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NO. 55256-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

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

Respondents,

v.

THE CITY OF SEATTLE, a municipal corporation,

Appellant.

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RESPONDENTS' BRIEF IN ANSWER TO BRIEFS
OF AMICUS CURIAE

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I. SUMMARY OF ARGUMENT

The LEOFF statutes, including RCW Chapter §41.26, have been the law in Washington since 1971. The Washington Supreme Court has repeatedly held that firefighters are entitled to sue their governmental employers under the provisions and constraints of the statute. Taylor v. Redmond, 89 Wn.2d 315, 320, 571 P.2d 1388 (1977) (looking to RCW §4.96.010 as a waiver of sovereign immunity for LEOFF tort claims); Gillis v. Walla Walla, 94 Wn.2d 193, 197-98, 616 P.2d 625 (1980) (holding that RCW §41.26.270 and .280 carry out the legislative balance of providing protection to both public employers and employees); Fray v. Spokane County, 134 Wn.2d 637, 651, 952 P.2d 601 (1978) (holding that “[t]he Legislature is presumed to have considered the right to sue provision applicable to Plan II members in enacting the amendments through four successive revisions.”). In Hanson v. City of Everett, 93 Wn. App. 921, 926-27, 971 P.2d 111 (1999), this Court explained that the LEOFF provision “creates a strong incentive for improved safety.”

This 1971 statute has been repeatedly amended by the Legislature and has been relied on by firefighters and police officers throughout the state for decades.¹ The Washington State Association of Municipal Attorneys (WSAMA) has filed an amicus brief supporting defendant’s

¹ See Brief of Amicus International Association of Fire Fighters (“IAFF”), p. 1.

effort to upset more than 30 years of settled expectations. WSAMA challenges the constitutionality of RCW §41.26.281 and also argues that Respondent's (hereafter "plaintiff" or "Mr. Locke") claims are barred by sovereign immunity. Its Brief fails even to cite Hanson or Taylor. Moreover, its brief misreads Gillis which holds that the LEOFF statute maintains a "quid pro quo" between public employers and employees. The WSAMA brief also ignores the holdings of Washington courts for more than 100 years which put a heavy burden of proof put on those who challenge a statute on constitutional grounds. Compare Fitch v. Applegate, 24 Wash. 25, 31-32, 64 P.2d 147 (1901) with Philippides v. Bernard, 151 Wn.2d 376, 391, 88 P.3d 939 (2001).²

II. ARGUMENT

A. RCW §41.26.281 Is Constitutional.

1. Burden And Standard Of Review.

WSAMA, as well as defendant, has a formidable burden in challenging RCW §41.26.281 as violative of Article I, §12 of the Washington Constitution. That statute "is presumed constitutional and the party challenging it has a heavy burden of proof." Philippides v. Bernard, 151 Wn.2d at 391. That has been true in Washington since the early

² Plaintiff generally agrees with the brief filed by International Association of Fire Fighters ("IAFF"). However, he responds to several aspects of that Brief.

1900's. For example, in O'Connell v. Conte, 76 Wn.2d 280, 283-84, 456 P.2d 317 (1969), the Court held:

It is the "established rule of law in this state that an enactment is presumptively valid, and the burden is upon the challenger to prove that the questioned classification does not rest upon a reasonable basis."

The O'Connell court also reaffirmed a 1910 holding that a legislative classification should be affirmed unless:

it is so manifestly arbitrary, unreasonable, inequitable, and unjust that it will cause an imposition of burdens upon one class to the exclusion of another without reasonable distinction.

Id. (emphasis added).³

2. RCW §41.26 Provides Employers Such As Defendant With A Legally Sufficient "Quid Pro Quo".

WSAMA takes the position that RCW §41.26 provides no benefits to public employers because "employers are required to fund the LEOFF compensation system, but receive no protection from tort lawsuits." WSAMA Brief, p. 5. According to WSAMA, RCW §41.26, thus lacks the constitutionally required quid pro quo. See also WSAMA Brief, p. 10.⁴

³ See also Fitch v. Applegate, 24 Wash. at 31-32, where the court, in an Article 1, Section 12 challenge, quoted approvingly that "[t]he legislature may also deem it desirable to prescribe peculiar rules for the several occupations." (Emphasis added.)

⁴ That argument mirrors the defendant's argument that "a negligent government employer under RCW §41.26.281 has no workers compensation type immunity. It is liable not only for non-fault workers compensation benefits, but also for damages as if it were a third party." Reply Brief, p. 9.

WSAMA's argument is wrong for three separate reasons.

1. First, WSAMA's argument is inconsistent with Gillis, supra, WSAMA mischaracterizes Gillis when it argues that "the Gillis court apparently assumed that the employer was receiving some protection under this analysis." WSAMA Brief, p. 11. Gillis did not assume that the employer was receiving some protection; rather it so held. 94 Wn.2d at 195. Gillis rejected the workers claim that pain and suffering damages were not subject to the LEOFF offset. Id. at 196. The court held that:

. . . the value of benefits received and the present value of benefits receivable under the chapter are to be offset against the gross verdict obtained for personal injury against the covered governmental employer.

The offset of benefits received against the gross verdict protects public employers from lawsuits that would otherwise be filed. Id. at 198.

WSAMA argues that the court in Gillis was wrong in so holding because:

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.

WSAMA Brief, p. 11. The argument that the Supreme Court was wrong in Gillis is not one which this intermediate appellate court can easily remedy given Washington's adherence to *stare decisis*. Moreover, it is WSAMA not the Supreme Court that is wrong.

RCW §41.26.281 only permits an action “for any excess of damages over the amount received or receivable under this chapter.” This statutory limitation on damages to those over future amounts “receivable” provides the employer legal protection not provided to other employers or third parties. The plaintiff in an ordinary tort action can sue now for all future damages and there is no authority requiring such a plaintiff to reduce his or her claim because of promised future payments by the tortfeasor. Under RCW §41.26.281, however, the only damages which properly can be sought are those in excess of amounts “received or receivable.” With the maximum potential damages available in such lawsuits being substantially reduced in many cases because of this provision, the number of such lawsuits likely will be substantially reduced.⁵

2. Secondly, governmental employers such as defendant are protected from suits from LEOFF members based on claims other than intentional action or negligence claims, e.g., product liability claims and strict liability claims. Like defendant, who argues that “a governmental employer would not typically qualify as a product manufacturer or seller

⁵ By way of an example, many employees would file a lawsuit if total damages were \$200,000 and find a lawyer to do so on a contingency basis. If future benefits under LEOFF are \$150,000 so the maximum damages are \$50,000, it is less likely that an employee would choose to sue for \$50,000 or that an attorney would take the case on a contingent basis.

(Def. Reply Brief, p. 9, n. 4), WSAMA argues that the LEOFF act “provides no protection from tort liability.” WSAMA Brief, p. 10. That ignores cases such as Almquist v. Finley Sch. Dist. No. 53, 114 Wn. App. 395, 57 P.3d 1141 (2002), in which a public entity was found liable for millions of dollars based on a product liability claim with no claim of negligence or intentional act. The limitation on product liability and strict liability claims granted by LEOFF is a benefit to defendant and other LEOFF employers.

The circumstance that the LEOFF statute protects public employers from some but not all tort claims by employees does not mean there is no “quid pro quo.” Title 51 also does not protect employers from all tort claims by employees. See RCW §51.24.020, Birklid v. The Boeing Co., 127 Wn.2d 853, 873-74, 904 P.2d 278 (1995). This has never been interpreted as violating the legislative quid pro quo. Id. at 874.⁶

⁶ In Hanson, this Court described a third benefit: an employer gains additional protection under the LEOFF program because LEOFF medical services payable are reduced by collateral sources 93 Wn. App. at 927. For example, in Pub. Safety Ass'n v. Bremerton, 104 Wn. App. 226, 235, 15 P.3d 688 (2001), the court permitted a LEOFF offset based on payments under Medicare. This provision gives LEOFF employers a benefit not provided to other employers who, under RCW §51.36.010 and §51.04.030 must provide medical services even if the worker has other sources of insurance or payment for medical expenses such as Medicare. See Buell v. Aetna Casualty & Sur. Co., 14 Wn. App. 742, 746-47, 544 P.2d 759 (1976).

3. RCW §41.26 Would Be Constitutional Even If It Did Not Provide A Quid Pro Quo.

WSAMA's argument in favor of the constitutional claims raised by defendant⁷ misreads Washington law. For example, according to WSAMA, State v. Daggett, 87 Wash. 253, 255, 151 P. 648 (1915) described "as a violation of equal protection" the imposition of a duty to fund the workers compensation system when the State could not protect the employer against admiralty suits. WSAMA Brief, p. 7. That is untrue. Rather, the Daggett court raised that issue as a concern rather than a holding, stating that in such a situation "it might well be doubted whether it [the State law] would not offend against that provision of the Fourteenth Amendment." 87 Wash. at 258 (emphasis added). The Daggett court

⁷ WSAMA also raises claims never made by defendant, *e.g.*, that RCW §41.26.281 violates "Due Process." WSAMA Brief, p. 6. "Due Process" was never raised by defendant and this Court should not consider this claim raised only by Amicus. For example, in Citizens for Responsible Wildlife Mgmt. v. State, 149 Wn.2d 622, 631, 71 P.3d 644 (2003), the court stated:

Amicus Curiae Washington State Farm Bureau raises several novel arguments that Citizens did not. However, those arguments will not be discussed as we will not address arguments raised only by amicus. See Sundquist Homes, Inc. v. Snohomish County Pub. Util. Dist. No. 1, 140 Wn.2d 403, 413, 997 P.2d 915 (2000).

Furthermore, any such due process claim would lack substantive merit. See, *e.g.*, Parrish v. West Coast Hotel Co., 185 Wash. 581, 55 P.2d 1083 (1936), *aff'd*, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). If WSAMA is characterizing the supposed lack of a "quid pro quo" as a due process claim, plaintiff responds to that claim infra.

construed the State workers compensation statute based in part on this constitutional concern but did not decide the constitutional issue.⁸

The States “police power” permits it to impose requirements on employers without a “quid pro quo”.⁹ For example, it cannot seriously be doubted that under WISHA (RCW §49.17), the State can impose on employers an obligation to spend money for safety equipment for their employees without giving the employers a corresponding financial benefit. As explained in State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 196, 117 P. 1101 (1911), the State has authority under its police power to adopt classifications so long as the classifications have any reasonable basis. Clausen has repeatedly been cited for that proposition. See, e.g., Markham Adver. Co. v. State, 73 Wn.2d 405; 424-25, 439 P.2d 248 (1968) (approving State’s authority to prevent the maintenance of

⁸ WSAMA Brief, at page 8 similarly overreads Zahler v. Department of Labor & Industries, 125 Wash. 410, 217 P. 55 (1923) which also construed the workers compensation statute but did not decide the constitutional issue under Article I, Section 12. See 125 Wash. at 417-420. The same is true of Epperly v. Seattle, 65 Wn.2d 777, 787, n. 1, 399 P.2d 591 (1965) which raised, rather than answered, the “grave constitutional question” under the IIA.

⁹ If anything, the State’s police power to impose conditions on public entities which it creates is greater than its police power over individuals. See Dept. of Labor & Industries v. Cook, 44 Wn.2d 671, 679, 269 P.2d 962 (1954); where the court held:

A municipal corporation may not invoke the equal protection clause of the fourteenth amendment of the constitution of the United States in opposition to the will of its creator. *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 77 L. Ed. 1015, 53 S. Ct. 431.

billboards on certain roadways without providing a direct benefit to the billboard companies or landowners).

Hildahl v. Bringolf, 101 Wn. App. 634, 5 P.3d 388 (2000) is directly on point. In Hildahl, defendant relied on Manor v. Nestle Food Co., 131 Wn.2d 439, 932 P.2d 628 (1997), and Epperly, supra. He claimed that his rights to due process and equal protection were violated because he had to pay an industrial insurance premium (although he was not an employer) without being afforded the quid pro quo of immunity from suit. The court disagreed with defendant's claims. 101 Wn. App. at 649-651. It found the *dicta* in Epperly unpersuasive and held it was constitutional to impose tort liability on defendant even though he had to pay the premiums which he could only recover from the actual employer if the employer were solvent.

WSAMA also argues that it is unconstitutional to allow firefighters and police officers to sue their employers because that is "a right that does not equally belong to all citizens" and then argues that employers of police and fire personal are treated less favorably with regard to employee lawsuits than other employers. WSAMA Brief, pp. 5-6.¹⁰ Neither argument is persuasive given the holding in cases such as School Directors v. Dept. of L&I, 82 Wn.2d 367, 510 P.2d 818 (1973) and cases cited

¹⁰ This mirrors defendant's argument at page 8 of its Reply Brief.

therein. In 1971, the legislature expanded L&I coverage beyond extra hazardous occupations, to which it had previously been limited. 82 Wn.2d at 369-70.¹¹ Affected employers sued saying that this expansion violated Article I, §9, but this argument was rejected since the legislature properly based its decision on “risk.” *Id.* at 380. See also Thompson v. Dep't of Labor & Indus., 194 Wash. 396, 78 P.2d 170 (1938) (fact that duties of non-covered employees were in fact extrahazardous did not entitle them to L&I coverage). Similarly, the Legislature can properly adopt the LEOFF provisions based on creating a “strong incentive for increased safety”. Hanson, 93 Wn. App. at 926-27.

B. The State Has Waived Sovereign Immunity.

WSAMA, as well as the parties, identified RCW §4.96.010 and RCW §41.26.281 as statutes potentially waiving sovereign immunity.

1. RCW §4.96.010 Waives Sovereign Immunity.

WSAMA argues that RCW §4.96.010 does not waive sovereign immunity with regard to LEOFF claims. However, its argument ignores Taylor, supra, which both specifically raised the issue of sovereign immunity with regard to the LEOFF statute permitting tort actions against employers and specifically quoted RCW §4.96.010 as resolving that issue.

¹¹ Thus, according to WSAMA’s argument, the L&I program would have violated Article I, §9 since its inception because it treated some employers and employees differently from other employers and employees. Of course, no Washington decision so holds.

89 Wn.2d at 320. Taylor applies to this case even though it involved a LEOFF 1 member rather than a LEOFF 2 member such as plaintiff because the issue of the waiver of sovereign immunity applies equally to LEOFF 1 and 2 members.¹² Taylor is thus controlling Washington precedent on this since it involves both .281 and RCW §4.96.010.

WSAMA instead argues, citing United States v. Olson, 126 S. Ct. 510, 163 Ed. 306 (2005), that under the Federal Tort Claims Act (“FTCA”), the United States would only be liable if a private person would be liable. WSAMA Brief, pp. 16-17. However, not only is the language of the two statutes different,¹³ Washington has interpreted RCW §4.96.010 differently than the federal courts have interpreted the FTCA. For example, WSAMA ignores J & B Dev. Co. v. King County, 100

¹² The Taylor court’s reference to the source of the workers compensation benefits related to an earlier issue discussed primarily at page 319. See also Fray, supra, discussing Taylor.

¹³ RCW 4.96.010 directly imposes liability and does not tie liability to a particular claimant:

All local governmental entities . . . shall be liable for damages arising out of their tortious conduct, . . . to the same extent as if they were a private person or corporation.

The FTCA on the other hand does not directly impose liability and provides jurisdiction tied directly to whether a private person would be liable to the claimant:

The district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Wn.2d 299, 305, 669 P.2d 468 (1983), which dealt directly with this issue and held that courts first determine if there is a duty by the public entity and, if there is duty, e.g., not to act negligently, the public entity would be liable for its negligence since a private citizen would be liable for its negligence. See also Garnett v. Bellevue, 59 Wn. App. 281, 285, 796 P.2d 782 (1990).¹⁴

WSAMA does not respond to plaintiff's argument (which also relied in part on Taylor, supra), that the Legislature is not presumed to do a meaningless act. As stated in Brief of Respondents, p. 11:

Under the City's interpretation, RCW §41.26.281 was a meaningless act by the legislature since no government could ever be sued by their police officers or fire fighters for the negligence of their governmental employer. (Emphasis added.)

Plaintiff also relied, inter alia, on Willoughby v. Dep't of Labor & Indus., 147 Wn.2d 725, 731, 57 P.3d 611 (2002). It does not suffice to argue that a statute should be interpreted to make it constitutional if that interpretation would make it meaningless. Here, RCW §41.26.281 may fairly be read as both meaningful and constitutional. See Taylor, supra. Moreover, the legislature repeatedly amended and, thus readopted with

¹⁴ The language of RCW §4.96.010 is not identical to RCW §4.92.090 (since it adds references to officers, agents, or employees not contained in RCW §4.92.090. Thus, cases interpreting the latter statutes are less controlling than those directly interpreting the statute at issue here.

changes, the LEOFF statute. It would make no sense to say that the Legislature repeatedly engaged in meaningless acts.

2. RCW §41.26.281 Also Waives Sovereign Immunity.

Both amici agree that RCW §41.26.281 can reasonably be read to waive the governmental employer's sovereign immunity. WSAMA Brief, p. 14¹⁵ and IAFF Brief, pp. 13-14.¹⁶ However, WSAMA argues that “the bill containing RCW §41.26.281 violates both the subject-in-title and single requirements of Article II, §19” (WSAMA Brief, p. 13), while the IAFF brief supports its constitutionality. IAFF Brief, pp. 11-17. Both amici extensively cite Washington cases on this issue.¹⁷ WSAMA's

¹⁵ “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.” WSAMA Brief, p. 14 (emphasis added).

¹⁶ Thus, under the plain language of the provision [41.26.281] members of LEOFF Plan II – such as the plaintiff – are entitled to the benefits of workers compensation coverage and the right to sue their governmental employer for negligence.” IAFF Brief, p. 13 (emphasis added).

¹⁷ On this issue, WSAMA cites Bennett v. State, 117 Wn. App. 483, 70 P.3d 147 (2003), Citizens for Responsible Wildlife Management v. State, 149 Wn.2d 622, 71 P.3d 644 (2003); Fray v. Spokane County, *supra*; In re Boot, 130 Wn.2d 553, 925 P.2d 964 (1996); Mount Spokane Skiing Corp. v. Spokane Cy., 86 Wn. App. 165, 936 P.2d 1148 (1997); State v. Thomas, 103 Wn. App. 800, 14 P.3d 854 (2000).

IAFF on the same issue cites Fray, *supra*; Kueckelhan v. Federal Old Line Ins. Co., 69 Wn.2d 392, 403, 418 P.2d 443 (Wash. 1966); State Finance Comm. v. O'Brien, 105 Wn.2d 78, 711 P.2d 993 (Wash. 1986); State v. Grisby, 97 Wn.2d 493, 498, 647 P.2d 6 (Wash. 1982); Treffry v. Taylor, 67 Wn.2d 487, 491, 408 P.2d 296 (Wash. 1965); Neighborhood Stores v. State, 149 Wn.2d 359, 70 P.3d 920 (Wash. 2003); YMCA v. State of Washington, 62 Wn.2d 504, 383 P.2d 479 (Wash. 1963).

analysis of Article II §19 is incorrect. Turning first to the “subject-in-title” requirement, the standard of review in Washington requires an obvious and serious conflict before the constitutional provision will strike down a law: “objections to the title must be grave and the conflict between it and the constitution palpable before we will hold an act unconstitutional.” Neighborhood Stores v. State, 149 Wn.2d at 372.

All of the Washington cases cited by either amicus listed in footnote 12 above, except Fray and State v. Thomas, *supra*, reject claims based on Article II, §19. See also the concurrence/dissent by Justice Talmadge in Fed'n of Employees v. State, 127 Wn.2d 544, 571-72, n.6, 901 P.2d 1028 (1995) (“since 1891, only nine supreme court cases have found that legislation contained more than one subject”). The cases also almost invariably accept the following propositions for evaluating claims based on Article II, §19:

a. Article II, §19 is to be liberally construed in favor of the legislation and the challenger bears a heavy burden to overturn the presumption of constitutionality. See, e.g., In re Boot, 130 Wn.2d at 566; State v. Grisby, 97 Wn.2d at 566; Bennett, 117 Wn. App at 486; Neighborhood Stores, 149 Wn.2d at 732; State Finance Committee, 105 Wn.2d at 80.

b. The subject-in-title requirement of Article II, Section 19 is met if the title gives notice which would lead to an inquiry in the body of the act or indicates the scope and purpose of the law. Citizens for Responsible Wildlife Mgmt., 149 Wn.2d at 639; YMCA, 62 Wn.2d at 506. State v. Grisby, supra, (“So long as the title embraces a general subject, it is not violative of the constitution even though the general subject contains several incidental subjects or subdivisions . . . All that is required is that there be some ‘rational unity’ between the general subject and the incidental subdivisions.”). See also School Directors, supra, 82 Wn.2d at 371. A title containing words which “indicate the theme or proposition of the act” suffices. Bennett, 117 Wn. App. at 491 (distinguishing Fray, supra). A title providing it is “an act relating to capital projects” meets that requirement for a series of different capital projects. State Finance Co., supra, 105 Wn.2d at 80.

c. With respect to the “single subject rule” embodied in Article II, §19, Washington courts first determine whether the bill’s title is general or restrictive. To be general, a few well-chosen words, suggestive of the general subject stated, is all that is necessary. Neighborhood Stores, 149 Wn.2d at 368; Bennett, 117 Wn. App. at 487. Even if the general subject contains several incidental subjects or subdivisions, all that is required is that there be some “rational unity” between “the general

subject and the incidental subdivisions.” State v. Grisby, 97 Wn.2d at 498. Furthermore, even if the title is restrictive, it is enforceable if its provisions are fairly within the subject of the title. Bennett, 117 Wn. App. at 488.

Applying these principles to the facts of this case calls for the conclusion that there is no constitutional violation. The title to the 1971 Act begins with the words “An Act relating to law enforcement officers and firefighters” and ends with “declaring an emergency.” Washington Law, 1971, 1st Ex. Sess., Chapter 257. As that title indicates, all of the provisions thereof relate to law enforcement officers and firefighters. This title is general and directly analogous to the title at issue in In Re Boot, 130 Wn.2d at 566, i.e., “an act relating to violence prevention” and State Finance Committee, 105 Wn.2d at 79 “an Act relating to capital projects.” Furthermore, the words of the title of the 1971 Act “indicate the theme or proposition of the act.” Bennett, supra.

The title of the 1971 Act is distinguishable from the title found unconstitutional in Fray, *supra*, which was both misleading and vague.¹⁸ The title in Fray was misleading in that it suggested that the amendments were simply “making technical corrections to Chapter 35, Laws of 1991”. Fray, 134 Wn.2d at 655. The title for the Act disapproved in Fray also did not reference the subject matter other than by referring to some other legislation. See Bennett, 117 Wn. App. at 490. That also is not the case here, i.e., “an Act relating to law enforcement officers and fire fighters”, Chapter 257 Wash. Laws. 1971, 1st Ex. Sess.¹⁹

Nor does the 1971 Act fail the single subject rule. The title of the 1971 Act quoted above. See In re Boot, *supra*, State v. Grisby, *supra*, for similar titles found to be general. The words here suggest the subject matter. Moreover, even if held to be restrictive, the provision at issue is fairly within the subject of the title. Bennett, *supra*.

WSAMA also ignores the fact that the LEOFF Act was repeatedly amended and repeatedly used similar titles. See, e.g., Washington Laws, 1977 1st Ex. Sess., Chapter 294. Its argument would not only call for the invalidation of numerous LEOFF enactments, it also would place in

¹⁸ The WSAMA Brief at page 14 states in a conclusory fashion that the titles of the two bills were similar but fails to compare the actual language.

¹⁹ In State v. Thomas, the title of “An Act Relating To Insurance Fraud” “covered all subjects related to fraud in the insurance industry” but did not notify about the Act’s substantive effect on the Criminal Profiteering Act”. 103 Wn. App. at 809.

jeopardy numerous other statutes which follow the pattern of a few well placed general words indicating its subject. That is not the law in Washington.

C. Plaintiff Was A Member Of LEOFF At The Time Of His Injury.

The IAFF Brief addresses defendant's legal contentions that "plaintiff was not a 'member' of LEOFF under RCW §41.26.281." IAFF Brief, p. 2. The significance of this issue relates to jurisdiction, keeping in mind that, as the Supreme Court stated in Marley v. Dep't of Labor & Indus., 125 Wn.2d 533, 539, 886 P.2d 189 (1994), "[a] court or agency does not lack subject matter jurisdiction solely because it may lack authority to enter a given order." Plaintiff wishes to respond to several points made on this issue. The IAFF argues "the Supreme Court even suggested in dicta that 'training to fight fires' was one of many possible 'fire fighter duties.' Schrom v. Board for Volunteer Fire Fighters, 153 Wn.2d 19, 23, 100 P.3d 814, 816 (Wash. 2004) . . .". IAFF Brief, p. 5. The Schrom court quotes were from the decision of the Board for Volunteer Fire Fighters, which was the successful petitioner in that case. As quoted by the Court, what the Board dubbed as "fire fighter duties" included "participating in fire fighter drills" and "training to fight fires." 153 Wn.2d at 23. This characterization by a governmental Board that fire

fighter drills and training to firefighters are part of fire fighter duties directly supports plaintiff's position.²⁰

The IAFF also relies on Tucker v. Dept. of Retirement Systems, 127 Wn. App. 700, 113 P.3d 4 (2005). IAFF Brief, pp. 8-9. As the IAFF explains, the court's analysis supports plaintiff's position. Notably, the court looked to the employer's own interpretation as to whether the employee was a LEOFF member. Tucker, 127 Wn. App. at 709. The IAFF refers to regulations and statutes such as RCW §41.26.030(4)(a) and WAC 415-104-225(2). Id. at 3. However, it is often the employer who is in a good position to know whether the employee's job duties and responsibilities fit within the statute, e.g., whether a given employee from the employer's viewpoint has "the legal authority and responsibility" to perform fire protection activities. That emphasizes the importance of the evidence supplied to the court in this case that defendant considered plaintiff a LEOFF member at the time of his accident. See, e.g., the portions of the record cited at pages 3-4 of Brief of Respondents.

Amici take diametrically opposed positions on the impact of the right to sue embodied in LEOFF. The IAFF argues that the right to sue assists the maintenance of discipline. WSAMA relies on a quotation from

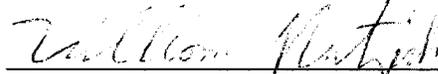
²⁰ Moreover, in Schrom, supra, the Supreme Court looked to the dictionary definition of "fire fighters" as "one who fights fires." As part of Mr. Locke's duties during the day in which he was hurt, he was fighting fires. This too supports plaintiff's position.

Kaya v. Partington, 681 A.2d 256 (R.I. 1996), a Rhode Island Supreme Court case, which predicted “near chaos” if firefighters could sue their employers for negligence” 681 A.2d at 261. Kaya does not assist WSAMA for two reasons. First, the court there was not faced with the clear legislative intent expressed in the LEOFF statute. Secondly, there is no evidence that the LEOFF statute enacted in 1971 has created a permanent state of “near chaos” in Seattle. Indeed, plaintiff questions whether defendant would describe its Department in as being in a state of near chaos during the past 35 year. Rather, as this Court recognized in Hanson, the LEOFF statute “creates a strong incentive for improved safety.” 93 Wn. App. at 926-27.

III. CONCLUSION

The LEOFF statute is constitutional, the State has waived defendant’s sovereign immunity and plaintiff was a member of LEOFF at the time of his accident.

RESPECTFULLY SUBMITTED this 1st day of **March, 2006**.



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