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STATE OF WASHINGTON

Consolidated Under No. 79222-4

No. 79381-6
(Court of Appeals No. 57725-5-1)
(King County No. 05-2-05740-8)

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

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

Respondent,

vs.

THE CITY OF SEATTLE, a municipal corporation

Petitioner.

REPLY BRIEF OF ~~APPELLANT~~ PETITIONER

THOMAS A. CARR
Seattle City Attorney

MARCIA M. NELSON, WSBA #8166
REBECCA BOATRIGHT, WSBA #32767
Assistant City Attorneys
Attorneys for Petitioner

Seattle City Attorney's Office
600 Fourth Avenue, 4th Floor
PO Box 94769
Seattle, Washington 98124-4769
(206) 684-8200

ORIGINAL

TABLE OF CONTENTS

	Page(s)
I. INTRODUCTION	1
II. CONSTITUTIONAL PRINCIPLES COMPEL WORKERS’ COMPENSATION STATUTES TO PROVIDE IMMUNITY FROM NEGLIGENCE ACTIONS	2
A. Plaintiff has presented no contrary authority	2
B. LEOFF violates Wash. Const. article I, section 12 under both traditional equal protection principles and under an independent state analysis.....	4
1. LEOFF cannot meet the minimal scrutiny test applicable to the Fourteenth Amendment.....	6
2. LEOFF also violates article I, section 12 under an independent state analysis.....	17
C. Municipalities can raise constitutional issues when they are directly affected	19
III. THE LEOFF RIGHT TO SUE PROVISION VIOLATES SOVEREIGN IMMUNITY	20
IV. CONCLUSION.....	25

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Alton V. Phillips Co. v. State</i> , 65 Wn.2d 199, 396 P.2d 537 (1964).....	6, 7, 20
<i>Andersen v. King County</i> , 158 Wn.2d 1, 138 P.3d 963 (2006).....	6, 17, 18, 19
<i>Arnold v. Laird</i> , 94 Wn.2d 867, 621 P.2d 138 (1980).....	14
<i>Birklid v. The Boeing Co.</i> , 127 Wn.2d 853, 904 P.2d 278 (1995).....	4
<i>DeYoung v. Providence Medical Center</i> , 136 Wn.2d 136, 960 P.2d 919 (1998).....	7, 8
<i>Donohoe v. State</i> , 135 Wn. App. 824, 142 P.3d 654 (2006).....	24
<i>Epperly v. City of Seattle</i> , 65 Wn.2d 777, 399 P.2d 591 (1965).....	3
<i>Evangelical United Brethren Church of Adna v. State</i> , 67 Wn.2d 246, 407 P.2d 440 (1966).....	22
<i>Grant Cy. Fire Protection Dist. v. City of Moses Lake</i> , 150 Wn.2d 791, 83 P.3d 419 (2004).....	17, 18
<i>Halvorson v. Dahl</i> , 89 Wn.2d 673, 574 P.2d 1190 (1978).....	24
<i>Hauber v. Yakima County</i> , 147 Wn.2d 655, 56 P.3d 559 (2002).....	8, 9
<i>Johnson v. Weyerhaeuser Co.</i> , 134 Wn.2d 795, 953 P.2d 800 (1998).....	12

<i>Johnston v. Ohls</i> , 76 Wn.2d 398, 457 P.2d 194 (1969).....	14
<i>Locke v. City of Seattle</i> , 133 Wn.App. 696, 137 P.3d 52 (2006).....	1, 8, 9, 11, 12, 13 15, 16, 24
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632, corrected 966 P.2d 305 (1998).....	13
<i>Manor v. Nestle Food Co.</i> , 131 Wn.2d 439, 932 P.2d 628, as amended 945 P.2d 1119 (1997).....	3, 4, 6
<i>Monell v. Department of Social Services</i> , 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d (1978)	23
<i>Mountain Timber Co. v. Washington</i> , 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917).....	3, 6, 15
<i>New York Central R.R. Co. v. White</i> , 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917).....	3
<i>Shaughnessy v. Northland S.S. Co.</i> , 94 Wash. 325, 162 P. 546 (1917)	3, 5, 16, 17
<i>State v. Daggett</i> , 87 Wash. 253, 151 P. 648 (1915)	3
<i>State v. Hart</i> , 125 Wash. 520, 217 P. 45 (1923)	5
<i>Stertz v. Industrial Ins. Comm'n</i> , 91 Wash. 588, 158 P. 256 (1916)	3
<i>Taylor v. Redmond</i> , 89 Wn.2d 315, 571 P.2d 1388 (1977).....	23, 24

STATUTES

1969 WASH. LAWS EX. SESS. CH. 209, § 8(2).....	24
Civil Rights Act of 1871, 42 U.S.C. § 1983	23
RCW 4.24.530(2)(e)	14
RCW 4.96.010	20, 21
RCW 4.96.010(1).....	2
RCW 16.08.040	13
RCW 41.26	1
RCW 41.26.270	8
RCW 41.26.281	9, 10, 12, 21
RCW 41.50.110	24
RCW 51.04.010	9, 10
RCW Title 51	8

CONSTITUTIONS

Fourteenth amendment to the Constitution of the United States ..	4, 5, 6, 17
Washington Constitution, article I, section 12.....	4, 5, 6, 7, 15, 16, 17, 19
Washington’s Constitution.....	1, 17

MISCELLANEOUS

BLACK'S LAW DICTIONARY (8th Ed. 2004) 3

DEBRA L. STEPHENS AND BRYAN P. HARNETIAUX, THE VALUE OF
GOVERNMENT TORT LIABILITY: WASHINGTON STATE’S JOURNEY FROM
IMMUNITY TO ACCOUNTABILITY,
30 Seattle U. L.Rev. (2006) 21, 22, 23

<http://www.bls.gov/news.release/pdf/cfoi.pdf> 10

JONATHAN THOMPSON, THE WASHINGTON CONSTITUTION’S PROHIBITION
ON SPECIAL PRIVILEGES AND IMMUNITIES: REAL BITE FOR “EQUAL
PROTECTION” REVIEW OF REGULATORY LEGISLATION?,
69 Temp. L. Rev. 1247 (1996)..... 5, 18, 20

L. ORLAND & K. TEGLAND, WASHINGTON PRACTICE,
§ 661 (5th Ed. 1966)22

MICHAEL TARDIF AND ROB MCKENNA, WASHINGTON STATE’S 45-YEAR
EXPERIMENT IN GOVERNMENT LIABILITY,
29 Seattle U. L.Rev. 1 (2005)21

I. INTRODUCTION

This challenge to the Law Enforcement Officers and Fire Fighters Retirement Systems Act (LEOFF), RCW ch. 41.26., on constitutional and sovereign immunity grounds, asks this question: Does LEOFF violate the privileges and immunities clause of Washington Constitution by requiring LEOFF employers to fund workers' compensation benefits while failing to provide immunity from negligence suits? Under either the traditional equal protection standard or under the independent state analysis, the answer is: Yes.

Division I, in *Locke v. City of Seattle*, 133 Wn. App. 696, 137 P.3d 52 (2006), created an unprecedented "vital and dangerous" exception to what has always been recognized to be the fundamental tenet of the great compromise of workers' compensation: "sure and certain" benefits in return for immunity from negligence suits. Workers' compensation laws were originally enacted because of the ultra hazardous nature of certain employments; over time they have been extended to include less hazardous employments. Now, Division I has abandoned the fundamental tenet of workers' compensation by allowing an exception for "vital and dangerous" employment. *Locke* is an anomaly. No comparable case has been located by any party from anywhere in the United States.

Shrugging off a unanimous national consensus to the contrary,

plaintiff nevertheless argues the statute is constitutional and does not violate sovereign immunity. Plaintiff argues the Legislature can impose liabilities in tort on governmental entities even when no such liability exists or can exist against private entities. This argument is contrary to article I, section 12 of the Washington Constitution and to RCW 4.96.010(1) which waives sovereign immunity only “to the same extent as if they were a private person or corporation.”

II. CONSTITUTIONAL PRINCIPLES COMPEL WORKERS’ COMPENSATION STATUTES TO PROVIDE IMMUNITY FROM NEGLIGENCE ACTIONS

A. Plaintiff has presented no contrary authority

The City’s opening brief presented overwhelming authority for the established principle recognized uniformly throughout the country that workers’ compensation laws must provide immunity from negligence suits. Notably absent from Brief of Respondent is any discussion of these long-standing workers’ compensation principles. Plaintiff presented no contrary authority and, of course, cannot. That is because there is none.

Plaintiff argues that, because workers’ compensation laws can and do provide an exception for intentional torts, the LEOFF statute can provide exceptions for both negligent and intentional torts. This argument has no basis in law or fact.

The “great compromise” of workers’ compensation was just that.

Both employers and employees gave up a significant interest. *Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 590-1, 158 P. 256 (1916). This compromise has been universally characterized as a *quid pro quo* whereby employer and employee give up significant rights in exchange for receipt of a significant benefit. The exchange must be more or less equal in value.¹ Here, there is no compromise. For LEOFF employers, it's all *quid*, but no *quo*.

LEOFF's failure to provide immunity from negligence actions goes to the very essence of workers' compensation principles. Both this Court and the United States Supreme Court have recognized that the failure or inability of a workers' compensation to provide immunity from negligence actions would violate equal protection and due process. *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917); *New York Central R.R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917); *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915); *Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325, 162 P. 546 (1917). More recent cases agree: *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 932 P.2d 628, as amended 945 P.2d 1119 (1997); *Epperly v. City of Seattle*, 65 Wn.2d 777, 399 P.2d 591 (1965).

¹ **Quid pro quo**, *n.* [Latin "something for something"] An action or thing that is exchanged for another action or thing of more or less equal value. BLACK'S LAW DICTIONARY (8th Ed. 2004). (Emphasis supplied).

Plaintiff here failed to discuss any of these compelling cases. Instead, plaintiff cites to *Birkliid v. The Boeing Co.*, 127 Wn.2d 853, 904 P.2d 278 (1995). *Birkliid* has no relevance here because it addresses the “deliberate intention” exception to workers’ compensation law.

This Court should give appropriate deference to nearly five generations of Washington and United States Supreme Court justices who have “consistently held” that when an employer is compelled to fund workers’ compensation benefits, the employer must receive immunity from accidental workplace injuries. As this Court succinctly stated:

We should not now disregard this fundamental tenet of the [Industrial Insurance Act].

Manor, 131 Wn.2d at 456. This fundamental tenet of immunity from negligence suits in workers’ compensation law has no exception.

B. LEOFF violates Wash. Const. article I, section 12 under both traditional equal protection principles and under an independent state analysis

Early workers’ compensation cases consistently recognized the quid pro quo requirement under the U.S. Constitution’s Fourteenth Amendment equal protection principles, in addition to due process. See Section IA above and Brief of Appellant Section 5C.

Additionally, the Washington Constitution, article I, section 12, requires that all employers and all employees who come within workers’

compensation statutes must receive the privileges and immunities equally. This Court in *Shaughnessy* specifically identifies article I, section 12 as the jurisprudential foundation for the requirement that workers' compensation statutes must provide immunity from suit, stating:

. . . the act . . . manifestly contemplates that *all employers* and *all employees* who are compelled to come under the act and have their rights each as against the other controlled and determined by its provisions shall enjoy such privileges and immunities equally, in harmony with the guaranty of § 12 of art. I of our state constitution. This evident spirit of the act, we think, points to a legislative intent to make the act applicable only to those relations of employer and employee which are in the legislative control of the state untrammelled by the laws of the United States and the jurisdiction of the courts of the United States which might have the effect of rendering the privileges and immunities for which the act provides, unequal as between employers or unequal as between employees.

Shaughnessy, 94 Wash. at 330. (Emphasis in original.)

Although this Court for many years viewed article I, section 12 as substantially identical to the Fourteenth Amendment's equal protection clause², this view has changed, with several recent cases distinguishing between traditional equal protection and requiring an independent state analysis where "positive favoritism" of an individual or class of citizens is

² See *State v. Hart*, 125 Wash. 520, 217 P. 45, 47 (1923); JONATHAN THOMPSON, THE WASHINGTON CONSTITUTION'S PROHIBITION ON SPECIAL PRIVILEGES AND IMMUNITIES: REAL BITE FOR "EQUAL PROTECTION" REVIEW OF REGULATORY LEGISLATION?, 69 Temp. L. Rev. 1247, 1262 (fn. 66) (1996).

created by a statute. *Andersen v. King County*, 158 Wn.2d 1, 138 P.3d 963 (2006). The LEOFF statute cannot withstand challenge under either standard.

1. LEOFF cannot meet the minimal scrutiny test applicable to the Fourteenth Amendment

One need only look to *Mountain Timber, supra*, to conclude a workers' compensation statute that does not provide immunity from suit cannot withstand an equal protection challenge. This Court more recently applied the rational basis test to evaluate equal protection principles in a workers' compensation statute. *Manor*, 131 Wn.2d 439, reversing Division I on equal protection grounds. *Manor* held that the parent company of Manor's employer was the "true victim of an equal protection violation under the Court of Appeals holding" because Nestlé, being financially responsible for compensation to injured workers, was entitled to the quid pro quo of immunity from suit by injured workers.

Similarly, this Court held that article I, section 12 prohibits the Legislature from authorizing suit to some individuals when all do not have the same rights. *Alton V. Phillips Co. v. State*, 65 Wn.2d 199, 396 P.2d 537 (1964). In *Phillips*, the Legislature enacted a special bill authorizing plaintiff to sue the State even though the statute of limitations had run. In holding that such a bill violated article I, section 12, the Court stated:

[The bill] grants to the plaintiff, a private litigant, special recourse to the courts – a privilege which does not belong

equally on the same terms to all persons and corporations in the state, similarly situated. The purpose of the constitutional provisions, as stated in [*Bacich v. Huse*, 187 Wash. 75, 59 P.2d 1101 (1936)], is clearly to strike down such legislation.

Alton V. Phillips v. State, 65 Wash.2d at 202.

Plaintiff attempts to distinguish *Phillips* because the bill specially favored only one corporation, rather than a class of persons. However, nothing in *Phillips* or in article I, section 12, supports this argument. Indeed, this Court has held that special legislation favoring defendants in medical malpractice claims violates article I, section 12 where the legislation “singles out a subgroup of negligent practitioners and a corresponding subgroup of injured patients for special treatment in violation of article I, section 12.” *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 145, 960 P.2d 919 (1998). Even though the legislation had in mind a specific purpose to solve a perceived insurance crisis and to bar stale claims, this Court held that those reasons were not a rational basis for special legislation affecting rights to sue and defenses from suit.

Phillips also sets to rest any argument that governmental entities cannot claim the protections of article I, section 12. Even though the bill was enacted by the State, the State had standing to raise the article I, section 12 challenge.

Like the legislation in *Phillip* and *DeYoung*, LEOFF cannot

withstand minimal scrutiny analysis. Unlike here, in *DeYoung* the legislation at least contained a purpose that matched the special legislation. Even so, the legislation was insufficient to form a rational basis for creating a special class of persons protected from suit.

Here, LEOFF's purpose is entirely at odds with the right to sue. RCW 41.26.270 states an intention to abolish all civil actions, provide sure and certain relief, and to treat LEOFF employers and LEOFF employees the same as those covered under RCW Title 51. There is no statement within the legislation itself or within the historical record of a rationale or even an intention to treat LEOFF members differently than other employees. Rather, RCW 41.26.270 directly states that LEOFF members' relationship to their employers is "similar to that of workers to their employers." Thus, it is irrational to treat LEOFF members differently.

Nevertheless, *Locke* disregarded the fundamental tenet of workers' compensation and held that "vital and dangerous" work can form a rational basis for the failure of a workers' compensation act to provide immunity, citing to *Hauber v. Yakima County*, 147 Wn.2d 655, 660, 56 P.3d 559 (2002). Plaintiff here relies heavily upon *Locke* and *Hauber*. However, neither provides any authority for authorizing an exception to immunity requirements.

The statement in *Hauber* that the "vital and dangerous" nature of

the work supports the special legislation in LEOFF was *dicta* and contained no analysis, merely citing to RCW 51.04.010 and RCW 41.26.281. Neither statute supports the statement.

Hauber was a wrongful death action arising out of the drowning death of two rescue divers. The estate of one brought suit, claiming his involvement was pursuant to a mutual aid agreement that would allow for suit to be brought against Yakima County. Although no claim was made against Hauber's employer, the Court included a short discussion of a possible ability to sue if the death had occurred while on duty for his employer. *Hauber*, 147 Wn.2d at 660. Because the remarks about what would happen *if* Hauber had died while on duty for his employer are *dicta*, and because the issues raised in this appeal were not raised in *Hauber*, the statement about the "vital and dangerous" nature of the work of fire fighters and police officers is without precedential value.

Nevertheless, since *Locke* relied heavily upon this statement in *Hauber*, and since *Locke* created a "vital and dangerous" exception to immunity requirements of workers' compensation laws, this statement requires analysis.

Hauber cited two statutes: RCW 51.04.010 and RCW 41.26.281. RCW 41.26.281 is the right to sue exception in LEOFF and does not contain any reference to vital or dangerous work. RCW 51.04.010

likewise contains no reference to an exception to immunity requirements for “vital and dangerous” work. Rather, RCW 51.04.010 abolishes civil actions against all employers who are compelled to fund workers’ compensation benefits and contains statements about “frequent and inevitable” injuries to workers in “modern industrial conditions”. Neither RCW 51.04.010 nor RCW 41.26.281 provides any authority for creating an exception for “vital and dangerous” work. RCW 51.04.010 supports a conclusion that other workplaces present “inevitable” hazards and injuries.

Plaintiff here essentially concedes that it is not the dangerous aspect of fire fighting and police work that is the key, apparently recognizing that other workplaces contain equally or more hazardous conditions. Plaintiff declines to engage in “some sort of strict statistical analysis” (Brief of Respondent, p. 6), implicitly recognizing that the evidence shows that other occupations are considerably more hazardous.³

Instead, plaintiff emphasizes the “vital” part of the phrase “**vital and dangerous**” (boldface in Brief of Respondent, page 6). There is no question that in a civilized society, police and fire fighters perform “vital” work. But other work is equally or more “vital”, and equally or more

³ The most hazardous occupations currently are logging, fishing, pilots and navigators, structural metalworkers, drivers-salesworkers, roofers, electrical power installers, farmworkers, construction laborers and truck drivers). (See <http://www.bls.gov/news.release/pdf/cfoi.pdf>.) (CP 1305-22)

“dangerous.” Plaintiff would have the Court engage in philosophical musings as to which employments are more “vital”. If it did so, the Court would have to conclude that workers who provide the population with basic necessities such as water, food, shelter, heat and electricity are engaged in even more “vital” industries than police and fire fighting.

However, workers’ compensation immunity requirements do not allow for such a distinction. No court in the nation other than the *Locke* panel has recognized a “vital and dangerous” exception to immunity requirements. The conclusion that occupational hazards justify a special right to sue for damages over and beyond guaranteed benefits, when it was precisely such hazards that led to the enactment of legislation to eliminate the right to sue in exchange for guaranteed benefits, creates an inconsistency that cannot be reconciled. The fact plaintiff has not found any other state with a similar statute highlights how meritless this argument is.

The *Locke* panel also held, without precedent, that the LEOFF statute passes constitutional muster under a minimal scrutiny analysis by providing a “middle ground” of a “limited quid pro quo” (*Locke*, 133 Wn. App. at 708-09) in that LEOFF employers receive an offset for benefits received and receivable and because LEOFF employers are immune from product liability claims based upon strict liability. There is no recognized

“middle ground” in workers’ compensation law. Nevertheless, plaintiff embraces that argument, discussing a strict liability dog bite statute.

Plaintiff argues that the offset does not merely prevent a double recovery claiming that, if plaintiff’s verdict does not exceed the LEOFF benefits, plaintiff gets nothing. Plaintiff is mistaken. Such a circumstance results from a failure of proof of greater damages—not from any immunity. Plaintiff provides no basis to conclude that LEOFF employers ever avoid any obligation as a result of an offset.

In making this argument, plaintiff states that “the offset . . . under RCW 41.26.281 of all benefits paid and payable results in treatment of the municipality is far more favorable than is generally received by most subrogors in tort litigation [sic]”, citing to *Locke*. (Brief of Respondent, p. 14) *Locke* similarly stated, “This formula treats municipal defendants more favorably than most other tortfeasors or subrogors.” *Locke*, 133 Wn. App. at 709. However, neither “other tortfeasors” nor “subrogors” provide a comparable situation. Other tortfeasors generally are not entitled to an offset for moneys received by a plaintiff from another source because of the collateral source rule. *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 798, 953 P.2d 800 (1998). Plaintiff here apparently recognizes this and chose not to include this argument in her brief even though it was one of the bases for the *Locke* panel’s decision.

Plaintiff does incorporate the “subrogor” comparison from *Locke*. However, neither *Locke* nor plaintiff explains this argument. Neither cites to any cases. *Locke*, 133 Wn. App. at 709; Lindell Brief of Respondent, p. 14. The comparison makes no sense. In an insurance context, the doctrine of subrogation enables an insurer that has paid an insured’s loss to recoup the payment from the tortfeasor. *Mahler v. Szucs*, 135 Wn.2d 398, 413, 957 P.2d 632, corrected 966 P.2d 305 (1998). The insurance company is the “subrogee” and the injured person who received insurance payments is the “subrogor”. *Mahler*, 135 Wn.2d at 413. Neither would be a defendant in a tort action.

Therefore, *Locke*’s conclusion that LEOFF employers occupy a “middle ground” between immune employers and other tortfeasors or subrogors is flawed. The offset LEOFF employers receive is not better than any comparable situation.

Plaintiff also argues that the theoretical existence of immunity for strict liability claims justifies the absence of immunity for negligence actions. *Locke* held that immunity from product liability claims would be part of the quid pro quo justifying the “middle ground” of a workers’ compensation statute that fails to provide immunity for negligence. Plaintiff here adds a discussion about a strict liability dog bite statute. RCW 16.08.040. (Brief of Respondent, pp. 15-16.)

Setting aside the extremely limited situation when strict liability product liability and dog bite claims by employees might arise, plaintiff fails to point out that claims for such injuries could be made under a negligence theory. Actions based on negligence and on strict liability are not mutually exclusive. *Arnold v. Laird*, 94 Wn.2d 867, 621 P.2d 138 (1980).

Further, this Court has held that in order to impose strict liability on the owner of a dog, the plaintiff must prove that the owner had knowledge of a trait or propensity of the animal which would be likely to cause such injury. *Johnston v. Ohls*, 76 Wn.2d 398, 457 P.2d 194 (1969). This requirement of knowledge of dangerousness under strict liability goes a long way toward the proof required in a negligence action.

Plaintiff focuses on police dogs, arguing that LEOFF employers would not be liable under the strict liability statute for dog bites. Given that plaintiff here is claiming the horse Officer Lindell had chosen to ride was somehow negligently trained (Amended Complaint, CP 660), one could easily imagine that attempts would be made to find a way to make similar negligence claims regarding the training of a police dog.⁴

⁴ Although the issue is not before this Court, the City nonetheless notes the inconsistency between plaintiff's concession that the City would not be liable under strict liability for dog bites and plaintiff's argument below that the equine immunity statute does not protect mounted patrol activities even though the statute is broadly written to encompass "equine activities of any type". RCW 4.24.530(2)(e). (CP 723-26)

Further, these theoretical immunities for strict liability statutes are woefully inadequate to justify the absence of immunity from negligence actions in a workers' compensation statute. No court other than *Locke* has held that anything short of the abolishment of negligence actions satisfies the fundamental tenet of workers' compensation. Plaintiff overlooks that the fundamental purpose of the act was to abolish private rights of action in return for sure and certain benefits:

. . . the fundamental purpose of the 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 employer 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. at 233. The Court continued:

. . . yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the quid pro quo for the burdens imposed upon him, so that if the act is not valid as against employees, it is not valid as against employers.

Mountain Timber, 243 U.S. at 234. The essence of a workers' compensation statute is absent from LEOFF, rendering it unconstitutional.

Plaintiff argues that it is only when a "select few" receive special privileges or immunities that article I, section 12 is implicated, as opposed to a "class of persons". (Brief of Respondent, page 12.) This contention

was set to rest long ago. In *Shaughnessy*, a workers' compensation case, this Court determined that the class of entities to be analyzed under equal protection is "all employers and all employees who are compelled to come under the act". *Shaughnessy*, 94 Wash. at 330.

The fact that all persons *within a specially privileged class* are treated equally does not and cannot satisfy article I, section 12. The fact that all LEOFF employees both receive workers' compensation benefits and retain the right to sue is of no consequence. Article I, section 12, prohibits favoritism to a "class of citizens" just as it prohibits favoritism to one person or corporation:

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, article I, section 12 (emphasis added).

Plaintiff's argument would write the words "class of citizens" out of article I, section 12. The argument would also render the entire section meaningless. Consistency among the favored persons cannot justify their favored treatment.

In sum, *Locke's* so-called rational basis is nothing short of irrational. The early cases that established the foundation for constitutionality of workers' compensation laws did so when the only

occupations that were covered were ultra hazardous. No “vital and dangerous” exception exists or can exist in workers’ compensation law.

2. LEOFF also violates article I, section 12 under an independent state analysis

Assuming *arguendo* that this Court concludes that LEOFF satisfies the traditional “minimal scrutiny” equal protection analysis, this Court must then decide whether the statute can survive an independent state analysis under article I, section 12.

Shaughnessy in 1917 specifically referenced article I, section 12 as requiring all employers and all employees who come within a workers’ compensation statute to receive equal immunities. Washington’s Constitution’s prohibition on special privileges and immunities has a strikingly different history than that of the Fourteenth Amendment’s Equal Protection Clause. These differences were explored at length in *Andersen v. King County*, 158 Wn.2d 1, 14, 138 P.3d 963 (2006), where the Court coined the phrase “positive favoritism.” The Court cited to *Grant Cy. Fire Protection Dist. v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) (“*Grant County II*”) and again

. . . recognized our framers’ “concern with avoiding favoritism” to a select group and that this “clearly differs from the main goal of the equal protection clause, which was primarily concerned with preventing discrimination against former slaves.”

Andersen, 158 Wn.2d at 14, quoting *Grant County II*, 150 Wn.2d at 808.

Thus, “the concern about favoritism arises where a privilege or immunity is granted to a minority class” (*Andersen*, 158 Wn.2d at 16), such as here. The number of LEOFF employees compared to the total number of employees whose employers are required to fund workers’ compensation is obviously a small percentage.

Plaintiff here concedes that the privileges and immunities clause reflects the concern with political influence. Plaintiff focuses on only one type of influence – that wielded by persons or corporations with great wealth. Of course, political influence comes in a variety of forms. One commentator, Jonathan Thompson, discussed both corporate and “other powerful minority interests seeking to advance their interests at the expense of the public.” THOMPSON, 69 Temp. L. Rev. 1247, 1253 (1996).

LEOFF creates a special subclass of employees who are granted benefits under workers’ compensation laws but who are also allowed to sue for negligence. Plaintiff here argues that there exists “reasonable grounds” for this distinction due to the “vital and dangerous” nature of the work and the “strong incentive for improved safety”. Brief of Respondent, pages 12-13. But workers’ compensation laws do not allow for exceptions. Further, other workplaces are equally or more “vital and dangerous.” Lastly, any perceived impact on employers to create an

incentive for improved safety applies even more so to other employment situations where the risks and hazards are more in control of the employer. The hazards that plaintiff argues justify special legislation are not within the control of LEOFF employers. They are inherent in the job. These inherent employment risks do not justify special legislation.

C. Municipalities can raise constitutional issues when they are directly affected

Plaintiff here bypasses the City's argument that it can raise equal protection arguments (either both a traditional analysis and under an independent state analysis) perhaps because this Court has clearly held that municipalities have such rights when they are "directly affected." (See Brief of Appellant, pages 34-37.) One commentator on article I, section 12, cited in *Andersen*, 158 Wn.2d at 15-16, explicitly recognized that taxpayers are among those to be protected by article I, section 12. Jonathan Thompson discussed the influence that organized special interest groups can have on the legislative process and the impact of such influences on taxpayers:

Another problem endemic to republican lawmaking is that while a legislature will tend to move toward restraint where the costs and benefits of a particular legislative initiative are widely distributed, it will tend to grant subsidies and power, i.e., privileges and immunities, to organized beneficiaries where benefits are concentrated and costs are widely dispersed. Unorganized interest groups such as taxpayers, consumers, or potential beneficiaries of

protective regulations, bear the costs of these special privileges and immunities. Thus, under some very identifiable conditions, interests may prevail that would not have if majority preferences were given full accounting.

JONATHAN THOMPSON, 69 Temp. L. Rev. 1247 (1996).

Thompson's view is consistent with that of this Court. This Court has, on several occasions, allowed municipalities and other governmental entities, to raise these constitutional issues. The case most analogous to the instant case is *Alton V. Phillips v. State*, 65 Wn.2d 199, where the State succeeded in invalidating a special bill authorizing suit by one entity beyond the limitations period.

LEOFF employers and their taxpaying public are directly affected by LEOFF. Nobody argues differently. Instead, plaintiff chooses to ignore this test, essentially arguing that the Legislature can do what it wants with regard to governmental obligations. This argument is belied by *Phillips*, where this Court held that the Legislature cannot do as it pleases, even with regard to liability against itself. It is axiomatic that the Legislature cannot do to municipalities what it cannot do to itself.

III. THE LEOFF RIGHT TO SUE PROVISION VIOLATES SOVEREIGN IMMUNITY

Municipalities can be liable only where there is a private liability analogy. This principle is clearly expressed in RCW 4.96.010, which waives tort immunity for municipalities and makes them liable for

damages arising out of their tortious conduct “to the same extent as if they were a private person or corporation.”

Plaintiff here argues that RCW 41.26.281 somehow superseded the clause “to the same extent as if they were a private person or corporation” from RCW 4.96.010. This argument is inconsistent with recent in-depth analyses of Washington’s sovereign immunity waiver.

The subject of expanding governmental liability in this state has been the subject of recent law review articles. MICHAEL TARDIF AND ROB MCKENNA, WASHINGTON STATE’S 45-YEAR EXPERIMENT IN GOVERNMENT LIABILITY, 29 *Seattle U. L.Rev.* 1 (2005), raise concerns about expanding governmental liability. DEBRA L. STEPHENS AND BRYAN P. HARNETIAUX, THE VALUE OF GOVERNMENT TORT LIABILITY: WASHINGTON STATE’S JOURNEY FROM IMMUNITY TO ACCOUNTABILITY, 30 *Seattle U. L.Rev.* (2006), wrote in response to the TARDIF AND MCKENNA article.

While there is disagreement in the two articles regarding the wisdom of expanding governmental liability into areas where no comparable private activity exists, no disagreement exists regarding the prohibition against governmental liability where there is a private entity analogy and no liability exists:

Moreover, in waiving sovereign immunity, the legislature consented to imposition of liability against state and local governmental entities for tortious conduct “to the

same extent as if [they] were a private person or corporation.” This language forecloses any reliance on the “governmental” nature of a particular activity as a basis for retaining sovereign immunity. In this regard, it is appropriate when assessing liability to draw analogies between the governmental defendant’s conduct and comparable conduct performed in the private sector. For example, the duty of a law enforcement officer may be analogized to that of a private security officer under similar circumstances. Notably, the statutory language, “as if,” suggests that liability may be imposed even in areas in which no prior analogous liability has been found in the private sector, *so long as a private entity would be subject to liability if the same theory were asserted against it in the first instance*. A more restrictive analysis might have been required if the statutes imposed liability only for conduct “performed by” or even “to the same extent as” private defendants, rather than “as if . . . a private person or corporation.”

STEPHENS AND HARNETIAUX, 30 Seattle U. L. Rev at 54. (Footnotes omitted; emphasis added.)

This view is consistent with previously cited authority plaintiff fails to discuss: *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1966), and L. ORLAND & K. TEGLAND, WASHINGTON PRACTICE, § 661 (5th Ed. 1966). Both recognize that plaintiff must show the conduct complained of would be “analogous, to some degree at least, to the chargeable misconduct and liability of a private person or corporation.” *Evangelical*, 67 Wn.2d at 253.

Here, there are private entity analogies but no comparable private entity liabilities. Where employers are not compelled to fund workers’

compensation benefits, they are subject to suit in tort by employees. Where employers are compelled to fund workers' compensation benefits, they must be immune. Even STEPHENS AND HARNETIAUX, who argue in favor of expanded governmental liability, concede that there can be no governmental liability if there is a comparable situation but no liability.

Plaintiff argues there is governmental liability without comparable private liability, citing to *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d (1978). *Monell* is inapposite. *Monell* merely expanded who could be sued under 42 U.S.C. § 1983 to include municipalities in certain situations. *Monell* did not hold that no private entity could be sued. Indeed, 42 U.S.C. § 1983 defeats plaintiff's argument, creating liability against "every person" (with certain exceptions) who violates its provisions. This wording existed ever since the Civil Rights Act of 1871, now codified as 42 U.S.C. § 1983, was enacted.

Plaintiff also argues that *Taylor v. Redmond*, 89 Wn.2d 315, 571 P.2d 1388 (1977), has already resolved the City's argument on sovereign immunity. However, plaintiff fails to acknowledge or even discuss the underlying mistaken assumption in *Taylor* that LEOFF employers are not required to fund LEOFF benefits, quoted here:

Also worth noting are the facts that police and fire fighters receive no benefits under workmen's compensation, and industrial insurance premiums are not paid by

municipalities. Instead, the benefits accorded police and fire fighters are under LEOFF.

Taylor, 89 Wn.2d at 319-20. As discussed in the City's Brief of Appellant (pages 3, 4, 7, and 45), from its inception, LEOFF required that LEOFF employers provide funding. 1969 WASH. LAWS EX. SESS. CH. 209, § 8(2) (requiring employer contributions); RCW 41.50.110. Plaintiff here does not and cannot claim that *Taylor's* assumption was not mistaken. Plaintiff's reliance on *Taylor* is misplaced.

Plaintiff does not dispute that there is a distinction between the public duty doctrine and sovereign immunity. *Donohoe v. State*, 135 Wn. App. 824, 142 P.3d 654, 657-58 (2006). There is nothing in LEOFF that creates a standard of care, unlike *Halvorson v. Dahl*, 89 Wn.2d 673, 574 P.2d 1190 (1978), (cited by the *Locke* panel) where claims against the City of Seattle were based on alleged duties to enforce code provision against a property owner.

As plaintiff knows well, the claims of negligence here include allegations of failure to train and premises liability claims. (CP 660.) These are common law duties, not statutory duties, and do not arise out of LEOFF. Police and firefighters could sue their employer in negligence if LEOFF did not exist, assuming they were not covered by another workers' compensation statute.

IV. CONCLUSION

The requirement that workers' compensation statutes provide immunity from suit is unalterable. There are no exceptions. LEOFF's one of a kind special privilege exists only in Washington. Only LEOFF creates a special class that gives up nothing in the great compromise of workers' compensation. Both private employers and the taxpaying public are entitled to their side of the quid pro quo.

DATED this 23rd day of April, 2007.

Respectfully submitted,

THOMAS A. CARR
Seattle City Attorney

By:



MARCIA M. NELSON, WSBA #8166
REBECCA BOATRIGHT, WSBA #32767
Assistant City Attorneys

Attorneys for Appellant City of Seattle

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Samantha Sams certifies under penalty of perjury under

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Attorney's office.

On April 23, 2007, I requested ABC-Legal Messengers, Inc., to
deliver, by April 23, 2007, a copy of this document to:

Todd W. Gardner
Swanson ❖ Gardner
4512 Talbot Road South
Renton, WA 98055
(425) 226-7920
Attorney for Respondent

Maureen Hart
Solicitor General
Attorney General's Office
1125 Washington Street SE
Olympia, WA 98504-0100

Johnna Skyles
Attorney General's Office
1125 Washington Street SE
Olympia, WA 98504-0100

and to file the original and one copy of said documents, by April 23, 2007,
with:

The Supreme Court of the
State of Washington

In addition, I submitted a copy of this document to all counsel of record in the consolidated case *Kevin Locke, et ux. v. The City of Seattle, et al.*, Supreme Court No. 79222-4, with instructions to ABC Legal Messengers to serve said documents on the following by 4:30 p.m. on April 22, 2007:

Pamela A. Okano
REED McCLURE
Two Union Square
601 Union St., Ste 1500
Seattle, WA 98101-1363

William Joel Rutzick
SCHROETER GOLDMARK &
BENDER
810 3RD Ave., Ste 500
Seattle, WA 98104-1657

David J. Wieck
John L. O'Brien
O'BRIEN & ASSOCIATES
O'Brien Professional Bldg.
175 NE Gilman Blvd.
Issaquah, WA 98027

Alexander John Skalbania
EMMAL SKALBANIA &
VINNEDGE PLLC
4241 21st Ave. W. Ste 104
Seattle, WA 98199-1250

I also caused to be mailed, via United States mail, postage prepaid, this document, addressed to the following:

Daniel B. Heid
City of Auburn Legal Dept.
25 West Main Street
Auburn, WA 98001-4998

Milton G. Rowland
Floor 5 Municipal Bldg.
808 W. Spokane Falls Blvd.
Spokane, WA 99201-3333

Thomas A. Woodley
General Counsel, IAFF
Baldwin Robertson
Assistant Counsel, IAFF
1750 New York Avenue N.W.
Washington, DC 20006

DATED this 23rd day of April, 2007.



Seattle City Attorney's Office
600 Fourth Avenue, 4th Floor
PO Box 94769
Seattle, WA 98124-4769
(206) 684-8200