

79222-4

NO. 79222-4
(Formerly Court of Appeals No. 55256-2-1)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Q
app

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

Respondents,

vs.

THE CITY OF SEATTLE, a municipal corporation; and THE CITY
OF SEATTLE FIRE DEPARTMENT,

Petitioners,

and

JAMES SEWELL, MOLLY DOUCE, JOHN CAMERON and
"JOHN DOES" 1-5
in their individual capacities; THE STATE OF WASHINGTON, its
subdivisions
and agencies; and the WASHINGTON STATE PATROL,

Defendants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Michael Spearman, Judge

RESPONDENT'S ANSWER TO PETITION
FOR REVIEW OF CITY OF SEATTLE

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I. IDENTITY OF RESPONDENT

Kevin Locke is the respondent.

II. DECISION AT ISSUE

This Court should not review Division I's June 19, 2006 decision, partially published as Locke v. City of Seattle, 133 Wn. App. 696, 137 P.3d 52 (2006), and the July 24, 2006 denial of reconsideration.

III. RESPONDENT'S STATEMENT OF ISSUES PRESENTED FOR REVIEW

The City's Petition refers to "Federal privilege and immunities, equal protection and the due process clauses" and to the "Federal Constitution." Def. Pet. p.2. It later refers to "significant questions of law under the Federal Constitution," Pet. p.6 and the Federal due process cases. Id. at 11. The City never raised any Federal constitutional issue or due process issues in the Court of Appeal and the Court of Appeals naturally never addressed issues not raised. As discussed, infra, the City should not be permitted to raise only Washington constitutional issues to the Court of Appeals and then, at this late stage, attempt to raise Federal constitutional issues when neither the Respondent nor the Court of Appeals had the opportunity to respond to those issues.

IV. RESPONDENT'S RESTATEMENT OF THE CASE

According to the City, "plaintiff fell off a ladder and, among other

things, sustained orthopedic leg injuries.” Pet., p. 2. A more accurate statement on these issues is that plaintiff “fell from a 50-foot ladder” (133 Wn. App. At 700), “that his pain had increased over time since his injury” (Locke Transcript 6/23/04, RP 203), and that his licensed physical therapist testified that he “will never have a normal gait, that his injuries are permanent, and that he was seeing a rolfer, a massage therapist, and a chiropractor.” Slip Op. p. 31.¹

V. ARGUMENT

A. Introduction to Argument.²

The Law Enforcement and Fire Fighters Retirement System (“LEOFF”) statute was enacted in 1969 and was amended in 1971 to provide a cause of action for negligence against the public employer of an injured police officer or fire fighter. See Fray v. Spokane County, 134 Wn.2d 637, 643-45, 952 P.2d 601 (1998). This court has consistently interpreted the LEOFF statute to carry out the Legislature’s intent to recognize the importance of the responsibilities of, and risks faced by, police officers and fire fighters in Washington. In Taylor v. Redmond, 89 Wn.2d 315, 571 P.2d 1388 (1977), this Court interpreted the portions of

¹ Respondent cites the Slip Opinion on the unpublished portions of the Court of Appeals’ opinion.

² This answer does not raise a new issue and petitioner therefore has no basis to file a reply. RAP 13.4(d).

the LEOFF statute which permitted a negligence action against the municipal employers. In Gillis v. Walla Walla, 94 Wn.2d 193, 616 P.2d 625 (1980), this Court explained the setoff provisions to be applied in an action under LEOFF by a police officer or a fire fighter against his employer. In Fray v. Spokane County, *supra*, this Court explained the parameters of LEOFF Plan II compared to LEOFF Plan I, and decided the constitutionality of the 1992 amendments to the LEOFF statute. See, also, Hauber v. Yakima County, 147 Wn. App. 655, 660, 56 P.3d 559 (2002) (recognizing the State's interest in providing extra protection to police and fire fighters because of the vital and dangerous nature of their jobs).

The LEOFF statutory and constitutional framework was interpreted by this Court in Taylor, Gillis and Fray. Since that time, related questions involving the LEOFF statute have been dealt with by the Courts of Appeals. In Hansen v. City of Everett, 93 Wn. App. 921, 971 P.2d 111 (1999), this Court denied review of the Division I, Court of Appeals opinion which, *inter alia*, explained that the purpose of the LEOFF statute was to create "a strong incentive for improved safety" for the police officers and fire fighters covered by LEOFF, and explained ways in which the municipal employers were also protected. Hansen, 93 Wn. App. at 926-927. In City of Pasco v. Dep't of Ret. Sys., 110 Wn. App. 582, 42 P.3d 992 (2002), Division II interpreted the impact on a fire

fighter's prior eligibility of LEOFF Plan I membership, and explained distinctions between Plan I and Plan II LEOFF membership. In Tucker v. Dep't of Ret. Sys., 127 Wn. App. 700, 113 P.3d 4 (2005), Division II filled in details of LEOFF eligibility including a discussion of the relevance of the employer's understanding whether a given employee was eligible for LEOFF membership. Tucker, supra, 127 Wn. App. at 712.

This case is similar to the three most recent Court of Appeals cases. It accurately relies on and interprets prior decisions of this Court and prior Court of Appeals decisions and does not call for review by this Court.

B. The Court Of Appeals Correctly Concluded That “Fire Fighter Trainees May Be Members of LEOFF.”

The City's Petition cites several portions of the Report of Proceeding (“RP”) in this case to suggest that a fire fighter recruit has no responsibility or authority to perform fire protection activities and, thus, cannot be a “member” of LEOFF. Pet. pp. 4-5. However, none of the portions of the record cited by the City sets out the duties of a recruit fire fighter although the City presumably knew the duties of its fire fighter recruits. Significantly, the record does show that the City twice admitted in writing that Mr. Locke was enrolled as a fire fighter under LEOFF since April 19, 2000. CP 2123-25. Those admissions took place both before

and after Mr. Locke's injury. The City thus admitted that it considered Mr. Locke a LEOFF member before his injury.

The City relied on Tucker v. Representatives of Retirement System, supra, in its brief to the Court of Appeals (Def. Brief, p. 13). As the Court of Appeals in this case explained, citing Tucker, "(a)n employer's understanding of whether its employee is a LEOFF member is a relevant and proper consideration in determining whether the employee is, in fact, a LEOFF member." Locke, supra, 133 Wn. App. at 710. The Court of Appeals also concluded, after a thorough analysis, that "training for fire suppression as Locke was doing when he fell" was a "fire protection activity" that was "required for and directly concerned with preventing, controlling and extinguishing fires." The Court also explained how its analysis was supported by policy considerations: the purpose of LEOFF protection "extends to fire fighters while they are in training academies, where they must encounter dangerous situations to prepare themselves to perform safely and effectively in actual emergencies." Id. at 711-12, citing Hansen, supra, 93 Wn. App. at 926.

The City's Petition does not refute or even address any of this analysis. Moreover, the City's claim of "substantial public interest" to review a decision that Mr. Locke was a LEOFF member is undercut by the fact that it itself viewed Mr. Locke as a LEOFF member. There is no

sound reason for this Court to review this issue.

C. This Court Should Not Review the Court of Appeals Holding that RCW 41.26.281 Does Not Violate Article I, §12 of the Washington Constitution and Does Not Violate Sovereign Immunity.

1. The Court Of Appeals Correctly Determined That RCW 41.26.281 Does Not Violate Article I, §12.

The Court of Appeals had “several” independent bases for ruling against the City’s claim that the LEOFF statute violates the City’s rights under Article I, §12 of the State constitution.³ The Court’s first basis was that Article I, §12 does not address a situation (such as this one) in which a municipal corporation is granted privileges and immunities not available to other citizens or corporations but that grant is conditioned by the State.

As the Court of Appeals explained:

article I, section 12 distinguishes between a “municipal corporation,” such as the city, and other corporations and citizens. As held in *City of Seattle v. State*, 103 Wn.2d 663, 668, 694 P.2d 641 (1985), the city “does not itself have rights under the equal protection clauses of the state and federal constitutions.” *See also Grant County Fire Protection Dist. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004). The State grants municipal corporations many privileges and immunities that are not shared by citizens and private corporations. For example, the city of Seattle may tax its residents to raise money for activities such as fire fighting. Nothing in section 12 prohibits the State from imposing additional requirements on its municipal corporations in connection with such activities.

³ That provision states, “[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.”

Locke, *supra*, 133 Wn. App. at 706-07. [emphasis added]

The Petition makes no effort to distinguish Seattle v. State, 103 Wn.2d 668, 694 p.2d 641 (1985) or to explain why this analysis is incorrect. Any such effort would fail. The text of Article I, §12 specifically distinguishes municipal corporations, such as the City, from citizens and private corporations. The State is entitled to grant municipal corporations the right to tax citizens to provide police and fire protection services that will put these providers in danger. Nothing in Article I, §12 prohibits the State from conditioning the granting of such powers to municipal corporations with obligations which the Legislature could reasonably believe would minimize that danger. To the contrary, State law often permits or compels municipal corporations to treat their employees differently than employees of private corporations in various ways: where they live, what their pension rights are, how they must conduct themselves on the job. Article I, §12 does not prevent such conditions. If it did, it would upset the balance struck involving municipal employees in untold ways to the disservice of Washington and its citizens.

This Court has long recognized the State's power to impose conditions on municipal corporations. For example, in Moses Lake Dist. v. Big Bend Coll., 81 Wn.2d 551, 503 P.2d 86 (1972), this court stated:

Although a possible exception is made for municipal corporations holding property in a private capacity, the United States Supreme Court makes it clear that political subdivisions of a state are created as convenient agencies for exercising such governmental powers of the state as may be entrusted to them. Thus, the state may, at its pleasure, modify or withdraw such powers, may take without compensation such property, hold it itself, or vest it in other agencies.

See, also, State Ex Rel. Smilanich v. J.E. McCollum, et al., 62 Wn.2d 605, 606, P.2d 358 (1963).

The City instead makes a new argument to this Court. The argument under Article I, §12 made by the City to the Court of Appeals and addressed by that Court was not that there was “a granting of positive favoritism”; rather, it was that the City was being required to pay workers compensation to fire fighters without being given the immunity offered private employers:

The city also argues that the LEOFF statute violates article I, section 12 of the state constitution by requiring the city to pay worker’s compensation benefits to LEOFF Plan 2 members without giving the city any corresponding immunity from suit. [footnote omitted] [emphasis added]

Locke, supra, 133 Wn. App. at 706. This quote correctly characterized the argument made to it by the City. For example, in the Brief of Appellant at p. 18, the City argued: “[i]n this instant case, RCW 41.26.281 denies the City the immunity the Industrial Insurance Act grants to all employer’s – a result without logic or justice.” [emphasis added] See, also, Brief of

Appellant, p. 19. The City made the same argument in its Reply Brief concerning its claim that RCW 41.26.281 violated Article I, §12:

It denies the City the immunity virtually all other employers enjoy under RCW tit. 51 by allowing LEOFF members to sue their governmental employers even though private employees cannot sue their employers.

Reply Br., p. 7.

In this petition, the City now argues not that it is being disadvantaged by a law which immunizes most employers but does not immunize the City. Instead, the City argues a claim based on “positive favoritism.” Pet. p. 6. The apparent reason for the City’s raising this new argument is the various opinions by this Court in Andersen v. King County, _____ Wn.2d _____, 138 P.3d 963 (2006). As argued by the City, “Andersen reaffirmed this Court’s holding in *Grant Cy. Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) (Grant Cy. II) that a statute that grants positive favoritism to a particular class is subject to an independent state analysis under WASH CONST. Art. I, §12,” Id. at 6.⁴ However, the fact that Andersen suggested a new

⁴ That appears to be the conclusion of the plurality opinion in Andersen: “[t]herefore, an independent state analysis is not appropriate unless the challenged law is a grant of positive favoritism to a minority class. In other cases, we will apply the same analysis that applies under the federal *equal protection clause*”. Andersen, supra, 138 P.3d at 972. However, because the separate opinion by Justice J.M. Johnson concurred in the judgment only and applied “a different article I, section 12 analysis” (138 P.3d at 992), there does not appear to be a majority opinion on this issue.

argument to the City does not justify or call for this Court to accept review of a new argument which the Court of Appeals did not have the opportunity to address.

Generally speaking, this Court does not review assignments of error not made to the Court of Appeals but raised in a petition for review to this Court. Bender v. City of Seattle, 99 Wn.2d 582, 598-99, 664 P.2d 492 (1983), Ravenscroft v. Water Power Co., 136 Wn.2d 911, 926-27, 969 P.2d 75 (1998). While RAP 2.5 permits this Court to accept review of an issue not raised and considered in the Court of Appeals or in the trial court, this Court need not and, respondent suggests, should not accept this issue.

Respondent has not had the opportunity to brief this issue and this Court would not have the benefit of argument or decision on this issue by the trial court or the Court of Appeals. Moreover, the various opinions in Andersen suggest that further efforts to resolve this issue are better left to situations where there is a full record and the full opportunity to research, brief and argue the issue. For example, the plurality opinion in Andersen supports the Court of Appeals analysis in this case when confronted with an argument that the City was not receiving immunities given to most employers. The Court of Appeals here applied the federal equal protection analysis. That is directly supported by the opinion of the plurality that in

cases, other than those involving a grant of positive favoritism to a minority class, “we apply the same constitutional analysis that applies under the equal protection clause of the United States Constitution.” Andersen, *supra*, 138 P.3d at 973.

2. The LEOFF Statute Satisfies A Minimal Scrutiny Analysis.

This Court recognized in Hauber v. Yakima County, *supra*, 147 Wn.2d at 660 that fire fighters and police officers are distinguished from other employees because of the “vital and dangerous nature of their work”:

While the Industrial Insurance Act immunizes most employers from job related negligence suits, fire fighters 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. RCW 51.04.010, 41.26.281. (emphasis added)

The Court of Appeals relied on Hauber in reaching its conclusion, but the City neither distinguishes nor even cites Hauber.⁵ Both Hauber and Hansen justify the legislature’s different treatment of fire fighters and police in a constitutional analysis.

⁵ The City also ignores the “incentive for improved safety” rationale for RCW 41.26.281 explained in Hansen v. City of Everett, *supra*, 93 Wn. App. at 926: “[b]y exposing an employer to liability for negligent acts toward its employees, the statute creates a strong incentive for improved safety.”

The City's argument is predicated on the purported absence of any "quid pro quo", e.g., its citations to and discussion of Mountain Timber Co. v. Washington, 243 U.S. 219 (1917) and Manor v. Nestle Food Co., 131 Wn.2d 439, 449, 932 P.2d 628, 945 P.2d 1119 (1997). Pet., pp. 10-12. The Court of Appeals, however, explained in some detail at p. 709 of the opinion that the City received some "quid pro quo" under RCW 41.26.281, e.g.:

To establish a claim, LEOFF members must also prove that their employers acted negligently or intentionally. Therefore, the city is protected from product liability claims vis-à-vis their employees since those are not based on negligence. Soproni v. Polygon Apartment Partners, 137 Wn.2d 319, 971 P.2d 500 (1999). [emphasis added]

The existence of a quid pro quo completely undermines the City's argument. This is particularly so because the legislature is not bound to a specific quid pro quo, i.e., providing immunity for all torts. For example, the existing RCW 51.24.020 makes employers liable for certain intentional torts. See, e.g., Birklid v. The Boeing Co., 127 Wn.2d 853, 904 P.2d 278 (1995). Even the City does not argue that RCW 51.24.020 is thereupon unconstitutional.

The Court of Appeals also referred to the City's argument which explained that:

RCW 41.26.281 serves vital government purposes, satisfying the "rational basis" inquiry. It gives extra

protection to fire fighters and law enforcements officers because of the hazardous nature of their occupations, thereby encouraging discipline and efficiency in the workplace. Moreover, under the statute, the governmental employer receives benefits not available to private parties subject to suits in negligence. In this context, the governmental employer occupies a middle ground between nonemployer tortfeasors and nongovernmental employer tortfeasors. The legislature had a “rational basis” for the establishment of this middle ground. There is no constitutional infirmity.

133 P.3d at 709.

3. A “ Minimal Scrutiny” Analysis Is Consistent With Both Washington Law And Principles Of Workers Compensation.

As discussed above, the Court of Appeals discussed several ways in which the LEOFF statute treats municipal defendants more favorably than most other tortfeasors or subrogors. Locke, supra, 133 Wn. App. at 709. The City takes the position, however, that this “quid pro quo” is less than that given in other states. Indeed, it suggests that other states give employers a blanket “immunity from suit.” Pet., p.10, n. 1. This analysis is both legally and factually incorrect. Legally, if Washington chooses to give additional protection to municipal police officers and fire fighters, that choice is not made impermissible even if other states choose differently. Factually, states differ considerably in the nature of immunity given to employers and those differences do not provide the basis for a finding of unconstitutionality. For example, in Birklid, supra, this Court extensively discussed distinctions among the states in the nature of the

immunity furnished under the various states workers compensation laws. See, e.g., Birklid, 127 Wa.2d at 863-865, which discusses such differences. Indeed, in Birklid, this Court declined to adopt the “substantial certainty’ test of Michigan, South Dakota, Louisiana, and North Carolina, or the Oregon ‘conscious weighing’ test.” Id. at 865. Thus, even assuming the necessity of a “quid pro quo” as a constitutional requirement, the LEOFF statute meets that requirement.

4. The Court Of Appeals Did Not Err In Rejecting A Due Process Claim That Was Not Raised.

The City’s Brief in the Court of Appeals cited no federal case or federal constitutional provision and did not argue a violation of due process. The same was true in the City’s Reply Brief. Nor was due process raised in the City’s Motion for Reconsideration. Since the due process implications of LEOFF were not raised by the City, the Court of Appeals understandably did not “discuss the due process implications of LEOFF.” Pet., p. 14. The City has no good reason for raising this issue in its petition when it never raised it with the Court of Appeals. See, Bender, supra; RAP 2.5, supra. Moreover, the same analysis put forth by the Court of Appeals at pages 706-709 to its opinion also applies to the City’s new found “due process claim.”

5. RCW 4.96.010 Waived The City’s Sovereign Immunity.

The essence of the City's argument on sovereign liability is that, by enacting RCW 41.26.281, the Legislature (a) both imposed obligations on the City not to negligently harm police officers and fire fighters and gave police officers and fire fighters a cause of action to enforce those obligations, but (b) did not intend for the waiver of sovereign immunity by RCW 4.96.010 to apply to that coverage action. Under the City's interpretation of RCW 4.96.010, the enactment of RCW 41.26.281 was a "meaningless act"; it essentially was a practical joke played on police officers and fire fighters across the State. As the Court of Appeals pointed out, however, "the legislature is not presumed to do a meaningless act." 133 P.2d at 704, *citing Taylor, supra*, 89 Wn.2d at 319, which was also a LEOFF case.

The Appeals Court reasonably interpreted RCW 4.96.010 to avoid this absurd result. The Court of Appeals relied on cases of this Court, including Bailey v. Forks, 108 Wn.2d 262, 265, 737 P.2d 1257, 758 P.2d 523 (1987), which recognized that RCW 4.96.010 permits different liability rules from public as opposed to private activities. The Court of Appeals then explained:

The difference in municipal liability compared to a private party's liability set forth in these cases does not preclude the applicability of RCW 4.96.010 to municipalities. As the Supreme Court explained:

[I]t is well recognized that RCW 4.96.010

was not intended to create new duties where none existed before. Rather, it was to permit a cause of action in tort if a duty could be established, just the same as with a private person.

J&B Dev. Co. v. King County, 100 Wn.2d 299, 305, 669 P.2d 468 (1983), *reversed on other grounds by Meaney v. Dodd*, 111 Wn.2d 174, 759 P.2d 455 (1988), and *Taylor v. Stevens County*, 111 Wn.2d 159, 759 P.2d 447 (1988).

The correct interpretation of RCW 4.96.010 is that if a government is found to have engaged in tortious conduct under applicable substantive law, which may or may not be different for government than for private parties, then the government will be liable for such tortious conduct “to the same extent as if they were a private person or corporation.” *See Taylor v. City of Redmond*, 89 Wn.2d 315, 319, 571 P.2d 1388 (1977) (sovereign immunity waived by RCW 4.96.010 for suits brought by LEOFF Plan 1 members).

133 Wa. App. at 703-704. The City’s petition does not cite J&B Dev. Co. v. King County, 100 Wn.2d 299, 305, 669 P.2d 468 (1983), and does not even try to explain why the legislature would have intended the City to be immune from a liability it directly imposed on the City.⁶

⁶ The City cites U.S. v. Olson, 126 S.Ct. 510, 163 L.Ed.2d 306 (2005) which interpreted the Federal Tort Claims Act, not RCW 4.96.010. However, the language of the two statutes is different. The Federal Tort Claims Act authorizes suits only “under circumstances where the United States, if a private person, would be liable to the claimant ...” 28 U.S.C. §1346(b)(1). RCW 4.96.010 does not tie liability as directly to the liability of a private person. Rather, it provides that municipalities shall be liable for damages arising out “of their tortious conduct” ... to the same extent as if they were a private person or corporation.” [emphasis added] That difference in language explains the result in J&B Dev. Co., supra, and demonstrates why Olson, supra, is distinguishable.

The City also cites Edgar v. State, 92 Wn.2d 217, 595 P.2 534 (1979) as adopting similar reasoning to Olson, supra. Pet. p.15. However, this Court, in Edgar, explained that the conduct need only be both “tortious” and “analogous, in

D. The Trial Court And The Court Of Appeals Properly Placed On The City The Burden Of Proof Relating To Its Affirmative Defense Of A Statutory Set Off.

The City's argument concerning Instruction 20 is that the instruction improperly placed on it the burden of proof regarding the offset of damages for amounts received or receivable under LEOFF. Pet, pp. 17-18. This argument ignores the fact that the City raised the setoff as an affirmative defense (CP 20), and provided evidence on it in its case. Tannehill testimony (see, generally, Locke Transcript 6/29/04, RP 98-132). The City also fails even to address the Court of Appeal's discussion that relied on those facts in explaining that the City had the burden of proving its affirmative defense:

[I]n its answer to Locke's complaint the city raised the issue of its entitlement to an offset such as that reflected in instruction 20. The city's pleading was proper under CR 8(c), which states that a party shall affirmatively plead any matter constituting an avoidance or affirmative defense. CR 8(c); *Rainier Nat'l Bank v. Lewis*, 30 Wn. App. 419, 422, 635 P.2d 153 (1981). The burden of proof is thereby placed upon the party asserting the avoidance or affirmative defense. See *Gleason v. Metro. Mortgage Co.*, 15 Wn. App. 481, 551 P.2d 147 (1976) (accord and satisfaction).

Locke, supra, 133 Wn. App. at 713. Neither of the cases⁷ cited by the City

some degree at least, to the chargeable misconduct and liability of a private person or corporation. *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 1965)." This explanation is similar to the approach used by this court in J&B Dev. Co., supra, and is distinguishable from the Olson, supra, approach.

⁷ Hansen v. City of Everett, supra, and Jeffers v. City of Seattle, 23 Wn. App. 301, 597 P.2d 899 (1979).

to this Court are on point because neither case concerned a situation in which the defendant raised offset or setoff as an affirmative defense. The Court of Appeals correctly concluded in this case that because the “City’s contention that it was entitled to the statutory offset was in the nature of an avoidance instruction 20 correctly stated the law.” *Id.*

Not only is the general rule that the party raising an affirmative defense has the burden of proof, but defendant, who kept the books and thus knew exactly how much it has paid on plaintiff’s behalf to medical providers, was in the better position than plaintiff to supply such information. Thus, the trial court and the Court of Appeals correctly placed the burden on the City.⁸

E. The Future Economic Damages Award Was Supported By The Evidence.

Karen Colara, a licensed physical therapist, testified that Mr. Locke will never have a normal gait (6/7/04 PM RP 42) and that his injuries were permanent (*id.* at 43). Ms. Colara also testified that Mr. Locke was “seeing a rolfer, a massage therapist and a chiropractor” (*id.* at 34), and explained that a rolfer is a “highly trained massage therapist”. Rolfers “do not just deal with muscles, but also with facie or

⁸ Indeed, defendant initially proposed an instruction placing the burden of proof on itself (CP 3953), though it later withdrew the proposed instruction. Moreover, the burden as to past benefits was resolved by stipulation. As to future benefits, defendant provided evidence including the testimony of Mary Tannehill.

connective tissue.” Id. at 34. Ms. Colara testified on cross examination that Biosports, the provider at which she worked while treating Mr. Locke, provided massage. Id. at 66. She further testified that Biosports charged Mr. Locke \$160 per visit (id. at 50), and that Biosports had charged Mr. Locke more than \$10,000 for his treatment between August 14, 2002 and May, 2004 – the time of the treatment. (6/7/04 p.m., RP 50-51, 123) The jury also was told in Instruction 19 that “the average life expectancy of a male aged forty three years is 32.43 years.” (CP 4079)

This evidence supported the jury’s award regarding economic damages which was separately set forth in the verdict form. As explained by the Court of Appeals:

We find that Locke presented evidence that, given his permanent injuries, his increasing pain, and his medical treatments for those conditions, he would need such treatments over the next approximately 33 years at a cost of \$160 pr treatment and would need such treatment more than once a week. A weekly expense of \$320 for such treatment over the next 33 years would total about \$550,000 even without considering the effects of inflation or a worsening of Locke’s conditions as he ages.

Slip Op., p. 31.⁹ While the City argues, as did the trial court in Erdman v. BPOE, 41 Wn. App. 197, 209-210, 704 P.2d 150 (1985), that the jury only “speculated” arriving at those economic damages, that argument ignores

⁹ This portion of the opinion was not reported and it only affects this case.

the Erdman opinion where the Court of Appeals reversed the trial court and held:

Since Mr. Erdman's impairments were present at the time of trial and he had received medical attention for the impairments, there can be no doubt from the evidence that future treatment is essential for his existence; the jury was entitled to award damages. Thus, we find the court erred in denying that portion of the verdict relating to future medically related expenses.

Id. at 209-210; see also Pattersen v. Horton, 84 Wn. App. 531, 544, 929 P.2d 1125 (1997) (in the case of future damages "mathematical exactness is not required."). Here, the evidence was similar to Erdman and Pattersen and those cases directly support the Court of Appeals decision. There is no good basis to review that portion of the opinion.

VI. CONCLUSION

For the foregoing reasons, this Court should not review Division I's June 19, 2006 decision, partially published as Locke, supra, or the July 24, 2006 denial of reconsideration.

DATED this 20th day of **September, 2006.**



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