effectively allowed Mr. Nelson to invoke Washington's Uniform Declaratory Judgments Act and thereby circumvent this Court's long-established requirement that a plaintiff must establish a private right of action under the statute allegedly violated as a prerequisite to monetary relief. By so holding, the Court of Appeals opened the door for litigants to invoke the UDJA to create a private right of action even where one clearly would not exist under well settled decisions of this Court -- an effect that goes far beyond the immediate context of the B&O statute, and can spill over to numerous other Washington statutes where the Legislature did not intend for there to be a private right of action.

As discussed in the Petition for Review, courts in other jurisdictions have held that uniform declaratory judgments acts, such as the one at issue here, cannot alone serve as a basis for relief when a party does not have a private cause of action pursuant to the underlying statute at issue.[3] The Court of Appeals acknowledged that the trial court had no

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[3]As one court stated, "[t]he Declaratory Judgment Act cannot be used to circumvent the enforcement mechanism which Congress established." Williams v. National Sch. of Health Tech., Inc., 836 F. Supp. 273, 281 (E.D. Pa. 1993), aff'd mem., 37 F.3d 1491 (3d Cir. 1994). Washington law is no different. See Braam v. Dep't of Soc. & Health Servs., 150 Wn.2d 689, 711-12, 81 P.3d 851 (2003); Washington State (continued . . .)

jurisdiction under the UDJA unless Mr. Nelson could establish a private cause of action to enforce a statutory right. Nelson, 129 Wn. App. at 936. The court nonetheless concluded that, although RCW 82.04.500 is a taxing and not a consumer-protection statute, individual consumers such as Mr. Nelson may proceed under the UDJA to seek a determination as to whether a business's method of itemizing and collecting the B&O tax is unlawful under RCW 82.04.500. Id. In so doing, the court failed to comply with the specific requirements for determining whether a statute provides for a private right of action, set forth by this Court in Bennett v. Hardy, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990).

This case satisfies none of the prerequisites for a private right of action. The Legislature enacted RCW 82.04.500 as a means of generating tax revenue from businesses, and the statute expressly acknowledges that businesses will pass their tax burden on to consumers. The Court of Appeals therefore had no basis for its apparent conclusion that the Legislature passed the statute at issue for the "especial" benefit of consumers. Nor was there any basis for the Court's determination that the Legislature intended to create a remedy distinct from the Consumer

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(. . . continued)
Coalition for the Homeless v. DSHS, 133 Wn.2d 894, 912-13, 949 P.2d 1291, 1301 (1997); Camer v. Seattle Sch. Dist. No. 1, 52 Wn. App. 531, 536-38, 762 P.2d 356 (1988).

Protection Act for consumers challenging a business's itemized disclosure under RCW 82.04.500.

The Court of Appeals' holding merits this Court's intervention. The decision dramatically expands the reach of the UDJA, creating a mechanism by which litigants may obtain monetary damages against Washington businesses that are not otherwise statutorily available. The decision thereby undermines legislative intent, and confronts a business with a new array of wide-ranging claims previously unavailable under Washington law -- not only with respect to B&O tax, but with respect to any other statute for which a private right of action has not previously been available.[4] The AWB respectfully requests that this Court accept review to make clear that a plaintiff may not use the UDJA to make an end run around Washington's private right of action requirements.

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[4]The initial consequences of the Court of Appeals' decision are already apparent in the B&O tax context. Just days after the decision, a copycat class action lawsuit was filed against other automobile dealers. See Johnson v. Camp Automotive, Inc., Spokane County No. 05-205059-9 (Oct. 19, 2005). Another similar lawsuit has also been commenced against a communications company. See James A. Brown v. Charter Communications LLC, Chelan County No. 05-2-01218-2 (Nov. 14, 2005).

C. The Court of Appeals Erroneously Allowed Mr. Nelson to Bypass the More Stringent Showing Required Under CR 23(b)(3) by Invoking CR 23(b)(2), Which Applies Only to Classes Seeking Predominantly Injunctive Relief.

The Court of Appeals held that Mr. Nelson could proceed with a class action under CR 23(b)(2), even though Mr. Nelson is seeking to recover millions of dollars from defendants. Nelson, 129 Wn. App. at 949. Under settled Washington law, however, certification under CR 23(b)(2) is inappropriate when the "primary objective of the suit is monetary damages." Sitton v. State Farm Mutual Auto Ins. Co., 116 Wn. App. 245, 251, 63 P.3d 198 (2003). CR 23(b)(2) classes are "mandatory," i.e., the results are binding on all class members, and those members do not have the right to opt out of a class action prior to judgment on the merits. Sitton, 116 Wn. App. at 252. "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 relief.'" Id. As this Court explained in Eriks v. Denver, 118 Wn.2d 451, 466, 824 P.3d 1207 (1992), in cases where plaintiffs seek class certification under CR 23(b)(2) on the basis of a request for declaratory relief, but "the declaration merely forms the basis for monetary relief, a CR 23(b)(2) action is not appropriate." Id. (citations omitted).

Here, the sole objective of the suit by Mr. Nelson is monetary damages, i.e., recovery of the amount of B&O taxes paid. Mr. Nelson's claim that he is seeking only some form of "injunctive relief" ignores the simple and indisputable fact that Mr. Nelson will get all he wants if he recovers money; indeed, because Mr. Nelson and the class already have paid itemized B&O taxes, neither he nor any class member would benefit from declaratory or injunctive relief (except insofar as that relief might serve as the springboard for recovery of monetary damages). The Court of Appeals' decision to affirm class certification in this case unnecessarily and improperly exposes Washington businesses to a measurably greater risk of class action damages cases that would not otherwise be allowable under the stringent requirements of CR 23(b)(3). This Court should accept review to correct the Court of Appeals' misapplication of CR 23.

RESPECTFULLY SUBMITTED this 15th day of February, 2006.

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