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STATE OF WASHINGTON

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CLERK

(Court of Appeals Division 1, No. 52928-5 I)

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

Respondents,

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, IN  
SUPPORT OF PETITIONERS' APPLICATION FOR  
DISCRETIONARY REVIEW

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## **I. IDENTITY OF AMICUS CURIAE**

The Washington State Association of Municipal Attorneys, a non-profit corporation of attorneys representing the cities and towns of the State (hereinafter “Amicus”) respectfully submits this brief.

## **II. STATEMENT OF THE CASE AND ISSUES**

Amicus accepts and refers to the Court the Statement of the Case set forth in the pleadings of the Petitioners. Amicus also concurs with the Statement of Issues identified in the pleadings of the Petitioners.

## **III. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED**

Consistent with Rule 13.4(b) of the Rules of Appellate Procedure (RAP), this Court should grant review of the ruling of the Court of Appeals as it is in direct conflict with decisions of the Supreme Court, and prior Court of Appeals decisions. Also, it involves significant questions of law under the Constitution of the United States and of the State of Washington. Lastly, it involves issues of substantial public interest that should be determined by the Supreme Court. The constitutional arguments presented by the Petitioners are well reasoned and very deserving of the Court’s consideration. Instead of repeating those valuable arguments, Amicus focuses instead on the purpose of industrial insurance, the practical reality and the fundamental unfairness of burdening local taxpayers with what amounts to a statutory cost for which

the statutory benefits are denied. It is unfair for taxpayers to pay for industrial insurance for their firefighters and law enforcement officers and yet still be vulnerable to the costs and expenses of a lawsuit by those same police and fire employees.

**A. THE PURPOSE OF INDUSTRIAL INSURANCE SUPPORTS PETITIONERS.**

In *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685 (1917), the United States Supreme Court analyzed the constitutionality of Washington’s then new Workmen’s Compensation Act, Ch. 74, Laws of 1911. The statute established a fund to compensate employees injured in hazardous employment and required their employers to fund it. The fundamental purpose of the statute was:

*. . . to abolish private rights of action for damages to employees in the hazardous industries . . . 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 employer protection from tort liability has been recognized in innumerable cases, including *Zahler v. Dept. of Labor and Indust.*, 125 Wash. 410, 217 P. 55 (1923), which recognized that employers of seamen, whose rights to suit are federal and thus cannot be abrogated by the State, could not be required to fund workers' compensation benefits. Also, *Epperly v. 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 . . . 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 added). Similarly, *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 932 P.2d 628 (1997), held that a parent corporation was immune because, as a self-insurer under Title 51, it 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).

Consistent with that, Section 51.04.010 of the Revised Code of Washington (RCW) re-states the purpose and historical reasoning behind Washington’s Industrial Insurance law. The full text of that statute is set forth in Appendix “A” hereto. The legislative intention, as stated in that statute, is clear; that all employee lawsuits against employers are substituted by the requirement that the employers fund the insurance.

Seemingly consistent with RCW Title 51, and with the purpose of industrial insurance, and purportedly in return for being required to fund benefits for injuries without regard to fault, the Law Enforcement Officer’s and Fire Fighter’s Retirement System statutes (LEOFF –

specifically RCW 41.26.270) also suggests that *civil actions against employers are abolished*. RCW 41.26.270 states, in part, as follows:

. . . 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 . . . 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.

RCW 41.26.270 – in part (emphasis added), the full text of which is set forth in Appendix “B” hereto. However, the last few words of that statute (*except as otherwise provided in this chapter*), along with RCW 41.26.281, seemingly render RCW 41.26.270 meaningless. Inconsistent with the purpose of workers' compensation - industrial insurance, and seemingly inconsistent with the entire purpose of (the rest of) RCW 41.26.270, RCW 41.26.281 re-provides the civil action that RCW 41.26.270 purportedly took away. That statute states as follows:

41.26.281. Cause of action for injury or death, when  
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.)

Different than the industrial insurance statutes (RCW Title 51), RCW 41.26.281 deprives employers who are required to fund the LEOFF system any protection from employee lawsuits. Aside from the apparent inconsistency between RCW 41.26.270 and RCW 41.26.281,<sup>1</sup> even though required to fund the system, public employers are deprived the benefits of workers' compensation statutes.

**B. THE COURT OF APPEALS' DECISION POSES A REAL PARAMILITARY SERVICE DILEMMA.**

Amicus urges the Court to consider a second implication of the decision below: the nearly unseen, insidious and corrosive effect it has on the orderly functioning of our police and fire departments by encouraging one police officer or fire fighter to sue another. Police and fire departments are universally understood to be "paramilitary" in nature requiring good order and discipline far unlike other types of employment:

[A] police officer does not have the prerogative of actively disobeying an order from a superior while the officer subjectively determines whether the order is lawful, valid or reasonable because such a practice would thwart the authority and respect which is the foundation of the

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<sup>1</sup> It must be asked what purpose exists at all for RCW 41.26.270, since its elimination of employee-employer civil actions is completely repudiated by the language of the very next section, RCW 41.26.281.

effective and efficient operation of a police force and destroy the discipline necessarily inherent in a paramilitary organization such as the police department.

*Haynes v. Police Bd. of the City of Chicago*, 293 Ill.App.3d 508, 512, 688

N.E.2d 794, 797-797, 228 Ill.Dec. 96,100 (1st Dist. 1997). Moreover:

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 (R.I. 1996). Many negligence claims by a police officer (or firefighter) against a fellow officer is, at its most basic level, a charge of professional failure. How do these two officers interact with one another after the lawsuit is filed as they go about their business of protecting the public? It takes little imagination to see the damage to the relationship between superior and subordinate; it takes less imagination to conclude that police and fire fighting efficiency suffers as a result. The inherent mischief occasioned by such a system is clear and can be illustrated by any number of common-sense examples. A fire commander watches an occupied, multi-story residential building burn. Fearful he/she will be blamed in a lawsuit if an injury to a fire fighter occurs, he/she hesitates to send fire fighters into the building for rescue work and members of the public are injured or killed. Just as the ultimate

economic burden will fall upon the general public in the wake of expanded tort liability, so too the general public will ultimately bear the consequences of decreased order and discipline wrought by the undeniable nastiness and name calling which, regrettably, seem part and parcel of modern litigation.

**C. IF THE DECISION WERE ALLOWED TO STAND, WASHINGTON WOULD BE THE ANOMALY.**

As argued by the Petitioners, the decision below is inconsistent with Washington law. Moreover, if allowed to stand it would transform Washington into the *only* state in the nation requiring municipalities to fund a workers' compensation system without the constitutionally-required *quid pro quo* of protection from suit for injuries. It is one thing to be part of a well-reasoned minority, but quite another to reject the collective, considered wisdom of every jurisdiction in the country. The lower court decision is an aberration requiring correction by this Court.

**D. RESPONDENTS MISREPRESENTED PRIOR LEOFF DECISIONS.**

The Respondents' Answer to the Petition for Review implies that the arguments presented by the Petitioners have already been decided by stating that LEOFF has survived numerous legal challenges to its "constitutional framework", citing *Taylor v. Redmond*, 89 Wn.2d 315, 571 P.2d 1388 (1977); *Gillis v. Walla Walla*, 94 Wn.2d 193, 616 P.2d 625

(1980); and *Fray v. Spokane County*, 134 Wn.2d 637, 952 P.2d 601 (1998). The Respondents leave unsaid the fact that LEOFF has *never* been challenged on the constitutional grounds raised here, and they are simply mistaken when implying that *Taylor*, *Fray* or *Gillis* analyzed the issues here. *Fray*'s constitutional question was resolved solely on article II, section 19 grounds (whether a bill depriving LEOFF II members of the right to sue embraced more than one subject in its title). The constitutional issues presented here -- privileges and immunities, equal protection, due process and sovereign immunity -- have never been addressed by this Court and squarely present a case of first impression.

Two additional, important matters must be addressed. First, central to the constitutional claims raised here, municipalities are required to fund the LEOFF system. In *Taylor* the Court wrote:

. . . police and fire fighters receive no benefits under workmen's compensation, *and industrial insurance premiums are not paid by municipalities*. Instead, the benefits accorded police and fire fighters are under LEOFF.

*Taylor* at 320 (emphasis added). It is not clear from this language whether the Court misapprehended the funding source for LEOFF. Amicus wishes to assure the Court that LEOFF employers, including municipalities and counties, have been statutorily required to fund LEOFF since 1969. 1969 Wash.Laws Ex. Sess., ch. 209, § 8; RCW 41.50.110.

Second, Respondents, quoting from *Hansen v. City of Everett*, 93 Wn. App. 921, 971 P.2d 111 (1999), urge the Court to deny review by touting LEOFF's effect of creating "...a strong incentive for improved safety..." [b]y exposing an employer to liability for negligent acts toward its employees." *Id.* at 926. But, the "inherently dangerous" aspects of police and fire fighting are overwhelmingly caused by the nature of the work -- controlling criminals prone to violence and fighting raging fires -- both of which are beyond the employer's control.

#### IV. CONCLUSION

The LEOFF "right to sue" statute is novel and, so far as Amicus can tell, is totally unique. It is unconstitutional and violates sovereign immunity. Furthermore, in addition to being counter to the reasons behind workers' compensation, the statute is also potentially one of the more disruptive statutes for municipal employers, given the paramilitary nature of police and fire organizations. This Court should thus grant review and should ultimately reverse.

Respectfully submitted this 18th day of October, 2006.

/s/

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Washington State Association  
of Municipal Attorneys

## APPENDIX "A"

51.04.010. Declaration of police power--Jurisdiction of courts abolished

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be *economically unwise and unfair*. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. *The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.*

Emphasis added.

## APPENDIX “B”

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.