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No. 79381-6
Court of Appeals No. 57725-5

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

MARGARET A. LINDELL, Personal Representative for the
Estate of GARY R. LINDELL, deceased,

Respondent,

vs.

THE CITY OF SEATTLE, a municipal corporation,

Petitioner.

**RESPONDENT LINDELL'S MEMORANDUM
IN OPPOSITION TO PETITIONER CITY OF SEATTLE'S
MOTION FOR DISCRETIONARY REVIEW**

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I. PROCEDURAL HISTORY

On January 9, 2006 the Honorable Mary Yu entered an order denying the City of Seattle's Motion for Summary Judgment. See, *Appendix, Exhibit 1*. Petitioner moved for Discretionary Review in Division I of the Court of Appeals. Petitioner's motion was denied by the Court Commissioner on July 5, 2006. See, *Appendix, Exhibit 2*. Petitioner's Motion to Modify the Ruling was denied by the Court of Appeals on September 29, 2006. See, *Appendix, Exhibit 3*.

Petitioner's constitutional argument is identical to the argument presented by the Petitioner in the case of *Locke v. City of Seattle*, 133 Wn. App. 696, 137 P.3d 52 (2006), *petition for review pending* (Supreme Court No. 79222-4). The Court of Appeals rejected the Petitioner's contention that RCW 41.26.281, a statute that has been in existence for 35 years and has been interpreted on multiple occasions by the Supreme Court and Court of Appeals, is unconstitutional. The decision was unanimous.

As noted by the Petitioner, it has petitioned the Supreme Court for review of the Court of Appeal's decision affirming the trial court in *Locke v. City of Seattle*, *supra*. The trial court and Court of Appeals rejected the identical constitutional arguments presented by the Petitioner in the case at bar. Respondent suggests that if the Supreme Court believes that it should exercise its right to review the constitutional issue raised both in this case and in *Locke* that the appropriate vehicle for review would be the Court of Appeal's decision in *Locke* rather than direct review of the interlocutory denial of the City's Motion for Summary Judgment in the case at bar.

II. DIRECT REVIEW

Petitioner has the right to seek review of a decision by the Court of Appeals denying discretionary review of an interlocutory decision pursuant to RAP 13.5. However, that does not allow the Petitioner to sidestep the requirements for direct review of a superior court decision by the Supreme Court. Petitioner has failed to address RAP 4.2 in its Motion for Discretionary Review. Any analysis of RAP 4.2(a), which identifies those types of cases that may be reviewed directly by the Supreme Court, immediately demonstrates that the denial of the City's Motion for Summary Judgment is not the type of decision subject to direct review. On that basis alone, the Petitioner's Motion should be denied.

III. STATEMENT OF THE CASE

Seattle Police Officer Gary Lindell died on March 13, 2002 as a result of a massive seizure he suffered secondary to the brain damage sustained in a fall from Donovan, a SPD police horse, on May 4, 1999. The accident occurred during a training session under the supervision of Training Officer Hansen at the SPD's training facility. For no apparent reason, Donovan started to come up on his hind legs and his head was "porpoising." Officer Lindell came off Donovan's right side, falling backwards with his head snapping back onto the ground.

The "paddock" where the accident occurred had previously been maintained with a thick layer of "hogsfuel," a soft and forgiving mixture of wood chips. Unfortunately, the hogsfuel was scraped off of the hardpan surface into a pile at least two months before this accident and never replaced. Thus, when Officer Lindell fell from Donovan his head

struck hardpan resulting in a fractured skull and permanent brain damage that ultimately led to his death.

The official report prepared by Lt. Getchman of the SPD concluded under "Probable Causes of Injury" that "The most evident unsafe condition leading to Gary's injury is the paddock surface." He notes that the "glacial till" had not been covered to a depth sufficient to prevent injury and that most riding arenas in this area have a groundcover of at least 4-6 inches of soft earth. He recommended that the paddock be covered with soft earth as soon as possible.

There is also considerable evidence that Donovan was unsuited for mounted patrol service. Donovan was purchased on December 9, 1993. Unfortunately, the City failed to complete its evaluation process within the 60 day "return period." The initial evaluation indicated that Donovan's "Main problem is one of not wanting to WHOA." At the conclusion of the evaluation in March, 1994 Officer Stimmel documented that Donovan "has returned to his old and bad habit of spinning off to his left for no apparent reason," and that "Donovan is a stubborn course and will resist situations that he chooses to escape from." He concluded that he did "not know how reliable Donovan will be."

Even though the City has no method by which it documents incidents involving its police horses, discovery to date has revealed eight separate accidents in which police officers have been thrown or fallen from Donovan. No one with the SPD recalls any other police horse with an accident history that even approaches Donovan's.

Discovery together with expert testimony has raised other issues dealing with the decision by the SPD not to provide or require helmets for its mounted patrol officers, the lack of training provided to the Training Officers, the lack of any formal evaluation or

performance testing of new Mounted Patrol officers and the use of a rope halter on May 4, 1999 rather than a bridle and bit.

IV. LEGAL AUTHORITY

A. Discretionary Review

Discretionary review of a denial of a Motion for Summary Judgment is ordinarily not granted. *DGHI Enterprises v. Pacific Cities Inc.*, 137 Wn.2d 933, 949, 977 P.2d 1231 (1999). The Petitioner must demonstrate that the decision by the Court Commissioner of the Court of Appeals, subsequently upheld in a 3-0 ruling by the Court of Appeals, demonstrates an "obvious error which would render further proceedings useless," "probable error and the decision of the Court of Appeals substantially alters the status quo or substantially limits the freedom of a party to act," or "the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the trial court..... as to call for the exercise of revisory jurisdiction by the Supreme Court." RAP 13.5(b).

The arguments presented by the Petitioner do not demonstrate a basis for discretionary review by the Supreme Court. In addition to failing to carry its burden of demonstrating obvious or probable error by the trial court and obvious or probable error by the Court of Appeals in its denial of discretionary review, Petitioner fails to demonstrate that this case is subject to direct review pursuant to RAP 4.2(a).

B. RCW 41.26.281 is Not Unconstitutional

Every constitutional analysis of a statute starts with the proposition that statutes are presumed to be constitutional and all doubts should be resolved in favor of constitutionality. *State ex rel. Smilanich v. McCollum*, 62 Wn.2d 602, 606, 384 P.2d 358 (1963); *Locke v. City of Seattle*, supra @ p. 704.

1. The Petitioner Has Not Established that RCW 41.26.281 is Unconstitutional Under the Privileges and Immunities Clause of Art. 1 § 12 of the Washington State Constitution

The Petitioner never presented any argument to the trial court nor within its Motion for Discretionary Review before the Court of Appeals suggesting that Washington's version of the equal protection clause may be construed as providing greater or different protection than the equal protection clause of the 14th Amendment of the Federal Constitution. This argument was first raised in the Petitioner's Motion to Modify the Ruling of the Court Commissioner denying discretionary review. In addition, at no time in the subject motion or in any other pleadings has the Petitioner analyzed the six factors relevant in determining whether the Washington State Constitution extends broader rights to citizens than the Federal Constitution, as required by this Court in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). Therefore, the Court has no obligation to analyze state constitutional grounds in this case:

"If a party does not provide constitutional analysis based upon the factors set out in *Gunwall*, the court will not analyze the state constitutional grounds in a case." *First Covenant Church v. Seattle*, 120 Wn.2d 203, 224, 840 P.2d 174 (1992).

Nonetheless, even if one was to evaluate this case on the basis of a state constitutional analysis, the Petitioner fails to carry its heavy burden of establishing that this statute is unconstitutional. The Petitioner argues that the statute grants positive

favoritism to a "select few;" apparently referring to all of the firemen and policemen throughout the state. It cites in support of its contention the case of *Alton v. Phillips Co. v. State*, 65 Wn.2d 199, 396 P.2d 537 (1964). In *Alton* special legislation had been passed to benefit a single corporation by waiving the applicable Statute of Limitations in order to allow it to pursue litigation against the State. As noted by this Court, our Constitution reflects the populist suspicion at the time of enactment of political influence exercised by those with large concentrations of wealth. *Fire Protection District v. City of Moses Lake*, 145 Wn.2d 702, 728, 42 P.3d 394 (2002). That concern could be manifested by the special legislation in *Alton* designed to benefit a single corporation. Application of the privileges and immunities clause resulted in a determination by this Court in *Alton* that such special litigation is unconstitutional.

However, providing firemen and police officers with the ability to pursue compensation for injuries caused as a result of their municipal employer's negligence, less an offset for all benefits paid and to be paid under LEOFF, does not benefit a "select few" and passes constitutional muster under the standard of review set forth in *Fire Protection District v. City of Moses Lake*, *supra*. In order for the statute to be constitutional, it only needs to be established that "the legislation applies alike to all persons within a designated class and there is a reasonable ground for distinguishing between those who fall within the class and those who do not." *Fire Protection District v. City of Moses Lake*, *supra* @ p. 731; *United Parcel Service v. Department of Revenue*, 102 Wn.2d 355, 367, 687 P.2d 186 (1984).

This Court has repeatedly expressed the "reasonable grounds" for providing firefighters and police officers with the right to seek compensation for damages caused

by their municipal employers' negligence, less an offset for benefits paid and to be paid under LEOFF:

While the Industrial Insurance Act immunizes most employers from job-related negligence suits, firefighters and police officers, because of the vital and dangerous nature of their work, are provided extra protection and are allowed to both collect workers' compensation and bring job-related negligence suits against their employers." *Hauber v. Yakima County*, 147 Wn.2d 655, 660, 56 P.3d 559 (2002); *Locke v. City of Seattle*, supra @ p. 708.

In addition, our Courts have noted that one of the purposes and effects of RCW 41.26.281 is that, "By exposing an employer to liability for negligent acts toward its employees, the statute creates a strong incentive for improved safety." *Hansen v. City of Everett*, 93 Wn. App. 921, 926, 971 P.2d 111 (1999). Safety is particularly important to individuals who serve the public by being routinely confronted with dangerous situations on the job. In short, even if the Petitioner had the right to have this statute constitutionally analyzed on the basis of its new argument that it grants a "Privilege and Immunity" to a "select few" in violation of Art. 1 §12, this Court has clearly expressed a "reasonable ground" in distinguishing between classifications as defined in this statute.

2. The Petitioner Has Not Established That This Statute is Unconstitutional on Equal Protection Grounds

The Petitioner's original basis for its claim that RCW 41.26.281 is unconstitutional was that it violated the equal protection clause, as embodied in the 14th Amendment of the Federal Constitution and Art. 1 §12 of the State Constitution. When a challenge to a statute does not implicate a "fundamental right or suspect class," a "minimal scrutiny" analysis is applied. *Locke v. City of Seattle*, supra @ p. 707; *Yakima County Deputy Sheriff's Association v. Board of Commissioners*, 92 Wn.2d 831, 835-36,

601 P.2d 936 (1979). As part of this analysis the statute is evaluated to determine whether there is "any rational relation" of the classification to the purposes of the challenged statute. *Id.*

Division I of the Court of Appeals recently held that providing firefighters and police officers with the right to seek compensation for injuries caused by the negligence of their employers, less an offset for benefits paid and payable under LEOFF, does have a rational relation to the purposes of RCW 41.26.281. *Locke v. City of Seattle*, supra. As noted above, this Court has already concluded that the basis for allowing firefighters and police officers to bring job-related negligence suits against their employers is "because of the vital and dangerous nature of their work." *Hauber v. Yakima County*, supra @ p. 660.

The Petitioner's claim that it receives no benefit whatsoever from the Industrial Insurance Act and RCW 41.26.281, with respect to injuries sustained by firefighters and police officers, has been expressly rejected by the Court of Appeals and implicitly rejected by this Court. See, *Locke v. City of Seattle*, supra @ p. 709; *Gillis v. City of Walla Walla*, 94 Wn.2d 193, 196, 616 P.2d 625 (1980), *overruled on other grounds by Flannigan v. Department of Labor & Industries*, 123 Wn.2d 418, 423, 869 P.2d 14 (1994). Petitioner receives an offset for 100% of all benefits paid under LEOFF plus the present value of LEOFF benefits to be paid in the future, irrespective of whether there is any comparative fault or the extent of past and future economic damages awarded by the jury. Therefore, the Petitioner receives an offset for all LEOFF benefits paid and payable, even if the plaintiff's economic damages, as awarded by the jury, are substantially less than those benefits, or the net recovery to the plaintiff is greatly diminished by comparative fault or fault on the part of a non-party. Thus, the offset

provided to the municipal employer under RCW 41.26.281 results in treatment of the municipality that is far more favorable than is generally received by most subrogors in tort litigation. *Locke v. City of Seattle*, supra.

In addition, the injured fire fighter or police officer must prove that his or her employer acted negligently or intentionally. Such plaintiffs cannot proceed on a product liability claim against their employer since such claims are not based on negligence. *Soproni v. Polygon Apartment Partners*, 137 Wn.2d 319, 971 P.2d 500 (1999). *Locke v. City of Seattle*, supra. In summary, this statute serves a legitimate governmental purpose, satisfying the "rational basis" test by providing extra protection to firefighters and police officers to account for the hazardous nature of their occupations, thereby encouraging discipline, safety and efficiency in the workplace. Under the statute, governmental employers receive benefits not available to private parties subject to suits in negligence. As already expressly held by our Court of Appeals, there is no basis upon which to conclude that this 35-year-old statute is unconstitutional. *Locke v. City of Seattle*, supra.

C. This Action is Not Barred by Sovereign Immunity

The Petitioner submits a convoluted argument that the Legislature's waiver of sovereign immunity via RCW 4.96.010 does not apply to the rights provided by RCW 46.26.281 to firefighters and police officers. This argument has already been expressly rejected by this Court in *Taylor v. City of Redmond*, 89 Wn.2d 315, 319, 571 P.2d 1388 (1977) and by Division I of the Court of Appeals in *Locke v. City of Seattle*, supra @ pp. 703-04.

D. Respondent's Claim is Not Barred by Washington's Equine Immunity Statute, RCW 4.24.530-540

The Court of Appeals, in denying Petitioner's Motion for Discretionary Review noted that there was nothing to suggest that the trial court had committed obvious or probable error. Certainly, there is nothing about the statute in question that would fulfill any of the categories for direct review by the Supreme Court.

A long-standing principle of statutory construction is that statutes in derogation of common law must be strictly construed and no intent to change the law will be found unless it appears with clarity. *McNeal vs. Allen*, 95 Wn.2d 265, 621 P.2d 1285 (1980); *Nielsen vs. Port of Bellingham*, 107 Wn. App. 662, 27 P.3d 1242, review denied, 145 Wn.2d 1027, 42 P.3d 974 (2001). It is important to note that statutes that provide immunity "should be strictly construed and limited so that only that immunity which is necessary to serve the particular societal interests involved is recognized." *Matthews vs. Elk Pioneer Days*, 64 Wn.App, 433, 439, 824 P.2d 541, review denied, 119 Wn.2d 1011, 133 P.2d 386 (1992).

The Court in *Matthews* was faced with the need to determine whether the recreational land use immunity statute (RCW 4.24.210) applied when a temporary outdoor structure fell over during an outdoor stage performance put on by the Elks on the grounds of their facility near Spokane. The Court noted that the trend in Washington law is toward abrogation of many of the statutory and common law immunities for negligence. *Id.* The Court cited several authorities that demonstrate that "our society generally assumes persons and entities should be accountable for their negligence." *Id.* The court concluded that the statute did not provide immunity in the circumstances

presented in that case because it determined that the Legislature did not intend "outdoor recreation" to include activities that could be held either outdoors or indoors. *Id.* This construction demonstrates the extent to which our Courts go to limit the scope and extent of immunity statutes that are in derogation of common law.

The first issue that must be decided by the Court is whether these statutes, when construed and limited so that only the immunity which is necessary to serve the particular societal interests recognized by the statutes, apply to the Seattle Mounted Patrol. RCW 4.24.530(1) provides, subject to the exceptions in subsection (2) of this section, that an "equine activity sponsor" is shielded from liability. The term "equine activity sponsor" is defined in RCW 4.24.530(3) as follows:

(3) "Equine activity sponsor" means an individual, group or club, partnership, or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for, an equine activity including but not limited to: Pony clubs, 4-H clubs, hunt clubs, riding clubs, school and college sponsored classes and programs, therapeutic riding programs, and, operators, instructors, and promoters of equine facilities, including but not limited to stables, clubhouses, ponyride strings, fairs, and arenas at which the activity is held.

None of the examples of an equine activity sponsor in the statute come anywhere close to describing organizations such as the Seattle Mounted Patrol where the participant is an employee who is required to engage in training and police work on horseback as part of his or her duties as a police officer. Similarly, the Legislative History of these statutes, Chapter 292 Sections 1 and 2 (1989), establishes that the purpose of these statutes was to protect organizations like clubs and stables who were having a difficult time procuring liability insurance. There is no mention of professional organizations, like

the Seattle Mounted Patrol, as entities that require some sort of statutory immunity because of the need for procuring liability insurance.

Moreover, if this statute is construed as applying to this employer/employee situation, the only working environment under the control of the City of Seattle that it would not have an obligation pursuant to RCW 46.21.281 to make safe for its police and firefighters would be the paddock for the officers who are assigned to serve in the Mounted Patrol. It would be nonsensical for only Mounted Patrol officers to not have the right to seek damages for the negligence of their employer when every other police officer has that right. In short, a strict construction of this statute should lead the Court to the conclusion that it does not apply to the Seattle Mounted Patrol where officers are riding horses in the paddock as part of their duties and responsibilities as a police officer under the direction of their superiors. Applying this statute to the Seattle Mounted Patrol will not serve the purpose of this statute and, therefore, it should be constructed as not extending to the facts of this case pursuant to the holding of *Matthews vs. Elk Pioneer Days*, supra.

E. Petitioner Fails to Demonstrate That There is No Issue of Material Fact With Respect to Assumption of Risk

The City's assumption of risk argument is based upon Washington case law that discusses implied primary assumption of risk. See, *Kirk vs. Washington State University*, 109 Wn.2d 448, 746 P.2d 285 (1987). There is no contention that there was "express" primary assumption of risk because that would require a contract between the parties indicating that the "defendant" shall not be liable for its negligence to the "plaintiff."

Wagenblast vs. Odessa School District No. 105, 110 Wn.2d 145, 148, 758 P.2d 968 (1988).

Washington law with respect to the doctrine of assumption of risk was reevaluated following the adoption of principles of comparative fault in 1981. *Kirk vs. Washington State University*, supra at 452. Therefore, it would be inappropriate to rely on the numerous cases cited in the City's motion decided in 1905, 1908, 1910, 1911, 1913, 1919 and 1965, aside from their historical value.

The Court in *Kirk* provided a long list of examples for which assumption of risk in recreational activity cases would *not* apply, including the following:

1. Spilled water on a go-cart race course.
2. Risk of a golfer of being hit by a golf ball due to an inadequate warning.
3. Diving into a public lake into water that is too shallow.
4. Injury in a recreational flag football game caused by another player who was violating the rules.
5. High school football player injured during a drill did not assume risks of improper supervision and inadequate safety equipment.
6. Spectator who walked onto a raceway after the race did not assume all risks of unauthorized vehicles racing around the track.
7. Hunter did not assume risk of being negligently shot by companion.
8. Skater did not assume risks of unusually hard and slippery ice at defendant's rink, even though known.
9. A high school football player did not voluntarily assume all risks of playing "jungle" football at coaches' request without equipment.
10. Student skier did not assume unknown risk of improperly adjusted bindings fitted by defendant. *Kirk vs. Washington State University*, supra at 456-57.

As noted by the Washington Supreme Court in a subsequent case, the plaintiff cheerleader in *Kirk* did assume the risks inherent in the sport of cheerleading but did not assume the risks caused by the university's negligent provision of dangerous facilities or improper instruction or supervision. Those were not risks "inherent" in the sport and therefore she did not assume the risk and relieve the defendant of those duties. *Scott vs.*

Pacific West Mountain Resort, 119 Wn.2d 484,498-99, 834 P.2d 6 (1992). The court went on to note that to the extent the plaintiff continued to practice on a dangerous surface without instruction as a cheerleader she may have "unreasonably assumed the risk i.e., have been contributorily negligent. This unreasonable assumption of the risk is assumption in the secondary sense which does not bar all recovery." *Scott vs. Pacific West Mountain Resort*, supra at 499. Similarly, Officer Lindell did not assume the risks caused by the City's negligent provision of dangerous facilities or improper instruction or supervision.

In order for the City to prevail on its Motion for Summary judgment on the basis of application of implied primary assumption of risk it must establish all of the following:

1. Officer Lindell had a full subjective understanding of,
2. The presence and nature of a specific risk, and
3. Voluntarily chose to encounter the risk.

Scott vs. Pacific West Mountain Resort, supra; *Brown vs. Stevens Pass Inc.*, 97 Wn. App. 519, 984 P.2d 448 (1999).

There is no evidence submitted by the City that Officer Lindell had a full subjective understanding of the risk presented by training in the paddock without a new layer of soft earth or hogsfuel. The risk is not the simple risk of falling from a horse. Everybody who gets up on a horse knows they can fall. The risk is what would happen if an Officer fell in the paddock after the hogsfuel has been removed and before it was replaced with a new layer of hogsfuel or soft earth. The City has the obligation of demonstrating that there is no issue of material fact as to Officer Lindell's subjective understanding of this risk.

Petitioner has failed to demonstrate that there was obvious and probable error with respect to the denial of summary judgment on the assumption of risk defense.

F. Petitioner Fails to Demonstrate That There is No Issue of Material Fact With Respect to the Fellow Servant Doctrine

Plaintiff has the right to bring a cause of action against the City pursuant to RCW 41.26.281, which reads as follows:

"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."

The definition of "member" includes any law enforcement officer. RCW 41.26.030 (8).

Cases in which compensation has been awarded to a police officer under this chapter include *Taylor vs. City of Redmond*, 89 Wn.2d 315, 571 P.2d 1388 (1977) in which the plaintiff police officer brought an action against his employer, Redmond, for a gunshot wound caused by another police officer employed by the City of Redmond, and *Fray vs. Spokane County*, 134 Wn.2d 637, 952 P.2d 601 (1998) in which a deputy was injured as a result of the negligence of his employer's dispatcher for failing to send backup assistance. Clearly the other officer in *Taylor* and the police dispatcher in *Fray* were co-employees and "fellow servants" of the plaintiffs. Nonetheless, plaintiffs were permitted to pursue their causes of action under RCW 41.26.281, or its predecessor. There is no indication that the "fellow servant rule" would apply to causes of action expressly permitted to be brought by a police officer against his or her employer pursuant to RCW 41.26.281. Frankly, since a municipality can only act through its employees, any case brought against an employer by a police officer would be based upon the negligence of another employee or "fellow servant." Therefore, this portion of the City's motion and its incorrect interpretation and application of the fellow servant rule, if

accepted by the Court, would completely eviscerate the rights provided to firemen and police officers by RCW 41.26.281.

Even if the fellow servant rule was applicable to this case, its meaning is misstated by the City. The fellow servant rule does not apply if the allegedly negligent co-employee has any supervisory authority or power to control the activities of the plaintiff. *Plemmons vs Antles*, 52 Wn.2d to 69, 271-72, 324 P.2d 823 (1958). See also, *Buss v. Wachsmith*, 190 Wash. 673, 70 P.2d 417 (1937). Under those circumstances, the negligent co-employee is considered to be the agent or alter ego of the employer. *Plemmons vs. Antles*, supra. In the case at bar, the contentions are that the various Officers in charge of operating and supervising the Mounted Patrol Unit, including the supervising Sergeant, Lieutenant and Training Officer, were negligent. These individuals were in charge of the Mounted Patrol and the training of Mounted Patrol officers. Officer Lindell was acting under their authority and supervision as an Officer in the Mounted Patrol. Therefore, the fellow servant rule does not apply to the case at bar.

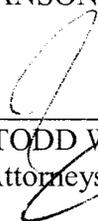
The case cited by the City, *Bennett vs. Messick*, 76 Wn.2d 474, 457 P.2d 609 (1969) held that there is another exception to the fellow servant rule. Under the exception set forth by the Supreme Court in *Bennett* if the allegedly negligent employee has complete control over whatever instrumentality led to the co-employee's injury, the fellow servant doctrine did not apply. The City does not cite any Washington cases adopting the Restatement (Second) of Agency § 474-475. Even if the Restatement was adopted, because of the supervisory authority of the allegedly negligent City employees, this doctrine does not apply.

V. CONCLUSION

The Petitioner has failed to demonstrate that the trial court committed obvious or probable error when it denied its Motion for Summary Judgment to Dismiss, has failed to demonstrate that the Court of Appeals committed obvious or probable error when it declined to grant discretionary review and has failed to demonstrate any basis for direct review by the Supreme Court. Therefore, Respondent respectfully requests that the Petitioner's Motion for Discretionary Review by the Supreme Court be denied.

Respectfully submitted this 16 day of November, 2006.

SWANSON ❖ GARDNER, P.L.L.C.

By 

TODD W. GARDNER, WSBA #11034
Attorneys for Respondent Lindell

APPENDIX

- Exhibit 1: Order Denying City of Seattle's Motion for Summary Judgment
- Exhibit 2: Commissioner's Order Denying Petitioner's Motion for Discretionary Review
- Exhibit 3: Order Denying Petitioner's Motion to Modify Ruling

Received

JAN 10 2005
Law Office of
Swanson & Gardner

THE HONORABLE MARY YU

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

MARGARET A. LINDELL, Personal
Representative for the Estate of GARY R.
LINDELL, deceased.

Plaintiff,

vs.

CITY OF SEATTLE, a municipal corporation,

Defendant.

No. 05-2-05740-8 SEA

ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
AND FOR DECLARATORY RELIEF

THIS MATTER, having come on duly and regularly for hearing before the Honorable Mary Yu of the above-entitled Court pursuant to the Defendant City of Seattle's Motion for Summary Judgment and for Declaratory Relief in the above-entitled cause, and the parties having appeared by and through their respective counsel of record, and the Court having heard argument of counsel submitted in support of and opposition to said Motion, and the Court having read and considered the records and files herein, including:

- A. Defendant City of Seattle's Motion for Summary Judgment and for Declaratory Relief;
- B. Declaration of Lt. Steve Wilske and attachments thereto;
- C. Declaration of Sgt. Terri MacMillan;

ORIGINAL

EXHIBIT 1

- 1 D. Declaration of Off. Tamara McClincy;
- 2 E. Declaration of Fred Treadwell
- 3 F. Declaration of Nick Borer and attachments thereto
- 4 G. Declaration of Marcia M. Nelson and attachments thereto;
- 5 H. Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary
- 6 Judgment to Dismiss;
- 7 I. Declaration of Todd W. Gardner with the following exhibits:
- 8 1) Declaration of Plaintiff's expert, Rod Bergen. *Accept for portions noted sticker*
- 9 2) Plaintiff's First Interrogatories to City of Seattle, #17-19, and Supplemental
- 10 Answer to #43.
- 11 3) CR 30(b)(6) Notice and matrix showing who was identified in response.
- 12 4) Paul Suguro deposition, pp. 6-19, 24-44 with exhibits.
- 13 5) S.L. Demps deposition, pages 4-5, 20-31.
- 14 6) Michael Fann deposition, pages 4-14, 22-23.
- 15 7) Geoff Getchman deposition, pages 14-15, 19-36, 43-48, 56-66, 78-79, 83-85,
- 16 88-91 and exhibits 2 and 3.
- 17 8) Terri MacMillan deposition, pages 4-6, 13-21, 31-32, 46-53, 57-58.
- 18 9) Kevin Stoops deposition, pages 5-13, 22.
- 19 10) Paul Stimmel deposition, pages 4-11, 30-31, 42-45, 55-58.
- 20 11) Scot Hansen deposition, pages 4-64, 70-71, 78-79, 86-88.
- 21 12) Steve Mathisen deposition, pages 6-11, 31-36, 40-42, 52-72.
- 22 13) Tamara McClincy deposition, pages 9-19, 22-29, 41-50, 57-58, 70-76.
- 23 14) Steve Wilske (Oct. 18, 2005) deposition, pages 7-14, 23-43, 46-57, 61-77, 83-
- 24 87, 90-92, 103-104.
- 25

1 15) Steve Wilske (Nov. 10, 2005) deposition, pages 3-12.

2 16) City of Seattle documents concerning Donovan, pp. 1091, 1096-1103
3 produced in response to Plaintiff's First Requests for Production.

4 17) RCW 4.24.530-540 and legislative history.

5 18) Court's Order Allowing Overlength Brief (Defendant's Motion for Summary
6 Judgment)

7 J. Defendant City of Seattle's Reply to Plaintiff's Response to the City's Motion for
8 Summary Judgment.

9 K. Second Declaration of Rebecca Boatright, with the following exhibits:

10 A. Plaintiff's Answer to Interrogatory No. 33 of Plaintiff's Answers to the City's
11 First Interrogatories and Requests for Production.

12 B. Plaintiff's Response to Request for Production No. 6 and a true and correct
13 copy of Officer Lindell's Reis Ranch Certificate, submitted in response
14 thereto.

15 C. Excerpt from the Deposition of Officer Scot Hansen.

16 L. Declaration of Troy Peterson with attachments.

17 M. Third Declaration of Marcia M. Nelson, with the following exhibits:

18 A. Copy of web page www.bls.gov/oco/ocos158.htm.

19 B. Copy of web page www.bls.gov/news.release/pdf/cfoi.pdf.

20 N. *Def. City of Seattle's Resp. to Pl. Motion for Leave to File Amended Compl. + Motion*
21 *and the Court having considered the following issues:* *to Strike Gardner*
22 *Decl. (M)*

- 23 1) Whether the City is immune from liability under RCW 4.24.540;
- 24 2) Whether Officer Lindell assumed the risk of injury;
- 25 3) Whether plaintiff's claim is barred by the Fellow Servant Rule;
- 1) Whether RCW 41.26.281 is unconstitutional under the equal protection and due
process clauses of the Washington State Constitution;
- 2) Whether RCW 41.26.281 is violative of the prohibitions against extra compensation
and special legislation under Article II §§ 25, 28 of the Washington State
Constitution;
- 3) Whether RCW 41.26.281 is violative of the requirements of Article § 19 of the
Washington State Constitution; and
- 4) Whether plaintiff's claim is barred by sovereign immunity.

and the Court being fully advised in the premises, now, therefore,

1 IT IS HEREBY IT IS HEREBY that RCW 4.24.530-540 does not apply to activities of
2 the Seattle Mounted Patrol and, therefore, the City is not immune from liability for the plaintiff's
3 claims based upon said statutes.

4 IT IS FURTHER ORDERED that RCW 41.26.281 is ~~constitutional~~ ^{not unconstitutional} 

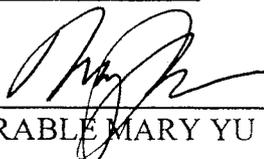
5 IT IS FURTHER ORDERED that plaintiff's claims are not barred by the doctrine of
6 sovereign immunity.

7 IT IS FURTHER ORDERED that genuine issues of material fact exist with respect to the
8 defendant's assumption of risk and fellow servant rule affirmative defenses, and that the
9 defendant has the right to ask that the trial judge consider submitting jury instructions on these
10 defenses, should the evidence justify their submission, and that the plaintiff has the right to move
11 that these affirmative defenses be stricken.

12 IT IS FURTHER ORDERED that the oral ruling of the Court as set forth on the record
13 on December 23, 2005 shall by reference be incorporated into this Order.

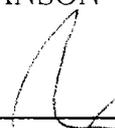
14 IT IS HEREBY ORDERED that Defendant City of Seattle's Motion for Summary
15 Judgment and Declaratory Relief is **DENIED**.

16 DONE IN OPEN COURT on Jan 9, 2006.

17 
18 _____
19 THE HONORABLE MARY YU

20 Presented by:

21 SWANSON ❖ GARDNER, P.L.L.C.

22 By 
23 _____
24 TODD W. GARDNER, WSBA #11034
Attorney for Plaintiffs

25 SWANSON ❖ GARDNER, P.L.L.C.

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Copy Received:

THOMAS A. CARR
SEATTLE CITY ATTORNEY

By _____
MARCIA M. NELSON, WSBA #8166
Assistant City Attorney
Attorneys for Defendant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

Received

MARGARET A. LINDELL, Personal)
Representative for the Estate of)
GARY R. LINDELL, deceased,)
)
Respondent,)
)
v.)
)
CITY OF SEATTLE, a municipal)
corporation,)
)
Petitioner.)
_____)

No. 57725-5-1

Law Office of
Swanson & Gardner

COMMISSIONER'S RULING
DENYING DISCRETIONARY
REVIEW

The City of Seattle seeks discretionary review of the trial court order denying summary judgment dismissal of Margaret Lindell's wrongful death suit against the City. After hearing argument, I stayed the motion pending this court's decision in Locke v. Seattle, No. 55256-2-1. The decision in Locke was filed on June 19, 2006. ___ Wn. App. ___, ___ P.3d ___ (2006). The stay is lifted, and for the reasons stated below, discretionary review is denied.

The lawsuit arises out of the death of retired Seattle Police Officer Gary Lindell. In May 1999, Officer Lindell, a member of the City's Mounted Patrol Unit, was participating in a training exercise when he fell from his service horse and struck his head. In 2002, he died of a seizure allegedly caused by the earlier injury. Officer Lindell's medical bills, time loss and disability retirement were paid under the Law Officers' and Fire Fighters Retirement System Act (LEOFF) statute, and after his death Margaret received beneficiary survivor

EXHIBIT 2

No. 57725-5-1/2

pension benefits and death benefits. Margaret filed a wrongful death action against the City, alleging the City was negligent in several ways, including maintaining the training facility, permitting the common practice of training without helmets, and providing inadequate training.

The City moved for summary judgment dismissal of the suit on several theories. The City challenged the constitutionality of LEOFF, arguing that abolishment of liability for negligence, which is the foundation of workers's compensation systems, is absent in LEOFF and it therefore violates due process, the privileges and immunities clauses of the Washington State Constitution, the prohibitions against extra compensation and special legislation under Article II, sections 19, 25, 28 of the Washington Constitution, and sovereign immunity. The City also sought dismissal under RCW 4.24.540, the equine immunity statute. Finally, the City argued that Lindell's claims failed under the assumption of the risk doctrine and the fellow servant rule.

The trial court denied summary judgment, ruling that LEOFF is not unconstitutional, that Lindell's claims were not barred by sovereign immunity, that the equine immunity statute does not apply to activities of the Seattle Mounted Patrol, and that there are genuine issues of material fact with respect to the assumption of the risk and fellow servant rule defenses. Regarding assumption of the risk and the fellow servant rule, the court left open whether and how the defenses would be presented to the jury; the City could ask the

trial court to submit jury instructions on the defenses and Lindell could move to strike them, depending on the evidence presented at trial.

The City seeks discretionary review.

LEOFF. The City's constitutional and sovereign immunity challenges to LEOFF were rejected by this court in Locke. There is no basis to grant discretionary review of the trial court's ruling that LEOFF is not unconstitutional and that Lindell's claims are not barred by sovereign immunity.

Equine Immunity. The City contends that the trial court's ruling that the equine immunity statute does not apply to the Mounted Patrol is an obvious error that renders further proceedings useless, or a probable error that substantially alters the status quo or limits the City's freedom to act.

RCW 4.24.540 sets forth limitations on liability for equine activities:

(1) Except as provided in subsection (2) of this section, an equine activity sponsor or an equine professional shall not be liable for an injury to or the death of a participant engaged in an equine activity, and, except as provided in subsection (2) of this section, no participant nor participant's representative may maintain an action against or recover from an equine activity sponsor or an equine professional for an injury to or the death of a participant engaged in an equine activity.

(2)(a) RCW 4.24.530 and 4.24.540 do not apply to the horse racing industry . . .

(b) Nothing in subsection (1) of this section shall prevent or limit the liability of an equine activity sponsor or an equine professional:

(i) If the equine activity sponsor or the equine professional:

(A) Provided the equipment or tack and the equipment or tack caused the injury; or

(B) Provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity, determine the ability of the equine to behave safely with the participant, and determine the ability of the participant to safely manage the particular equine;

(ii) If the equine activity sponsor or the equine professional owns, leases, rents, or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous latent condition which was known to or should have been known to the equine activity sponsor or the equine professional and for which warning signs have not been conspicuously posted;

(iii) If the equine activity sponsor or the equine professional commits an act or omission that constitutes willful or wanton disregard for the safety of the participant and that action or omission caused the injury;

(iv) If the equine activity sponsor or the equine professional intentionally injures the participant;

....

RCW 4.24.530 defines the key statutory terms, including

(1) "Equine activity" means: (a) Equine show, fairs, competitions, performances, or parades . . . (b) equine training and/or teaching activities; (c) boarding equines; (d) riding, inspecting, or evaluating an equine belonging to another . . . and (e) rides, trips, hunts, or other equine activities

(2) "Equine activity sponsor" means an individual, group or club, partnership, or corporation, whether or not . . . for profit or nonprofit, which sponsors, organizes, or provides the facilities for, an equine activity, including but not limited to: Pony clubs, 4-H clubs

....

(4) "Participant" means any person, whether amateur or professional, who directly engages in an equine activity . . .

(5) "Engages in an equine activity" means a person who rides, trains, drives, or is a passenger upon an equine, whether mounted or unmounted, and does not mean a spectator . . .

(6) "Equine professional" means a person engaged for compensation (a) in instructing a participant or renting to a participant an equine for the purpose of riding, driving, or being a passenger upon the equine, or, (b) in renting equipment or tack to a participant.

The City contends that as a municipal corporation, it falls squarely within the definition of an "equine activity sponsor," that Officer Lindell is a "participant," as well as an "equine professional," and that Officer Lindell's riding/training before the accident was an "equine activity." Lindell responds

that the statutes do not apply to the Mounted Patrol. Alternatively, Lindell argues that at least two of the exceptions in RCW 4.24.540(2)(b)(i)(A) (tack) and (2)(b)(i)(B) (providing the horse and failing to determine safety and ability).

The parties have cited no case law that addresses whether the equine immunity statute applies to the Mounted Patrol, and I know of none. The only Washington case interpreting RCW 4.24.540, Patrick v. Sferra, 70 Wn. App. 676, 855 P.2d 320 (1993), held that neither the donor of the horse nor the stables where it was kept were liable, when plaintiff, an inexperienced rider, was injured while riding a former racehorse given to her. The court noted, "[t]he whole thrust of the statute is to protect people and organizations who sponsor riding activities." Patrick, 72 Wn. App. at 681. While the City has raised a debatable issue, there is no basis to conclude the trial court's ruling is obvious or probable error. Moreover, even if the statute applies, there are disputed issues of material fact regarding the applicability of the exceptions.

Assumption of the Risk and Fellow Servant Rule. The City contends that implied assumption of the risk and the fellow servant rule act as a complete bar to liability in the employment context. The City has not demonstrated obvious error that renders further proceedings useless. There are disputed issues of material fact regarding the applicability of these defenses, and the trial court left open the availability of the defenses depending on the evidence at trial. Nor has the City demonstrated probable error that substantially alters the

No. 57725-5-1/6

status quo or limits the City's freedom to act within the meaning of RAP

2.3(b)(2). See Task Force Comment to RAP 2.3(b).

Remedy by appeal from a final judgment is generally adequate, and the court discourages piecemeal review. Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 127, 467 P.2d 372 (1970). Discretionary review of an interlocutory trial court order is not ordinarily granted. DGHI Enters. v. Pac. Cities, Inc., 137 Wn.2d 933, 949, 977 P.2d 1231 (1999). The City has not demonstrated that discretionary review is warranted. In re Dependency of Grove, 127 Wn.2d 221, 235, 897 P.2d 1252 (1995).

Now, therefore, it is hereby

ORDERED that discretionary review is denied.

Done this 5th day of July, 2006.

Mary S. Nell

Court Commissioner

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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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

No. 57725-5-1

ORDER DENYING
MOTION TO MODIFY

Received

Law Office of
Swinson & Gardner

Petitioner City of Seattle has moved to modify the Commissioner's July 5, 2006 ruling denying discretionary review. Respondent opposes the motion. We have considered the motion under RAP 17.7 and have determined that it should be denied.

Now, therefore, it is hereby

ORDERED that the motion to modify is denied.

Done this 29th day of September, 2006.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON

2006 SEP 29 PM 3:32

Schindler, ACS

Gross

Ajida, J.

EXHIBIT 3