

79222-9

55256-2

No. ~~52928-51~~

**DIVISION I OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON**

KEVIN J. LOCKE and TORI LOCKE, husband and wife and the marital community composed thereof,

Respondent,

vs.

THE CITY OF SEATTLE, a municipal corporation; THE CITY OF SEATTLE FIRE DEPARTMENT; JAMES SEWELL, MOLLY DOUCE,

Petitioners,

and JOHN CAMERON AND, "JOHN DOES" 1-5, in their individual capacities, and the STATE OF WASHINGTON, its subdivisions and agencies, and the WASHINGTON STATE PATROL,

Defendants.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS

MILTON G. ROWLAND WSBA #15625
Assistant City Attorney
City of Spokane
Attorney for Amicus Curiae Washington
State Association of Municipal Attorneys

2011/11/03 11:09
8

Spokane City Attorney's Office
W. 808 Spokane Falls Boulevard
Spokane, Washington 99201
(509) 625-6225

TABLE OF CONTENTS

	Page
I. IDENTITY OF AMICUS CURIAE	1
II. STATEMENT OF THE CASE	1
A. Description of LEOFF System.	2
B. The Statutes	2
C. Statement of Facts.....	5
III. STATEMENT OF ISSUES	5
IV. ARGUMENT.....	6
A. The LEOFF statute is unconstitutional.	6
1. RCW 41.26.281 Violates Due Process and Art. I, § 12, of the Washington State Constitution.....	6
2. 2. RCW 41.26.281 Violates Wash. Const. Art. II, § 19.....	12
B. Plaintiff's claim is barred by sovereign immunity	15
C. Cities have standing	17
V. CONCLUSION.....	18

TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
<i>Bennett v. State</i> , 117 Wn. App. 483, 70 P.3d 147 (2003), <i>rev. denied</i> , 151 Wn.2d 1004 (2004).....	13
<i>Citizens for Responsible Wildlife Management v. State</i> , 149 Wn.2d 622, 71 P.3d 644 (2003).....	13
<i>City of Seattle v. State</i> , 103 Wn.2d 663, 668, 694 P.2d 641 (1985)	18
<i>Epperly v. City of Seattle</i> , 65 Wn.2d 777, 399 P.2d 591 (1965).....	9
<i>Fray v. Spokane County</i> , 134 Wn.2d 637, 952 P.2d 601 (1998)	14
<i>Gillis v. Walla Walla</i> , 94 Wn.2d 193, 616 P.2d 625 (1980)	11
<i>Grant Co. Fire Protection Dist. No. 5 v. City of Moses Lake</i> , 145 Wn.2d 702, 42 P.3d 394 (2002).....	17
<i>Grant Co. Fire Protection Dist. No. 5 v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004).....	17
<i>In re Boot</i> , 130 Wn.2d 553, 925 P.2d 964 (1996).....	13
<i>Kaya v. Partington</i> , 681 A.2d 256 (1996)	19
<i>Manor v. Nestle Food Co.</i> , 131 Wn.2d 439, 932 P.2d 628 (1997)	9, 10
<i>Mount Spokane Skiing Corp. v. Spokane Cy.</i> , 86 Wn. App. 165, 936 P.2d 1148 (1997), <i>rev. denied</i> , 133 Wn.2d 1021 (1997).....	13
<i>Mountain Timber Company v. Washington</i> , 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685 (1917).....	7
<i>New York Central R.R. Co. v. White</i> , 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917)	8
<i>Seattle First Nat'l Bank v. Shoreline Concrete Co.</i> , 91 Wn.2d 230, 241, 588 P.2d 1308 (1978).....	9
<i>Seattle Sch. Dist. 1 v. State</i> , 90 Wn.2d 476, 490, 585 P.2d 71 (1978).....	18

<i>State v. Daggett</i> , 87 Wash. 253, 151 P. 648 (1915).....	7
<i>State v. Lee</i> , 96 Wn. App. 336, 979 P.2d 458 (1999)	16
<i>State v. Thiessen</i> , 88 Wn. App. 827, 828, 946 P.2d 1207 (1997)	15
<i>State v. Thomas</i> , 103 Wn. App. 800, 14 P.3d 854 (2000), <i>rev. denied</i> , 143 Wn.2d 1022, 29 P.3d 719 (2001).....	12
<i>State v. Turner</i> , 114 Wn. App. 653, 59 P.3d 711 (2002).....	16
<i>United States v. Olson</i> , ___ U.S. ___, 126 S.Ct. 510, 163 L.Ed.2d 306, 74 USLW 4008, 2005 Daily Journal D.A.R. 13,151, 18 Fla. L. Weekly Fed. S 573 (U.S. Nov 08, 2005) (NO. 04-759).....	16, 17
<i>Zahler v. Department of Labor and Industries</i> , 125 Wash. 410, 217 P. 55 (1923).....	8

Statutes

Revised Code of Washington 4.96.010.....	14, 15, 16
Revised Code of Washington 4.96.010(1).....	13
Revised Code of Washington 41.26.270.....	2, 3, 6, 10, 11
Revised Code of Washington 41.26.281.....	1, 2, 4, 5, 6, 10, 12, 13, 14, 15
Revised Code of Washington 41.26.901.....	12
Revised Code of Washington 41.50.110.....	3
Revised Code of Washington 41.26.....	2, 3, 6
Revised Code of Washington 51.....	2, 3, 4, 6, 9, 10
Revised Code of Washington 51.04.010.....	10

Constitutional Provisions

Wash. Const., Article I, § 12.....	5, 6, 17
Wash. Const., Article II, § 19	12, 13, 14

Other Authorities

1971 Wash. Laws, 1 st Ex. Sess., ch. 257.....	13
2A ARTHUR LARSON, WORKMEN’S COMPENSATION LAW § 72.33, at 14-290.3 (1993).....	10
The Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b)(1)	16
Workmen’s Compensation Act, Chap. 74 of the laws of 1911	7

I. IDENTITY OF AMICUS CURIAE

The Washington State Association of Municipal Attorneys (hereinafter “WSAMA”) submits this brief. WSAMA is a non-profit corporation of attorneys representing cities, towns and other municipalities from larger cities such as the City of Spokane to the Town of Krupp, population 65.

II. STATEMENT OF THE CASE

Several times in the past century, Washington and other courts have expressed “grave” concerns about removing employer immunity from an industrial insurance statute. It is everywhere agreed that *only* the quid pro quo of immunity from civil actions renders industrial insurance laws constitutionally permissible. Yet Washington alone has purportedly removed employer immunity from one class of industrial insurance laws: those involving law enforcement officers and firefighters.

WSAMA believes that the time has come to address the “grave” concerns echoed in cases that remain vital and cogent over the years. Although numerous cases have dealt with the statute in question here, RCW 41.26.281, not one word has been addressed to the constitutionality of depriving municipal employers of *both* immunity from civil suits by paramilitary (police and fire) employees *and* common law defenses to

employer liability absent fault. This Court is respectfully requested to reverse on constitutional grounds.

A. Description of LEOFF System.

The City of Seattle challenges the right-to-sue portion of the statutory framework of the workers' compensation system that applies to police and firefighters: the Law Officers' and Fire Fighters' Retirement System Act (LEOFF), RCW Chapter 41.26. The workers' compensation system that applies to non-police and fire personnel (RCW Title 51) contains a quid pro quo for requiring employers to fund the system. The quid pro quo is protection from tort liability. The LEOFF statutory scheme claims to provide protection from tort liability but in reality does not. Absent such a quid pro quo, such a purported workers compensation scheme cannot withstand constitutional or sovereign immunity challenge.

B. The Statutes.

RCW 41.26.270, the statutory section immediately preceding the "right to sue" statute found at RCW 41.26.281, purports to provide the basic underlying policy of providing "sure and certain" benefits while abolishing tort causes of action. This lawsuit shows that any protection from suit is illusory.

In addition to being a retirement and pension system, the Law Officers' and Fire Fighters' Retirement System Act ("LEOFF"), RCW

Chapter 41.26, is a workers' compensation statute that, like RCW Title 51, provides for "sure and certain" benefits for police and fire personnel killed or injured in the line of duty. The statutory scheme compels municipalities to fund the benefits provided under LEOFF. RCW 41.50.110. Likewise, employers including municipalities must fund workers' compensation benefits for covered workers under RCW Title 51. Seemingly consistent with RCW Title 51 and the nature and purpose of industrial insurance, and purportedly in return for being required to fund benefits for injuries without regard to fault, *the LEOFF statute states that civil actions are abolished.* RCW 4.26.270. However, the last seven words of that statute, along with RCW 4.26.281, render that provision illusory:

41.26.270. Declaration of policy respecting benefits for injury or death--Civil actions abolished

The legislature of the state of Washington hereby declares that the relationship between members of the law enforcement officers' and fire fighters' retirement system and their governmental employers is similar to that of workers to their employers and that the sure and certain relief granted by this chapter is desirable, and as beneficial to such law enforcement officers and fire fighters as workers' compensation coverage is to persons covered by Title 51 RCW. The legislature further declares that removal of law enforcement officers and fire fighters from workers' compensation coverage under Title 51 RCW necessitates the (1) continuance of sure and

certain relief for personal injuries incurred in the course of employment or occupational disease, which the legislature finds to be accomplished by the provisions of this chapter and (2) protection for the governmental employer from actions at law; and to this end the legislature further declares that the benefits and remedies conferred by this chapter upon law enforcement officers and fire fighters covered hereunder, shall be to the exclusion of any other remedy, proceeding, or compensation for personal injuries or sickness, caused by the governmental employer except as otherwise provided by this chapter; and to that end all civil actions and civil causes of actions by such law enforcement officers and fire fighters against their governmental employers for personal injuries or sickness are hereby abolished, *except as otherwise provided in this chapter.*

(Emphasis added)

RCW 41.26.281 demonstrates what is “otherwise provided in this chapter.” RCW 41.26.281 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. (Emphasis added.)

The LEOFF statute is similar to the workers’ compensation statute (RCW Title 51) in that it allows for sure and certain relief for workers injured or killed on the job. However, the LEOFF statute deprives

employers with the quid pro quo that justifies requiring employers to fund such a system; LEOFF workers can also sue in tort for negligence.

As such, employers are required to fund the LEOFF compensation system but receive no protection from tort lawsuits. Thus, if an employer of a police officer or firefighter is not at fault, the police officer or firefighter is entitled to benefits funded by the employer. If the employer is at fault, the employee receives LEOFF benefits—but is *also* entitled to any and all tort damages above the benefits funded by the employer.

C. Statement of Facts.

WSAMA adopts the statement of facts contained in the brief filed by the City of Seattle.

III. STATEMENT OF ISSUES

(1) Whether RCW 41.26.281 violates due process and Article I, § 12, of the Washington State Constitution

(2) Whether RCW 41.26.281 violates the requirements of Article II, § 19 of the Washington State Constitution; and

(3) Whether plaintiff's claim is barred by sovereign immunity.

IV. ARGUMENT

A. The LEOFF statute is unconstitutional.

1. RCW 41.26.281 Violates Due Process and Art. I, § 12, of the Washington State Constitution.

A review of cases regarding the workers' compensation laws shows that a statutory scheme which imposes a duty on an employer to fund a no-fault workers' compensation system while providing no protection from suit for negligent conduct is unconstitutional. The cases addressing the issue have discussed it under both equal protection and due process principles.

Article I, § 12, of the Washington Constitution states:

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.

When read together, RCW Chapter 41.26 and RCW Title 51 violate Article I, § 12 in two respects. First, RCW 41.26 grants to a certain class of citizens (firefighters and police officers) a right that does not equally belong to all citizens – that is, the right to sue their employer in tort. Second, RCW Title 51, read in conjunction with RCW 41.26.270 and .281, grants to certain corporations immunities that do not equally belong to all corporations – that is, complete immunity from being sued in tort by

injured employees for negligence. Thus, employers of non-police and fire personnel are immune from negligence suits, whereas employers of police and fire personnel are not – even though both types of employers have to fund workers’ compensation systems. As numerous cases and jurisdictions have held, such a scheme is per se unconstitutional.

The Court discussed constitutionality issues in *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915), where the issue was whether seamen were covered by the provisions of the Workmen’s Compensation Act. The court held that seamen were not covered under the Act and, further, that they could not be covered under the Act. The reason for this conclusion was that the State of Washington was without authority to protect the employers from suits in admiralty in federal courts. And, since the legislature could not provide any protection, it could not impose a duty to fund the workmen’s compensation system. The court described this as a violation of equal protection. *Id.* at 258.

The United States Supreme Court analyzed the issue in *Mountain Timber Company v. Washington*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685 (1917), where a logging company challenged the constitutionality of Washington’s then recently enacted Workmen’s Compensation Act, Chap. 74 of the laws of 1911. The State had established a state fund for the compensation of workmen injured in hazardous employment (when only

workers employed in hazardous occupations were required to be covered under workmen's compensation laws) and required employers of such workers to fund it. The Supreme Court summarized the purpose of workmen's compensation statutes:

. . . the fundamental purpose of the act [the Workmen's Compensation Act] *is to abolish private rights of action for damages to employees* in the hazardous industries (and in any other industry, at the option of employer and employees), and to substitute a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazard of each class of occupation.

243 U.S. 219 at 233 (emphasis added). At the same time, the Supreme Court recognized that employers' constitutional rights would be violated if the "quid pro quo" of freedom from suit were not included:

. . . yet it is evident that *the employer's exemption from liability to private action is an essential part of the legislative scheme and the quid pro quo* for the burdens imposed upon him, so that if the act is not valid as against employees, it is not valid as against employers.

Id. at 234. See also *New York Central R.R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917). The necessity for a workers' compensation scheme to include protection from tort liability has been recognized in innumerable cases, including *Zahler v. Department of Labor and Industries*, 125 Wash. 410, 217 P. 55 (1923), which recognized that employers of seamen, whose rights to suit are federal and thus not able to

be abrogated by the State, could not be required to fund workers' compensation benefits.

Epperly v. City of Seattle, 65 Wn.2d 777, 399 P.2d 591 (1965), recognized that a workers' compensation scheme that imposed a duty to fund the system without protecting the employer from tort liability would present "grave constitutional questions", stating:

We are impressed, as was the trial court, with the incongruous result necessarily flowing from the plaintiff's theory under which the owner of the premises who either directly or indirectly pays the insurance premium based on the hazards of his undertaking gets no protection from the employees of the contractor who may be injured in the course of the work for which the premiums are paid. *The construction of the statute to permit such a result presents grave constitutional questions which have not been adequately argued.*

Id. at 787 n.1 (emphasis supplied). *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 932 P.2d 628 (1997), held that a parent corporation was immune because it, as a self-insurer under Title 51, was responsible for payment of industrial injury benefits:

This Court has "consistently held that when an employer ... pays its industrial insurance premiums pursuant to the Act the employer may no longer be looked to for recourse." *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 241, 588 P.2d 1308 (1978). We should not now disregard *this fundamental tenet* of the IIA.

Manor, 131 Wn.2d at 456 (emphasis added). *Manor* quoted from Professor Larson—the premier authority on workers' compensation laws:

By fulfilling its obligations to *Manor* under Title 51, *Nestle* should a fortiori, be entitled to its side of the quid pro quo central to the entire workers' compensation statutory design: it should be immune from suit by Manor. In the words of the late Professor Larson, "*immunity follows compensation responsibility.*" 2A ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 72.33, at 14-290.3 (1993).

Id. at 450 (emphasis added).

RCW 41.26.270, the statutory section immediately preceding the "right to sue" statute found at RCW 41.26.281, purports to provide the basic underlying policy of providing "sure and certain" benefits while abolishing tort causes of action. The language in RCW 41.26.270 is similar to that found in RCW Title 51, RCW 51.04.010, whereby the workers' compensation system likewise provides "sure and certain relief" while abolishing civil causes of action for negligence—except that the last seven words in RCW 41.26.270 defeat the abolition of civil causes of action. While the LEOFF statute gives lip service to abolishing negligence causes of action, RCW 41.26.281 authorizes suit for negligence "for any excess of damages over the amount received or receivable under this chapter." The effect is that there is "sure and certain" relief whether or not the employer is negligent and yet there is no avoidance of or reduction in potential tort damages if the employer is at fault.

Gillis v. Walla Walla, 94 Wn.2d 193, 616 P.2d 625 (1980), recognized that the legislature intended to provide the quid pro quo of employer protection from suit:

[T]he declaration of policy in RCW 41.26.270 indicates a legislative concern that there be sure and certain relief for a member's injuries, on the one hand, and protection for the employer from actions at law on the other. Appellant's interpretation of the statutory system would undermine this legislative intent. Pain, suffering, and to a lesser extent, disability and disfigurement are components of most personal injury actions. Accordingly, if appellant's position is accepted, members would be able to sue their governmental employers every time personal injury resulted from an intentional act or a negligent act or omission. This constant exposure to legal action would make both the extent of the relief and the protection from litigation uncertain thus destroying the clear legislative policy set forth in RCW 41.26.270.

Gillis, 94 Wn.2d at 197.

In *Gillis*, the Court addressed whether tort damages should be reduced by LEOFF benefits. The Court apparently assumed that the employer was receiving some protection under their analysis. However, any perceived protection is illusory. Even without the LEOFF statute or any workers' compensation statute, if an employee had a cause of action in tort against his employer, any benefits paid or funded by the employer would be offset against any recovery. There would be no bar based upon collateral source because the source of the monies would not be collateral – it would be direct. Therefore, because governmental employers of

police and fire personnel are required to fund a workers' compensation-type benefits program with only illusory protection from suit, this court should hold that RCW 41.26.281 is unconstitutional.¹

2. RCW 41.26.281 Violates Wash. Const. Art. II, § 19.

As will be discussed in section B *infra*, plaintiff's claim is barred by sovereign immunity because there can be no public liability where there is no private liability. But if RCW 41.26.281 is read to remove sovereign immunity, it is nevertheless unconstitutional because the bill enacting it violates Article II, § 19 of the state constitution. That provision provides that "No bill shall embrace more than one subject, and that shall be expressed in this title." Violation of either the single-subject requirement or the subject-in-title requirement alone is sufficient to render the relevant provisions unconstitutional. *State v. Thomas*, 103 Wn. App. 800, 14 P.3d 854 (2000), *rev. denied*, 143 Wn.2d 1022, 29 P.3d 719 (2001).

In determining whether a bill violates the single subject clause of the state constitution, the court must first determine whether the bill's title is general or restrictive; a general title is broad, comprehensive, and

¹ The remainder of the LEOFF statute will remain in full force and effect. RCW 41.26.901 provides that if any provisions of the LEOFF act are invalid, the remainder of the act will not be affected.

generic, whereas a restrictive title is specific and narrow. *Bennett v. State*, 117 Wn. App. 483, 70 P.3d 147 (2003), *rev. denied*, 151 Wn.2d 1004 (2004). If the title of the bill is restrictive, provisions which are not fairly within such restricted title will not be given force. *Citizens for Responsible Wildlife Management v. State*, 149 Wn.2d 622, 71 P.3d 644 (2003).

In determining whether the subject-in-title requirement is met, the title of the proposed legislation must give notice of the act's contents and there must be rational unity between the subject of the title and provisions of the bill. *Mount Spokane Skiing Corp. v. Spokane Cy.*, 86 Wn. App. 165, 936 P.2d 1148 (1997), *rev. denied*, 133 Wn.2d 1021 (1997). The title of a bill is deemed to comply with constitutional requirements under Article II, § 19 if it gives notice that would indicate to the inquiring mind the scope and purpose of the law. *In re Boot*, 130 Wn.2d 553, 925 P.2d 964 (1996).

Here, the bill containing RCW 41.26.281 violates both the subject-in-title and single-subject requirements of Article II, § 19. First, the title of the bill containing RCW 41.26.281 is "An Act relating to law enforcement officers and firefighters." 1971 Wash. Laws, 1st Ex. Sess., ch. 257. This title gives no notice that the bill expands governmental liability beyond the restrictions of RCW 4.96.010(1). *See* section B *infra*.

Ironically, the Supreme Court has previously addressed the subject-in-title requirement of Article II, § 19 with respect to the right to sue provision of RCW 41.26.281. In *Fray v. Spokane County*, 134 Wn.2d 637, 952 P.2d 601 (1998), the court held that the right to sue provisions of RCW 41.26.281 apply to both Plan I and Plan II members and that the legislature's attempt to remove Plan II members was done in a unconstitutional manner by failing to properly set the amendment out in full in the title of the bill. The court's reasoning in *Fray* applies here as well: if the title of the bill attempting to remove Plan II members from the right to sue provision was insufficient to put reasonable inquiring minds on notice that the right to sue was abolished, the title of the bill containing RCW 41.26.281 is clearly insufficient to put reasonable inquiring minds on notice that a right to sue in violation of sovereign immunity is granted.

Second, the bill containing RCW 41.26.281 violates the single-subject requirement of Article II, § 19 in that it contained not only multiple but substantively conflicting subjects – (1) employer-funded firefighter and law enforcement officer benefits and (2) waiver of the governmental employer's sovereign immunity. If RCW 41.26.281 is read to waive the City's sovereign immunity (i.e., expand the RCW 4.96.010 waiver of sovereign immunity), it is unconstitutional under Article II, § 19 as embracing more than one subject and failing to express its subject in the

title. If RCW 41.26.281 is not read to waive sovereign immunity, then the City is immune from suit under RCW 4.96.010. There is no middle ground.

B. Plaintiff's claim is barred by sovereign immunity.

There has never been a blanket waiver of sovereign immunity. RCW 4.96.010 sets forth the parameters of the waiver of sovereign immunity as follows:

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, *to the same extent as if they were a private person or corporation.*

[Emphasis supplied.]

The foregoing language shows that sovereign immunity is only waived for tortious conduct “to the same extent as if they were a private person or corporation.” Here, only governmental employers of police and fire fighters are subject to workers’ compensation obligations while not being relieved of tort liability.

Recent cases have recognized that sovereign immunity remains a valid defense. In *State v. Thiessen*, 88 Wn. App. 827, 828, 946 P.2d 1207 (1997), the court held that under the doctrine of sovereign immunity, the

State could not be liable for interest on its debt absent the State's consent. In that case, the court held that the State did not give its consent, and, therefore, interest could not be awarded. *Accord, State v. Lee*, 96 Wn. App. 336, 979 P.2d 458 (1999). As *State v. Turner*, 114 Wn. App. 653, 59 P.3d 711 (2002), stated:

As a matter of sovereign immunity, "the state cannot, without its consent, be held to interest on its debts."
. . . .But only the Legislature can adopt a blanket waiver, which it has not done here.

114 Wn. App. at 660 (citations omitted).

Municipalities can only be liable in tort "*to the same extent as if they were a private person or corporation.*" [Emphasis supplied.] RCW 4.96.010. Since LEOFF allows for sure and certain relief while not eliminating tort liability, and since LEOFF applies only to governmental entities, the LEOFF statute violates sovereign immunity. Governmental entities cannot be liable without the same type of liability being imposed on private entities.

The United States Supreme Court recently recognized the sovereign immunity bar where no private cause of action exists, *United States v. Olson*, 126 S.Ct. 510, 163 L.Ed.2d 306 (2005). The Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b)(1), authorizes suits against the United States "under circumstances where the United States, if a private

person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” The federal waiver of immunity matches our state's waiver of immunity in that both waive immunity ONLY to the extent private entities can be sued.

The *Olson* court re-affirmed that governmental liability does not exist without companion private liability under the federal tort waiver of immunity statute. Since the Legislature cannot require private employers to both fund workers' comp and be liable in tort, the Legislature cannot make public employers fund LEOFF and be liable in tort.

C. Cities Have Standing.

The right of municipalities to claim rights under the privileges and immunities clause, Wash Const., art. I, §12, was recognized in *Grant Co. Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) (“Grant Cy. II”), which held that a municipality directly affected has standing to assert rights under that clause. *Grant Cy. II* reaffirmed that the privileges and immunities clause requires an independent constitutional analysis separate from the equal protection clause of the United States Constitution. See *Grant Co. Fire Protection Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 42 P.3d 394 (2002) (“Grant Cy. I”). *Grant Co. II* discussed the possibility of both direct and representational municipal standing. *Grant Cy. II*, 150 Wn.2d at 802-03.

Municipal standing here can rest upon other bases as well. See *City of Seattle v. State*, 103 Wn.2d 663, 668, 694 P.2d 641 (1985), citing *Seattle School District 1 v. State*, 90 Wn.2d 476, 490, 585 P.2d 71 (1978).

V. CONCLUSION

No one can denigrate the public service performed by sworn fire and law enforcement employees. However, workers' compensation statutes applicable to firefighters and police officers must meet the same basic constitutional requirements as other workers' compensation statutes. The only justification for requiring employers to fund workers' compensation laws was that employers were given something in return. Here, that justification is notably absent. If municipalities do not have the same protections from liability as other employers, the statutory scheme is unconstitutional and is barred by sovereign immunity.

The "right to sue" statute is novel and, so far as WSAMA can tell, totally unique. It is also potentially one of the more disruptive statutes for municipal employers, given the paramilitary nature of police and fire organizations. As one court stated, in a similar context:

It would be productive of near chaos if we should recognize a right of action for police officers, firefighters, and crash-rescue crewmembers to sue their superior officers and fellow employees. In a paramilitary organization nothing could be more detrimental to good order and discipline than the encouragement of civil actions by police, fire, and emergency personnel against their employers and their

superior officers arising out of perceived shortcomings in preparing them for dangerous circumstances that they must encounter on a daily basis.

Kaya v. Partington, 681 A.2d 256 (1996).

This Court should reverse.

Respectfully submitted this 3rd day of February, 2006.

Handwritten signature of Milton G. Rowland in cursive. Below the signature, the text "WSBA 8217" is written in a smaller, less legible hand.

Milton G. Rowland, WSBA #15625
Attorneys for Amicus Curiae
Washington State Association
of Municipal Attorneys

CERTIFICATE OF SERVICE

Daniel B. Heid states and declares as follows:

1. I am over the age of 18, not a party to the within action, am competent to testify in this matter, am an employee of City of Auburn, and make this declaration based on my personal knowledge and belief.

2. On February 3, 2006, I directed Stephen King to serve by hand no later than 4:30 pm on February 3, 2006, a true and correct copy of the subjoined "Brief of Amicus Curiae Washington State Association of Municipal Attorneys" and Motion for Leave to file Amicus Curiae Brief upon the following counsel of record for the parties in the matter and return confirmation of receipt for my files:

David J. Wieck
O'Brien & Associates
O'Brien Professional Building
175 NE Gilman Boulevard
Issaquah, WA 98027

William Rutzick
Schroeter Goldmark & Bender
500 Central Bldg
810 Third Avenue, Ste.500
Seattle, W A 98104

Pamela A. Okano
William R. Hickman
Reed McClure
Two Union Square
601 Union Street, Suite 1500
Seattle, WA 98101-1363

Gregory Fuller
Assistant City Attorney
Seattle City Attorney's Office
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769

2006 FEB -3 AM 11:10

3. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 3rd day of February, at Aben,
King County, Washington.

A handwritten signature in black ink, appearing to be 'A. B. S.', written over a horizontal line.