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,

Respondents.

CORRECTED RESPONDENTS' BRIEF

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I. INTRODUCTION

Appellant U.S. Oil Trading, LLC (U.S. Oil) in effect asserts a tort claim for wrongful assessment of the potential fiscal impact of legislation. There is no precedent for such a claim, and creation of one would be poor public policy. To allow the tort claim U.S. Oil asserts would be wasteful and circular, resulting in government funding private tax liabilities (or private lobbying), and thwarting exclusive statutory remedies for tax refunds.

U.S. Oil claims Senate Bill 6096 (SB 6096)[1] was enacted by the 2009 Legislature because the actions of two executive agencies *caused* the Legislature to deviate from the procedure established by Initiative 960 (I-960) in 2007.[2] There was no causation as a matter of law—executive agencies cannot cause the Legislature to enact legislation. The Legislature, not the agencies, determined the applicability of the supermajority provision in I-960 and enacted the challenged legislation.

More fundamentally, U.S. Oil's challenge is barred by separation of powers principles. Even where the legislative proceeding underlying a facially valid enactment is challenged as unconstitutional, the Court will not look beyond the final record of the Legislature. *Brown v. Owen*, 165

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[1] SB 6096 is attached hereto as Appendix B.

[2] The full text of I-960 is attached as Appendix C. U.S. Oil cites to I-960 as the source of RCW 43.135.031

Wn.2d 706, 722-24, 206 P.3d 310 (2009). Applying those principles, this Court dismissed a challenge to the Lieutenant Governor's Ruling on a point of order as to I-960, explaining that the court does not "go behind an enrolled enactment to determine the method, the procedure, the means, or the manner by which it was passed in the houses of the legislature." *Id.* at 723. U.S. Oil's asserted tort claim must be rejected because here, as in *Brown* the remedy sought would require the court to invade the province of the Legislature and violate separation of powers.

I-960 created no private right of action. U.S. Oil cannot assemble a statutory cause of action for wrongful fiscal assessment of legislation by artificially cobbling together I-960 and other legislation.

Moreover, U.S. Oil's asserted tort claim seeks to circumvent the exclusive excise tax refund remedy the Legislature enacted in RCW 82.32. To recognize such a tort claim would violate the State's sovereign immunity reaffirmed in art. II, § 26 of the Washington Constitution.

Finally, U.S. Oil's asserted tort claim also must fail due to sovereign immunity and/or absolute legislative immunity, the corollary of separation of powers. The respondent agencies here were providing information to the Legislature in response to a specific legislative directive; their actions thus were an integral part of the legislative process, uniquely governmental, and are entitled to absolute immunity.

A claim for tortious assessment of the fiscal impact of legislation simply should not be recognized. The claim is barred by separation of powers principles, plaintiffs have a tax refund remedy, and there is no basis for any further remedy. There is neither precedent nor sound policy justification to impose such tort liability.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Did respondent state agencies owe any legally cognizable duty to U.S. Oil?

2. Did I-960 create a private right of action for damages against respondent state agencies for allegedly providing inaccurate fiscal analysis of potential legislation?

3. Are respondent state agencies immune from a tort action for damages arising from their fiscal analysis of potential legislation?

III. STATEMENT OF THE CASE

A. Allegations In The Complaint

U.S. Oil's amended complaint alleged a tort claim and a tax refund claim. Although the respondent state agencies deny both claims brought by U.S. Oil, no answer to the tax refund claim is required under RCW 82.32.180,[3] and the respondent agencies did not file an answer to

[3] *See* Appendix D.

that claim.[4] Rather than answering the tort claim, the agencies moved to dismiss the claim under CR 12(b) for failure to state a claim, and the superior court granted the motion. Only the tort claim is at issue in this appeal.

Because U.S. Oil's tort claim was dismissed for failure to state a claim, appellate review is based on the facts alleged in U.S. Oil's Amended Complaint.[5] Respondents do not admit U.S. Oil's allegations and summarize them here only for purposes of this appeal.

U.S. Oil seeks "damages" in tort for the respondent state agencies' input in the process of legislation. U.S. Oil's original and amended complaints name as defendants the Washington State Department of Revenue (DOR) and Office of Financial Management (OFM).[6] U.S. Oil seeks damages in tort, alleging that acts of the two agencies relating to and preceding the enactment of SB 6096 breached duties owed to U.S. Oil. CP at 3-9, 40-42.

SB 6096 was passed by the Legislature, signed by the Governor, and became the law of the State of Washington effective May 14, 2009.

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[4] Although not stated in the amended complaint, there is no dispute that the tax refund action is based upon the exclusive remedy authorized by RCW 82.32.180.

[5] *See* Standard of Review at page 7 below.

[6] U.S. Oil amended its Complaint after the state agencies filed their CR 12(b)(6) motion to dismiss U.S. Oil's alleged tort claim, apparently for the primary purpose of adding the curious allegation that the state agencies (not any identified persons) "intentionally" engaged in misconduct. CP at 3-9, 37-43.

The bill is entitled, "Concerning the taxation of the manufacturing and selling of fuel for consumption outside the waters of the United States by vessels in foreign commerce." U.S. Oil alleged that the agencies should be liable in tort because "the Legislature would not have approved" SB 6096, and "the bill would not have passed," but for the agencies' allegedly tortious actions. CP at 41 (Amended Complaint, ¶¶. 33, 35).

U.S. Oil's asserted basis for the agencies' liability is allegedly flawed information about SB 6096 provided by DOR to OFM,[7] and by OFM to the Legislature pursuant to RCW 43.135.031 (the codification of §. 2 of I-960).[8] CP at 40-41. In particular, U.S. Oil alleged that the state agencies failed to conclude that SB 6096 "raises taxes" pursuant to RCW 43.135.031, or to provide an accurate fiscal note pursuant to RCW 43.88A. CP at 40-41.

U.S. Oil claimed damages of "the estimated present value of future taxes" that would have to be paid if SB 6096 "has become valid law." If the bill did not become "valid law," then damages were pled only in a

[7] U.S. Oil neither alleges nor asserts that DOR has any duty imposed by RCW 43.135.031, and instead attempts to encompass a separate responsibility for fiscal notes under RCW 43.88A within its arguments for tort liability under RCW 43.135.031. CP at 40-41.

[8] The Amended Complaint also references RCW 43.88A (fiscal notes). CP at 40. However, RCW 43.88A.900 protects the validity of legislation in the event of "the lack of any fiscal note as provided in [RCW 43.88A] or the accuracy thereof."

dollar amount of $76,000. CP at 42. No specific damages other than past or future taxes were identified in the amended complaint.

B. The Legislature Independently Determined That SB 6096 Did Not Raise Taxes

U.S. Oil claims that "no reasonable official would have produced" an analysis that SB 6096 did not raise taxes.[9] The legislative record suggests otherwise. SB 6096 amended RCW 82.04.433; the bill's text indicates that its purpose was to clarify the intent of that law as passed in 1985. SB 6096, § 1. In the legislative consideration of SB 6096, the President of the Senate issued a Ruling on a point of order "as to the application of Initiative Number 960 to Senate Bill 960." 1 SENATE JOURNAL, 61st Leg., Reg. Sess., p. 2115 (2009) (attached as Appendix A). The President found SB 6096 "to be a proper clarification, not an action that 'raises revenue' pursuant to I-960." *Id.* Likewise, the Legislature's Final Bill Report for SB 6096[10] (as well as the bill reports prepared by each house) indicates that the "[t]he act *clarifies* that income .... can be deducted from the B&O tax ...." (Emphasis added.) Neither the President's Ruling nor the Final Bill Report made any reference to OFM or DOR assessments of whether the bill raised taxes.

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[9] Br. of Appellant at 29 n.25. U.S. Oil falsely claimed in the trial court that this was alleged in the Amended Complaint. CP at 40, 50. The assertion is mere argument, but to the extent it might be deemed "factual," its absence in the pleadings forecloses the need to accept its truth for purposes of reviewing the CR 12(b)(6) dismissal.

[10] *See* Appendix E.

C. Procedural Background

The state agencies moved for partial dismissal of U.S. Oil's complaint (and amended complaint) pursuant to CR 12(b)(6), seeking dismissal of the tort claims but not the tax refund action. CP at 10-12. In the course of the argument, held on November 20, 2009, the state agencies argued in part that "there are no other properly pled damages other than taxes." RP at 5. When questioned by the court, U.S. Oil for the first time revealed that it was seeking damages other than taxes, and admitted it was also seeking as damages lobbying expenses[11] and expenses for the present litigation. RP at 13-15. The trial court granted the state agencies' motion to dismiss U.S. Oil's tort claims, and certified this portion of the case for appeal by judgment entered on December 18, 2009.

IV. ARGUMENT AND AUTHORITIES

A. Standard Of Review

The trial court dismissed the tort allegations in plaintiff's complaint under CR 12(b)(6).[12] On appeal, CR 12(b)(6) rulings are reviewed *de novo*. *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). The court must take the facts alleged in the complaint,

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[11] *See,* RP at 13:

THE COURT: Isn't that what we call lobbying?

MR. DINCES: It isn't lobbying -- it was lobbying, but not when you're trying to correct a wrong.

[12] CR 12(b)(6) allows motions "to dismiss for failure of the pleading to state a claim upon which relief can be granted . . . ."

as well as hypothetical facts consistent therewith, in the light most favorable to the nonmoving party. *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 122, 11 P.3d 726 (2000). Under the parallel federal rule, the United States Supreme Court has recently observed that allegations must be "plausible" to survive a motion for dismissal. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955, 1965-66, 167 L. Ed. 2d 929 (2007).

B. Summary Of Argument

U.S. Oil seeks to hold the respondent state agencies liable in tort for taxes imposed by legislation, on the basis of alleged wrongful fiscal assessment of legislation. Whether a plaintiff is owed a duty of care in tort is a threshold legal question, involving mixed considerations of logic and common sense. U.S. Oil concedes that the tort liability asserted here is a "case of first impression." Br. of Appellant at 1. The respondent agencies maintain that they owed no duty to U.S. Oil that is actionable in tort, and assert that no such duty or remedy should be created.

There is no duty of the respondent state agencies to prevent legislation imposing taxes, and no tort remedy should be created for taxes or other damages for the alleged wrongful fiscal impact of legislation. U.S. Oil's assertion that a tort remedy was created by I-960 is without merit, and such a remedy would conflict with the existing exclusive tax refund remedies authorized by RCW 82.32.

I-960 does not authorize a private right of action by U.S. Oil to assert damages for the respondent state agencies' alleged wrongful assessment of the fiscal impact of proposed tax legislation. There is no express language in I-960 that articulates any such duty. To support an implied tort cause of action under the common law, I-960 must have been enacted for the special benefit of a narrowly circumscribed class of persons. *Aba Sheikh v. Choe*, 156 Wn.2d 441, 457, 128 P.3d 574 (2006); *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990). The language of I-960 indicates it was enacted to create transparency in legislation for the benefit of all the people in the state, and not for the protection of any narrowly circumscribed class.

U.S. Oil's assertion of a duty and remedy in tort is not salvaged by the allegation that it suffered some damages other than taxes alone. The assertion does not alter the fact that U.S. Oil is principally seeking damages in the form of payment for taxes owed. Moreover, under the doctrine of sovereign immunity, the public duty doctrine, and the doctrine of legal causation, no duty and no remedy is appropriate for the alleged misconduct of the state agencies.

Even if there were some colorable duty owed to U.S. Oil, the respondent state agencies further maintain they are immune from any tort liability to U.S. Oil. The doctrine of separation of powers and the correlative doctrine of absolute legislative immunity foreclose the tort claim asserted by U.S. Oil.

C. Defendants Owed No Duty To U.S. Oil

U.S. Oil misstates the law when it argues that it properly alleged tort liability by asserting a statutory responsibility, accompanied by breach and damages. Br. of Appellant at 14-18. U.S. Oil overlooks the well-established principle in tort law that "[t]he existence of a duty is a question of law for the court, to be considered in light of public policy considerations." *Suter v. Virgil R. Lee & Son, Inc.*, 51 Wn. App. 524, 528, 754 P.2d 155, *review denied,* 111 Wn.2d 1005 (1988) (citing *Bernethy v. Walt Failor's, Inc.*, 97 Wn.2d 929, 933, 653 P.2d 280 (1982)). If a plaintiff cannot establish that the defendant owes a duty of care, there is no need to determine the remaining elements of a negligence claim. *Linville v. State*, 137 Wn. App. 201, 208, 151 P.3d 1073 (2007) (citing *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998)).

U.S. Oil concedes that liability requires the existence of a duty. Br. of Appellant at 14. Yet, it fails to show any precedent, valid legal basis, or good policy for the tort liability it asserts. To the contrary, the imposition of taxes by legislation is the exclusive province of the Legislature. The state agencies have no authority, and therefore no duty, to pass legislation or impose taxes. They should not be held liable in a tort action for damages in the form of taxes.

Under *Brown v. Owen,* no intrusion into the legislative process is permitted for assessing whether a bill "raises taxes" under I-960 (codified, in part, as RCW 43.135.035). 165 Wn.2d at 722-23. If the courts cannot second-guess or inquire into the effect in the legislature of fiscal information provided by state agencies for other purposes, then it would be anomalous to allow a tort cause of action that requires the courts to engage in the same inquiry.[13] That is exactly what U.S. Oil's tort claim would require.

In addition, a tort claim for damages in the form of taxes for the passage of tax legislation cannot reasonably or logically be supported by the statutes U.S. Oil relies upon. In order to support a tort cause of action, a statutory obligation must have been intended to protect a narrowly circumscribed class of persons. I-960 does not evidence an intent to protect a narrow class that would include U.S. Oil, and does not support a private right of action.

[13] The tort action asserted by U.S. Oil would also conflict with the *exclusive* statutory remedy for tax refunds, under RCW. 82.32, discussed below.

U.S. Oil's allegation of some damages other than taxes does not alter the fact that U.S. Oil is asserting a tort claim for a tax refund or tax indemnification. Respondents are aware of no precedent in Washington or in any jurisdiction that recognizes such a tort, and it would be poor public policy to create a new form of tort that results in government funding of private lobbying or litigation expenses arising from legislation or the legislative process.

This Court should affirm the trial court and deny U.S. Oil's request to recognize a tort cause of action for damages against state agencies for damages allegedly caused by actions of the Legislature.

1. State Agencies Have No Authority To Legislate Or Impose Taxes, And No Duty To Protect U.S. Oil From Legislation Or Taxes

U.S. Oil's claim is, in essence, that the state agencies caused it to suffer damages in the form of taxes. It is fundamental that taxes may only be "levied in pursuance of law," and that only the People and the Legislature may pass laws. Washington Constitution, art. VII, § 5 (Clause 1); art. II, § 1. The respondent state agencies plainly have no authority to legislate or to impose taxes.

Absent any authority to pass legislation or impose taxes, the state agencies can have no duty to U.S. Oil to protect it from legislation or taxes. Absent a duty, there can be no breach of duty and the tort claim asserted by U.S. Oil for damages in the form of taxes must fail.

The separation of powers doctrine would be violated by the imposition of liability on state agencies for the passage of legislation or taxes. Under separation of powers, the courts may not inquire whether legislators were deceived, examine investigations of legislative committees, or inquire into other prior proceedings. *Brown*, 165 Wn.2d at 724. To give constitutionally-mandated respect to the legislative function, "the judiciary will not go beyond the final record of the legislature when an enactment is facially valid, even when the proceedings are challenged as unconstitutional." *Id.*, 165 Wn.2d at 719. The principles set forth in *Brown* apply whether it is alleged that a bill wrongfully did not pass, as in *Brown*, or that it wrongfully did pass, as alleged in the present case. 165 Wn.2d at 724.

U.S. Oil's complaint specifically alleges that SB 6096 "would not have been passed" but for the asserted misconduct of the respondent agencies, and its tort claim is dependent upon that allegation. CP at 41. U.S. Oil's asserted tort claim therefore would necessitate a judicial inquiry – discovery – into the legislative process to determine whether its allegations can be proved. This Court's history of respect for a coequal branch of government, as articulated in *Brown*, plainly forbids such inquiry:

> Just as the legislature may not go beyond the decree of the court when a decision is fair on its face, the judiciary will not look beyond the final record of the legislature when an enactment is facially valid, even when the proceedings are challenged as unconstitutional.

Brown, 165 Wn.2d at 722 (citing S*tate ex rel. Reed v. Jones*, 6 Wash. 452, 460, 34 P. 201 (1893)).

This principle of separation of powers is incorporated into the enrolled bill rule, which "forbids an inquiry into the legislative procedures preceding the enactment of a statute that is 'properly signed and fair upon its face.'" *Brown*, 165 Wn.2d at 722 (quoting *Washington State Grange v. Locke*, 153 Wn.2d 475, 499-500, 105 P.3d 9 (2005), and *Schwarz v. State*, 85 Wn.2d 171, 175, 531 P.2d 1280 (1975)).

The Constitutional authority to legislate and to tax is held by the legislature, and not by the respondent state agencies. The state agencies can have no duty to U.S. Oil for taxes imposed by the legislature, and to allow such a claim would necessitate a violation of the doctrine of separation of powers. The asserted claim by U.S. Oil for tort damage in the form of its tax liabilities must be rejected.

2. Initiative 960 Does Not Create A Private Right Of Action For Damages

Even if U.S. Oil's argument for a statutorily imposed tort liability were not in conflict with separation of powers, it would still fail. The only statute plaintiff advances as a source of a right of action in this case is RCW 43.135.031 (§ 2 of I-960). That statute does not create a private right of action.

In asserting that the State has a duty under RCW 43.135.031, U.S. Oil fails to identify or address the applicable standard. The determination of whether legislation creates a private right of action involves a three-part, conjunctive test, which is not met here.

> Washington courts employ a three-part test to determine whether a statute or regulation creates an implied duty: (1) "whether the plaintiff is within the class for whose 'especial' benefit the statute was enacted"; (2) "whether legislative intent, explicitly or implicitly, supports creating or denying a remedy"; and (3) "whether implying a remedy is consistent with the underlying purpose of the legislation."

Linville, 137 Wn. App. at 211 (quoting *Bennett v. Hardy*, 113 Wn.2d 912, 920-21, 784 P.2d 1258 (1990)); *see also Aba Sheikh v. Choe,* 156 Wn.2d 441, 457, 128 P.3d 574 (2006).

U.S. Oil does not assert any explicit creation of a private right of action by the passage of I-960. It only asserts an *implied* private right of action. Since U.S. Oil must meet all three of the *Linville* elements, but can satisfy none, there is no implied private right of action under RCW 43.135.031 or its source, I-960.

a. I-960 Was Not Enacted For The "Especial" Benefit of Any Narrowly Circumscribed Class Of Persons

The first and most fundamental issue in assessing whether there is an implied private right of action is whether there is proof of a legislative intent to create a right of action for a special and narrowly circumscribed class of persons. Here, the proper analysis of RCW 43.135.031 (I-960, § 2) demonstrates that no private right of action is created.

The *Linville* decision addressed a claim by children who were sexually abused in state-licensed, private day care facilities. The court held there was no statutory language implicitly or explicitly stating that the statute was enacted for the "special benefit" of sexual abuse victims in licensed day care facilities. *Linville*, 137 Wn. App. at 211. The court reached that conclusion despite a legislative intent provision that included a reference to the "protection for children at risk due to poverty and abuse." RCW 48.88.010. U.S. Oil asserts that "taxpayers" is a sufficiently narrow class and that I-960 protects taxpayers by creating "transparency." Br. of Appellant at 18. Both assertions are incorrect.

U.S. Oil effectively concedes that I-960 provides no private right of action. U.S. Oil does not argue that I-960, by itself, was intended to serve a class that is any more narrow than that of "taxpayers," nor does it argue that the class of "taxpayers" is materially different from the whole of the general public. Instead, U.S. Oil attempts to artificially narrow the class of "taxpayers" by reading SB 6096 into I-960.[14] If this kind of analysis were accepted, then the result would be the same for any tax legislation, and would not be limited to SB 6096. For example, if a sales tax bill were subject to the analysis advanced by U.S. Oil, any person paying that tax would fall within another "narrowly circumscribed class." In the end, U.S. Oil's own reasoning is that I-960 was intended to create a right of action for damages in tort for *all* taxpayers. The transparent and artificial construct by U.S. Oil tacitly admits that I-960/RCW 43.35.031 was not passed to benefit or protect a narrowly circumscribed class of persons.[15] For this reason alone, U.S. Oil's assertion of a private right of action must fail.

U.S. Oil's reliance upon the narrower class of "taxpayers" affected by SB 6096 ignores the fact that, if RCW 43.135.031 were deemed to

[14] *See* Br. of Appellant at 20, ultimately relying on the assertion that there are "very few persons who manufacture foreign fuels."

[15] Equally transparent is U.S. Oil's attempt to seek a tort damages action against DOR which has no obligations whatsoever under section 2 of I-960 (RCW 43.35.031). Rather, U.S. Oil seeks to bring in DOR by claiming it caused the passage of legislation for failings under fiscal note requirements set forth by RCW 43.88A. Just as U.S. Oil failed to address – and cannot meet -- the three-part test to show that I-960 created a private right of action, U.S. Oil failed to address – and cannot meet – the three-part test to show that RCW 43.88A creates a private right of action. Moreover, U.S. Oil neglects the fact that RCW 43.88A.900 explicitly protects the validity of legislation from "the lack of any fiscal note as provided in [RCW 43.88A] or the accuracy thereof."

support an implied private right of action, then any bill addressing retail sales taxes, use taxes, B&O taxes or any other form of taxes, would likewise yield a private right of action for the taxes (and undefined other damages) resulting from the legislation. In the end, despite U.S. Oil's assertions to the contrary, it seeks a ruling that would potentially make the government liable in tort to indemnify the general public for all forms of taxation.

Thus, the broad category of "taxpayers" is what is truly at issue. It is not a sufficiently narrow class to support an implied private right of action. Given the breadth of tax liabilities, taxpayers are effectively synonymous with the general public. Consequently, no identifiable class is an "especial" beneficiary of the provisions of I-960. U.S. Oil has failed to meet the first element under *Linville.*

It is also unreasonable to consider "taxpayers" the class sought to be protected by RCW 43.135.031. I-960 protects taxpayers only by creating "transparency."[16] Br. of Appellant at 18. More importantly, there is a *specific* statement of intent in I-960 in reference to § 2 of the initiative, which was codified as RCW 43.135.031. *Id.* That specific intent

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[16] The "transparency" is described in the *general* statement of intent as "publication of cost projections, information on public hearings, and legislators' sponsorship and voting records on bills increasing taxes and fees." I-960, § 1. This does not express an intent to protect taxpayers from taxes, but to facilitate their participation in the legislative/political process *leading to* the imposition of taxes.

statement does not even purport to protect taxpayers, instead referring repeatedly to the "people." RCW 43.135.031 was not intended for the "especial" protection of a sub-class of taxpayers affected by SB 6096.

b. I-960 Evidences No Intent To Create A Tort Remedy

The second element for a private right of action under *Linville* is the intent of the statute. In *Linville*, the court addressed this factor by reasoning that "there is no evidence of explicit or implicit legislative intent that, in promulgating RCW 48.88, our Legislature contemplated creating a remedy for victims of daycare sexual abuse." *Linville*, 137 Wn. App. at 212. The statute was silent on the subject. *Id.*

I-960 likewise bears no indication of any legislative intent to create a tort remedy for taxpayers. The general rules of statutory construction apply to initiatives, except that in interpreting an initiative, the court looks at the voters' intent and the language of the initiative as the average informed lay voter would interpret it, giving the words their ordinary meaning. *State ex rel. Wash. State Pub. Disclosure Comm'n. v. Wash. Educ. Ass'n*, 156 Wn.2d 543, 554, 130 P.3d 352 (2006), *rev'd on other grounds sub nom. Davenport v. Wash. Educ. Ass'n*, 551 U.S. 177, 127 S. Ct. 2372, 165 L. Ed. 2d 1014 (2007). The objective is to "discern whether the . . . voters collectively intended to create a statutory cause of action."

Davenport v. Wash. Educ. Ass'n, 147 Wn. App. 704, 717, 197 P.3d 686 (2008), *review granted,* 166 Wn.2d 1005, 208 P.3d 1124 (2009).[17]

Here, the 2007 Voters Pamphlet,[18] like I-960 itself, is silent on the question whether a private right of action is created by I-960 or any of its parts. There is certainly no explicit language in the initiative to create a private right of action for Sec. 2 of I-960 (RCW 43.135.031). There is nothing to avoid the exclusivity of the tax remedies provided under RCW 83.32.150 and .180, which will be addressed more fully below. These omissions should be deemed to imply the absence of a private right of action for U.S. Oil under I-960.

c. Judicially Implying A Tort Remedy Is Inconsistent With I-960's Underlying Purpose

The third element for an implied private right of action also undermines U.S. Oil's assertion of right of action for damages. In *Linville,* the court found as a legal matter that "judicially implying a remedy is inconsistent with the underlying purpose of this legislation." *Id.*

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[17] The *Davenport* decision decided whether Initiative 134 (1992) created a private right of action, and concluded that it did not, concluding that silence on the subject in both the initiative and the underlying voters' pamphlet "implies the *absence* not the presence, of intent to create a private statutory cause of action." 147 Wn. App. at 718-19 (footnotes omitted). Notably, the underlying conduct of the defendant in *Davenport* was an alleged *intentional* violation of Initiative 134. 147 Wn. App. at 712. This did not obviate the need to consider whether the initiative created a private right of action for the benefit of the plaintiffs.

[18] *See* Appendix F.

> We fail to see how implying a monetary damages award to children injured by intentional sexually assaultive torts or crimes at daycare facilities is consistent with our Legislature's statutory purpose to improve the availability of general liability insurance for daycare providers. Absent express legislative intent to provide such coverage, we will not act judicially to imply such a remedy.

Linville, 137 Wn. App. at 213.

A private right of action here would likewise be inconsistent with the underlying purpose of RCW 43.135.031. The underlying purpose, as noted above, is to enhance the information and participation in the *legislative* processes *leading* to the *Legislature's* exercise of its exclusive constitutional power. This purpose would be frustrated by allowing a private right of action against state agencies for the effects of tax legislation enacted by the Legislature. Taxpayers could forego the political debate the initiative was intended to foster and instead seek tort remedies after passage of legislation. Providing a tort remedy for providing information to the Legislature would frustrate the underlying purpose of RCW 43.135.031.

3. Plaintiff's U.S. Oil's Tort Claim Is Foreclosed By The Exclusive Refund Remedy, RCW 82.32

U.S. Oil's asserted tort claim plainly seeks damages for taxes paid or owed in the past and predicted to be owed in the future. Implying a cause of action under I-960, as U.S. Oil urges, would conflict with the established and exclusive tax remedies the Legislature provided in RCW 83.32. This conflict further warrants against creating a claim for damages for taxes as requested by U.S. Oil.

RCW 82.32.180[19] provides the exclusive means by which a taxpayer is authorized to bring a lawsuit against the State to dispute its B&O tax liability and forecloses U.S. Oil's "tort" claim for tax indemnification. It provides that a taxpayer "*having paid any tax as required* and feeling aggrieved by the amount of the tax" may file an action in the Thurston County Superior Court for a refund. RCW 82.32.180 (emphasis added). The statute further provides that

> no court action or proceeding of any kind shall be maintained by the taxpayer to recover any tax paid, or any part thereof, except as herein provided.

Id.

RCW 82.32.150 and 180 generally require a tax to be paid before it may be challenged. *See Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 638 P.2d 1213 (1982). This forecloses circular and wasteful proposition inherent in U.S. Oil's asserted tort action: payments by the government in tort to fund tax payments back to the government by the plaintiff. U.S. Oil's anticipated future B&O tax liabilities, asserted as damages for the alleged tortious acts of the respondent agencies, are also

[19] The text of RCW 82.32.180 is attached in Appendix D.

speculative. U.S. Oil's tort suit attempts to circumvent the limitations the Legislature has imposed on suits against the State over B&O tax liabilities.

The State is immune from suits against it for taxes beyond the limitations of RCW 82.32.180 and related statutes. RCW 82.32.180 is "a conditional, partial waiver of the sovereign immunity afforded by the Washington Constitution, article II, § 26 of the Washington Constitution."[20] *Lacey Nursing Ctr. v. Dep't of Revenue*, 128 Wn.2d 40, 52, 905 P.2d 338 (1995).

Courts have strictly enforced the requirements of RCW 82.32.180. *See, e.g., AOL, LLC v. Dep't of Revenue,* 149 Wn. App. 533, 544-55, 205 P.3d 159 (2007). In *Lacey Nursing Ctr.*, the court foreclosed a class action for tax refunds under RCW 82.32.180, because the details required by the statute were not provided for each taxpayer. *Id.* It held that "[s]ince the state waives sovereign immunity only to the extent provided in the statute, the statute must expressly authorize class actions." 128 Wn.2d at 53-54. Similarly, in *Weber v. Sch. Dist. 7*, 185 Wash. 697, 701-05, 56 P.2d 707 (1936), the court refused to permit an interpleader action to be used to circumvent the exclusive refund action authorized under RCW 82.32.180, basing its holding on article II, § 26.

[20] Article II, § 26 provides: "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state."

Adherence to Washington's limited tax remedies is further supported by reference to federal cases. Federal courts have declined to recognize a civil rights cause of action in connection with federal taxes. "[E]very circuit that has considered the appropriateness of a *Bivens* remedy in the taxation context has uniformly declined to permit one." *Hudson Valley Black Press v. I.R.S.*, 409 F.3d 106, 113 (2d Cir. 2005). The *Hudson* decision concluded that retaliatory tax audits are not actionable. In the Washington State context, as in the federal context, there are specific tax remedies available and

> [t]he collection of taxes would become "chaotic if a taxpayer could bypass the remedies provided by Congress simply by bringing a damage action against Treasury employees. It is hard enough to collect taxes as it is; additional obstructions are not needed."

409 F.3d at 113-14 (quoting *Cameron v. IRS,* 773 F.2d 126, 129 (7th Cir. 1985)).

Similarly, the United States Supreme Court held that state courts cannot award either declaratory or injunctive relief against state taxes under 42 U.S.C. § 1983 if state law provides an adequate legal remedy in the form of a refund action. *Nat'l Private Truck Council, Inc. v. Okla. Tax Comm'n*, 515 U.S. 582, 115 S. Ct. 2351, 132 L. Ed. 2d 509 (1995). Consequently, no attorney fees can be awarded under 42 U.S.C. § 1988 in such state tax cases. *Id.*

U.S. Oil here is attempting to litigate its past and possible future B&O tax liabilities in the guise of a tort suit. The Legislature provided an exclusive and limited remedy with respect to most state excise taxes in RCW 82.32.180. *See* RCW 82.32.010 (Scope of RCW 82.32). Implying a cause of action under I-960 would contribute to the chaos and confusion and conflict with the plain and accepted purposes of RCW 83.32. U.S. Oil's tort claim should be dismissed.

4. The Public Duty Doctrine Forecloses Tort Liability Of The State Agencies

The court need not look beyond the "conditional, partial waiver" of sovereign immunity in RCW 82.32.180 to conclude the state has not consented to the type of tort liability advanced by U.S. Oil. And, as explained in section D.1 below, there is simply no private counterpart for the asserted tort liability asserted by U.S. Oil that would implicate the state's general waiver of sovereign immunity in tort. But even if the court were to find it appropriate in this case to examine U.S. Oil's claim under the general waiver of sovereign immunity in tort, the courts have recognized an exception to tort liability under the "public duty doctrine."

Washington courts have long recognized the distinction between the duties of government which run to the public generally, for which there is no recovery in tort, and duties that run to individuals who may recover in tort for their breach. *See, e.g., Baerlein v. State*, 92 Wn.2d 229, 595 P.2d 930 (1979); *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978). Here, U.S. Oil asserts the respondent agencies have a duty to assess the fiscal impact of proposed legislation, but any such duty runs to the public in general and is therefore subject to the public duty doctrine.

Under the public duty doctrine, tort liability should not be imposed upon a governmental entity unless the plaintiff can show that "the duty breached was owed to the injured person as an individual and was not merely the breach of an obligation owed to the public in general (i.e., a duty to all is a duty to no one)." *Taylor v. Stevens County*, 111 Wn.2d 159, 163, 759 P.2d 447 (1988) (quoting *J&B Dev. Co. v. King County*, 100 Wn.2d 299, 304, 669 P.2d 468 (1983), *overruled on other grounds by Taylor and Meaney v. Dodd*, 111 Wn.2d 174, 180, 759 P.2d 455 (1988)); *Goggin v. City of Seattle*, 48 Wn.2d 894, 297 P.2d 602 (1956) (no municipal liability for failure to enforce ordinances).

The vitality of the public duty doctrine as the proper focusing tool for determining whether the government owes a tort duty to an individual was recently reaffirmed by this court in *Osborn v. Mason County*, 157

Wn.2d 18, 134 P.3d 197 (2006), and in *Cummins v. Lewis County*, 156 Wn.2d 844, 133 P.3d 458 (2006).[21] As stated by the court in *Osborn*:

> The public duty doctrine simply reminds us that a public entity -- like any other defendant -- is liable for negligence only if it has a statutory or common law duty of care. And its "exceptions" indicate when a statutory or common law duty exists. "The question whether an exception to the public duty doctrine applies is thus another way of asking whether the State had a duty to the plaintiff." In other words, the public duty doctrine helps us distinguish proper legal duties from mere hortatory "duties."

Osborn, 157 Wn.2d at 27-28 (internal citations omitted).

The public duty doctrine is based on the policy that "[l]egislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability." *Taylor*, 111 Wn.2d at 170..

There are four exceptions to the public duty doctrine: (1) legislative intent, (2) special relationship, (3) failure to enforce, and (4) volunteer rescue. *Bailey v. City of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987). There is no need here to even address the special relationship or rescue exceptions, because these would require some direct interaction between the state agencies and U.S. Oil, which was not alleged by U.S. Oil or present in the passage of the legislation at issue here.

[21] The public duty doctrine remains good law, despite U.S. Oil's suggestion that there is some doubt as to its vitality. *See* Br. of Appellant at 21 n.12.

Neither the legislative intent exception nor the failure to enforce exception to the public duty doctrine applies here. Under the legislative intent exception, the analysis is similar to assessing whether a statute supports an implied private right of action. In *Burnett v. Tacoma City Light*, 124 Wn. App. 550, 562-63, 104 P.3d 677 (2004), the court observed that the exception requires an intent to protect a "particular and circumscribed class of person." We have argued above that I-960, assessed under the *Linville* decision, fails to support a private cause of action for damages. There is no need for further analysis. *See Linville* 137 Wn. App. at 213 n.5 (because there is no common law cause of action "we do not address . . . the public duty doctrine and its exceptions.").

The same legislative intent requirement applies to the failure to enforce exception to the public duty doctrine. *Halleran v. NuWest*, 123 Wn. App. 701, 704, 98 P.3d 52 (2004) (failure to enforce exception requires that "the plaintiff is within the class the statute intended to protect.") Without a clear expression of legislative intent to protect U.S. Oil, the legislative intent and failure to enforce exceptions to the public duty doctrine do not apply in this case.

Furthermore, the failure to enforce exception can not logically apply in this case. The exception requires the absence of a mandatory *enforcement* action by the defendant "despite actual knowledge of a statutory violation." *Bailey,* 108 Wn.2d at 268; *Yonker v. Dep't of Soc. & Health Servs.,* 85 Wn. App. 71, 76, 930 P.2d 958 (1997). Here, there is no allegation that the defendant state agencies failed to enforce a known statutory violation by a third person, and the exception cannot apply.[22]

In its opening brief to this court, U.S. Oil has argued the "special relationship" exception in this appeal, but the claim is not alleged in the amended complaint or preserved for appeal by the arguments made to the trial court. CP at 58-60. Arguments made for the first time on appeal should not be considered. RAP 2.5(a); *Brower v. Ackerley,* 88 Wn. App. 87, 96, 943 P.2d 1141 (1997). In addition, there is no allegation in the amended complaint, or elsewhere, of any duty of the state agencies not founded on RCW 43.135.031.

At any rate, even if this argument had been properly alleged and preserved, U.S. Oil misconstrues and ignores the elements of the special relationship exception. To establish a special relationship based on an express assurance, a plaintiff must prove: (1) there is direct contact or privity between the public official and the injured plaintiff that sets the injured plaintiff apart from the general public, and (2) there is an express assurance given by the public official, which (3) gives rise to justifiable

[22] Perhaps the implication of U.S. Oil's allegations is that the state agencies had a statutory duty to prevent the *Legislature* from passing SB 6096 with less than the super-majority. This is an untenable approach due to the separation of powers doctrine and the agencies' lack of authority argued above.

reliance by the injured plaintiff. *Cummins*, 156 Wn.2d at 854; *Beal for Martinez v. City of Seattle*, 134 Wn.2d 769, 785, 954 P.2d 237 (1998). U.S. Oil has not argued that the elements of the special relationship exception are met. Indeed, the element of "justifiable reliance" is completely undermined by U.S. Oil's consistent assertion that it *disagreed* with and actively opposed the representations by the state agencies that it now complains about.

U.S. Oil's assertion of a tort claim meets none of the exceptions to the public duty doctrine and should be rejected.

5. The Application Of Legal Proximate Cause Forecloses A Tort Remedy

Washington law recognizes two elements to proximate cause: cause in fact and legal causation. Cause in fact refers to the "but for" consequences of an act. Legal causation is a policy determination by the courts that, as a matter of law, forecloses any duty in this case.

> Legal causation . . . rests on policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of whether liability *should* attach *as a matter of law* given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on "mixed considerations of logic, common sense, justice, policy, and precedent."

Hartley v. State, 103 Wn.2d 768, 779, 698 P.2d 77 (1985) (emphasis added).

The considerations enunciated in *Hartley* have led to the rejection of asserted tort duties as a matter of law. For example, cities are "under no duty to protect the plaintiff from the extreme carelessness" of another motorist, despite a general duty to maintain safe roadways. *Klein v. Seattle*, 41 Wn. App. 636, 639 P.2d 806 (1985); *see also Braegelmann v. Snohomish Cy.*, 53 Wn. App. 381, 766 P.2d 1137 (1989) ("As a matter of public policy, there is no duty to guard against such extreme conduct.").

The courts have also held that an unsuccessful bidder cannot sue a governmental entity for damages arising from a public procurement, even if the contract was improperly awarded. *Peerless Food Prod. v State*, 119 Wn.2d 584, 591-92, 835 P.2d 1012 (1992); *Mottner v. Town of Mercer Island*, 75 Wn.2d 575, 452 P.2d 750 (1969). In foreclosing a cause of action, the court "recognized the rationale of protecting the public treasury has priority over compensation for bidders wrongfully rejected." *Peerless*, 119 Wn.2d at 591-92 (citing *Mottner*, 75 Wn.2d at 578-79).

The duty asserted by U.S. Oil should likewise be rejected on the basis of the lack of precedent, policy, common sense, and logic. There is no precedent for tort liability for providing input into the legislative process. To the contrary, citizens' participation in the legislative process is protected by the right of petition under the First Amendment to the

United States Constitution.[23] The respondent state agencies should not be made liable for their participation in the legislative process.

Moreover, the doctrine of separation of powers and the enrolled bill doctrine foreclose any inquiry into the connection between input to the Legislature and the ultimate enactments of the Legislature. Yet, U.S. Oil's specific allegation that the state agencies caused the passage of legislation would explicitly require either speculation or discovery into the legislative deliberative process.

Here, the defendant agencies are being sued because they provided fiscal impact analysis to the Legislature. Yet it was the Legislature, not the agencies, that determined SB 6096 was a mere clarification of existing law and did not require a two-thirds majority under RCW 43.135.031/I-60. It was the Legislature that enacted the bill, not the state agencies. This Court does not pass upon the validity of legislation by reference to the legislative process that produced it, and may scrutinize only the language of the bill that is enacted. *Brown*, 165 Wn.2d at 722-24; *Washington State Grange v. Locke*, 153 Wn.2d 475, 499-500, 105 P.3d 9 (2005). SB 6096 on its face, supported by the Final Bill Report, indicates that the bill was a mere clarification of existing law.

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[23] The United States Supreme Court has deemed lobbying to be "one of the most precious of the liberties safeguarded by the Bill of Rights." *BE & K Constr. Co. v. N.L.R.B*, 536 U.S. 516, 524-25, 122 S. Ct. 2390, 153 L. Ed. 2d 499 (2002).

It is also significant that the President of the Senate specifically ruled that the bill was not subject to a two-thirds majority under RCW 43.135.031/I-960, and supported his ruling with a cogent explanation that did not reference any of the agency analysis U.S. Oil complains of. Notwithstanding U.S. Oil's conclusory allegations to the contrary, the President of the Senate's ruling articulates a reasonable basis for concluding the bill did not raise taxes and was of no fiscal consequence.

If plaintiffs' claim were permitted, the court would be required to inquire into the legislative process, to determine whether the fiscal information provided by the defendant agencies was accurate, whether and to what extent the President of the Senate relied on it in making his ruling, and whether and to what extent legislators relied on it in deciding whether to vote for or against SB 6096. This type of inquiry is specifically what the doctrine of separation of powers and legislative immunity seek to avoid.[24]

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[24] In *Brown*, as in the present case, the President of the Senate issued a Ruling on a point of order as to whether a particular bill was subject to the super majority requirement in I-960. Applying separation of powers principles, the court 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.

165 Wn.2d at 719. The same improper ruling would be required here to allow the assertion of U.S. Oil that SB 6096 should not have been passed with a mere majority.

The conclusion that no tort liability should be recognized here is reinforced by the existence of the exclusive remedy for taxes under RCW 82.32 (explained above in section C.3). Allowing the tort claim urged by U.S. Oil would inappropriately thwart the exclusive nature of the existing tax remedy. It is of no consequence that U.S. Oil alleges intentional, as opposed to negligent, conduct because the existence of causation is not dependent upon any specific level of culpability.

There is no duty for state agencies to guard against the passage of legislation by the Legislature. The fundamental purpose of taxation, to generate revenues for government, would be thwarted if the courts imposed liability upon state agencies to underwrite taxes payable under "valid law" as U.S. Oil urges. Legal proximate cause should foreclose any duty under the circumstances of this case.

D. The Respondent State Agencies Are Immune From The Tort Liability Asserted By U.S. Oil

U.S. Oil has failed to allege a recognized tort cause of action, and there is no support for the creation of a cause of action for faulty fiscal assessment of legislation. Even if there were support under statutory analysis for a tort cause of action for damages for taxes or lobbying expenses, as U.S. Oil asserts, the respondent state agencies would be immune from liability.

1. Sovereign Immunity Forecloses Plaintiff's Tort Claim

U.S. Oil summarily and incorrectly dismisses the state's assertion of sovereign immunity.[25] The public duty doctrine, addressed above, recognizes limitations on the state's waiver of sovereign immunity when the duty is owed to the public generally. The waiver of sovereign immunity for tax refunds is also limited in scope. Likewise, the general waiver of sovereign immunity under RCW 4.92.090 is limited.

In its general waiver of state immunity, the Legislature waived the State's sovereign immunity only so far as to permit liability in tort to the same extent as private entities:

> The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct *to the same extent as if it were a private person or corporation.*

RCW 4.92.090 (emphasis added).[26] Accordingly, the state's waiver of sovereign immunity is not absolute. A person asserting a claim against the state must show that the conduct complained of constitutes a tort that would be actionable if it were done by a private person in a private setting. *Edgar v. State*, 92 Wn.2d 217, 226, 595 P.2d 534 (1979).

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[25] Br. of Appellant at 12, 27.

[26] The fact that the State's waiver of sovereign immunity was never intended to subject the State to liability for purely governmental functions for which there is no private sector counterpart is thoroughly analyzed and explained in Michael Tardif & Rob McKenna, *Washington State's 45-year Experiment in Governmental Liability*, 29 Seattle U. L. Rev. 1 (2005).

The inquiry whether there is a private analogy for liability is necessary regardless of whether the alleged breach is negligent or intentional. In *Edgar*, the court addressed allegations of threats, intimidation, and harassment of a national guardsman by his superior officer, resulting in suspension of duties and reduction in pay. The court held that the claim was outside the State's waiver of sovereign immunity because the plaintiff had drawn "no analogy between the conduct complained of and any conduct of a private individual which would be actionable" in tort. As the court unanimously concluded:

> [W]e are here concerned with a state statute [RCW 4.92.090] which we are not at liberty to extend beyond the intent expressed in the act. The statute was not designed to create new causes of action. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). As we said in *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965), the statute does not render the State liable for every harm that may flow from governmental action, but only the harm which is the result of tortious misconduct.

Edgar, 92 Wn.2d at 228.

Our courts thus have refused to impose liability on the State where the State is acting in its governmental capacity because, by definition, there is no private counterpart. For example, in *Linville,* 137 Wn. App. at 208, the court held that there was no common law duty for what the statute required: to license day cares for the benefit of those using those facilities by requiring the day care operator to obtain liability insurance for sexual abuse because this was a governmental function and no similar private right of action existed. Regarding the plaintiffs' negligent licensing claim in that case, this Court observed:

> At common law, the State was immune from lawsuit. At common law, "it is not a tort for government to govern" or, conversely, not to govern. *Evangelical United Brethren Church v. State,* 67 Wn.2d 246, 253, 407 P.2d 440 (1965)
>
> . . . .
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> Only where the Legislature has expressly waived sovereign immunity by statute can there be the possibility of an actionable duty owed by the State. *Donohoe v. State*, 135 Wn. App. 824 , 832, 142 P.3d 654, 657 (2006).

Id.; *see also Morgan v. State*, 71 Wn.2d 826, 430 P.2d 947 (1967) (sovereign immunity not waived on claim that State should have erected a fence to keep children from wandering onto highway).

Here, U.S. Oil has failed to demonstrate, or even to argue, that there is any previously recognized private tort cause of action for participation in the legislative process or for the uniquely governmental task of attempting to assess the fiscal impact of proposed legislation. Indeed, U.S. Oil concedes that the tort liability asserted here is a "case of first impression." Br. of Appellant at 1. There is no showing that anyone has ever been held liable for damages for another's tax burdens because of alleged misrepresentations to the legislature, intentional or otherwise. There is no precedent for one person to be liable in tort for another's lobbying expenses. Indeed, it would appear that U.S. Oil's asserted tort liability for taxes and private lobbying expense would necessarily be limited to governmental defendants.[27] There is no private corollary for the tort liability asserted here. The State should be held to enjoy sovereign immunity from the tort claim asserted here by U.S. Oil.

2. The State Agencies Are Entitled To Legislative Immunity

The *Brown v. Owens* decision, in applying the doctrine of separation of powers to foreclose interference with legislative compliance with I-960, did not specifically address the question of tort liability for damages. However, the doctrine of separation of powers necessarily implicates legislative immunity. *See Steiner v. Superior Court of Orange County*, 50 Cal. App. 4th 1771, 1784, 58 Cal Rptr. 2d 668 (1996), *review denied* (March 19, 1997) (the principle of legislative immunity is a "corollary" of the separation of powers doctrine).

Legislative immunity is plainly recognized in Washington. *See Mission Springs v. City Of Spokane*, 134 Wn.2d 947, 969-70, 954 P.2d

[27] Citizens have a right to petition and free speech under the First Amendment of the United States Constitution. In addition, witnesses in the judicial context are immune from tort liability. *Briscoe v. LaHue*, 460 U.S. 325, 335-36, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983); *Boeing Co. V. Sierracin Corp.*, 108 Wn.2d 38, 56, 738 P.2d 665 (1987); *Lange v. Nature Conservancy*, 24 Wn. App. 416, 422, 601 P.2d 963 (1979) (there is a First Amendment right to "try to influence government action"). These principles prevent liability even for government officials. *See, e.g., Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 685 (4th Cir. 2000) (government official's responsive/retaliatory speech, even if defamatory, is not actionable).

250 (1998); *Miller v. Pacific County*, 91 Wn.2d 744, 746-48, 592 P.2d 639 (1979). In *Miller*, the Court granted legislative immunity because the imposition of liability

> would render the legislative process inoperable and involve this court in a flagrant invasion of the prerogatives of the legislative branch of government.
>
> . . .
>
> Plaintiff has supplied the court with no authority holding elected legislators liable for unreasonableness, lack of consideration, bad faith or improper motivations - other than the events of a subsequent election - and we will not by this case supply such authority.

91 Wn.2d at 747 (citations omitted).

Legislative immunity is not confined to members of the Legislature, and is properly applied to the actions of the state agencies at issue here. Whether an act is one subject to legislative immunity is not a simple matter of who takes the alleged action: "We must look to the nature of the function performed, not the identity of the actor who performed it." *Mission Springs,* 134 Wn.2d at 969 (citing *Forrester v. White*, 484 U.S. 219, 229 (1988)). "'[A]n act which applies generally to the community is a legislative one, while an act directed at one or a few individuals is an executive one.'" 134 Wn.2d at 969-70 (citations omitted). For example, legislative immunity extends to legislators' aides because their assistance is "so critical to the [legislators'] performance that they must be treated as the latter's alter egos" to avoid thwarting the purposes legislative immunity furthers. *Gravel v. United States*, 408 U.S. 606, 616-17, 92 S. Ct. 2614, 33 L. Ed. 2d 583 (1972). The California court in *Steiner* observed that the legislative privilege "protects not only the acts of municipal legislators, but also the acts of municipal administrators and executives taken in direct assistance of legislative activity." 50 Cal. App. 4th at 1784 (internal quotes omitted)*; see also Lake Country Estates, Inc. v. Tahow Regional Planning*, 440 U.S. 391, 406, 99 S. Ct. 1171, 1179, 59 L. Ed. 2d 401 (1979) (absolute immunity for planning commissioners; immunity needed to protect the public good).[28]

Here, the actions of the state agencies in question are to provide analysis that can be used to assess whether a bill in the legislature "raises taxes," under RCW. 43.135.[29] These actions were as much a part of the

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[28] Washington courts have also recognized an executive immunity parallel to legislative immunity, known as discretionary immunity. *See Miller v. Pacific County*, 91 Wn.2d at 746–47. This doctrine either reinforces the application of legislative immunity here, or provides a separate basis to dismiss U.S. Oil's tort claim. The existence of the doctrine demonstrates that the purposes for legislative immunity are not limited to the Legislature and should be extended where appropriate to State executives. In *King v. Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974), the court explained the reason for the immunity as follows:

> The court directed those seeking to determine whether an act is discretionary or not to "find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision."
>
> . . . ." 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.

[29] U.S. Oil also asserts a faulty fiscal note by DOR under RCW 43.88A, but asserts a tort duty arising only via the requirements of I-960.

legislative process as the assistance of legislative aides or the acts of executives in *Steiner*. The respondent agencies' action of providing information in connection with SB 6096 is subject to legislative immunity and forecloses U.S. Oil's claim of tort liability.

E. Allegations of Intentional Conduct Do Not Further U.S. Oil's Tort Claim

U.S. Oil attempts to circumvent proper analysis of duty, causation and immunities by asserting the analysis is unnecessary because intentional conduct is alleged. This is incorrect, and should not be accepted. The legal determinations of whether duties and immunities exist are equally necessary for whether the alleged malfeasance is intentional or negligent. *See Edgar*, 92 Wn.2d at 228. Moreover, U.S. Oil's allegation that the state agencies acted intentionally does not sufficiently plead an actionable intentional tort. Finally, U.S. Oil has sued only state agencies, and not any individuals who might be capable of acting intentionally.

U.S. Oil fails to allege or identify any *recognized* intentional tort, and relies exclusively on the assertion of a statutory duty under RCW 43.135.031. The need for the court to determine whether there is a duty applies regardless of whether the asserted tort sounds in negligence or is claimed to be intentional. No duty can exist in tort without a correlative right. *See Calbom v. Knudtzon*, 65 Wn.2d 157, 162, 396 P.2d 148 (1964) (In an intentional tort, it is a "fundamental premise of the tort--

that a person has a right").[30] In *Calbom*, the court addressed a claim of intentional interference with a business expectancy. It was not enough that the plaintiff vaguely alleged "intent" as U.S. Oil does here. The court recognized that English law and the Restatement of Torts "crystallized" a right to be "unmolested by the wrongful and officious intermeddling of a third party." *Id.* Only then did the court acknowledge a correlative duty actionable in tort. *Id.* As argued above, there is simply no duty under the only authority U.S. Oil relies upon. Recognized torts, such as assault, outrage or intentional interference with a business expectancy, are recognized and have defined elements. *Cf. Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996) (nine elements to intentional misrepresentation).

U.S. Oil also asserts that immunities are inapplicable in the face of allegations of intentional fault. This argument reflects a fundamental misunderstanding of the concept of immunity. Immunity is an absence of liability *despite* alleged misfeasance. *See Miller*, 91 Wn.2d at 747 (legislators immune despite "unreasonableness, lack of consideration, bad faith or improper motivations."). The allegation of some alleged

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[30] *See also Harbeson v. Parke-Davis, Inc.*, 98 Wn.2d 460, 467, 656 P.2d 483 (1983), a negligence case identifying the right "and the correlative duty flowing from that right" as the heart of the wrongful birth action.

culpability of a defendant's employees (negligence or intent), has no bearing on the defendant's claims of immunity.

Finally, state agencies cannot intentionally violate the law. They are creatures of statute that cannot form any intent or act intentionally. There are no individual defendants named in the amended complaint in this matter, nor does U.S. Oil allege vicarious liability of the respondent state agencies for "intentional" misconduct by their individual employees. Vicarious liability must be alleged and proven. *See, e.g., Thompson v. Everett Clinic,* 71 Wn. App. 548, 860 P.2d 1054 (1993), *review denied,* 123 Wn.2d 1027 (1994); *Kuehn v. White,* 24 Wn. App. 274, 600 P.2d 679 (1979).

V. CONCLUSION

The judgment of the superior court dismissing U.S. Oil's tort claims should be AFFIRMED.

RESPECTFULLY SUBMITTED this 12 day of April, 2010.

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below 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 17 day of April, 2010, at Tumwater, WA.

Tracy Jones

TRACY JONES