

No. 235041

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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

**Respondent**

v.

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

**Petitioners**

---

REPLY BRIEF OF PETITIONERS

---

Gregg R. Smith, Bar # 15553  
Attorney at Law  
W. 905 Riverside Avenue  
Suite 409  
Spokane, Washington 99201  
(509) 456-0883 (phone)  
(509) 838-0955 (fax)

Daniel F. Katz  
Luba Shur  
Williams & Connolly LLP  
725 12th Street, N.W.  
Washington, D.C. 20005  
(202) 434-5000 (phone)  
(202) 434-5029 (fax)

Attorneys for Defendants-Appellants

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... ii

INTRODUCTION .....1

A. RCW § 82.04.500 Does Not Prohibit Disclosure  
of the Lawful B&O Tax Pass-Through.....2

    1. The Claim before the Court Is That  
    Itemization Transforms an Otherwise  
    Lawful Pass-Through into an Illegal Tax  
    Collection, Not That the Pass-Through Is  
    Illegal *Per Se*.....2

    2. Mr. Nelson’s Argument Conflicts with  
    Washington Law That Itemizing a  
    Business Tax and Shifting that Tax  
    Burden to Consumers Does Not  
    Transform the Nature of the Tax .....4

    3. Mr. Nelson’s Argument Conflicts with  
    Related Washington Tax Law Suggesting  
    That Itemizing the B&O Tax Is  
    Permissible.....10

    4. Chapter 82.04’s Silence as to Itemization  
    Cannot Be Construed as a Prohibition on  
    the Practice.....12

    5. Mr. Nelson’s Construction of RCW §  
    82.04.500 Would Yield an Absurd Result .....13

    6. The DOR’s Special Notice, as the Only  
    Plausible Statutory Interpretation, Is  
    Entitled to Deference. ....14

B. Mr. Nelson May Not Bypass Washington’s  
Private-Right-of-Action Requirement by  
Invoking the Declaratory Judgment Remedy .....15

C. Mr. Nelson Fails To Establish Standing .....19

D. Mr. Nelson Is Not Entitled to Equitable Relief.....22

E. The Superior Court Abused Its Discretion in  
Certifying a CR 23(b)(2) Class.....23

CERTIFICATE OF SERVICE .....26

**TABLE OF AUTHORITIES**

**Washington Cases**

*Biggers v. City of Bainbridge Island*, 124 Wash. App. 858,  
103 P.3d 244 (2004).....15

*Braam v. Department of Social & Health Services*, 150  
Wash. 2d 689, 81 P.3d 851 (2003)..... 18-19

*Branson v. Port of Seattle*, 152 Wash. 2d 862, 101 P.2d 67  
(2004)..... 7, 8, 21-22

*Brown v. Scott Paper Worldwide Co.*, 143 Wash. 2d 349, 20  
P.3d 921 (2001).....8

*Canteen Serv. Inc. v. State*, 83 Wash. 2d 761, 522 P.2d 847  
(1974).....7, 8

*Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash.  
App. 106, 780 P.2d 853 (1989).....23

*Grant County Fire Protection District No. 5 v. City of  
Moses Lake*, 150 Wash. 2d 791, 83 P.3d 419 (2004)...15, 19, 21

*Public Utility District No. 3 of Mason County v.  
Washington*, 71 Wash. 2d 211, 427 P.2d 713 (1967) .....  
..... 5-8, 12, 14

*State v. Creegan*, 123 Wash. App. 718, 99 P.3d 897 (2004) ... 11-12

*Thorgaard Plumbing & Heating Co. v. County of King*, 71  
Wash. 2d 126, 426 P.2d 828 (1967).....16, 17

*Wagers v. Goodwin*, 92 Wash. App. 876, 964 P.2d 1214  
(1998).....23

*Washington Federation of State Employees v. State  
Personnel Board*, 23 Wash. App. 142, 594 P.2d 1375  
(1979).....16

**Cases From Other Jurisdictions**

*Barnhart v. Walton*, 535 U.S. 212 (2002).....15

*Blockbuster, Inc. v. White*, 819 So. 2d 43 (Ala. 2001)..... 17-18

*Gurley v. Rhoden*, 421 U.S. 200 (1975).....21

*NALSO v. Continental Grain Co.*, 901 S.W.2d 127 (Mo. Ct. App. 1995) .....18

*Pure Oil Co. v. State*, 12 So. 2d 861 (Ala. 1943).....9

*Robinson v. Tex. Automobile Dealers Association*, 387 F.3d 416 (5th Cir. 2004)..... 24-25

*Scratchfield v. Mutual of Omaha Insurance Co.*, 341 F. Supp. 2d 675 (E.D. Tex. 2004) .....22

*Texaco Refining & Marketing Co. v. Commissioner of Revenue Services*, 522 A.2d 771 (Conn. 1987) .....7, 9, 10

*United Nuclear Corp. v. Revenue Division*, 648 P.2d 335 (N.M. Ct. App. 1982).....7, 9

*Watkins Cigarette Serv., Inc. v. Arizona State Tax Commission*, 526 P.2d 708 (Ariz. 1974).....9

**Washington Statutes and Rules**

RCW § 54.28 .....5

RCW § 82.04 ..... 11-12

RCW § 82.04.220 .....5, 12

RCW § 82.04.500 ..... *passim*

RCW § 82.16 .....5, 11

RCW § 82.16.090(2)..... 11-12

CR 23 ..... 23-25  
CR 57 ..... 22

**Federal Rule**

Fed. R. Civ. P. 23 ..... 24-25

**Other Authority**

15 Karl B. Tegland, *Washington Practice: Civil Procedure*  
§ 42.1 ..... 18  
Special Notice ..... 8, 14-15  
2002 Tax Reference Manual ..... 8, 9, 10-11

## INTRODUCTION

From beginning to end, Mr. Nelson's Answering Brief is an effort to divert this Court's attention from the real issue on this appeal: whether itemizing the B&O Tax on customer invoices converts a legal pass-through of the tax into an illegal one.<sup>1</sup> Mr. Nelson's Introduction and Statement of Issues not once mention the word "itemize," and, instead, Mr. Nelson characterizes the issue for this Court to decide as whether the dealerships' practice of "assessing and collecting" the B&O Tax is illegal *per se*. Answering Brief ("AB") 2; *see id.* at 1, 3, 6, 7, *passim*. Yet Mr. Nelson admitted in proceedings below (and the Superior Court agreed, *see* RP 11:12-14 (8/20/04 Hearing) that "the vast majority of Washington businesses . . . factor the B&O [T]ax into their overall pricing" and that this is "perfectly legal." CP 191. And, indeed, RCW § 82.04.500 does make perfectly clear that B&O Taxes "shall constitute a part of the operating overhead" of the taxpayer. Mr. Nelson has come to the realization that the only way to make even a superficially plausible – albeit plainly untenable – argument on appeal is to ignore that itemization is the issue, not generally whether the dealerships may "assess[] and collect[]" the B&O Tax. AB 2.

---

<sup>1</sup> Terms previously defined in defendants'-appellants' Brief have the same meaning here.

This Court should summarily reject Mr. Nelson's attempt to obscure the real issue on appeal.<sup>2</sup>

**A. RCW § 82.04.500 Does Not Prohibit Disclosure of the Lawful B&O Tax Pass-Through**

**1. The Claim before the Court Is That Itemization Transforms an Otherwise Lawful Pass-Through into an Illegal Tax Collection, Not That the Pass-Through Is Illegal *Per Se***

RCW § 82.04.500 expressly contemplates that sellers will pass through the B&O Tax to consumers "as part of the operating overhead of such persons." Mr. Nelson framed the issue below – a framework from which is he now rapidly running – as whether the dealerships violated the law by *itemizing* the B&O Tax as a separately-stated part of their overhead instead of simply including the pass-through as part of their overall price.<sup>3</sup>

---

<sup>2</sup> The standard of review, as defendants-appellants previously explained, *see* Brief 13-14, is *de novo* respecting the Superior Court's rulings on summary judgment, and it is *de novo* where the issue for reconsideration is a ruling on summary judgment. Mr. Nelson alludes to "new legal theories," being raised on reconsideration but does not argue that this Court should not consider any such theories. AB 34-35. As defendants-appellants previously discussed, the arguments raised on their motion for reconsideration were properly considered by the Superior Court and are preserved on appeal. CP 501-03, 536-38.

<sup>3</sup> In proceedings before this Court, Mr. Nelson also asserted that itemization *is* permissible if the timing is right. *See* Brief 24 n.3. If this Court takes Mr. Nelson at his word, this argument plainly spells the end of Mr. Nelson's claim, since it constitutes a concession that RCW § 82.04.500 does not prohibit itemization of the B&O Tax if such disclosure is made at the appropriate time. Mr. Nelson's Complaint does not claim that the

*See, e.g.*, CP 190 (“Retail sellers are free to separately list in their prices every other element of their overhead expenses (including utility bills, insurance, rent and payroll), but they may not list taxes imposed uniquely upon them by the government as a separate item for consumers to pay.”);<sup>4</sup> CP 191 (“unlike other overhead expenses, [the dealerships] may not present the B&O Tax explicitly and directly to the consumer”); CP 194 (stating that the dealerships itemize “the B&O Tax as a line item” and “this practice is unlawful and impermissible”). Likewise, the Superior Court agreed that “paying the B&O [T]ax indeed can be part of the operating overhead of the

---

timing of the dealerships’ disclosure is improper under RCW § 82.04.500. CP 4-12.

<sup>4</sup> Mr. Nelson states:

It is undisputed that businesses incur overhead expenses for B&O [T]axes and other business costs, but it is also undisputed that [the dealerships] do[] not “itemize,” charge, or otherwise collect from [their] customers other elements of overhead that are its legal responsibility, such as utility costs, advertising, rent, and employee salaries and benefits, to name a few.

AB 18. Nowhere in the record is there any indication that the dealerships do not “collect from [their] customers” expenses “such as utility costs, advertising, rent, and employee salaries and benefits.” To the contrary, if the dealerships did not collect such expenses from their customers, they would be unable to stay in business. *See* Brief 26-27, CP 400 (citing cases recognizing that businesses must recover their costs from consumers to remain viable). Once again, what Mr. Nelson means to say is that the dealerships collect – *but do not itemize* – such other overhead costs.

business,” but the statute “does not say . . . that you can directly, *by* ‘itemization’, [sic] pass [the B&O Tax] on to the consumer.” RP 55:9-11 (8/13/04 Hearing) (emphasis added).

Thus, notwithstanding Mr. Nelson’s strenuous effort to recharacterize the thrust of this appeal, the issue before the Court is whether an otherwise lawful B&O Tax pass-through becomes illegal if it is disclosed to the consumer in an itemized invoice. The issue is not whether the pass-through itself is unlawful – it is clearly lawful under the plain language of the statute.

**2. Mr. Nelson’s Argument Conflicts with Washington Law That Itemizing a Business Tax and Shifting that Tax Burden to Consumers Does Not Transform the Nature of the Tax**

Mr. Nelson makes the odd argument that permitting itemization of the B&O Tax would effectively transform the tax into a sales tax. Unlike the B&O Tax, Washington’s sales tax statute *requires* sellers to collect sales tax from buyers; consumers who fail to pay sales tax may be held *guilty of a misdemeanor*; and *the DOR may proceed directly against the consumer for collection of the tax*. AB 16-17; *see also id.* at 13, 15 (quoting the Superior Court). In contrast, Washington’s B&O Tax statute does *not* require sellers to collect the B&O Tax from buyers; does *not* make it unlawful for a consumer to pay the B&O Tax; and does *not*

permit the DOR to pursue consumers if a seller fails to remit the B&O Tax to it. *No seller can alter these legal differences between the B&O Tax statute and the sales tax statute by itemizing the B&O Tax.* Irrespective of itemization by the dealerships, the State of Washington continues to “lev[y]” and “collect[.]” the B&O Tax from the dealerships based on their “gross sales,” and the taxes still “constitute a part of [their] operating overhead.” RCW §§ 82.04.220, 82.04.500; *see* Brief 30-37.

Moreover, Mr. Nelson’s argument conflicts with controlling Washington Supreme Court case law. In *Public Utility District No. 3 of Mason County v. Washington*, 71 Wash. 2d 211, 427 P.2d 713 (1967), a privilege tax was imposed on a light and power company under Chapter 54.28. The company “pass[ed] these taxes on to its customers by billing them as a separate item, labelled [sic] tax.” 71 Wash. 2d at 212, 427 P.2d at 714. Thereafter, the company “would . . . remit the taxes . . . to the taxing source without including these receipts in its reported gross income” for purposes of determining its tax liability under Chapter 82.16. *Id.* The taxing authority challenged the company’s failure to include the separately-billed tax in its “gross income.” *Id.* The trial court held that the privilege taxes “were designed to be borne by the [company],” that the taxes “could not be deducted from its gross income,” and that the company “*could not*,

*by billing the taxes as a separate item to the consumer convert them to taxes on the ultimate user of the services.” Id. (emphasis added).*

The Washington Supreme Court affirmed the trial court’s holding because, under the operative statute, the taxes

*are treated as part of the cost of doing business. Therefore, the [company], by billing the two taxes in question to its customers (either separately or buried in the total charge for services), adds to its ‘gross income’ and cannot thereafter make deductions therefrom in measuring its tax liability. . . . [T]he tax receipts collected are part of the consideration given by the customer for electric services, regardless of the form of the [company’s] billing, since they are operational expenses of the district directly connected with the performance of its particular public service.*

71 Wash. 2d at 214, 427 P.2d at 715 (emphasis added). Thus, Washington law could not be clearer that neither itemization nor any other bookkeeping practice of a business can magically transform the nature of a tax.

Further, *Public Utility District No. 3 of Mason County v. Washington*, 71 Wash. 2d 211, 427 P.2d 713 (1967), sheds light on the purpose behind the language in RCW § 82.04.500 that the B&O Tax is not to be “construed as [a] tax[] upon the purchasers or customers,” but “shall constitute a part of the operating overhead of [businesses].” By making clear that the B&O Tax is not a tax on consumers but that the B&O Tax is

part of a business's "operating overhead" – i.e., a "part of the cost of doing business," 71 Wash. 2d at 214, 427 P.2d at 715 – RCW § 82.04.500 forecloses the type of argument made in *Public Utility District No. 3 of Mason County*: that a business may exclude from its "gross revenue" the tax pass-through by itemizing and transform the tax into a consumer tax.

As defendants-appellants discuss in their Brief, the holding and reasoning of *Public Utility District No. 3 of Mason County v. Washington*, 71 Wash. 2d 211, 427 P.2d 713 (1967), are consistent with a long line of cases from Washington and elsewhere. Brief 30-37 (citing, *inter alia*, *Branson v. Port of Seattle*, 152 Wash. 2d 862, 873-77, 101 P.2d 67, 73-74 (2004) (governmental fee imposed on car rental companies, which they itemized and chose "to pass . . . through to their customers," was not effectively a fee imposed on consumers); *Texaco Refining & Mktg. Co. v. Comm'r of Revenue Servs.*, 522 A.2d 771, 779 (Conn. 1987) (interpreting materially identical statutory language as that relied upon by Mr. Nelson to preclude the argument that a seller may exclude from its gross earnings the portion of the tax passed through to consumers, irrespective of itemization); *United Nuclear Corp. v. Revenue Div.*, 648 P.2d 335, 340 (N.M. Ct. App. 1982) (citing *Canteen Serv. Inc. v. State*, 83 Wash. 2d 761, 522 P.2d 847 (1974) ("[t]he legal incidence of a tax does not always fall upon the same person or entity as the economic burden"))).

Mr. Nelson does not address *Branson* on this point, and does not mention *Canteen* at all. Nor does Mr. Nelson successfully distinguish the multitude of on-point, out-of-state authorities that soundly reject Mr. Nelson's argument that itemization of a business gross receipts tax transforms the tax into a consumer tax (several of which he does not even mention).<sup>5</sup>

Instead, Mr. Nelson resorts to the unhelpful mantra that Washington's "B&O Tax is unique; no other state levies a comprehensive gross receipts tax on all businesses." AB 3 (quoting a 2002 Tax Reference Manual issued by the DOR).<sup>6</sup> For purposes of the issues before this Court,

---

<sup>5</sup> Mr. Nelson disparages certain authorities that defendants-appellants cite – including a Supreme Court opinion from another state interpreting *materially identical language as in RCW § 82.04.500* – as “out-of-jurisdiction.” *See, e.g.*, AB 20. Nothing in Washington law suggests that Washington courts ought not consider relevant law from other jurisdictions. The Washington Supreme Court routinely considers and/or relies upon out-of-state authority when it is applicable. *See, e.g., Brown v. Scott Paper Worldwide Co.*, 143 Wash. 2d 349, 359, 20 P.3d 921, 926 (2001). *Public Utility District No. 3 of Mason County v. Washington*, 71 Wash. 2d 211, 427 P.2d 713 (1967), confirms that the authorities defendants-appellants cite are entirely consistent with Washington law. Moreover, Mr. Nelson himself has attempted to support his argument with out-of-state authorities. *See, e.g.*, CP 144.

<sup>6</sup> Ironically, in support of this argument (and other arguments) Mr. Nelson relies not on the plain language of the statutes at issue, but upon a 2002 Tax Reference Manual issued by the DOR. At the same time, Mr. Nelson attacks defendants-appellants for invoking the DOR's Special Notice because it is not a legal opinion, a legislative rule, an adjudication, or an

RCW § 82.04.500 is not “unique” at all. Mr. Nelson does not and cannot dispute that though other states and other statutes may not levy a gross receipts tax on “*all businesses*,” *id.* (emphasis added), numerous states and statutes levy a comprehensive gross receipts tax on certain businesses that is materially identical in concept and execution to RCW § 82.04.500. No issue before this Court turns on whether any particular excise tax reaches “*all businesses*” or merely a select few. Thus, it is facially absurd to claim, as Mr. Nelson does, that the numerous cases that defendants-appellants cite in their Brief are inapplicable because the tax statutes analyzed therein apply not to the gross earnings of all businesses in a state, but only to gross earnings on petroleum products (*Texaco Refining & Mktg. Co. v. Comm’r of Revenue Servs.*, 522 A.2d 771 (Conn. 1987)); uranium sales (*United Nuclear Corp. v. Revenue Div.*, 648 P.2d 335 (N.M. Ct. App. 1982)); illuminating, lubricating, or fuel oils (*Pure Oil Co. v. State*, 12 So. 2d 861 (Ala. 1943)); or cigarettes (*Watkins Cigarette Serv., Inc. v. Arizona State Tax Comm’n*, 526 P.2d 708, 711 (Ariz. 1974)). AB 20-21.

Mr. Nelson also claims that these cases do not address the issues raised by Mr. Nelson’s suggested construction of RCW § 82.04.500. AB 21. The cases are on-point because they involve attempts by taxpayers

---

Excise Tax Advisory. AB 22-24. Mr. Nelson makes no claim that the 2002 Tax Reference Manual falls within any of these categories.

to minimize their tax burden by arguing that the mere itemization of a gross receipts tax turns the gross receipts tax into a tax on consumers even though the law at issue made clear that businesses bore the legal responsibility for the tax. These cases clearly illuminate the proper interpretation of the “operating overhead” language in RCW § 82.04.500 that Mr. Nelson now misconstrues. That language is to foreclose arguments that itemizing a tax transforms the tax into a consumer tax, not to facilitate such arguments. *See, e.g., Texaco Refining & Mktg. Co. v. Comm’r of Revenue Servs.*, 522 A.2d 771, 779 (Conn. 1987) (stating that materially identical language to RCW § 82.04.500 reflects the legislature’s intent that the petroleum tax “be treated as an item of operating overhead measured by gross earnings derived from the sale of petroleum products in Connecticut,” “*includ[ing] . . . the amounts that the [business] has collected as taxes passed through to its customers,*” irrespective of the fact that the business “*billed its customers separately . . . for the taxes it collected from them*”) (emphasis added).

**3. Mr. Nelson’s Argument Conflicts with Related Washington Tax Law Suggesting That Itemizing the B&O Tax Is Permissible**

Mr. Nelson attempts to draw a contrast between the B&O Tax and Washington’s “selective” taxes, suggesting that the latter taxes, unlike the B&O Tax, *may* be shifted to consumers. AB 17 (citing the 2002

Tax Reference Manual). The argument ignores the fact that RCW § 82.04.500 *does* expressly contemplate that the B&O Tax will be shifted onto the consumer as “part of the [seller’s] operating overhead.” And Mr. Nelson’s argument once again ignores his concession that it is “perfectly legal” to have consumers such as Mr. Nelson pay the B&O Tax as part of a seller’s overhead. CP 191; *see* RP 55:6-11, 57:3-6 (8/13/04 Hearing).

Not only does Mr. Nelson’s attempted comparison between the statutes fail but, in addition, the statutory section imposing one of the “selective” taxes Mr. Nelson identifies – the public utility tax – unequivocally disproves his underlying argument. Chapter 82.16, which governs the public utility tax, requires certain taxes to appear on customer billings, including those “*added as a component of the amount charged to the customer,*” but states that such taxes “*need not include taxes . . . levied under chapter[ ] . . . 82.04 RCW [the B&O Tax Chapter].*” RCW § 82.16.090(2) (emphasis added). Thus, RCW § 82.16.090(2) suggests that the B&O Tax may be “added as a component of the amount charged to the consumer.” Further, by clear implication RCW § 82.16.090(2) *permits* – but does not require – itemization of the B&O Tax on consumer invoices. Mr. Nelson’s view of the law would improperly and needlessly give rise to a conflict between RCW § 82.16.090(2) and RCW § 82.04.500, both of which are part of the Washington Tax Code. *See, e.g., State v. Creegan,*

123 Wash. App. 718, 726, 99 P.3d 897, 901 (2004) (“Statutory provisions should be read together with others to achieve a harmonious and unified statutory scheme. Statutes relating to the same subject will be read as complementary, rather than in conflict with each other.”). Consequently, RCW § 82.16.090(2) undercuts Mr. Nelson’s argument that Washington law (and, specifically, RCW § 82.04.500) contains a blanket prohibition against “add[ing]” or itemizing the B&O Tax “as a component of the amount charged to the consumer.” RCW § 82.16.090(2).

**4. Chapter 82.04’s Silence as to Itemization Cannot Be Construed as a Prohibition on the Practice**

Mr. Nelson cites RCW § 82.04.220 and RCW § 82.04.500 in support of his proposed “unambiguous” construction of Washington’s B&O Tax statute (Chapter 82.04) as precluding an itemized pass-through (a construction that would conflict with the reasoning in *Public Utility District No. 3 of Mason County v. Washington*, 71 Wash. 2d 211, 427 P.2d 713 (1967), and RCW § 82.16.090(2)). AB 14-15. But neither RCW § 82.04.220 nor RCW § 82.04.500 purports to govern the form of business invoices or type of disclosure permitted. Brief A-1, A-2 (quoting statutes). Mr. Nelson makes no attempt to distinguish the legion of Washington and other cases cited by defendants-appellants establishing that statutory silence on a matter cannot be interpreted as a prohibition respecting the

matter, and courts may not read into a statute a prohibition that does not otherwise exist. *See* Brief 27-29. Mr. Nelson also fails to address the case law suggesting that prohibiting a business from separately stating a tax pass-through on consumer invoices would likely violate the First Amendment. *See id.* Nor does Mr. Nelson explain why these cases should not govern this Court's construction of RCW § 82.04.500.

**5. Mr. Nelson's Construction of RCW § 82.04.500 Would Yield an Absurd Result**

In their Brief, defendants-appellants cited more than one dozen Washington authorities and a federal district court case in support of their argument that it would be unreasonable and likely unconstitutional to interpret RCW § 82.04.500 as prohibiting the accurate disclosure of a lawful tax pass-through. *See* Brief 37-40. Mr. Nelson does not attempt to grapple with a single one of these authorities respecting these issues.

Instead, Mr. Nelson contradicts the position that he previously championed and distances himself from the Superior Court's clear statement that passing through the B&O Tax is lawful but that disclosing the pass-through is unlawful. Mr. Nelson now claims that the mere "collect[ion]" of the B&O Tax is unlawful (which obviously includes "collect[ion]" of the tax by passing it on to consumers as part of overhead) and, therefore, that disclosing the pass-through cannot make the pass-

through lawful. AB 18-19. In fact, Mr. Nelson argued and the Superior Court accepted the notion that having the consumer indirectly pay the B&O Tax in the form of an overhead pass-through is “perfectly legal.” CP 191. Mr. Nelson pursues an “Alice in Wonderland” strategy on appeal in arguing that having the consumer pay the B&O Tax in any form is illegal. With it established that the B&O Tax is “a part of the operating overhead” of Washington businesses, RCW § 82.04.500, it would be both absurd and likely unconstitutional to prohibit businesses from recouping an overhead expense directly with full disclosure rather than indirectly. Irrespective whether a tax is stated “separately or buried in the total charge for services,” the tax is part of the “consideration given by the customer.” *Public Utility District No. 3 of Mason County v. Washington*, 71 Wash. 2d 211, 214, 427 P.2d 713, 715 (1967).

**6. The DOR’s Special Notice, as the Only Plausible Statutory Interpretation, Is Entitled to Deference.**

For the reasons discussed above, RCW § 82.04.500 cannot plausibly be interpreted to forbid any of the practices Mr. Nelson has identified as unlawful in the course of this litigation – passing-through the B&O Tax to consumers; itemizing the pass-through; or itemizing the pass-through at the “wrong” time in a transaction. *See supra* Introduction; Section A.1-5. The DOR, then, undoubtedly was correct in concluding in

the Special Notice that RCW § 82.04.500 does not prohibit the conduct at issue, and the Superior Court should have deferred to the DOR.

Mr. Nelson, however, argues that the Special Notice is not entitled to deference because it is not a legal opinion, a legislative rule, an adjudication, or an Excise Tax Advisory. AB 22-24. Mr. Nelson cites no law foreclosing judicial deference to certain categories of agency interpretations, and, indeed, this is not the law. *See Barnhart v. Walton*, 535 U.S. 212, 221-222 (2002) (“less formal” agency interpretations are “not automatically deprive[d] . . . of . . . deference”).

**B. Mr. Nelson May Not Bypass Washington’s Private-Right-of-Action Requirement by Invoking the Declaratory Judgment Remedy**

While conceding that he lacks a private cause of action under RCW § 82.04.500, Mr. Nelson advances the unsupported proposition that simply by requesting declaratory relief – and notwithstanding his claim for millions of dollars in money damages – he may be excused from establishing a private cause of action. None of the cases Mr. Nelson cites stands for any such proposition. The private-right-of-action issue was not before the Court in *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wash. 2d 791, 802, 83 P.3d 419 (2004), or *Biggers v. City of Bainbridge Island*, 124 Wash. App. 858, 103 P.3d 244 (2004). The parties in these cases challenged the constitutionality of governmental

action and did not seek any monetary damages. No party argued that a private action was required or that a private action was missing. Neither case stands for the proposition that a Washington consumer may prosecute alleged statutory violations against private entities for millions of dollars in money damages where a private cause of action is not permitted under the applicable statute. *See* Brief 14-21.

Mr. Nelson also relies on *Thorgaard Plumbing & Heating Co. v. County of King*, 71 Wash. 2d 126, 426 P.2d 828 (1967), in support of his argument that he can sue for violations of RCW § 82.04.500 even though the statute does not permit a private right of action. Pointing to *Thorgaard's* explanation of the distinction between a “right of action” and a “cause of action,” Mr. Nelson attempts to explain away the uncontradicted holding in *Washington Federation of State Employees v. State Personnel Board*, 23 Wash. App. 142, 148, 594 P.2d 1375, 1379 (1979), 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.”

*Thorgaard* is not even remotely on point. In *Thorgaard* no party sought either a declaratory judgment or sought to enforce a statute absent a private right of action. Rather, the issue addressed was whether a

statute prescribing the conditions under which a county may be sued applied to arbitration proceedings instituted against the county. 71 Wash. 2d at 130, 426 P.2d at 832. The court held that the statute did not apply to arbitrations and, as a basis for its holding, reasoned that a “right of action” to pursue a judicial remedy is distinct from a “cause of action,” which is the underlying claim. 71 Wash. 2d at 131-32 & n.5, 426 P.2d at 833 n.5. As these terms are defined in *Thorgaard*, Mr. Nelson has neither a “cause of action” – an underlying claim – nor a “right of action” – the right to pursue a judicial remedy.

Mr. Nelson’s unsupported assertion that his monetary claim is “equitable,” and therefore likewise exempt from the private-right-of-action requirement, does not make it so, and, in any case, is beside the point, since Mr. Nelson cites no law that only “tort-like” claims for monetary relief are subject to the private-right-of-action requirement. AB 29. In fact, Mr. Nelson’s claim for monetary relief is no different from the plaintiff’s in *Blockbuster, Inc. v. White*, 819 So. 2d 43 (Ala. 2001), who also unsuccessfully argued that the defendant improperly “add[ed] a rental tax [imposed upon Blockbuster] to the amount he had agreed to pay for rental[s],” and “unjustly enriched [itself] by passing the rental tax on to [the plaintiff].” *Id.* at 44. There the applicable statute likewise provided that the taxes were to be “levied and . . . collected” from “each person engaging

. . . in the business of leasing or renting tangible personal property,” and the court found no evidence that a consumer claiming an unlawful pass-through could assert a private right of action. *Id.* Indeed, in response to the lower court’s failure to dismiss the case altogether, the Alabama Legislature amended the statute to clarify that under the law the tax “may be passed on to the [consumer].” *Id.* at 45 (quoting statute).

Finally, Mr. Nelson once again dismisses authorities from other jurisdictions – simply because they are not from Washington – holding that the declaratory judgment label will not resuscitate a claim for which no private cause of action exists. AB 31-32. But “because the Washington [Uniform Declaratory Judgments Act] . . . is based upon a uniform act, . . . cases interpreting the uniform act in other jurisdictions can often be helpful in predicting how the Washington statute will be interpreted.” 15 Karl B. Tegland, *Washington Practice: Civil Procedure* § 42.1 (1st ed. 2003 & Supp. 2004). The cases from other jurisdictions stand for the proposition that a “Declaratory Judgment Act . . . cannot serve as a basis for relief where . . . the party seeking to invoke the . . . [Act] does not have a direct cause of action concerning the matter as to which declaratory relief is sought,” *NALSO v. Continental Grain Co.*, 901 S.W.2d 127, (Mo. Ct. App. 1995); *see generally* Brief 14-21, and Washington law is no different, *see, e.g., Braam v. Dep’t of Soc. & Health Servs.*, 150 Wash. 2d

689, 71-12, 81 P.3d 851, 863 (2003) (private right of action required to enforce statutory rights, including claims for injunctive relief).

**C. Mr. Nelson Fails To Establish Standing**

Mr. Nelson's concession that he has no private right of action under RCW § 82.04.500 forecloses the argument that he has standing to proceed and bars his claim. Even putting aside this insuperable obstacle and assuming for the sake of argument that Mr. Nelson's (erroneous) formulation of the law applies, Mr. Nelson's claim is still precluded. Mr. Nelson argues that he has established standing because the dealerships' "illegal practice" of "passing the burden of the B&O [T]ax to consumers" (1) benefits the dealerships and (2) injures Mr. Nelson and other consumers. AB 25-26, 28. Further, Mr. Nelson asserts that he has standing because "the interest sought to be protected" under Washington's excise tax law is "within the zone of interests to be protected or regulated" under Washington's excise tax law, as required by *Grant County Fire Protection District No. 5 v. City of Moses Lake*, 150 Wash. 2d 791, 802, 83 P.3d 419, 423 (2004). AB 27-28. Finally, Mr. Nelson claims the matter at issue in this lawsuit is of "substantial public importance" and that, on this basis, the ordinary standing test should be relaxed to permit his claim. AB 28-29 (internal quotations and citations omitted).

All of Mr. Nelson’s standing arguments again depend on a revisionist and patently incorrect characterization of the alleged legal violation. As discussed above, the alleged legal violation is the itemization of the B&O Tax, not the pass-through as part of overhead. *See supra* Introduction; Section A.1. Thus, since Washington businesses are lawfully permitted to shift the B&O Tax burden to consumers, (1) there is no economic benefit to the dealerships from disclosing the lawful pass-through;<sup>7</sup> and (2) neither Mr. Nelson nor any other consumer has suffered injury by receiving an itemized invoice setting forth the costs of the B&O Tax to them.<sup>8</sup> RCW § 82.04.500 – on its face a revenue generating statute, not a consumer protection statute – does not address the manner in which businesses may disclose the incidence of the B&O Tax and, therefore, cannot be said to have been intended to protect consumers from receiving full disclosure. Finally, in making his argument that the claim before the Court is of “substantial public importance” Mr. Nelson relies on the rule

---

<sup>7</sup> Mr. Nelson claims that the dealerships benefit by deducting the B&O Tax on their federal income tax forms or retaining interest on the B&O Tax. Neither of these “facts” is in the record, and, more importantly, the dealerships would realize these same benefits even absent itemization.

<sup>8</sup> Mr. Nelson is incorrect that the issue of injury was not before the Superior Court. AB 26 n.12. Defendants-appellants moved for summary judgment on Mr. Nelson’s entire claim, including his claim for monetary relief.

that a matter may be of substantial public interest “when a controversy . . . immediately affects significant segments of the population[] and *has a direct bearing on commerce.*” AB 28 (quoting *Grant*) (emphasis Mr. Nelson’s). Mr. Nelson claims this test is satisfied here because if the dealerships’ practice is “condone[d] . . . Washington consumers should expect to pay an additional B&O . . . [T]ax on everything they purchase.” AB 29. Once again, Mr. Nelson’s argument is premised on the specious notion that consumers may not already be made to bear the burden of the B&O Tax “on everything they purchase.” *Id.*; see *Gurley v. Rhoden*, 421 U.S. 200, 204 (1975) (“The economic burden of taxes incident to the sale of merchandise is traditionally passed on to the purchasers of the merchandise.”). Mr. Nelson cites no case to support the claim that the real issue in this appeal meets the “substantial public importance” test – i.e., that whether consumers receive non-itemized as opposed to itemized invoices is a matter of “substantial public importance.”<sup>9</sup> See Brief 21-23.

---

<sup>9</sup> In a footnote, Mr. Nelson claims that *Branson v. Port of Seattle*, 152 Wash. 2d 862, 101 P.2d 67 (2004), supports his claim for standing. To the contrary, *Branson* held that even though car rental companies “recouped [governmental fees] through a line item charge on [their] customers’ bills” the itemized fee was not effectively rendered a charge to consumers, and that, therefore, consumers are *not* within the “zone of interest” of the relevant statute. 152 Wash. 2d at 875-76, 101 P.3d at 73, 74. Thus, the Court’s statement that the plaintiff’s complaint “would more properly be addressed by a claim against the rental car companies” cannot be read to suggest that the plaintiff would have standing to bring a claim that the car

**D. Mr. Nelson Is Not Entitled to Equitable Relief**

Mr. Nelson does not explain how declaratory or injunctive relief would be of use to him, given that he has alleged a *past* violation and has alleged no risk of a *future* violation. *See, e.g.*, CP 380-81. Moreover, assuming away the other multiple obstacles to his lawsuit, Mr. Nelson would have a fully adequate remedy at law – money damages. *See, e.g., Scritchfield v. Mutual of Omaha Ins. Co.*, 341 F. Supp.2d 675, 682 (E.D. Tex. 2004) (“Even though there is a dispute about the rights and obligations of the parties under the contract, that does not automatically ripen into a dispute under the Declaratory Judgment Act, especially if other adequate remedies already exist. . . . Plaintiffs would get nothing from a declaratory judgment that they would not get from prevailing on their breach of contract claims.”). As the case on which Mr. Nelson relies states:

[CR 57] and the case law can be harmonized in this way: *Ordinarily, where a plaintiff has another adequate remedy, he or she should not proceed by way of a declaratory judgment action; but declaratory relief may be “appropriate” in some situations,*

---

rental companies were unlawfully “recoup[ing] [governmental fees] through a line item charge on [their] customers’ bills.” *Id.* Instead, the Court merely indicated that *if* there existed a claim (for instance under the Consumer Protection Act) that claim would have to be brought against the car rental companies as opposed to the governmental airport authority. *See* 152 Wash. 2d at 868, 101 P.3d at 70.

notwithstanding the availability of another remedy.

*Wagers v. Goodwin*, 92 Wash. App. 876, 879-80, 964 P.2d 1214, 1216 (1998) (emphasis added). Mr. Nelson does not offer any reason why his case falls outside of the general rule and is not entitled to equitable relief.

**E. The Superior Court Abused Its Discretion in Certifying a CR 23(b)(2) Class**

Mr. Nelson does not contest that a class representative “cannot litigate a claim against a defendant who the representative cannot sue individually.” *Doe v. Spokane & Inland Empire Blood Bank*, 55 Wash. App. 106, 115, 780 P.2d 853, 859 (1989). Thus, the purported distinction Mr. Nelson identifies between this case and *Doe* – which boils down to the argument that the reasons the *Doe* class representative lacked standing is different from the reasons Mr. Nelson lacks standing – is irrelevant. AB 38. Consequently, if the Court agrees with any one of the arguments above, *see supra* Sections A-D, the class must be decertified.

Further, Mr. Nelson concedes that CR 23(b)(2) is appropriate only when: (1) the “primary claim” is for “injunctive or declaratory relief,” and (2) monetary damages are “merely incidental” such that they “flow directly from liability” and are “capable of computation by means of objective standards and not dependent in any significant way on

the intangible, subjective differences of each class members' circumstances." AB 39 (internal quotations and citations omitted).

Here, neither of these requirements is satisfied. Injunctive or declaratory relief cannot possibly be deemed "predominant" when it would be of no use to the named representative or any other class member, none of whom have alleged prospective injuries; when only monetary damages would redress the alleged wrong; and where the monetary request is for millions of dollars.<sup>10</sup> The class is defined to include only individuals who received an invoice with an itemized B&O Tax in the past; it does not include individuals who may receive a future itemized invoice. CP 380-81. Moreover, the assumption that alleged damages could be calculated simply based on the amount itemized as B&O Tax "defies the realities of the haggling that ensues in the American market when one buys a vehicle." *Robinson v. Tex. Auto. Dealers Ass'n*, 387 F.3d 416, 423-24 (5th Cir. 2004). Although Mr. Nelson is correct that *Robinson* dealt with Fed. R.

---

<sup>10</sup> Mr. Nelson attempts to distinguish between this case and the cases defendants-appellants cite for these propositions, AB 42 n.19, but the purported distinctions are immaterial since Mr. Nelson does not deny that the courts rejected Rule 23(b)(2) certification where, as here, the plaintiff sought a substantial monetary award, when the declaratory or injunctive relief was a mere springboard for monetary relief, or when the plaintiff would have received no benefit from the equitable relief. Nor does Mr. Nelson cite any Washington law for his claim that the amount of the monetary claim is irrelevant, contrary to the law of other jurisdictions.

Civ. P. 23(b)(3) certification in which the plaintiffs were attempting to establish antitrust injury, the discussion in *Robinson* about antitrust injury applies equally to the damages calculations that would be required in the case at bar. While Mr. Nelson asserts that defendants-appellants have offered no evidence regarding negotiations in more than “tens of thousands” transactions, CP 93, “the burden is on [Mr. Nelson] to establish the propriety of the class.” *Robinson*, 387 F.3d at 423 n.24. Mr. Nelson has not even attempted to show that, contrary to “the realities” of the “American [car] market,” *not even some* transactions were negotiated in a “bottom-line” manner. To determine which transactions involved “backing in” a B&O Tax, each and every one of more than “tens of thousands” of transactions would have to be individually examined. Under such circumstances, CR 23(b)(2) certification constitutes an abuse of discretion.

Respectfully submitted,

May 4, 2005



---

Daniel F. Katz  
Luba Shur  
Williams & Connolly LLP  
725 12th Street, N.W.  
Washington, D.C. 20005

Gregg R. Smith, Bar # 15553  
Attorney At Law  
W. 905 Riverside Avenue  
Suite 409  
Spokane, Washington 99201

Attorneys for Defendants-Appellants

**RECEIVED**

**MAY 05 2005**

In the Office of the Clerk of Court  
Washington Court of Appeals, Division Three

By \_\_\_\_\_

**CERTIFICATE OF SERVICE**

I hereby certify that on May 4, 2005, I furnished true and correct copies of the foregoing Reply Brief of Defendants-Appellants to the following counsel by Federal Express.

Brian S. Sheldon  
Phillabaum, Ledlin, Matthews & Sheldon, PLLC  
Paulsen Professional Center  
Suite 900 421 N. Riverside  
Spokane, WA 99201-0413

Kim D. Stephens  
Max E. Jacobs  
Kimberlee L. Gunning  
Tousley Brian Stephens PLCC  
1700 Seventh Avenue  
Suite 2200  
Seattle, WA 98101-7332

Gregg R. Smith  
Attorney at Law  
W. 905 Riverside Avenue  
Suite 409  
Spokane, Washington 99201



\_\_\_\_\_  
Luba Shur