

COA #40950-0

No. 84062-8

**SUPREME COURT
OF THE STATE OF WASHINGTON**

U.S. OIL TRADING LLC.

Appellant,

v.

STATE OF WASHINGTON, OFFICE OF FINANCIAL
MANAGEMENT AND DEPARTMENT OF REVENUE,

Respondent.

Brief of Appellant

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STATE OF WASHINGTON
SUPREME COURT
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I. Introduction

The Taxpayer Protection Act of 2007 (“the Act”), passed as Initiative 960 by a vote of the people, protects taxpayers by requiring the Office of Financial Management (“OFM”) to identify legislative bills that raise taxes and to publish the projected cost to taxpayers of such bills over a ten year period. OFM may obtain the assistance of other agencies in preparing such projections, and the Department of Revenue (“DOR”) frequently assists OFM with such tasks. (We hereinafter refer to OFM and DOR as “the executive agencies.”) The purpose of such identification and publication is to increase public awareness of potential tax increases. The Act further protects taxpayers by allowing such identified bills to be enacted into law only after a two-thirds vote of the Legislature or a vote of the people.

This case will determine, as this is a case of first impression, whether a taxpayer, who would be subject to new taxes under a bill not identified as raising taxes by the executive agencies and therefore not passed by a two-thirds vote of the Legislature or a vote of the people, may seek damages from the executive agencies for their intentional failure to identify the bill as raising taxes. According to the Amended Complaint, the allegations of which are assumed true for purposes of this appeal, the

executive agencies' failure was intentional. The Amended Complaint alleges that the executive agencies knew the bill raised taxes and that the executive agencies intended to deny U.S. Oil Trading LLC and other taxpayers the protections of the Act by failing to properly identify the bill as raising taxes.

II. Assignments of Error

Assignments of Error

No. 1. The Superior Court erred in entering the Final Judgment of Tort Claims on December 18, 2009.

No. 2. The Superior Court erred in its Order Granting Partial Motion to Dismiss, entered November 20, 2009, by granting Defendant's, State of Washington, Partial Motion to Dismiss.

No. 3. The Superior Court erred in its Order Granting Partial Motion to Dismiss, entered November 20, 2009, by dismissing Plaintiff's, U.S. Oil Trading LLC's tort claim.

No. 4. The Superior Court erred in its Order Granting Partial Motion to Dismiss, entered November 20, 2009, by dismissing the Office of Financial Management as a defendant.

No. 5. The Superior Court erred in its oral ruling on November 20, 2009 dismissing Plaintiff's, U.S. Oil Trading LLC's allegations in the

complaint and amended complaint under the heading of tortious conduct and under the heading tortious damages.

No. 6. The Superior Court erred in its oral ruling on November 20, 2009 by finding “that as a matter of law, the defendants have no actionable duty toward the plaintiff, and that no private right of action was created” by the Taxpayer Protection Act of 2007.

No. 7. The Superior Court erred in its oral ruling on November 20, 2009 by not finding that U.S. Oil Trading LLC properly stated a cause of action in tort against Defendants.

No. 8. The Superior Court erred in its oral ruling on November 20, 2009 by not finding that Defendants’ owed a duty to Plaintiff, U.S. Oil Trading LLC, that was allegedly breached.

Issues Pertaining to Assignments of Error

No. 1. May a Taxpayer who would pay the taxes resulting from proposed legislation bring an action in tort against executive branch agencies when the agencies intentionally fail to correctly identify the proposed legislation as raising taxes as required by the Taxpayer Protection Act of 2007? (Assignments of Error Nos. 1 – 8).

No. 2. Is it necessary for the Act to expressly delineate a private right of action for a Taxpayer to bring a tort action to recover its actual and reasonable damages proximately caused by the executive agencies’

failure to obey the Taxpayer Protection Act of 2007 or does such an action otherwise exist under common law or arise from the penumbra of the Act? (Assignments of Error Nos. 1 – 8).

No. 3. Does the Taxpayer Protection Act of 2007 create duties on behalf of the executive agencies owed to Taxpayers? (Assignments of Error Nos. 1 – 8).

III. Statement of the Case

Statement of Procedures

U.S. Oil Trading LLC's ("Trading's") Complaint included a refund action brought under RCW 82.32.180 and an action in tort. CP 3-9. The refund action alleges that Senate Bill 6096 ("the Bill") is not valid law because it was not passed by a two-thirds vote of the Legislature. The Complaint seeks refund of the taxes Trading has paid according to the terms of the Bill to date. The tort action alleges that the executive agencies' failure to properly identify the Bill as one that raises taxes damaged Trading, and Trading seeks its damages proximately caused by the executive agencies' wrongful failure to properly identify the Bill.

Trading's damages are stated in the Complaint in the alternative. CP 7-8. If the Bill is not valid law, as Trading contends, its damages consist of the costs it had to incur as a result of the wrongful acts of the executive agencies. Such costs would be proved at trial but would include

the costs it incurred in attempting to first have the Legislature and then the Governor recognize that the Bill raised taxes. The damages also include the cost of the refund action which would not have had to be brought but for the wrongful acts of the executive agencies. If the Bill is valid law, then and only then, Trading's damages would also include the present value of the taxes Trading would not have had to pay but for the wrongful act of the executive agencies.

Rather than file an Answer to the Complaint, the executive agencies brought a CR12 (b) (6) partial motion to dismiss for failure to state a claim. CP 10-12. The executive agencies recognized that the refund action was properly before the Superior Court and excluded it from the scope of the partial motion to dismiss. Therefore, the executive agencies' motion sought to dismiss only Trading's tort claims.

Prior to the executive agencies' motion being heard, Trading filed an Amended Complaint which reiterated its tort claim and included additional allegations making it clearer that the tortious conduct of the executive agencies was intentional, alleging that the executive agencies knew the Bill raised taxes, knew they were duty bound to so identify the Bill to the Legislature and intended to harm Trading and similarly situated taxpayers by failing to so identify the Bill, thereby permitting the Bill to pass without the two-thirds vote of the Legislature. CP 37-43.

Trading's Amended Complaint contains all the allegations necessary to state a cause of action in tort -- that is, Trading alleged the existence of a duty, the breach of that duty, injury, and a causal connection between the breach and damage. CP 40-42. The executive agencies contended below that they were immune from such a suit or otherwise enjoyed a privilege which would permit them to violate the statute and in so doing violate the expressed will of the people. CP 13-36.

The Superior Court for Thurston County granted the executive agencies' partial motion to dismiss. CP 84-85. While the Order granting the motion and the subsequent CR 54(b) partial judgment do not state the basis for the ruling below, in open court Judge Murphy found, as a matter of law, that the executive agencies had no actionable duty towards Trading and that no private right of action was created by the Act. RP 25.

Subsequent to the Order granting the partial motion to dismiss, the Superior Court entered a CR 54(b) partial judgment which found that all claims Trading brought against OFM and all tort claims brought by Trading were dismissed. CP 88-90. The Superior Court further found that Trading's refund action against the DOR under RCW 82.32 was properly still before the Superior Court, that such claim was separable from the tort claim, and that the legal issues that would be reviewed upon an appeal from the dismissal of the tort claim would not be considered by the

Superior Court in adjudicating the refund action. *Id.* The Superior Court also entered findings that the resolution of the refund action will not moot an appeal from the dismissal of the tort claim and the resolution of the appeal of the tort claim dismissal will not moot the refund action, that certification that the dismissal of the tort claims was final would simplify the adjudication of the refund action and that there was no just reason to delay entry of final judgment on the tort claims. *Id.*

The CR 54(b) partial judgment was entered on December 18, 2009. The notice of appeal seeking review of the judgment was filed on December 31, 2009. CP 91.

Statement of Facts

Trading's Business Activities

Trading sells in Washington certain fuels for consumption outside the territorial waters of the United States by vessels used primarily in foreign commerce. Such sales are hereinafter referred to as "foreign fuel sales". Trading obtains such fuels from its parent, U.S. Oil & Refining Co. (hereinafter referred to as "Refining") under a contract whereby Trading supplies Refining the materials necessary for the fuels to be produced, Refining creates the fuels, and Trading pays Refining a fee for

its manufacturing services.¹ Under DOR regulations, Trading is deemed a manufacturer. WAC 458-20-136. Prior to Trading's formation, Refining engaged in the foreign fuel sales now engaged in by Trading.

RCW 82.04.433's Deduction For Foreign Fuel Sales

In 1985, the Washington Legislature adopted RCW 82.04.433. That statute created a deduction from the measure of the business and occupation tax for amounts derived from foreign fuel sales. From the date RCW 82.04.433 became effective until the time Trading took over the sales function from Refining, Refining enjoyed the deduction permitted by RCW 82.04.433.

In 1993, the audit division of the DOR disallowed Refining the deduction it took to its manufacturing business and occupation tax for amounts derived from foreign fuel sales. Based on the plain meaning of the legislative language, the DOR appeals division reversed the audit division assessment by issuing a Determination holding that the deduction allowed by RCW 82.04.433 applied to the measure of the business and occupation tax including the measure of the manufacturing business and

¹ See, CP 37-43 (Amended Complaint). This appeal arises from the Superior Court's granting of a CR 12(b)(6) motion to dismiss. In reviewing such motions, all allegations in the Amended Complaint as well as all hypothetical facts consistent therewith in the light most favorable to Trading are taken as true. *Tenore v. AT&T Wireless Services*, 136 Wn. 2d 322, 329-30, 962 P.2d 104 (1998). All factual matters stated herein are either allegations expressly made in the Amended Complaint or facts consistent therewith which Trading intends to prove at the trial of this matter. The uncontroverted Declaration of Thor Nielsen (CP 44-46) provides proof of some of the facts.

occupation tax. Refining was subsequently audited three more times. In each and every audit, the DOR permitted Refining to deduct from the measure of its manufacturing tax the amounts it derived from foreign fuel sales.

Sometime after the third audit permitting Refining a deduction to its manufacturing business and occupation tax under RCW 82.04.433, but before the conclusion of the fourth audit again permitting Refining the same deduction, a different taxpayer sought a substantial refund of manufacturing business and occupation tax for taxes it paid that were measured by amounts it derived from foreign fuel sales.

In response to that third party taxpayer's claim for refund, the DOR claimed RCW 82.04.433 only permitted a deduction to be taken against the wholesaling or retailing business and occupation taxes and not to the manufacturing business and occupation tax.

Senate Bill 6096 Attempts To Amend RCW 82.04.433

Also in response to that third party taxpayer's claim for refund, Senate Bill 6096 was introduced in the 2009 legislative session. The Bill attempts to amend RCW 82.04.433, on both a retroactive and prospective basis, such that the statutory deduction would not apply to the manufacturing business and occupation tax. If the Bill became valid law, Refining and Trading would no longer be entitled to the deduction. The

Bill therefore undeniably raises Trading's taxes and the disallowance of the deduction cannot lower anyone's taxes. Thus, it is axiomatic that the Bill raises taxes and that is what Trading alleged.

The Executive Agencies' Tortious Conduct

While the Bill was before the Legislature, the executive agencies jointly and severally prepared a fiscal note to Senate Bill 6096. The executive agencies both had actual knowledge that Refining and Trading enjoyed the benefits of the deduction to the manufacturing business and occupation tax for years and that under Senate Bill 6096 the companies would no longer be able to take the deduction. Thus, the executive agencies had actual knowledge that Senate Bill 6096 would "raise taxes" as that term is used in RCW 43.135.035 if the Bill became valid law.² Despite this knowledge, the note falsely indicated that the proposed legislation had no revenue impact and the executive agencies otherwise

² RCW 43.135.035 defines "raises taxes" as "any action of the legislature that increases state tax revenue deposited into any state fund" This definition is substantially broader than the ordinary meaning of the term. If for any reason state tax revenue deposits increase as a result of any action of the legislature, that is a tax increase. State tax revenue deposits can increase because enforcement is increased, awareness is increased, prior rulings or instructions are retracted, prior determinations lose their force, prior settlements terminate and for a myriad other reasons in addition to taxes being increased in the ordinary meaning. Here for example, even if SB 6096 would not otherwise increase taxes, it would be deemed to raise taxes under RCW 43.135.031 because it will lead the DOR to overrule its prior determination to Refining and make that ruling retroactive to some extent unless this Court's ruling intervenes. Similarly, the Bill has already led Trading to pay some tax that it would not have otherwise paid.

failed to fulfill the duties imposed upon them by the Taxpayer Protection Act of 2007.³

The executive agencies purposefully failed to fulfill their statutory duties because they wanted to deny Trading, and other similarly situated taxpayers, the protections afforded by the people in the Taxpayer Protection Act of 2007.

Among the protections the executive agencies intended to deny Trading is the Act's requirement that any bill raising taxes must obtain a two-thirds vote of each House prior to passage. *See*, RCW 43.135.035. If the executive agencies had fulfilled their duties, both Houses of the Legislature would not have passed Senate Bill 6096 unless the Bill was approved by a two-thirds vote of each House.

The failure of the executive agencies to fulfill their duties allowed Senate Bill 6096 to be approved by simple majority vote. Neither House approved the Bill with a two-thirds vote. Thus, the Bill would not have been passed but for the issuance of the improper fiscal note. Indeed, the

³ The Taxpayer Protection Act of 2007 is codified in part at RCW 43.135.031 and imposes a duty on OFM to (i) expeditiously determine the cost of legislative action to taxpayers, (ii) perform a thorough independent analysis of any proposed increase in taxes, (iii) provide notices to the public and the legislature regarding any bill that would raise taxes as that term is defined by RCW 43.135.035. The DOR has a duty to prepare accurate fiscal notes, fully inform OFM of the revenue impact of proposed legislation, and assist OFM in its preparation of fiscal notes and other notices to the public and the legislature regarding any bill that would raise taxes. The preparation of accurate fiscal notes under RCW 43.41.110 and RCW 43.88A is one method by which the executive agencies typically discharge the statutory duties imposed by the Taxpayer Protection Act.

avoidance of the two-thirds vote requirement was the reason the executive agencies intentionally breached their statutory duties.

IV. Summary of Argument

The Superior Court concluded that Trading failed to state a claim because it could not find a duty owed by the executive agencies to Trading. The Superior Court erred. No preexisting duty is necessary to bring an action against a defendant committing an intentional tort. Moreover, RCW 43.135.035 clearly creates statutory duties owed to taxpayers such as Trading. The executive agencies intended to harm Trading by their unlawful failure to act. They succeeded in harming Trading. A tort action is proper.

The Superior Court also concluded that no private right of action was created by the Taxpayer Protection Act. Again, the Superior Court erred. Trading's claim for damages is not an enforcement action under the Taxpayer Protection Act. It is a tort action seeking compensation for damages caused by the executive agencies' breach of duties owed to Trading. The executive agencies are liable for damages arising out of their tortious conduct to the same extent as if they were private parties. RCW 4.92.090. Any private party intentionally causing injury through the breach of duties owed to the injured party would be liable for damages. The executive agencies enjoy no immunity or privilege that permits them

to intentionally and unlawfully breach duties intended to protect the injured party.

V. Argument

A. Standard of Review

The Superior Court's decision is subject to de novo review, and all facts alleged by Trading are deemed true for purposes of the appeal.

“Under CR 12 (b) (6), a complaint can be dismissed for ‘failure to state a claim upon which relief can be granted.’ A dismissal under this rule involves a question of law which is reviewed de novo by an appellate court and is appropriate only if it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery. In such a case, a plaintiff's allegations are presumed to be true and a court may consider hypothetical facts not included in the record. CR 12(b) (6) motions should be granted “sparingly and with care’ and ‘only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.”

Tenore v. AT&T Wireless Services, 136 Wn. 2d 322, 329-30, 962 P.2d 104 (1998).

Given the facts alleged in the Amended Complaint, the Superior Court's decision should be reversed because it does not appear beyond doubt that Trading cannot prove any set of facts which would justify recovery. Indeed, if the allegations of Trading are true, the facts demand a recovery by Trading. The executive agencies are not sovereign. The

people are sovereign,⁴ and the executive agencies have flouted the will of the people. Justice demands the executive agencies be held to account for their intentional wrongful behavior.

B. Trading’s Allegations Properly State a Cause of Action in Tort.

To raise a tort claim, a plaintiff must allege the existence of a duty, the breach of that duty, injury, and a causal connection between the breach and damage. *See generally, Harold Hutchins v. 1001 Fourth Avenue Assoc.*, 116 Wn.2d 217, 802 P.2d 1360 (1991) and W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on Torts* 30 (5th Ed. 1984).

(i) The Amended Complaint at Paragraphs 25-30 Alleges The Existence of A Duty.

The Amended Complaint states:

25. RCW 43.135.031 creates a duty on OFM to expeditiously determine the cost of legislative action to taxpayers.

26. RCW 43.135.031 creates a duty on OFM to perform a thorough independent analysis of any proposed increase in taxes.

27. RCW 43.135.031 creates a duty on OFM to provide notices to the public and the legislature regarding any bill

⁴ Wash. Const., Art. I, Section 1 (“All political power is inherent in the people,”); *See also, Hubbard v. Spokane*, 146 Wn.2d 699, 50 P.3d 602 (2002) (... “public officials serve the interest of the citizens of Washington”) and *see, Heron v. King Broadcasting*, 109 Wn.2d 514, 746 P.2d 295 (1987) (Anderson, J. dissenting,) (“Under our constitution, it is the other way around; the people are sovereign and it is the public officials who work for the people.”)

that would raise taxes as that term is used in RCW 43.135.035.

28. RCW 43.41.110 and RCW 43.88A create a duty on OFM to provide a fiscal note depicting the expected fiscal impact of proposed legislation.

29. The DOR has a duty to prepare accurate fiscal notes and a duty to assist OFM in its preparation of fiscal notes and other notices to the public and the legislature regarding any bill that would raise taxes and in fulfilling the duties created by RCW 43.35.031.

30. The DOR has a duty to fully inform OFM of the revenue impact of proposed legislation.

Thus, RCW 43.135.031 placed on the executive agencies the duty to (a) expeditiously determine the cost of SB 6096 to taxpayers, (b) perform a thorough independent analysis of SB 6096, (c) provide notices to the public and the legislature that SB 6096 would raise taxes as that term is used in RCW 43.135.035 and (d) provide a fiscal note depicting the expected fiscal impact of SB 6096.⁵ These RCW 43.135.031 Duties not only are alleged but they plainly exist.

(ii) The Amended Complaint at Paragraphs 31-32 Alleges That the RCW 43.135.031 Duties Were Breached.

The Amended Complaint states:

⁵ This last duty concerning a fiscal note is explicitly required by RCW 43.41.110 and 43.88A. It is a duty implicitly required by RCW 43.135.031 because a fiscal note is one of the end products of the determinations and analyses required by RCW 43.135.031 and an accurate fiscal note would have been one of the several notices that are required by RCW 43.135.031. We hereinafter refer to these four separate duties as “RCW 43.135.031 Duties”.

31. OFM intentionally and negligently breached its above-referenced duties.

32. DOR intentionally and negligently breached its above-referenced duties.

In context, the above-referenced duties were the RCW 43.135.031 Duties imposed on the executive agencies by the people. These duties were breached by the executive agencies never publicly determining that SB 6096 raised taxes and by the executive agencies failure to provide the required notices of that fact.

(iii) The Amended Complaint at Paragraphs 36, 40 and 41 Alleges Trading was Injured By the Breach.

The Amended Complaint states:

36. Trading was damaged by the failure of OFM and DOR to fulfill their duties in the amounts described below. ...

40. If Senate Bill 6096 has become valid law, Trading has been damaged by the failure of OFM and DOR to fulfill their duties in the amount of \$11,275,000, the estimated present value of the future taxes Trading will have to pay as a result of Senate Bill 6096 becoming valid law.

41. If Senate Bill 6096 has not become valid law, Trading has been damaged by the failure of OFM and DOR to fulfill their duties in an amount in excess of \$76,000, the exact amount to be proven at trial.

Trading was harmed by the breach because the breach permitted SB 6096 to be passed by the Legislature and signed by the Governor without the two-thirds vote the people require for a measure raising taxes.⁶

⁶ No speculation is necessary to reach this conclusion. The duties exist to protect taxpayers. Accurate fiscal information protects taxpayers by alerting the public so that

Trading suffered losses as a result of the breach-- the costs it incurred to attempt to advise the Legislature and the Governor that the Bill raised taxes and could therefore not become law given the lack of a two-thirds vote, the costs it has and will incur through its court action to invalidate the passed Bill and/or the costs (the taxes) it will incur if somehow contrary to the will of the people the Bill has become valid law. These damages are covered by the allegations in the Amended Complaint.

(iv) The Amended Complaint at Paragraphs 35, 37 and 39

Alleges a Causal Connection between the Breach and Damage.

The Amended Complaint states:

35. The failure of DOR and OFM to fulfill their duties, allowed Senate Bill 6096 to be approved by simple majority vote. Neither House approved the Bill with a two-thirds vote. Thus, the bill would not have been passed but for the issuance of the improper fiscal note. ...

37. Trading's damage was a reasonably foreseeable consequence of the failure of the DOR and OFM to fulfill their duties. In fact, it was the intention of the Defendants to harm Trading and other similarly situated taxpayers by intentionally failing to fulfill their statutory duties. ...

they may contact their legislators. Taxpayers are also protected because accurate fiscal information in this case would have led to the bill not being passed out of the Legislature with less than a two-thirds vote. While it is conjectural to know what effect the public might have had on the legislative process if properly informed, we know that the bill failed to obtain a two-thirds vote. Thus, but for the lack of accurate fiscal information the bill would not have passed. Baseless conjecture is required to argue the bill would have garnered more support if the public and the Legislature were properly informed that the bill raised taxes. Such conjecture is inconsistent with the fact that the executive agencies intended to deny such knowledge to the public and the Legislature with the intent of harming taxpayers like Trading by depriving them the protection of having the Bill passed only with a two-thirds vote. *See*, CP 41.

39. DOR and OFM knew that taxpayers like Trading would be damaged by the failure of DOR and OFM to fulfill their duties.

The DOR had a direct relationship with Trading, and the executive agencies' breach occurred during dealings with Trading.⁷ Thus, the damage to Trading must have been clearly foreseen by the executive agencies.⁸ The easy foreseeability of the damage and the intention that the damage occur demonstrates the causal connection between the breach and the damage. The Amended Complaint's allegations encompass all of these facts.

C. Taxpayers, such as Trading, Are the Intended Beneficiaries of The Taxpayer Protection Act.

The RCW 43.135.031 Duties were explicitly intended to protect taxpayers. The Intent Clause, Section 1 of Initiative 960, codified at the end of RCW 43.135.031 reads in part:

The people have clearly ... illustrated their ongoing and passionate desire to ensure that taxpayers are protected. ... [T]he people intend to protect taxpayers by creating ... transparency ... This measure protects taxpayers...

⁷ The breach occurred shortly after the DOR's fourth audit allowing the deduction to the manufacturing tax, shortly after DOR and U.S. Oil (Trading and Refining) discussed tax reporting practices, and while an appeal of the audit was pending. CP 44-46.

⁸ When harm is clearly foreseeable, courts more easily find the requisite duty exists. *See generally, Rikstad v. Holmberg*, 76 Wn.2d 265, 456 P.2d 355 (1969); *Wells v. Vancouver*, 77 Wn.2d 800, 467 P.2d 292 (1970).

In the context of the Taxpayer Protection Act, “taxpayers” must mean the persons whose taxes would be raised by a bill subject to the duties.

Trading falls squarely within that class of persons. Thus, the executive agencies’ duties are owed to Trading.

The executive agencies in their Answer to Statement of Grounds for Direct Review argue that Trading

offered nothing to distinguish itself from any other person or taxpayer, or any reason to distinguish the taxes at issue here from other state taxes such as retail sales tax, use tax, gas tax, or property tax. Virtually all residents of Washington, as well as many non-residents, pay taxes to the State of some form. [Trading] made no assertion that it is part of any class more narrow than “taxpayer” or “person” to justify a common law right of action against the State in tort.

The executive agencies miss that “taxpayers” in the context of the Act must mean only the persons whose taxes would be raised by the bill subject to the duties. This meaning is necessary because the Act protects taxpayers. In the context of a bill that raises taxes, only those persons whose taxes would be raised are capable of being protected by the Act. Other persons or the public in general, are not “protected” by the two-thirds vote. Other persons are also not taxpayers for purposes of determining a bill’s “cost to the taxpayers”.⁹

⁹ RCW 43.135.031 requires OFM to “expeditiously determine [a bill’s] cost to the taxpayers” If “taxpayers” meant the people, as the executive agencies suggest, there would be no costs to determine. By definition, a bill that raises taxes increases state

In the context of the Bill at issue, there are very few taxpayers as there are very few persons who manufacture foreign fuels. Thus, in the context of the Bill at issue, Trading is one of only a handful of persons intended to benefit from the Act's protections.

Here, where the executive agencies have acted with the intention of harming taxpayers such as Trading, the argument that Trading is not intended to be within the protected class of the duties is not well taken. The very fact that the executive agencies intended to harm Trading by denying it the protections of the Act demonstrates that Trading must fall within the protected class. Stated otherwise, the executive agencies actions were wrongful, but they were rational. The executive agencies committed a tort by failing to perform their duties, but the executive agencies accomplished their goal. They denied Trading the protection of the Bill being passed only with a two-thirds vote.

The executive agencies' argument also defeats the purpose of the Act in its entirety. They necessarily argue that the people are the protected class but that no one under any set of facts could ever sue the executive agencies for breaching their duties. The people did not intend a

revenues. A bill that increases state revenues is a cost to the parties that pay the taxes (the taxpayers), but it is a revenue enhancement to the people. Thus, the term "taxpayers" means the parties who would pay the taxes proposed by a bill subject to the Act.

meaningless Initiative. The executive agencies' argument demonstrates contempt for the people.¹⁰

D. The Inapplicability of the Public Duty Doctrine Also Demonstrates that the RCW 43.135.031 Duties Are Owed To Trading.

The public duty doctrine has been described as the duty to no one doctrine.¹¹ *Babcock v. Fire Dist.*, 144 Wn.2d 774, 30 P.3d 1261 (2001). While frequently criticized¹², it is helpful to analyze the doctrine in the context of this case because its inapplicability demonstrates that the RCW 43.135.031 Duties are owed to Trading.¹³

¹⁰ Throughout this matter, the executive agencies' self-reference as the State is problematic. It implies that they are sovereign, but of course, the people are sovereign. The executive agencies are the people's servants. *See*, n. 4, *supra*. It is contemptuous indeed for a servant to allege that it may fail to follow its master's instructions without consequence.

¹¹ When a duty is owed to no one in particular, a private right of action would not exist. Thus, the private right of action legal construct and the public duty doctrine implicate the same concerns and appear to be two formulations of the same principle.

¹² *See generally*, *J&B Dev. Co. v. King County*, 100 Wn.2d 299, 669 P.2d 468 (1983) (Utter, J., concurring opinion); *Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 281, 669 P.2d 451 (1983) (Utter, J., concurring opinion); *Beal v. City of Seattle*, 134 Wn.2d 769, 794, 954 P.2d 237 (1998) (Talmadge, J. dissenting) (The special relationship rule has swallowed up the public duty doctrine. If we wish to eliminate it, we should say so.) *and see*, *Babcock v. Fire Dist.*, 144 Wn.2d 774, 795, 30 P.3d 1261 (2001) (Chambers, J. concurring) (The public duty doctrine is unnecessary.).

¹³ As the private right of action legal construct and the public duty doctrine implicate the same concerns and appear to be two formulations of the same principle, the inapplicability of the doctrine also is an alternative demonstration as to why Trading has a private right of action. Note 23, *infra*, sets out the legal tests this Court has formulated for determining whether a private right of action is created by a statute. Those tests also provide an alternative demonstration as to why the public duty doctrine does not apply.

The doctrine's inapplicability is a result of three of its four recognized exceptions.¹⁴

(i) The Legislative Intent Exception To the Public Duty

Doctrine Applies In this Case.

The legislative intent exception applies where a statute evidences the intent to “identify and protect a particular and circumscribed class of persons”.¹⁵ In this case, the RCW 43.135.031 Duties were designed to protect taxpayers. Trading is within that class. Thus, the legislative intent exception applies.

¹⁴ The exceptions include (1) legislative intent, (2) special relationship, (3) failure to enforce and (4) volunteer rescue. *Bailey v. Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). With the exceptions, the doctrine typically no longer has any force or effect; rather, the public duty doctrine is merely a restatement of the traditional tort rule that the duty breached must be owed to the plaintiff. *See e.g., id.* at 265 (fundamental inquiry is whether the governmental unit owed a duty to this particular plaintiff as contrasted to a duty owed to the public in general).

¹⁵ *See, Ravenscroft v. Water Power* 136 Wn.2d 911, 969 P.2d 75 (1998) (Public duty doctrine is not a bar if a statute evidences a clear intent to protect a class and the claimant is within the protected class. This exception is known as the legislative intent exception.) *and see, Halvorsen v. Dahl*, 89 Wn.2d 673, 676-77, 574 P.2d 1190 (1978) (“Liability can be founded upon a municipal code, if that code by its terms evidences a clear intent to identify and protect a particular circumscribed class of persons”), *Campbell v. Bellevue*, 85 Wn.2d 1, 13, 530 P.2d 234 (1975) (permitting member of protected class to bring tort action); *J&B Dev. Co. v. King County*, 100 Wn.2d 299, 307, 669 P.2d 468 (1983) (finding that permit and inspection requirements do not create a duty of care only to the public but specifically protect a class of citizens, builders, who may bring tort actions),

(ii) The Public Duty Doctrine Does Not Apply To Intentional Torts. Intentional Torts Create a Special Relationship.

Trading's Amended Complaint alleges an intentional tort.¹⁶ The public duty doctrine has not, does not, and should not apply to intentional torts.¹⁷ Such a conclusion may stem from the fact that "intentional torts do not require a preexisting duty",¹⁸ *see*, Restatement (Second) of Torts, § 46 (1965) *cited by Dussault v. Am. Int'l Group, Inc.* 123 Wn. App. 863, 99 P.3d 1256 (2004), or from the inevitability that where a wrong is intentionally inflicted a special relationship should be deemed to exist¹⁹ or from the same public policy concerns that generally result in other immunities and broad defenses not applying to intentional tortfeasors.²⁰

¹⁶ CP 40-41 (Amended Complaint ¶¶ 24, 34 and 37).

¹⁷ *See generally, Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 669 P.2d 451 (1983) (permitting an intentional tort to be claimed without any reference to the public duty doctrine despite analyzing negligent claims under the doctrine).

¹⁸ This rule of law alone demonstrates the Superior Court erred. Trading alleged an intentional tort. Thus, no preexisting duty is required. The Superior Court premised its ruling on the absence of such a duty (RP 25) despite its lack of necessity and Trading alleging such a duty.

¹⁹ The special relationship exception is a 'focusing tool' used to determine whether a government is under a general duty to a nebulous public or whether that duty has focused on the claimant. *Babcock v. Fire Dist.*, 144 Wn.2d 774, 30 P.3d 1261 (2001). While *Babcock* has language that limits the special relationship exception to situations where there is direct contact between the government and the claimant (met here) and express assurances (not met here) given by the government to the claimant which give rise to justifiable reliance on the part of the claimant (satisfied here because Trading should be able to rely on the executive agencies following the law) such limitations do not serve the focusing policy. The facts discussed in text demonstrate that the special relationship exception should not be so limited when the tortfeasor is or should be focused on the claimant.

²⁰ *See generally, Boss v. City of Spokane*, 63 Wn.2d 305, 387 P.2d 67 (1963) (no claim filing is required for intentional tort); *Morgan v. Johnson*, 137 Wn.2d 887, 889, 976 P.2d 619 (1999) (failure to mitigate damages and plaintiff intoxication are not defenses to

Whether the inapplicability of the public duty doctrine for intentional torts is characterized as a function of the doctrine's scope, another exception or an example of instances when a "special relationship" exists, it does not matter. The executive agencies' tort was intentional and done with the intent to harm Trading. By being done with intent to harm, the executive agencies did not just breach a duty owed to the public, they purposely breached a duty to Trading.

(iii) The Executive Agencies Failed To Follow (Enforce)

The Law.

The failure to enforce exception to the public duty doctrine applies whenever government agents responsible for enforcing the statutory requirements possess knowledge of a statutory violation and fail to correct the violation if the claimant is within the protected class. *Bailey v. Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). Here, the executive agencies were the government agents responsible for ensuring that the RCW 43.35.031 Duties were met. They not only possessed knowledge that the Duties were not met and failed to correct the violation, they were the parties violating the statutes. They breached their duties with knowledge

intentional tort); *Jenkins v. Snohomish Cty. PUD*, 105 Wn.2d 99, 713 P.2d 79 (1986) (parental immunity not available if intentional tort alleged); *Newby v. Gerry*, 38 Wn. App. 812, 690 P.2d 603 (1984) (immunity from co-employee suits does not exist for intentional torts); *Birklid v. Boeing Co.*, 127 Wn.2d 853, 859, 904 P.2d 278 (1995) (employer immunity from suit for injuries on the job does not apply to employers who intentionally injure employees).

that it would harm Trading. The knowledge that their illegal actions would harm Trading demonstrates that the duty was owed to Trading.

E. The Executive Agencies Enjoy No Immunity or Privilege That Permits Them To Violate The Will of the People Codified Into Law.

In the Superior Court, the executive agencies contended that they were entitled to legislative immunity, sovereign immunity, and discretionary immunity. None of these immunities apply, and the decision below did not rely on any of these immunities. We briefly describe the inapplicability of each in anticipation of the executive agencies again arguing they are somehow permitted to violate law.

(i) The Executive Agencies Do Not Enjoy Legislative Immunity.

Legislative immunity protects the Legislature from service of process and government officials from liability for considered, policy decisions. *See*, discussion of discretionary immunity at pages 28 - 29, *infra*. The executive agencies wrongful acts fall outside the scope of this immunity.

There are only four Washington cases even using the words “legislative immunity”. *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 970, 954 P.2d 250 (1998) (which denies immunity because the act in question was administrative); *Seamans v. Walgren*, 82 Wn.2d 771, 514 P.2d 166 (1973) (which applied immunity to protect a legislator from

service of process during times stated in Wash. Const. Art. 2 §16); *Miller v. Pacific County*, 91 Wn.2d 744, 592 P.2d 639 (1979) (where the dissent wrongfully characterized the majority as applying legislative immunity. The majority simply found no tort existed under the facts of that case); and *Republican Party v. Public Disclosure Commission*, 141 Wn.2d 245, 4 P.3d 808 (2000) (which stated the general rule that public employees performing *discretionary* functions are entitled to immunity insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known). Those four cases are the universe of Washington legislative immunity cases. They are not remotely close to the facts of this case.

Here, we have a tort. The executive agencies acted outside the bounds of a reasonable person.²¹ Their actions were intentional and negligent. CP 40-41 (Amended Complaint ¶¶ 24 -37). While the RCW 43.135.031 Duties require accounting skills, the RCW 43.135.031 Duties involve only executive, administrative acts ministerial in nature. They do not involve any exercise of policy or discretion. Legislative immunity does not run to such nondiscretionary, executive, administrative, accounting and ministerial tasks. *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 970, 954 P.2d 250 (1998) (denied immunity to action by a

²¹ The executive agencies' actions are outside the bounds of a reasonable person; therefore, they cannot be deemed "considered" decisions able to enjoy the benefit of immunity for discretionary actions. See, *King v. Seattle*, 84 Wn.2d 239, 247, 525 P.2d 228 (1974) (finding actions that are arbitrary and capricious subject to suit).

legislature that involved passage of legislation that denied a land use permit; such legislation was deemed to be an administrative, executive action).²² There is no Washington authority to the contrary.

(ii) The Executive Agencies Do Not Enjoy Sovereign Immunity.

The executive agencies are liable because they breached the RCW 43.135.031 Duties they owed to Trading. The executive agencies wrongful acts are a tort under traditional tort analysis. Sovereign immunity has been waived. RCW 4.92.090.

The waiver of sovereign immunity also disposes of the Superior Court's concern that no private right of action is created by the Act. Trading is not seeking to enforce the Taxpayer Protection Act. Trading is seeking compensation for damages caused by the executive agencies' breach of duties owed to and intended to protect Trading. RCW 4.02.090 expressly makes the executive agencies liable for damages arising out of tortious conduct to the same extent as if they were private persons. No private person could intentionally and unlawfully breach duties owed to and intended to protect a third party and escape liability for damages

²² The executive agencies were also not acting in aid of the Legislature. RCW 43.135.035 and RCW 43.135.031 require accurate fiscal information to be widely disseminated to the public to protect taxpayers from the Legislature. *See*, Findings and Intent, codified at RCW 43.135.031. RCW 43.135.031 requires the executive agencies to perform an independent analysis of bills. In context, that analysis is to be independent of the Legislature. The conclusion that a bill raises taxes cannot aid the Legislature; it limits the Legislature by prohibiting such a bill from being enacted without a two-thirds vote. Thus, the people's purpose behind requiring the executive agencies to perform the RCW 43.135.031 Duties is not to aid the Legislature but to protect taxpayers such as Trading from the Legislature. *See, id.* Immunizing the executive agencies for their breach of the RCW 43.135.031 Duties defeats the people's purpose.

caused by such tortious conduct. The executive agencies are liable in tort in precisely the same manner. The cause of action arises from the common law and from the penumbra of the Act itself.²³

(iii) The Executive Agencies Do Not Enjoy Discretionary

Immunity for Breaching the RCW 43.135.031 Duties.

Immunity exists for quasi-legislative policy making actions for high level discretionary acts. Such discretionary immunity does not apply to a decision no reasonable official could have adopted. *King v. Seattle*, 84 Wn.2d 239, 525 P.2d 228 (1974). By alleging that the executive agencies intentionally and negligently performed the RCW 43.135.031 Duties,²⁴ Trading has alleged that no reasonable official could have taken

²³ Even if Trading needed the Act to create a cause of action, such a cause of action would be implied by the Act. This Court has established that the tests for determining if a private right of action exists by implication are whether the plaintiff is within the class for whose benefit a statute was enacted, whether legislative intent supports creating such a remedy, or whether implying such a remedy is consistent with the underlying purpose of the statute. *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990); *See, Cazzanigi v. General Elec. Credit Corp.*, 132 Wn.2d 433, 446, 938 P.2d 819 (1997) (following the *Bennett* three part test). Such tests and the legal construct of a private right of action are in essence a restatement of the analysis necessary to demonstrate the inapplicability of the public duty doctrine. Both concepts are satisfied when a statutory duty is owed to the plaintiff. In such cases, the legislative intent supports a remedy and implying the remedy is consistent with the underlying purpose of the statute. Similarly, just as no preexisting duty is necessary to bring an action for an intentional tort, whenever a statute is intentionally violated with the intent to harm a particular party, the tests for a private right of action are satisfied. Here, the tests are satisfied. The breached duties are owed by the executive agencies to Trading, *see* p. 18 - 24, *supra*. The statutory intent supports creating a remedy as implying a remedy is consistent with the purposes of the statute, *see e.g.*, p. 30 *infra*. Moreover, the executive agencies intended to harm Trading by violating their duties. Such intentional wrongful acts permit a cause of action even if one would not exist for negligent harms.

²⁴ CP 39-41 (Amended Complaint ¶¶ 22 – 39).

the action of the executive agencies.²⁵ Thus, no discretionary immunity exists.

In addition, discretionary immunity is a “narrowly circumscribed exception to the rule abolishing sovereign immunity” *Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 281, 669 P.2d 451 (1983). “Immunity for ‘discretionary’ activities serves no purpose except to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government. Accordingly, to be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place.” *King v. Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974). Immunity applies only “in instances involving high level discretionary acts exercised at a truly executive level. To fall within this exception, however, the discretionary act must not only INVOLVE a basic policy determination, but must also be the product of a CONSIDERED policy decision.” *Chambers-Castanes v. King Cty.*, 100 Wn.2d 275, 281, 669 P.2d 451 (1983) (emphasis in original). Performance of the RCW 43.135.031 Duties does not entail making policy decisions. The RCW 43.135.031 Duties call for administrative functions, calculating and publishing the revenue impact of policy decisions made by others. Thus, immunity does not and should not apply.

²⁵ Given that the Executive Agencies knew that more revenue would be paid to the State with the passage of the bill then if the bill did not pass, the truth is that no reasonable official would have produced such a knowingly false fiscal analysis. The fact that the executive agencies were knowingly unreasonable is why they are liable.

F. Trading's Tort Claim Serves the People's Purpose.

The people prohibit bills that raise taxes from passing out of the Legislature without a two-thirds vote. RCW 43.135.035. The people require executive agencies to inform the public and the Legislature when a bill raises taxes so that such a prohibition can be effected. The people's express purpose behind these requirements is to protect taxpayers.

The executive agencies suppressed the fact that SB 6096 raised taxes so that it could be passed with a bare majority. Trading is a taxpayer whose taxes are raised by SB 6096.

If Trading cannot state a cause of action in tort for violating the Act, the will of the people in requiring notice of bills raising taxes and in requiring such bills to pass only with supermajorities will be defeated. The Judiciary needs to recognize that an intentional breach of law by the Executive is a tort against the persons intended to be protected by the law. Trading is a person intended to be protected by the Taxpayer Protection Act. It depends on the Judiciary for protection against the Executive.

V. Conclusion

Given the allegations contained in the Amended Complaint, the Superior Court's decision needs to be reversed. Assuming Trading's allegations are true, Trading is entitled to recover its damages caused by the executive agencies' breach of duties intended to protect taxpayers such as Trading. Therefore, Appellant, U.S. Oil Trading LLC. respectfully

prays for this Court to reverse the Superior Court, order the reinstatement of Appellant's tort claim and the Office of Financial Management as a defendant in the action below and remand the matter to the Superior Court for further proceedings.

Respectfully submitted, this 5th day of February 2010.

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