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STATE OF WASHINGTON

NO. 77985-6

**SUPREME COURT OF THE STATE OF WASHINGTON**

**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 foreign  
corporation,**

**Petitioners/Appellants.**

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**RESPONDENT HERBERT NELSON'S ANSWER TO PETITION  
FOR REVIEW**

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## **I. IDENTITY OF RESPONDENT**

The responding party for purposes of this brief is Herbert Nelson.

## **II. CITATION TO COURT OF APPEALS' DECISION**

Mr. Nelson opposes review. The decision from which Petitioners seek discretionary review is *Nelson v. Appleway Chevrolet, Inc.*, \_\_\_ Wn. App. \_\_\_, 121 P.3d 95 (2005).<sup>1</sup>

## **III. COUNTER STATEMENT OF ISSUES PRESENTED FOR REVIEW**

1. Whether the petition for review of the Court of Appeals' decision that Appleway's practice of assessing and collecting B&O Tax from its customers contravenes RCW 82.04.500 should be denied because the Court of Appeals' decision does not: (a) conflict with any decisions of the Washington Supreme Court or another decision of the Court of Appeals; (b) involve a significant question of law under the Constitutions of the State of Washington or of the United States; or (c) involve an issue of substantial public interest that should be determined by this Court.

2. Whether the petition for review of the Court of Appeals' decision that Mr. Nelson has a judicially enforceable right under RCW 82.04.500 sufficient to establish jurisdiction under Washington's Uniform Declaratory Judgments Act ("UDJA") and standing to bring his claim

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<sup>1</sup> The Court of Appeals' decision is attached as Appendix A.

under the UDJA should be denied because the Court of Appeals' decision does not: (a) conflict with any decisions of the Washington Supreme Court or another decision of the Court of Appeals; or (b) involve an issue of substantial public interest that should be determined by this Court.

3. Whether the petition for review of the Court of Appeals' decision that the Superior Court did not abuse its discretion in certifying the class under CR 23(b)(2) should be denied because the Court of Appeals' decision does not: (a) conflict with any decisions of the Washington Supreme Court or another decision of the Court of Appeals; or (b) involve an issue of substantial public interest that should be determined by this Court.

#### **IV. COUNTER STATEMENT OF THE CASE**

##### **A. Washington's B&O Tax**

As the Superior Court noted in the proceedings below, "this is a very straightforward case." RP 100:7-8 (8/13/04 Hearing). Washington State levies a business and occupation tax ("B&O Tax") on businesses for the privilege of doing business in the State. RCW 82.04.220. And, since its enactment in 1935, the B&O Tax statute, codified at RCW 82.04 *et seq.*, has stated plainly that the B&O Tax "[is not intended to be] construed as [a] tax[] upon the purchasers or consumers, but that [the B&O Tax] shall be levied upon, and collectible from, the person engaging

in the business activities herein designated....” RCW 82.04.500. Until Appleway initiated the practice of itemizing and collecting B&O Tax from Washington consumers, businesses in Washington State uniformly paid their own B&O Tax as a cost of doing business.

**B. Mr. Nelson’s Claim Against Petitioners<sup>2</sup>**

Mr. Nelson’s suit against Petitioners AutoNation (“AutoNation”) and the Appleway automobile dealerships owned<sup>3</sup> by AutoNation (collectively, “Appleway”) arose out of Mr. Nelson’s purchase of a car from an Appleway dealership. CP 114, 117. As a separate line item on his invoice, Appleway charged Mr. Nelson B&O Tax on his purchase. *Id.* Appleway also collected sales tax from Mr. Nelson on the B&O Tax (“B&O Sales Tax”). *Id.* Mr. Nelson subsequently filed a class action complaint in Spokane County Superior Court for declaratory and injunctive relief and restitution. CP 11.

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<sup>2</sup> The factual background of this case, including the procedural history in the Superior Court, is set forth in greater detail in Respondent’s briefing in the Court of Appeals. *See* Respondent’s Answering Br. at 3 – 11.

<sup>3</sup> On information and belief, the Appleway dealerships are wholly-owned subsidiaries of AutoNation. CP 6. In the proceedings before the Court of Appeals, Petitioners asserted that AutoNation “is not a proper party to this suit.” Appellants’ Br. at 3, fn.1. Petitioners now claim that the Appleway automobile dealerships are “*indirectly* owned by AutoNation.” Petition for Review (“Pet.”) at 1 (emphasis added). The Superior Court, however, did not rule on this issue or enter any findings as to the relationship between AutoNation and Appleway. RP 17:14–19 (8/20/04 Hearing). For purposes of this Answer, Mr. Nelson references Petitioners collectively as “Appleway” but makes no concession as to the corporate relationship between AutoNation and Appleway. Rather, Mr. Nelson wishes the appellate record to reflect accurately the record on review.

**C. The Superior Court's Orders on Appeal**

Three orders of the Superior Court give rise to Appleway's appeal. First, the Superior Court granted Mr. Nelson's motion for partial summary judgment seeking declaratory and injunctive relief, finding that Appleway's "itemizing and collecting" of B&O Tax and B&O Sales Tax from consumers "violates the laws of the State of Washington." CP 388.<sup>4</sup> Second, the Superior Court granted Mr. Nelson's motion for class certification pursuant to CR 23(b)(2), entering specific findings as to each requirement of CR 23(a) and CR 23(b)(2). CP 375 – 80. Appleway also appealed issues relating to Mr. Nelson's standing to bring his claims. *See* Appellants' Br. at 14 – 23. The Superior Court's findings on the standing issues are contained in its order denying Appleway's motions for reconsideration of the summary judgment and class certification orders, in which the Superior Court held that Mr. Nelson had established standing to bring his claim for declaratory and incidental monetary relief. CP 578-82.

**D. The Court of Appeals' Decision**

The Court of Appeals affirmed the Superior Court's orders, rejecting all assignments of error raised by Appleway. *See Nelson*, 121

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<sup>4</sup> The Superior Court also enjoined Appleway from "further collecting, 'passing through' or 'itemizing'" B&O Tax and B&O Sales Tax. CP 388. The Court of Appeals stayed declaratory and injunctive relief pending Appleway's exhaustion of its appellate rights. *See* Commissioners' Ruling (11/10/04). Because of the stay, Appleway continues to

P.3d at 97. First, the Court of Appeals held that “RCW 82.04.500 is unambiguous.” *Id.* at 103. “[T]he B&O tax can be added to operating overhead but cannot be passed on to the customer as a tax.” *Id.* Like the Superior Court, the Court of Appeals declined to defer to a “special notice” issued informally by the Department of Revenue (“DOR”) approving the pass-through of B&O Tax, noting that “[c]ourts have the ultimate authority to interpret a statute and do not defer to an agency’s rule where no ambiguity exists in the statute.” *Id.* at 104 – 05.

Second, the Court of Appeals affirmed the Superior Court’s decision regarding Mr. Nelson’s standing and “right to bring this claim under the UDJA.” *Nelson*, 121 P.3d at 97. Specifically, the Court of Appeals held that “Mr. Nelson has demonstrated a judicially enforceable right under RCW 82.04.500 sufficient to establish jurisdiction under the UDJA,” and that Mr. Nelson satisfied the two-part test for standing set forth in *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004). *Id.* at 101 – 02.

Finally, the Court of Appeals held that the Superior Court “did not abuse its discretion in certifying the class under CR 23(a) and CR 23(b)(2).” *Nelson*, 121 P.3d at 106.

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assess B&O Tax from consumers. The Class grows as more consumers are harmed by Appleway’s unlawful practice.

## V. ARGUMENT

### A. **The Petition for Review of the Court of Appeals' Decision Holding Appleway's Assessment and Collection of B&O Tax From Customers Violates Washington Law Should Be Denied**

#### 1. The Court of Appeals' Decision Does Not Conflict With Any Decisions of the Washington Supreme Court or the Court of Appeals

Appleway asserts that the Court of Appeals' interpretation of RCW 82.04.500 "contravenes authority from [the Washington Supreme] Court" and thus, that review is appropriate under RAP 13.4(b)(1). Pet. at 7 – 11. Appleway's assertion is without merit.

First, Appleway does not dispute the standard of statutory interpretation used by the Court of Appeals. As the Court of Appeals explained, "[w]hen a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself....[a] statute is not ambiguous merely because different interpretations are conceivable." *Nelson*, 121 P.3d at 103 (citing *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1020 (2001) and *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)). Applying this standard, the Court of Appeals correctly concluded that "RCW 82.04.500 is unambiguous." *Id.* The statute "specifically provides that the B&O tax is not to be 'construed as taxes upon the purchasers or customers.'" *Id.* (quoting RCW 82.04.500). As the Court of Appeals noted, while the statute states that the B&O Tax is part of

businesses' operating overhead, "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." *Id.*

The Washington cases Appleyway claims are "contravened" by the Court of Appeals' decision are inapposite here. For example, the tax at issue in *Pub. Util. Dist. No. 3 of Mason County v. Washington*, 71 Wn.2d 211, 427 P.2d 713 (1967)<sup>5</sup> was a specialized privilege tax authorized by RCW 54.28 *et seq.*, not a B&O Tax. 71 Wn.2d at 212. Unlike the B&O Tax statute, the governing statute for that tax explicitly provides that public utility districts "shall have the power to add the amount of such tax to [their] rates or charges...." RCW 54.28.070. Similarly, *Branson v. Port of Seattle*, 152 Wn.2d 862, 101 P.2d 67 (2004), which involved a challenge to an airport concession fee charged to rental car companies, did not concern the B&O Tax (or any tax, for that matter). As in *Mason County PUD*, the businesses involved in *Branson* (rental car companies) were explicitly permitted to include the concession fee as a line item on their customers' bill. *Branson*, 152 Wn.2d at 867-68.

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<sup>5</sup> Appleyway asserts that the Court of Appeals "did not even mention *Mason County PUD*." Pet. at 10. Mr. Nelson notes, however, that Appleyway did not cite this case, or make the argument that Mr. Nelson's interpretation of RCW 82.04.500 "conflicts with controlling Washington Supreme Court case law" until its reply brief submitted to the Court of Appeals. See Reply Brief of Defendants-Appellants at 5.

Appleway also claims that the Court of Appeals' decision "contravenes authority from... the DOR," and that review is warranted on that ground. Pet. at 7. A conflict with an agency's interpretation of a statute, however, is not a basis for discretionary review. *See* RAP 13.4(b). And, the case cited by Appleway as support for its argument that the DOR's interpretation "deserved deference," *Seatoma Convalescent Ctr. v. Dep't. of Soc. & Health Servs.*, 82 Wn. App. 495, 919 P.2d 602 (1996), is distinguishable. In *Seatoma*, the administrative agency interpretations at issue were the result of formal decisions of administrative law judges and administrative review judges. 82 Wn. App. at 505 – 11. Here, the "special notice" was an informal opinion, not the result of fact-finding by the DOR. Furthermore, the Court of Appeals' lack of deference to the DOR's "special notice" was in accord with this Court's precedent holding that courts need not defer to an agency's interpretation of a statute when the statutory language is unambiguous. *See Nelson* 121 P.3d at 104-105 (citing *Edelman v. State ex. rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004)).<sup>6</sup> Thus, the Court of Appeals' lack of deference to an informal DOR notice does not justify review.

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<sup>6</sup> As Mr. Nelson noted in his briefing to the Court of Appeals, this Court has recently reaffirmed this principle in *Burton v. Lehman*, 153 Wn.2d 416, 103 P.3d 1230 (2005). *See* Respondent's Answering Br. at 22. In *Burton*, this Court refused to defer to an agency's interpretation because "[it] is neither consistent with the plain language of [the statute] nor an official interpretation of that statute." 153 Wn.2d at 426 n.4.

Appleway also argues that the Court of Appeals' decision "contravenes...courts in other jurisdictions," Pet. at 7, but this assertion does not provide grounds for discretionary review. *See* RAP 13.4(b). Appleway's argument is particularly unpersuasive since no out-of-state case involves interpretation of Washington's unique B&O Tax statute.<sup>7</sup>

In sum, the Court of Appeals' interpretation of RCW 82.04.500 is not in conflict with any decision of the Washington Supreme Court or Court of Appeals.

2. This Case Does Not Present a Significant Question of Constitutional Law

Appleway claims that review is warranted under RAP 13.4(b)(3), on the grounds that the Court of Appeals' "statutory interpretation violates the First Amendment," and that its decision (affirming the judgment of the Superior Court) is "constitutionally flawed." Pet. at 7, 2.

Yet, Appleway never establishes that a constitutional issue exists, much less a significant one. Besides a few scattered references to the First Amendment,<sup>8</sup> and citation to a 1993 decision by a federal district court

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<sup>7</sup> As the Court of Appeals recognized, the non-Washington authorities cited by Appleway are distinguishable. *See Nelson*, 121 P.3d at 103 – 04. None of these out-of-jurisdiction authorities considered a question similar to that here: the legality of Appleway's practice in light of RCW 82.04.500. *See Respondent's Br.* at 20 – 21.

<sup>8</sup> *See, e.g., Appellants' Br.* at 40 (arguing that prohibiting Appleway from "disclosing" (*i.e.*, itemizing and collecting) B&O Tax from its customers "is constitutionally questionable").

interpreting a Minnesota statute, *Bloom v. O'Brien*, 841 F.Supp. 277 (D. Minn. 1993), Appleway has never developed its “constitutional” argument. An appellate court will only review an error “which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.” RAP 10.3(g). Appleway has never shown that the conduct at issue—Appleway’s unlawful assessment and collection of B&O Tax and B&O Sales Tax from its customers—is “speech” and thus potentially entitled to constitutional protection. And, even assuming Appleway’s conduct is commercial speech, Appleway has never attempted to address the four-part test this Court uses to determine whether restrictions on commercial speech are constitutionally permissible. *See Kitsap County v. Mattress Outlet/Gould*, 153 Wn.2d 506, 512, 103 P.3d 1280 (2005).

A few references to “constitutional concerns” and “First Amendment implications,” unaccompanied by any assignment of error, argument, or authority, do not give rise to a “significant constitutional question” so as to warrant review under RAP 13.4(b)(3). The Court should decline to accept review on this ground.

3. The Court of Appeals' Decision Does Not Involve Issues of Substantial Public Interest

Appleway never specifies any issue of “substantial public interest” warranting this Court to grant review of the Court of Appeals’ decision interpreting the B&O Tax Statute. The language of the B&O Tax statute is unambiguous in prohibiting Appleway’s practice. The Court of Appeals’ decision does not conflict with prior decisions of this Court or the universal practices of Washington businesses. There is no issue of “public interest” for this Court to determine. Review under RAP 13.4(b)(4) should be denied.

**B. The Petition for Review of the Court of Appeals’ Decision That Mr. Nelson Had Standing and a Right to Bring His Claim Under The UDJA Should Be Denied**

1. The Court of Appeals’ Decision Does Not Conflict With Any Decisions of the Washington Supreme Court or the Court of Appeals

Appleway claims that the Court of Appeals’ determination that Mr. Nelson had standing and a right to bring his claim under the UDJA conflicts with Washington law. Appleway’s assertions are incorrect and do not support the Court’s granting review of this issue pursuant to RAP 13.4(b)(1) and (2).

Appleway cites this Court’s decisions in *Braam v. Dep’t. of Soc. & Health Servs.*, 150 Wn.2d 689, 81 P.3d 851 (2003) and *Washington State Coalition for the Homeless v. DSHS*, 133 Wn.2d 894, 949 P.2d 1291

(1997), and the Court of Appeals' decision in *Camer v. Seattle Sch. Dist. No. 1*, 52 Wn. App. 531, 762 P.2d (1988) to support its claim that a plaintiff must establish a private right of action under a statute before proceeding with a claim for declaratory relief. Pet. at 15. Appleway's argument misinterprets both the Court of Appeals' holding and Washington law.

As the Court of Appeals explained here, “[u]nder 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.” *Nelson*, 121 P.3d at 99 (citing *Branson* 152 Wn.2d at 877). Noting that the cases Appleway cited are distinguishable, the Court of Appeals underscored that no other Washington statutes provide remedies for Mr. Nelson. *Id.* at 100 – 01. As a “purchaser” and “customer,” Mr. Nelson is entitled to seek a declaratory judgment determining his responsibility to pay B&O Taxes Appleway illegally assessed on his purchase. Indeed, RCW 82.04.500 explicitly references “purchaser[s]” and “customer[s]” and clearly states they are not to be assessed a business’s B&O Taxes. Mr. Nelson’s rights are “affected” by the B&O Tax statute, and he thus has the right to proceed under the UDJA to protect his rights. *Id.* None of the Washington cases cited by Appleway contradict this holding. *See Braam*, 150 Wn.2d at 711

– 12 (plaintiffs brought claims directly under statutes, not under UDJA); *Washington State Coalition*, 133 Wn.2d at 913 – 14 (holding that permitting plaintiffs to bring UDJA action “is consistent with the underlying purpose of the statute”); *Camer*, 52 Wn. App. at 538 (no discussion of private cause of action as requirement for UDJA action). In short, the Court of Appeals’ decision that “Mr. Nelson has demonstrated a judicially enforceable right under RCW 82.04.500 sufficient to establish jurisdiction under the UDJA,” *Nelson*, 121 P.3d at 101, does not conflict with Washington case law.<sup>9</sup>

Appleway also claims that the Court of Appeals overlooked Washington precedent in concluding that Mr. Nelson satisfied the *Grant County* two-prong standing test. This argument similarly fails to hold water. Mr. Nelson is a “purchaser” or “customer” who seeks a declaration as to the meaning of a statute clearly stating that the B&O Tax is not intended to be “construed as [a] tax[] upon the purchasers or customers.” Thus, he is certainly within the zone of interest contemplated by the statute. *Nelson*, 121 P.3d at 101. Further, Appleway’s claim that “the ‘zone of interests’ must be measured by ‘the general purpose of the

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<sup>9</sup> Nor does Mr. Nelson’s request for equitable monetary relief (restitution) conflict with Washington law. As the Court of Appeals noted, RCW 7.24.080 “allows further relief based on a declaratory judgment or decree whenever necessary or proper.” *Nelson*, 121 P.3d at 102. *See also* Respondent’s Br. at 33.

statute.” Pet. at 17, does not render the Court of Appeals’ decision incorrect. On the contrary, the plain language of RCW 82.04.500 manifests the legislature’s contemplation of purchasers’ interests. As for the second prong of the *Grant County* test—“whether the challenged action has caused injury in fact, economic or otherwise, to the party seeking standing”<sup>10</sup>—the Court of Appeals recognized that Mr. Nelson is adversely affected by having been illegally charged B&O Tax. *Nelson*, 121 P.3d at 102. Like the property owners in *Grant County* who “face different tax rates” should they not prevail in their declaratory judgment action, Mr. Nelson (and the Class) face being subject to a different tax structure than that intended by the legislature should they not prevail here.

The Court of Appeals’ decision as to Mr. Nelson’s standing and his right to bring a claim under the UDJA does not conflict with any decisions of this Court or the Court of Appeals, and review is not warranted under RAP 13.4(b)(1) or (2).

2. The Court of Appeals’ Decision Does Not Involve Issues of Substantial Public Interest

Appleway asserts that review is warranted under RAP 13.4(b)(4), because the Court of Appeals’ decision as to Mr. Nelson’s standing and his right to bring his claim under the UDJA “violates the substantial public

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<sup>10</sup> *Grant County*, 150 Wn.2d at 802 (internal citations and marks omitted).

interest in appropriately limiting private rights of action to enforce statutory obligations.” Pet. at 14. As discussed above, however, the Court of Appeals’ decision is consistent with prior Washington decisions interpreting the UDJA. The standards outlined in those decisions define the appropriate limits on a plaintiff’s right to request relief under the UDJA. Because the Court of Appeals merely applied those standards to the facts of this case, no issue of substantial public interest is affected by the Court of Appeals’ decision on Mr. Nelson’s standing. Accordingly, review of the Court of Appeals’ determination that Mr. Nelson had standing and a right to bring his claim under the UDJA is not warranted under RAP 13.4(b)(4).

**C. The Petition for Review of the Court of Appeals’ Decision That the Superior Court Did Not Abuse Its Discretion In Certifying the Class Under CR 23(b)(2) Should Be Denied**

1. The Court of Appeals’ Decision Does Not Conflict with Any Decisions of the Washington Supreme Court or the Court of Appeals

The Court of Appeals’ decision to affirm the Superior Court’s class certification order is not in conflict with any decision of the Washington Supreme Court or Court of Appeals.

First, as this Court held in *Eriks v. Denver*, 118 Wn.2d 451, 824 P.2d 1207 (1992) “[a] trial court’s decision to certify a class is discretionary” and “will not be overturned absent a manifest abuse of discretion.” 118 Wn.2d at 466. The *Eriks* court also held that “a trial court’s class certification will be upheld if it appears from the record that the court considered all of the criteria of CR 23.” *Id.* at 467. As the Court of Appeals concluded, this is exactly what the Superior Court did. *See Nelson*, 121 P.3d at 105 – 06; CP at 377 – 80; *see also* CP 582. Appleway makes no attempt to show that a “manifest abuse of discretion” occurred here.

Second, the Court of Appeals’ decision considered, and rejected, Appleway’s argument that Mr. Nelson’s claim for monetary relief “predominates,” and affirmed the Superior Court’s class certification ruling. *Nelson*, 121 P.3d at 105 – 06. Nothing in *Eriks* or in *Sitton v. State Farm Mut. Ins. Co.*, 116 Wn. App. 245, 63 P.3d 198 (2003) suggests that the Court of Appeals should have determined that the Superior Court abused its discretion in so ruling.

In *Eriks*, the class certification issue presented to this Court was whether the trial court abused its discretion when it declined to “recertify” a class. 118 Wn.2d at 467. The *Eriks* plaintiffs brought class action claims for negligence, breach of fiduciary duty and violation of the Consumer Protection Act. *Id.* at 455. The trial court certified the class under CR 23(b)(3). *Id.* After plaintiffs were awarded affirmative relief on their breach of fiduciary duty claim, plaintiffs moved to recertify the class under CR 23(b)(2). *Id.* at 455 – 56. The trial court denied this request, ruling “that it was improper to recertify the class after already granting affirmative relief.” *Id.* at 456. This Court affirmed, noting that the plaintiffs “did not request recertification until after a determination of the case on the merits.” *Id.* at 467. Plainly, recertification is not at issue here. *Eriks* noted in *dicta* that “[w]here [a] declaration merely forms the basis for monetary relief, a CR 23(b)(2) action is not appropriate.” *Id.* at 466 – 67. But, it did not reach the issue of whether the class could in fact have been certified under CR 23(b)(2).<sup>11</sup> *Id.* Nor did it provide any guidance as to how a trial court determines when a request for monetary relief is “incidental” to the claim for injunctive or declaratory relief, as did the Court of Appeals in *Sitton*, decided more than a decade later. *See Sitton*,

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<sup>11</sup> As the Court noted, “[e]ven if the [plaintiffs] are correct that the class could have been certified under CR 23(b)(2), the question for this court is whether it was an abuse of discretion for the court to not recertify the class.” *Eriks*, 118 Wn.2d at 467.

116 Wn. App. at 252-53. *Sitton* explained that a class may be certified under 23(b)(2) if the plaintiff's "primary claim" is for "injunctive or declaratory relief," and "the monetary damages sought are merely incidental to the primary claim for injunctive or declaratory relief." *Sitton*, 116 Wn. App. at 252 (internal citations and marks omitted). "Incidental damages" are damages "that flow directly from liability to the class as a whole on the claims forming the basis of the injunctive and declaratory relief." *Id.* (internal citations omitted). Such damages "should at least be capable of computation by means of objective standards and not be dependent in any significant way on the intangible, subjective differences of each class members' circumstances." *Id.* at 252-53 (internal citations and marks omitted). Finally, determination of damages should not require the resolution of "new and substantial legal and factual issues." *Id.* (internal citations and marks omitted).

Nothing in the record suggests that the restitution sought by Mr. Nelson and the Class requires that "new and substantial legal and factual issues" be resolved, or that such restitution is not "capable of computation by means of objective standards." *See Sitton*, 116 Wn. App. at 252 - 53. Indeed, as the Superior Court held and the Court of Appeals affirmed, the incidental damages here can be determined by simply referring to Appleway's sales invoices itemizing the B&O Tax and B&O Sales Tax

illegally collected from Mr. Nelson and the Class. *See Nelson*, 121 P.3d at 105-06. Review of the Court of Appeals' class certification decision is therefore not warranted under RAP 13.4(b)(1) or (2).

2. The Court of Appeals' Class Certification Decision Does Not Involve Issues of Substantial Public Interest

As an additional ground for review, Appleway contends the Court of Appeals' class certification decision "raises issues of great importance to practitioners and the public" thus warranting review under RAP 13.4(b)(4). Pet. at 19. This assertion is without merit. As discussed *supra*, the Court of Appeals' decision did not conflict with the standard established by previous Washington appellate decisions. Because the Court of Appeals' class certification decision applied the correct legal standard and was limited to the specific facts of this case, it does not "substantially impact the public interest."

Finally, Appleway suggests that the Court of Appeals' decision conflicts with an opinion from the Fifth Circuit, *Robinson v. Texas Automobile Dealers Ass'n*, 387 F.3d 416 (5th Cir. 2004). Even if this were true, it would not provide a basis for discretionary review. *See* RAP 13.4(b). As the Court of Appeals explained in detail, however, *Robinson* is inapposite here. *Robinson* reviewed a Rule 23(b)(3) class certification in an antitrust case, in which the central issue was whether questions of

law or fact common to the members of the class predominated over individualized questions. *Nelson*, 121 P.3d at 106 (citing *Robinson*, 387 F.3d at 422). As the Court of Appeals correctly noted, “[p]redominance is an issue in CR 23(b)(3) certification, not CR 23(b)(2) certification.” *Id.* at 106. Moreover, alleged factual differences in the putative class members’ negotiations with the defendants in *Robinson* were crucial to establish the elements of the plaintiffs’ price-fixing claim. *Id.*; see also *Robinson*, 387 F.3d at 422 – 24. Here, as the Court of Appeals recognized, the central issue on the merits is whether Appleway’s “itemization” and collection of the B&O Tax was unlawful. *Nelson*, 121 P.3d at 106.<sup>12</sup> Moreover, unlike *Robinson*, there are no facts in the record to support Petitioners’ allegations regarding Class members’ individualized circumstances.

The Court of Appeals correctly affirmed the Superior Court’s decision to certify the Class.

## VI. CONCLUSION

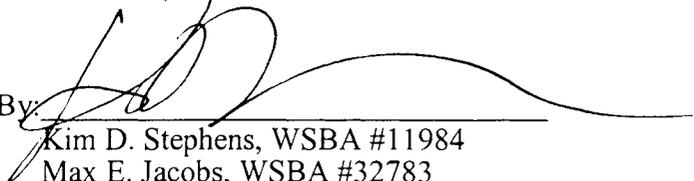
Petitioners have failed to satisfy the requirements of RAP 13.4(b). Mr. Nelson respectfully requests this Court deny Appleway’s petition for review.

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<sup>12</sup> This is also the only issue decided by the Superior Court on summary judgment. RP 52:1-5 (8/13/04 Hearing).

RESPECTFULLY SUBMITTED this 14th day of December, 2005.

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**CERTIFICATE OF SERVICE**

I, Bradford Kinsey, declare and say as follows:

1. I am a citizen of the United States and resident of the State of Washington, over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness herein. My business address and telephone number are 1700 Seventh Avenue, Suite 2200, Seattle, Washington 98101, telephone 206.682.5600.

2. On December 14, 2005, I caused a true and correct copy of the foregoing document to be personally delivered to the following parties in the manner indicated at the addresses listed below.

---

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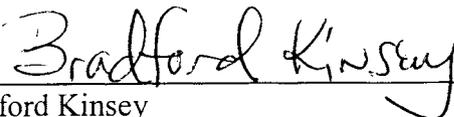
U.S. Mail, postage prepaid  
 Hand Delivered via Messenger Service  
 Overnight Courier  
 Facsimile  
 Electronic Transmission

*Attorneys for Petitioners/Appellants*

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I declare under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

Executed this 14<sup>th</sup> day of December, 2005, at Seattle, Washington.

  
\_\_\_\_\_  
Bradford Kinsey



**A**

Court of Appeals of Washington,  
Division 3,  
Panel Seven.

Herbert NELSON, on his behalf and on behalf of all  
others similarly situated,  
Respondent,

v.

APPLEWAY CHEVROLET, INC., a Washington  
corporation, d/b/a Appleyway  
Subaru/Volkswagen/Audi, Appleyway Advertising,  
Appleyway Audi, Appleyway  
Automotive Group, Appleyway Chevrolet Leasing,  
Appleyway Group, Appleyway Mazda,  
Appleyway Mitsubishi, Appleyway Subaru, Appleyway  
Towing, Appleyway Toyota,  
Appleyway Volkswagen, East Trent Auto Sales, Lexus  
of Spokane, Opportunity  
Center, and TSP Distributors; and Autonation, Inc., a  
Delaware corporation,  
Petitioner.

No. 23504-1-III.

Oct. 13, 2005.

**Background:** Car buyer filed declaratory relief  
action against car dealership, challenging dealership's  
imposition of Business and Occupation (B & O)  
taxes on car purchase. Buyer also sought class  
certification. The Superior Court, Spokane County,  
Kathleen M. O'Connor, J., certified the class and  
granted summary judgment for buyer, concluding  
that dealership's method of itemizing and collecting B  
& O taxes was unlawful. Dealership appealed.

**Holdings:** The Court of Appeals, Kurtz, J., held  
that:

(1) buyer was not required to establish private cause  
of action in order to obtain relief under Uniform  
Declaratory Judgments Act (UDJA);

(2) buyer had standing to pursue declaratory  
judgment action under UDJA; and

(3) buyer had standing to represent class of other  
buyers.

Affirmed.

West Headnotes

**[1] Appeal and Error**  **893(1)**  
30k893(1) Most Cited Cases

The appellate court's review of the trial court's  
decision on summary judgment is de novo.

**[2] Appeal and Error**  **893(1)**  
30k893(1) Most Cited Cases

Questions of statutory construction are reviewed de  
novo.

**[3] Appeal and Error**  **949**  
30k949 Most Cited Cases

A trial court's class certification decision is reviewed  
for an abuse of discretion.

**[4] Declaratory Judgment**  **2**  
118Ak2 Most Cited Cases

**[4] Declaratory Judgment**  **26**  
118Ak26 Most Cited Cases

Uniform Declaratory Judgments Act (UDJA) is to be  
liberally construed and is designed to clarify  
uncertainty with respect to rights, status, and other  
legal relations. West's RCWA 7.24.020.

**[5] Declaratory Judgment**  **81**  
118Ak81 Most Cited Cases

Car buyer was not required to establish a private  
cause of action in order to obtain relief under the  
Uniform Declaratory Judgments Act (UDJA), in  
lawsuit challenging car dealership's imposition of  
Business and Occupation (B & O) taxes on car  
purchases; buyer could proceed under UDJA to  
determine whether dealership's method of itemizing  
and collecting B & O tax was unlawful, inasmuch as  
buyer established a judicially enforceable right under  
B & O taxation statute that was sufficient to establish  
jurisdiction under UDJA. West's RCWA 7.24.020,  
82.04.500.

**[6] Declaratory Judgment**  **392.1**  
118Ak392.1 Most Cited Cases

The appellate court has no jurisdiction under the  
Uniform Declaratory Judgments Act (UDJA) unless  
the plaintiff can show that he or she is asserting a  
statutory legal right capable of judicial protection.  
West's RCWA 7.24.020.

**[7] Declaratory Judgment**  **4**  
118Ak4 Most Cited Cases

A cause of action will be implied under the Uniform  
Declaratory Judgments Act (UDJA) if: (1) the

plaintiff is in the class for whose benefit the relevant 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.

**[8] Action** 34

13k34 Most Cited Cases

Where a statute provides a new right, but no remedy, a remedy will be provided.

**[9] Declaratory Judgment** 61

118Ak61 Most Cited Cases

**[9] Declaratory Judgment** 292

118Ak292 Most Cited Cases

To proceed under the Uniform Declaratory Judgments Act (UDJA), a person must present a justiciable controversy and establish standing. West's RCWA 7.24.020.

**[10] Declaratory Judgment** 62

118Ak62 Most Cited Cases

For purposes of the Uniform Declaratory Judgments Act (UDJA), 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. West's RCWA 7.24.020.

**[11] Action** 13

13k13 Most Cited Cases

The traditional doctrine of standing limits the justiciability determination and prohibits a litigant from raising another person's legal right.

**[12] Action** 13

13k13 Most Cited Cases

A two-part test has been developed for determining if a party has standing to bring an action: the court first inquires whether the interest asserted is arguably within the zone of interests protected by the statute or constitutional right at issue, and second, the court asks whether the party seeking standing has suffered an injury in fact, economic or otherwise.

**[13] Declaratory Judgment** 300

118Ak300 Most Cited Cases

Car buyer had standing to pursue declaratory

judgment action under Uniform Declaratory Judgments Act (UDJA), in lawsuit challenging car dealership's imposition of Business and Occupation (B & O) taxes on car purchases, inasmuch as buyer fell within zone of interest contemplated by the B & O taxation statute; that statute stated that B & O tax was not intended to be construed as taxes upon purchasers or customers, which placed buyer within the zone of interest contemplated by the statute. West's RCWA 7.24.020, 82.04.500.

**[14] Declaratory Judgment** 81

118Ak81 Most Cited Cases

**[14] Declaratory Judgment** 300

118Ak300 Most Cited Cases

Car buyer was able to establish injury in fact for purposes of his declaratory judgment action under Uniform Declaratory Judgments Act (UDJA), in lawsuit challenging car dealership's imposition of Business and Occupation (B & O) taxes on car purchases; buyer met test for showing personal harm in that he bought car from dealership and was charged with a "Business & Occupation Tax Overhead" charge after negotiating the purchase price. West's RCWA 7.24.020, 82.04.500.

**[15] Declaratory Judgment** 65

118Ak65 Most Cited Cases

To establish harm under Uniform Declaratory Judgments Act (UDJA), the claimant must demonstrate a justiciable controversy based on allegations of personal harm that are substantial rather than speculative or abstract. West's RCWA 7.24.020.

**[16] Licenses** 28

238k28 Most Cited Cases

Statute pertaining to Business and Occupation (B & O) taxes prohibited car dealership from imposing such taxes on customers; plain language of statute provided that B & O tax was not intended to be construed as taxes upon purchasers or customers. West's RCWA 82.04.500.

**[17] Appeal and Error** 893(1)

30k893(1) Most Cited Cases

The appellate court reviews questions of statutory construction de novo.

**[18] Statutes** 190

361k190 Most Cited Cases

When a statute is plain and unambiguous, its meaning must be derived from the wording of the statute itself.

**[19] Statutes**  **190**

361k190 Most Cited Cases

A statute is ambiguous if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable.

**[20] Statutes**  **189**

361k189 Most Cited Cases

The appellate court must discern and carry out the intent of the legislature, but must also avoid a literal interpretation leading to an absurd result.

**[21] Statutes**  **219(10)**

361k219(10) Most Cited Cases

Trial court could reject special notice from Department of Revenue, and interpret statute pertaining to Business and Occupation (B & O) taxes so as to prohibit car dealership from imposing such taxes on customers; court had ultimate authority to interpret statute and was not required to defer to agency's rule when there was no ambiguity in statute. West's RCWA 82.04.500.

**[22] Declaratory Judgment**  **305**

118Ak305 Most Cited Cases

Buyer of automobile, in action to challenge car dealership's imposition of Business and Occupation (B & O) taxes on car purchases, had standing to represent class of other persons who purchased motor vehicles, parts, merchandise, or service; buyer had himself purchased a vehicle from dealership, and was found to have claims that were typical of the class as a whole. West's RCWA 82.04.500; CR 23(b)(2).

\*97 Daniel Katz, Luba Shur, Williams & Connolly, LLP, Washington, DC, Gregg Randall Smith, Attorney at Law, Spokane, WA, for Petitioner.

Max Eric Jacobs, Kim D. Stephens, Tousley Brain Stephens PLLC, Seattle, WA, Brian Scott Sheldon, Attorney at Law, Spokane, WA, for Respondent.

KURTZ, J.

¶ 1 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 Appleyway Volkswagen. After the purchase price was negotiated, the parties signed a sales agreement listing an additional amount

designated as "Business & Occupation Tax Overhead." [FN1] Mr. Nelson filed an action seeking a declaratory judgment that Appleyway'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 Appleyway's method of itemizing and collecting the B & O tax and B & O sales tax was unlawful.

[FN1. Clerk's Papers (CP) at 50.

¶ 2 In this appeal, Appleyway challenges Mr. Nelson's right to bring this claim under Washington's uniform declaratory judgments act (UDJA). Appleyway further contends RCW 82.04.500 authorizes the pass through of the B & O tax to customers. Appleyway 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 Appleyway's manner of assessing and collecting the B & O tax from customers violated RCW 82.04.500. We further hold Mr. Nelson has 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**

¶ 3 In September 2002, Herbert Nelson purchased a used Volkswagen Cabriolet from Appleyway Volkswagen in Spokane, Washington. Appleyway Volkswagen is a car dealership \*98 within the Appleyway Chevrolet, Inc., group of dealerships.

¶ 4 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.

¶ 5 **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.

¶ 6 **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.

¶ 7 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. [FN2]

[FN2]. The B & O tax was also disclosed in Appleway's advertising and signage, which refer to "B & O Overhead." CP at 21-22.

¶ 8 **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).

¶ 9 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.

¶ 10 **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 \*99 " 'itemizing,' " the B & O tax and the B & O sales tax. CP at 388.

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

All individuals and entities from whom Defendants itemized and collected B & O Tax on the sale of motor vehicles, parts, merchandise, or service in the state of Washington. [FN3]

[FN3]. 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.

CP at 380.

¶ 12 **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.

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

#### ANALYSIS

[1][2][3] ¶ 14 **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 Wash.2d 221, 224, 86 P.3d 1166 (2004). Questions of statutory construction are also reviewed de novo. State v. J.M., 144 Wash.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 Wash.2d 40, 47, 905 P.2d 338 (1995) (quoting Eriks v. Denver, 118 Wash.2d 451, 466, 824 P.2d 1207 (1992)).

[4] ¶ 15 **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 Wash.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 Wash.2d 327, 330, 684 P.2d 1297 (1984).

[5] ¶ 16 **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.

¶ 17 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 Wash.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 Failor's, Inc., 97 Wash.2d 929, 932, 653 P.2d 280 (1982).

¶ 18 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 Wash.App. 142, 148, 594 P.2d 1375 (1979). For this reason, some declaratory judgment cases discuss whether there is a judicially \*100 enforceable duty and may or may not use the term "private cause of action." See, e.g. Wash. Fed'n, 23 Wash.App. at 148, 594 P.2d 1375 ("legal right capable of judicial protection"); Camer v. Seattle Sch. Dist. No. 1, 52 Wash.App. 531, 536, 762 P.2d 356 (1988) ("private cause of action"; "private right of action"; "judicially enforceable duty").

[6][7][8] ¶ 19 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 Wash.App. at 148, 594 P.2d 1375. 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 Wash.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, 25 P.3d 1057.

¶ 20 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.

¶ 21 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.

¶ 22 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.

¶ 23 Appleyway 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 Wash.App. at 148, 594 P.2d 1375. 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, 594 P.2d 1375. 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 Wash.App. at 537, 762 P.2d 356.

¶ 24 Appleyway also contends that this court has no jurisdiction because remedies are available under other statutes. Along similar lines, Appleyway 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.

¶ 25 Appleyway'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 [FN4] from circumventing legislatively created enforcement provisions. *Id.*

FN4. 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."

\*101 ¶ 26 But the Washington statutes Appleyway suggests here are not helpful, or even applicable, remedies for Mr. Nelson. For example, Appleyway contends that Washington customers have remedies

for unfair and deceptive conduct under the CPA, RCW 19.86.090. Appleyway 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 Appleyway, RCW 82.32.060, .150, .160, and .170, are available to taxpayers, not customers and purchasers, such as Mr. Nelson.

¶ 27 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 Wash.2d at 877, 101 P.3d 67. Here, Mr. Nelson has demonstrated a judicially enforceable right under RCW 82.04.500 sufficient to establish jurisdiction under the UDJA.

[9][10] ¶ 28 **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 Wash.2d 811, 815, 514 P.2d 137 (1973).

[11][12] ¶ 29 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 Wash.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 Wash.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.*

[13] ¶ 30 Appleyway 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.

¶ 31 Appleyway 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, Appleyway relies on Van Eck v. Gavin, 44 Conn.Supp. 407, 690 A.2d 460 (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.

¶ 32 Appleyway 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 Wash.2d at 876-77, 101 P.3d 67.

¶ 33 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 \*102 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).

¶ 34 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 Wash.2d at 867, 101 P.3d 67. 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, 101 P.3d 67.

¶ 35 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, 101 P.3d 67. 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.

¶ 36 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, 101 P.3d 67.

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

[14] ¶ 38 Appleyway next maintains Mr. Nelson cannot bring a claim under the UDJA because he cannot establish injury in fact.

[15] ¶ 39 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 Wash.2d at 802, 83 P.3d 419. Appleyway 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 Appleyway 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.

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

[16] ¶ 41 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.

\*103 [17][18][19][20] ¶ 42 This court reviews questions of statutory construction de novo. State v. J.M., 144 Wash.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 Wash.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 Wash.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 Wash.2d 947, 955, 51 P.3d 66 (2002).

¶ 43 **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.

¶ 44 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."

¶ 45 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.

¶ 46 Citing Canteen Service, Inc. v. State, 83 Wash.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 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, 522 P.2d 847.

¶ 47 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.

¶ 48 **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.

¶ 49 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.

¶ 50 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, 522 A.2d 771. Of greater importance, the issue raised in Texaco Refining \*104 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, 522 A.2d 771. [FN5]

FN5. 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, 522 A.2d 771.

¶ 51 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."

¶ 52 In other words, the cases relied upon by Appleyway 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.

¶ 53 Appleyway 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 Wash.2d at 876, 101 P.3d 67.

¶ 54 Appleyway 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 Appleyway 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 Appleyway 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.

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

¶ 56 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.

¶ 57 Relying on Bloom v. O'Brien, 841 F.Supp. 277 (D.Minn.1993), Appleyway 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.

[21] ¶ 58 **Deference to Special Notice.** Appleyway 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 \*105 legal opinion and did not directly rule that the itemization of the B & O tax to the customer was legal.

¶ 59 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 Wash.2d 584, 590, 99 P.3d 386 (2004).

¶ 60 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 Wash.2d 40, 47, 905 P.2d 338 (1995) (quoting Eriks v. Denver, 118 Wash.2d 451, 466, 824 P.2d 1207 (1992)).

¶ 61 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.

¶ 62 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.

[22] ¶ 63 *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.

¶ 64 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 Wash.App. 475, 836 P.2d 260 (1992), and Doe v. Spokane & Inland Empire Blood Bank, 55 Wash.App. 106, 780 P.2d 853 (1989).

¶ 65 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 Wash.App. at 477-78, 836 P.2d 260. Here, Mr. Nelson properly sought a declaratory judgment to define and enforce a statutory right.

¶ 66 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 Wash.App. at 108, 114, 780 P.2d 853. 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, 780 P.2d 853. Here, Mr. Nelson has a claim for the purchase of his vehicle from Appleway Volkswagen.

¶ 67 *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.

¶ 68 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.

\*106 ¶ 69 Appleway relies on Fry v. Hoyt, Hoyt & 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 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.

¶ 70 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.

¶ 71 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.

¶ 72 *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 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.

¶ 73 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).

¶ 74 We affirm the judgment of the trial court.

WE CONCUR: KATO, C.J., and SCHULTHEIS, J.

121 P.3d 95

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