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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.

Reply Brief of Appellant

Franklin G. Dinces, WSBA #13473
Geoffrey P. Knudsen, WSBA # 1324
Attorneys for Appellant
The Dinces Law Firm
5314 28th St. NW
Gig Harbor, WA 98335
(253) 649-0265

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I. Introduction

The issue on appeal is whether U.S. Oil Trading LLC (Trading) may bring an action as a result of the executive branch agencies' intentional failure to identify proposed legislation as raising taxes. This issue's resolution is controlled by determining whether the executive agencies owed Trading a duty. All the trial court decided was that the executive agencies owed Trading no duty and that no private right of action was created by the Taxpayer Protection Act. If the executive agencies owe a duty to Trading that was breached as alleged, then such an action is appropriate and the lower court's dismissal of Trading's tort claim should be reversed.

In the Brief of Appellant, Trading demonstrated that the executive agencies owed it a duty and that the duty was breached. Thus, liability exists.

The executive agencies' response spends many pages discussing one *potential* and alternative component of Trading's damages. In so doing, the Respondent's Brief is not directed at the issue before the Court: Do the executive agencies owe Trading a duty? Arguments over whether that duty was breached and the amount of the liability resulting from the breach, including arguments over the components and measure of

damages, raise mixed questions of fact and law that should be determined later by the trier of fact.¹

Moreover, even if the executive agencies' argument, that one *potential* and alternative component of Trading's damages is not the result of the executive agencies' actions, is correct (which it is not), it does not eliminate the executive agencies' duty and the liability for its breach. Trading has other damages, uncontested to this point, which would in all events be recoverable. At most, only the *potential* and alternative damage component may not be included in the measure of the relief. The fallacy in the response is that by focusing on one *potential* and alternative component of Trading's damages (taxes that Trading should not owe²) the executive agencies lose sight of the issue before the Court.

The duty owed by the executive agencies to Trading was to tell the truth to the public and the Legislature about SB 6096 (the Bill). The breach was the failure to satisfy that duty. It arose prior to the Bill being passed by the Legislature.

¹ These questions should be decided in Trading's favor for purposes of this Appeal. The executive agencies admit, "the court must take the facts alleged in the complaint, as well as hypothetical facts consistent therewith, in the light most favorable to the moving party." Respondents' Brief (hereinafter cited as Resp. Br.) at 1.

Out of an abundance of caution, Section III. C., *infra*, demonstrates that the breach was a proximate cause of the taxes being raised. That demonstration precludes a holding that as a matter of law the damages cannot include any amount for the raised taxes.

² If the taxes are not owed, as Trading contends in its refund action, then such taxes are not a component of Trading's damages. Yet, the tort action will still be appropriate to recover other damages Trading suffered. The damages that are the focus of the executive agencies' arguments are only potential damages.

The cause of action exists whether or not any taxes are owed.³ The response's attempt to portray the issue as whether the executive agencies are liable for taxes⁴ or whether the executive agencies owed a duty to prevent the taxes from being levied⁵ obscures the fact that the executive agencies are liable for their breach of duty and that a tort action may lie to recover whatever damages are caused by that breach. The components of Trading's damages are not the issue now before the Court.

Therefore, Trading principally replies to the Respondents' arguments concerning whether a duty was owed to Trading and secondarily demonstrates that if the taxes raised by the Bill are lawful, they should be included in a proper measure of damages.⁶ A focus on the tort, the duty owed Trading and its breach, disposes of Respondents' many arguments regarding separation of powers, RCW 82.32., *Brown v. Owen*, and immunity. We discuss these arguments at the end of this Reply.

II. Summary of Argument

³ Trading has from the outset stated its damages in the alternative – depending on whether or not the raised taxes may be legally imposed. The respondents' assertion, at Resp. Br. at 7, that Trading for the first time revealed during oral argument below that it was seeking damages other than the raised taxes is incorrect. The amended complaint sufficiently alleges damages other than raised taxes. CP 42.

⁴ See, Resp. Br. at 8, 13, and 14.

⁵ See, Resp. Br. at 9 and 34.

⁶ As SB 6096 raised taxes and was passed with a simple majority, not with the supermajority required, the taxes raised by the Bill should not be lawfully due, see, RCW 43.135.035, and should be recoverable in a refund action. See also, p. 16 – 17, *infra*.

The Taxpayer Protection Act creates a duty on behalf of the executive agencies to inform the public and the Legislature about a bill that proposes to raise taxes. Under traditional tort doctrine as well as the public duty doctrine, this duty is owed to parties who would pay the taxes to be raised by the bill. In this case, that includes Trading.

The executive agencies breached their duty. Thus, they committed a tort and are liable for the damage proximately caused by their actions.

The components of damage include costs Trading incurred that would not have been incurred but for the executive agencies' malfeasance. Such costs include the raised taxes if they are lawful. Trading's damages also includes other costs to be proved at trial that would not have been incurred but for the executive agencies' malfeasance.

The executive agencies are not immune from suit for any reason, and the tax refund statute is not a remedy for the tortious actions of the executive agencies. Holding the executive agencies liable for their actions, which are separate and apart from any legislative action, does not raise a separation of powers issue.

III. Argument

A. RCW 43.135.031 Creates A Duty Owed To Taxpayers.

Relying on the intent clause, section 1 of Initiative 960, codified at the end of RCW 43.135.031, Trading demonstrated that the RCW

43.135.031 Duties were explicitly intended to protect taxpayers. Brief of Appellant (hereinafter cited as Br. of App.) at 18 – 21.

The response claims that “I-960 protects taxpayers only by creating ‘transparency’.” Resp. Br. at 19. The executive agencies contend this is a sufficient response because there is not an expressed intent to protect taxpayers from taxes. *See*, Resp. Br. at n. 16.

By looking only for an expressed intent to protect taxpayers from taxes, the executive agencies fail to understand their duty and to whom it is owed. At a minimum, the RCW 43.135.031 Duties are designed to protect taxpayers by creating transparency.⁷ Thus, the RCW 43.135.031 Duties are owed to taxpayers. The transparency is to be obtained by requiring the executive agencies to identify bills that raise taxes. The executive agencies breached that duty. Thus, the executive agencies are liable to taxpayers for the damages the taxpayers suffered as a consequence of the breach.

The executive agencies fail to understand the consequence of the RCW 43.135.031 Duties being intended to protect taxpayers.⁸ The

⁷ The Taxpayer Protection Act, establishing the RCW 43.135.031 Duties and the supermajority requirement to pass legislation raising taxes, is a comprehensive statutory scheme designed to protect taxpayers from having their taxes raised except under limited circumstances. Thus, if the executive agencies were correct in contending that it is necessary for the intent of the Act to be protection of taxpayers from taxes, that condition is satisfied. In text, we demonstrate that the executive agencies’ contention is incorrect.

⁸ That fact leads to the conclusions that (i) the duty is owed to Trading, (ii) the public duty doctrine is inapplicable and (iii) a private cause of action may be implied.

agencies are blinded by their focus on a *potential* and alternative component of Trading's damages (taxes that might be lawfully imposed) rather than the duty (notification that the underlying bill raises taxes) and who is intended to be protected by the notification (taxpayers).

B. In the Context of RCW 43.135.031, Taxpayers Is A Narrow Class of Persons That Includes Trading.

In the Brief of Appellant, Trading demonstrated that for purposes of the RCW 43.135.031 Duties, "taxpayers" was a narrow class of persons that includes Trading. Focusing on the meaning of the word "taxpayers," Trading demonstrated that "taxpayers" meant the "persons whose taxes would be raised by a bill subject to the RCW 43.135.031 Duties." Br. of App. at 19.

The executive agencies are obligated by RCW 43.135.031 to "expeditiously determine [a bill's] cost to the taxpayers" It is axiomatic that a bill which raises taxes increases state revenues. Thus, such a bill is a revenue enhancement for the public. It is a cost *only* to those parties who would pay the taxes being raised. Taxpayers is thus necessarily limited to the persons who would pay the taxes being raised. Taxpayers does not refer to the public. In this case, Trading is a taxpayer. Thus, the duty to publish notifications that the Bill raised taxes was owed to Trading.

The executive agencies contend that this analysis is incorrect, not because taxpayers has a different meaning, but because such a definition potentially makes the executive agencies liable to different persons with each successive bill they analyze. That is, while SB 6096 only effected certain persons, another bill might raise B&O taxes paid by others, while a third might raise property taxes and a fourth sales taxes. *See*, Resp. Br. at 17 – 18.

The executive agencies misunderstand what it means for a duty to be owed to a person or narrow class of persons. In effect, they contend that a statutory duty is only owed to a person or narrow class of persons if the duty is owed to a fixed, identified group that is not large. *See, id.* But:

(i) under a traditional tort analysis, the purpose of requiring that the duty breached must be owed to a person or narrow class of persons as distinct from the public is to ensure that the harm is foreseeable. *See generally, Schooley v. Pinch's Deli Market*, 80 Wn. App. 862, 864 n. 16, 912 P.2d 1044 (1996). Under the public duty doctrine, the purpose is to ensure that the government is not subject to unlimited liability. *See generally, Resp. Br. at 20, quoting, Taylor and Meaney v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988) (“Legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.”);

(ii) the requirement that the duty must be owed to a person or narrow class of persons as distinct from the public is the same whether the duty arises from statute or common law. *Schooley* at n. 13 and

(iii) the requirement is the same whether the defendant is the government or a private party. *Compare, Peterson v. State*, 100 Wn.2d 421, 671 P.2d 230 (1983) and *Schooley*.⁹

Thus, the executive agencies' objection -- that Taxpayers is not a fixed, small group -- is without force. Duties on which torts are based are frequently owed to unfixed, large groups when harm to the injured party is foreseeable. *See e.g., Purchase v. Meyer*, 108 Wn.2d 220, 228, 737 P.2d 661 (1987) (RCW 66.44.320 which prohibits sales of alcohol to minors held to impose duty to members of the general public as well as to minors.)¹⁰ Indeed, virtually all duties are owed to persons unidentified until they are injured by a tortfeasor's actions. Identifying the class of persons to whom the executive agencies owe the RCW 43.135.031 Duties

⁹ Confusion could arise by focusing too quickly on the public duty doctrine. That doctrine is nothing more than a restatement of traditional tort principles in a governmental context. The doctrine's exceptions help explain whether and why a governmental duty is owed to a plaintiff. Where, as here, the duty is owed to the plaintiff under a traditional tort analysis, the public duty doctrine is superfluous because the "doctrine simply reminds us that a public entity -- like any other defendant -- is liable... if it has a statutory or common law duty of care." *Osborn v. Mason County*, 157 Wn.2d 18, 27-28, 134 P.3d 197 (2006). The traditional tort analysis shows that the legislative intent exception applies here. That the executive agencies are intentional tortfeasors also results in the failure to enforce and special relationship exceptions being applicable. *See*, Br. of App. at 21 – 25.

¹⁰ *See also, Munger v. Union Sav. & Loan Assn.*, 175 Wash. 455, 458, 27 P.2d 709 (1933) (possessor of land owes duty to passer by).

as parties who would pay the raised taxes is a sufficient identification to make the breach of the duty actionable by members of that class under both a traditional tort analysis and the public duty doctrine.¹¹ That parties who would pay the raised taxes would be harmed by a breach of the RCW 43.135.031 Duties is clearly foreseeable and limiting liability to that class of persons does not expose the government to unlimited liability.

C. Trading's Damages Proximately Caused By the Executive Agencies' Breach of Duty Are Recoverable.

In the Brief of Appellant at 17- 18, Trading discussed the casual connection between the breach and damage. The executive agencies do not deny that Trading incurred costs and might incur taxes that would not have been incurred but for the executive agencies' breach of their duties. There appears to be no denial that the executive agencies are the cause in fact¹² of all of Trading's damages¹³ including the *potential* taxes raised by

¹¹ Resp. Br. at 15 – 22 argues that The Taxpayer Protection Act failed to create a private right of action and criticizes Trading for not identifying or addressing the applicable standard, *id.* at 15, while acknowledging that the legislative intent exception is similar to assessing whether a statute supports a private right of action, *id.* at 28. But, Trading first made the same observation, that the private right of action construct and public duty doctrine implicate the same concerns and appear to be two formulations of the same principle such that the inapplicability of the doctrine is a demonstration that Trading has a private right of action, in the Br. of App. at n. 13, before identifying the applicable standard for a private right of action and demonstrating that the standard was met, *id.* at n. 23.

¹² Resp. Br. at 30 (the executive agencies recognize the distinction between cause in fact and legal cause and then proceed to only discuss legal causation).

¹³ Trading alleged that if the taxes are lawful, a present value of the future taxes should be a component of its damages. Trading will also prove at trial that the executive agencies' breach required Trading to incur costs for attempting to have the Legislature and

SB 6096. The executive agencies limit their objection on damages to the *potential* and alternative component of Trading's damages, the taxes that are ostensibly, but illegally, imposed by SB 6096.

The executive agencies contend that their breach is not the legal cause of the raised taxes. They also argue that RCW 82.32.180 bars such damages from being recovered. While the issue of whether the raised taxes may be a component of damages is not ripe, out of an abundance of caution we address both of the executive agencies' arguments in turn:

1. The Executive Agencies' Breach Is A Proximate Cause of the Raised Taxes.

The People of the State of Washington adopted Initiative 960, the Taxpayer Protection Act, a comprehensive legislative scheme "to protect taxpayers."¹⁴ All bills that "tend to increase or decrease state government revenues or expenditures"¹⁵ are to be studied by the executive agencies for purposes of preparing a fiscal note, and for all bills that are found to raise

Governor recognize that SB 6096 raised taxes, bringing the refund action currently pending in the Superior Court to invalidate the imposition of the taxes, accounting for the raised taxes, planning business strategies and undertaking and/or declining certain business activities in part due to the increased taxes. *See*, CP 42. These other damages have not been objected to by the executive agencies. In fairness, Trading has yet to prove these damages, but Trading is only required to allege damage at this stage of the proceeding. Merely stating an amount of damage to be proved at trial is sufficient to properly state a tort cause of action. *Conner v. Universal Utilities*, 105 Wn.2d 168, 712 P.2d 849 (1986) (Merely pleading an amount to be proved at trial sufficient for default judgment).

¹⁴ Taxpayer Protection Act, Section 1. Each of the Initiative's substantive headings start with the words "Protecting Taxpayers".

¹⁵ Taxpayer Protection Act, Section 3, codified at RCW 43.88A.020.

taxes, the executive agencies are further required to prepare and disseminate to the public and Legislature projections of the bills' "cost to taxpayers".¹⁶ Other taxpayer protections are also required once the executive agencies determine a bill raises taxes.¹⁷ The public must receive information on public hearings, legislative sponsorships and voting records on such bills. In addition, such bills may only be passed by a two-thirds vote of the Legislature or a vote of the People.¹⁸ The comprehensive legislative scheme therefore makes the executive agencies' finding that a bill raises taxes a trigger for various taxpayer protections including the supermajority requirement.

Here, the executive agencies intentionally¹⁹ failed to find that SB 6096 raised taxes with the intent to harm Trading. CP 41.²⁰ The Bill then

¹⁶ Taxpayer Protection Act, Section 2, codified at RCW 43.135.031.

¹⁷ Taxpayer Protection Act, Sections 2 -14, codified in part at RCW 43.135.031, .035, .041 and .055, RCW 43.88A.020 and .030, RCW 29A.72.040, .250 and .290

¹⁸ RCW 43.135.035.

¹⁹ Without citation to authority, the executive agencies contend that state agencies as creatures of statute cannot intentionally violate the law. Resp. Br. at 43. Corporate entities, also creatures of statute, may be subject to penalties for intentionally and or negligently violating tax laws. *See e.g.*, RCW 82.32.090. We know of no reason why it needs to be conclusively presumed that state agencies never intend to violate the law and the allegations make such a conclusion inescapable.

²⁰The executive agencies had no reasonable basis for concluding that SB 6096 did not raise taxes. CP 39 - 40 (The executive agencies had actual knowledge that the Bill raised taxes, a statutory duty to notify the public and Legislature of that fact and knew they were breaching their duties with the intent to harm Trading). Trading takes exception to Resp. Br. at n. 9 where it states, "U.S. Oil falsely claimed in the trial court that this conclusion was alleged in the Amended Complaint." The Respondent cites to the amended complaint and Trading's response to the partial motion to dismiss for this statement. But, Trading's argument in response was simply a citation to the amended complaint which contains the allegations that make this conclusion undeniable. "[T]he court must take the

passed with a simple majority vote and without the public scrutiny the Initiative requires.²¹ Thus, there is a clear causal connection between the executive agencies' breach and the raised taxes.

Nevertheless, the executive agencies argue that because "the imposition of taxes is the exclusive province of the Legislature"²², that "only the People and the Legislature may pass laws,"²³ and that "[a]bsent any authority to pass legislation or impose taxes"²⁴ they can have no duty to protect Trading from taxes. Similarly, the executive agencies argue "[l]egal causation is a policy determination by the courts that, as a matter of law, forecloses any duty in this case"²⁵ and that [t]he duty asserted (by Trading) should likewise be rejected on the basis of precedent, policy, common sense and logic."²⁶

facts alleged in the complaint, as well as hypothetical facts consistent therewith, in the light most favorable to" Trading. *Id.* at 8.

²¹ Ironically, the executive agencies argue that permitting the tort action would lead taxpayers to forego participating in the debate over raising taxes, Resp. Br. at 21, without recognizing that their intentional failure to publish the required notifications defeated the possibility of sufficient taxpayer involvement in the debate over SB 6096. The very fact that absent public notification, the public is not informed enough to enter the debate is itself a reason to find the executive agencies' breach a proximate cause of all of Trading's damages.

²² Resp. Br. at 11.

²³ Resp. Br. at 12.

²⁴ Resp. Br. at 13.

²⁵ Resp. Br. at 30.

²⁶ Resp. Br. at 32.

The executive agencies are incorrect.²⁷ Simply put, the Taxpayer Protection Act is the policy of this State. The People created precisely and expressly what the executive agencies deny -- an executive agency duty to protect taxpayers. Thus, the executive agencies disagree with the People, but the People have spoken. The People's actions are, of course, consistent with common sense and logic. The People know that an independent analysis of bills that raise taxes is necessary to protect taxpayers. That is why the executive agencies are charged with performing an analysis independent of the Legislature. The People know that a supermajority vote requirement is needed to protect taxpayers from having their taxes raised too quickly. That is why the People require a two-thirds vote when the executive agencies identify a bill as raising taxes. No public policy permits the executive agencies to flout the will of the People by intentionally failing to identify a bill raising taxes.

The executive agencies' claim, Resp. Br. at 6, that the Legislature independently determined that SB 6096 did not raise taxes cannot prevent the executive agencies' breach from being a proximate cause of the raised taxes.

²⁷ While the executive agencies intertwine the concepts of duty and legal causation, the concepts are distinct. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 18 P.3d 558 (2001). Trading has demonstrated at pages 5 – 9, *infra*, that a duty was owed by the executive agencies to Trading. We now address in text the reasons why the executive agencies' breach is a legal cause of Trading's *potential* and alternative damage component, the raised taxes.

First, as a matter of law, such a determination cannot occur. The executive agencies attempt to persuade this Court that the executive agencies' statutory communications regarding the Bill were both ineffectual and meaningless. But, the comprehensive legislative scheme charges the executive agencies with the primary responsibility to notify the Legislature of bills that raise taxes. The People intended the Legislature to rely on the executive agencies' independent analysis. Here, the executive agencies concluded that there was no revenue impact to the Bill, that it did not raise taxes. Given that the executive agencies told the Legislature that the Bill did not raise taxes, the Court would have to peer inside the mind of the Legislature to determine that any determination was made completely independent of the executive agencies' statutory pronouncement.²⁸ Thus, as a matter of law, it must be conclusively presumed that the executive agencies' determination at least influenced the Legislature.

Second, even if such a determination could occur, it could not excuse the executive agencies' failure to perform their duties. The

²⁸ Such peering is prohibited by the separation of powers doctrine. *See generally, Brown v. Owen*, 165 Wn.2d 706, 206 P.3d 310 (2009). Moreover, it is wrong to conclude that the Legislature was uninfluenced by the executive agencies' findings. The Legislature acted consistent with the findings. The Legislature should pay attention to the executive agencies' findings. The executive agencies are basically arguing that even though they announced that the Bill did not raise taxes and the Legislature acted as if the Bill did not raise taxes, that the executive agencies' actions are immaterial. If the executive agencies' actions are immaterial, why would the People require the agencies to undertake the analysis in the first instance?

executive agencies' duty was to notify the public and the Legislature that the Bill raised taxes. It failed to fulfill its duty. If the executive agencies had properly notified the Legislature, the Legislature would have heeded the executive agencies' notification. The Court should presume that the Legislature would act consistent with the statute and pass a Bill that the executive agencies concluded raised taxes only with a two-thirds vote.²⁹

Third, it is unnecessary for Trading to demonstrate the executive agencies' breach is the sole cause of its damage. There may be more than one proximate cause. *State of Washington v. Jacobsen*, 74 Wn.2d 36, 442 P.2d 629 (1968). The *potential* taxes may therefore be included as an alternative component of damages so long as one of the causes is the executive agencies' breach.

As the comprehensive legislative scheme makes the executive agencies' finding that a bill raises taxes the trigger for various taxpayer protections including the supermajority requirement, it must be true that the executive agencies telling the People and the Legislature that SB 6096 did not raise taxes was at least one cause of the Bill being passed with only a simple majority, rather than two-thirds, vote. Indeed, the executive

²⁹ The executive agencies fail to recognize that their failure to publish the fact that the Bill raised taxes was beyond reason because they had actual knowledge that the Bill raised taxes. CP 39. Nothing in the record indicates that the Legislature shared such knowledge, and it must be presumed that the Legislature lacked such knowledge for its actions (passing the Bill by a simple majority) to be in good faith.

agencies knew the Bill raised taxes and did not publish that fact precisely to avoid the two-thirds vote requirement. Far from being too remote or attenuated, the *potential* and alternative damage component claimed by Trading is a foreseeable harm caused by a breach of the RCW 43.135.031 Duties.³⁰

2. RCW 82.32.180 Is Not Being Circumvented.

RCW 82.32.180 provides the exclusive statutory means to obtain a tax refund. Trading's tort claim does not circumvent this statute.

Trading brought a refund action simultaneously with the tort action. The trial court will determine whether the taxes are valid in the refund action. If the taxes are invalid, as Trading contends because they are imposed by a bill that raised taxes without a two-thirds vote, Trading will not seek any amount of damages related to the raised taxes.

The raised taxes will only be sought to be included in the measure of damages if the taxes are valid. That is, if the refund action fails because the taxes are legal, then and only then would Trading suffer the damage of

³⁰ "The focus in the legal causation analysis is whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability." *Schooley v. Pinch's Deli Market*, 134 Wn.2d 468, 478-9, 951 P.2d 749 (1998) (vendor who sold alcoholic beverages to a minor owed duty to second minor who drank some of the beverages and was subsequently injured in a swimming pool accident. The sale of the beverages to the first minor was held to be the proximate cause of the second minor's injuries). Stated otherwise, legal causation asks: was the defendant under a duty to protect the plaintiff against the event which did in fact occur and whether the relationship between plaintiff and defendant is close enough or too attenuated to support liability. *Id. at 480*. Foreseeability of the harm and remoteness of the damage are factors that assist in determining legal causation. *Id. at 470*.

having to pay the raised taxes. In such a case, Trading would not be seeking a refund of taxes; it would be seeking damages. The fact that the damages may be measured in part by the current discounted value of taxes to be paid in the future does not convert such damages into taxes.

The executive agencies are attempting to deprive Trading of any procedural as well as substantive remedy for their breach of duty. They claim here that the tort action needs to be dismissed because it may include as a potential and alternative component of damage the discounted value of future taxes that might be paid, and in the refund action, the Department of Revenue will argue that the raised taxes are valid even though they were approved by a simple majority vote.³¹ Here too, the Department claims the tort should be dismissed, but in the refund action it will undoubtedly claim that all of Trading's damages other than the raised taxes are not recoverable. The People intended Trading to be protected by the executive agencies. Trading deserves an opportunity to recover all of its damages.

³¹ Trading anticipates that the Department of Revenue will contend that the two-thirds vote requirement is unconstitutional. Trading can argue in the tort, but not the refund, action that the two-thirds vote requirement was a rule of the Legislature that would have been followed but for the executive agencies' breach of duty. Thus, even if the two-thirds vote requirement is ultimately determined to be unconstitutional, Trading is still entitled to damages caused by the breach and those damages may include the discounted future value of the raised taxes.

D. No Immunity Prohibits The Executive Agencies From Being Liable.

The executive agencies argue that sovereign immunity, legislative immunity and/or the doctrine of separation of powers prohibits them from being sued for their breach. A focus on the duty and the breach of the duty disposes of these claims.

1. The Duties Breached Were Ministerial Not Legislative Acts.

The RCW 43.135.031 Duties breached were the duties to undertake an independent analysis of SB 6096, determine if it raised taxes and if so, notify the public and Legislature of that fact. Those duties are all ministerial. They involve no discretion or policy decisions. They require the executive agencies to perform an accounting function to calculate the revenue effect of legislative policy proposals.

2. In Performing the Duties, The Executive Agencies Are Not Protected By Legislative Immunity.

Legislative immunity protects the Legislature from service of process and government officials from liability for considered, policy decisions. As discussed in Brief of Appellant at 25 – 26, the universe of Washington cases using the words “legislative immunity” is limited to four cases none of which are remotely close to this case.

The RCW 43.135.031 Duties call for executive, administrative acts. They do not involve an exercise of policy or discretion. While the RCW 43.135.031 Duties require accounting skills, they are ministerial in nature. Legislative immunity does not apply to such nondiscretionary, executive, administrative, accounting and ministerial tasks.³² *Mission Springs v. City of Spokane*, 134 Wn.2d 947, 970, 954 P.2d 250 (1998) (Denied immunity to action by a legislature that involved passage of legislation that denied a land use permit; such legislation was deemed to be an administrative, executive action). There is no Washington authority to the contrary.³³

The executive agencies attempt to cloak their administrative function with legislative immunity but fail to recognize that they are 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 for the protection of taxpayers. *See*, Findings and Intent codified at RCW

³² For the reasons discussed at n. 22, *supra*, the executive agencies acted outside the bounds of a reasonable person. Therefore, even if their actions were not of an administrative or ministerial nature, they would not 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 (1994) (finding actions that are arbitrary and capricious subject to suit).

³³ In the Superior Court, the executive agencies argued that discretionary immunity protected them from liability. CP 22 – 23. While not specifically raised in Resp. Br., the claim that separation of powers protects the executive agencies appears to be a relabeling of this argument. Therefore, we reference the unanswered arguments contained in Br. of App. at 28-30 as additional reasons why neither legislative immunity nor separation of powers bars Trading’s tort claim.

43.135.031. In addition, 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. Any conclusion that a bill raises taxes does not 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.*

3. The Separation of Powers Doctrine Does Not Immunize The Executive Agencies From Liability.

The executive agencies' claim that they are entitled to immunity by virtue of the separation of powers doctrine is premised on its mistaken assertion that its administrative function is a legislative function,³⁴ and that the "doctrine would be violated by the imposition of liability on state agencies for the passage of legislation or taxes."³⁵ The executive agencies fail to recognize that their liability stems entirely from a failure to perform an administrative function for the protection of taxpayers and not from the passage of legislation.

³⁴ *See*, Resp. Br. at 1, 2, 13, 14 and 39.

³⁵ Resp. Br. at 13. The executive agencies also claim that Trading's claim "would necessitate a judicial inquiry -- discovery -- into the legislative process". *Id.* at 14. Such a claim is flatly untrue. The Court merely has to determine that the executive agencies' analysis, required to be independent of the Legislature, was intentionally or negligently false.

The executive agencies' separation of powers claim also fails because the RCW 43.135.031 Duties are, by definition, a statutory obligation not a constitutional duty or prerogative. The separation of powers doctrine is only applicable to protect one branch of government's constitutional functions being encroached by another branch of government. There is no danger of such encroachment here by the Court permitting the instant tort action to proceed.

The Respondent's Brief also relies on *Brown v. Owen*, 165 Wn.2d 706, 206 P.3d 310 (2009) as support for its claim that the separation of powers doctrine prohibits Trading's tort claim. But, *Brown's* reasoning supports Trading's, not the executive agencies', positions in this case.

In *Brown*, the issue was whether "a writ of mandamus ordering the president of the senate to forward a bill to the house that did not receive the statutorily required two-thirds vote an appropriative remedy where the petitioner argues the two-thirds vote requirement of RCW 43.135.031(1) is unconstitutional". *Id.* at 717. The Court declined to issue a writ reasoning that the "*court will not interfere in the internal proceedings of a legislative house to overturn a ruling on a point of order*" and the Court "will not substitute the judgment of this court for that of a legislative officer performing a discretionary duty". *Id.* at 720 (emphasis in

original).³⁶ The Court further held that a “ruling by this court overturning the president of the senate’s ruling on a point of order would undermine the constitutional authority of the senate to govern its own proceedings and the lieutenant governor’s duty to preside over those proceedings.”³⁷ *Id.* at 719. Thus, the court held that the requested relief violated the separation of powers doctrine.

Here, Trading is not requesting the Court to interfere in the *internal* proceedings of a legislative house. Trading is not asking the Court to substitute its judgment for that of a legislative officer in performing a *discretionary* duty. Trading is requesting the Court to permit the executive agencies to be found liable for intentionally failing to perform a *ministerial* duty to publish a report the purpose of which was to protect Trading.

³⁶ In *Brown*, the Court distinguished between ministerial and discretionary duties. *Id.* at n. 10. (“A duty is ministerial ‘where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.’”). The Court reasoned that it could compel mandatory duties. Where such duties are ministerial, mandamus may be appropriate. Where such duties are discretionary, the Court found that it could compel the duty to be performed but not how such duty should be exercised. *Id.* at 725.

³⁷ The executive agencies claim “[t]he same improper ruling would be required here to allow the assertion of (Trading) that SB 6096 should not have been passed with a mere majority.” Resp. Br. at n. 24. But, Trading is not seeking in its tort action a ruling that the Legislature erred by passing SB 6096 with a mere majority. Quite the contrary, Trading contends that because the executive agencies determined that the Bill did not raise taxes, the Legislature was compelled to permit the Bill to pass with a mere majority. In the refund action, Trading will contend that the Bill cannot be law because it failed to pass with a two-thirds majority.

A ruling of this Court that the executive agencies' failed to perform the mandatory, ministerial, statutory duty owed to Trading would not undermine any constitutional authority of the Legislature or the Governor. Such a ruling treats the executive agencies like a private party breaching an analogous duty. Far from violating separation of powers, such a ruling is the appropriate check on what would otherwise be an unfettered abuse of power by the executive agencies. The executive agencies are required to follow the statutes. This Court's constitutional role, in part, is to ensure that the executive follows the law.

4. Sovereign Immunity Has Been Waived.

RCW 4.92.090 waives sovereign immunity. The executive agencies are liable for their torts.

The executive agencies argue that Trading's dismissal of the sovereign immunity claim is incorrect. It argues that the public duty doctrine recognizes limitations on the State's waiver of sovereign immunity and that the waiver of sovereign immunity for tax refunds and the general waiver of sovereign immunity are limited. Resp. Br. at 35.

The public duty doctrine, as the executive agencies recognize, is merely a focusing tool for determining whether the government owes a

duty to the plaintiff. Resp. Br. at 27. It does not resurrect sovereign immunity.³⁸

The waiver of immunity for tax refunds is a red herring. Trading is not seeking a tax refund in its tort action. *See*, p. 16 – 17, *supra*.

The general waiver of sovereign immunity makes the executive agencies liable to the same extent as a private entity. Resp. Br. at 35. The executive agencies recognize that governmental conduct is actionable if analogous conduct by a private person is actionable, *id.* at 36. Private parties are liable for intentional or negligent misrepresentation of material facts. *See generally*, *St. Paul Mercury v. Salovich*, 41 Wn. App. 652, 705 P.2d 812 (1985) (An insurer sought a declaration of noncoverage due to alleged willful misrepresentation of material fact) and *Elliott v. Barnes*, 32 Wn. App. 88, 645 P.2d 1136 (1982) (Purchaser sought damages from seller for erroneous description of property). Here, the executive agencies' conduct is analogous to private parties' misrepresentation of material facts. Therefore, sovereign immunity has been waived.

³⁸ At pages 4 – 9, *supra*, Trading demonstrates that the executive agencies owe it a duty and that the public duty doctrine is satisfied.

IV. Conclusion

For the reasons expressed above, Appellant, U.S. Oil Trading LLC, respectfully prays this Court to reverse the Superior Court and 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 31st day of ~~April~~^{May}, 2010.

The Dinces Law Firm

By 

Franklin G. Dinces, WSBA # 13473
Attorney For Appellant

Certificate of Service

I, Franklin G. Dinces, do hereby certify that on this the 5th day of May, 2010, I placed in the United States mail, postage prepaid, a copy of the Reply Brief of Appellant, addressed to:

Don Cofer and Peter Gonick, Assistants Attorney General
Attorney General's Office – Revenue Division
7141 Cleanwater Drive SW
PO Box 40123
Olympia, WA 98504-0123

D. Thomas Wendel
7141 Cleanwater Drive SW
PO Box 40126
Olympia, WA 98504



Franklin G. Dinces