

NO. 73534-9-I
(King County No. 14-2-22655-1 SEA)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON DIV. I

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2015 NOV 23 PM 4:08

NICHOLAS E. BOONE, an individual,

Plaintiff – Petitioner,

v.

CITY OF SEATTLE,

Defendant - Respondent,

PETITIONER’S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ASSIGNMENT OF ERROR 5

III. STATEMENT OF THE CASE..... 10

 A. Summary of Case and UDJA Claim 10

 B. The Automated Traffic Camera Legislation at Issue 13

 C. The WAC Governs School Speed Zone Sign Assemblies
 13

 D. The Relevant MUTCD Sections 16

 E. Plaintiff Boone’s Infraction and Lawsuit..... 16

 F. The Prior “School Speed Zone” Case Involving the City
 17

 G. The City’s Deposition Through its 30(b)(6)
 Representatives 18

 H. Summary Judgment Motions and May 8 Hearing 20

IV. ARGUMENT 21

 A. De Novo Review Applies 21

 B. The Orwick, Nelson, Doe and Todd Decisions 21

 C. The Order is Inconsistent with Orwick and Nelson..... 26

 D. Doe is Distinguishable on Various Grounds..... 28

 E. Res Judicata Does Not Bar Boone’s UDJA Claim 29

 F. The City is Collaterally Estopped to Reargue the Issue 31

 G. Res Judicata Does Not Apply 33

V. CONCLUSION..... 35

TABLE OF AUTHORITIES

Cases

Doe v. Fife Municipal Court, 74 Wn. App. 444, 874 P.2d 182 (1994)
..... passim

Hadley v. Maxwell, 144 Wn.2d 306 (2001) 29, 31

Nelson v. Appleway Chevrolet, 160 Wn.2d 173 (2007)..... passim

Orwick v. City of Seattle, 103 Wn. 2d 249 (1984)..... passim

Todd v. City of Auburn et al., Case No. C09-1232JCC (W.D. Wash, 2010)
..... passim

Other Authorities

18 Wright et. al., Federal Practice and Procedure (2002) at § 4415 31

Statutes

23 C.F.R. § 655.603 16

23 U.S.C. § 109(d) 15

RCW 46.63.170 30

RCW 46.63.170(1)(b) 13

RCW 46.63.170(1)(e)(f) 1

RCW 46.63.170(1)(h) 1, 5, 10, 13

WAC 468-95-340..... 1, 14

Rules

CR 23(b)(2)..... 8, 28, 35

CR 54(b)..... 5

CrRLJ 7.8..... 22

IRLJ6.7(a) 5

RAP 2.3(b)(4) 4

I. INTRODUCTION

This class action arises from speeding tickets (“Notices of Infraction”) that were issued by the Defendant City of Seattle (“the City”) at three school speed zones that used an automated traffic camera (“camera”), instead of a human being, to document a violation.¹ The three school zones at issue were the only ones out of nine zones in Seattle that had improper signs that combined two different bottom plaques and non-conforming words. This action alleges a Uniform Declaratory Judgment Action (UDJA) claim that the signs were non-complying and that the infractions issued at zones with non-conforming signs were unlawful.

School speed zone signage is controlled by WAC 468-95-340. It mandates that the sign assembly “shall consist of” only one bottom plaque, not two, and that the bottom plaque be one of five alternative wordings that are set out in the federal Manual of Uniform Traffic Control Devices (“MUTCD”).² The Legislature required that the signage in “all locations” using an automated traffic camera “follow specifications and guidelines under the (MUTCD).” RCW 46.63.170(1)(h). The Legislative history

¹ The cameras are commonly referred to as “red-light cameras” because they are most often used at four-way intersections controlled by a traffic signal. The infraction is issued to the owner of the car, not the driver, because it is based solely on the car’s license plate number recorded by the camera’s photo. RCW 46.63.170(1)(e)(f).

² The manual sets out pictures and designs of what the sign must look like and how it must be worded. See, Declaration of David E. Breskin in Supp. of Plf’s Mot. for Partial Summ. Judg., (Breskin Decl.) at p. 2, “School Speed Limit Assembly.” CP 181. The trial court, Judge Schapira considered the Plaintiff’s motion for summary judgment and the City’s motion on the Plaintiff’s refund claim at the same hearing on May 8, 2015 and had before her the entire record on both motions. See, 5/8/15 Order, CP 778-780.

shows that the Legislature imposed this requirement on cities that chose to use automated cameras to promote uniformity of signage.

It is undisputed that the City's signage in the three school zones at issue had two bottom plaques and the wording was not the same as the wording in the required bottom plaques shown in the MUTCD.

The streets in the school speed zones at issue had a normal, posted speed limit of 35 mph. But when the cameras were operating the limit was 20 mph. The purpose of the signage is to alert drivers when the 20 mph limit is in effect. That's why the wording is important and mandatory. But for reasons that the City cannot explain, because it does not know why the signs were different at these three locations at issue, these three school zones using a camera to issue tickets had non-conforming signs.

In February 2014, Plaintiff Boone ("Boone") got a ticket in one of the school zones with non-conforming signs for going 27 mph. CP 187. His speed was well below the normal, posted limit of 35 mph.

Boone filed a class action against the City in the King County Superior Court on behalf of all Washington citizens who had received speeding infractions at one of the three school speed zones with non-conforming signs. He alleged a Uniform Declaratory Judgment Action (UDJA) claim that the signs were non-complying and that the infractions issued at zones with non-conforming signs were unlawful. He sought damages for the City's violation of law and for appropriate relief,

including disgorgement.³

In a prior case, Hunt v. City of Seattle, Judge Heller of the King County Superior Court held that one of the three school speed zones at issue had a non-conforming sign and that issuing infractions at the zone with signage that violated the law was illegal.⁴ In June 2014, the decision in Hunt was publicized by the *Seattle Times*. Rather than appeal Judge Heller's decision, the City chose to comply with his order and replace the signs. The City replaced the signs on a single day, August 9. CP 380. The City did so to prevent drivers from believing they could speed in school zones based on Judge Heller's order. The City offered no other reason.⁵

Plaintiff Boone's case was assigned to Judge Carol Schapira rather than Judge Heller. Judge Schapira certified Boone's UJDA claim as a class action under CR 23(b)(2) on behalf of all citizens who had been issued an infraction at one of the three school speed zones prior to August 9, 2014 when the City changed the signs. She appointed Boone as the Class representative and his attorneys as Class counsel.⁶

³ See, Nelson v. Appleway Chevrolet, 160 Wn.2d 173, 185 (2007)(disgorgement of improperly imposed fees is appropriate class-wide relief on UDJA claim.), **attached as Appendix A.**

⁴ See, Order in Hunt, CP 254-256, **attached as Appendix B.**

⁵ The City was deposed through its CR 30(b)(6) representatives, a traffic safety coordinator, Mr. Dougherty, and the current Traffic Engineer, Mr. Chang. See, Chang decl. at ¶ 21, CP 380.

⁶ The City did not dispute that certification was proper under CR 23(b)(2). The trial court's class certification order is not a subject of this appeal.

On May 8, 2015, Judge Schapira heard argument on 1) Boone's motion for partial summary judgment that the City's signs were non-conforming and the infractions issued illegal, i.e. the same ruling Judge Heller had made earlier; and 2) the City's motion for judgment on the Plaintiff's "refund claim." Relying solely on Doe v. Fife Municipal Court, 74 Wn. App. 444, 874 P.2d 182 (1994),⁷ Judge Schapira granted the City's motion ruling that res judicata barred Boone's refund claim in the Superior Court and that Boone had return to the municipal court first to vacate the judgment before returning to the Superior Court for adjudication of his UDJA claim. See, Order, CP 778-780. In the same order, Judge Schapira denied Plaintiff's motion.

While not stated in the trial court's order, Commissioner Neel read Judge Schapira's denial of Plaintiff's motion as being based on disputed issues of fact related to the City's affirmative defenses of substantial compliance and engineering judgment.⁸ Commissioner Neel stated that these issues of fact had to be resolved by the jury and thus summary judgment was inappropriate.

The parties agreed to a stipulated order that the Court's May 8 order granting the City's motion and denying the Plaintiff's motion presented controlling issues of law about which there was genuine dispute and that immediate relief was appropriate under RAP 2.3(b)(4). The

⁷ A copy of which is attached as **Appendix C**.

⁸ See, Aug. 25, 2015, Letter Decision, signed by Richard D. Johnson, at 4, **attached as Appendix D**.

stipulated order also stated that there was no just reason for delay in entry of the order invoking CR 54(b) as another basis for immediate review. Nevertheless, Commissioner Neel only granted review of the part of the order granting the City's motion and denied review of the part of the same order denying Boone's motion. This appeal follows that decision.⁹

II. ASSIGNMENT OF ERROR

Judge Schapira erred in granting the City's motion and ruling that under Doe "Plaintiffs' refund claims are barred by res judicata in this Court (i.e. the Superior Court)" because "Plaintiffs' refund claims must be brought in the municipal court under IRLJ6.7(a) and RCW 7.08.010.¹⁰ The trial court's summary judgment order was in error because:

(a) It is inconsistent with Orwick v. City of Seattle, 103 Wn. 2d 249 (1984) (Attached as **Appendix E.**) Boone brought a UDJA claim that the City's signage was unlawful under the WAC, the MUTCD and RCW 46.63.170(1)(h) and that the notices of infraction issued to Boone and the Boone Class members was unlawful. The Orwick court ruled that the Superior Court, not the municipal court, has original jurisdiction over a UDJA claim that the City of Seattle systematically violated Washington law in enforcing a city ordinance. The Superior Court has authority to

⁹ Boone moved to modify Commissioner Neel's August 25 decision. Boone argued in part that there were no disputed issues of fact necessary for resolution by a jury and that Judge Schapira made erroneous legal rulings that were "threshold" issues warranting judgment in Boone's favor. No ruling has been received yet on the motion to modify.

¹⁰ See Order Granting Defendant's Mot. for Sum. Judgment, at 2, ¶3, CP 779.

enter a declaratory judgment without regard for whether the relief available is a “refund” of the fines paid, disgorgement or damages. The Superior Court has authority to order any appropriate relief on a class-wide basis on a UDJA claim.¹¹

(b) The City was collaterally estopped by the prior federal court decision in Todd v. City of Aberdeen et al., Case No. C09-1232JCC (W.D. Wash, 2010) (CP 611-619) (**Appendix F**) from re-litigating the issue whether citizens had to vacate the municipal court judgment first before obtaining a declaratory judgment from the Superior Court that the City violated the law when it imposed camera infraction fines on them. In Todd, Judge Coughenour ruled that the plaintiff class of citizens that were issued camera infractions and paid excessive fines did not have to vacate the municipal court judgment on their traffic infractions first to recover the fines improperly imposed by the City of Seattle and other cities.¹²

(c) Doe did not hold that res judicata barred the plaintiff’s attack on the municipal court judgment in the Superior Court. It held the opposite. It held that collateral estoppel did not bar Doe from claiming in the Superior Court that the municipal court had illegally imposed court costs on him for a deferred DUI prosecution. The Doe court held that the imposition of costs was illegal at the time and the judgment was void.

¹¹ See Nelson v. Appleway Chevrolet, 160 Wn.2d 173, 185 (2007).

¹² At the May 8 hearing, Judge Schapira said she believed Judge Coughenour had not made such a ruling, but when she reviewed the order she admitted he had. Trans., RP 52-55.

The Doe court, having first ruled that the municipal court acted illegally and that the judgment was void, then held that under those circumstances, Doe had to return to the municipal court to get a refund of the costs illegally imposed on him by the municipal court by vacating the judgment for costs under the municipal court's criminal procedure rules. Doe is distinguishable in at least 9 different ways from our case:

1. In Doe, the Superior Court and the Doe court had already ruled that the municipal court violated the law by imposing court costs on the plaintiff. Hence the plaintiff had already obtained the very type of declaration of illegality Boone sought from the Superior Court here.

2. The Doe court did not consider in any manner the Washington Supreme Court's decision in Orwick that held in a case involving the City of Seattle that the Superior Court could enter the type of declaratory judgment sought by Boone here rather than the municipal court.

3. In Doe, unlike our case, there had not been a prior federal court ruling against the municipality that citizens could obtain a declaratory judgment on the legality of the municipal court fines in the Superior Court without going to the municipal court first, like the Todd ruling applicable here.

4. Doe involved a direct claim against the municipal court that had improperly imposed court costs for a deferred DUI prosecution under a municipal court procedure. Unlike Boone's claim, Doe's claim was not against the City of Fife for wrongfully issuing the subject DUI infraction;

5. Doe involved a criminal proceeding that was subject to the rules of criminal procedure. Boone's infraction is a civil infraction that is governed by the automated traffic camera statute and civil procedure rules.

6. In Doe, the Superior Court did not retain jurisdiction to decide if the municipality violated the law. Here, Judge Schapira did.

7. In Doe, the Superior Court did not rule there were disputed facts on whether the City of Fife had violated the law by issuing the infraction that had to be resolved by a Superior Court jury. Here, Boone's only basis for vacating the judgment is that the infraction was illegally issued. But Judge Schapira ruled that the jury must resolve disputed facts to determine if the infractions were improperly issued. Under the law of the case, the jury, not the municipal court must decide the facts necessary for Boone and the Boone Class to vacate the municipal court judgments.¹³

8. In Doe, the court held that each DUI defendant could return to the municipal court to get a refund on an individual basis of the illegally imposed court costs. But in Doe, no class had been certified. Here Judge Schapira certified a CR 23(b)(2) class and appointed Boone the representative for all citizens seeking relief from the City's improperly issued infractions. Under CR 23(b)(2) and the court's certification order, these class members are not entitled to notice and would be unfairly disadvantaged by not having Boone represent them in getting a refund if the Superior Court finds that the infractions were improperly issued.

¹³ Accordingly, there is nothing for the municipal court to do. The jury must decide first.

9. Because a class has been certified here, unlike Doe, there is no legal basis to force each individual class member to go to the municipal court to get a refund on the same basis that Boone seeks a judgment in the Superior Court, i.e. that the municipal court judgment should be vacated because the infractions were improperly issued due to unlawful signage.

e. Even if Doe had held that res judicata applied – which it did not - it would be inequitable to apply res judicata to bar Boone’s refund claims because Judge Schapira’s order creates a “catch-22” that deprives Boone of both due process and his right under the Washington Constitution to a jury determination of the disputed factual issues. Res judicata is an equitable doctrine and it would be inequitable to apply it here because the only basis for vacating the municipal court judgment that Boone can assert is that the City’s infractions were improperly issued due to its unlawful signage. But that is the very the issue over which Judge Schapira retained jurisdiction and the jury must decide. The effect of Judge Schapira’s order is to deprive Boone of due process by taking away the only basis he has to vacate the municipal court judgment in the municipal court. It also deprives Boone of his right to have the jury decide the factual issues.

f. Judge Schapira treated Boone’s request for a refund as the only possible relief that could be afforded on a finding of liability on his UDJA claim. But Boone could have obtained broader or different relief, including disgorgement and damages under Nelson, supra.

III. STATEMENT OF THE CASE

A. Summary of Case and UDJA Claim

This is a certified class action alleging a Uniform Declaratory Judgment Act (UDJA) claim. The Plaintiff and class representative, Nicholas Boone, alleges that the Defendant City of Seattle (the “City”) issued him a Notice of Infraction (“Notice” or “infraction”) because the City’s automated traffic camera photographed his car going over the 20 mph speed limit in a “School Speed Zone” (“school zone”). Mr. Boone alleges that the Notice of Infraction was unlawfully issued by the City because the City’s signage for the school zone did not comply with the mandatory form of signage required by the Washington Legislature for school speed zones that use an automated traffic camera.

The Legislature gave cities permission to issue infractions to a car’s owner based solely on a photo of the car taken by an automated camera even if the owner was not the driver. The photo does not identify the driver. It only shows the car’s license plate number and the City can only identify the owner from the photo. Nevertheless, the Legislature allowed cities to cite car owners, not drivers, for violating the traffic laws based on a photo of the car’s license plate over the obvious due process concerns of car owners.¹⁴ But in exchange, the Legislature expressly limited the use of such cameras to specific types of locations and mandated among other conditions that cities “must” use an approved form

¹⁴ After receiving an infraction, a car owner can dispute the infraction if s/he was not driving the vehicle.

of signage with specific words and not others. RCW 46.63.170(1)(h). The Legislature did so for the expressly stated purpose and intent of requiring uniformity in the signs used by all cities that wanted to use automated traffic cameras to issue infractions. Stated simply, the Legislature did not force cities to use automated cameras to issue infractions. But if a city wanted to use cameras to save itself the cost of having police officers issue the infraction based on the officer's personal observation, the city had to comply with the Legislature's mandates and conditions. Compliance was not optional or at the discretion of the city. Rather the applicable legislation and regulations contain the terms "must" and "shall."

But contrary to the Legislature's desire for uniformity, the City did not comply with the required form of signage and wording for three of its nine school zones. It used its own form of signage with its own wording. From June 8, 2012 to August 9, 2014, it used non-conforming signs when using cameras to issue infractions based solely on a photo of the license plate.¹⁵

One might expect that the City would have a good reason for doing so, supported by competent analysis and/or studies showing that safety was increased and infractions were decreased as a result of its use of its own verbiage rather than the words mandated by law and regulation. But, in fact, the City cannot say why it used non-conforming signs. At its

¹⁵ The City changed the wording of its signs in the 3 locations at issue in August 9, 2014. See, dep. of City through 30(b)(6) representative, Dougherty at 35-36, CP 337-338.

March 25, 2015 deposition, the City admitted that no one knows why the City used non-conforming signs. It also admitted it knows of no studies, analysis or investigation regarding the wording it used.¹⁶

The City also knows of no one who tried to figure out if adding extra words to the signs, as the City did, would make the signs harder to read, or would diminish the driver's response time. Dougherty dep. p. 33, CP 699. The City knows of no one who tried to disprove the Federal Highway Administration's opinion that shorter language makes it easier for drivers to comprehend school speed zone signs. Id. at 34, CP 700.

As disheartening as that is with regard to how a city exercises the limited governmental power to use traffic cameras entrusted to it by the Legislature, it is more disquieting that the City admits that the proper and required signage was always readily available to the City in the Manual of Uniform Traffic Control Devices (the "MUTCD"). The MUTCD has pictures of what the proper and required signage is supposed to look like. The MUTCD literally tells a city how to assemble the signs for school speed zones with proper signage and the required wording.¹⁷

The City cannot articulate any reason that was in fact the reason the City did not to simply look at the MUTCD, select one of the permitted sign assemblies that used the required wording, and use that sign in the three school speed zones at issue. One is left with the inescapable

¹⁶ See, March 25, 2015 deposition of City through 30(b)(6) representative and City Traffic Engineer, Dong-Ho Chang, at 7, 12-13, 51-52 and 54-55, CP 315-317, 322-325.

¹⁷ See, Dougherty dep., at 37-39, CP 339-341 and CP 344-345.

conclusion that the City's use of its own wording was due to nothing more than oversight and sheer negligence rather than a thoughtful judgment.

According to the city's statistics, of the over 98,000 infractions issued (from 2012 through January 2015 in all school speed zones), over 20% of all drivers cited were going only 26 mph. The average speed of all drivers cited was only 29 mph.¹⁸ That speed is unlikely to draw an infraction from an observing police officer.

B. The Automated Traffic Camera Legislation at Issue

In 2005, the Washington Legislature gave cities permission to use automated traffic cameras to issue infractions but imposed certain limitations. One was that cameras could only be used at two-arterial intersections, railroad crossings and school speed zones. RCW 46.63.170(1)(b). In 2012, the legislature amended the camera statute and required that "signs placed in automatic traffic safety camera locations after June 7, 2012 must follow specifications and guidelines under the manual of uniform traffic control devices" ("MUTCD"). RCW 46.63.170(1)(h) (emphasis added). The Legislature chose to require that cities comply with one of the forms of signage specifically approved in the MUTCD. The requirement was "must," i.e. mandatory, not permissive or advisory.

C. The WAC Governs School Speed Zone Sign Assemblies

The three school speed zones at issue are at Olympic View

¹⁸ See, Breskin Declaration submitted in support of Plaintiff's Motion for Summary Judgment at ¶ 2, CP 175.

Elementary, Gatewood and Broadview-Thompson. While these school speed zones use cameras to issue infractions, signage required at all school speed zones, including ones that use and do not use a camera, has been governed by WAC 468-95-340 since at least 2003. The WAC has required since then that school speed zones comply with the MUTCD. So before the 2012 amendment to the camera statute, the WAC had required that the City of Seattle have only one bottom plaque that was one of five permissible signs shown in the MUTCD. See MUTCD 7B.15, ¶ 09. WAC 864-95-340 reads:

“Amend paragraphs 08 and 09 of the standard in MUTCD Section 7B.15 to read:

The School Speed Limit assembly shall be either a fixed-message sign assembly or a changeable message sign. The fixed-message School Speed Limit assembly shall consist of a top plaque (S4-3) with the legend SCHOOL, a Speed Limit (R2-1) sign, and a bottom plaque (S4-1, S4-2, S4-4, S4-6, or S4-501) indicating the specific periods of the day and/or days of the week that the special school speed limit is in effect (see Figure 7B-1).

The City admits that the signs at issue are “fixed-message sign assemblies” and hence, under the WAC, they “shall consist of... a bottom plaque (S4-1, S4-2, S4-6, or S4-501.) Those are the only alternatives.

One permissible alternative is the “WHEN FLASHING” plaque.¹⁹ But the City installed signs at the three school speed zones with cameras at issue that read “OR WHEN LIGHTS ARE FLASHING” (emphasis

¹⁹ See MUTCD Figure 7B-1, CP 180-182.

added). The City's signage is clearly contrary to the mandatory signage required by the WAC and is also contrary to the Legislature's stated intent in amending the camera statute in 2012 to have uniform signage. See, RCW 46.63.170(1)(h), emphasis added:

The legislature finds that it is in the interests of the driving public to continue to provide for a uniform system of traffic control signals, including provisions relative to... signage...

Accordingly, by using non-conforming signage, the City not only violated the MUTCD and WAC but frustrated the Legislature's intent in permitting the use of cameras to have a uniform signage.

On March 25, 2015, Boone took the City's deposition through two 30(b)(6) representatives, Dong-ho Chang and Brian Dougherty. Chang is the City Traffic Engineer for the City.²⁰ Dougherty is a Senior Transportation Planner. His primary duty is school traffic safety.²¹ At its March 25 deposition, the City admitted that it had to use only one of the sign assemblies in the MUTCD. It admitted one option in the MUTCD stated "WHEN FLASHING." It admitted there was no plaque that said, "OR WHEN LIGHTS ARE FLASHING." The City also admitted that the Legislature amended the camera statute to require uniform signage. See, Chang dep., at 12, 51-52 and 54-55, CP 316, 322-325.

²⁰ See, Chang dep., at 7, CP 315.

²¹ Dougherty dep., at 6, CP 333.

D. The Relevant MUTCD Sections

The MUTCD sets out the federal standards for traffic control devices of which signage is one type. See, 23 U.S.C. § 109(d); 23 C.F.R. § 655.603. Each provision in the MUTCD is prefaced by a text heading stating that the provision contains either a “Standard,” “Guidance,” “Option,” or “Support.” Each term is defined differently.

The relevant MUTCD provision is Section 7B.15. It sets out the required signage for school speed zones. The signage is a “Standard.”

Section 1A.13 defines a “Standard” as a “statement of required, mandatory... practice regarding a traffic control device.” Emphasis added. Thus, it is “mandatory” under Section 7B.15 that the City of Seattle use one of the permissible options for the bottom plaque of the School Speed Zone limit assembly sign. The City failed to comply with MUTCD Section 7B.15 when it used signs stating, “OR WHEN LIGHTS ARE FLASHING” instead of “WHEN FLASHING.” Emphasis added.

E. Plaintiff Boone’s Infraction and Lawsuit

On February 6, 2014, Boone was issued an infraction because an automated traffic camera photographed his car going 27 mph in a 20 mph school zone located near the Olympic View School. See Infraction, CP 187-190. Boone then paid the City a fine of \$189.00, not knowing that the Notice was improperly issued. Boone Decl., CP 349.

On June 18, 2014, Boone served the City with a tort claim (“Notice of Claim”) and received no response. CP 14. So on August 18, 2014, Boone filed the instant class action. On April 1, 2015, the trial court

entered an order granting certification Boone's UDJA claim for a class of citizens who were sent infractions from June 8, 2012 to August 9, 2014 for the three school speed zones at issue. See Order, CP 247-252.

F. The Prior "School Speed Zone" Case Involving the City

In 2013, a car owner, Joseph Hunt, brought a similar school speed zone case against the City of Seattle. He also alleged that the City had failed to comply with the mandatory requirement that its signs say "WHEN FLASHING" rather than "WHEN LIGHTS ARE FLASHING." He alleged that the City's failure to comply meant that the issuance of his infraction was unlawful and that the fine he paid should be refunded. See, City of Seattle v. Joseph Hunt, Case No. 13-2-25366-6 SEA.

On March 10, 2014, the Hunt case came before Judge Heller of the King County Superior Court for resolution. After rejecting the City's defenses, Judge Heller ruled in Mr. Hunt's favor and entered an order that the City violated the mandatory signage requirement of Washington law by using the "WHEN LIGHTS ARE FLASHING" signs rather than the "WHEN FLASHING" signs set out in the MUTCD. Judge Heller also ruled that the issuance of the infraction to Hunt was unlawful because the City failed to comply with the law by using proper signs. ²²

In June 2014, the *Seattle Times* reported on the Hunt case. The City's Traffic Engineer, Mr. Chang, consulted with the City's attorney about the story and decided to comply with Judge Heller's order by

²² See, Order, CP 254-256.

changing the signs to “WHEN FLASHING” signs. Chang testified that the reason for doing so was that he did not want drivers to think they could speed in school zones based on Judge Heller’s order. He did not give any other reason for why the City chose not to appeal the order.²³

G. The City’s Deposition Through its 30(b)(6) Representatives

As discussed, on March 25, 2015, Boone took the City’s deposition through two CR 30(b)(6) representatives, Chang and Dougherty. The City admitted that the MUTCD and WAC required the use of specific bottom plaques and one of the permissible signs stated “when flashing,” and not “or when lights are flashing.” Chang dep. at 54-55, CP 324-325.

The City was unable to provide any reason for why it used the language it used or even identify who made the decision and when. Chang has been with the City’s Traffic Engineer only three years. The signs were installed well before he began and he was unable to find out who made the decision and why. Chang dep. at 7 and 19, CP 315, 318. The City’s other designated 30(b)(6) representative, Mr. Dougherty, who works in the City’s traffic engineering department and has been with the City for six years, said he did not know who made the decision, when or why. Dougherty dep. at 11-12, CP 159, 334.

²³ See, Chang decl. in support of summary judgment motion, CP 373-418.

Indeed, there is no evidence a “decision” per se was made because the City’s documents also failed to provide any reason for the non-conforming signs in the three school zones at issue. The document most on point was a 1999 engineering department memo saying that all signage in school zones was to be changed to “when flashing” by no later than September 4, 2002. See, Chang deposition, at 26, CP 319 and Memo, Dep. Exhibit 3 (p. 1 under heading, “Project Description” and p. 4 under heading, “Project Sites and Action Areas” and “Timing – Construction Schedule”), CP 327-330.

Despite this memo in 1999, the City admits that no change was made at the three school zones at issue until August 2014. It does not know why and as noted, there is no documentation explaining why.

The City also admits that there were no studies or analysis done that relate to the decision to use signage with the extra words “OR WHEN LIGHTS ARE FLASHING,” instead of “WHEN FLASHING.” Chang dep, at 44, CP 321; Dougherty dep., at 1, CP 332.

There is no evidence that anyone used any engineering judgment or analysis in deciding to use more words. There is no evidence about how or why the decision was made. Instead, there is evidence that the city’s staff simply chose a sign out of its own “sign book” of City approved signs without regard to the permissible sign options in the MUTCD. Dougherty dep., at 22, CP 335. The “sign book” the City produced has a date of 1992 but does not have a sign that says either “WHEN FLASHING” or “WHEN LIGHTS ARE FLASHING” or “OR WHEN

LIGHTS ARE FLASHING” See, sign book, CP 192-245. Accordingly, the City’s sign book does not comply with the MUTCD either.

The City testified it would have cost about \$1,000 per school zone to have conforming signs. Dougherty dep. at 53, CP 342.

H. Summary Judgment Motions and May 8 Hearing

On April 3, 2015, Judge Schapira certified the case as a class action under CR 23(b)(2). The parties then brought cross-motions for partial summary judgment. The City moved to dismiss the Plaintiff’s “refund” claim asserting that under Doe v. Fife Municipal Court, supra., Boone’s refund claim was barred by res judicata unless he vacated the municipal court judgment and should be ordered, under Doe, to do so.

At the hearing on class certification, the City conceded that the Superior Court had jurisdiction to enter a judgment on Boone’s UDJA claim that its signs were non-conforming and that its issuance of the infraction to Boone was illegal. The City’s summary judgment motion addressed only the relief the court might order upon a finding of liability.

Plaintiff Boone’s motion for partial summary judgment sought a declaration that the City’s signs were non-conforming at the three school speed zones at issue and the infractions issued unlawful. As discussed, the motion sought the identical rulings that Judge Heller entered against the City in the Hunt case that the City chose to comply with and not appeal.

On May 8, 2015, Judge Schapira considered the two motions together and the entire record presented on the motions. She granted the City’s motion based solely on her reading of Doe v. Fife Municipal Court

that Boone's refund claim, as a type of relief on the UDJA claim, was barred by res judicata in the Superior Court until he vacated the municipal court judgment. She denied Boone's summary judgment motion.

While the court's May 8 order does not give any reason for denying Boone's motion, Commissioner Neel found the reason was disputed issues of fact that the jury had to resolve before a determination could be made if the City was liable for its non-conforming signs.

IV. ARGUMENT

A. De Novo Review Applies

Summary judgment orders are reviewed "de novo."²⁴

B. The Orwick, Nelson, Doe and Todd Decisions

In Orwick, 103 Wn. 2d 249, the Washington Supreme Court held that the Superior Court, not the municipal court, has original jurisdiction over a UDJA claim that the City of Seattle systematically violated the law in applying a city ordinance. Municipal courts do not have exclusive jurisdiction over such a claim even though it relates to the enforcement of a city ordinance. Orwick, 103 Wn.2d at 252:

[A] municipal court does not have exclusive original jurisdiction merely because the factual basis for a claim is related to enforcement of a municipal ordinance. The relevant consideration for determining jurisdiction is the nature of the cause of action and the relief sought...Petitioners' claim for injunctive and declaratory relief is based on their rights under a state statute and the state and federal constitutions. These claims do not "arise under" a municipal ordinance and, therefore, are not within the exclusive jurisdiction of the Seattle Municipal Court.

²⁴ Doe, 74 Wn. App. at 448.

Boone's claim is for declaratory relief based on the City's systematic violation of Washington law by issuing infractions at school speed zones with signs that violate the WAC, MUTCD and camera statute. Boone seeks equitable relief that flows naturally from a finding of a violation and is within the authority of the Superior Court to award.²⁵

Orwick was decided in 1984. The Washington Supreme Court has not vacated Orwick or rejected its reasoning or approach to municipal court jurisdiction in any subsequent case for over thirty years.

In 1994, Division II of the court of appeals decided Doe v. Municipal Court of Fife, the case relied on by Judge Schapira in our case. In Doe, plaintiff Doe was a defendant charged with DUI – a criminal infraction. He obtained a deferred prosecution by paying certain court costs. The Fife municipal court imposed the costs on Doe at a time when there was a statutory prohibition on doing so. Doe sued in the Superior Court to recover the court costs. The Superior Court ruled that he had to go to the municipal court to recover the costs paid to the municipal court. Doe sought review from the Washington Supreme Court. The Court transferred the case to Division II. It held that Doe had to go to the municipal court to get a refund of his court costs based on the criminal rules of procedure for courts of limited jurisdiction. CrRLJ 7.8.

²⁵ See, Nelson v. Appleway Chevrolet, 160 Wn. 2d 173 (2007).

The Doe court rejected the defendant's assertion that Doe's claim was barred because he had not previously sought to vacate the municipal court judgment, 74 Wn. App. at 451 stating, cite omitted:

The Limited Courts contend, finally, that the Does could have directly appealed the imposition of court costs and that their failure to do so should bar their suits to recover the costs. Even assuming that an appeal would lie, cases permitting a void order to be collaterally attacked do not appear to require that a direct appeal be exhausted or even pursued.

Unlike Boone's case, Division II in Doe noted that the Superior Court found that the Fife municipal court had violated the law by imposing the court costs under controlling precedent and that the legislature had subsequently changed the law²⁶ In other words, Doe had the very type of declaratory judgment that Boone sought in his motion before Judge Schapira before Doe was ordered to return to the municipal court to get back his costs. See, also, 74 Wn. App. at 449, n.8 ("we note that the trial court found that the judgment requiring the Does to pay court costs was void").

Division II's decision requiring Doe to go to the municipal court to get a refund of the illegally imposed costs under criminal procedure rule 7.8 was based on its conclusion that the judgment of the municipal court for court costs was void and that the municipal court could not assert

²⁶ 74 Wn. App. at 447-448, stating: In reaching its decision, the trial court took note of this court's decision in State v. Friend, 59 Wn. App. 365, 797 P.2d 539 (1990), in which we held that RCW 10.05 did not, at that time, authorize courts of limited jurisdiction to impose court costs on defendants who successfully petitioned for deferred prosecution. See also, 448, n.7.

collateral estoppel as a bar. 74 Wn. App. at 451, n. 9, stating, emphasis added:

Because we conclude that the judgement of court costs was void, we need not address the Does' additional arguments... Neither is it necessary for us to address their contention that even if the order imposing court costs here was subject to collateral estoppel, the collateral estoppel factors would weigh against the Limited Courts asserting it as a bar.

It is quite clear that Judge Schapira “bought” the City’s res judicata argument without reading Doe carefully as the decision does not hold that res judicata barred Doe’s claim – it holds the opposite. Indeed, in a similar vein, Judge Schapira admitted at the May 8 hearing that she misread Judge Coughenour’s decision in Todd that Orwick did not control, when Judge Coughenour had so ruled against the cities. See, trans., RP 53-55.

Doe was decided in 1994, ten years after the Washington Supreme Court’s decision in Orwick. Division II does not mention let alone discuss Orwick. The Doe decision has not been followed or applied by any other Washington court with regard to its interpretation of CrLJR 7.8.

In Todd v. City of Auburn et al., Case No. C09-1232JCC (W.D. Wash, 2010) (CP 611-619), the plaintiff class of citizens alleged that the defendant cities, including the City of Seattle, violated the camera statute’s limitation on the amount of the fine that could be imposed for an infraction to the amount of a normal parking ticket, around \$35. Instead, the cities, like the City of Seattle, imposed a fine of \$189. The plaintiffs

sought a refund of the difference between the amount charged and a normal parking ticket.²⁷

The cities argued that the plaintiffs had to seek relief from the municipal court. Judge Coughenour rejected the argument and ruled that under Orwick, the Superior Court and hence the federal court, had jurisdiction to decide the plaintiff's UDJA claim that the cities had systematically violated the camera statute's limitation by imposing excessive fines for infractions on the plaintiffs. Id.

The Todd order was entered in 2010 and appealed to the Ninth Circuit. The Ninth Circuit affirmed the order on the merits without addressing Judge Coughenour's ruling that the plaintiffs could bring their UDJA claim before the federal court. That ruling however was a necessary procedural decision before Judge Coughenour enabling the Ninth Circuit to reach the merits of the plaintiff's claim.²⁸

In Nelson v. Appleway Chevrolet, 160 Wn. 2d 173 (2007), a car dealer charged customers a "B&O tax charge" to recoup its B&O tax owed to the state on the sale of the car. The B&O tax statute prohibited retailers from passing onto consumers their B&O tax liability. A plaintiff class of consumers sued on a UDJA claim for a judgment that the defendant's B&O tax practice violated Washington law. The Washington

²⁷ See, Judge Coughenour's order in Todd v. City of Auburn et al, CP 611-619.

²⁸ See, Todd v. City of Auburn et al, No. 10-35222 (9th Cir. 2011) (unpublished). The Ninth Circuit affirmed the order granting defendants' judgment on the merits of the plaintiff's claim that there had been no violation of the camera statute.

Supreme Court held that the Superior Court had broad discretion on a class action UDJA claim for improperly imposed fees to fashion appropriate relief, including a refund or disgorgement of the fees. Id at 185.

In our case, the Superior Court has jurisdiction on Boone's UDJA claim to fashion broad appropriate relief including a refund.

C. The Order is Inconsistent with Orwick and Nelson

Based on Doe, Judge Schapira ruled that before Boone and the Boone Class could obtain a determination of liability on his UDJA claim, Boone and each Class member had to individually seek to vacate their municipal court judgment. The ruling is clearly contrary to Orwick.

In Doe, Division II did not address the Superior Court's subject matter jurisdiction to order equitable relief of the type Boone seeks in our case. 74 Wn.App. at 444. It did not discuss Orwick. Instead, it opines that the "Washington Supreme Court intended to make CrRLJ 7.8 an exclusive remedy" for a municipal court order that violates Washington law.²⁹

²⁹ The Doe Court states, 74 Wn. App. at 454, emphasis added:

Furthermore, an examination of CR 60(c) together with CrRLJ 7.8 leads us to the conclusion that the Supreme Court intended to make CrRLJ 7.8 an exclusive remedy. We reach that conclusion because CrRLJ 7.8 does not contain a provision equivalent to CR 60(c), which provides that the rule does not limit a court's ability to entertain an independent action to relieve a party from a judgment or order. The lack of an equivalent provision in CrRLJ 7.8 suggests that the criminal rule was intended as the exclusive mechanism for a party to obtain relief from a judgment or order, and that an independent civil action is, thus, barred.

But that cannot possibly be correct under Orwick with regard to Boone's UDJA claim because the Washington Supreme Court held in Orwick that the Superior Court, not the municipal court, has jurisdiction over a UDJA claim asserting the City of Seattle's systematic violation of law in applying of a city ordinance. The municipal court does not have exclusive jurisdiction. Orwick, 103 Wn.2d at 252, emphasis added:

[A] municipal court does not have exclusive original jurisdiction merely because the factual basis for a claim is related to enforcement of a municipal ordinance. The relevant consideration for determining jurisdiction is the nature of the cause of action and the relief sought...Petitioners' claim for injunctive and declaratory relief is based on their rights under a state statute and the state and federal constitutions. These claims do not "arise under" a municipal ordinance and, therefore, are not within the exclusive jurisdiction of the Seattle Municipal Court.

Boone alleges that the City of Seattle systematically issued camera infractions³⁰ at the three school zones at issue despite having signage that violated the law and that doing so was unlawful. The Superior Court has jurisdiction under Orwick to determine the liability issue without Boone first vacating the municipal court judgment because the municipal court does not have exclusive jurisdiction over Boone's UDJA claim.

Under Orwick and Nelson, supra., the Superior Court has broad authority to grant relief on a class-wide basis upon a finding of liability. That relief could include disgorgement of the improper fines imposed on Boone and the Boone Class. Id. Accordingly, Judge Schapira's order that

³⁰ As noted above, there were around 98,000 infractions issued at all speed zones.

Boone and the Class are only entitled to obtain a judgment of liability on their UDJA after they individually seek to have their municipal court judgment vacated in the municipal court is inconsistent with Orwick and Nelson. It is also inconsistent with Doe itself, because as noted above the Superior Court and Court of Appeals in Doe had already found the municipal court's judgment imposing court costs on Doe was illegal and the judgment was void.

D. Doe is Distinguishable on Various Grounds.

As discussed above, pages 6-8, Doe is distinguishable from our case on multiple grounds and is clearly limited to its facts and circumstances, as no case in the last 27 years since Doe was decided has followed its holdings. Even so, Doe did not hold that res judicata barred the plaintiff's claim. Nor did Doe hold that the municipal court, rather than the Superior Court had jurisdiction to enter a declaratory judgment that the municipal court had violated the law and its judgment was void. Both the Doe court and the Superior Court ruled that the municipal court violated the law and the Doe court held that the municipal court judgment was vacated. Whether it made sense in Doe, under those circumstances, to return individually to the municipal court to obtain a refund – where no class had yet been certified by the Superior Court – it makes no sense in the circumstances of this case, where the Superior Court has already certified a CR 23(b)(2) Class and appointed Boone as its representative, and Boone's attorneys as Class counsel. Requiring that the Class members represented by Boone return to the municipal court to vacate their

judgments in order to get a determination on liability from the Superior Court is contrary to the certification order, Rule 23, and makes no sense.

Equally, given Judge Schapira's order retaining jurisdiction over the issue of whether the infractions were illegally issued and her order that there are factual disputes that must be resolved by a Superior Court jury, there is nothing for the municipal court to decide. The jury clearly has to decide the factual issues under Judge Schapira's order as interpreted by Commissioner Neel, before a determination can be made the City violated the law by issuing the infraction. But that is the only basis by which Boone could seek to vacate the municipal court judgment.

E. Res Judicata Does Not Bar Boone's UDJA Claim

Putting aside Doe, the City has no res judicata or collateral estoppel affirmative defense that would bar Boone's UDJA claim based on the municipal court judgment. As discussed, under Orwick a municipal court judgment would not bar Boone's UDJA claim in the Superior Court because the Superior Court has original jurisdiction to enter a declaratory judgment and to grant equitable relief. The municipal court has neither.

Even so, the City cannot establish the elements of the affirmative defenses. To establish its res judicata or collateral estoppel affirmative defenses, the City would also have to establish that applying the defenses would not work an injustice. See, Hadley v. Maxwell, 144 Wn.2d 306 (2001). In Hadley, the Washington Supreme Court held that paying a fine for a lane change violation based on a municipal court judgment did not

create sufficient incentive for a citizen to challenge the judgment as to bar a subsequent civil action based on collateral estoppel. The court states:

To determine whether an injustice will be done, respected authorities urge us to consider whether ‘the party against whom the estoppel is asserted [had] interests at stake that would call for a full litigational effort’. . . . In 1981, Washington joined other states in decriminalizing minor traffic offenses. . . .Critics contend the system creates too great an incentive to simply pay the fine rather than incur the time and expense to resist, whether or not the infraction was actually committed. . . Collateral estoppel is, in the end, an equitable doctrine that will not be applied mechanically to work an injustice. To that end, we hold it is not generally appropriate when there is nothing more at stake than a nominal fine. There must be sufficient motivation for a full and vigorous litigation of the issue. (Citations omitted.)

Plaintiff Boone had no motivation for a “full and vigorous litigation” in the Municipal Court because he had nothing more at stake than paying a \$189 fine. Indeed, camera infractions are not criminal infractions and do not go on the driver’s driving record. RCW 46.63.170.

In contrast, in the Todd case, the City was faced with a class action in which the Plaintiffs sought to recover millions of dollars in fines from the City of Seattle. Similarly, in the Hunt case, in which Judge Heller ruled against the City on the merits of the same claim asserted by Plaintiff Boone in our case, the City of Seattle fully appreciated that there was more at stake than Mr. Hunt’s fine. As the City’s Traffic Engineer, Mr. Chang, stated at his deposition, he believed that the ruling in Hunt would give drivers the wide-spread, false impression they could simply violate the speed limit in all school speed zones and public safety would be greatly compromised. Mr. Chang asserts that based on the Hunt case, he

immediately ordered that all of the non-conforming bottom plaques be changed to the proper plaque at the cost of a \$1,000 per plaque.

A res judicata and collateral estoppel defense can also be defeated “on broad grounds of public interest alone.” 18 Wright et. al., *Federal Practice and Procedure* (2002) at § 4415 (citing Mercoird Corp. v. Mid-Continent Ins. Co., 64 S.Ct. 268 (1944)). Obviously, the public has a great interest in determining whether a public entity in Washington has engaged in a systematic violation of law and illegally imposed fines on Washington citizens as a result. It would work an injustice to preclude such a claim based on the Plaintiff paying a small uncontested fee. Hadley, supra.

F. The City is Collaterally Estopped to Reargue the Issue

In Seattle-First Nat'l Bank v. Cannon, 26 Wn. App. 922, 927 (1980), the court stated, cites omitted:

The purpose of collateral estoppel is to prevent relitigation of a particular issue or a determinative fact after the party estopped has a full and fair opportunity to present its case in order to promote the policy of ending disputes. Affirmative answers must be given to the following questions before collateral estoppel is applicable:

(1) Was the issue decided in the prior adjudication identical with the one presented in the action in question? (2) Was there a final judgment on the merits? (3) Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication? (4) Will the application of the doctrine not work an injustice on the party against whom the doctrine is to be applied?

In Todd, the plaintiffs sued the City of Seattle and other cities that issued camera infractions for charging excessive fines. They brought a UDJA and CPA claim that the cities violated the camera statute by

imposing excessive fines. Like the City of Seattle here, the cities asserted that the court could not enter such a declaration because the citizens had not vacated the municipal court judgment imposing the fines. Judge Coughenour rejected the argument. He ruled that under Orwick the Superior Court and hence the federal court could enter a judgment that the cities violated the law without plaintiffs first vacating the municipal court judgments. He stated that “because municipal courts lacked the authority to hear tort claims, Consumer Protection Act (“CPA”) claims, and equitable claims, prior arguments to the municipal courts should be disregarded and considered here afresh.” Order at 4, CP 614.

Boone seeks a “refund” or disgorgement of the improperly imposed camera infraction fines and damages caused by the City of Seattle’s tortious and illegal conduct. The City is estopped by Judge Coughenour’s ruling that a class of Washington citizens need not vacate the municipal court judgment prior to obtaining a declaratory judgment, a refund or other equitable relief in the Superior Court. Each of the four elements of collateral estoppel are met: (1) the issues are identical; (2) there was a final judgment on the merits – Judge Coughenour entered an order granting summary judgment; (3) the City of Seattle was a defendant in the Todd case; and (4) there is no injustice to the City because it was

given a full and fair opportunity to (unsuccessfully) argue its position to Judge Coughenour.³¹

G. **Res Judicata Does Not Apply**

The party asserting an affirmative defense of res judicata must establish Doe does not say that. It held the municipal court judgment was void because it imposed court costs on the plaintiff in violation of law.

Putting Doe aside, the City cannot prove the elements of a res judicata affirmative defense. First, the judgment in the municipal court did not determine Boone's UDJA claim in this action that the City violated the law by non-conforming signage and by issuing camera infractions with illegal signs. As the Orwick court made clear, the Superior Court has jurisdiction to decide the UDJA claim, not the municipal court. And as Judge Coughenour ruled in Todd, because the municipal court lacks jurisdiction to rendered such a declaration and enter relief based on such a determination, those claims can be made "afresh" in the Superior Court.

Equally, it would be injustice to apply res judicata to bar Boone's claim in the Superior Court because Judge Schapira's order creates an unfair "catch 22" and an injustice. As discussed, the only basis Boone has

³¹ The City has argued before that because the Ninth Circuit affirmed Judge Coughenour on the Plaintiff's appeal of the summary judgment order entered against the Plaintiff by Judge Coughenour without reaching Judge Coughenour's ruling on the court's jurisdiction to enter a judgment on the merits without the plaintiff first vacating the municipal court judgment, it would be unfair to give collateral estoppel effect to Judge Coughenour's ruling. But the City has not cited any authority that supports that position and it makes no sense, since the "full and fair opportunity" to be heard was before Judge Coughenour before he entered his order. The City does not dispute that it was given a full and fair opportunity to argue its position to Judge Coughenour before he ruled. And, of course, the City has been given the full benefit of his ruling on the merits.

to vacate the municipal court judgment is that the City illegally issued the camera infraction because it violated the law requiring proper signage in the school zones. But that is the issue the Superior Court retained jurisdiction over and which can only be decided after the jury resolves factual disputes. Given Judge Schapira's order, Boone cannot present his argument for vacating the judgment to the municipal court.

The final judgment in the prior action involved the identical claim and that it would not work an injustice to apply doctrine against the party to which it is being applied. As noted, Judge Schapira relied solely on her misread of Doe to rule that res judicata barred Boone's "refund claim" in the Superior Court based on the prior municipal court judgment because the judgment could not be attacked as void in the Superior Court. The Order Violates Due Process and Right to Jury

As discussed, by setting up a "catch 22" whereby Boone has to wait to seek a judicial determination from the Superior Court that the City violated the law in issuing the camera infraction until after he seeks to vacate the municipal court judgment, Judge Schapira's order violates Boone's due process rights. He simply cannot move to vacate the judgment in the municipal court based on the only reason he has for doing so because Judge Schapira retained jurisdiction to decide that issue.

Similarly, Judge Schapira deprives Boone of his right to have the jury decide those facts by compelling Boone to move to vacate the judgment when Judge Schapira's order requires a jury determination of disputed factual issues first because Boone can present the only reason he

has to vacate the judgment to the municipal court. Boone cannot present to the municipal court the facts showing that the City violated the law and that its issuance of the camera infraction to him was illegal in order to have the municipal court judgment vacated, unless he waives his right to have the Superior Court jury decide those issues. This violates Boone's right, secured by the Washington Constitution, to a trial by jury shall remain "inviolate."³²

V. CONCLUSION

Judge Schapira misread the Doe decision, failed to read Judge Coughenour's decision in Todd correctly and did not adhere to the Washington Supreme Court's decision in Orwick. Her order is contrary to her prior class certification order under CR 23(b)(2) and sets up an unfair "Catch-22" that deprives Boone of any meaningful way to seek to vacate the municipal court judgment. The order deprives Boone of due process and violates his right to a jury trial. The order should be vacated.

³² Again, to be clear, Plaintiff believes Judge Schapira erred as a matter of law in ruling that disputed issues of fact exist that preclude a judgment being entered in favor of Boone and the Boone Class. Plaintiff moved this Court to modify Commissioner Neel's decision denying review of that error by Judge Schapira but no decision has been rendered on the motion to modify.

DATED this 23rd day of November, 2015.

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on November 23, 2015, I caused the foregoing to be filed via legal messenger with:

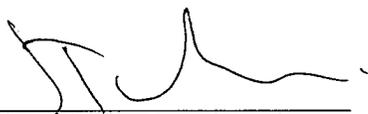
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Court of Appeals, Division I
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APPENDIX A



HERBERT NELSON, *Individually and on Behalf of All Others Similarly Situated*,
Respondent, v. APPLEWAY CHEVROLET, INC., ET AL., *Petitioners*.

No. 77985-6

SUPREME COURT OF WASHINGTON

160 Wn.2d 173; 157 P.3d 847; 2007 Wash. LEXIS 295

October 19, 2006, Argued

April 26, 2007, Filed

PRIOR HISTORY: *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 121 P.3d 95, 2005 Wash. App. LEXIS 2682 (2005)

DISPOSITION: The supreme court affirmed the appellate court

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: An individual who purchased a vehicle from a dealership pursuant to a sales agreement under which the plaintiff was required to pay an additional amount designated as "business and occupation tax overhead" sought a declaration that the dealership's practice of itemizing and collecting business and occupation tax from customers, and of collecting sales tax on the business and occupation tax, was unlawful. The plaintiff also sought an injunction prohibiting the dealership from assessing or collecting business and occupation tax from Washington customers in the future and restitution damages on the basis of unjust enrichment. The plaintiff sought certification of the action as a class action on behalf of all customers from whom the dealership had assessed and collected the business and occupation tax.

Superior Court: The Superior Court for Spokane County, No. 04-2-01725-9, Kathleen M. O'Connor, J., on

October 13, 2004, entered a judgment in favor of the plaintiff. The court ruled that the dealership's practice of itemizing and collecting the business and occupation tax from customers, and of collecting sales tax on the business and occupation tax, violated the business and occupation tax statute. The court also enjoined the dealership from itemizing and collecting the business and occupation tax from customers in the future and certified the class.

Court of Appeals: The court *affirmed* the judgment at 129 Wn. App. 927 (2005), holding that the plaintiff properly pursued his claim as a declaratory judgment action; that the dealership's practice of itemizing and collecting business and occupation tax from customers, and of collecting sales tax on the business and occupation tax, violated the business and occupation tax statute; and that the trial court did not abuse its discretion in certifying the class.

Supreme Court: Holding that the dealership improperly charged the plaintiff business and occupation tax on top of the final negotiated purchase price of the vehicle, that the plaintiff may seek declaratory relief, and that the trial court properly certified the class, the court *affirms* the decision of the Court of Appeals and the judgment.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] Statutes -- Construction -- Question of Law or Fact -- Review -- Standard of Review. The construction of a statute is a question of law that is reviewed de novo.

[2] Statutes -- Construction -- Unambiguous Language -- Plain Meaning -- In General. Unambiguous statutes are applied according to their plain language. There is no need to construe an unambiguous statute.

[3] Taxation -- Business and Occupation Tax -- Nature -- Incidence -- Business Overhead -- What Constitutes -- In General. Under *RCW 82.04.500*, the business and occupation tax is a tax on business, not customers, and should be part of a business's operating overheads. A business's operating overheads are those general charges or expenses that cannot be charged up as belonging exclusively to any particular part of the work or product. Examples of overhead include rent, taxes, insurance, lighting, heating, accounting and other office expenses, and depreciation. In general terms, overhead is the aggregate cost of doing business.

[4] Taxation -- Business and Occupation Tax -- Nature -- Pass-On to Customers -- Validity. Under *RCW 82.04.500*, a business may not charge business and occupation tax to a customer as an add-on to the final price negotiated for the good or service purchased by the customer. The business must treat the tax as an operating overhead that is factored into the price at which a good or service is offered for sale. The tax may not be levied directly on customers by the artifice of an additional charge or itemization to an established price.

[5] Statutes -- Construction -- Administrative Construction -- Court's Ultimate Responsibility. The courts, not administrative agencies, have the ultimate authority to construe statutes. While a court may accord deference to an administrative interpretation of a statute, the administrative interpretation is never binding on the courts.

[6] Statutes -- Construction -- Administrative Construction -- Deference to Agency -- Ambiguity -- Necessity. An agency's interpretation of an unambiguous statute is not entitled to deference by a court.

[7] Statutes -- Construction -- Administrative Construction -- Conflict With Statute. An agency's interpretation of a statute is not entitled to deference by a court if the agency interpretation conflicts with the

statute.

[8] Taxation -- Business and Occupation Tax -- Nature -- Pass-On to Customers -- Statutory Prohibition -- Validity -- First Amendment. A statutory requirement that a business may not charge business and occupation tax to a customer as an add-on to the final price negotiated for the good or service purchased by the customer does not implicate the First Amendment. Where the business remains free to disclose or itemize to a customer any tax or cost that is a component of the sale price of a good or service, the First Amendment is not implicated.

[9] Declaratory Judgment -- Statutory Provisions -- Construction -- Liberal Construction. The Uniform Declaratory Judgments Act (chapter 7.24 RCW) is intended by the legislature to be liberally construed.

[10] Statutes -- Applicability -- Determination -- Declaratory Action -- Standing -- Test. A party has standing to bring a declaratory judgment action to determine the scope or applicability of a statute if the party (1) is within the zone of interests protected by the statute and (2) has suffered an injury in fact, economic or otherwise.

[11] Taxation -- Business and Occupation Tax -- Nature -- Pass-On to Customers -- Statutory Prohibition -- Scope -- Determination -- Standing. An individual who, in purchasing a good or service, is charged for and pays an additional sum on top of the agreed purchase price for business and occupation tax has standing to seek a judicial declaration concerning the scope of *RCW 82.04.500*, which directs that business and occupation taxes constitute a part of the operating overheads of business entities and are to be levied upon and collected from such entities.

[12] Declaratory Judgment -- Justiciable Controversy -- What Constitutes -- Test. For purposes of a declaratory judgment action, a justiciable controversy is presented if (1) the parties have existing and genuine rights or interests, (2) the rights or interest are direct and substantial, (3) the determination will be a final judgment that extinguishes the dispute, and (4) the proceeding is genuinely adversarial in character.

[13] Declaratory Judgment -- Availability -- Other Available Remedy -- Necessity. Under *RCW 7.24.020*, no additional private right of action is necessary for a

160 Wn.2d 173, *; 157 P.3d 847, **;
2007 Wash. LEXIS 295, ***

party to seek a judicial declaration concerning the construction or validity of a statute if the party's rights are affected by the statute.

[14] Equity -- Restitution -- Unjust Enrichment -- Source of Cause of Action. A claim for restitution based on unjust enrichment has roots in both equity and the law. It flows from the principle that a transaction not adequately supported by law is voidable. Restitution is more than a simple contract remedy; it is itself a source of obligations, analogous in this respect to tort or contract.

[15] Equity -- Restitution -- Unjust Enrichment -- What Constitutes. Unjust enrichment is enrichment that lacks an adequate legal basis. It results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights.

[16] Taxation -- Payment -- Pass-On to Customers -- Invalidation -- Restitution of Sum Paid -- Right of Action. A purchaser of a good or service who seeks a judicial declaration as to the lawfulness of an additional sum charged by the seller on top of the agreed purchase for a tax the seller is required by law to pay may have an independent restitution claim against the seller for the amount of the charge based on the equitable principle of unjust enrichment.

[17] Parties -- Class Actions -- Certification -- Review -- Standard of Review. A trial court's certification of a class is reviewed for an abuse of discretion. The trial court's certification decision will not be disturbed if the court properly considered all of the *CR 23* criteria. A trial court abuses its discretion if its decision is manifestly unreasonable or is based on untenable grounds. The appellate courts resolve close cases in favor of allowing or maintaining the class.

[18] Parties -- Class Actions -- Certification -- Monetary Damages -- Incidental to Injunctive or Declaratory Relief -- What Constitutes. For purposes of class certification under *CR 23(b)(2)*, a claim for money damages is merely incidental to a claim for injunctive or declaratory relief if the damages flow directly from liability to the class as a whole on the claims forming the basis for the injunctive or declaratory relief. These damages must be cognizable by objective standards and not be significantly dependent on each class member's subjective circumstances. So long as the damages are incidental and the claim for monetary relief

does not dominate the claim for injunctive or declaratory relief, *CR 23(b)(2)* is satisfied. MADSEN, C. JOHNSON, and J.M. JOHNSON, JJ., dissent by separate opinion.

COUNSEL: *Stephen M. Rummage* (of *Davis Wright Tremaine, LLP*) (*Daniel F. Katz* and *Luba Shur of Williams & Connolly, LLP*, of counsel), for petitioners.

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Jill D. Bowman and *Jeremy D. Sacks* on behalf of *Camp Automotive and Lithia Motors, Inc.*, amici curiae.

Kimberley H. McGairon behalf of *Charter Communications, LLC*, amicus curiae.

Michael B. King and *Linda B. Clapham* on behalf of *Association of Washington Business*, amicus curiae.

JUDGES: [***1] **AUTHOR:** Justice Richard B. Sanders. **WE CONCUR:** Chief Justice Gerry L. Alexander, Justice Bobbe J. Bridge, Justice Tom Chambers, Justice Susan Owens, Justice Mary E. Fairhurst. MADSEN, J. (dissenting). **WE CONCUR:** Justice Charles W. Johnson, Justice James M. Johnson.

OPINION BY: Richard B. Sanders

OPINION

[**849] En Banc

[*178] ¶1 SANDERS, J. -- Herbert Nelson purchased a used car from Appleway Volkswagen. But after negotiating a final purchase price, Appleway added \$ 79.23 for business and occupation (B&O) tax. Nelson argues Appleway improperly charged this tax as an additional cost above the final price, while Appleway argues it merely disclosed and itemized an overhead expense. Appleway also argues declaratory judgment is improper because Nelson has no standing, there is no justiciable controversy, and there was no private right of action. Appleway also complains the superior court improperly certified the class because Nelson seeks both declaratory and monetary relief. The trial court held for Nelson, the Court of Appeals affirmed, as do we.

¶2 We hold Appleway improperly charged Nelson

B&O tax on top of the final price, Nelson can seek declaratory judgment, and the superior court properly certified the class.

I

¶3 The [***2] facts are undisputed. On September 3, 2004, Herbert Nelson purchased a used Volkswagen Cabriolet from Appleway in Spokane. ¹ Appleway charged several fees and taxes in addition to the agreed sale price of \$ 16,822. This included a \$ 79.23 charge for B&O tax. ²

1 Appleway Volkswagen is a car dealership within the Appleway Chevrolet, Inc., group of dealerships.

2 In the same way as it charged a B&O tax, Appleway also charged \$ 1,225.60 in sales tax, which included sales tax charged on the B&O tax.

¶4 Soon after purchase, Nelson filed a class action claim requesting declaratory relief that Appleway's collection of B&O tax, and the sales tax on the B&O tax, violated Washington law. ³ He also asked the court to enjoin Appleway's future collection of B&O tax from customers and [*179] prayed for monetary relief, claiming Appleway was unjustly enriched. Each party moved for summary judgment. The superior court found for Nelson, concluding Appleway's collection of B&O tax from customers violated *RCW 82.04.500*. It enjoined Appleway from passing through the tax to its customers and certified the class. ⁴ The Court of Appeals [**850] affirmed. *Nelson v. Appleway Chevrolet, Inc.*, 129 Wn. App. 927, 945, 121 P.3d 95 (2005). [***3] We granted review. 157 Wn.2d 1012, 139 P.3d 350 (2006).

3 Nelson paid the B&O tax under protest. It was disclosed at four places in the contract, which stated: "Business and Occupation taxes (B&O tax) have been assessed on the negotiated sales amount." Clerk's Papers (CP) at 51. Additionally, Catherine Nelson initialed a line on the acknowledgement of terms and conditions form that read: "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 the B&O tax amounts." CP at 53.

4 The superior court defined 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." CP at 375.

II

[1, 2] ¶5 First, we address whether Appleway could directly impose its B&O tax obligation on its customers. Statutory construction is a question of law and is reviewed de novo. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). Washington State generates substantial revenue through its B&O tax. This B&O tax is for the privilege of engaging in business and is levied against the value of products, gross proceeds [***4] of sales, or gross income of a business. *RCW 82.04.220*. This tax is levied directly on businesses:

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 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.

RCW 82.04.500. We apply unambiguous statutes according to their plain language. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). Only ambiguous statutes will be construed. *Id.*

[*180] A. The plain meaning of *RCW 82.04.500* prevents Appleway from directly imposing B&O tax on its customers

[3] ¶6 *RCW 82.04.500* is not ambiguous and plainly says two things. First, the tax is not a tax on customers. Second, the tax is a tax on business and should be part of the operating overhead. "Overhead" is a well-known and well-understood term. *Webster's Third New International Dictionary* 1608 (2002) defines it as: "those general charges or expenses in a business which cannot be charged up as belonging exclusively to any particular part of the work [***5] or product (as rent, taxes, insurance, lighting, heating, accounting and other office expenses, and depreciation)." Overhead is simply the aggregate cost of doing business. By saying "such taxes shall constitute a part of the operating overhead," the legislature simply considers the B&O tax a cost of doing business. *RCW 82.04.500*.

[4] ¶7 Contravening the statute's plain meaning,

Appleway added \$ 79.23 in B&O tax *after* Appleway and Nelson negotiated a final price of \$ 16,822.⁵ No other overhead costs--such as rent, insurance, utilities--were itemized [*181] and charged above the \$ 16,822. Appleway treated the B&O tax as a tax on customers. Clerk's Papers (CP) at 51 (contract stating the B&O taxes "have been assessed on the negotiated sales amount"). Appleway's practice is explicitly forbidden by the statute.

6

5 Appleway claims as a practical matter if Nelson does not pay the tax as an added-on charge, then Appleway will simply increase its final price by the amount of the B&O tax. But Appleway cannot necessarily receive whatever price it sets; the market determines the fair market value, not the costs of doing business. In *City of Phoenix v. Kolodziejcki*, 399 U.S. 204, 210 n.6 90 S. Ct. 1990, 26 L. Ed. 2d 523 (1970), the parties stipulated "the amount of money paid [***6] as real property taxes is a cost of doing business of the [appellee's] landlord and as such has a material bearing on the cost of the [appellee's] rental payments." (Alterations in original.) But the Supreme Court disputed that characterization: "The extent to which a landlord can pass along an increase in property taxes to his tenants generally depends on how changes in rent levels in the municipality affect the amount of rental property demanded--the less responsive the demand for rental property to changes in rent levels, the larger the proportion of property taxes that will ultimately be borne by tenants. See C. Shoup, Public Finance 385-390 (1969); D. Netzer, Economics of the Property Tax 32-40 (1966); Simon, The Incidence of a Tax on Urban Real Property, in Readings in the Economics of Taxation 416 (published by the American Economic Assn. 1959)." *Id.* So while Appleway can negotiate a purchase price with its customers, which may (or may not) include its B&O tax liability, the actual sale price will reflect what the used car market will bear. The \$ 16,822 negotiated between Appleway and Nelson [***7] is presumably that market price; Appleway cannot then add its B&O tax liability on top of this final price.

6 Appleway argues the Court of Appeals decision "finds no support in the law." Pet. for Review at 8. Apparently, Appleway believes a

statute's plain meaning is insufficient support.

[**851] ¶8 Appleway's defense of this add-on practice misconstrues the Court of Appeals holding, mischaracterizes court decisions, and relies on unconstitutional out-of-state statutes and ambiguous Department of Revenue (DOR) notices. Appleway claims the Court of Appeals held Appleway could add on the tax as long as it did not disclose or itemize it to the customer. Pet. for Review at 1 ("[A]fter the court of appeals' decision, the Appleway dealerships remain free to pass through the B&O tax to consumers ... *but only so long as they bury the pass-through.*"). Appleway's reading is flawed. First, the Court of Appeals explicitly found the add-on was improper. *Appleway*, 129 Wn. App. at 945 ("[T]he 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."). Second, the Court of Appeals did not prohibit [***8] disclosure. Rather it said: "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." *Id.* Appleway may itemize the tax if it is part of the final purchase price. In other words, it is lawful for Appleway to disclose a B&O charge to Nelson *during* the course of negotiating a purchase price or later identify any claimed element of overhead. However, Appleway may not add a B&O charge as one of several fees and taxes *after* Appleway and Nelson negotiated and agreed upon a final purchase price.

[*182] ¶9 None of Appleway's cited authority is apposite, and some cases support Nelson rather than Appleway. Appleway relies heavily on *Public Utility District No. 3 of Mason County v. State*, 71 Wn.2d 211, 427 P.2d 713 (1967). This case is not on point.⁷ It concerns whether Mason County Public Utility District (PUD) needed to include taxes levied on utilities customers in its gross income. This court said those taxes must be included in gross income. Appleway's argument seems to be since the court [***9] did not disallow the pass-through of utilities taxes there, it should not be concerned with the pass-through of B&O taxes here. But, in a statute entitled "Municipal taxes--May be passed on," the legislature specifically allowed PUD to levy such taxes directly on the customers. *RCW 54.28.070* ("Any such district shall have the power to add the amount of

such tax to the rates or charges it makes for electricity so sold within the limits of such city or town."). Here, the legislature has said the opposite. *RCW 82.04.500*.⁸

7 In its petition for review, Appleway chastises the Court of Appeals for not discussing this case in its opinion. But the Court of Appeals likely ignored it because, like so much of Appleway's cited authority, it is irrelevant, dealing with entirely different tax issues.

8 In other authority cited by Appleway, there was no statutory language specifically outlawing the tax against customers. In *Sprint Spectrum, LP/Sprint PCS v. City of Seattle*, 131 Wn. App. 339, 127 P.3d 755 (2006), the court held Sprint must include collected taxes in its gross income. Sprint was assessed a B&O tax and utility taxes by both the State and city of Seattle. It passed the municipal utility [***10] excise taxes, but not the B&O tax, on to the customer. There is no language in the law prohibiting a pass-through of utility taxes, like in *RCW 82.04.500*. See *RCW 82.16.090* (describing how utility companies should pass-through the tax to customers); SEATTLE MUNICIPAL CODE 5.48.020(B).

¶10 Appleway also relies on *Texaco Refining & Marketing Co. v. Commissioner of Revenue Services*, 202 Conn. 583, 522 A.2d 771 (1987). This case supports Nelson rather than Appleway. This is the only case Appleway cites concerning statutory language similar to *RCW 82.04.500*. See *CONN. GEN. STAT. § 12-599(a)* ("It is not the intention of the General Assembly that the tax ... be construed as a tax upon purchasers ..."). But the Second Circuit Court of Appeals ruled the Connecticut statute unconstitutional in 1981 because it was preempted by federal law regulating oil [*183] prices. *Mobil Oil Corp. v. Dubno*, 639 F.2d 919 (2d Cir. 1981). The *Texaco Refining* court specifically noted this was why Texaco was "able to pass through the tax to its purchasers." *Texaco Ref.*, 202 Conn. at 585 n.5 (citing *Mobil Oil Corp. v. Dubno*, 492 F. Supp. 1004 (D. Conn. 1980), *aff'd in part, dismissed in part*, 639 F.2d 919). [***11] But for the Second Circuit's ruling, [**852] the statute would have prevented Texaco from passing the tax on to its customers. Conversely, *RCW 82.04.500* is still good law and therefore does prevent Appleway from passing the tax on to its customers.

B. The notice from DOR is ambiguous and does not

deserve deference

¶11 Next Appleway relies on a notice from DOR, which Appleway says allows companies to pass the B&O tax on to its customers. This DOR notice is at worst ambiguous. In April 2002 DOR reissued a special notice that said, "It is not illegal for a seller to itemize the B&O tax. ... The statute intends the B&O tax to be a part of the seller's overhead. However, it does not prevent a seller from itemizing and showing the effect of the tax." CP at 122 (Washington State Department of Revenue Special Notice, "What You Need to Know about Itemizing the B&O Tax" (reissued Apr. 2002)). The notice then quotes *RCW 82.04.500*. Appleway claims this means DOR allows businesses to pass the tax on to its customers after a final price has been set.⁹ Or this could mean DOR is suggesting companies can inform customers part of the final price includes the B&O tax.¹⁰ A second [*184] DOR notice supports this latter [***12] interpretation. In September 2004 DOR circulated a B&O tax fact sheet, which states: "The B&O tax is a cost of doing business and should not be billed to your customer as a separately stated item (as is the sales tax)." CP at 497.

9 An example in the notice might support this interpretation: "Two Seattle retailers selling the same products both make a \$ 20,000 sale. One retailer doesn't itemize the B&O tax while the other does." CP at 123. The example then explains how to calculate the increased B&O charge. This is not necessarily apposite, however, since it is not clear whether the B&O tax was added before or after the buyer and seller agreed to a final price. The notice ends by saying: "The tax simply becomes one of the many overhead costs a prudent businessperson considers when pricing goods and services." *Id.*

10 The attorney general's office has also expressed its concern over car dealerships' charging B&O tax. CP at 150. A memorandum from Douglas Walsh, senior counsel for the attorney general, to Washington State Independent Automobile Dealers' Association, says: "Our office is concerned that, in the context of [] negotiated vehicle sales or lease transactions, separately charging the [***13] B&O tax is fraught with risk of unfairness and deception, which is highlighted by the legislature's clear expression of intent that the tax not be imposed directly on consumers, but instead

160 Wn.2d 173, *184; 157 P.3d 847, **852;
2007 Wash. LEXIS 295, ***13

be included as part of the overhead." CP at 151.

[5-7] ¶12 Even though the DOR policy is at worst unclear, Appleway claims the Court of Appeals' decision contravenes the April 2002 notice. The response is threefold: First, the judiciary has ultimate authority to construe statutes; an administrative interpretation may be only given deference, it is never authoritative. *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 627-28, 869 P.2d 1034 (1994). Second, this court will give deference only if the statute is ambiguous. *Id.* Here there is no ambiguity as the statute plainly forbids the tax on customers. See *RCW 82.04.500*. Third, an agency interpretation that conflicts with a statute is given no deference. *Waste Mgmt.*, 123 Wn.2d at 628. If the April 2002 notice does say businesses can pass through the tax after a final price has been set, then it is wrong and conflicts with the plain language of *RCW 82.04.500*. In any event, this DOR notice bears no weight on this court's decision.

C. *RCW 82.04.500* [***14] does not violate the *First Amendment to the United States Constitution*

[8] ¶13 Appleway claims its *First Amendment* rights are violated because it misreads the Court of Appeals' holding to prevent disclosure and itemization. The statute is silent about disclosure, and Appleway is free to disclose and itemize any tax or cost. Appleway was free to inform Nelson that \$ 79.23 of his final purchase price would be used to pay for the B&O tax. The *First Amendment*, however, will not insulate Appleway's illegal practice of making customers bear Appleway's tax burden.

[*185] ¶14 A Minnesota case cited by Appleway is, again, inapposite. *Bloom v. O'Brien*, 841 F. Supp. 277 (D. Minn. 1993). The Minnesota legislature specifically allowed health care tax to be passed through to patients but forbade doctors from informing [**853] patients about the tax. *Id.* at 279. The United States District Court for the District of Minnesota ruled this was unconstitutional. *Id.* But *RCW 82.04.500* says nothing about disclosure. Appleway can disclose or itemize costs associated with the purchased item, but unlike a sales tax, it cannot add a B&O tax to the purchase price.

III

[9] ¶15 Next we address whether Nelson can seek a declaratory judgment concerning [***15] his rights

under *RCW 82.04.500*. The Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, grants Nelson the right to seek a declaratory judgment finding Appleway violated *RCW 82.04.500*.

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.

RCW 7.24.020; see also *State ex rel. Lyon v. Bd. of County Comm'rs*, 31 Wn.2d 366, 196 P.2d 997 (1948) (holding a party may seek declaratory judgment to construe a statute). Furthermore, the legislature intended for the UDJA to be applied liberally. *RCW 7.24.120* (stating the UDJA "is to be liberally construed and administered").

¶16 Appleway raises three challenges to Nelson's seeking a declaratory judgment. First, Appleway argues Nelson has no standing. Second, Appleway argues there is no judicable controversy. And third, Appleway argues there is no private right of action, express or implied, in *RCW 82.04.500*.

[*186] A. Nelson has standing to seek a declaratory judgment

[10, 11] ¶17 To [***16] have standing, a party must (1) be within the zone of interest protected by statute and (2) have suffered an injury in fact, economic or otherwise. *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004). Appleway contends Nelson is a customer and not within the zone of interests protected by *RCW 82.04.500* because it is a tax "on *businesses*." Suppl. Br. of Pet'rs at 13. Therefore, Appleway argues, a customer has no rights under the statute. Appleway is right--the B&O tax is meant to be a tax on businesses. But Nelson paid Appleway's tax for Appleway. This is precisely what *RCW 82.04.500* forbids. Therefore, Nelson is within the zone of interest protected by the statute. Appleway also maintains there is no injury in fact because Nelson would have to pay the tax as part of the overhead expense. This is incorrect as the market sets the price, not the overhead.

160 Wn.2d 173, *186; 157 P.3d 847, **853;
2007 Wash. LEXIS 295, ***16

See discussion *supra* note 5. Nelson paid \$ 79.23 more than the negotiated price. This is economic injury in fact and Nelson satisfies both standing requirements.

B. This case is a justiciable controversy

[12] ¶18 The elements of a justiciable controversy under the UDJA are (1) parties [***17] must have existing and genuine rights or interests, (2) these rights or interests must be direct and substantial, (3) the determination will be a final judgment that extinguishes the dispute, and (4) the proceeding must be genuinely adversarial in character. *State ex rel. O'Connell v. Dubuque*, 68 Wn.2d 553, 413 P.2d 972 (1966). All elements are easily satisfied. There are genuine rights and interests concerning who must pay Appleway's B&O tax. Both parties are adversarial, each aggressively seeking the other pays the tax.¹¹ And construing the statute will [*187] conclusively decide Appleway must pay the tax from the final purchase price.

11 Appleway argues Nelson should seek redress from the DOR. This is absurd. Nelson is not maintaining the State overcharged him B&O tax. Rather, Nelson is contending Appleway unlawfully shifted its tax to its consumers. This dispute is only between Nelson and Appleway and does not concern the DOR.

C. Nelson's restitution claim is a private right of action that allows him to recover the \$ 79.23 improperly paid as B&O tax

[13] ¶19 Finally, Appleway maintains Nelson failed to have a private right of action to [***854] support his claim for relief. Of course, no additional private right [***18] of action is necessary for parties to seek a declaratory judgment whenever their rights are affected by a statute. *RCW 7.24.020* ("A person ... whose rights ... are affected by a statute ... may have determined any question of construction or validity."). Appleway argues, though, a private right of action is necessary for Nelson to recover the \$ 79.23 paid as B&O tax.¹² But Nelson does not invoke the UDJA "to obtain monetary relief," as suggested by Appleway. Pet. for Review at 15. Rather, he brought a private right of action in his unjust enrichment claim.

12 This argument is dubious. *RCW 7.24.080* allows further relief to be granted whenever necessary or proper. If a court found Appleway

violated *RCW 82.04.500* by charging the B&O tax as an additional cost, then it is arguably necessary to force Appleway to remit that payment to Nelson.

[14, 15] ¶20 The new *Restatement (Third) of Restitution* addresses the confusion surrounding unjust enrichment claims. While historically understood as an equity action, restitution has roots in both equity and the law. See *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 1 cmt. b (Discussion Draft 2000). The original justification, dating back to Lord [***19] Mansfield's decision in *Moses v. Macferlan*,¹³ has given way to a modern understanding, based on a transaction's legal validity. Specifically, any transaction not adequately supported by law is voidable. See *RESTATEMENT (THIRD) OF RESTITUTION, supra*, § 1 cmt. b at 3 [*188] ("Unjustified enrichment is enrichment that lacks an adequate legal basis: it results from a transfer that the law treats as ineffective to work a conclusive alteration in ownership rights."). Because Appleway illegally charged Nelson the B&O tax as an additional cost to the final purchase price, Appleway has been unjustly enriched with money properly belonging to Nelson. In effect, Appleway has made Nelson pay Appleway's taxes. Furthermore, restitution is more than a simple contract remedy. It is "itself a source of obligations, analogous in this respect to tort or contract." *Id.* § 1 cmt. h at 12-13.

13 *Moses v. Macferlan*, (1760) 97 Eng. Rep. 676, 681 (K.B.) ("In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.").

[16] ¶21 We need not address whether *RCW 82.04.500* implies a private right [***20] of action because Nelson brought an independent claim of restitution. Therefore, we hold the superior court properly allowed Nelson to seek a declaratory judgment.

IV

¶22 Finally, we address whether the superior court properly certified the class under *CR 23(b)(2)*. *CR 23* states:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:

...

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole

[17] ¶23 We review class certification for abuse of discretion and will not disturb a trial court's certification decision if the record indicates the court properly considered all *CR 23* criteria. *Lacey Nursing Ctr. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995) ("A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds." (quoting *Eriks v. Denver*, 118 Wn.2d 451, 467, 824 P.2d 1207 (1992))). An appellate court resolves close cases in favor of allowing [*189] or maintaining the class. [***21] *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 250, 63 P.3d 198 (2003).

[18] ¶24 Appleway concedes the class meets the requirements of *CR 23(a)* and the explicit requirements of *CR 23(b)(2)* by acting in a way generally applicable to the class. But Appleway reminds this court any monetary relief must be incidental to the declaratory relief. In *Sitton*, the Court of Appeals [**855] examined case law on *CR 23*'s federal counterpart and found:

Classes certified under subsections (b)(1) and (b)(2) are "mandatory" classes; that is, the results are binding on all class members, who may not choose to opt out of the class. Notice to class members under these subsections is left to the trial court's discretion. Mandatory class members thus may be deprived of their rights to notice and an opportunity to control their own litigation. For these reasons, when plaintiffs are seeking monetary damages, certification under (b)(1) or (b)(2) violates due process unless the monetary damages sought are merely "incidental to the primary claim for injunctive or declaratory relief."

Sitton, 116 Wn. App. at 252 (footnotes omitted) (quoting *Molski v. Gleich*, 307 F.3d 1155, 1165 (9th Cir. 2002),

withdrawn and reprinted [***22] as amended by 318 F.3d 937, 949 (9th Cir. 2003)). Incidental damages "flow directly from liability to the class as a whole on the claims forming the basis of the injunctive or declaratory relief." *Molski*, 318 F.3d at 949 (quoting *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 415 (5th Cir. 1998)). These damages must be cognizable by objective standards and not significantly dependent on each class member's subjective circumstances. *Sitton*, 116 Wn. App. at 252.

¶25 Nelson's claim for \$ 79.23 flows directly from Appleway's liability. Furthermore, computing the monetary relief is simple and relies entirely on objective facts, without need for individual assessments of each class member's circumstances. The relief is simply the amount of B&O tax [*190] Appleway charged customers above the purchase price.¹⁴ There is no threat of a due process violation because all damages can be objectively determined.

14 This relief would also include a partial refund of the sales tax because Appleway charged sales tax on the B&O tax.

¶26 Appleway also relies on *Eriks*, 118 Wn.2d 451, where we upheld a trial court's denial of class certification under *CR 23(b)(2)*. There the plaintiffs moved to recertify under [***23] *CR 23(b)(2)* after the trial court granted partial summary judgment. *Id.* at 465-66 (remaining issue concerned primarily disgorgement of attorney fees). This court found no abuse of discretion when the trial court refused to recertify. The court relied on a federal case, which said, "subdivision (b)(2) by its own terms does not apply to actions only for damages." *McDonnell Douglas Corp. v. U.S. Dist. Court*, 523 F.2d 1083, 1087 (9th Cir. 1975) ("[T]he declaratory relief sought by plaintiffs adds nothing to their claim for damages."); see *Eriks*, 118 Wn.2d at 466-67. The *Eriks* court said, "[w]here the declaration merely forms the basis for monetary relief, a *CR 23(b)(2)* action is not appropriate." *Id.* at 466. Here the declaratory judgment is more than a basis for monetary relief; Nelson asks the court to declare his rights under the statute. Lastly, certification under *CR 23(b)(2)* is inappropriate if the claim relates "exclusively or predominantly" to monetary damages. 3A LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE *CR 23* advisory comm. notes at 560 (4th ed. 1992). Appleway claims Nelson "seeks millions of dollars." Pet. for

160 Wn.2d 173, *190; 157 P.3d 847, **;
2007 Wash. LEXIS 295, ***23

Review at 14. Seventy-nine dollars [***24] and twenty-three cents is not millions of dollars, and Nelson's claim for monetary relief does not dominate his claim for declaratory relief.

CONCLUSION

¶27 The superior court properly considered all *CR 23* criteria, and its decision is not manifestly unreasonable. All requirements of *CR 23(a)* are met; Appleyway's improper pass through of the B&O tax applies to the entire class; and [*191] Nelson's damages are incidental to his declaratory relief and do not predominate the claim. The superior court properly certified the class.

¶28 We affirm the Court of Appeals.

ALEXANDER, C.J., and BRIDGE, CHAMBERS, OWENS, and FAIRHURST, JJ., concur.

DISSENT BY: Barbara A. Madsen

DISSENT

[**856] ¶29 MADSEN, J. (dissenting) -- For at least three reasons, the majority comes to the wrong result. First, it rests on an illogical premise. The majority reasons that if the parties' negotiations include an amount for the seller's business and occupation tax, it may be included in the price of the vehicle sold, but if the parties' negotiations do not include reference to the tax, then it may not be added to the sales price of the vehicle. But if *RCW 82.04.500* does not permit [***25] a pass-through of the tax to the customer, it makes no difference at what point the tax is added to the selling price. Either way, the customer pays the amount that represents the seller's business and occupation tax attributable to the proceeds of the sale.

¶30 Second, the majority's reading of the statute is, in any case, contrary to the plain language of the statute. The statute does not say that a seller cannot include the amount representing its business and occupation tax liability in the price it charges the customer, whether itemized or not. Instead, it says, quite simply, that the burden of the tax is on the seller, i.e., the seller is the taxpayer responsible for the tax. It does not say that the seller cannot obtain the funds necessary to pay the tax by charging the customer. Quite the contrary. Overhead costs of doing business are routinely and necessarily passed on to customers. The statute expressly states that

the tax is a part of overhead. Under *RCW 82.04.500*, there is no difference between an overhead expense such as rent or utilities, for which the seller is responsible, and the business and occupation tax, for which the seller is also responsible.

¶31 Third, the majority goes [***26] to extraordinary lengths to allow Mr. Herbert Nelson and the class he represents a day [*192] in court. The majority first rejects the notion that Nelson is seeking to enforce the statute, reasoning instead that all he asks is for an interpretation of the statute as it affects his rights. This conclusion is untenable. Mr. Nelson does not want the court to simply interpret the statute. He wants the court to enforce the statute as favorably interpreted. But he has no standing to enforce it, as he implicitly concedes. The majority then says that Nelson may seek damages because he has a cause of action for restitution. Even a casual reading of the complaint shows that Nelson did not assert a private right of action for restitution, contrary to the majority's representation. Instead, he asserted only claims under the Uniform Declaratory Judgments Act (UDJA), chapter 7.24 RCW, and his request for restitution is not an independent cause of action but rather simply a request for additional relief and damages, under *RCW 7.24.080*.

¶32 Given the severity of the flaws in the majority's opinion, I must dissent.

Analysis

¶33 The first problem with the majority is, as noted, that ultimately it rests on inconsistent applications [***27] of *RCW 82.04.500* that cannot be reconciled with any reasonable reading of the statute. Like the Court of Appeals, the majority holds that the statute prohibits adding the amount due from the seller on a sale of an automobile to the price of the vehicle after negotiations have otherwise concluded but permits including this amount in the sales price of the vehicle if the amount was disclosed during the course of the negotiations. If the statute prohibits passing on to the customer the amount that the seller is obligated to pay in business and occupation tax on the proceeds from the sale, then this amount cannot be charged to the customer and it makes no difference when it is added to the price of the vehicle. If the statute does not prohibit charging the customer the amount the seller must pay, again it makes no difference when the charge is added. Likewise, whether the amount is itemized separately makes no difference because

[*193] itemization does not determine whether the customer is or is not paying that amount. And if itemizing is prohibited, the seller can simply bury the amount in the total charged.

¶34 This flaw in the majority becomes even more evident upon a closer look at the language [***28] and meaning of the statute in the context of the statutory framework governing payment of the business and occupation tax. The tax is a tax on gross proceeds of sales or gross income of the business, *RCW 82.04.070, .080*, depending on the circumstances, [**857] *RCW 82.04.220*. For retailers, the tax is imposed on the gross proceeds of sales. *RCW 82.04.250*. "Gross proceeds of sales" are defined as the "value proceeding or accruing from the sale of tangible personal property and/or for services rendered," without any deductions for costs of the items or services, or other expenses, including "taxes, or any other expense whatsoever paid or accrued." *RCW 82.04.070*.

¶35 The statute at issue here, *RCW 82.04.500*, states two things. First, and most importantly, the statute says that the legislature does not intend that business and occupation taxes "be construed as taxes upon the purchasers or customers, but that such taxes *are levied upon, and collectible from, the person engaging in the business activities*" designated. *RCW 82.04.500* (emphasis added). *RCW 82.04.500* thus explicitly places the legal obligation to pay the tax on the businesses identified in the tax statutes--in this case, a retail automobile dealership. This [***29] court has similarly observed, "[t]he burden of the business and occupation tax falls on the business itself." *Commonwealth Title Ins. Co. v. City of Tacoma*, 81 Wn.2d 391, 396, 502 P.2d 1024 (1972).

¶36 But this does *not* mean the business cannot include that amount in the price of the product sold. The plain meaning of a statute is determined from the ordinary meaning of the language in the statute, its context, related statutory provisions, and the relevant statutory scheme as a whole. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). In addition to identifying the business as the entity bearing the legal responsibility for paying the business and [*194] occupation tax, *RCW 82.04.500* also says that the tax "shall constitute a part of the overhead" of the business. As explained, *RCW 82.04.070* states that a business's expenses, unquestionably including overhead costs and expressly

including taxes, cannot be deducted from the amount of a business's gross proceeds of sales on which the business and occupation tax must be paid. Necessarily, the statute therefore contemplates that gross proceeds of sales *can include* a business's taxes. That is, if the business is prohibited from deducting taxes [***30] from the gross proceeds of sales, taxes must be within the proceeds of sales in the first place or the question of deductibility would never arise.

¶37 By expressly identifying business and occupation tax as overhead, and by expressly including taxes within the class of business expenses that cannot be deducted from gross proceeds of sales, the legislature has consistently treated these taxes as business expenses virtually indistinguishable from any other part of overhead in relation to the price of items sold. It is elementary that a business will price the items it sells to recoup its expenses, including its overhead costs. Most tax-paying businesses aim to make a profit, as the legislature undoubtedly knew when enacting the relevant statutes. Accordingly, just as it is obvious that a business will include overhead costs when pricing merchandise, it is obvious that it will also include the cost of its business and occupation tax when doing so--and that it can legally do so under *RCW 82.04.500*.

¶38 This being the case, what possible difference does it make that this item of overhead is itemized separately on the sales contract? Or that it is, or is not, specifically part of the negotiations [***31] between the seller and purchaser? Here, in fact, Mr. Nelson's testimony was that he knew he could still walk away once he knew the amount was added to the purchase price. More to the point, any customer has the option to decline to pay the price set by the seller, and that price will *always* include amounts to cover overhead costs.

¶39 In the end, the majority unfortunately overlooks the true significance of the statute: *RCW 82.04.500* says the [*195] business is the legal obligor responsible for payment of the tax and the taxing statutes must not be construed to place that legal burden on the customer, and it says that the tax is to be considered part of overhead. The statute says nothing that precludes a business from passing on the cost of this part of its overhead just as any other part of overhead, and it says nothing precluding itemizing any overhead costs, including this tax, on an individual sales contract. The majority has turned a fairly simple statute into a complex and ultimately unworkable

ban barring sellers [**858] from passing on overhead costs to their customers unless they expressly negotiate this particular part of overhead as part of the price.

¶40 The third problem with the majority is its [***32] casual conversion of an attempt to obtain a declaratory judgment and damages under the UDJA into what is effectively an enforcement action Mr. Nelson is *not entitled* to bring. The majority permits use of the UDJA on the ground that it authorizes a person to bring an action seeking construction of a statute that "affect[s]" his or her "rights." Majority at 187 (quoting *RCW 7.24.020*). What Mr. Nelson ultimately seeks, however, is a declaration that the statute means that it is illegal for the dealer to charge him and members of the class the amount representing what it must pay in business and occupation tax and that having illegally done so, the dealer was unjustly enriched and must return the money to Nelson and other class members. Stated more directly, Mr. Nelson wants the statute enforced to prevent his and class members' payment of what he says is the dealer's tax obligation and the return of the money he and other class members paid in contravention of the statute.

¶41 Such an "end run" should not be countenanced by the court. The majority's reasoning means that private enforcement actions will be permitted even if there is no statutory authority for such claims--provided they are [***33] disguised as declaratory judgment actions accompanied by claims for restitution.

[*196] ¶42 To properly invoke the provisions of the UDJA Nelson invokes here, there must be some "right" that is "affected" by the statute. Mr. Nelson states that none of the "causes of action alleged in [his] complaint are pled as violations of the B&O [business and occupation] tax statute To the contrary, [he] asked the Superior Court to issue a declaratory judgment that [the dealer's] assessment and collection of B&O tax is 'contrary to the laws of the State of Washington.'" Suppl. Br. of Resp't/Appellee Herbert Nelson at 14 (quoting Clerk's Papers (CP) at 9-10). Nelson identifies his "affected" "right" as the right not to pay business and occupation taxes illegally assessed by the dealer. Resp't Herbert Nelson's Answer to Pet. for Review at 12. This asserted "right" (assuming for the sake of argument it exists) arises because *RCW 82.04.500*, as Mr. Nelson reads the statute, prohibits a business from passing on to the customer the amount it must pay in business and

occupation tax.

¶43 Despite his protests to the contrary, Mr. Nelson is seeking enforcement of the statute as though he has a private right of action [***34] to enforce it. Significantly, however, neither he nor the majority argues that he is entitled to bring an enforcement action based on alleged violations of the statute. But, as is crystal clear, Nelson claims the statute has been violated, wants the court to declare the meaning of the statute to confirm that it has been violated, and wants what amounts to a "refund" of the "taxes" he claims he and others were illegally required to pay.

¶44 The majority also permits what it describes as a common law cause of action for restitution. Initially, while there are cases from other jurisdictions and secondary authority supporting the view that modernly some jurisdictions recognize an independent cause of action for restitution, and that it is not simply a remedy associated with tort or contract (or quasi-contract), the majority relies instead on a *tentative draft* provision (and commentary) in the *Restatement (Third) of Restitution and Unjust Enrichment* (Discussion Draft 2000). Majority at 187. While the court [*197] has turned to the American Law Institute's restatements of the law in several areas, I do not believe we should rely on *tentative draft* provisions as authority.

¶45 More importantly, however, the [***35] majority attributes a cause of action to Mr. Nelson that he did not bring. As mentioned, Nelson asserts a claim for damages under *RCW 7.24.080*. This provision in the UDJA states that "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." *Id.* However, nothing in the statute confers a cause of action. Instead, the statute codifies "the principle that every court has the inherent power to enforce its decrees and make such orders as may be necessary to render them effective." *Ronken v. Bd. of County Comm'rs*, [**859] *89 Wn.2d 304, 311-12, 572 P.2d 1 (1977)*. The statute allows further relief based on a declaratory judgment once it has been entered.

¶46 Here, Mr. Nelson stated in his complaint that he brought "this action for declaratory and injunctive relief and for monetary damages on his behalf and on behalf of all other similarly situated individuals and entities who were directly charged a B&O Tax on motor vehicles, parts, merchandise, or services they purchased from Defendants in Washington State." CP at 4. Nelson wants

return of the "illegal tax" he claims he and other members of the class paid, based on a declaratory judgment that [***36] charging customers for the amount of the tax is illegal under *RCW 82.04.080*, i.e., "[d]isgorgement of all monies received by Defendants from their illegal collection of B&O Tax and B&O Sales Tax, and full restitution to Plaintiff and the Class." CP at 11. Factually, he asserted that "[a]s a result of Defendants' misconduct, Plaintiff and members of the Class have suffered incidental damages to the extent they have wrongfully paid B&O Tax and B&O Sales Tax." CP at 9. Under these circumstances, I do not agree that Mr. Nelson has asserted a separate common law restitution cause of action. Instead, he seeks restitution as an additional remedy.

[*198] ¶47 In any event, whether he asserted an independent cause of action or not makes no difference because, as explained, he should not be permitted to camouflage an enforcement action under *RCW 82.04.500* as a declaratory judgment action along with a request for restitution.

¶48 Finally, if customers are misled into thinking that a business and occupation tax is, like the sales tax,

the legal obligation of the customer, and therefore must be paid by the customer, other recourse may be available. For example, *RCW 46.70.180(1)* makes it an unlawful act or practice [***37] "[t]o cause or permit to be advertised, printed, displayed, published, distributed, broadcasted, televised, or disseminated in any manner whatsoever, any statement or representation with regard to the sale, lease, or financing of a vehicle which is false, deceptive, or misleading." *RCW 46.70.310* provides that "[a]ny violation of this chapter is deemed to affect the public interest and constitutes a violation of *chapter 19.86 RCW*," the Consumer Protection Act. Under appropriate circumstances, a Consumer Protection Act claim might be brought.

¶49 For the reasons stated, I dissent from the majority opinion.

C. JOHNSON and J.M. JOHNSON, JJ., concur with MADSEN, J.

Washington Rules of Court Annotated (LexisNexis ed.)

Annotated Revised Code of Washington by LexisNexis

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APPENDIX B

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HON. BRUCE E. HELLER

FILED
KING COUNTY WASHINGTON

MAR 11 2014

SUPERIOR COURT CLERK
BY JOSEPH MASON
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CITY OF SEATTLE,

Plaintiff,

v.

JOSEPH HUNT,

Defendant.

No. 13-2-25366-6 SEA

ORDER GRANTING RALJ APPEAL

This matter is before the court on a RALJ appeal from a decision of the Municipal Court of Seattle finding Appellant Joseph Hunt guilty of speeding in a school zone. Mr. Hunt contends that the case should have been dismissed because the School Speed Limit Sign Assembly posted where he was cited for speeding failed to comply with statutory requirements for such signs.

RCW 46.63.170(1) provides that the use of automated traffic safety cameras for issuance of notices of infraction is subject to certain requirements. One of them is RCW 46.63.170(1)(h), which states that signs placed in automatic traffic safety camera locations after June 7, 2012 must follow the specifications and guidelines under the manual of uniform traffic control devices (MUTCD). Section 7B.15 of the MUTCD, amended by WAC 468-95-

1 340, requires that the bottom plaque contain one or more of several permissible signs. See
2 MUTCD 7B.15, Paragraph 09. "WHEN LIGHTS ARE FLASHING," the sign the City used, is
3 not one of the options—rather, a permissible option is "WHEN FLASHING." See MUTCD
4 Figure 7B-1.

5 Each provision in the MUTCD is prefaced by a text heading, include Standard,
6 Guidance, Option, and Support, and each is defined differently. The relevant portion of
7 Section 7B.15 at issue here is a "Standard." Section 1A.13 defines a Standard as "a statement
8 of required, mandatory, or specifically prohibitive practice regarding a traffic control device."
9 Therefore, it is mandatory under Section 7B.15 that the City use one of the permissible options
10 for the bottom plaque of the School Speed Limit Assembly Sign.

11 The City failed to comply with MUTCD Section 7B.15 when it used a sign stating,
12 "WHEN LIGHTS ARE FLASHING," instead of "WHEN FLASHING." While at first glance
13 the difference between the two appears trivial, Mr. Hunt argues they are important because the
14 additional words could affect the visibility of the sign. While the Municipal Court made no
15 findings regarding the sign's visibility, this is not necessary given the requirement in RCW
16 46.63.170(1)(h) that the City follow the specifications of the MUTCD. The court is not
17 persuaded by the City's argument that substantial compliance with the MUTCD was sufficient.
18 If the required wording in the sign were pursuant to a recommended guidance or option, as
19 opposed to mandatory standard, substantial compliance might satisfy the requirements. But
20 that is not the case here.

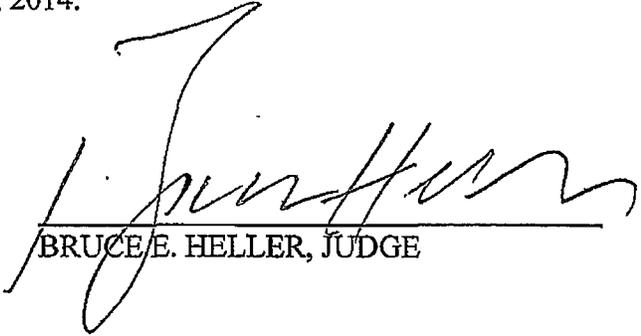
21 Having concluded that the strict requirements governing automated traffic cameras
22 were not met with respect to the "WHEN LIGHTS ARE FLASHING" sign, it is not necessary
23 for the court to address other arguments advanced by Mr. Hunt.

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The decision of the Municipal Court is therefore **reversed**.

IT IS SO ORDERED.

ENTERED this 10th day of March, 2014.



BRUCE E. HELLER, JUDGE

APPENDIX C



Jane Doe, et al, Appellants, v. Fife Municipal Court, et al, Respondents. Jane Roe, et al, Appellants, v. Tacoma Municipal Court, et al, Respondents. John Doe, et al, Appellants, v. Puyallup Municipal Court, et al, Respondents. John Roe, et al, Appellants, v. Pierce County District Court, et al, Respondents

No. 16203-2-II

COURT OF APPEALS OF WASHINGTON, Division Two

74 Wn. App. 444; 874 P.2d 182; 1994 Wash. App. LEXIS 242

June 2, 1994, Decided

June 2, 1994, Filed

SUMMARY:

Nature of Action: Four persons who had been granted deferred prosecution for alcohol related crimes in courts of limited jurisdiction brought separate actions seeking injunctive relief and a refund of court costs paid as a condition of their deferred prosecutions.

Superior Court: After consolidating the actions, the Superior Court for Pierce County, No. 90-2-00666-8, Thomas R. Sauriol, J., on July 5, 1991, entered a summary judgment denying the relief requested.

Court of Appeals: Holding that CrRLJ 7.8 provides the exclusive remedy for the plaintiffs and that their actions must be brought in the courts of limited jurisdiction that imposed the court costs, the court *affirms* the judgment.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Judgment -- Summary Judgment -- Review -- Standard of Review** An appellate court reviews a summary judgment de novo by engaging in the same inquiry as the trial court.

[2] **Judgment -- Collateral Attack -- Grounds -- Void Judgment -- In General** A void judgment is always subject to collateral attack.

[3] **Judgment -- Vacation -- Void Judgment -- What Constitutes -- Exceeding Statutory Authority**

A judgment, or a portion of a judgment, exceeding the court's statutory authority is void.

[4] **Courts of Limited Jurisdiction -- Deferred Prosecution -- Conditions -- Costs** A court of limited jurisdiction lacks subject matter jurisdiction to impose court costs paid as a condition of deferred prosecution.

[5] **Judgment -- Collateral Attack -- Grounds -- Void Judgment** Failure To Appeal. A party's failure to appeal a void court order does not preclude a later collateral attack on the order.

[6] **Courts -- Rules of Court -- Construction -- Rules of Statutory Construction** Court rules are interpreted in the same manner as statutes.

[7] **Courts -- Rules of Court -- Construction -- Omitted Language** Court rules are interpreted as they are written; a court may not read into court rules language that it conjectures the drafters of the rules may have omitted.

[8] **Courts of Limited Jurisdiction -- Relief From Judgment -- Criminal Case -- Court Rule -- Conviction -- Necessity** CrRLJ 7.8(b), which sets forth grounds for providing relief from a court of limited jurisdiction's judgment or order in a criminal case, applies whether the defendant has been convicted or not.

[9] **Criminal Law -- Rules of Court -- Supplementation by Civil Rules** Applicable provisions of

criminal court rules are not supplemented by civil court rules.

[10] Courts of Limited Jurisdiction -- Collateral Attack -- Void Judgment -- Criminal Case -- Court Rule CrRLJ 7.8(b)(4) provides the exclusive means for a party to collaterally attack a void judgment or order entered by a court of limited jurisdiction in a criminal case.

[11] Appeal -- Assignments of Error -- Argument -- Necessity -- In General An unsupported contention on appeal need not be considered by the appellate court.

COUNSEL: [***1] *John S. Abolofia, Gary M. Clower, and John A. Strait*, for appellants.

Michael C. Walter and Keating, Bucklin & McCormack, for respondents Puyallup.

William Barker, City Attorney, and Joseph M. Diaz, Assistant, for respondents Tacoma.

John W. Ladenburg, Prosecuting Attorney, and Douglas W. Vanscoy, Deputy, for respondents Pierce.

Scott A. Kallander, John P. Erlick, and Cozen & O'Connor, for respondents Fife.

JUDGES: Alexander, J. Seinfeld, A.C.J., and Houghton, J., concur.

OPINION BY: ALEXANDER

OPINION

[*446] [**183] John Doe, Jane Roe, John Roe, and Jane Doe (Does) ¹ appeal an order of the Pierce County Superior Court granting summary judgment to various courts of limited jurisdiction and governmental entities (Limited Courts), dismissing the Does' claims against the Limited Courts for recovery of "court costs" the Does paid as a condition of deferred prosecution. We affirm.

1 Each of the Appellants obtained an order from the Pierce County Superior Court authorizing them to maintain their suit anonymously.

[***2] The Does were charged in various Pierce County courts of limited jurisdiction with alcohol related criminal offenses. ² The Does separately petitioned the courts in which they were charged for consideration for a deferred prosecution program. *See* RCW 10.05. ³ Their petitions were all granted, [*447] each on the condi-

tion that the petitioner enter an alcohol treatment program and pay [**184] court costs. Their respective obligations for court costs ranged from \$ 100 to \$ 350. The Does each paid the court costs and entered alcohol treatment programs as a condition of the deferred prosecution. No appeals were taken from any of the orders granting their petitions for deferred prosecution and assessing court costs. ⁴

2 John Doe was charged in Puyallup Municipal Court with "driving while under the influence of intoxicating liquor". Jane Roe was charged in Tacoma Municipal Court with "driving while intoxicated". John Roe was charged in Pierce County District Court with "driving a motor vehicle while under the influence of intoxicating liquor". Jane Doe was charged in Fife Municipal Court with assault and resisting arrest.

[***3]

3 RCW 10.05.010 provides in part as follows:

"In a court of limited jurisdiction a person charged with a misdemeanor or gross misdemeanor may petition the court to be considered for a deferred prosecution program."

RCW 10.05.020(1) provides in part as follows:

"The petitioner shall allege under oath in the petition that the wrongful conduct charged is the result of or caused by alcoholism, drug addiction, or mental problems for which the person is in need of treatment . . .".

4 At least three of the prosecutions were dismissed, pursuant to the provisions of RCW 10.05.120, before the present action was filed in superior court. Presumably they were dismissed because those appellants completed their respective alcohol treatment programs.

The Does separately filed suit in Pierce County Superior Court against the Limited Courts seeking a refund of court costs and injunctive relief. They all moved to have their lawsuits proceed as a class action suit; however, a class has not yet been certified by court [***4] order. ⁵

5 The Does asserted in their brief that they reached an informal agreement with all of the Limited Courts to reserve their motions for class certification until a decision was reached on the issues in this appeal.

All of the Does' lawsuits were consolidated for argument before a judge of the Pierce County Superior Court. The Does each alleged there that the imposition of court costs as a condition of deferred prosecution was

74 Wn. App. 444, *, 874 P.2d 182, **;
1994 Wash. App. LEXIS 242, ***

not authorized by RCW 10.05 and, therefore, each of the courts of limited jurisdiction erred in assessing the costs. The Limited Courts all moved for a summary judgment of dismissal, asserting that they had implied authority to impose the costs and that, in any case, the Does' claims were barred by the statute of limitations, collateral estoppel, res judicata, judicial immunity, and/or the failure of the Does to avail themselves of the remedy provided by CrRLJ 7.8.⁶

⁶ The Limited Courts have not argued on appeal, as they did at the trial court, that the Does' lawsuit is barred by the statute of limitations or that they had implied authority to impose court costs. Because they have provided no argument on these issues, we have not addressed them. *RAP 10.3(a)(5)*.

[**5] The trial court granted a summary judgment to the Limited Courts and dismissed the Does' actions. In reaching its decision, the trial court took note of this court's decision in *State v. Friend*, 59 Wn. App. 365, 797 P.2d 539 (1990), in [*448] which we held that RCW 10.05 did not, at that time, authorize courts of limited jurisdiction to impose court costs on defendants who successfully petitioned for deferred prosecution.⁷ The trial court nevertheless concluded that the Does were barred from recovering the court costs in an independent suit against the Limited Courts because the Does had not appealed the orders granting their petitions for deferred prosecution or moved, pursuant to CrRLJ 7.8(b)(4), to vacate what they each now claim are void judgments. It also denied the Does' request for injunctive relief, concluding that the Limited Courts were already on notice of our holding in *Friend* that assessment of court costs in deferred prosecutions was not authorized by statute. The Does each appealed to the Supreme Court. That court consolidated the appeals and transferred them to us for review.

⁷ The Legislature has since amended *RCW 10.05.140* to allow courts of limited jurisdiction to impose court costs in deferred prosecutions as long as the costs do not exceed \$ 150 (Laws of 1991, ch. 247, § 1). *RCW 10.01.160*.

[**6] [1] The underlying issue on appeal is whether the Superior Court erred in granting summary judgment to the Limited Courts. We review summary judgment orders de novo and engage in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Summary judgment is warranted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *CR 56(c)*; *Yakima Cy. (W. Vly.) Fire Protec. Dist. 12 v. Yakima*, 122 Wn.2d 371, 381, 858 P.2d 245 (1993).

I

The Limited Courts contend, initially, that the Does' lawsuit to recover court costs is, in reality, a collateral attack on the orders that the various courts of limited jurisdiction entered requiring payment of court costs as a condition of deferred prosecution and is, thus, barred by the doctrine of collateral estoppel. Collateral estoppel, or issue preclusion, bars a party from relitigating an [**185] issue that was already litigated and decided in a prior proceeding. The elements of issue preclusion are as follows:

[*449] (1) identical issues; (2) a final judgment on the merits; (3) the party [**7] against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.

In addition, the issue to be precluded must have been actually litigated and necessarily determined in the prior action.

(Citations omitted.) *Shoemaker v. Bremerton*, 109 Wn.2d 504, 507-08, 745 P.2d 858 (1987) (quoting *Malland v. Department of Retirement Sys.*, 103 Wn.2d 484, 489, 694 P.2d 16 (1985)).

[2] The Does respond that the portions of the orders of the courts of limited jurisdiction requiring them to pay costs as a condition of deferred prosecution are void judgments and, as such, are subject to collateral attack. The Does correctly observe that a void judgment is always subject to collateral attack. *Bresolin v. Morris*, 86 Wn.2d 241, 245, 543 P.2d 325 (1975). We will, therefore, first address the issue of whether the portions of the various orders of the courts of limited jurisdiction assessing court costs against the Does are void judgments.

[3] [4] [**8] A judgment is considered void as opposed to merely erroneous when "the court lacks jurisdiction of the parties or the subject matter or lacks

74 Wn. App. 444, *, 874 P.2d 182, **;
1994 Wash. App. LEXIS 242, ***

the inherent power to enter the particular order involved". *Bresolin*, at 245. A void judgment must be vacated whenever the lack of jurisdiction comes to light. *Mitchell v. Kitsap Cy.*, 59 Wn. App. 177, 180-81, 797 P.2d 516 (1990).

The critical question here is whether the judgment ordering payment of court costs was void or merely erroneous.⁸ As we have observed, if the judgments were void, then the Does are not collaterally estopped from maintaining an independent action to recover the costs. If, however, the judgments were merely erroneous, then the Does' action could be barred by principles of collateral estoppel.

8 Although we are not bound by its conclusion, we note that the trial court found that the judgment requiring the Does to pay court costs was void.

The Washington Supreme Court discussed the difference between a void judgment and [***9] an erroneous judgment in [*450] some detail in *Dike v. Dike*, 75 Wn.2d 1, 448 P.2d 490 (1968). The court quoted with approval language from *Robertson v. Commonwealth*, 181 Va. 520, 536, 25 S.E.2d 352, 146 A.L.R. 966 (1943), regarding how a void judgment can be distinguished from an erroneous judgment. The court in *Dike* quoted *Robertson* as follows:

[A] void judgment should be clearly distinguished from one which is merely erroneous or voidable. There are many rights belonging to litigants -- rights which a court may not properly deny, and yet if denied, they do not render the judgment void. Indeed, it is a general principle that where a court has jurisdiction over the person and the subject matter, no error in the exercise of such jurisdiction can make the judgment void, and that a judgment rendered by a court of competent jurisdiction is not void merely because there are irregularities or errors of law in connection therewith.

Dike, 75 Wn.2d at 8 (quoting [***10] *Robertson*, 181 Va. at 536). Consistent with *Dike*, Division One of this court recently noted that a void judgment is one that "exceeds . . . statutory authority" while an erroneous judgment is one that "erroneously interprets . . . the stat-

ute . . .". (Italics omitted.) *Marley v. Department of Labor & Indus.*, 72 Wn. App. 326, 334, 864 P.2d 960 (1993).

The Limited Courts contend that the judgments here were merely erroneous because the courts had personal jurisdiction over the parties and subject matter jurisdiction over the cause of action. Although the Limited Courts correctly observe that the various courts of limited jurisdiction had personal jurisdiction over the Does as well as subject matter jurisdiction to determine the alcohol related criminal offense cases and the petitions for deferred prosecution, they did not have subject matter jurisdiction to impose the costs. That is made clear by *Friend* where we said: "Nothing in the deferred [*186] prosecution statute itself authorizes the imposition of such costs." [***11] 59 Wn. App. at 366. The costs that were imposed by the courts of limited jurisdiction were clearly not authorized by statute, and, therefore, the imposition of these costs was in excess of the statutory authority of the courts.

[*451] Although we recognize that the judgments of the courts of limited jurisdiction were not entirely void, one portion of an order or judgment can be considered void if a court acted without jurisdiction as to a portion of that order or judgment. *In re Marriage of Leslie*, 112 Wn.2d 612, 618-21, 772 P.2d 1013 (1989). In *Leslie*, the trial court had awarded relief that exceeded the relief requested in the complaint, and the court held that only "that portion" of the judgment was void. *Leslie*, at 618. That is the case here. The deferred prosecution orders were valid except for the portion of the judgments imposing costs, which was void.

[5] The Limited Courts contend, finally, that the Does could have directly appealed the imposition of court costs and that their failure to do so should bar their suits to recover the costs. Even assuming that an appeal would lie, [***12] cases permitting a void order to be collaterally attacked do not appear to require that a direct appeal be exhausted or even pursued. *See Bresolin*.⁹

9 Because we conclude that the judgment of court costs was void, we need not address the Does' additional arguments that the order requiring payment of court costs also amounted to an unconstitutional or illegal tax or fee and/or a coerced payment. Neither is it necessary for us to address their contention that even if the order imposing court costs here was subject to collateral estoppel, the collateral estoppel factors would weigh against the Limited Courts asserting it as a bar.

II

74 Wn. App. 444, *, 874 P.2d 182, **;
1994 Wash. App. LEXIS 242, ***

The Limited Courts also contend that even if the Does' claim is not barred by collateral estoppel or their failure to appeal, their independent action should be barred on the basis that they did not avail themselves of what the Limited Courts allege is the exclusive remedy for relief provided in CrRLJ 7.8(b)(4). The issue we are presented with is whether CrRLJ 7.8 provides [***13] the exclusive mechanism for a party to collaterally attack a void judgment or order issued by a court of limited jurisdiction in a criminal case. We conclude that it does.

CrRLJ 7.8 provides in part as follows:

RELIEF FROM JUDGMENT OR ORDER

....

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. *On motion and upon such [*452] terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:*

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) *The judgment is void;* or

(5) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1) and (2) not more than 1 year after the judgment, order, or proceeding was entered or taken, and is further subject to *RCW 10.73.090* [***14] , .100, .130, and .140. A motion under this section does not affect the finality of the judgment or suspend its operation.

(Italics ours.)

[6] [7] Court rules are to be interpreted in the same manner as statutes. *State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993). A court must in-

terpret a rule as it is written and may not read into it things that it may conceive that the drafters have left out. *Waite v. Morissette*, 68 Wn. App. 521, 525, 843 P.2d 1121, review denied, 122 Wn.2d 1006 (1993). Our [**187] function is to ascertain what the drafters did, not conjecture what they could have done. *State v. Hastings*, 115 Wn.2d 42, 47, 793 P.2d 956 (1990).

The Does present several arguments as to why CrRLJ 7.8 should not be interpreted to be their exclusive remedy. We will address each of these arguments.

A

[8] The Does assert initially that CrRLJ 7.8(b) is a postconviction remedy and because they were not convicted of any crime, the rule has no applicability. We disagree. The rule provides that it exists to enable a party to obtain relief from judgments or orders, not merely [***15] convictions. CrRLJ 7.8.

B

The Does' primary argument that CrRLJ 7.8(b) is not the exclusive remedy is by reference to *CR 60*. They contend [*453] that their right to bring an independent action to challenge a void order or judgment is recognized in *CR 60*, which provides in part as follows:

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc. *On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:*

...

(5) The judgment is void;

...

(c) Other Remedies. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

[9] In our judgment, *CR 60* has no application in this case. It is a civil rule and when rules are set out in detail in criminal rules, they need not be supplemented by civil rules. *State v. Pawlyk*, 115 Wn.2d 457, 476-77, 800 P.2d 338 (1990). CrRLJ 7.8 fully sets out the procedure to be employed in vacating void judgments and, thus, it is not to be supplemented by *CR 60*.

[***16] [10] Furthermore, an examination of *CR 60(c)* together with CrRLJ 7.8 leads us to the conclu-

sion that the Supreme Court intended to make CrRLJ 7.8 an exclusive remedy. We reach that conclusion because CrRLJ 7.8 does not contain a provision equivalent to *CR 60(c)*, which provides that the rule does not limit a court's ability to entertain an independent action to relieve a party from a judgment or order. The lack of an equivalent provision in CrRLJ 7.8 suggests that the criminal rule was intended as the exclusive mechanism for a party to obtain relief from a judgment or order, and that an independent civil action is, thus, barred. See *Waite*, at 525.

Our determination that CrRLJ 7.8 is the sole mechanism for a party to move to vacate a void judgment or order issued by a court of limited jurisdiction finds support in other provisions in the criminal rules for the courts of limited jurisdiction. For example, CrRLJ 1.1 provides: "These rules govern the procedure in the courts of limited jurisdiction . . . in *all* criminal proceedings . . ." (Italics ours.) In addition, CrRLJ 1.2 provides: "These rules are intended to provide for the just [*454] determination of [***17] every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration, effective justice, and the elimination of unjustifiable expense and delay." (Italics ours.)

Our conclusion is also buttressed by the strong policy reason that judicial resources are employed more efficiently if the party who asserts a judgment or order as being void is first required to address its concerns to the court that issued the judgment or order. Clearly, the district or municipal court that issued the order or judgment that is being characterized as being void will be in the best position to assess the merits of the movant's argument. If the motion to vacate the judgment is denied and the movant is dissatisfied with the decision of the court of limited jurisdiction, he or she may then appeal the ruling to the superior court. See *RALJ 2.2(a)* ("A party may appeal final a final decision of a court of limited jurisdiction. . . . [A] final decision includes . . . an order granting or denying a motion for . . . [**188] amendment of judgment . . ."); cf. [***18] *Kruteger Eng'g, Inc. v. Sessums*, 26 Wn. App. 721, 722, 615 P.2d 502 (1980) (motion to amend judgment includes a party's motion to vacate a portion of a judgment); *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991) (courts have non discretionary duty to vacate void judgment), review denied, 118 Wn.2d 1022 (1992). Finally, restricting motions to vacate void criminal judgments to the courts that issued them gives those courts the opportunity to correct their mistakes. Cf. *Ryan v. Westgard*, 12 Wn. App. 500, 510, 530 P.2d 687 (1975).

C

[11] The Does next contend that CrRLJ 7.8(b) provides inadequate and ineffective relief for large numbers of people who are attempting to recoup court costs that were allegedly wrongfully assessed. In that regard, they argue that the district and municipal courts do not have jurisdiction to hear class action suits, award "money-had-and-received" damages or provide injunctive relief in this case. We reject these arguments. We see no barrier to a party obtaining effective relief, even in the absence of a class action suit. The mere fact that the Does might be unable [***19] to maintain a class action suit [*455] does not preclude their ability to recover the overpaid costs. Indeed, the procedure each of the Does would have to follow to obtain relief is quite simple. We are also not persuaded by the Does' argument that the district and municipal courts will be overwhelmed with litigants. As to the Does' claim that the courts of limited jurisdiction cannot award "money-had-and-received" damages, the Does provide no support for this proposition, nor can we find any. We, therefore, decline to consider it. *RAP 10.3(a)(5)*.

D

Finally, the Does assert that new amendments to CrRLJ 7.8(b), which became effective on September 1, 1991, restrict its availability as a remedy in this case. The new amendments include a reference in CrRLJ 7.8 to *RCW 10.73.090* and .100. *RCW 10.73.090* established a 1-year time limit for motions to collaterally attack a judgment in a criminal case. In our judgment, CrRLJ 7.8(b) would still be available to the Does because the new 1-year time limit imposed on a party's motion to collaterally attack a judgment does not apply if "the sentence imposed was in excess of the [***20] court's jurisdiction . . .". *RCW 10.73.100(5)*. Because that is the claim here, the new statutes do not affect the availability of CrRLJ 7.8 as a remedy to the Does. See *Mitchell*, at 180-81 (void judgment must be vacated whenever lack of jurisdiction comes to light).

III

Because we conclude that the Does' exclusive remedy for relief is in the courts of limited jurisdiction that imposed the court costs, we need not address the argument of the Limited Courts that the Does' independent actions are barred by the doctrine of judicial immunity.

Affirmed.

Seinfeld, A.C.J., and Houghton, J., concur.

APPENDIX D

The Court of Appeals
of the
State of Washington

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Court Administrator/Clerk

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CASE #: 73534-9-I

Nicholas E. Boone, Petitioner, v. City of Seattle, Respondent

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on August 24, 2015, regarding Petitioner's Motion for Discretionary Review:

This matter involves a dispute over whether speed zone signs the City of Seattle placed in certain school zones comply with applicable statutes and regulations and whether individuals cited for speeding within the school zones may seek a refund in superior court of fines they paid in municipal court following municipal court notices of infraction. The superior court has certified a class action under CR 23(b)(2). Plaintiff/petitioner Nicholas Boone, on behalf of the certified class, seeks discretionary review of a May 8, 2015 trial court order granting defendant/respondent City of Seattle's motion for summary judgment dismissal of Boone's refund claims and denying his motion for partial summary judgment on his claim for declaratory relief that the City's school speed zone signs do not comply with regulations. On June 2, 2015, the trial court signed a stipulated order certifying the matter for discretionary review under RAP 2.3(b)(4)

In February 2014, Boone was cited for speeding in a school zone. He received a municipal court notice of infraction and paid the fine without challenge; he did not appeal or otherwise challenge the infraction in the superior court. Instead, in July 2014 he filed a class action

lawsuit in superior court against the City of Seattle, seeking a declaratory judgment that the school zone speed signs in three areas of the City, including the area where he was speeding, do not strictly comply with the Manual on Uniform Traffic Control Devices (MUTCD). Specifically, he asserted that the lower plaque of the sign improperly said "WHEN LIGHTS ARE FLASHING" instead of "WHEN FLASHING." (The signs have since been replaced.) Boone sought "equitable restitution," i.e., a refund and/or damages. The trial court certified the class under CR 23(b)(2).

On May 8, 2015, the trial court granted the City's motion for summary judgment, ruling that under Doe v. Fife Municipal Court, 74 Wn. App. 444, 874 P.2d 182 (1994), Boone's challenge was an improper collateral attack on the prior municipal court judgment and that the refund claims must be brought individually in municipal court by motion to vacate under Infraction Rules for Courts of Limited Jurisdiction (IRLJ) 6.7(a) (a motion to waive or suspend a fine or vacate a judgment is governed by CRLJ 60(b)).

The court declined to follow a decision from the U.S. Western District of Washington involving red light cameras, Todd v. City of Auburn, No. C09-1232JCC. In Todd, plaintiffs brought a class action suit against multiple cities challenging notices of infractions generated by a traffic camera. Plaintiffs challenged the legality of the traffic camera program. The defendant Cities moved to dismiss on several grounds, including that jurisdiction over claims relating to traffic infractions is limited to municipal courts. The district court disagreed. Relying on Orwick v. City of Seattle, 103 Wn.2d 249, 692 P.2d 793 (1984), the court reasoned that the superior courts, not the municipal courts, have jurisdiction over claims for equitable relief that relate to system-wide violations of statutory requirements in the enforcement of municipal ordinances. Todd, Order at 3-4.

The trial court also denied the City's and Boone's cross motions for summary judgment on the issue of whether or not the signs violate applicable statutes and regulations. In support of his motion, Boone relied on the superior court decision in another case City of Seattle v. Hunt, No. 13-2-2-25366-6 SEA. Joseph Hunt received a notice of infraction for speeding in a school zone. Unlike Boone, Hunt challenged the infraction in municipal court and was found guilty. In his RALJ appeal to the superior court, he argued that the City's sign, which said "WHEN LIGHTS ARE FLASHING" instead of "WHEN FLASHING" did not strictly comply with MUTCD specifications. The superior court agreed and reversed:

While at first glance the difference between the two appears trivial, Mr. Hunt argues they are important because the additional words could affect the visibility of the sign. While the Municipal Court made no findings regarding the sign's visibility, this is not necessary given the requirement in RCW 46.63.171(1)(h) that the City follow the specifications of the MUTCD. The court is not persuaded by the City's argument that substantial compliance with the MUTCD was sufficient.

Noting that the City did not seek discretionary review in Hunt, Boone argued that the City was collaterally estopped from arguing that anything other than strict compliance is sufficient. The trial court disagreed, noting procedural differences between the cases, and denied the cross

motions for summary judgment based on multiple disputed issues of material fact. (As the City notes, in Hunt it was precluded from seeking RALJ discretionary review under RAP 2.3(d) because the amount in controversy was under \$200. See RCW 2.06.030).

At the hearing, the parties and the court agreed to certify the municipal court/superior court jurisdiction issue for review (RP 5/8/15 at 90-91). The court also found that “the ruling falls under CR 54(b); there is no just reason for delay in entry of this order as final.” Then on June 2, 2015, the court entered a stipulated certification order under RAP 2.3(b)(4):

Pursuant to RAP 2.3(b)(4), the Court hereby certifies that its May 8, 2015 order on the parties’ cross motions for summary judgment involve controlling questions of law as to which there is a substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation. The court also finds that its rulings fall under CR 54(b); there is no just reason for delay in entry of the May 8, 2015 order as final.

Boone filed a motion for discretionary review under RAP 2.3(b)(4). Alternatively, Boone argues that review is warranted under RAP 2.3(b)(1), obvious error that renders further proceedings useless. He argues that the trial court erred in ruling that his refund request was an improper collateral attack on the municipal court judgment and must be brought in municipal court by individual motions to vacate under IRLJ 6.7(a). He also argues that the court erred in denying summary judgment on his claim that the signs do not comply with the MUTCD.

The City agrees that discretionary review is warranted on the issue of whether the superior court properly ruled that Boone must bring his refund request by motion to vacate in the municipal court. But the City argues that because the trial court ruled there were disputed issues of fact, this court should not now review the denial of Boone’s claim for declaratory relief.

In his reply, Boone argues that the parties stipulated to discretionary review of *both* issues and the trial court granted the certification as to *both* issues.

To the extent the City and Boone dispute the scope of the certification, it is not controlling because this court retains the discretion to determine whether a RAP 2.3(b)(4) certification is well taken. The rule requires three things: a controlling question of law; a substantial ground for a difference of opinion on the question of law; and a showing that immediate review may materially advance the ultimate termination of the litigation. Although the court did not enter detailed findings, the court also found there was no just reason for delay. See CR 54(b) and RAP 2.2(d).

I agree with the parties and the trial court that immediate review of the municipal/superior court “jurisdiction” issue on Boone’s refund claim is warranted. It involves a controlling question of law, there is a substantial ground for a difference of opinion (see Doe, Orwick, and Todd), and immediate review of the issue will materially advance the ultimate termination of the litigation.

Page 4 of 4
August 25, 2015
CASE #: 73534-9-1

I also conclude that even assuming the City agreed to the stipulation for immediate review of all issues, review of Boone's declaratory judgment claim is not warranted at this time. Boone's position is that the City must strictly comply with the MUTCD (citing Hunt) and that because the City's signs did not strictly comply, he was entitled to declaratory relief as a matter of law, it was error for the trial court to deny summary judgment, and the question of law he raises is controlling.

But the trial court disagreed and reasoned that although it had jurisdiction to address Boone's claim for declaratory relief (RP at 74, 84), and it was undisputed that the "WHEN LIGHTS ARE FLASHING" signs did not strictly comply with the "WHEN FLASHING" regulation, the court could not and would not rule as a matter of law because there were disputed issues of fact, for example, as to whether the signs substantially conformed with the regulations (RP 79), and whether or not the nonconformity made a difference in terms of engineering and individual circumstances (RP 78, 79-81). The court further reasoned that in light of its ruling that the refund claims must be brought in the municipal court individually by way of motions to vacate and its certification for immediate review of this decision, it did not make sense to proceed to trial on the declaratory judgment class action claims (RP 87-88). Similarly, immediate review under RAP 2.3(b)(4) of the declaratory judgment issue is not warranted, and Boone has not demonstrated that review should be granted under RAP 2.3(b)(1).

Therefore, it is

ORDERED that discretionary review of the trial court order denying Boone's motion for summary judgment on his declaratory judgment claim is denied; and it is

ORDERED that discretionary review of the trial court order granting the City of Seattle's motion for summary judgment dismissal of Boone's refund claims is granted, and the clerk will set a perfection schedule.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

lls

APPENDIX E



John W. Orwick, Arthur M. Peterson, John A. French, et al., Petitioners, v. The City
of Seattle, a municipal corporation, Respondent

No. 50714-7

SUPREME COURT OF WASHINGTON

103 Wn.2d 249; 692 P.2d 793; 1984 Wash. LEXIS 2099

December 13, 1984

SUMMARY:

[**1] **Nature of Action:** Three drivers cited for speeding sought declaratory and injunctive relief and damages. The citations subsequently were dismissed.

Superior Court: The Superior Court for King County, No. 81-2-17110-9, Frank J. Eberharter, J., dismissed the action on December 22, 1981.

Court of Appeals: The court *affirmed* the dismissal at 37 Wn. App. 594, holding that the trial court lacked jurisdiction over the equitable claims and that the allegations for damages were insufficient to warrant relief.

Supreme Court: Holding that the equitable claims, although subject to the trial court's jurisdiction, were moot and that the complaint stated an actionable claim for damages, the court *affirms* the dismissal of the claims for declaratory and injunctive relief and *reverses* the dismissal of the claim for damages.

HEADNOTES

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Courts -- Jurisdiction -- Subject Matter -- Determination** Whether an action is within a particular court's subject matter jurisdiction depends upon the nature of the action and the relief sought.

[2] **Municipal Corporations -- Courts -- Municipal Courts -- Jurisdiction -- Action "Arising Under" Ordinance** An action alleging violations of statutory and constitutional rights in enforcing municipal ordinances does not "arise under" a municipal ordinance for purposes of RCW 35.20.030, [**2] which grants

municipal courts exclusive jurisdiction over cases arising under a municipal ordinance.

[3] **Appeal and Error -- Decisions Reviewable -- Moot Questions -- What Constitutes** A cause of action is moot if the court cannot provide effective relief under the circumstances.

[4] **Courts -- Justiciable Controversy -- Necessity -- Review** Dismissal of a case prior to trial on the ground of mootness will generally be sustained on appeal. In such a dismissal there is no issue of preserving judicial resources and there is no motive to zealously advocate the opposing positions.

[5] **Dismissal and Nonsuit -- Failure To State Claim -- Factual Basis** Dismissal for failure to state an actionable claim under CR 12(b)(6) is not proper unless there is no state of facts consistent with the pleadings which would entitle the claimant to relief.

[6] **Dismissal and Nonsuit -- Failure To State Claim -- Legal Theory** The failure of a complaint to identify or develop adequately the legal theory underlying the claim does not render it subject to dismissal under CR 12(b)(6) for not stating a claim upon which relief can be granted.

[7] **Malicious [**3] Prosecution -- Elements -- Malice -- Sufficiency of Allegation.** In an action for malicious prosecution, the element of malice is sufficiently pleaded if the facts alleged give rise to an inference of malice.

COUNSEL: Hollowell, Pisto & Kalenius and Mr. O. W. Hollowell, Federal Way, Washington, for petitioners.

103 Wn.2d 249, *; 692 P.2d 793, **;
1984 Wash. LEXIS 2099, ***

Hon. Douglas N. Jewett, City Seattle Attorney, and Mr. Philip M. King, Assistant, Seattle, Washington, for respondent.

JUDGES: En Banc. Brachtenbach, J. Williams, C.J., and Utter, Dolliver, Dore, Dimmick, Pearson, and Andersen, JJ., concur.

OPINION BY: BRACHTENBACH

OPINION

[*250] [**795] This is an appeal from the dismissal of petitioners' claims under *CR 12(b)(1)* and (6).

The three petitioners were each issued traffic citations by the Seattle Police Department for exceeding the speed limit. Radar was used in each instance to determine speed. Each petitioner requested a hearing to contest his citation; however, all three traffic citations were dismissed before a hearing was held. The reason for dismissal [***4] is not in the record.

Prior to the dismissal of their citations, petitioners filed a class action suit against the City of Seattle, requesting declaratory and injunctive relief and damages. They allege (1) that procedures used by the Seattle Municipal Court to adjudicate traffic citations violate RCW 46.63, the statute governing traffic infractions and (2) that significant numbers of motorists are wrongfully issued citations for speeding as the result of the use of inaccurate radar equipment by inadequately trained officers. Petitioners claim that the [*251] Seattle Police Department is aware of the inaccuracy of its radar equipment. The legal theory under which petitioners are proceeding has yet to be made clear.

The City moved for dismissal under *CR 12(b)* for lack of jurisdiction over the subject matter and failure to state a claim upon which relief can be granted. The trial court granted the City's motion. Petitioners had requested certification of the class; the trial court never ruled on this motion. Petitioners appealed the dismissal.

The Court of Appeals affirmed the decision of the trial court. *Orwick v. Seattle*, 37 Wn. App. 594, 682 P.2d 954 (1984). It ruled [***5] that the trial court did not have jurisdiction over petitioners' claim for injunctive and declaratory relief, but did have jurisdiction over petitioners' claim for damages. However, it ruled that the damage claim was properly dismissed because petitioners failed to allege malice, a necessary element of the tort of malicious prosecution.

The first issue is whether the superior court had jurisdiction to hear petitioners' claim for injunctive and declaratory relief. We hold that superior courts have

original jurisdiction over claims for equitable relief from alleged system-wide violations of mandatory statutory requirements by a municipal court and from alleged repetitive violations of constitutional rights by a municipality in the enforcement of municipal ordinances.

The superior courts have broad and comprehensive original jurisdiction over all claims which are not within the exclusive jurisdiction of another court. *Const. art. 4, § 6*. Because of this specific constitutional grant of jurisdiction, exceptions to this broad jurisdiction will be read narrowly.

Under *RCW 35.20.030*, municipal courts have exclusive jurisdiction over all cases arising under a municipal ordinance. [***6] Inherent in this grant of power is the exclusive authority of the municipal court to hear and determine evidentiary and procedural issues which routinely arise in proceedings before it. An issue arises because petitioners sought to enjoin the use of radar evidence in all traffic infraction cases until the Seattle Police Department [**796] corrected [*252] the alleged deficiencies. The Court of Appeals was correct in ruling that the municipal court has exclusive original jurisdiction over the admissibility of evidence in a contested hearing of a traffic citation. The appropriate remedy for error by the municipal court on an evidentiary ruling is through an appeal to the superior court. Petitioners conceded this point in oral argument.

[1] [2] However, a municipal court does not have exclusive original jurisdiction merely because the factual basis for a claim is related to enforcement of a municipal ordinance. The relevant consideration for determining jurisdiction is the nature of the cause of action and the relief sought. *Silver Surprise, Inc. v. Sunshine Mining Co.*, 74 Wn.2d 519, 522, 445 P.2d 334 (1968).

Here, petitioners allege system-wide violations of the statutory [***7] requirements in RCW 46.63 and state and federal constitutional violations. Petitioners' claim for injunctive and declaratory relief is based on their rights under a state statute and the state and federal constitutions. These claims do not "arise under" a municipal ordinance and, therefore, are not within the exclusive jurisdiction of the Seattle Municipal Court. Thus, the superior court has jurisdiction to hear petitioners' claim and jurisdiction to grant equitable relief, if appropriate. Whether the Seattle Municipal Court is a necessary defendant is not before us.

The circumstances under which a court will exercise its equitable powers are limited. Equitable relief is available only if there is no adequate legal remedy. *Tyler Pipe Indus., Inc. v. Department of Rev.*, 96 Wn.2d 785, 791, 638 P.2d 1213 (1982). However, under extraordinary circumstances a superior court may find it necessary to use its equitable powers to intervene in the

103 Wn.2d 249, *; 692 P.2d 793, **;
1984 Wash. LEXIS 2099, ***

administration of the municipal courts, *see State ex rel. Wallen v. Noe*, 78 Wn.2d 484, 485, 475 P.2d 787 (1970), or to prevent misconduct by the police. *Jacobsen v. Seattle*, 98 Wn.2d 668, 658 P.2d 653 (1983).

[3] Although the superior [***8] court had jurisdiction to hear petitioners' claim for injunctive and declaratory relief, the [*253] claim was properly dismissed because it was moot as to these petitioners. A case is moot if a court can no longer provide effective relief. *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983); *In re Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983).

In this case, the traffic citations issued to the petitioners have been dismissed. Any inconvenience to the petitioners due to allegedly incorrect procedures of the Seattle Municipal Court or the Seattle Police Department has already occurred and cannot be corrected by injunction. Nor can the petitioners suffer adverse collateral consequences from the mere issuance of traffic citations which have been dismissed. Petitioners' claim for damages provides a full remedy for their alleged injury.

[4] This court generally will not review a case which has become moot. This is to avoid the danger of an erroneous decision caused by the failure of parties, who no longer have an existing interest in the outcome of a case, to zealously advocate their position.

We do make an exception for moot cases involving "matters of continuing and [***9] substantial public interest". *Sorenson v. Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). However, the moot cases which this court has reviewed in the past have been cases which became moot only after a hearing on the merits of the claim. *In re Cross*, *supra*; *In re Bowman*, 94 Wn.2d 407, 409-10, 617 P.2d 731 (1980); *In re Patterson*, 90 Wn.2d 144, 145, 579 P.2d 1335 (1978); *Northwest Trollers Ass'n v. Moos*, 89 Wn.2d 1, 2, 568 P.2d 793 (1977); *Hartman v. State Game Comm'n*, 85 Wn.2d 176, 177, 532 P.2d 614 (1975); *Sorenson v. Bellingham*, *supra*. In those cases, the facts and legal issues had been fully litigated by parties with a stake in the outcome of a live controversy. After a hearing on the merits, it is a waste of judicial resources to dismiss [**797] an appeal on an issue of public importance which is likely to recur in the future.

In this case, however, petitioners' claim for declaratory and injunctive relief became moot before trial. Dismissal of their claim will not involve a waste of judicial resources and [*254] will avoid the danger of allowing petitioners to litigate a claim in which they no longer have an existing interest.

This case [***10] is not before the court as a class action and we express no opinion as to the merits of the

class claims. The trial court neither certified nor denied certification of the class. Petitioners made no assignment of error regarding the trial court's failure to certify the class and abandoned their class claim before the Court of Appeals.

[5] [6] The final issue is whether the petitioners' claim for damages was properly dismissed under *CR 12(b)(6)*. Dismissal for failure to state a claim may be granted only if "it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief." *Corrigal v. Ball & Dodd Funeral Home, Inc.*, 89 Wn.2d 959, 961, 577 P.2d 580 (1978). Petitioners' factual allegations are presumed to be true for the purpose of this motion.

The legal basis for petitioners' claim is neither clear from the pleadings, nor has it been adequately developed in the briefs. However, petitioners' factual allegations appear to state some type of claim. This leads us to an evaluation of a *CR 12(b)(6)* motion and appellate review thereof.

CR 12(b)(6) authorizes a motion to raise the defense that the complaint fails [***11] to state a claim upon which relief can be pleading demurrer. The motion must be tested in light of *CR 8(a)(1)* which requires "a short and plain statement of the claim showing that the pleader is entitled to relief . . .".

A claim for which relief can be granted is based upon facts which constitute invasion of a recognized legal right. Thus, on its face, a *CR 12(b)(6)* motion, tested against *CR 8(a)(2)*, seemingly would challenge both the sufficiency of the alleged facts and the legal theory relied upon by the plaintiff. However, the interpretative cases have so narrowed the function of a *CR 12(b)(6)* motion that it has been concluded that *CR 12(b)(6)* motions should be granted "sparingly and with care." 27 *Federal Procedure Pleadings [*255] and Motions* § 62:465 (1984); 5 C. Wright & A. Miller, *Federal Practice* § 1349, at 541 (1969).

As to the *facts*, the complaint survives a *CR 12(b)(6)* motion if *any* state of facts could exist under which the claim could be sustained. *Brown v. MacPherson's, Inc.*, 86 Wn.2d 293, 297, 545 P.2d 13 (1975); *Corrigal v. Ball & Dodd Funeral Home, Inc.*, *supra*. Because of pretrial procedures, including discovery and the summary [***12] judgment motion, this standard of testing factual allegations is adequate.

However, testing the *legal* theory of the complaint is another matter. The identification of a legal theory permits the matching of the elements of that theory against the alleged or hypothetical facts. Yet the federal courts, with an identical rule, have held that the complaint need not correctly identify the legal theory or the-

103 Wn.2d 249, *; 692 P.2d 793, **;
1984 Wash. LEXIS 2099, ***

ories which give rise to the claim. *Rathborne v. Rathborne*, 683 F.2d 914 (5th Cir. 1982); *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 604 (5th Cir. 1981); *Goldstein v. North Jersey Trust Co.*, 39 F.R.D. 363, 366 (S.D.N.Y. 1966); 5 C. Wright & A. Miller, *Federal Practice* § 1357 (1969). Indeed, it has been said that the trial court has a duty to examine the complaint to determine if the allegations provide for relief under *any possible theory*, *Thomas W. Garland, Inc. v. St. Louis*, 596 F.2d 784, 787 (8th Cir. 1979), and that "it is unnecessary to set out the legal theory upon which a claim is based." *Speed Auto Sales, Inc. v. American Motors Corp.*, 477 F. Supp. 1193, 1198 (E.D.N.Y. 1979).

This case illustrates the folly of the interpretation given CR [***13] 12(b)(6) by these cases. Here, the petitioners' complaint alleged the violation of a statute, and that the actions [**798] of the defendants were patently unjust, caused economic harm, impaired the public's perception of the legal system and violated the federal and state constitutions. How these allegations lead to a conclusion of relief for these petitioners is unstated. In their brief, petitioners claim that the defendant's actions are contrary to common notions of justice. These shotgun assertions hardly allow a trial court to [*256] evaluate the potential merits of any legal theory and the elements thereof.

After the Court of Appeals categorized the claim as one of malicious prosecution, the petitioners, in their petition for review, added a conclusory theory of negligence. No analysis was made or authority cited. Finally, in oral argument before this court, a claim based upon false arrest was asserted for the first time.

Neither party has even suggested, much less analyzed, the question of the legal theories upon which petitioners proceed. Obviously this state of affairs is of no assistance to the trial or appellate court.

While we reverse to allow petitioners [***14] to pursue some damage claim, we point out the following principles:

1. The federal cases are of interest but not binding.
2. CR 12(b)(6) motions, as the rule is now written and so far interpreted, are very narrow in scope. If those motions are to serve a more effective and realistic purpose, CR 12(b)(6) should be examined and perhaps made more specific, by rule amendment, as to the statement of legal theories and their elements in order to test the alleged or presumed hypothetical facts.
3. Notwithstanding the foregoing, the Rules of Appellate Procedure are more specific and compliance will be expected hereafter. For example, RAP 10.3(a)(3) requires an identification of issues and (a)(5)

requires citations to legal authority pertaining thereto. See also RAP 13.4(c)(5). This case is woefully lacking in compliance with the theory or spirit of these rules. To identify the issues without analysis of the underlying legal theory giving rise to the issues means that an adversary expects the court to research all possible theories of legal liability and apply them to the hypothetical facts. It is not the function of trial or appellate courts to do counsel's thinking and briefing.

[***15] Despite petitioners' inadequate briefing, their claim for damages survives. The Court of Appeals erred when it dismissed petitioners' claims for malicious prosecution under CR 12(b)(6) for failure to allege malice.

[*257] [7] Malice is a necessary element of the tort of malicious prosecution. *Bender v. Seattle*, 99 Wn.2d 582, 593, 664 P.2d 492 (1983); *Peasley v. Puget Sound Tug & Barge Co.*, 13 Wn.2d 485, 497, 125 P.2d 681 (1942). However,

[T]he requirement that malice be shown as part of the plaintiff's case in an action for malicious prosecution may be satisfied by proving that the prosecution complained of was undertaken from improper or wrongful motives or in reckless disregard of the rights of the plaintiff.

(Italics omitted.) *Bender*, at 594, quoting *Peasley*, at 502. Petitioners allege intentional, patent violations of RCW 46.63 by the Seattle Municipal Court. They also allege continuing and systematic violations of motorists' constitutional rights, by the Seattle Police Department, with the knowledge of the Department's administration. If proven, these continuing violations constitute reckless disregard for petitioners' rights and create [***16] an inference of malice. Given the liberality of pleading and construction in favor of the nonmoving party these allegations are sufficient, though barely, to survive a motion to dismiss for failure to state a claim.

In conclusion, the superior court had jurisdiction to hear petitioners' claim for injunctive and declaratory relief, even though their claims related to the City's enforcement of its traffic ordinances. However, the petitioners' claims for equitable relief are moot. The dismissal of petitioners' claim for damages was improper, [**799] despite petitioners' failure to develop adequately the legal basis for their claim.

The trial court's dismissal of petitioners' claims for equitable relief is affirmed. The dismissal of petitioners' claim for damages is reversed.

APPENDIX F

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL TODD, GREGORY STACKHOUSE,)
STEVE BLAI, VONDA SARGENT, MAX)
HARRISON, ZOANN CHASE-BILLING, OGNJEN)
PANDZIC, SEUNGRAN CHWE, DANIEL WU,)
MARCUS NAYLOR, MELISSA MILLER, LEN)
JOHNSON, ASHLEY ALM, JIM AMES, BLANCA)
ZAMORA, CHARLES MAEL, SOMER CHACON,)
BRAD HAMPTON, NICHOLAS JUHL,)
GEORGINA LUKE, JUDITH STREDICKE, RICH)
NEWMAN, MARK CONTRATTO, ANEVA)
FREEMAN, CHRIS CLINE, TERA CLINE, JIM)
ABRAHAM, CATHERINE IWAKIRI, VICKI)
WAGNER, CODY EDWARDS, JULIE WILLIAMS,)
MICHAEL SALOKAS, BARBARA KELLER,)
CRAIG COATES, CHRIS SPERLICH, LORI)
FLEMING, BEN BACCARELLA, DALTON)
SHOTWELL, JERE KNUDTSSEN, BELINDA RIBA)
GREIG FAHNLANDER, DONALD STAVE,)
RICHARD MERCHANT, DAVID ROARK,)
TIMOTHY MORGAN, CHARLES GUST, CASEY)
HALVORSON, STEVEN MOODY, RICHARD)
DAIKER, individually and on behalf of two classes)
of similarly situated persons,)

Case No. C09-1232JCC

ORDER

Plaintiffs

v.

THE CITIES OF AUBURN, BELLEVUE, BONNEY)
LAKE, BREMERTON, BURIEN, FEDERAL WAY,)
FIFE, ISSAQUAH, LACEY, LAKE FOREST)
PARK, LAKEWOOD, LYNNWOOD, PUYALLUP,)
RENTON, SEATAC, SEATTLE, SPOKANE,)
TACOMA, , as well as AMERICAN TRAFFIC)
SOLUTIONS (d/b/a "ATS"); AMERICAN)
TRAFFIC SOLUTIONS, LLC (DBA "ATS)
SOLUTIONS") AND REDFLEX TRAFFIC)
SYSTEMS, INC.,)

Defendants

1 This matter comes before the Court on Defendants' motion to dismiss (Dkt. No. 108),
2 Plaintiffs' response (Dkt. No. 118), and Defendants' reply. (Dkt. No. 119.) Having thoroughly
3 considered the parties' briefing and the relevant record, the Court finds oral argument
4 unnecessary and hereby GRANTS the motion for the reasons explained herein.

5 **I. BACKGROUND**

6 In 2005, the Washington State Legislature passed a law granting municipalities the
7 authority to issue citations to owners of vehicles that were photographed violating red lights or
8 school speed zones. WASH. REV. CODE 46.63.170. Several municipalities throughout the state
9 adopted the traffic camera program and contracted with either American Traffic Solutions,
10 LLC or Redflex Traffic Systems, Inc. to provide equipment and services. (Mot. 4 (Dkt. No.
11 108).) Plaintiffs are a group of vehicle owners who were issued a notice of infraction ("NOI")
12 generated by a traffic camera. (Resp. 20 (Dkt. No. 118).) Plaintiffs are at different stages of the
13 proceedings that ensued from the issuance of the NOI, but all have either paid or are subject to
14 fines of \$101, \$104 or \$124. (*Id.*) Defendants are a group of municipalities in Washington
15 State ("Defendant Cities") and two companies that contracted with Defendant Cities to operate
16 and maintain the traffic cameras.

17 Plaintiffs originally filed suit in King County Superior Court, but Defendants removed
18 the case to this court pursuant to the Class Action Fairness Act, which grants original
19 jurisdiction to federal district courts for any civil action in which the amount in controversy
20 exceeds \$5,000,000 and is a class action in which any plaintiff is a citizen of a State different
21 from any defendant. 28 U.S.C. § 1332(d)(2)(A). Plaintiffs challenge the legality of the traffic-
22 camera program on the grounds that the fines are excessive, the contracts with the Defendant
23 corporations are contrary to statute, and Defendant Cities failed to get the required approval for
24 the NOIs from the Administrative Office of the Courts ("AOC"). Defendants dispute Plaintiffs'
25 claims and bring this motion to dismiss on the grounds that jurisdiction over claims relating to
26 traffic infractions should be limited to the municipal courts.

1 **II. APPLICABLE LAW**

2 Under Federal Rule of Civil Procedure 12(b)(6), a party may move to dismiss a claim
3 for “failure to state a claim upon which relief can be granted.” Although a complaint
4 challenged by a Rule 12(b)(6) motion to dismiss need not provide detailed factual allegations,
5 it must offer “more than labels and conclusions” and contain more than a “formulaic recitation
6 of the elements of a cause of action.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
7 The complaint must indicate more than mere speculation of a right to relief. *See id.* When a
8 complaint fails to adequately state a claim, such deficiency should be “exposed at the point of
9 minimum expenditure of time and money by the parties and the court.” *Id.* at 558. A complaint
10 may be lacking for one of two reasons: (1) absence of a cognizable legal theory or (2)
11 insufficient facts under a cognizable legal claim. *Robertson v. Dean Witter Reynolds, Inc.*, 749
12 F.2d 530, 534 (9th Cir. 1984). In ruling on a defendant’s motion to dismiss under Rule
13 12(b)(6), the Court assumes the truth of the plaintiff’s allegations and draws all reasonable
14 inferences in the plaintiff’s favor. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir.
15 1987).

16 **III. ANALYSIS**

17 **A. Jurisdiction**

18 Defendants argue that the Court lacks jurisdiction to hear Plaintiffs’ claims. The Seattle
19 Municipal Court has statutory jurisdiction over traffic cases. WASH. REV. CODE 35.20.010(1).
20 Municipal courts in all other Defendant Cities have exclusive original jurisdiction over traffic
21 infractions arising under city ordinances. WASH. REV. CODE 3.50.020. However, this does not
22 mean that municipal courts have original jurisdiction over any case conceivably related to the
23 enforcement of municipal ordinances; many such cases will be outside their purview. *Orwick*
24 *v. City of Seattle*, 692 P.2d 793, 796 (Wash. 1984). The Supreme Court of Washington has held
25 that “superior courts have original jurisdiction over claims for equitable relief from alleged
26 system-wide violations of mandatory statutory requirements by a municipal court and from

1 alleged repetitious violations of constitutional rights by a municipality in the enforcement of
2 municipal ordinances.” *Id.* at 795.

3 The Court notes that there was some inconsistency with respect to the different claims
4 and defenses made by different Plaintiffs in municipal court. (Reply 12–13 (Dkt. No. 119).)
5 Before the filing of this case, some municipal courts allowed Plaintiffs to bring the claims that
6 they repeat now. (*Id.*) This, Defendants argue, proves that municipal courts did indeed have
7 jurisdiction to hear these claims. (*Id.*) Plaintiffs argue that the examples Defendants cite are
8 merely instances where *Orwick* was not properly applied, and that because municipal courts
9 lacked the authority to hear tort claims, Consumer Protection Act (“CPA”) claims, and
10 equitable claims, prior arguments to the municipal courts should be disregarded and considered
11 here afresh. (Resp. 11 (Dkt. No 118).) The Court agrees. Article IV Section 6 of the
12 Washington State Constitution does not grant municipal courts the authority to hear equitable
13 claims. These claims can be resolved consistently only in federal courts or Washington
14 superior courts.

15 Defendants offer two more jurisdictional reasons why this Court should dismiss. First,
16 Plaintiffs argue that municipal courts have jurisdiction over these claims and that where two
17 tribunals have jurisdiction, the one first obtaining jurisdiction maintains it exclusively. *Yakima*
18 *v. Int’l Ass’n of Fire Fighters, et al.*, 117 Wn.2d 655, 673–76 (1991). Second, Defendants cite
19 *Younger v. Harris*, 401 U.S. 37 (1971) for the position that a federal court must abstain in
20 deference to state courts where: (1) there is an ongoing state proceeding; (2) the proceeding
21 implicates important state interests; and (3) the federal litigant is not barred from litigating
22 federal constitutional issues in that proceeding.

23 However, as stated above, the Court finds that municipal courts do not have jurisdiction
24 over claims that relate to system-wide violations of statutory requirements in the enforcement
25 of municipal ordinances. The Court agrees with Plaintiffs that they could be barred from
26

1 litigating federal constitutional issues, and, accordingly, will not abstain from hearing
2 Plaintiffs' claims.

3 **B. Res Judicata**

4 Defendants argue that res judicata bars Plaintiffs' claims. Res judicata prevents a party
5 from re-litigating all claims that were raised, or could have been raised, in an earlier action.
6 *Stevens County v. Futurewise*, 192 P.3d 1, 6 (Wash. Ct. App. 2008). Defendants cite several
7 cases in which Plaintiffs failed to bring possible claims in municipal courts or superior courts
8 and were therefore prohibited from bringing these claims in federal court. *Idris v. City of*
9 *Chicago*, 552 F.3d 564, 565 (7th Cir. 2009); *McCarthy v. City of Cleveland*, 2009 WL
10 2424296 (N.D. Ohio Aug. 6, 2009); *Kovach v. District of Columbia*, 805 A.2d 957 (D.C. Ct.
11 App. 2002); *Dajani v. Governor & General Assemble of the State of Md.*, 2001 WL 85181 (D.
12 Md. Jan. 24, 2001). The Court finds these cases to be unpersuasive.

13 None of Defendants' cases is from Washington. As stated above, the Washington
14 Supreme Court has stated that the superior courts have original jurisdiction over claims
15 alleging system-wide violations in the enforcement of municipal ordinances. *Orwick v. Seattle*,
16 692 P.2d at 795. Defendants have not established that the states in which their cases were
17 decided have similar laws. To the extent that Defendants' cases stand for the proposition that
18 Plaintiffs should have brought their claims in municipal court, they simply do not apply to
19 Washington law.¹

20 Accordingly the Court finds that res judicata does not bar Plaintiffs' claims.

21 **C. Declaratory and Injunctive Relief Claims**

22 Plaintiffs present three challenges to the traffic camera system. The first is that
23 Defendant municipalities violated due-process requirements when they failed to get approval
24

25 ¹ This logic also applies to Plaintiffs' failure to appeal the infractions. Because Superior
26 Courts have *original* jurisdiction, Plaintiffs cannot be faulted for not engaging in an appeals
process that would have skirted that jurisdiction.

1 for the NOIs from the Administrative Office of the Courts. (Resp. 6–9 (Dkt. No. 118).) Rule
2 2.1 of the Infraction Rules for Courts of Limited Jurisdiction (“ILRJ”) states: “Infraction cases
3 shall be filed on a form entitled ‘Notice of Infraction’ *prescribed* by the Administrative Office
4 of the Courts; except that the form used to file cases alleging the commission of a parking,
5 standing or stopping infraction shall be *approved* by the Administrative Office of the Courts.”
6 (emphasis added). WASH. REV. CODE 46.63.170(2) states: “infractions generated by the use of
7 automated traffic safety cameras under this section shall be *processed* in the same manner as
8 parking infractions, including for the purposes of RCW 3.50.100, 35.20.220, 46.16.216, and
9 46.20.270(3).” (emphasis added). Plaintiffs argue that because traffic camera infractions should
10 be processed in the same manner as parking infractions, and the form used to file cases
11 alleging parking infractions requires AOC approval, then NOIs generated by traffic cameras
12 must also require approval. Not so.

13 The Code does not require a traffic camera infraction to be treated like a parking
14 infraction in every single respect. WASH. REV. CODE 46.63.170(2) states only that when an
15 infraction is generated, is to be processed like a parking infraction. This refers to individual
16 NOIs given to individual drivers and the legal steps and consequences that ensue. The four
17 code sections that WASH. REV. CODE 46.63.170(2) specifies, WASH. REV. CODE 3.50.100,
18 35.20.220, 46.16.216, and 46.20.270(3), confirm this interpretation in that they all concern
19 aspects of post-infraction procedure: treatment of funds collected by an infraction, renewal of a
20 driver’s license following infractions, and withholding of driving privileges following traffic
21 offenses. AOC approval is not a step contemplated in the processing of any infraction; it is a
22 way of ensuring, before any processing of infractions begins, that a municipality is using
23 legally sufficient forms. Although NOIs from traffic cameras are processed like parking
24 tickets, the forms are to be drafted in compliance with rules for traffic tickets. And ILRJ 2.1
25 states that NOIs for traffic tickets need only be on forms prescribed by the AOC, not approved
26 by them. Plaintiffs have not alleged that the NOIs fail to meet any of the AOC’s prescriptions.

1 Plaintiffs' second challenge is that the fines generated by traffic cameras are excessive.
2 WASH. REV. CODE 46.63.170(2) states that the fines "shall not exceed the amount of a fine
3 issued for other parking infractions within the jurisdiction." Plaintiffs argue that the
4 Washington State Legislature intended for the fines to be no higher than a normal parking
5 ticket, i.e. twenty dollars. (Resp. 4 (Dkt. No. 118).) Defendants respond that in the intervening
6 five years, the Legislature could have clarified its views on fine limits if they felt they had been
7 misinterpreted. (Mot. 23 (Dkt. No. 108).) A more plausible reading of the Code, Defendants
8 argue, is that the municipalities may set fine amounts at or below those of the maximum fine
9 allowed for parking infractions. (*Id.* at 22.) Traffic camera fines range from \$101 to \$124. (*Id.*
10 at 23.) Fines for fire lane parking and disabled parking violations in each municipality range
11 from \$175 to \$250. (*Id.*) While these fines are set by state law rather than municipal code
12 (WASH. REV. CODE 46.16.381(7)–(9); WASH. REV. CODE 46.55.105(2)), Plaintiffs offer no
13 reason to conclude that these fines are outside the jurisdiction of the city, and therefore an
14 impermissible ceiling on fine amounts, given that WASH. REV. CODE 35A.12.140 allows
15 municipalities to adopt state code by reference. The Court agrees that the Code grants
16 municipalities flexibility in determining fine levels, and that the fines are not excessive.

17 Plaintiff's third challenge is that the municipalities' contracts with ATS and Redflex
18 violate Washington law. WASH. REV. CODE 46.63.170(1)(i) states that "the compensation paid
19 to the manufacturer or vendor of the equipment used must be based only upon the value of the
20 equipment and services provided or rendered in support of the system, and may not be based
21 upon a portion of the fine or civil penalty imposed or the revenue generated by the equipment."
22 Plaintiffs argue that the contracts violate this statute in two ways, but they are misinterpreting
23 the law.

24 First, the contracts contain "stop-loss" provisions. These provisions allow the
25 municipalities to defer payment until the cameras generate enough revenue to cover their
26 expense. (Mot. 18 (Dkt. No. 108).) But they do not change the amount that the municipalities

1 must eventually pay the camera companies. (*Id.*) Plaintiffs insist that these provisions run
2 counter to the prohibition on any system of compensation based on a portion of the revenue
3 generated. (Resp. 6 (Dkt. No. 118).) The Court does not agree. Under this system, it is the
4 payment schedule, not the amount of compensation, that is based on a portion of revenue
5 generated. The stop-loss provisions have allowed the municipalities to purchase traffic
6 enforcement on a layaway plan, but not to change the price.

7 Second, Plaintiffs argue that some contracts with Bellevue, Lynwood, Seattle, and
8 Spokane include unlawful volume-based payments. The Lynwood contract, for example, states
9 that ATS charges a fee of \$5.00 for the first infraction per camera, and then processes all
10 following infractions via that camera during a month, up to 800, as part of the flat fee per
11 camera. (Mot. 6 n. 6 (Dkt. No. 108).) However, when infractions per camera exceed 800 per
12 month, Lynwood pays ATS a processing fee of \$5.00 per infraction over 800. (*Id.*) As with the
13 stop-loss provisions, Plaintiffs argue that this is a system of compensation based on a portion
14 of the revenue generated. Again, Plaintiffs misread the statute. The statute specifically allows
15 for compensation based on the value of services provided. WASH. REV. CODE 46.63.170(1)(i).
16 The Court agrees with Defendants that the \$5.00 is a service charge, not a share of the
17 revenues.

18 Plaintiffs have failed to state facts sufficient to support their claims for declaratory and
19 injunctive relief.

20 **D. Additional Claims.**

21 Plaintiffs also bring a claim for violation of the CPA and common law claims for
22 Abuse of Process and Unjust Enrichment. (Resp. 32–36 (Dkt. No. 118).) But all of these claims
23 are predicated on the finding that Defendants violated Washington law by entering into illegal
24 contracts, charging excessive fees, and issuing unapproved NOIs. (*Id.*) As detailed above, the
25 Court finds that Defendants' actions were not in violation of Washington law. Accordingly,
26 Plaintiff's CPA and common law claims fail.

1 **IV. CONCLUSION**

2 Defendants' motion to dismiss (Dkt. No. 108) is GRANTED. The Clerk is DIRECTED
3 to CLOSE the case.

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5 DATED this 2nd day of March, 2010.

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11 John C. Coughenour
12 UNITED STATES DISTRICT JUDGE
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