

19381-6

No. _____
(formerly No. 57725-5-I in the Court of Appeals)

**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.

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**CITY OF SEATTLE'S
MOTION FOR DISCRETIONARY REVIEW**

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1. Identity of Petitioner

The City of Seattle (“the City”), defendant, is the petitioner.

2. Decision Below

The trial court denied the City’s motion for summary judgment. The City moved for discretionary review by the Court of Appeals. On July 5, 2006, a commissioner for the Court of Appeals denied the City’s motion for discretionary review, and, on September 29, 2006, a three-judge panel denied the City’s motion to modify. (Copies in Appendix.) Pursuant to RAP 13.5, the City asks the Supreme Court to accept discretionary review.

3. Issues Presented for Review

Issues presented for review are whether the Court of Appeals (1) committed an obvious error that would render further proceedings useless; (2) committed probable error that substantially limits the freedom of the City to act; and (3) sanctioned a departure so far from the accepted and usual course of judicial proceedings as to call for the exercise of revisory jurisdiction by the Supreme Court, by declining to accept review of:

1. The trial court’s ruling rejecting the City’s motion for summary judgment argument that RCW 41.26.281 is unconstitutional as violative of privileges and immunities, equal protection and due process clauses;

2. The trial court's ruling rejecting the City's motion for summary judgment argument that RCW 41.26.281 violates sovereign immunity;
3. The trial court's ruling that plaintiff's lawsuit is not barred by the fellow servant doctrine;
4. The trial court's ruling that plaintiff's lawsuit is not barred by assumption of the risk; and
5. The trial court's ruling that the equine immunity statute does not apply to mounted patrol activities even though the statute has a "sweeping and broad" scope.

4. Statement of the Case

Plaintiff's decedent, Ofc. Gary Lindell, was a member of the Seattle Mounted Patrol when he fell from his horse and suffered a head injury while at the Mounted Patrol's training facility. Plaintiff alleges that his death almost 3 years later resulted from his injuries. Compensation for Ofc. Lindell's medical expenses, disability benefits, death benefits and widow's pension were and are being paid pursuant to the no-fault workers' compensation system applicable to police and fire personnel, RCW 41.26, "Law Enforcement Officers and Fire Fighters Retirement System Act ("LEOFF"). That system compels LEOFF employers to fund such benefits, but fails to provide immunity from suit as constitutionally required in all workers' compensation systems. The City challenges the statute on constitutional and sovereign immunity grounds.

Plaintiff claims that the injuries and death were caused by an alleged failure to compel mounted patrol officers to wear helmets and by the condition of the ground surface. Even where a cause of action for negligence against an employer exists (where workers receive no workers' compensation benefits and there is no immunity from suit), such actions are barred where the injury was caused by a fellow servant or where the injured person assumed the risks inherent in the job. The City contends it is entitled to judgment as a matter of law under the fellow servant and assumption of risk doctrines.

Also, the legislature has codified the assumption of risks inherent in equine activities and has provided statutory immunity to equine activity sponsors. RCW 4.24.540. The trial court held the equine immunity statute does not apply to mounted patrol activities even though the statute is written broadly and does not exclude such activities. The City submits the plain language of the statute includes mounted patrol activities. Alternatively, if it were not read to include such activities, the statute would violate constitutional and sovereign immunity principles.

5. Grounds for Relief and Argument

A. RCW 41.26.281 is unconstitutional and violates sovereign immunity.

The City challenged, on constitutional and sovereign immunity grounds, the right-to-sue provision of LEOFF, RCW 41.26.281. The Court of Appeals Commissioner relied solely on Division One's recent ruling in *Locke v. City of Seattle*, 133 Wn. App. 696, 137 P.3d 52 (2006), *petition for review pending* (Supreme Court No. 79222-4), in rejecting the City's motion for discretionary review. *Locke* held that neither constitutional principles nor sovereign immunity was violated by the special privileges granted to LEOFF members alone at the expense of municipalities and their taxpayers.

The LEOFF statute is an anomaly. The City has found no comparable statute in the country. Significantly, even amicus curiae International Association of Fire Fighters in the *Locke* case could not point to a single state where a scheme similar to LEOFF exists, let alone has been upheld against constitutional challenge.

1. RCW 41.26.281 violates Art. I, § 12.

The test under the privileges and immunities clause is whether the statute grants a citizen, class of citizens, or corporation a privilege or immunity that it does not grant to all:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Washington Constitution, Art. I, § 12. Here, the LEOFF statute is doubly flawed: it both grants an unconstitutional *privilege* and takes away a constitutionally-mandated *immunity* from suit. Noting the dangerous nature of police and fire fighting work, LEOFF bestows the privilege of suing their employers but denies this privilege to other employees, even those engaged in occupations which are as or more hazardous. Moreover, the statute deprives LEOFF employers of the constitutionally-required quid pro quo of immunity from suit which is granted to every other employer that is required to fund workers' compensation benefits. Nevertheless, the *Locke* panel, with extremely limited analysis, held the LEOFF statute does not implicate any Art. I, § 12 privileges or immunities, stating:

. . . no “privileges or immunities,” as that term is used in article I, section 12, are implicated. The power to bring suit for negligence against an employer – or, conversely, the right to avoid such a suit – is not a privilege or immunity under article I, section 12.

133 Wn. App. at 707.

This holding is directly contrary to prior decisions of this Court (*Alton v. Phillips Co. v. State*, 65 Wn.2d 199, 396 P.2d 537 (1964) (cited in *Grant Cy. Fire Protection Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d

702, 731, 42 P.3d 394 (2002) (“Grant Cy. I”) and is contrary to the recent extensive analysis of Art. I, § 12 in *Andersen v. King County*, ___ Wn.2d ___, 138 P.3d 963 (2006).

Andersen’s constitutional analysis re-affirmed the holding in *Grant Cy. Fire Protection Dist. v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) (“Grant Cy. II”) that, where a statute grants positive favoritism to a “select few” or a particular class, the statute is subject to an independent state analysis under Art. I, § 12. *Andersen*, 138 P.3d at 971.

Though it is directly on point, the *Locke* court failed to discuss *Phillips*, 65 Wn.2d 199. Grounding its decision on the privileges and immunities clause, *Phillips* invalidated a special bill allowing a corporation to sue, thus depriving the State of the benefit of a statute of limitations. The special bill violated the privileges and immunities clause even though it was the State’s own bill that authorized suit against itself. Here, a special bill benefits a class of citizens rather than just one. However, Art. I, § 12 equally prohibits special bills that benefit a “class of citizens”.

The *Locke* decision concluded that neither the privilege of a special right to sue granted only to a “select few”, nor being deprived of an immunity from suit enjoyed by other employers after being required to fund a workers’ compensation system implicated Art. I, § 12. Regrettably,

the *Locke* panel did not have the benefit of this Court’s recent extensive discussion in *Andersen* of what constitutes an Art. I, § 12 “privilege or immunity”. Justice J. M. Johnson, concurring in *Andersen*, cited Justice Bushrod Washington’s “classic statement of the law on privileges and immunities under article IV of the United States Constitution” in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52, 4 Wash. C.C. 371 (C.C.E.D.Pa. 1823), which protects both “the right to acquire and possess property of every kind” and “to institute and maintain actions of every kind in the courts of the state”. *Andersen*, at 138 P.3d at 994. *See also Grant County II*, 150 Wn.2d at 812-813. *Phillips* likewise recognized that issues regarding rights to bring suit and assert affirmative defenses implicate Art. I, § 12.

Ignoring precedent and logic, *Locke* asserts that, because Art. I, § 12 grants municipalities *greater* privileges and immunities (for example, the right of municipal corporations to levy taxes), Art I, § 12 must also authorize municipalities to be specially burdened. Nothing in Art. I, § 12 even remotely supports such a *non sequitur*. Art. I, § 12 does not fail to mention municipalities – rather, municipalities are especially called out as being authorized to receive privileges and immunities that private entities do not have. Nothing in Art. I, § 12 authorizes legislation that deprives municipalities of privileges or immunities.

2. LEOFF violates equal protection and due process

The *Locke* panel also failed to follow established precedent by finding LEOFF constitutional under an equal protection analysis. This was no mean feat as it required *Locke* to disregard nearly a century of workers' compensation cases, all of which *without exception* require a quid pro quo of immunity from suit where an employer is required to fund workers' compensation benefits. Those cases have used both an equal protection and a due process analysis.

Immunity from suit is a fundamental tenet of workers' compensation laws. Without immunity, employers cannot be compelled to fund a no-fault workers' compensation system. *New York Central Railroad Company v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917); *Mountain Timber Company v. State of Washington*, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917); *Zahler v. Department of Labor and Industries*, 125 Wash. 410, 217 P. 55 (1923); *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915). In *Epperly v. City of Seattle*, 65 Wn.2d 777, 399 P.2d 591 (1965), this Court reiterated that a workers' compensation scheme that imposed a duty to fund the system without protecting the employer from tort liability would present "grave constitutional questions." *Epperly*, 65 Wn.2d at 787 (footnote 1).

In *Manor v. Nestle Food Company*, 131 Wn.2d 439, 932 P.2d 628 (1997), this Court said it has “consistently held” that employers who fund workers’ compensation cannot be sued, citing *Seattle First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wash.2d 230, 241, 588 P.2d 1308 (1978), and then said “We should not now disregard this fundamental tenet of the IIA.” *Manor*, 131 Wn.2d at 456.

The *Locke* panel simply disregarded this fundamental tenet of workers’ compensation. There is no minority view. Neither plaintiff here nor the Court of Appeals cites to any contrary authority – instead sidestepping these “grave constitutional issues.” It is one thing to be part of a well-reasoned minority, but quite another to reject the collective, considered wisdom of every jurisdiction in the country. The *Locke* decision is an aberration which requires correction by the Court.

The *Locke* panel applied an equal protection “minimal scrutiny” test to the LEOFF statute and held it met that test “because of the vital and dangerous nature” of the work of police and firefighters. *Locke*, 133 Wn.App. at 707. There is no “hazardous employment” exception to the immunity requirement for workers’ compensation laws. Established workers’ compensation case law has long recognized that a workers’ compensation statute that fails to provide immunity from suit violates equal protection and due process, even for the most hazardous

occupations. The court in *Mountain Timber v. State of Washington*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, discussed equal protection but also relied upon the reasoning in *New York Central Railroad Company v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917), where the Court discussed the due process implications that can only be satisfied by the quid pro quo of protection from tort liability.

In *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915), the Court considered whether seamen were covered by the Workmen's Compensation Act. Because the State of Washington could not shield employers from admiralty suits in federal court, the Court held seamen were not covered and could not be covered under the Act. The core holding in *Daggett* – that because the legislature could not provide protection from suit, it could not impose a duty to fund the workmen's compensation system – was characterized by the Court as a violation of equal protection. *Daggett*, 87 Wash. 253 at 258.

Although workers' compensation laws exist in every state, neither the *Locke* panel, nor counsel for Locke or Lindell, has cited to a single case supporting the panel's conclusion. In contrast, the absolute constitutional prohibition against such a workers' compensation statute that fails to provide protection from suit is inviolate. In *Mountain Timber*, the Court recognized the fundamental purpose of workmen's

compensation was to abolish private rights of action in the hazardous industries:

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

Mountain Timber, 243 U.S. 219 at 233 [emphases supplied].

The *Locke* panel's reasoning that the special privilege granted to LEOFF members to sue for damages in excess of workers' compensation benefits is justified by the hazardous nature of their occupation is logically unsound in light of the fact that worker's compensation laws were originally enacted *only* for workers "in hazardous industries." *Mountain Timber*, 243 U.S. 219 at 233.

3. Sovereign immunity bars this action.

The *Locke* panel further ruled RCW 4.96.010 unequivocally waived the City's sovereign immunity. The Court was mistaken. Like Mark Twain's famous remark, "The report of my death was an exaggeration," any suggestion of the *total* abolition of sovereign immunity is unfounded. The waiver of sovereign immunity for municipalities, although broad, is limited: liability against a governmental entity is barred

where there is no analogous private liability. This prohibition, codified by the legislature in RCW 4.96.010, operates as a legislative reservation of immunity rights for government:

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

RCW 4.96.010.

Locke's reliance upon *Evangelical United Brethren Church of ADNA v. State*, 67 Wn.2d 246, 407 P.2d 440 (1966) is misplaced. *Evangelical* expressly prohibits liability against governmental entities where there is no analogous private liability. *Evangelical* explicitly held the sovereign immunity waiver is limited:

Essentially, then, the official conduct giving rise to liability must be *tortious*, and it must be analogous, to some degree at least, to the chargeable misconduct and liability of a private person or corporation.

67 Wn.2d at 253 [italics in original; underlined emphasis supplied.]

This principle that governmental liability cannot exist without a comparable private entity liability is hornbook law:

The state, whether acting in its governmental or proprietary capacity, is liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

It is incumbent upon the plaintiff to show that the state's conduct would be actionable if it were done by a private person in a private setting. If the plaintiff would have no cause of action against a private person for the same conduct, then the plaintiff has no cause of action against the state.

LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE, Vol. 15 § 661 (5th Ed. 1996) [emphasis supplied; footnotes omitted]. *See also U.S. v. Olson*, 126 S. Ct. 510, 546 U.S. 43, 163 L. Ed. 2d 306 (2005), where the Court analyzed the federal waiver of immunity (28 U.S.C. § 1346(b)(1)) which matches Washington's statute in that both waive immunity *only* to the extent that a private entity could be sued for the same conduct.

The Washington Supreme Court applied this principle in *Edgar v. State*, 92 Wn.2d 217, 595 P.2d 534 (1979), when it interpreted RCW 4.92.090 – the analogous waiver of sovereign immunity for the State. The *Edgar* court held RCW 4.92.090 required a party suing the State “to show that the conduct complained of constitutes a tort which would be actionable if it were done by a private person in a private setting.” *Edgar*, 92 Wn.2d at 226.

Ignoring cases on point, the *Locke* panel instead cited several public duty doctrine cases and erroneously concluded public liability can exist where there is no private entity liability analogy. These cases are inapposite and irrelevant. The conflating of public duty and sovereign immunity was the subject of recent comment by Judge Robin Hunt in

Donohoe v. State, __ Wn. App. __, 142 P.3d 654, 657-8 (2006), in which she notes the waiver of sovereign immunity, although “broad”, is “circumscribed” by the statute’s plain language which limits governmental liability “...to the same extent as if it were a private person or corporation.” Is there, *Donohoe* wonders, a “private entity analogue for the State’s...” allegedly tortious conduct? If not, there can be no liability. Because this issue was not briefed and the case was resolved on other issues, the *Donohoe* court left the issue “... for another day when the issues are squarely presented and briefed”. *Id* at 658. The day to analyze sovereign immunity separately from public duty has arrived.

B. The Fellow Servant Doctrine bars this claim.

Where employees do have a cause of action against their employers in negligence (i.e., in lieu of workers’ compensation benefits), an employer is not liable for the injuries or death of employees injured in the course of their work through the negligence of fellow servants. *Bennett v. Messick*, 76 Wn.2d 474, 475-6, 457 P.2d 609 (1969); RESTATEMENT (SECOND) OF AGENCY, § 474. Here, all Mounted Patrol members maintained the paddock area where Ofc. Lindell fell, and all members made the common decision not to wear helmets. These members were, by definition, fellow servants of Ofc. Lindell. *See* RESTATEMENT (SECOND) OF AGENCY, § 475.

C. The Assumption of Risk Doctrine bars this claim.

There are no disputed issues of fact as to whether Ofc. Lindell appreciated the risks inherent in his actions and in serving with the Mounted Patrol. Plaintiff has never alleged that Ofc. Lindell did not appreciate these risks. All the evidence shows that Ofc. Lindell had full subjective understanding of the presence and nature of the specific risks involved and voluntarily chose to encounter such risks. Ofc. Lindell himself stated he recognized and assumed the risks of his activities, telling a fellow officer that, despite pressure from his family to sue over his accident, he refused to do so, stating "I knew what I was doing."

Moreover, a plaintiff cannot deny knowledge of the obvious to defeat assumption of the risk. *Perry v. Seattle Sch. Dist. #1*, 66 Wn.2d 800, 405 P.2d 589 (1965). The conditions under which Ofc. Lindell was working were readily apparent. He was well acquainted with, and specifically selected, his horse. He was well aware he was riding without a helmet. He was well acquainted with the paddock where he rode and the condition of the paddock at the time of his accident.

In an employment setting, Washington courts have long held that assumption of the risk is a bar to tort recovery by a servant from his master where the dangers of his employment are known to him or discoverable by the exercise of ordinary care on his part. *Snyder v.*

Lamb-Davis Lumber Co., 64 Wn. 587, 117 P. 399 (1911).¹ The obvious rationale for this rule was laid out by our Supreme Court in *Lynch v. City of North Yakima*, 37 Wn. 657, 80 P. 79 (1905), where the plaintiff, employed as a teamster in a city fire department, sought to recover for injuries sustained when he was kicked by a horse he had been training. It was held the plaintiff, being “in as good a position as anyone well could be to know of the dangers reasonably to be expected,” could not recover from the city for his injuries, even though he may not have been injured had the city provided him with additional equipment. *Lynch*, 37 Wn. at 663. The same situation exists here.

Finally, the legislature itself has explicitly recognized the obvious risks in riding horses – including falling off a horse – in enacting the equine immunity statute (*see* Section D, below). Judge Yu’s reading of the statute leads to the incongruous result that assumption of the risk is imputed to an amateur rider with potentially minimal or no horseback riding experience, but not to a professional rider with considerable experience and expertise. Neither the common law nor RCW 4.24.540 supports this incongruity.

¹ Workplace assumption of the risk cases are rare in modern times because of the protections from suit provided to employers in return for funding workers’ compensation benefits. Thus, one must necessarily look to cases decided prior to the enactment of workers’ compensation laws. These cases remain good law.

D. The “sweeping and broad” scope of the equine immunity statute, RCW 4.24.540, compels its application to mounted patrol activities.

The trial court erred in ruling that the equine immunity statute, RCW 4.24.540, does not apply to mounted patrol activities. The statute by its terms does apply. Rules of statutory construction require courts to assume that the legislature means exactly what it says; a court is not free to disregard the plain language of a statute – particularly where, as here, the legislature has specified in a definition section the meanings and limitations it intends to place on its words. *Western Telepage, Inc. v. City of Tacoma Dep’t of Financing*, 140 Wn.2d 599, 998 P.2d 884 (2000); *Seattle v. State*, 54 Wn.2d 139, 338 P.2d 126 (1959).

It is undisputed that the City is a “corporation ... which provide[d] the facilities for an equine activity...” – that is, an “equine activity sponsor” as expressly defined by RCW 4.24.530(3). Respondent alleges (Complaint, para. 5.1 and 5.2) Ofc. Lindell fell from his horse during a “training session” or “training exercise;” RCW 4.24.530(2), (4) and (5) explicitly define such a person as a “participant” “engaged in an equine activity.” That Ofc. Lindell was injured in the scope of his employment is irrelevant for purposes of immunity; RCW 4.24.530(4) expressly declines to recognize a distinction, specifically including as a “participant” both “amateur” and “professional” riders. Moreover, stripping the City of the

immunity provided by this statute further violates the City's sovereign immunity in that it subjects a municipality to liability for injuries sustained by horse riders in its employ where a private corporation, under both Title 51 and RCW 4.24.530-.40, could not be.

Where the legislature intends to exclude a certain group from the scope of a statute, the legislature does so with explicit language. *See, e.g.,* RCW 4.24.540(2)(a), which explicitly excludes the horse racing industry from the statute. The Court of Appeals has specifically recognized that the “plain purpose of the act is to limit liability,” that the statute’s definition of “sponsor” is “sweeping and broad,” and that the statute provides that such sponsors “shall not be liable *except as specifically provided in the act.*” *Patrick v. Sferra*, 70 Wn. App. 676, 680 (1993) [emphasis supplied]. The trial court’s ruling is flawed in light of both (1) the explicit nonexclusivity of RCW 4.24.530(3) (which includes *but is not limited to* certain enumerated “equine activities”) and (2) the blanket inclusivity of “other equine activities *of any type*” under RCW 4.24.530(2)(e) [emphasis supplied].

Furthermore, Division I’s Commissioner is incorrect in suggesting that even if the statute does apply, there are disputed issues of fact regarding the applicability of the exceptions that justify remand to the trial court. Here, the trial court’s ruling that the statute has no application will

preclude any consideration of such exceptions. The trial court did not hold that questions of fact exist regarding exceptions to the equine immunity statute. Rather, the trial court held as a matter of law that the statute does not apply.

6. Conclusion

The City's petition for review in *Locke* is now pending before this Court. Similar LEOFF cases are pending against other municipalities (Aberdeen, Centralia and Tacoma) in the State. These important issues should be resolved without wasting additional court and municipal resources. The trial court in the instant case agreed that appellate review prior to trial was warranted. Judge Yu certified the challenges to the LEOFF statute for appellate review pursuant to RAP 2.3(b)(4), having found these issues involve a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order would materially advance the ultimate termination of the

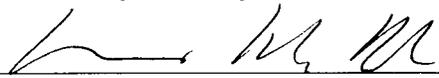
litigation. For the foregoing reasons, the City respectfully requests that this Court accept discretionary review.

DATED this 26th day of October, 2006.

Respectfully submitted,

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APPENDIX

- Ex. A Commissioner's Ruling Denying Discretionary Review
- Ex. B Order Denying Motion to Modify

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

MARGARET A. LINDELL, Personal)	
Representative for the Estate of)	No. 57725-5-1
GARY R. LINDELL, deceased,)	
)	
Respondent,)	COMMISSIONER'S RULING
)	DENYING DISCRETIONARY
v.)	REVIEW
)	
CITY OF SEATTLE, a municipal)	
corporation,)	
)	
Petitioner.)	
_____)	

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

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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

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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

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

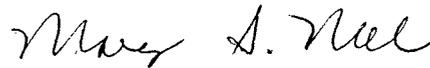
2.3(b)(2). See Task Force Comment to RAP 2.3(b).

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.



Court Commissioner

FILED
COURT OF APPEALS DIV #1
STATE OF WASHINGTON
2006 JUL -5 PM 3:51

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

COPY RECEIVED
06 OCT -2 AM 9:21
SEATTLE CITY ATTORNEY

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

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