

NO. 43459-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STEVE FABRE AND THE POINT DEFIANCE CAFE AND CASINO,

Appellants,

v.

THE TOWN OF RUSTON

Respondent.

**REPLY BRIEF OF APPELLANTS STEVE FABRE AND HIS
BUSINESS**

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TABLE OF CONTENTS

I. SUMMARY OF REPLY	1
II. ISSUES RAISED IN RESPONSE	2
A. Disputed Factual Assertions.....	2
1. House Banked Card Games Generated Millions In Ruston.....	2
2. Less than Twenty Votes In Favor of A Ban Than Against Is Not A Margin of 52.27 Percent.....	2
3. Ruston Mischaracterizes Its Ban As Advisory.....	3
4. Steve Fabre Pled and Argued Negligent Misrepresentation	3
5. Mr. Fabre’s Authority For The Trial Court’s Mistaken Assumption as to the Effect of Cross Motions.....	4
6. Towns Were Never Authorized to Ban Card Games	5
B. Mr. Fabre’s Responses to Ruston’s Legal Arguments.....	6
1. Ruston’s Failure to Properly Inform Steve Fabre	6
2. Ruston’s Duty Arises From A Special Relationship With Steve Fabre From Erroneous Communications With Him Each Miscommunication Is A Breach.....	7
3. Misinformation Presents Risk of Criminal and Civil Penalties to Steve Fabre.....	8
4. Judicial Recreation of Sovereign Immunity Discouraged	9
III. CONCLUSION	15

TABLE OF ATHORITIES

Cases

<i>Howe v. Douglas County</i> , 146 Wn. 2d 183, 43 P.3d 1240 (2002).....	11
<i>Cook v. State</i> , 83 Wash.2d 599, 613–17, 521 P.2d 725 (1974)	11
<i>Haberman v. Washington Public Power Supply System</i> , 109 Wn. 2d 107, 744 P.2d 1032 (1987).....	14
<i>Hunter v. N. Mason High Sch.</i> , 85 Wash.2d 810, 818, 539 P.2d 845 (1975)	11
<i>Sundberg v. Evans</i> , 78 Wn. App. 616, 897 P.2d 1285 (1995).....	12

<i>ZDI Gaming Inc. v. State ex rel. Washington State Gambling Comm'n</i> , 173 Wash. 2d 608, 621, 268 P.3d 929, 935 (2012).....	11
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Statutes

RCW 4.92.090	11
RCW 4.96.010(1).....	10
RCW 9.46.010	9
RCW 9.46.075	9
RCW 9.46.110	7
RCW 9.46.113	7
RCW 9.46.150	9
RCW 9.46.170	9
RCW 9.46.190	9
RCW 9.46.250	9
RCW 9.46.295	6, 7
RCW 9.46.350	9

I. SUMMARY OF REPLY

Ruston claims the misconduct of its officials is a protected act of governance, claiming in essence “The King Can Do No Wrong.” Ruston urges this court to leave Steve Fabre and his business without a remedy even though the Legislature waived this immunity doctrine long ago recognizing it as “archaic”. Ruston has no immunity for the Mayor’s express assurances to Steve Fabre that his business must pay a flat tax rate of 12% when that tax rate was void from its inception. Ruston also has no immunity when the Mayor, City Attorney, and Councilmembers assured him that his card games were banned by referendum. Ruston’s ban was void, just like its tax rate, and its officials acted as if both were enforceable up to the date Ruston repealed them several months later. During this time, Steve Fabre could not operate his most popular card games. These games were paying back his investment and were lucrative. Ruston equates the negligence claims with the intentional interference claims, failing to understand the immunity defenses do not apply when the officials made representations outside council chambers and not in the passage of any legislation or policy. The jury should hear issues of fact regarding damages and the actions of Ruston’s officials. This case should be remanded for trial.

II. ISSUES RAISED IN RESPONSE

A. *Disputed Factual Assertions*

1. House Banked Card Games Generated Millions In Ruston

Ruston opens its brief discounting the value of Steve Fabre's business. Resp. Br. 3 - 4. The value of his business and the damages he suffered are in dispute. CP 1258. The only fact not in dispute is the reported gross receipts generated by his house banked games. CP 1271. The games were lucrative, generating millions in revenue. Id. Summary dismissal on damages was never warranted, as there are genuine issues of material fact regarding the losses suffered by Steve Fabre and his business.

2. Less than Twenty Votes In Favor of A Ban Than Against Is Not A Margin of 52.27 Percent.

Ruston claims the citizens supported a ban by a margin of 52.27 percent. Resp. Br. 9. The difference between the votes in favor versus the votes against the ban was fewer than twenty votes. CP 1015. Fewer than twenty votes do not represent a margin of more than fifty percent of over one hundred votes. 52.27 percent represents the percentage total of all votes. 47.73 percent voted against the ban. Ruston never had the support it thought it had to close down Steve Fabre's business, which is one of the reasons it agreed to repeal the ban.

3. Ruston Mischaracterizes Its Ban As Advisory

Ruston suggests its Referendum was advisory rather than dispositive. Resp. Br. 8. Ruston labeled its referendum, “REFERENDUM MEASURE No. 1.” CP 119, CP 107 - 108. Ruston did not label its Referendum “ADVISORY.” Ruston expressly delegated the question of whether Ruston should allow house banked card games to its citizens: “whether or not to continue to allow social card games within the Town of Ruston is of great public interest, controversy, and concern, and should be decided by the citizens of the Town...” Ruston did not seek an advisory opinion from its citizens.

4. Steve Fabre Pled and Argued Negligent Misrepresentation

Steve Fabre timely identified and argued the Mayor’s and other officials’ insistence that Ruston’s flat rate of 12% was enforceable was a factual basis in support of his negligence claims against Ruston. CP 8 - 9, 11-12, RP 131 - 137 4/23/12. His negligence claims are inclusive of all forms of negligence to include Ruston’s negligent misrepresentation that its tax rate was 12% when it was not. The 12 % tax rate was void at its inception. CP 105. Similarly so with regard to its ban. CP 11. The ban was void and unenforceable, yet Ruston insisted its ban was valid for months and that it had referendum powers that it did not have.

5. Mr. Fabre's Authority For The Trial Court's Mistaken Assumption as to the Effect of Cross Motions

Ruston complains that Mr. Fabre has no authority to argue the judge reached an erroneous assumption as to the effect of cross motions for summary judgment. Resp. Br. at 45. Ruston is incorrect. Mr. Fabre cites to and excerpts into his brief the court's actual letter opinion wherein the court equates Mr. Fabre's cross motion to a concession that Mr. Fabre agrees the facts are not in dispute. App. Br. 11. The trial court failed to understand that a counter motion is evidence that the parties disagree as to the facts that are material and thus the matter may not be decided as a matter of law.

Ruston also incorrectly claims Mr. Fabre did not make a good cause argument for the court to consider his counter motion after the cutoff. Resp. Br. 45. Mr. Fabre did make such an argument and filed the proper motion, which the court denied as moot. CP 111, 1353. Mr. Fabre had already prevailed in dismissing Ruston's immunity defenses and in establishing Ruston had a duty to him and his business when Ruston brought a second motion on the same issues. RP 103 - 108 6/24/11. Mr. Fabre had no reason to bring forward a second motion on this subject before the dispositive motion deadline. CP 115 - 116. When defendants disregarded the trial court's prior ruling and raised the same issues again

on summary judgment at the end of the deadline, Mr. Fabre was forced to revisit the matter and counter moved for summary judgment. Mr. Fabre was never provided any opportunity to perfect his counter motion with a Reply because the court ruled considering only his responsive brief, which was improper. RP 118, 120 4/23/12.

6. Towns Were Never Authorized to Ban Card Games

Ruston claims it has authority to ban house banked card games under the Gambling Act. RCW 9.46.295. Resp. Br. 4-5. RCW 9.46.295 expressly permits cities and counties to prohibit gambling activities, not towns. Ruston's dependence upon Pierce County's authority over its gambling activities is reflected in its gambling tax ordinance: "The collection of the tax imposed ... shall be ... by the Clerk-Treasurer pursuant to rules established herein, and such additional rules and regulations as may be adopted by ... the Pierce County Commissioners." CP 87.

Ruston points to subsection RCW 9.46.295(2) where it specifically mentions "towns" with a prohibition and argues a town could not have a prohibition if it did not have the power to prohibit gambling activities. Resp. Br. 38. Ruston's argument fails to recognize that a town can have a prohibition without the power to have a prohibition if no one ever challenges its prohibition. Subsection (2) was amended into the statute after Mr. Fabre established his card room. It was also amended into the

statute after a town that was subject to annexation had a card room. Thus, the Legislature was merely protecting a valued constituent when it added “town” to the annexation provisions of RCW 9.46.295. The amendment adding subsection (2) without amending subsection (1) is indicative that the Legislature did not mistakenly omit “towns” from subsection (1).

The court’s reference in the *Edmonds* case to “municipalities” having authority ban cited to by Ruston in support of its argument is not dispositive. Resp. Br. 38. The court was never asked to engage in a statutory construction analysis of RCW 9.46.295 and decide whether a town had authority to impose a ban. *Edmonds* was a city, not a town. Here, Mr. Fabre asks this court to recognize the Legislature would have included “towns” by specific reference in the statute if it had intended to confer such powers to them. This court cannot read the word “town” into a statute when it is not there even when construing the statute as a whole. Construing the statute and the Act as a whole demonstrates the Legislature uses the term when it means to include them and omits the term when it does not. Compare RCW 9.46.110 and RCW 9.46.113 to RCW 9.46.295.

B. Mr. Fabre’s Responses to Ruston’s Legal Arguments

1. Ruston’s Failure to Properly Inform Steve Fabre

The primary flaws with Ruston’s legal arguments are twofold. First, Ruston has no immunity when it misstates its tax rate and publishes

it erroneously. Second, Ruston has no immunity for pursuing a referendum power it did not have and for representing it effectively banned Steve Fabre's house banked games when it did not. Ruston has a special duty to Steve Fabre to provide him accurate and reliable information so that he may successfully operate his business without risk of criminal or civil penalties. Its intentional and or negligent erroneous communications to him as to his tax rate and the operational environment are not acts of governance, they are ministerial or administrative misdeeds not subject to any immunity.

2. Ruston's Duty Arises From A Special Relationship With Steve Fabre From Erroneous Communications With Him Each Miscommunication Is A Breach

Ruston segregates out its misdeeds and asks the court to examine each separately. It wants this court to find that it has no duty to Mr. Fabre or his business either because it is immune and is simply engaged in acts of governance or because each individual misdeed does not create a duty to Mr. Fabre. Mr. Fabre encourages this court to look at each misdeed cumulatively as breaches of Ruston's duty to Mr. Fabre to accurately represent its tax rate and its business environment as one permitting house banked social card games since 2004.

3. Misinformation Presents Risk of Criminal and Civil Penalties to Steve Fabre

Mr. Fabre operates in a highly regulated industry. The Washington State Gambling Commission is a law enforcement agency empowered to strictly regulate and control gambling activities. RCW 9.46.010 and 9.46.210. Any error by Steve Fabre intentional or unintentional exposes him to criminal sanctions and his business to substantial civil penalties, suspension and or revocation of the license, injunctive relief, and abatement. RCW 9.46.075, RCW 9.46.150, RCW 9.46.170, RCW 9.46.190, RCW 9.46.250. A licensee must promptly pay all of its taxes, including local taxes or face civil action by the attorney general for delinquent amounts plus penalties and interest. RCW 9.46.350. A card room operating where the local jurisdiction has banned the activity assumes the risk of all of the civil and criminal penalties described in the Gambling Act.

In addition, Ruston adopted its own local ordinance to allow Ruston to bring a criminal or civil action against Steve Fabre and his business if he failed to promptly pay the proper taxes or operated in violation of a ban. RMC 1.18. In Ruston, it is a misdemeanor to fail to perform any act required by any ordinance or to do any act forbidden by ordinance. RMC 1.18.010. The punishment includes imprisonment for up to 90 days or a

fine up to \$1,000.00 or both. *Id.* Ruston also has the power to charge Steve Fabre with a civil infraction under its code for operating games that are prohibited. RMC 9.22. It also has power to enforce its tax code. RMC 5.01A.

Steve Fabre required accurate and reliable information from Ruston. Ruston failed to give him accurate or reliable information on the gambling tax rates he had to pay and his ability to operate house banked card games.

4. Judicial Recreation of Sovereign Immunity Discouraged

Ruston ignores the plain language of this state's waiver of local governmental immunity wherein the state has expressly allowed claims against local government entities: "whether acting in a governmental or proprietary capacity." RCW 4.96.010(1). Thus its assertion that it has both discretionary and legislative immunity for all of the misconduct of its officials is nothing more than an unlawful effort to recreate its sovereign immunity under a different label. The doctrines are derived from the same principals of the "King Can Do No Wrong." Judicial recreation of sovereign immunity is disfavored under the law. A "powerful principle of Washington jurisprudence" is that the Legislature has abolished sovereign immunity and the courts "carefully scrutinize apparent local government attempts to recreate it." *Howe v. Douglas County*, 146 Wn. 2d 183, 43 P.3d 1240 (2002). This is true even in gambling cases:

But in 1961, the Washington State Legislature abolished sovereign immunity. Laws of 1961, ch. 136, § 1, codified as RCW 4.92.090. We have recognized that in so doing, the State intended to repeal all vestiges of the shield it had at common law. *See Hunter v. N. Mason High Sch.*, 85 Wash.2d 810, 818, 539 P.2d 845 (1975); *Cook v. State*, 83 Wash.2d 599, 613–17, 521 P.2d 725 (1974) (Utter, J., concurring). We noted long ago that the waiver of sovereign immunity was “unequivocal” and abolished special procedural roadblocks placed in the way of claimants against the State. *Hunter*, 85 Wash.2d at 818, 539 P.2d 845 (striking a 120 day nonclaims statute that effectively operated as a statute of limitations). Simply put, the State may not create procedural barriers to access to the superior courts favorable to it based upon a claim of immunity it has unequivocally waived.

ZDI Gaming Inc. v. State ex rel. Washington State Gambling Comm'n, 173 Wash. 2d 608, 621, 268 P.3d 929, 935 (2012), as corrected (Mar. 20, 2012), reconsideration denied (Mar. 21, 2012)

In an effort to create immunity where it does not exist, Ruston generalizes all of its misconduct as the adoption of its tax rate and the adoption of its ban so it can characterize the acts and omissions as legislative action or discretionary acts of governance. Omitted from its briefing is all of the misconduct of its officials post enactment of the tax hike or ban.

a. Ruston Has No Immunity for Erroneously Insisting
Its Tax Rate Was 12%

When an official provides false information about local laws to a citizen, the local government entity has no immunity. *Sundberg v. Evans*, 78 Wn. App. 616, 897 P.2d 1285 (1995). Ruston recognizes that the immunities it invokes are limited. That is why throughout its briefing,

Ruston does not address all of its officials acts and omissions that occurred after it adopted its tax hike, or after it adopted its ban. Ruston simply downplays the fact that its officials maintained to Steve Fabre that his tax rate was a flat rate of 12% from the date its officials erroneously enacted it in July of 2008 to the date Ruston finally repealed it and reinstated its graduated rate in Dec. 2010. CP 83, Resp. Br. 8 fnt 37. Ruston misstated its correct tax rate to Steve Fabre for over two years. Ruston refused him a reliable representation as to its tax rate even after the court ruled its flat rate void. In fact, Ruston erroneously codified an incorrect tax rate confusing regulators and misleading Steve Fabre's investors.

Ruston's first express assurances to Mr. Fabre as to his tax rate for his house banked card games was after it was adopted on July 15th, 2008. CP 241. Mayor Everding sent him a letter demanding his business pay the higher rate. Id. After that letter, not one other official ever sent him another letter to advise him that his tax rate was not a flat rate of 12%.

Next in August of 2008, the Town Attorney maintained the flat tax rate was enforceable. CP 249 - 253. The Mayor, the Council, and the Town Attorney would not concede the rate was void. Ruston took no action to correct its erroneous rate; instead it maintained its rate was 12%. Id.

Ruston's recalcitrance forced Steve Fabre to file suit. When he filed

suit he asked Ruston to stay enforcement of the rate. CP 439. Ruston refused. Id. Ruston's Town Attorney and Councilmember Dan Albertson delayed his ability to have his case heard by refusing to produce a certified transcript of its hearing. CP 439. Ruston contested injunctive relief in his challenge to the tax.

When Ruston lost, the order was never presented to the Council at any public meeting. No official recognized the validity of the order or notified Steve Fabre as to its effect. The Mayor codified the wrong rate, and did not mention the order in its publication.

Ruston could have limited its liability if the Mayor or Council had agreed to stay or enjoin enforcement of its tax hike, but it refused. As a result, Mr. Fabre is entitled to recover for Ruston's repeatedly false statements as to his tax rate. Since the court declared its rate void, Ruston's liability exposure dates back to 2008 when it first maintained its tax hike was valid.

- b. Ruston Has No Immunity for Its Pursuit of a Referendum Power It Does Not Have and Maintaining It Effectively Banned Steve Fabre's Most Lucrative Card Games.

When officials make false statements in reports or other publications the officials are not acting in a discretionary or legislative capacity. *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 744 P.2d 1032 (1987)(Official statements and annual reports

by power company to sell bonds to finance project did not involve discretionary acts or policy decisions by power company and instead involved mechanisms by which power company implements its decision to build a project, so that discretionary immunity did not bar bondholders' fraud claims against power company.) Misleading and false statements or omissions such as Ruston's false assertions that it had referendum powers and the effectiveness of its ban are not protected under any immunity.

After the Council adopted its ordinance to delegate the question of a ban to the public, Ruston's council members actively lobbied for the ban to include writing a statement for the referendum with specific reference to Steve Fabre and his business:

"We the people of Ruston" will decide the fate of casinos in our community and not have it decided by business people who don't live in Ruston."

"The house-banked card room in Ruston never turned a profit, never served a "public need", was never our largest taxpayer, and never paid the 12-percent tax rate under the voided ordinance." CP 625. (Emphasis added)

Councilmembers Hedrick and Huson who authored the comments made it clear they were not seeking an advisory opinion. They wanted the citizens to vote against Steve Fabre and ban his card room by referendum. They represented the citizens could take action against Steve Fabre when the citizens could not take such action. The council members have no

legislative or policymaking authority to write statements for a referendum, particularly in Ruston where there were no referendum powers.

When the votes were taken and there were a few votes more in favor of the referendum than against, Steve Fabre contacted the Mayor, pointing out Ruston did not have referendum powers. CP 253. He asked the Mayor to tell him whether or not Ruston planned on enforcing Referendum 1. The Mayor refused to respond, thus by omission maintaining the enforceability of the ban. The Town attorney was equally unwilling to concede Ruston had no referendum powers. CP 255. Ruston's officials maintained its ban was enforceable and in effect from the date they first pursued it in August, upon its enactment in November, and finally until they repealed it in February of 2011 after he sued them. CP 114. Ruston made express assurances to him that it had referendum powers when it answered his complaint. Ruston created a hostile business environment in which Mr. Fabre was precluded from operating his most lucrative activity for more than six months. Ruston created uncertainty in his ability to operate, precluding him from reopening by its incorrect representations about its referendum powers and whether it had effectively banned his activities.

The trial court erroneously reversed itself when it had correctly concluded Ruston owed Mr. Fabre a duty that arose from his special

relationship with Ruston. Mr. Fabre's special relationship was clearly established when he questioned the tax rate and the ban and ultimately sued over them because Ruston's insistence as to their validity was false. He was in privity with Ruston and Ruston breached its obligations to him. His claims should be reinstated and he should be permitted to proceed to trial.

III. CONCLUSION

Mr. Fabre and his business are entitled to relief. Ruston improperly asks this court to judicially recreate impenetrable sovereign immunities so that it may not be held accountable for its officials' misdeeds. Such a result is unjust and encourages flagrant abuse of power with absolute disregard to the devastating impacts upon individuals and businesses trying to succeed in these difficult economic times. Ruston's actions are particularly harmful because Steve Fabre operates a highly regulated business with substantial risks if he does not comply with local regulations. The court should reverse the trial court's summary judgment dismissal because the trial court's initial instincts that this matter presented triable issues of fact were correct. Its later decision to reverse itself was based upon an erroneous assumption that a counter motion for summary judgment equates to undisputed facts when instead it means there was a dispute as to what facts were material. Thus, genuine issues of material

fact need to be decided by a jury. A jury should decide whether Ruston is liable for its officials maintaining either intentionally or negligently that Ruston's tax rate was 12% when it was not and for maintaining either intentionally or negligently it had effectively banned Steve Fabre's card room by referendum when it had not. The jury should decide the value of Mr. Fabre's losses and the losses to his business.

Respectfully submitted this 21st day of December 2012.

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Declaration of Service

I, Jonathan Tretheway, make the following declaration:

I am over the age of 18, a resident of Pierce County, and not a party to the above action. On December 20, 2012, I caused to be served true and correct copies of the foregoing: Steve Fabre's Reply Brief, and this Declaration of Service by Electronic mail through the Washington State Court of Appeals Div. II filing system as follows:

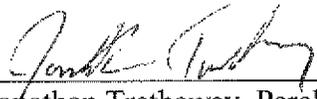
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 21st day of December 2012 at Fircrest, WA.


Jonathan Tretheway, Paralegal

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