

No. 49899-5-II

DIVISION II OF THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

WENDY ANN MURRAY as PERSONAL REPRESENTATIVE OF THE
ESTATE OF CARL MURRAY, a deceased career professional firefighter,
for and on behalf of the Estate and RCW 4.20.020 beneficiaries,

Petitioner,

v.

CITY OF VANCOUVER, a municipal subdivision of the State of
Washington,

Respondent.

APPELLANT'S REPLY BRIEF

Ron Meyers WSBA No. 13169
Matthew Johnson WSBA No. 27976
Tim Friedman WSBA No. 37983
Attorneys for Petitioner

Ron Meyers & Associates, PLLC
8765 Tallon Ln. NE, Suite A
Olympia, WA 98516
(360) 459-5600

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I. REVIEW OF RELEVANT FACTS

Career firefighter Carl Murray was intentionally, negligently and/or recklessly exposed to radioactive, invisible, odorless and lethal radon gas in City fire stations, likely for the two decades he served the City. The City knowingly failed to inform Murray, or other firefighters, of lethal levels of radioactive radon in its fire stations. The City never provided information on the nature and extent of each exposure of the radioactive radon in its fire stations as required by the firefighter safety standards and state law requiring a safe work place identified in the Notice of Tort Claim, the Complaint, the response to the City's premature motion for summary judgment, the motion for discretionary review, the city's second motion for summary judgment and the opening brief to this Court.

No one argues that Murray died a horrible death from lung cancer. His cancer was admitted by the City to be caused from his occupational exposures to smoke, fumes and toxic substances responding to fire suppression and other calls. The City did so – likely knowing that Murray had been exposed to radon in every fire station he had ever worked in as a City fire firefighter from 1992 to 2013. The City never mentioned radon as the most likely cause of Murray's lung cancer. The City failed day after day, year after year to comply with Washington law – it is required to know --

requiring it to notify its firefighters of continuous exposures to hazards such as radioactive radon gas. There is evidence of knowing, reckless and ongoing failures by the City to obey its own rules, state laws and regulations incorporated into the Washington Industrial Safety and Health Act, and industry standards to ensure the safety of its firefighters over many, many years. WAC 296-305.

Murray was hired as a firefighter for the City on May 26, 1992. Br. of Appellant, Appx. B at Ex. A. For unknown reasons, the City did not even begin to test its fire stations for radon until September 17, 2001. Br. of Appellant, Appx. A at Ex. G. On September 17, 2001 the City received a report that fire stations 82 and 86 had tested abnormally high for radon. *Id.* The report recommended further testing be conducted. *Id.* In October 2001, a month after the initial radon tests were performed, the City had Murray sign an exposure report form for two of the City's ten fire stations for the 2001 exposure. CP at 46. It did not reference or warn of exposures at the City's other fire stations. CP at 46, 47. It did not reference or warn of any future exposures up through the last day of Murray's employment in 2013. *Id.* In November 2001, after Murray signed the exposure form, the City once again performed radon testing at fire stations 82 and 86. Br. of Appellant, Appx. A at Ex. H. Once again fire station 82 tested abnormally high for radon. Br.

of Appellant, Appx. A at Ex. H. It did not tell its firefighters, including Murray, or require them to sign exposure reports.

The City did not test the ten fire stations again for lethal radioactive radon until 2006. Br. of Appellant, Appx. A at Ex. I. At that time station 82 once again tested high for radon. *Id.*

Three years later, in 2009, the City sent an email to employees regarding radon in homes. CP at 23, 27. This email did not warn the about radon in the City's fire stations. It did not address current levels of radon in City fire stations. The email did not even mention fire stations and did not provide the history of high radon levels at the City's fire stations. *Id.* The email was not for the purpose of informing firefighters about the dangers of radon exposure in the City's fire stations. The email had no information about the ongoing high level radon issues in the City's fire stations. This email did nothing to cause the statute of limitations to begin ticking for Carl Murray and his family because it failed to give them adequate notice of dangers he was exposed to over his career in City fire stations.

Murray was diagnosed with lung cancer on December 23, 2010. CP at 53. On January 8, 2011 the City's Chief emailed Murray asking him what type of cancer he had to see if she could make any connection to radon exposure for his presumption claim with the City. CP at 40. On January 9,

2011 Murray diligently responded to the City's Chief's inquiry by writing, "The issues that qualify me are: have to fit the description of what a firefighter is, have been with dept for 10 years or more, no history of tobacco use, no family history of cancer." *Id.* Murray never listed insidious radioactive radon as an "issue" which he believed supported his occupational cancer claim when inquiring with the City. *Id.* The City never corrected Murray's belief. The City never told him radon was the most likely cause of his lung cancer. CP at 507-513, Br. of Appellant, Appx. B at Ex. A. See also Respondent's Brief.

There were no more communications required by law. CP at 507-513, Br. of Appellant, Appx. B at Ex. A. See also Respondent's Brief. The City's Chief never informed Murray of any connection she made to radon exposure in the City's fire stations being the cause of his lung cancer. The result was that the City deliberately and recklessly misled Murray into continuing to believe that his lung cancer was caused by the smoke, fumes, and toxic substances from fire fighting. CP at 507-513, Br. of Appellant, Appx. B at Ex. A. See also Respondent's Brief.

The City did not conduct a radon investigation until 2013. The City was first aware of the radon problem at least as early as 2001. The radon investigation conducted 12 years after the City first started testing their fire

stations, revealed that the reasons for the high radon levels in the City's fire stations **were caused by faulty equipment** installed by the City **and caused by the conditions of the fire stations due to lack of mitigation** by the City. Br. of Appellant, Appx. A at Ex. N, Ex.M.

Murray battled lung cancer until his death on July 30, 2013 reasonably believing it was caused by countless exposures to smoke, fumes and toxic substances related to firefighting, not radon. CP at 507-513, Br. of Appellant, Appx. B at Ex. A. Murray made a meaningful inquiry, the City breached its duty to investigate and inform him of the facts of the harms surrounding his long-term exposure to radon at all of the City's fire stations over his entire career up through the time of his death. CP at 507-513, Br. of Appellant, Appx. A-C. See also Respondent's Brief. The City failed to conduct an investigation and to inform Murray regarding his radon exposures. *Id.* The statute of limitations should not even begin to run – at the earliest – until his last day of radon exposure in the City's fire stations – on his last day of employment – shortly before his untimely death – if even then.

Even when only relying on those documents filed prior to the summary judgment order where the trial court granted partial summary judgment to the City on June 10, 2016 it is apparent that discovery had only just begun. However, it is also apparent from the Court record that Murray

was deceived by the City and was not meaningfully informed of the harm from his long term exposures to radon in the City's fire stations over the entirety of his two decade career from 1992 through 2013. Partial summary judgment should not have been granted. CP at 507-513, Br. of Appellant, Appx. A-C. See also Respondent's Brief.

The statute of limitations did not begin to run based upon the onetime 2001 radon exposure report form that was limited to only two of the City's ten fire stations. CP at 47. The two fire stations that Murray mainly worked at during the early years of his career, but not during his career or the time he was diagnosed with lung cancer. CP at 507-513, Br. of Appellant, Appx. A-C. See also Respondent's Brief. After 2001 the City continued to conceal ongoing exposures to radon even though it had a duty to keep Murray and other firefighters informed of hazardous exposures. *Id.*

Once Murray was diagnosed with lung cancer in 2010 the City approved his claim as a presumptive disease claim resulting from exposures to smoke, fumes and toxic substances from firefighting – not the much more likely radioactive radon. The City's deceit in allowing Murray's claim as a presumptive disease claim from the smoke, fumes and toxic substances from firefighting, rather than advising Murray that his lung cancer was most likely from decades of radon exposures in all the City's fire stations also tells the

statute of limitations under the discovery rule. CP at 507-513, Br. of Appellant, Appx. A-C. See also Respondent's Brief.

Furthermore, the City failed to follow-up with Murray regarding any connection between the radon exposure noted by Chief Barnes and Murray's lung cancer. CP at 507-513, Br. of Appellant, Appx. A-C. See also Respondent's Brief. The City did not provide any information to the Murrays regarding Carl Murray's countless exposures to radon in the all of the City's fire stations over the entirety of his career. *Id.* Murray had a right to rely on the City to perform what it was legally required to do. *Id.* The City had a duty to take reasonable precautions to protect him against reasonably foreseeable dangers. WAC 296-305. It did not. CP at 507-513, Br. of Appellant, Appx. A-C. See also Respondent's Brief. The City did not conduct a radon investigation until 2013, the year Murray died, even though Murray inquired in 2011 and the City was first aware of the radon problem at least as early as 2001. *Id.* Murray trusted the City when they informed him his lung cancer was caused from his occupational exposures to smoke, fumes and toxic substances responding to fire suppression and other calls. *Id.* This deceitful conduct is another reason why the statute of limitations could not even begin to run until after the first radon investigations were performed by the City in 2013. Only then could Murray have discovered the reasons for the high

radon levels in the City's fire stations were caused by faulty equipment installed by the City and caused by the conditions of the fire stations due to lack of mitigation by the City. Br. of Appellant, Appx. A at Ex. N, Ex.M.

This is also why the statute of limitations should not even begin to run until the last day Murray was exposed to radon in the City's fire stations – on his last day of employment shortly before his death.

These facts were all before the trial court and demonstrated that Murray did not know or could not have known the essential elements of his claims against the City until the radon investigations that took place in 2013, shortly before his death. The City's reckless and deceitful acts and omissions is also a basis for the Plaintiff's outrage claim.

The trial court judge, a former government attorney, should have denied summary judgment. Plaintiff's May 16, 2016 summary judgment response set forth several reasons the trial court should simply have denied summary judgment rather than rushing to judgment. Further, the trial court should have denied summary judgment under the provisions of CR 56(f) or should have denied summary judgment through the inherent power of the court. At the time of the summary judgment, discovery could not even have been meaningfully reviewed by Plaintiff. Plaintiff was entitled to full and fair discovery, an opportunity to review the discovery, to have the discovery

reviewed by experts, to take depositions, obtain expert opinions for trial (and to defeat any summary judgment motion by the City), and then take the case to jury trial. Discovery by ambush, like trial by ambush, violates the very foundation of our system of justice.

Industrial Insurance Act.

This case has nothing to do with the Industrial Insurance Act (IIA) regarding the City's intentional or negligent tortious conduct. Reference to the IIA is a "red herring" designed to mislead – and make employers and government immune to accountability for all torts.

This case is about the totality of rights every citizen has to bring claims against others – even government. Equally important is the fact that firefighters and their families have those rights against their employers, without any of the limitations of the IIA. This sharp contrast between the IIA and the firefighter right to sue statute is discussed in detail later in this Reply. The City misrepresents the law in this regard.

The quotes and citations in Appellant Murray's Opening Brief are correct and applicable law, just as they were in Murray's motion for discretionary review denied by this Court, because the issues were not yet timely. There is no invited error. The issues are ripe for determination.

The City had a duty to disclose all exposures to radon to its

firefighters. RCW 49.17.010; 49.17.060; WAC 296-305-01509; WAC 296-901-14016.

The City recklessly and intentionally failed year after year to conduct the radon mitigation program required to protect its firefighters even though it had an ongoing duty to do so. CP at 507-513, Br. of Appellant, Appx. A-C. See also Respondent's Brief.

The deceit by the City in failing to report years of radioactive radon exposure, its failure to investigate the radon exposure noted by Chief Barnes, its failure to comply with safety requirements for years and years, and its sleight of hand in blaming smoke, fumes and toxic substances in fire suppression for Murray's lung cancer rather than the most likely cause – radioactive radon – all toll the statute of limitations.

The statute of limitations did not run until – at the earliest 2013. The statute of limitations was never started because of misconduct, or because there was insufficient data upon which to start the clock ticking against Murray. CP at 507-513, Br. of Appellant, Appx. A-C. See also Respondent's Brief.

The City's conduct is reckless and outrageous and should not be rewarded by a grant of immunity. Governments – like the City -- is accountable just like all of us.

II. ARGUMENT

Summary judgment should only be granted where reasonable minds can reach but one conclusion. *White v. State*, 131 Wash.2d 1, 929 P.2d 396 (1997). Summary judgment should not be granted where discovery is just beginning and right after the City “data dumped” almost 200,000 pages of discovery – most of it unresponsive and much of it illegible. The City’s conduct violates the spirit and intent of *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wash.2d 299, 858 P.2d 1054 (1993):

Because it is essentially identical to Rule 26(g), this court may look to federal court decisions interpreting that rule for guidance in construing CR 26(g).⁷⁴ In turn, federal courts analyzing the Rule 26 sanctions provision look to interpretations of **1077 Fed.R.Civ.P. 11.75 The federal advisory committee notes describe the discovery process and problems that led to the enactment of Rule 26(g) as follows: Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems....

The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. “Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.” *Hickman v. Taylor*, 329 U.S. 495 [67 S.Ct. 385, 91 L.Ed. 451] (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake....

*342 ... Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In

addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions.... The term “response” includes answers to interrogatories and to requests to admit as well as responses to production requests....

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. Sanctions to deter discovery abuse would be more effective if they were diligently applied “not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.”

... Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.

(Citations omitted. Italics ours.) Amendments to the Federal Rules of Civil Procedure, Advisory Committee Note, 97 F.R.D. 166, 216–19 (1983).

The concept that a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials is reflected in decisions of our Court of Appeals. In *Gammon v. Clark Equip. Co.*, 38 Wash.App. 274, 686 P.2d 1102 (1984), *aff'd*, 104 Wash.2d 613, 707 P.2d 685 (1985), the Court of Appeals held that a new trial should have been ordered because of discovery abuse by the defendant. Then Court of Appeals Judge Barbara Durham wrote for the court:

The Supreme Court has noted that the aim of the liberal discovery rules is to “make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” The availability of liberal discovery means that civil trials no longer need be carried on in the dark. **The way is now clear ... for the parties to obtain the fullest possible knowledge of the issues and facts before trial.** [emphasis added]

A mere inquiry into a possible cause of action, by the claimant or her attorney, is not enough to establish, as a matter of law, that the plaintiff

discovered all of the essential elements of that claim. *Weisert v. University Hosp.*, 44 Wn.App. 167, 171-73, 721 P.2d 553 (1986) The discovery rule focuses on discovery facts, not knowledge of the legal cause of action. The facts were recklessly and intentionally concealed by the City year after year in violation of law.

Murray did not inquire as he fought a losing battle to save his life and be with his family because the City told Murray that it would investigate the radon exposures. The City did not do what it told him it would do. The City cannot profit from its broken promises in violation of law. CP at 507-513, Br. of Appellant, Appx. A-C. See also Respondent's Brief.

Even today, there has been no opportunity for expert review of discovery, or the the last minute "data dump" of discovery by the City at the time of the summary judgment. Br. of Appellant, Appx. A-C.

Murray was misled by the City in several ways. First, the City allowed the claim based upon exposure to smoke, fumes and toxic substances, even though it knew that radon was the most likely source of lung cancer for non-smoker Murray. Second, the City never conducted its mandatory investigation regarding radon exposures required by law and promised by its Chief. Third, it is unfair to claim that while Murray was fighting for his life, he could not rely on the City to do what the law required

it to do. Br. of Appellant, Appx. A-C. For the City to argue that Murray should have also been performing the investigation that the City had a duty to perform is outrageous and unfair. See, RCW 49.17.010 (purpose to enhance industrial safety and health), RCW 49.17.060 (employer general safety standard); WAC 296-305-01503 (accident/incident investigation); WAC 296-305-01507 (fire department health and safety officer duties and responsibilities); WAC 296-305-01509 (management's responsibility); and, WAC 296-901-14016 (employee information and training).

“The term "safety and health standard" means a standard which requires the adoption or use of one or more practices, means, methods, operations, or processes reasonably necessary or appropriate to provide safe or healthful employment and places of employment.” RCW 49.17.020(7).

The City had a duty to disclose all exposures to radon to its firefighters. The City knew as a matter of law that it had a duty to disclose all firefighter exposures to radon. Every fire department in the state of Washington is responsible for knowing and complying with the safety standards designed to prevent injury, disease and death. WAC 296-305-01001. As to firefighter safety, WAC 296-305 trumps all other safety general safety and health standards. See, WAC 296-305-01003(6).

Because the City failed to do what it was required to do – investigate

the radon claim as the law, and Chief Barnes, said it would, and as the law required – Murray had no reasonable basis to know that high levels of radon over his distinguished career were the most likely cause of his lung cancer -- not the smoke, fumes and toxic substances the City told him was the cause. He was entitled to rely on the City’s legal duty to investigate, inform firefighters of the hazard, and to rely on the City’s promise to him. Br. of Appellant, Appx. A-C.

The specific duty imposed on employers to comply with applicable Washington Industrial Safety and Health Act Regulations applies not only to employer's employees but to all employees on the “job site”. *Stute v. P.B.M.C., Inc.*, 114 Wash.2d 454, 788 P.2d 545 (1990), reconsideration denied.

Because of the timing of the City’s motion for summary judgment and the City’s belated, disorganized, largely irrelevant and illegible “data dump”, the Plaintiff has not even had an opportunity for oncologist, industrial hygienist, and other expert review. Br. of Appellant, Appx. A-C. The discovery by ambush is abhorrent to substantial justice.

Lung cancer caused by radon – even more so than most carcinogens – is an insidious cancer causing disease process. Radon is radioactive, invisible, odorless and cannot be detected without testing. To allow the

condition to continue year after year is reckless and intentional. For the City to argue that one radon exposure report in 2001, when contrasted against radon exposures likely occurring over a career spanning 1992 to 2013 is outrageous. So is its underlying conduct.

To allow lethal levels of radioactive radon gas to continue to exist in the City's fire stations for years and years knowing radon causes lung cancer -- and doing so in violation of statute and case law -- is a proper basis for the imposition of strict liability.

The City did not tell Murray that radon exposure levels exceeded the EPA remediation amount several times over, on many occasions, over many years. Murray had the right to rely upon the City's non-delegable duty to keep him advised of hazards in his workplace. WAC 296-305. The City -- a government entity that is charged with knowing better -- failed him. It seeks immunity for reckless and illegal conduct.

The City allowed the claim as a presumptive occupational disease claim caused by exposure to smoke, fumes and toxic substances fighting fires. CP at 507-513, Br. of Appellant, Appx. A-C. IT clearly put its own interests before those of the firefighter who made a career of putting his life on the line to protect Defendant's citizens.

By allowing the claim as a presumptive claim the City intentionally,

recklessly and/or negligently led Murray away from what the City knew was the most likely cause of his lung cancer - radioactive radon in fire stations. The motive was money. The City also knew that Murray could sue for radon exposures, RCW 41.26.281, but that he could not likely sue for causes of action under the IIA.

The City never conducted any investigation into radon as a cause of Murray's lung cancer as required by law. WAC 296-305.

As to firefighters, the IIA is not the controlling law on any tort claim, including the torts of outrage and strict liability.

The trial judge knew from the record that discovery was just beginning, that there had been inadequate time to review material, that experts had not reviewed the documents – including the recent 200,000 page “data dump” documents, that the responses were provided in a state of disarray, that key responses were illegible (another violation of firefighter safety standards) and that expert opinions require full and fair discovery before the opinions can be determined. The Judge knew as a matter of law, that firefighters had rights beyond the IIA. CR 56.

The Firefighter Right To Sue Statute Provides For All Causes of Action Arising From Negligent, Intentional or Reckless Conduct.

The “firefighter right to sue statute” allows claims for intentional or

negligent acts or omissions. Additionally, the statute also allows claims “as otherwise provided by law” arising from reckless or other conduct. It contains no provision against imposition of strict liability or damages for the tort of outrage on the City. All of Plaintiff’s causes of action are viable based upon the City’s’s reckless, intentional and continuing acts and omissions. RCW 41.26.281.

Loss of Consortium and other Torts Claims.

Plaintiff brings these negligence and intentional tort causes of action against the City as provided by RCW 41.26.281. The statute, which is part of the Law Enforcement Officers’ and Fire Fighters Retirement System Act (LEOFF), grants firefighters who are injured or killed the “right to sue” their governmental employers for negligence in addition to recovering benefits under our worker’s compensation statutes. *See Fray v. Spokane County*, 134 Wn.2d 637, 952 P.2d 601 (1998).

In its motion for partial summary judgment, the City claimed that RCW 41.26.281 does not allow for separate spousal claims [such as loss of consortium] that are premised upon injuries suffered by the firefighter. But the plain language of RCW 41.26.281 belies this claim. In enacting RCW 41.26.281, our Legislature did not limit the application of the statute exclusively to the injured firefighter as claimed by the City. Instead, the

Legislature clearly extended the benefits of the statute to dependents of the injured firefighter by providing that a dependent shall have the privilege to benefit under LEOFF and also have a cause of action against the governmental employer as otherwise provided by law:

If injury or death results to a member from the intentional or negligent act or omission of a member's governmental employer, the member, *the widow, widower, child, or dependent [person dependent for support] of the member shall have the privilege to benefit under this chapter and also have cause of action against the governmental employer as otherwise provided by [not Title 51] law*, for any excess of damages over the amount received or receivable under this chapter.

RCW 41.26.281 (emphasis added).

Rather than creating a limited exception to the exclusive remedies under the workers' compensation statutes as claimed by the City, the statute authorizes causes of action "against the governmental employer as *otherwise provided by law.*" RCW 41.26.281 (emphasis added). Washington law "otherwise" provides that "[a]ll local governmental entities ... shall be liable for damages arising out of their tortious conduct ... to the same extent as if they were a private person or corporation." RCW 4.96.010. Our courts have long recognized that damages for the tortious conduct of an individual or corporation includes damages for a spouse's loss of consortium. *See Lundgren v. Whitney's, Inc.*, 94 Wn.2d 91, 614 P.2d 1272 (1980); WPI 32.01.

Nothing in the language of RCW 41.26.281 warrants a different conclusion in the context of LEOFF actions.

The City argues that the court should interpret the language “as otherwise provided by law” as referring to the workers’ compensation statutes. But to interpret this language in this fashion would reverse the meaning of the language used by the legislature in RCW 41.26.281 to prohibit actions against governmental employers instead of allowing such actions as this language clearly intends. In addition, our courts have interpreted this language as requiring the application of other tort provisions under Washington law. For example, in *Hansen v. City of Everett*, 93 Wn. App. 921, 971 P.2d 111 (1999), the court held that under this language the contributory fault provisions of RCW 4.22.005 and RCW 4.22.015 apply in LEOFF actions:

The Hansens [both spouses] contend that principles of comparative fault do not apply to LEOFF’s “excess damages” provision, RCW 41.26.281. The City, on the other hand, maintains that the plain language of this provision and of the comparative fault provision, RCW 4.22, mandate that comparative fault principles be applied to LEOFF’s “excess damages” provision. We agree with the City.

“Absent ambiguity, a statute’s meaning must be derived from the wording of the statute itself without judicial construction or interpretation.” *Fray v. Spokane County*, 134 Wn.2d 637, 649, 952 P.2d 601 (1998) (footnote omitted). LEOFF’s “excess damages” provision provides:

If injury or death results to a member from the intentional or negligent act or omission of a member's governmental employer, the member, the widow, **widower, child, or dependent of the member shall have the privilege to benefit** under this chapter and also have cause of action against the governmental employer *as otherwise provided by law*, for any excess of damages over the amount received or receivable under this chapter.

RCW 41.26.281 (emphasis added).

And the comparative fault statute provides:

In an action based on fault seeking to recover damages for injury or death to person or harm to property, any contributory fault chargeable to the claimant diminishes proportionately the amount awarded as compensatory damages for an injury attributable to the claimant's contributory fault, but does not bar recovery. This rule applies whether or not under prior law the claimant's contributory fault constituted a defense or was disregarded under applicable legal doctrines, such as last clear chance.

RCW 4.22.005. “‘Fault’ includes acts or omissions ... that are in any measure **negligent or reckless** toward the person or property of the actor or others[.]” RCW 4.22.015.

The language of these statutes is clear and unambiguous. Under RCW 41.26.281, the Hansens have a cause of action against the City for damages *“as otherwise provided by law.”* This lawsuit is an action to recover damages for injury based on the City's alleged negligent act toward his person. Accordingly, we hold that the comparative fault statute applies to the Hansens' lawsuit based on fault under LEOFF's “excess damages” provision.

Hansen, 93 Wn. App. at 924-925 (emphasis added in last paragraph).

The only limitation in RCW 41.26.281 on the recovery of an injured firefighter and/or his or her dependents is that a governmental employer can

only be held liable for “any excess of damages over the amount received or receivable under this chapter.” RCW 41.26.281. In other words, the statute gives the governmental employer an offset for any worker’s compensation benefits that the injured firefighter has received or will receive in the future. *See Lascheid v. City of Kennewick*, 137 Wn. App. 633, 154 P.3d 307 (2007). In *Lascheid*, the court held that LEOFF members have a cause of action for any excess of damages over the amount received under LEOFF for injuries caused by employer negligence, and that an offset is taken against the gross amount of the verdict, and the court then applies the comparative negligence calculation. Contrary to the City’s claim, this language does not bar non-economic or economic claims of any kind. Rather, this language merely prevents the injured firefighter from receiving a double recovery for the portion of his or her damages covered by workers’ compensation benefits. There is no double recovery in providing for non-economic loss of consortium damages.

The City also claims that RCW 41.26.281 prohibits derivative actions because Washington courts have barred both wrongful death and loss of consortium claims under the exclusive remedy provisions of our workers’ compensation statutes. But this argument ignores the fact that LEOFF benefits are governed by chapter 41.26 RCW, not the workers’ compensation

statutes in Title 51 RCW and that our Supreme Court has recognized that to the extent that Title 51 is inconsistent with full compensation under RCW 41.26.281, LEOFF supersedes and expressly expands on these limited Industrial Insurance Act remedies. *See Fray*, 134 Wn.2d at 648. The City’s argument also ignores that the legislature’s use of the terms “*widow*” and “*widower*” in the language of RCW 41.26.281 shows a clear intent to allow wrongful death actions under the statute, which by their very nature would derive solely from the death of the firefighter. *See Locke v. City of Seattle*, 162 Wn.2d 474, 172 P.3d 705 (2007) (personal representative of a Seattle Police Officer – the decedent’s wife -- brought a wrongful death action against the City under LEOFF's “right to sue” provision for the officer’s death).

In addition, our appellate courts have decided several LEOFF cases that have involved loss of consortium claims. For example, in *Locke*, the court consolidated two LEOFF cases both of which involved claims. As mentioned above, one case was for the wrongful death of a police officer. The other case was for injuries sustained by a firefighter and initially included a loss of consortium claim by the firefighter’s wife as shown by the caption of the case. Likewise, *Hansen v. City of Everett*, *supra*, was a LEOFF case brought by a marital community. Similarly, *Elford v. City of Battle Ground*,

87 Wn. App. 229, 941 P.2d 678 (1997) involved a LEOFF claim against a city brought on behalf of a husband and wife.

Nothing in the language of RCW 41.26.281 precludes claims such as the claim brought by Mrs. Murray. The Legislature clearly extended the benefits of the statute to dependents of the injured firefighter in RCW 41.26.281. Because nothing in the statute precludes or prohibits the spouse of an injured firefighter from asserting a claim for loss of consortium, the City's motion for partial summary judgment should have been denied and Mrs. Murray should be allowed to go forward with her claim as a matter of clear legislative edict and case law.

The analysis applied to loss of consortium is the same for all tortious conduct, including outrage and strict liability.

III. CONCLUSION

The City is no different than any of us. Its reckless and outrageous conduct in its two decades of firefighter exposures to radioactive radon is shocking and its cavalier attitude regarding firefighter safety is at the heart of imposition of strict liability. Its deceit and failure to investigate and report to its firefighters the radon exposures also tolls the statute of limitation. The exposure report signed by Murray by order of the City does nothing to

exonerate the City or start the statute of limitations ticking for decades of deceit and misconduct.

WPI 1.07 Corporations and Similar Parties:

The law treats all parties equally whether they are government entities or individuals. This means that government entities and individuals are to be treated in the same fair and unprejudiced manner.

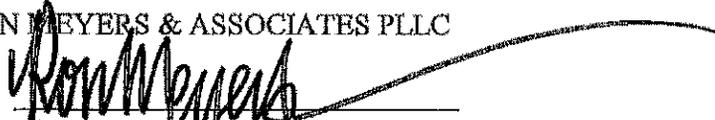
Murray has been prejudiced by the premature granting of summary judgment in favor of the City. The government has been treated preferentially by the granting of summary judgment by the trial judge when discovery had just begun and the City's conduct violated *Fison's, id.*

The City's bringing of a motion for summary judgment after data dumping 200,000 pages of discovery on Plaintiff shortly before filing its motion is unjust and unfair and tantamount to trial by ambush. The conduct violates the principles of full and fair discovery set forth in *Fisons. id.*

All decisions of the trial court should be reversed and remanded for trial by jury -- after full and fair discovery.

DATED: October 11, 2017.

RON MEYERS & ASSOCIATES PLLC

By: 

Ron Meyers, WSBA No. 13169

Matthew G. Johnson, WSBA No. 27976

Tim Friedman, WSBA No. 37983

Attorneys for Personal Representative for Firefighter Murray

RON MEYERS & ASSOCIATES PLLC

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