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STATE OF WASHINGTON

Supreme Court No. \_\_\_\_

(Court of Appeals No. 23504-1-III)

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

*Respondent-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,

*Petitioners-Appellants.*

PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

Petitioners are AutoNation, Inc. (“AutoNation”), and the Appleway automobile dealerships and other businesses indirectly owned by AutoNation, all identified in the caption. Petitioners seek review of the decision designated in Part II.

## II. COURT OF APPEALS DECISION

Herbert Nelson claims that a consumer class has the right to recover millions of dollars from the petitioner dealerships on the theory that they violated RCW 82.04.500, a taxing statute, simply because they disclosed an indisputably lawful pass-through of a Business & Occupation (“B&O”) tax. Mr. Nelson does *not* allege that the disclosure was unfair or deceptive, CP 36 (42:12-18), and he has *not* asserted a claim under the Consumer Protection Act (“CPA”). Instead, he has sued only under the Uniform Declaratory Judgments Act (“UDJA”), seeking a “declaration” that the disclosure violated RCW 82.04.500 and the recovery of all taxes disclosed – *without regard to the manner or fairness of the disclosure*.

In a reported decision issued on October 13, 2005, 121 P.3d 95, the court of appeals affirmed certification of a class under CR 23(b)(2) and partial summary judgment in favor of that class. This Court should accept review of the decision under RAP 13.4(b), for three reasons:

*First*, even though the court of appeals agrees “that the B&O tax *may* be passed on to the customer as part of operating overhead,” the decision below asserts both that the lawful pass-through *may not* be itemized at all and that it *may* be disclosed, but only “while setting the

final purchase price.” Slip op. 17, 21 (emphases added). Although inconsistent, both statements transform a B&O taxing provision into a consumer protection statute, ignore the plain language of RCW 82.04.500 – contradicting guidance from the Department of Revenue (“DOR”), on which the dealers relied – and depart from the weight of authority. Further, by forbidding businesses from making truthful disclosures, the court’s construction of RCW 82.04.500 violates the First Amendment. This Court should accept review to correct the court of appeals’ constitutionally flawed and erroneous reading of the statute, to resolve the inconsistencies in the decision, and to provide Washington businesses with definitive guidance as to what they can disclose and when.<sup>1</sup>

*Second*, the decision below dangerously expands the reach of the UDJA so that litigants can use it as a springboard for recovery of damages for the violation of *any* statute – even if the plaintiff cannot assert a private right of action predicated on that statute or establish standing. This Court should accept review to clarify that plaintiffs (1) may *not* invoke the UDJA as an end-run around the Court’s well-established criteria for determining whether a plaintiff has a private right of action, and (2) *must* establish standing as a prerequisite to a UDJA action.

*Third*, the decision below contradicts this Court’s precedent in allowing this case to proceed as a class action under CR 23(b)(2), which governs classes seeking predominantly injunctive relief. Under this

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<sup>1</sup> These issues will recur: shortly after the court of appeals filed its opinion, new plaintiffs filed a copy-cat suit against other dealerships. See *Johnson v. Camp Automotive, Inc.*, Spokane County No. 05-205059-9 (Oct. 19, 2005).

Court's jurisprudence, CR 23(b)(2) *cannot* be used in a declaratory judgment case where, as here, the declaration merely forms the basis for monetary relief; instead, CR 23(b)(3) governs class certification of damage claims. The Court should accept review to clarify that litigants cannot avoid the requirements of CR 23(b)(3), rooted in due process, by creatively re-characterizing damage claims as injunctive-relief claims.

### **III. ISSUES PRESENTED FOR REVIEW**

1. Can RCW 82.04.500, a revenue-protection provision within the B&O tax Chapter that allows businesses to recoup B&O taxes as part of their overhead, be construed, consistent with the First Amendment, to prohibit businesses from truthfully itemizing the portion of their prices attributable to the B&O tax?

2. Does the UDJA, RCW 7.24.010, *et seq.*, allow a plaintiff to seek millions of dollars in monetary relief for an alleged statutory violation even though the plaintiff does not have a private right of action pursuant to the underlying statute, especially when the plaintiff's standing hinges on hypothetical "injury" from a truthful disclosure?

3. May a court, consistent with class action law and due process, avoid the stringent requirements of CR 23(b)(3), the rule for money damages classes, and certify a class under CR 23(b)(2), the rule for injunctive classes, when the class seeks millions of dollars in damages and would not derive any benefit from declaratory or injunctive relief?

#### IV. STATEMENT OF THE CASE

##### A. The B&O Tax and the Pass-Through Provision

Washington imposes a B&O tax on “every person . . . for the act or privilege of engaging in business activities.” RCW 82.04.220. The State assesses the B&O tax against a business’s “gross proceeds of sales.” *Id.*; *see* RCW 82.04.070. Unlike the sales tax, levied directly on buyers, the B&O tax becomes “part of [the] operating overhead” of a business, which businesses recoup like any other expense. 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.]

##### B. Agency Special Notice Approving Itemization

The DOR, which administers the B&O tax statute, has given taxpayers guidance on how businesses may recoup the B&O taxes they pay. According to a Special Notice dated September 5, 2000, “[a] number of businesses” had contacted DOR to inquire about the propriety of “[i]dentify[ing] the [B&O] tax as a separate item on . . . [consumer] invoice[s].” CP 23. In the Special Notice, DOR responded by stating unequivocally that “[i]t is *not illegal for a seller to itemize* the B&O tax.” *Id.* (emphasis added). The DOR noted that the pass-through is simply “one of the many overhead costs a prudent businessperson considers when

pricing goods and services,” and the decision to itemize would be based, among other factors, on “customer service considerations.” CP 24. The DOR cautioned that the itemized B&O tax would remain part of “gross proceeds of sale,” subject to both the B&O tax and sales tax. *Id.*

**C. Itemization of Previously Undifferentiated Pass-Through**

In light of the Special Notice, the Appleway dealerships (and other businesses) began to itemize the B&O tax on their consumer invoices. Itemizing did *not* shift to consumers an economic burden previously borne by the Appleway dealerships – to the contrary, the B&O tax “ha[d] been factored into the price of vehicles as overhead ever since the State instituted a tax on businesses.” CP 152. Itemization merely showed “customer[s] . . . why they are being charged a certain amount by breaking out . . . that cost.” CP 155. The Appleway dealerships posted a notice in their dealerships and included language in their advertisements disclosing that they “pass through to their customers the B&O tax that the dealer pays as an overhead expense.” CP 21 (notice), 22 (advertisement).

**D. Appleway’s Full Pre-Sale Disclosure of the Pass-Through to Mr. Nelson**

On September 3, 2002, Mr. Nelson and his wife purchased a used Volkswagen Cabriolet 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 (15:16-24), and he understood that he could avoid the B&O tax pass-through by “not buy[ing] the car.” CP 30 (18:13-25 – 19:1-10); CP 31 (21:17-21). 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 (20:24), and chose to buy it despite the tax pass-through.

**E. Mr. Nelson’s Claim**

In April 2004, 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 itemization was deceptive. CP 36 (42:12-18). He claimed, however, that itemizing the lawful pass-through and recouping it as part of overhead “unjustly enriched” the dealerships by millions of dollars, which he sought to recover. CP 11, 90, 93.

Mr. Nelson’s Complaint proposed a class under CR 23(b)(2), which applies to classes seeking predominantly injunctive relief, as opposed to a monetary recovery. *See* CP 7. But Mr. Nelson defined this class to consist only of individuals who *already* had received invoices itemizing the B&O tax; he did not allege any risk of future harm to this class that could be avoided by a declaration or an injunction. *Id.*

**F. Proceedings Below**

Mr. Nelson moved for partial summary judgment on his declaratory judgment claim under CR 56 (reserving as to his “unjust enrichment” claim) and moved for class certification under CR 23(b)(2). Petitioners filed a cross motion for summary judgment on all claims. Like Mr. Nelson before it and the court of appeals after it, the superior court recognized that the dealers lawfully could pass through the B&O tax, RP 55:6-9 (8/13/04 Hearing); RP 11:12-14 (8/20/04 Hearing), but ruled that the statute “does not say . . . that you can directly, by ‘itemization[,]’ pass [the B&O tax] on to consumers.” RP 55:9-11. The superior court granted Mr. Nelson’s motion for partial summary judgment, denied petitioners’ motion for summary judgment, and certified a CR 23(b)(2) class.<sup>2</sup>

**V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

**A. This Court Should Accept Review to Correct the Paradoxical Misinterpretation of RCW 82.04.500 as an Anti-Disclosure Consumer Protection Statute**

The decision below is internally inconsistent and contravenes authority from this Court, courts in other jurisdictions, and the DOR. Its statutory interpretation violates the First Amendment and important public policy. The Court should grant review under all prongs of RAP 13.4(b).

**1. The Decision Conflicts with the Statutory Language and Applicable Authority**

The court of appeals rested its holding on one phrase in RCW 82.04.500: “[i]t is not the intention of this chapter that the taxes herein

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<sup>2</sup> The superior court denied petitioners’ motions for reconsideration.

levied upon persons engaging in business be construed as taxes upon the purchasers or customers.” Slip op. 17. In multiple layers of internal contradiction, the court of appeals read this portion of RCW 82.04.500:

- to be “unambiguous,” yet to have “inherent” “tension,” *id.* at 9, 17;
- “not [to] expressly address itemization,” yet to “set forth the manner in which the pass-through must take place,” *id.* at 18;
- to “plain[ly] . . . allow[] for . . . disclosure . . . while setting the final purchase price,” yet to make businesses liable for *any* “itemization” without regard to individual negotiations, *id.* at 21, 26; and
- to prohibit the pass-through “to the customer as a tax,” yet to allow the pass-through as “part of operating overhead,” *id.* at 17, 18.

These baffling inconsistencies, without more, justify review. Only this Court can clarify the rights of Washington businesses and consumers.

Further, the court of appeals’ holding finds no support in the law. In the end, the court of appeals affirmed the trial court’s partial summary judgment, which held that the mere fact of itemization entitled Mr. Nelson to recover despite the absence of *any* claim of deception. *See, e.g.*, CP 360-61 (oral decision) (itemization unlawful even if business has “the absolutely best disclosure policy in the world”); CP 36 (42:12-18) (Nelson testifies no deception). To reach this conclusion, the court of appeals had to reject petitioners’ arguments that the B&O tax statute “takes no position as to [itemization]” and that “itemization of a tax does not change its underlying character,” apparently condemning the dealers for truthfully disclosing the B&O tax “as a tax.” Slip op. 18.

But the court of appeals misunderstood the function of the statutory language. By mandating that the B&O tax not be “construed” as

one “upon purchasers or customers,” the Legislature simply foreclosed the decades-old argument that sellers could reduce their taxable gross sales by itemizing the B&O tax and treating the itemized amount as a consumer tax, rather than as part of their gross sales subject to tax. *See* Brief (“Br.”) 25-27, 30-37; Reply Brief (“Rep. Br.”) 4-10 (citing cases). The claims in *Public Utility District No. 3 of Mason County v. Washington*, 71 Wn.2d 211, 212, 427 P.2d 713, 714-15 (1967), illustrate this argument. Just as Appleway itemizes the B&O tax, Mason County PUD’s bills itemized a public utility tax, which the State assessed on the PUD’s “gross income.” Unlike Appleway, however, the PUD argued that, because of itemization, the taxes collected would not be part of its “gross income.” This Court rejected the PUD’s argument that “by billing . . . taxes as a separate item to the consumer [a business may] convert them to taxes on the ultimate user of the services.” *Id.*; *accord Branson v. Port of Seattle*, 152 Wn.2d 862, 873, 101 P.2d 67, 72 (2004) (fee imposed on car rental companies, which they itemized and chose “to pass . . . through to their customers,” is *not* effectively imposed on consumers). Because the State imposed the tax on the PUD, not its customers, the amounts collected pursuant to the itemization remained “part of the consideration given by the customer for electric services.” *Mason County PUD*, 71 Wn.2d at 214.

Here, as in *Mason County PUD*, itemization of the tax did not alter the character of the consideration received from Mr. Nelson for the car he bought. Despite being itemized, the B&O tax remained “part of the consideration given by the customer” for the goods sold. RCW 82.04.500

codifies that result by clarifying that the State has levied the tax on businesses, not consumers, and thus protects the State's tax revenues from the argument made in *Mason County PUD*. But the statute on its face does not address, much less *prohibit*, either itemization or disclosure.

Decisions in other jurisdictions have read similar statutes the same way that petitioners advocate here. For example, the court in *Texaco Refining & Marketing Co. v. Commissioner of Revenue Servs.*, 522 A.2d 771, 779 (Conn. 1987), analyzed a *materially identical* statutory gross receipts tax on petroleum sales, which was not to "be construed as a tax upon purchasers of petroleum products." The court read the provision as ensuring that the petroleum tax, even if itemized, "be treated as an item of operating overhead measured ... by gross earnings derived from the sale of petroleum products." The court's holding was "not altered by the fact that ... the ... [seller] billed its customers separately for the sales price of its petroleum products and for the taxes it collected from them." *Id.* Thus, as this Court held in *Mason County PUD*, itemization did not convert the tax on the seller into a tax on the purchaser.

The court of appeals did not even mention *Mason County PUD*. It did, however, purport to distinguish a few of the many out-of-state cases to the same effect, *see* Br. 25-27, 30-37; Rep. Br. 4-10, on the ground that in those cases the taxpaying businesses – not "the customer[s] charged with the itemized tax," slip op. 20 – had sued, arguing that itemization transformed the tax to one on consumers and thereby permitted them to exclude the amount itemized from gross earnings subject to taxation. *Id.*

at 19-20. This supposed distinction misses the point. The repeated efforts by sellers to reduce tax liability by characterizing itemized business taxes as consumer taxes shows *why* our Legislature provided that such taxes would not be “construed as taxes upon the purchasers or customers,” RCW 82.04.500, and gives meaning to that phrase. *See* slip op. 17 (“we must also read the statute to give meaning to th[at] language”). Further, even though all of these cases involved itemization of some gross receipts tax, not one even hints that itemization would be intrinsically improper.

The DOR, of course, specifically determined – and told taxpayers – that Washington law *did* permit itemization. The court of appeals gave the DOR’s reading no weight, claiming that “no ambiguity exists in the statute,” slip op. 22 (despite also recognizing “tension inherent in RCW 82.04.500,” *id.* at 9). In fact, the DOR’s interpretation fits neatly into the case law, including *Mason County PUD*: the DOR advised that RCW 82.04.500 permits itemization but 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.” CP 24. The DOR’s advice to taxpayers on the exact matter at issue deserved deference. *See Seatoma Conval. Ctr. v. DSHS*, 82 Wn. App. 495, 518, 919 P.2d 602, 613 (1996).

Neither Mr. Nelson nor the court of appeals has cited a single case to support their reading of RCW 82.04.500, nor have they explained why the Legislature would have forbidden non-deceptive itemization of the B&O tax. This Court should accept review to reaffirm the DOR’s reading

of the statute, consistent with this Court's decision in *Mason County PUD*, and place Washington back into the jurisprudential mainstream.

**2. The Decision Conflicts with the First Amendment and Violates Public Policy**

In reading RCW 82.04.500 to forbid businesses from making truthful disclosures, the court of appeals has construed the statute to violate the First Amendment. For that reason, in similar circumstances, the court in *Bloom v. O'Brien*, 841 F. Supp. 277, 278 (D. Minn. 1993), preliminarily enjoined state officials from enforcing a statute that *permitted* health care providers to pass through a gross revenue tax, but "*prohibited* the health care providers from itemizing the cost of the gross revenue tax on invoices." The court of appeals purported to distinguish *Bloom* on the ground that "[u]nlike RCW 82.04.500, the Minnesota statute had no language indicating that the tax could not be passed on to customers." Slip op. 21. But this is no distinction at all. As the court of appeals accurately admitted in another part of its opinion, RCW 82.04.500 "unambiguously provides that the B&O tax *may* be passed on to the customer as part of operating overhead." *Id.* at 17 (emphasis added).<sup>3</sup>

The court of appeals' misguided effort to transform RCW 82.04.500 into a statute that "protects" consumers from truthful

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<sup>3</sup> The Port of Seattle has acknowledged the First Amendment implications of forbidding itemization. As this Court noted in *Branson*, the Port until 1997 prohibited car rental companies from "unbundling" or itemizing airport concession fees in customer invoices, until one company "objected to this provision on First Amendment grounds," and the Port "concluded that company's objection was reasonable." *Branson*, 152 Wn.2d at 867-68.

itemization achieves no benefit for consumers. To survive, any business must pass through its overhead costs to consumers, and this Court has recognized that “[t]he legal incidence of a tax does not always fall upon the same person or entity as the economic burden.” *Canteen Serv., Inc. v. State*, 83 Wn.2d 761, 762, 522 P.2d 847, 847-48 (1974). Accordingly, after the court of appeals’ decision, the Appleway dealerships remain free to pass through the B&O tax to consumers – indeed, they may charge whatever overall price they see fit – ***but only so long as they bury the pass-through***. The decision below thus undercuts the constitutionally-protected and oft-recognized public interest “in preserving the free flow of commercial information.” *Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506, 512, 104 P.3d 1280, 1284 (2005) (internal quotations and citations omitted).

This Court should accept review to correct the constitutional and public policy flaws in the decision and to make clear that RCW 82.04.500 ***cannot*** prevent businesses from truthfully itemizing the B&O tax.

**B. This Court Should Accept Review to Restore the Integrity of Its Implied Right of Action and Standing Tests**

The decision below dramatically expands the reach of the UDJA in two ways that will have important consequences for the administration of justice in Washington. First, the decision permits litigants such as Mr. Nelson to invoke the UDJA to create a private right of action where one would not exist under tests long-established by this Court. Second, the

decision strips all meaning from the two prerequisites to standing under the UDJA and ushers in a new era where litigants will use declaratory relief *not* to resolve uncertainty, but as a springboard to recover money damages that otherwise would not be available.

In this respect, the decision below conflicts with precedent and violates the substantial public interest in appropriately limiting private rights of action to enforce statutory obligations. The Court should grant review under RAP 13.4(b)(1), (2), and (4).

**1. The Court Should Clarify that a Party Cannot Seek Damages under a Statute without Showing a Right of Action under that Statute**

Although Mr. Nelson sued under the UDJA, he does not request a mere declaration as to the meaning of RCW 82.04.500. Instead, he seeks millions of dollars from businesses that relied on the DOR Special Notice. In his briefing to the court below, Mr. Nelson did not even *attempt* to argue that RCW 82.04.500 created a private right of action in favor of consumers to allow such a remedy, arguing instead that he could sue under the UDJA and recover under RCW 82.04.500 without showing that he had an independent private cause of action. *See* Answering Brief 29-32.

Cases from other jurisdictions confirm that the UDJA “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,” because this would “amount to an end run around the lack of any private right of action to enforce” the statute.

*NALSO v. Continental Grain Co.*, 901 S.W.2d 127, 132 (Mo. Ct. App. 1995); *see Williams v. Nat'l Sch. of Health Tech., Inc.*, 836 F. Supp. 273, 281 (E.D. Pa. 1993) (plaintiff cannot “circumvent” statutory framework by invoking declaratory judgment act where that would be “tantamount to allowing a private cause of action” that the statute does not provide), *aff'd mem.*, 37 F.3d 1491 (3d Cir. 1994); *see also* Br. 18 (citing cases).

This Court’s decisions confirm that Washington falls within the mainstream. In *Braam v. Dep’t of Soc. & Health Servs.*, 150 Wn.2d 689, 711-12, 81 P.3d 851 (2003), for example, the Court analyzed the availability of a private right of action in a case seeking to enforce statutory rights, including claims for injunctive relief. Likewise, in *Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 762 P.2d 356 (1988), the court dismissed a claim for declaratory relief where the plaintiff lacked a private right of action. And in *Washington State Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 912-13, 949 P.2d 1291 (1997), the Court permitted an action for declaratory relief to proceed only after determining that the plaintiff had satisfied the private-right-of-action requirement. Until now, no Washington case has held that the UDJA may be invoked to obtain monetary relief absent an independent right to sue.

At first glance, the court of appeals appears to have recognized that Mr. Nelson had to satisfy the three-part test for determining whether a private right of action exists. *See* slip op. 8. But after reciting the requirement, the court of appeals did not make *any* effort to explain how Mr. Nelson could show that consumers had a right to sue under this

business tax statute. In fact, there is no evidence (1) that the Legislature passed RCW 82.04.500 for the “especial” benefit of consumers; (2) that the Legislature intended to create a remedy distinct from the CPA for consumers challenging a business’s disclosures under B&O tax law; or (3) that a consumer remedy would be consistent with the underlying purpose of the B&O taxing statute. *See Braam*, 150 Wn.2d at 711-12.

To the contrary, the Legislature passed the B&O tax statute to generate tax revenue, and Washington tax law therefore provides express remedies for taxpayers, not consumers.<sup>4</sup> For those reasons, the court in *Van Eck v. Gavin*, 690 A.2d 460 (Conn. Super. Ct. 1996), held that a consumer did *not* have a right to sue under a *materially identical* statute; rather, only the taxpayer had a right of action. *See Blockbuster, Inc. v. White*, 819 So.2d 43 (Ala. 2001) (consumer has no right of action under rental tax statute based on Blockbuster’s itemized pass-through of statutory rental tax). This Court should accept review and confirm that Washington law does not allow litigants to use the UDJA to execute an end run around the requirement of showing an implied right of action.

## **2. This Court Should Clarify the UDJA’s Standing Requirements**

This Court recently restated the standing requirements under the UDJA. *See, e.g., Grant County Fire Protection Dist. No. 5 v. City of*

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<sup>4</sup> Consumers have ample remedies, including broad protection under the CPA, among other statutory and common law rights. *See Dix v. ICT Group, Inc.*, 125 Wn. App. 929, 937, 106 P.3d 841, 845 (2005); *Robinson v. Avis Rent-a-Car System, Inc.*, 106 Wn. App. 104, 22 P.3d 818 (2001). Mr. Nelson chose not to pursue those remedies, presumably because he could not prove a right to relief.

*Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (plaintiff must show that he is within statute's "zone of interest" and "injury"). The decision below misapplied these requirements so profoundly as to demonstrate the need for further clarification from this Court.

**First**, the court of appeals declared that Mr. Nelson satisfied the "zone of interests" test because he is a "purchaser." Slip op. 13. But that assertion, unaccompanied by any analysis, directly contradicts *Branson*, where this Court held that a car rental customer was *not* "within the zone of interests" of a statute that governed the assessment of airport fees on rental car companies, even though the companies itemized and then recouped that fee from customers. Because the "zone of interests" must be measured by "the general purpose of the statute," *Branson*, 152 Wn.2d at 876 n.7, customers did not fall within the zone of interests of the fee statute, even though the "rental car compan[ies,] ... ultimately decide[d] ... [to] recoup[] [the fees] through a line item on [their] customers' bills." 152 Wn.2d at 876. The same is true with respect to RCW 82.04.500.

**Second**, the court of appeals drained the *Grant County* "injury in fact" test of meaning. Because the court of appeals agreed that RCW 82.04.500 allows a business to pass through the B&O tax, slip op. 17,<sup>5</sup> the

<sup>5</sup> The court of appeals thus recognized the economic truism that the legal incidence of a tax may differ from its economic incidence. See *Canteen Serv., Inc. v. State*, 83 Wn.2d 761, 762, 522 P.2d 847, 847-48 (1974); see also *Pure Oil Co. v. State*, 12 So. 2d 861, 863 (Ala. 1943) ("[T]he economic burden of the tax is generally passed on to the purchaser, and finally to the consumer. We make no criticism of making invoices disclose the tax burdens of the seller, rendering the public tax-conscious, maybe reacting on legislative bodies when framing tax laws."). For this reason, i.e., that the dealerships were entitled to recoup the B&O tax one way or another, Mr. Nelson has no "unjust enrichment" claim.

alleged injury from itemization cannot arise from mere payment of a price that includes the tax. Instead, Mr. Nelson had to show injury from the fact that Appleway itemized a B&O tax that it had the right to pass through; he never did so.<sup>6</sup> This Court should accept review to confirm that standing requires “allegations of harm personal to the party that are substantial rather than speculative or abstract.” *Grant County*, 150 Wn.2d at 802.

**C. This Court Should Accept Review to Preclude the Misuse of CR 23(b)(2) in Damages Cases**

The court of appeals permitted Mr. Nelson to bypass the requirements of CR 23(b)(3), the rule governing class actions for money-damages, by invoking CR 23(b)(2), which applies only to the narrow category of class actions that can be resolved by “final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” But this Court has held that the more lenient standards for class certification under (b)(2) do *not* apply to cases where a “declaration merely forms the basis for monetary relief.” *Eriks v. Denver*, 118 Wn.2d 451, 466, 824 P.2d 1207, 1215 (1992) (CR 23(b)(2) certification properly denied where court granted declaratory relief merely as a prelude to disgorgement).

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<sup>6</sup> In yet another illustration of the internal contradictions in its opinion, the court of appeals characterized the “injury in fact” as stemming from the fact that Appleway made the disclosure of the B&O tax pass-through too late, i.e., only “after negotiating the purchase price.” *Id.* at 15. Not only is this statement factually incorrect, *see supra* Section IV.D, but it flatly contradicts the court of appeals’ own statement that “damages can be obtained with reference to [class members’] individual sales agreements,” without *any* inquiry as to the timing of disclosure. *Id.* at 26. Significantly, neither Mr. Nelson nor the trial court relied on any inadequacy in disclosure, presumably because no such inadequacy was, or could have been, proven. *See, e.g.*, CP 360-61 (trial court oral decision).

Here, as in *Eriks*, Mr. Nelson's request for damages predominates. Indeed, the class includes **only** consumers, such as Mr. Nelson, who already have paid the B&O pass-through, but may never do so again. Because these consumers have no continuing interest in the dealers' future conduct, the damages case necessarily predominates as to them. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983) (plaintiff injured by LAPD choke-hold policy could pursue **damages** for past application of policy but lacked standing to pursue injunctive relief). Accordingly, any declaration as to the meaning of RCW 82.04.500 will have no significance for class members except to "form[] the basis for monetary relief," making "a CR 23(b)(2) action ... not appropriate." *Eriks*, 118 Wn.2d at 466.

The court of appeals purported to address this issue by finding that the request for monetary relief was "incidental" for purposes of CR 23(b)(2), which requires that the damages not be "dependent in any significant way on the intangible, subjective differences of each class member's circumstances." *Sitton v. State Farm Mut. Ins. Co.*, 116 Wn. App. 245, 252, 63 P.3d 198 (2003) (citation omitted). According to the court of appeals, damages would be easy to calculate, i.e., "damages can be obtained with reference to the individual sale agreements," and "[t]here need not be any inquiry into [the dealerships'] negotiations with each individual class member." Slip op. 26.

But the court of appeals previously stated that "the seller **can disclose** the B&O overhead charge to the purchaser ... while setting the final purchase price," i.e., during "the negotiation of a price," slip op. 21

(emphasis added), and that Mr. Nelson suffered injury-in-fact by virtue of the itemization of the “charge after negotiating the purchase price,” *id.* at 15. Given this emphasis on the timing of disclosure, Mr. Nelson and the class could not *possibly* prove “damages” simply from the “sales agreements” or without “any inquiry” into negotiations. For exactly this reason, the Fifth Circuit in *Robinson v. Texas Automobile Dealers Ass’n*, 387 F.3d 416, 423-24 (5th Cir. 2004), reversed certification in a case involving a challenge to tax itemization. Although the court of appeals distinguished *Robinson* as arising under subsection (b)(3), slip op. 25, that distinction begs the question. In fact, as *Robinson* shows, damages cannot be “incidental” under CR 23(b)(2) because, as the court of appeals has admitted, a class member’s right to recover will depend on “differences [in] each class member’s circumstances.” *Sitton*, 116 Wn. App. at 252.

The decision below fundamentally misperceives CR 23(b)(2), in contradiction of this Court’s decision in *Eriks* and Division I’s decision in *Sitton*, and raises issues of great importance to practitioners and the public. Thus, the Court should accept review under RAP 13.4(b)(1), (2) and (4).

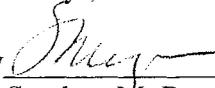
## VI. CONCLUSION

Petitioners request that the Court grant review under RAP 13.4(b).

RESPECTFULLY SUBMITTED on November 14, 2005.

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**FILED**

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In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS 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, )

Petitioner. )

No. 23504-1-III

Division Three  
Panel Seven

PUBLISHED OPINION

**KURTZ, J.** – Business and Occupation (B&O) taxes are not intended to be construed as taxes upon purchasers or customers, but, instead, “shall be levied upon, and collectible from, the person engaging in the business activities . . . and shall constitute part of the operating overhead.” RCW 82.04.500. Herbert Nelson purchased a vehicle from Appleway Volkswagen. After the purchase price was negotiated, the parties signed a sales agreement listing an additional amount designated as “Business & Occupation Tax Overhead.”<sup>1</sup> Mr. Nelson filed an action seeking a declaratory judgment that Appleway’s collection of the B&O tax, and the sales tax on the B&O tax, was unlawful. Mr. Nelson also requested class certification under CR 23(b)(2) and other relief. The court certified the class and granted summary judgment, concluding that Appleway’s method of itemizing and collecting the B&O tax and B&O sales tax was unlawful.

In this appeal, Appleway challenges Mr. Nelson’s right to bring this claim under Washington’s uniform declaratory judgments act (UDJA). Appleway further contends RCW 82.04.500 authorizes the pass through of the B&O tax to customers. Appleway finally contends the court erred by certifying the class because Mr. Nelson lacked standing and has no cognizable claim. We conclude Mr. Nelson had a right to bring this claim under the UDJA. We hold Appleway’s manner of assessing and collecting the B&O tax from customers violated RCW 82.04.500. We further hold Mr. Nelson has

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<sup>1</sup> Clerk’s Papers (CP) at 50.

standing and his request for monetary relief did not bar certification under CR 23(b)(2). Accordingly, we affirm the judgment of the trial court.

### FACTS

In September 2002, Herbert Nelson purchased a used Volkswagen Cabriolet from Appleway Volkswagen in Spokane, Washington. Appleway Volkswagen is a car dealership within the Appleway Chevrolet, Inc., group of dealerships.

The parties agreed on the price of \$16,822 for the vehicle and entered into an Agreement to Purchase (the "Agreement"). In addition to the sales price, the Agreement listed several fees and taxes, including Washington State sales tax of \$1,255.60 and a charge of \$79.23 for Washington State B&O tax. The amount of sales tax included sales tax charged on the B&O tax.

Washington B&O Tax. Washington imposes a B&O tax for the privilege of engaging in business. RCW 82.04.220. This tax is measured by the application of rates against the value of products, gross proceeds of sales, or gross income of a business. RCW 82.04.220. At issue in this case is the operation of RCW 82.04.500, which provides:

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.

Disclosure of B&O Tax. Appleway points out that the B&O tax was disclosed to Mr. Nelson at four places on the contracts. First, the Agreement stated that Mr. Nelson would be charged \$79.23 "Business & Occupation Tax Overhead." Clerk's Papers (CP) at 50. Second, in small print on the back of the page listing the charges, paragraph 12—of 13 paragraphs—read as follows:

12. Business and Occupation taxes (B&O tax) have been assessed on the negotiated sales amount. B&O taxes are a tax on businesses for the right to operate in the State of Washington, are an overhead expense of the dealership, and are assessed as a percentage of total sales. As such, the amount of B&O tax assessed on your transaction depends on the negotiated price of the vehicle, service, parts, or other items being purchased by you. Sales tax is assessed on both the negotiated selling price and the B&O tax amount. All advertised vehicles, services, parts, etc. are advertised at a specific price plus B&O tax, sales tax, luxury tax, license fees, or other governmentally mandated charges.

CP at 51.

Catherine Nelson initialed a line on the Acknowledgement of Terms and Conditions of Vehicle Transaction form indicating that: "I understand that the dealership is passing through the B&O tax overhead and that I am paying sales tax on the sales price and B&O tax amounts." CP at 53. Mr. and Mrs. Nelson signed the Retail Installment Contract and Security Agreement that also disclosed the B&O charge.<sup>2</sup>

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<sup>2</sup> The B&O tax was also disclosed in Appleway's advertising and signage, which refer to "B&O Overhead." CP at 21-22.

**Complaint.** Mr. Nelson filed a complaint requesting a declaratory judgment that Appleway's collection of B&O tax, and the sales tax on the B&O tax violates RCW 82.04.500. Mr. Nelson also asked the court to enjoin Appleway from assessing or collecting these taxes from customers in Washington. Finally, the complaint also seeks further relief under RCW 7.24.080, alleging that Mr. Nelson should receive restitution because Appleway has been unjustly enriched. The complaint alleged Mr. Nelson's claims are suitable for class treatment under CR 23(a) and CR 23(b)(2).

Significantly, the complaint does not allege claims based on theories of tort or contract, or based on a violation of the Washington Consumer Protection Act (CPA), chapter 19.86 RCW.

**Decision on Summary Judgment Motions.** Both parties filed motions for summary judgment as to the issue of whether Appleway's conduct was lawful. The superior court concluded that Appleway's practice of itemizing and collecting the B&O tax from customers, and Appleway's practice of collecting sales tax on the B&O tax, violated the applicable statutes. Finding Appleway's conduct had the potential to further injure Mr. Nelson, the court enjoined Appleway from collecting, "passing through," or "itemizing," the B&O tax and the B&O sales tax. CP at 388.

**Class Certification.** Along with his motion for summary judgment, Mr. Nelson moved for class certification. The court granted the motion, certifying the class as:

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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.<sup>3]</sup>

CP at 380.

**Reconsideration.** The court denied Appleway's motion for reconsideration but stayed its grant of declaratory and injunctive relief for 30 days to allow Appleway to seek relief in the appellate court.

**Discretionary Review.** Appleway filed a notice for discretionary review and a motion for a stay. This court granted both motions.

#### ANALYSIS

**Standard of Review.** The facts are undisputed and our review of the trial court's decision on summary judgment is de novo. See Castro v. Stanwood Sch. Dist. No. 401, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004). Questions of statutory construction are also reviewed de novo. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). A trial court's class certification decision is reviewed for an abuse of discretion. Lacey Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 47, 905 P.2d 338 (1995) (quoting Eriks v. Denver, 118 Wn.2d 451, 466, 824 P.2d 1207 (1992)).

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<sup>3</sup> The following are excluded from the class: defendants, any entity in which defendants have a controlling interest; any entity which has a controlling interest in defendants; defendants' legal representatives, assigns, and successors; the judge to whom the case is assigned and any member of the judge's immediate family.

**Declaratory Judgment.** Under Washington's UDJA, a person whose rights, status, or other legal relations are affected by a statute may have any question concerning the construction of that statute determined by the court. Branson v. Port of Seattle, 152 Wn.2d 862, 877, 101 P.3d 67 (2004). Specifically, RCW 7.24.020 reads, in part, as follows:

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

The UDJA is to be liberally construed and is designed to clarify uncertainty with respect to rights, status, and other legal relations. DiNino v. State, 102 Wn.2d 327, 330, 684 P.2d 1297 (1984).

**Enforceable Right/Private Cause of Action.** One of the most contentious issues between the parties is whether Mr. Nelson is required to establish a private cause of action in order to obtain relief under the UDJA. This issue was raised at the summary judgment proceeding and the court concluded that Mr. Nelson need not show a private cause of action because he was not seeking tort damages. Appleway maintains the trial court erred because Mr. Nelson must establish an independent private cause of action in order to pursue this matter as a declaratory judgment.

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The confusion on this question is understandable because the term “private cause of action” is frequently used in the context of tort litigation. While most tort theories arise from the common law, the legislature also has the power to define and change tort law. Geschwind v. Flanagan, 121 Wn.2d 833, 841, 854 P.2d 1061 (1993). As a result, a duty may be imposed based on a statute or common law principles of negligence. Bernethy v. Walt Faylor’s, Inc., 97 Wn.2d 929, 932, 653 P.2d 280 (1982).

In contrast, an action seeking declaratory relief may involve the construction of a statute, and injunctive relief may be more appropriate than damages. See Wash. Fed’n of State Employees v. State Pers. Bd., 23 Wn. App. 142, 148, 594 P.2d 1375 (1979). For this reason, some declaratory judgment cases discuss whether there is a judicially enforceable duty and may or may not use the term “private cause of action.” See, e.g. Wash. Fed’n, 23 Wn. App. at 148 (“legal right capable of judicial protection”); Camer v. Seattle Sch. Dist. No. 1, 52 Wn. App. 531, 536, 762 P.2d 356 (1988) (“private cause of action”; “private right of action”; “judicially enforceable duty”).

In any event, this court has no jurisdiction under the UDJA unless Mr. Nelson can show that he is asserting a statutory legal right capable of judicial protection. Wash. Fed’n, 23 Wn. App. at 148. A cause of action will be implied if: (1) the plaintiff is in the class for whose benefit the statute was enacted; (2) the legislative intent expressly or implicitly supports creating or denying a remedy; and (3) implying a remedy is consistent

with the purpose of the legislation. McCandlish Elec., Inc. v. Will Constr. Co., 107 Wn. App. 85, 96-97, 25 P.3d 1057 (2001). Where a statute provides a new right, but no remedy, a remedy will be provided. Id. at 97.

RCW 82.04.500 states that the B&O tax was created to tax businesses, not purchasers or customers—but that businesses may include this tax in their business overhead. The UDJA is available to resolve the tension inherent in RCW 82.04.500. Consequently, purchasers or customers, like Mr. Nelson, may proceed under the UDJA to determine whether Appleway's method of itemizing and collecting the B&O tax was unlawful under RCW 82.04.500.

Relying on Blockbuster, Inc. v. White, 819 So. 2d 43 (Ala. 2001), Appleway contends that customers have no judicially enforceable right under RCW 82.04.500. "

In Blockbuster, a customer sought damages based on allegations that the video store fraudulently passed on a rental tax to customers. Id. at 44. The language of the statute provided that the rental tax would be imposed on each person engaging in the business of leasing or renting tangible personal property. Id. Significantly, the provision did not contain language similar to that found in RCW 82.04.500 stating that the tax was not intended as a tax on customers. The court concluded that the customer had no private cause of action under the applicable statute. Blockbuster, 819 So. 2d at 44.

Appleway cites several Washington cases to support its position that an action under the UDJA requires an independent, private cause of action. But these cases are also distinguishable. In Washington Federation the court concluded that a plaintiff seeking relief under the UDJA must assert "a legal right capable of judicial protection which exists in a statute, constitution or common law." Wash. Fed'n, 23 Wn. App. at 148. As a result, the court refused to allow review of a nonjudicial administrative decision under the UDJA because the agency was not engaging in statutory interpretation when making the decision. Id. at 146-48. In Camer, the court noted that declaratory relief was available to parties requesting construction of a statute, but the court concluded that the underlying administrative decisions did not involve the interpretation of a statute. Camer, 52 Wn. App. at 537.

Appleway also contends that this court has no jurisdiction because remedies are available under other statutes. Along similar lines, Appleway maintains that there is no need to imply a private cause of action under RCW 82.04.500 because the legislature made the decision to provide other statutory remedies for customers.

Appleway's underlying assertion is true. Courts are unwilling to find an implied private cause of action where the legislature has established a specific administrative or judicial appellate procedure. See, e.g. Williams v. Nat'l Sch. of Health Tech., Inc., 836

F. Supp. 273, 281 (E.D. Pa. 1993), aff'd, 37 F.3d 1491 (3rd Cir. 1994). This restriction prevents the UDJA<sup>4</sup> from circumventing legislatively created enforcement provisions. Id.

But the Washington statutes Appleway suggests here are not helpful, or even applicable, remedies for Mr. Nelson. For example, Appleway contends that Washington customers have remedies for unfair and deceptive conduct under the CPA, RCW 19.86.090. Appleway also contends there is an extensive statutory scheme relating to tax administration and recovery granting taxpayers private remedies against the Department of Revenue relating to claims of overpaid taxes. But the CPA provides relief for certain types of unfair trade practices. Likewise, the tax provisions cited by Appleway, RCW 82.32.060, .150, .160, and .170, are available to taxpayers, not customers and purchasers, such as Mr. Nelson.

In summary, a person whose rights, status, or other legal relations are affected by a statute may have a question of construction determined by the court. Branson, 152 Wn.2d at 877. Here, Mr. Nelson has demonstrated a judicially enforceable right under RCW 82.04.500 sufficient to establish jurisdiction under the UDJA.

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<sup>4</sup> The federal statute concerning declaratory judgments is found at 28 U.S.C.A. § 2201 and, with exceptions in some subject areas, allow the federal courts to “declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.”

**Justiciability and Standing.** To proceed under the UDJA, a person must present a justiciable controversy and establish standing. A justiciable controversy is:

- (1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement,
- (2) between parties having genuine and opposing interests,
- (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and
- (4) a judicial determination of which will be final and conclusive.

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 815, 514 P.2d 137 (1973).

The traditional doctrine of standing limits the justiciability determination and prohibits a litigant from raising another person's legal right. Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (Grant County II). A two-part test has been developed for determining if a party has standing to bring an action. Id. When applying this test, the court first inquires whether the interest asserted is arguably within the zone of interests protected by the statute or constitutional right at issue. Id. (quoting Save A Valuable Env't v. City of Bothell, 89 Wn.2d 862, 866, 576 P.2d 401 (1978)). Second, the court asks whether the party seeking standing has suffered an injury in fact, economic or otherwise. Id.

Appleway contends Mr. Nelson lacks standing to pursue a declaratory judgment action because the interest he asserts is beyond the scope of the statute. But RCW 82.04.500 states that the B&O tax "shall be levied upon, and collectible from, the

person engaging in the business activities” and that the B&O tax is not intended to be “construed as taxes upon the purchasers or customers.” As a purchaser, Mr. Nelson is certainly within the zone of interest contemplated by the statute.

Appleway also maintains that Mr. Nelson’s interest must be beyond the scope of the statute because he cannot establish a private cause of action under RCW 82.04.500. This argument repeats the assertions made in connection with the issue of jurisdiction. For example, Appleway relies on Van Eck v. Gavin, 690 A.2d 460 (Conn. Super. Ct. 1996). In Van Eck, the purchaser of petroleum products was not allowed to bring an action to challenge the assessment of a sales tax on the gross earnings of petroleum products because the purchaser did not qualify as a “taxpayer” authorized to appeal under the applicable statute. Id. at 462.

Appleway also relies on Branson regarding the issues of standing and justiciability. In Branson, declaratory relief was denied because Mr. Branson and the class he represented lacked standing and because they failed to show a controversy arising between parties having genuine and opposing interests on the issue. Branson, 152 Wn.2d at 876-77.

Mr. Branson challenged the “reasonable and uniform” provision of RCW 14.08.120(6), which is part of the statutory scheme that allows a municipality to raise money for its airports. The provision in question reads, in part, as follows:

PROVIDED, That in all cases the public is not deprived of its rightful, equal, and uniform use of the property. Charges shall be reasonable and uniform for the same class of service and established with due regard to the property and improvements used and the expense of operation to the municipality.

RCW 14.08.120(6) (emphasis added).

Mr. Branson rented cars from Sea Tac airport and, on each occasion, his bill included a separate line item to cover the concession fee the rental car companies paid to Sea Tac. These rental car companies paid a fixed rent for counter space, plus a concession fee of 10 percent of their gross income. Branson, 152 Wn.2d at 867. Mr. Branson claimed the airport concession fees charged to rental car companies based on gross receipts denied the public uniform use of the property, were not uniform for the same class of people, and were not established with regard for the amount of property used and the expense of airport operation. Id. at 866.

The court determined that Mr. Branson lacked standing because he was not within the zone of interests intended to be protected by the “reasonable and uniform” provision. Id. at 876. The court acknowledged that the statute indicated that it was designed to protect the public by ensuring “equal and uniform public use,” but determined that the “reasonable and uniform” provision pertaining specifically to charges indicated an intent to protect only those entities charged with fees by the Port. Id. In other words, the protection offered by the language limiting charges did not extend to Mr. Branson

because he was not charged the fee, but, instead, paid a recoupment fee to the rental car company. Id. Hence, the court determined that Mr. Branson did not fall within the zone of interests protected by the “reasonable and uniform” language. Id.

Branson also examined the justiciability requirements of the UDJA. The court concluded that the controversy arising out of the challenged statutory language was not between parties having genuine and opposing interests on the issue. Because the fees were not charged directly by the Port to Mr. Branson, the two parties were not sufficiently opposed to satisfy the justiciability requirement of the UDJA. Id. at 878.

In short, while Appleway relies heavily on Branson, this case is distinguishable as the language of the statute under consideration was vastly different than RCW 82.04.500.

Appleway next maintains Mr. Nelson cannot bring a claim under the UDJA because he cannot establish injury in fact.

To establish harm under the UDJA, the claimant must demonstrate a justiciable controversy based on allegations of personal harm that are substantial rather than speculative or abstract. Grant County II, 150 Wn.2d at 802. Appleway maintains that Mr. Nelson was not harmed because he would have had to pay the operating overhead charge even if it had not been disclosed. We disagree. Mr. Nelson meets this test because he purchased a vehicle from Appleway and was charged with a “Business & Occupation Tax Overhead” charge after negotiating the purchase price. CP at 50. Also,

CR 57 provides: "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." And, RCW 7.24.080 allows further relief based on a declaratory judgment or decree whenever necessary or proper.

In short, we conclude Mr. Nelson could bring this claim under the UDJA.

RCW 82.04.500. The trial court concluded that Appleway's "itemizing and collecting B & O Tax and B & O Sales Tax from buyers violates the laws of the State of Washington," and enjoined Appleway from collecting, "passing through" or "itemizing" B&O tax and B&O sales tax. CP at 388. Appleway contends the court erred because RCW 82.04.500 expressly permits the pass-through of the B&O tax, and, in any event, does not prohibit the itemization of the tax pass-through to customers.

This court reviews questions of statutory construction de novo. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). When a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself. State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). A statute is ambiguous if "susceptible to two or more reasonable interpretations," but "a statute is not ambiguous merely because different interpretations are conceivable." State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996). This court must discern and carry out the intent of the legislature, but

must also avoid a literal interpretation leading to an absurd result. State v. Watson, 146 Wn.2d 947, 955, 51 P.3d 66 (2002).

Plain Language. RCW 82.04.500 is unambiguous. First, RCW 82.04.220 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.

Second, RCW 82.04.500 specifically provides that the B&O tax is not to be “construed as taxes upon the purchasers or customers.” Third, RCW 82.04.500 also provides that the B&O tax “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.”

Appleway points out that the statute unambiguously provides that the B&O tax may be passed on to the customer as part of operating overhead. While this is true, we must also read the statute to give meaning to the language stating that the B&O tax should not be construed as a tax on purchasers and customers.

Citing Canteen Service, Inc. v. State, 83 Wn.2d 761, 762, 522 P.2d 847 (1974), Appleway reminds the court that “[t]he legal incidence of a tax does not always fall upon the same person or entity as the economic burden.” Canteen Service, who sold cigarettes from vending machines, challenged that part of the sales tax and B&O tax assessed

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against the part of the sales price resulting from the cigarette stamp tax. Id. Unlike the provision we are considering, Canteen considered a statute which defined the selling price for purposes of the retail sales tax to include taxes or other expenses. Id. at 762-63.

In other words, the economic burden of a tax is usually passed on the customers, but that does not mean that legislatures cannot design statutes to set forth the manner in which the pass-through must take place. Here, RCW 82.04.500 provides that the B&O tax can be added to operating overhead but cannot be passed on to the customer as a tax.

Underlying Character of the Tax. Appleway next argues that itemization of the B&O tax is legal because the statute does not prohibit a seller from disclosing the pass-through as a line item on the sales agreement. In Appleway's view, this court cannot construe the statute as prohibiting itemization when the statute is silent and takes no position as to this practice. However, while RCW 82.04.500 does not expressly address itemization, the statute does state that the tax cannot be passed on to the customer, and that the seller must consider the tax as an operating expense.

Appleway cites several out-of-jurisdiction cases to support the position that the itemization of a tax does not change its underlying character. These cases are distinguishable.

In Texaco Refining & Marketing Company v. Commissioner of Revenue Services, 202 Conn. 583, 584-85, 522 A.2d 771 (1987), the court addressed the question as to

whether the funds collected from customers for the Connecticut gross earnings tax were includable in the gross earnings derived from the sales of petroleum products and subject to a tax on that amount. While the language in the statute was similar to the language in RCW 82.04.500, the Connecticut statute dealt with the sale of petroleum fuel products, which apparently also contained some mechanism for price control. Texaco Ref., 202 Conn. at 595. Of greater importance, the issue raised in Texaco Refining was not brought by customers, but by a seller of petroleum products who, by itemizing the B&O tax on petroleum products, was attempting to avoid the overall B&O tax on gross earnings for the petroleum tax portion of his earnings. Id. at 585-86.<sup>5</sup>

Likewise, in Pure Oil Company v. State, 244 Ala. 258, 261, 12 So. 2d 861 (1943), the court determined the definition of gross sales for purposes of a tax on fuel oils where Pure Oil sought deductions for other items of taxation levied against it. Similarly, in United Nuclear Corporation v. Revenue Division, 98 N.M. 296, 300, 648 P.2d 335 (1982), the court determined that a seller/taxpayer could not deduct amounts it charged buyers for reimbursement of a severance tax where the applicable statute specifically provided it was "without deduction of any kind."

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<sup>5</sup> The court gives this example: "Assume that the plaintiff sold petroleum products to a customer for a sales price of \$1,000—and a 2 percent tax of \$20. According to the plaintiff, its taxable gross earnings on this transaction are \$1,000. According to the defendant, the plaintiff's taxable gross earnings are \$1,020." Texaco Ref., 202 Conn. at 585 n.6.

In other words, the cases relied upon by Appleway involve situations where a seller is attempting to deduct amounts charged to a buyer from a tax liability. These cases concluded that a seller who itemizes an amount on an invoice to the buyer does not change the seller's underlying responsibility for the tax. These cases are not helpful here because the statutory language is different and the customer charged with the itemized tax is bringing the action.

Appleway also contends that Branson demonstrates that a governmental fee imposed on a seller will not be transformed into a governmental charge levied on a customer even if the charge is passed through to the customer by itemization on an invoice. However, as pointed out earlier, Branson determined that the "reasonable and uniform" provision did not apply to payments made by the customer. Branson, 152 Wn.2d at 876.

Appleway also maintains that the provisions of RCW 82.04.500 were designed to protect the State's tax base, and do not limit the manner in which the seller discloses the B&O tax to customers. But this is another jurisdiction or standing argument in that Appleway is arguing, again, that Mr. Nelson has no enforceable rights under RCW 82.04.500. Mr. Nelson has an enforceable right because the plain language of the statute states that Appleway must treat the B&O tax as operating overhead and that the B&O tax cannot be treated as a tax on purchasers or customers.

Disclosure. Appleway argues that it would be unreasonable to construe RCW 82.04.500 to penalize disclosure of pricing information to customers. Moreover, Appleway points out that Mr. Nelson concedes that the B&O tax information could have been disclosed as part of the negotiation process.

But a plain reading of the statute allows for both payment of the tax by the seller and disclosure. Quite simply, the seller can disclose the B&O overhead charge to the purchaser, but it must be done while setting the final purchase price. The process here involved the negotiation of a price; hence, the information should have been disclosed as part of that process.

Relying on Bloom v. O'Brien, 841 F. Supp. 277 (D. Minn. 1993), Appleway suggests that any prohibition on disclosure raises First Amendment issues. Bloom considered a Minnesota statute imposing a gross revenue tax on health care providers and allowing health care providers to pass the tax on to customers. However, the statute also prohibited health care providers from itemizing the cost of the gross revenue tax on invoices. Id. at 278. The court granted a preliminary injunction concluding that this restriction placed a chilling effect on the health care providers' free speech. Id. at 281-82. Unlike RCW 82.04.500, the Minnesota statute had no language indicating that the tax could not be passed on to customers.

Deference to Special Notice. Appleway also maintains that the superior court erred by failing to defer to the Department of Revenue special notice. The superior court refused to defer to this publication, concluding that the special notice was not a legal opinion and did not directly rule that the itemization of the B&O tax to the customer was legal.

We agree with the court's decision to reject the special notice. Courts have the ultimate authority to interpret a statute and do not defer to an agency's rule where no ambiguity exists in the statute. Edelman v. State ex. rel. Pub. Disclosure Comm'n, 152 Wn.2d 584, 590, 99 P.3d 386 (2004).

CR 23(b)(2). A trial court's class certification decision is reviewed for an abuse of discretion. Lacey Nursing Ctr., Inc. v. Dep't of Revenue, 128 Wn.2d 40, 47, 905 P.2d 338 (1995) (quoting Eriks v. Denver, 118 Wn.2d 451, 466, 824 P.2d 1207 (1992)).

The trial court certified the following class:

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. 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.

CP at 380-81.

Appleway apparently concedes that Mr. Nelson has satisfied the prerequisites for class certification set forth in CR 23(a): numerosity, commonality, typicality, and adequacy. Appleway also appears to concede that Mr. Nelson has met the first requirement in CR 23(b)(2), requiring that the defendants have acted or refused to act on grounds generally applicable to the class. Instead, Appleway argues that the class certification was inappropriate because Mr. Nelson lack standing to represent the class and because Mr. Nelson's claim for monetary relief clearly predominates over his request for declaratory relief.

*Does Mr. Nelson have standing to represent the class?* The trial court concluded that Mr. Nelson's claims were "typical of those of the Class as a whole," and that Mr. Nelson would "fairly and adequately protect the interests of the class as a whole." CP at 377-78.

Appleway contends that Mr. Nelson lacked standing to represent the class because he cannot state a claim against Appleway on his own behalf. To support this claim Appleway relies on Corrigan v. Tompkins, 67 Wn. App. 475, 836 P.2d 260 (1992), and Doe v. Spokane & Inland Empire Blood Bank, 55 Wn. App. 106, 780 P.2d 853 (1989).

In Corrigan, the plaintiff failed to state a claim because he filed a suit against the commission for not following appeal procedures when he had an adequate remedy at law in the form of an appeal or petition for review. Corrigan, 67 Wn. App. at 477-78. Here,

Mr. Nelson properly sought a declaratory judgment to define and enforce a statutory right.

In Doe, the named plaintiff admitted in depositions that he never had contact with the defendants and there was no evidence in the record supporting a basis for the plaintiff having named the defendants. Doe, 55 Wn. App. at 108, 114. Accordingly, the plaintiff in Doe was not allowed to litigate a claim against the defendants on behalf of a class when he had no claim against the defendants himself. Id. at 115. Here, Mr. Nelson has a claim for the purchase of his vehicle from Appleway Volkswagen.

Does the claim for monetary relief predominate? CR 23(b)(2) authorizes class certification where, among other things, the primary claim is for injunctive or declaratory relief and the request for monetary damages is merely incidental.

Appleway maintains that Mr. Nelson and the members of the class would not benefit from any declaratory or injunctive relief because each class member has already allegedly paid the B&O tax overhead. Moreover, Mr. Nelson seeks a substantial amount that was allegedly collected from thousands of class members. In view of these allegations, Appleway asserts that the claim for monetary relief clearly predominates.

Appleway relies on Fry v. Hayt, Hayt & Landau, 198 F.R.D. 461 (E.D. Pa. 2000) to support this assertion. But Fry is not helpful. Mr. Fry filed action against a law firm seeking damages stemming from a collection letter sent out by the firm that Mr. Fry

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alleged violated various state and federal statutes. The parties reached a settlement agreement and sought conditional class certification. The court granted conditional certification under CR 23(b)(3) and, in a footnote, determined that certification under CR 23(b)(2) was inappropriate because the plaintiffs had not sought an injunction in their original complaint and were seeking a substantial monetary amount of \$453,500. Fry, 198 F.R.D. at 469 n.8.

Relying on Robinson v. Texas Automobile Dealers Association, 387 F.3d 416 (5th Cir. 2004), Appleway next contends that individual trials would be necessary to determine the amount owed to each customer.

In Robinson, customers filed an action against automobile dealers and their association alleging that the practice of charging the vehicle inventory tax as a separate item resulted in horizontal price-fixing and a conspiracy to create a horizontal price-fixing regime. Id. at 420. The court reversed class certification because the court would have to determine whether a purchaser negotiated a top-line or a bottom-line strategy; hence, the court would have to hear evidence regarding the transaction of each class member. Id. at 423-24.

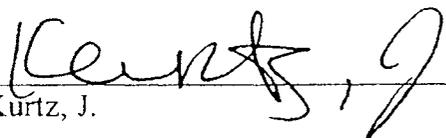
Robinson is distinguishable on several grounds. First, the court in Robinson reviewed a CR 23(b)(3) certification, not a CR 23(b)(2) certification. Second, the issue in Robinson was whether the facts necessary to establish a horizontal price-fixing action

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predominated the proposed class. Id. at 422. Predominance is an issue in CR 23(b)(3) certification, not CR 23(b)(2) certification. As a result, the manner in which the class members negotiated the purchase price of their vehicle was crucial to the plaintiffs' ability to establish that they purchased the vehicle at a higher rate than the competitive rate. Id. at 422-24.

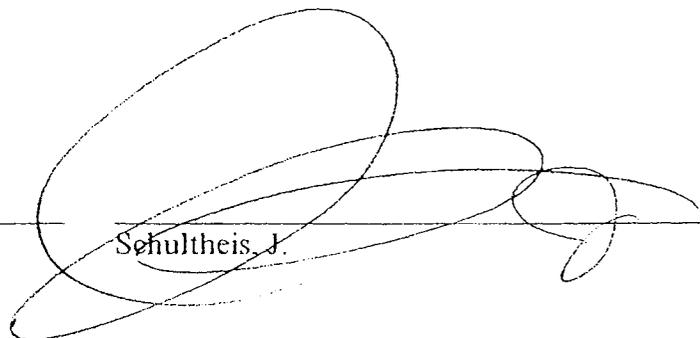
In contrast, here the issue is whether Appleway's itemization and collection of the B&O tax was unlawful. Presumably, damages can be obtained with reference to the individual sales agreements. There need not be any inquiry into Appleway's negotiations with each individual member of the class. The court did not abuse its discretion in certifying the class under CR 23(a) and CR 23(b)(2).

We affirm the judgment of the trial court.

  
Kurtz, J.

WE CONCUR:

  
Kato, C.J.

  
Schultheis, J.

West's RCWA 82.04.500

C

West's Revised Code of Washington Annotated Currentness

Title 82. Excise Taxes (Refs & Annos)

Chapter 82.04 Business and Occupation Tax (Refs & Annos)

**→ 82.04.500. 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.

CREDIT(S)

[1961 c 15 § 82.04.500. Prior: 1935 c 180 § 14; RRS § 8370-14.]

West's RCWA 82.04.500, WA ST 82.04.500

Current through Chapter 2 of 2005 Regular Session

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