

Consolidated No. 79222-4
(Formerly Court of Appeals No. 55256-2-I)
No. 79381-6
(Formerly Court of Appeals No. 57725-5-I)

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

KEVIN J. LOCKE and TORI LOCKE,
Respondents,
v.
THE CITY OF SEATTLE,
Petitioner.

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MARGARET A. LINDELL, Personal Representative for the
Estate of GARY R. LINDELL, deceased,
Respondent,
v.
THE CITY OF SEATTLE,
Petitioner.

**CITY OF SEATTLE'S RESPONSE TO BRIEF OF AMICUS
CURIAE WASHINGTON COUNCIL OF POLICE AND SHERIFFS,
SEATTLE POLICE OFFICERS' GUILD AND KING COUNTY
POLICE OFFICERS' GUILD**

THOMAS A. CARR
Seattle City Attorney

MARCIA M. NELSON, WSBA #8166
REBECCA BOATRIGHT, WSBA #32767
Assistant City Attorneys
Attorneys for Petitioner

Seattle City Attorney's Office
600 Fourth Avenue, 4th Floor
PO Box 94769
Seattle, Washington 98124-4769
(206)

684-8200

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I. INTRODUCTION

The Washington Council of Police and Sheriffs, the Seattle Police Officers' Guild, and the King County Police Officers' Guild (collectively referred to herein as the "police council and guilds" or "amicus") argue that the right to sue provision of RCW 41.26.281 somehow attracts applicants into police and fire service. Neither evidence nor common sense supports this claim. On the record before this Court, Washington stands alone in the nation as having burdened its local governments with a workers' compensation system for police and fire fighters that fails to provide immunity from suit. No evidence has been presented that the other 49 states have greater difficulty than Washington in obtaining or retaining applicants for police or fire service.

The police council and guilds submit that they have "expertise in . . . on-the-job injury to law enforcement officers." (Amicus Brief 2) They express concern about the effect of injuries and death upon "officers, their families, and their communities." However, equal concern should apply to all public and private servants who are killed or seriously injured at work. Serious injury and death in the workplace is a tragedy for all affected – not just employees in hazardous industries. As the United States Supreme Court observed, "A machine as well as a bullet may produce a wound, and the disabling effect may be the same." *Mountain*

Timber v. State of Washington, 243 U.S. 219, 240, 37 S. Ct. 260, 266, 61 L. 3d. 685 (1917). It is beyond comprehension to suggest that such a tragedy is diminished in any measure by subjecting the coworkers to the ordeal of litigation during which plaintiffs necessarily lay blame at the feet of the coworkers, supervisors, and commanders who must undertake split second, complex, coordinated tactical decisions necessary to protect lives and property during uncontrolled emergencies.

As the police council and guilds point out, police and fire fighters receive substantial monetary compensation for work related death or disabilities that no other workers receive. For example, *see* section III.C., *infra*, for a description of the substantial benefits received by Officer Lindell and his widow in connection with his injury and death. These benefits far exceed those available to other workers, public or private.

II. ISSUES ADDRESSED BY POLICE COUNCIL AND GUILDS

The police council and guilds assert at page 3 that review before this Court is limited to two issues. They are mistaken. *See* Issues Presented for Review at pages 1-2 of Petition for Review of City of Seattle in *Locke v. City of Seattle*. *See also* Issues Presented at page 2 of Brief of Appellant in *Lindell v. City of Seattle*.

While recognizing that the City challenges LEOFF both on constitutional grounds and on sovereign immunity grounds, the police

council and guilds' brief is silent on sovereign immunity, focusing entirely on the constitutional issues.

III. LEOFF VIOLATES ARTICLE I, SECTION 12 OF THE WASHINGTON CONSTITUTION

A. RCW 41.26.281 IS UNCONSTITUTIONAL UNDER TRADITIONAL EQUAL PROTECTION PRINCIPLES

The police council and guilds devote much discussion to whether the right to sue provision of LEOFF violates the privileges and immunities clause under an independent state analysis. However, this Court need not reach this issue (which will nevertheless be discussed in section B *infra*) because the statute is unconstitutional under traditional equal protection analysis. Settled law throughout the country, with no minority view, establishes that workers' compensation laws must provide immunity from suit as the quid pro quo for requiring employers to fund no fault benefits. *Mountain Timber Co. v. Washington*, 243 U.S. 219, 233, 37 S. Ct. 260, 61 L. Ed 685 (1917); *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 932 P.2d 628, *as amended*, 945 P.2d 1119 (1997); *Epperly v. City of Seattle*, 65 Wn.2d 777, 399 P.2d 591 (1965); *Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325, 162 P. 546 (1917); *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915). Amicus do not suggest that these cases were wrongly decided in any respect. This Court should follow established precedent and declare

the right to sue section of LEOFF, RCW 41.26.281, unconstitutional after applying a rational basis test.

The hallmark of the irrationality of a right to sue granted to a small subclass of workers' compensation participants is in the patent inconsistency of the right to sue with the "fundamental tenet" of workers' compensation statutes (*Manor*, 131 Wn.2d at 450) that resulted from the "great compromise between employers and employed" (*Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 590-91, 158 P. 256 (1916)).

Nothing in the legislative history supports a legislative intention to authorize suit against LEOFF employers in situations where other employers are immune. To the contrary, LEOFF's express legislative intention is to treat LEOFF employers and employees similarly to other employers and employees by providing "sure and certain" workers' compensation benefits to employees and provide LEOFF employers with "protection . . . from actions at law". RCW 41.26.270. The legislative history of SSB 554 (now codified as RCW 41.26.270 and 41.26.281) matches this intention to provide immunity. (Journal of the House 1971 1st Ex. Sess., pp. 1750-51.) The only reference in this legislative history is an assurance to cities that the immunity language was in the bill.

Thus, the right to sue provision not only has no rational basis but in fact is entirely at odds with the purposes of the enactment – to provide

sure and certain benefits to LEOFF employees and to provide immunity to LEOFF governmental employers.

In other situations involving acts at law or affirmative defenses to them, this Court found no rational basis for legislation that granted special privileges or immunities in litigation. *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998), struck down a statute of repose in RCW 4.16.350(3) because it offended the privileges and immunities clause by favoring the medical profession with rights not accorded to other negligent defendants who caused personal injury. RCW 4.16.350(3) was unconstitutional even though the enactment matched legislature's express intention.

Likewise, a special bill granting special litigation rights was held unconstitutional where it authorized one corporation to sue the State of Washington beyond the statute of limitations because doing so offended the privileges and immunities clause of art. I, section 12. (*Alton V. Phillips Co. v. State*, 65 Wn.2d 199, 396 P.2d 537 (1964).) This Court so held even though the legislative action only affected the State of Washington itself and the State legislature authorized suit against itself. Here, the legislature has authorized suit against municipalities (while assuring municipalities that it was providing immunity) but has not authorized similar suits against itself by Washington State Patrol

members. *See* RCW ch. 43.43. Amicus here makes no mention of this irrationality.

Amicus ignores *DeYoung* but attempts to distinguish *Alton V. Phillips* on the basis that only one entity was provided with a special right to sue. This is a distinction without a difference. Art. I, Section 12 specifically prohibits both the granting of special rights to individual citizens and to classes of citizens. *DeYoung* applies this principle where a class of persons were provided with special defenses in litigation.

An additional case where this Court struck down on equal protection grounds a special bill favoring a class of defendants is found in *Hunter v. North Mason High School*, 85 Wn.2d 810, 818-19, 539 P.2d 845 (1975). *Hunter* analyzed the constitutionality of RCW 4.96.020 which required plaintiffs to give formal notice of their claims against governmental entities within 120 days. *Hunter* held that government was placed on an “equal footing with private parties defendant” by the waiver of sovereign immunity and, applying equal protection principles, held that no rational basis exists for favoring government in litigation.

Relying upon *Hunter v. North Mason High School*, 85 Wn.2d at 817-19, Justice Sanders opined in his partially concurring and partially dissenting opinion in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005),

Hunter is clear. A statute the purpose of which is to favor the government in litigation lacks rational basis.

Habitat Watch, 155 Wn.2d at 428 (J. Sanders, partially concurring and partially dissenting). Likewise here, a statute the purpose of which is to disfavor the government in litigation lacks rational basis.

Amicus argues that the right to sue provision was enacted to increase safety, arguing that this is a sufficient “rational basis.” Amicus is mistaken. As the United States Supreme Court noted in *New York Central Railroad Co. v. White*, 243 U.S. 188, 207, 37 S. Ct. 247, 254, 61 L. Ed. 667 (1917), “This [workers’ compensation] statute does not concern itself with measures of prevention, which presumably are embraced in other laws.” Likewise, the purpose of LEOFF was to provide an “actuarial reserve system” to fund benefits for employees in occupations that present unavoidable risks inherent in the occupations well outside the control of the employer. RCW 41.26.020. The right to sue entities for monies over and above the funds in the actuarial reserve system is completely inconsistent with an actuarial system of sure and certain benefits.

Amicus’ argument that improved safety is encouraged by the enactment of a right to sue is belied by the fact that this is a unique statute in the nation. Nobody has suggested that police and fire fighters in the

State of Washington have fewer injuries or deaths (or risk thereof) as compared to all other states as a result of this unprecedented statute.

On the issue of improved safety in employment, there can be no rational basis for encouraging greater safety for LEOFF employees than for employees in other hazardous industries. Recent news reports show that other occupations continue to be more hazardous than police and fire fighting. A recent article states that farmers in 2005 were “more than twice as likely to die on the job than police officers . . . and nearly four times more likely to be killed at work than firefighters.”¹ This is consistent with the evidence submitted in *Lindell v. City* below, from the Bureau of Labor Statistics, U.S. Department of Labor, which shows that many occupations involve greater risk of injury and death including logging, fishing, pilots and navigators, structural metalworkers, drivers-salesworkers, roofers, electrical power installers, farmworkers, construction laborers, and truck drivers. CP 1305-22. Amicus concedes that other occupations involve greater risk of injury and death, stating at page 16, “The City is of course correct that other kinds of work involve similar or greater risk of injury and death.”

¹See http://msn.careerbuilder.com/custom/msn/careeradvice/viewarticle.aspx?articleid=604&SiteId=cbsnhp4604&sc_extcmp=JS_604_home1>1=9965&cbRecursionCnt=1&cbsid=705ef903e2444b35b1dc4c375c6dbe45-233928369-RZ-4

Amicus points to recent news articles regarding difficulty throughout the nation in recruiting law enforcement, arguing that some theoretical aid to recruitment is a rational basis for the right to sue statute. This illogical argument is devoid of any rational link between the two.

No rational basis exists to favor some public employees with rights at substantial taxpayer expense that other employees (public or private) cannot receive. The right to sue provision of LEOFF cannot withstand constitutional prohibitions under traditional equal protection analysis.

B. LEOFF VIOLATES ART. I, SECTION 12, UNDER AN INDEPENDENT STATE ANALYSIS

Assuming *arguendo* this Court overrules established workers' compensation fundamental tenets and overrules established law that legislative grants of special rights to sue or defend in suit violate Washington's privileges and immunities clause under traditional equal protection principles, this Court must then determine whether an independent state analysis is implicated due to the granting of "positive favoritism" to a class of citizens. *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006). If a legislative act operates as positive favoritism to a class of citizens, the act is unconstitutional.

Amicus argues that the right to sue when others cannot is not a "privilege or immunity" under art. I, section 12. They ignore the clear

language of the Washington Constitution and fail in their attempt to distinguish established precedent from this Court.² As discussed in *Grant County Fire Protection District v. City of Moses Lake*, 150 Wn.2d 791, 812-13, 83 P.3d 419 (2004) (“*Grant County II*”), the right to sue is a “privilege” and immunity from suit is an “immunity.”

Amicus argues that this Court should disregard *Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325, 330, 162 P. 546 (1917) (recognizing that all employers and all employees who come within the requirements of workers’ compensation statutes must “enjoy such privileges and immunities equally, in harmony with the guaranty of § 12 of art. I of our state constitution”). Amicus argues that *Shaughnessy* is old law and should be disregarded based upon this Court’s more recent interpretation of art. I section 12. Amicus misreads this Court’s recent opinions.

Shaughnessy predated both rational basis terminology and positive favoritism analysis. However, it unambiguously relies upon the state constitution’s privileges and immunities clause rather than the federal equal protection clause. The holding in *Shaughnessy* suggests that this Court’s relatively recent analysis of art. I, section 12, is consistent with the

² They also ignore the language of RCW 42.16.281 which states that LEOFF members shall have the “privilege” to both benefit under LEOFF and also have cause of action against the governmental employer for intentional or negligent conduct.

Court's early view of the privileges and immunities clause as providing protections separate and more expansive than the federal equal protection clause.

Amicus relies heavily upon *Grant County II*, for their contention that a special right to sue is not a "fundamental right" under art. I, section 12, citing specifically to pages 812-13 of 150 Wn.2d (pages 5-7 of Brief of Amicus). Amicus fails to mention that *Grant County II* on page 813 lists examples of fundamental rights included within privileges or immunities protections. Specifically included in privileges or immunities protection is "the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law", quoting from *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902). Amicus is disingenuous in suggesting that *Grant County II* is inconsistent with *Shaughnessy*, particularly where the list of issues included within privileges or immunities protection immediately follows the paragraph quoted by amicus at the top of page 5.

Amicus largely ignores *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006) (recognizing that legislation that creates "positive favoritism" would violate art. I, section 12; Justice J. M. Johnson in a concurring opinion included rights to sue and defend in litigation as within the protections of the privileges or immunities clause (*Andersen*, 158 Wn.2d at 60)). Both *Grant County II* and *Andersen* recognize that a right

to sue when others cannot (or the granting of an affirmative defense not available to others) is a violation of Washington's privileges or immunities clause.

If a privilege to sue when others have no such privilege and the deprivation of an immunity that all others have is not a privilege or immunity under art. I, section 12, one can only wonder what would be a privilege or immunity under art. I, section 12. RCW 41.26.281 unambiguously defines the right of LEOFF members to both benefit under LEOFF and sue for damages as a "privilege."

This Court's recent extensive analysis of art. I, section 12 in *Andersen* is entirely consistent with *Shaughnessy* and the unanimous opinion in *Grant County II*. *Andersen* recognized that the privileges or immunities clause is implicated where legislation grants a citizen or class of citizens "positive favoritism". *Andersen's* analysis results from the historical basis for art. I, section 12 and from the unambiguous language of the constitution:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Washington Constitution, art. I, section 12.

C. THE FACT THAT POLICE AND FIRE FIGHTERS RECEIVE OTHER SPECIAL BENEFITS DOES NOT JUSTIFY THE ABSENCE OF IMMUNITY

Amicus argues that, if the City is correct here, other special benefits available to police and fire fighters are likewise unconstitutional, pointing out that they receive other special and more generous benefits than other public employees, even employees in more hazardous occupations such as electrical linework. The constitutionality of those special benefits are not at issue here. Amicus cites no authority for their argument.

Amicus points out that there are numerous ways in which police and fire fighters are specially compensated when severely injured or killed in the line of duty. Here, Officer Lindell was granted and received full line-of-duty disability retirement pension and benefits from the date of his injury until his death on March 13, 2002. (CP 162) He received a monthly pension of 50 percent of his final average salary (the amount he received in salary when he was injured). That benefit was (and is for his widow) tax-free. He also received an excess pension benefit under pre-LEOFF. That excess pension benefit provided him with an additional 10 percent during his lifetime. His widow continues to receive his LEOFF I 50 percent benefit (and will until her death) but does not receive the excess benefit under pre-LEOFF. (CP 162-63) In addition to receiving

his pension, Gary Lindell's medical expenses were fully covered by the City of Seattle. (CP 163)

In addition, Officer Lindell's widow received the following tax-free death benefits:

| | |
|--|----------------|
| Pre-LEOFF statutory death benefit | \$1,000 |
| LEOFF I death benefit | \$150,000 |
| City of Seattle group term life insurance (premiums paid by the City) | \$52,500 |
| U.S. Department of Justice | \$259,038 |
| Seattle Police Relief Association | <u>\$1,500</u> |
| Total death benefits | \$464,038 |

CP 163.

As Amicus concedes, disability and death benefits for police and fire fighters are considerably more generous than disability and death benefits payable under workers' compensation for workers killed or disabled in the course of their employment. These special compensations are not at issue and, in any event, cannot justify a workers' compensation system that fails to provide immunity from suit.

IV. FELA AND THE JONES ACT ARE NOT WORKERS' COMPENSATION STATUTES

Amicus argues that the Federal Employers' Liability Act (FELA) and the Merchant Marine Act (the Jones Act) are precedent for the argument that workers' compensation laws need not provide immunity to employers. However, amicus is mistaken. Neither FELA nor the Jones

act is a workers' compensation act. Neither compels employers to fund no-fault workers' compensation benefits. As such, they are irrelevant to the issues here, and neither FELA nor the Jones Act is analogous.

Whereas LEOFF authorizes members to both obtain sure and certain workers' compensation benefits and maintain an action at law against their employers for additional damages, workers covered under FELA or the Jones Act are limited to the exclusive remedy of the federal act and, while they may bring an action in negligence against their employer, have no rights to benefits under state workers' compensation laws. *See, e.g., Felton v. Southeastern Pennsylvania Transp. Authority*, 757 F. Supp. 623 (E.D. Pa. 1991), *aff'd*, 952 F.2d 59 (3rd Cir. 1991) (individuals covered by FELA are not eligible for workers' compensation under state law); *Garrisey v. Westshore Marina Associates*, 2 Wn. App. 718, 469 P.2d 590 (1970) (state workers' compensation act can have no application where activity of injured employee is within exclusive maritime and admiralty jurisdiction); *Indiana & Michigan Elec. Co. v. Workers' Compensation Com'r*, 403 S.E.2d 416 (W.Va. 1991) (Jones Act seaman ineligible to file claim under workers' compensation act; exclusive remedy was through federal maritime law). Amicus' reliance on *Chandris, Inc. v. Latsis*, 515 U.S. 347, 356, 115 S. Ct. 2172, 132 L. Ed. 2d 314 (1995) is likewise misplaced; as the *Chandris* court made clear, it is

only those injured workers who fall outside the scope of the federal remedies who may recover under the state workers' compensation system. *Chandris*, 515 U.S. at 356.

Further, while the Jones Act does provide for no-fault coverage for "maintenance and cure" of an injured seaman, it is not a statutory workers' compensation remedy and, as courts have noted, should not be analogized as such. *See, e.g., Newport News Shipbuilding and Dry Dock Co. v. Hall*, 674 F.2d 248 (4th Cir. 1982). Instead, the maintenance and cure provision is more properly viewed as a contractual form of compensation, deeply rooted in centuries-old maritime law. A shipowners' obligation to provide maintenance and cure is considered to be an implied term of the contract for maritime employment. *See, e.g., Vaughan v. Atkinson*, 369 U.S. 527, 82 S. Ct. 997, 8 L. Ed. 2d 88 (1962).

V. CONCLUSION

Equal protection is clear: This Court has consistently held that a statute the purpose of which is to favor a class of persons in litigation lacks rational basis. LEOFF cannot withstand either traditional equal protection analysis or independent state analysis.

DATED this 13th day of June, 2007.

Respectfully submitted,

THOMAS A. CARR
Seattle City Attorney

By: 

MARCIA M. NELSON, WSBA #8166
REBECCA BOATRIGHT, WSBA #32767
Assistant City Attorneys

Attorneys for Appellant City of Seattle

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