

**FILED**  
MAR 20 2007

NO. 79222-4

CLERK OF SUPREME COURT  
STATE OF WASHINGTON

Consolidated With No. 79381-6

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

**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" +5  
in their individual capacities; THE STATE OF WASHINGTON, its subdivisions  
and agencies; and the WASHINGTON STATE PATROL,**

**Defendants.**

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**APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Michael Spearman, Judge**

**SUPPLEMENTAL BRIEF OF CITY OF SEATTLE**

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## **I. NATURE OF THE CASE**

Plaintiff/respondent, a fire fighter recruit not yet eligible to fight real fires, fell from a ladder at recruit school. He received workers' compensation benefits. While virtually every other employer who pays workers' compensation benefits has immunity from suit, RCW 41.26.281 of the Law Enforcement Officers' and Fire Fighters' Act (LEOFF) allows "members" to sue their employers. Claiming he was a LEOFF "member", plaintiff sued his employer, the City.

## **II. ISSUES PRESENTED**

1. Is a fire fighter recruit a LEOFF "member" where, by statute and regulation, a "member" must have "the legal authority and responsibility to direct or perform fire protection activities"?
2. Is a statute that compels public employers to fund workers' compensation benefits without protection from suit unconstitutional?
3. Does LEOFF violate sovereign immunity by creating a cause of action against public employers that does not and cannot exist against private employers?
4. Does a LEOFF employer have the burden of proving the "amount received or receivable" under RCW 41.26.281?
5. May future economic damages be upheld where it is contrary to the evidence and speculative?

### **III. STATEMENT OF THE CASE**

#### **A. STATEMENT OF RELEVANT FACTS.**

Plaintiff was a City of Seattle fire fighter recruit. (6/10 RP 46) Recruits do not become probationary fire fighters who fight real fires until graduation from recruit school. (5/26 RP 118-19; 5/27 AM RP 116, 126; 6/28 RP 222) While training in recruit school, plaintiff fell off a ladder and, among other things, sustained orthopedic leg injuries. (CP 4-6) As a self-insured employer, the City paid workers' compensation benefits. (6/29 RP 105-06, 115-16)

#### **B. STATEMENT OF PROCEDURE.**

Plaintiff sued the City for negligence under RCW 41.26.281. (CP 1-11) A jury found the City liable. Judgment for \$1,513,663.88 was entered. (CP 4089-91, 4505-07) Division I affirmed.

### **IV. ARGUMENT**

#### **A. THE TRIAL COURT HAD NO JURISDICTION.**

The City paid workers' compensation benefits under RCW tit. 51. Typically, employees in such a situation cannot sue their employers for negligence because RCW 51.04.010 removes jurisdiction. *See Dougherty v. Department of Labor & Industries*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003). However, the LEOFF statute, RCW 41.26.281 allows LEOFF "members" to sue their employers for negligence.

RCW 41.26.030(8) defines “member” to include “every . . . fire fighter who is employed in that capacity.” RCW 41.26.030(4)(a) defines “fire fighter” as a full-time, fully compensated member of a fire department “who is serving in a position which requires passing a civil service examination for fire fighter, *and who is actively employed as such*” (emphasis added). WAC 415-104-225(2) explains what this means:

You are a fire fighter if you are employed in a uniformed fire fighter position by an employer on a full-time, fully compensated basis, *and* as a consequence of your employment, *you have the legal authority and responsibility to direct or perform fire protection activities that are required for and directly concerned with preventing, controlling and extinguishing fires.*

(a) “Fire protection activities” may include incidental functions such as housekeeping, equipment maintenance, grounds maintenance, fire safety inspections, lecturing, performing community fire drills and inspecting homes and schools for fire hazards. *These activities qualify as fire protection activities only if the primary duty of your position is preventing, controlling and extinguishing fires....*

(Emphasis added.) At the time of his accident, plaintiff had *no* duty, let alone a primary one, to prevent, control, or extinguish fires. Unless and until he graduated from recruit school and became a probationary fire fighter<sup>1</sup>, he could not and would not be assigned to the operations division

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<sup>1</sup> Reflecting their ability and responsibility to fight real fires, probationary fire fighters—*i.e.*, those who have graduated from recruit school—are LEOFF members. WAC 415-104-225(2)(d). (5/26 RP 118-19; 5/27 AM RP 116, 126; 6/28 RP 222)

to fight real fires. (5/25 RP 24, 165; 5/27 RP AM 116, 124, 126, 143; CP 191, Ex. I [part of Sub 51A transmitted to the Court of Appeals separately from the clerk's papers]) He was not "actively employed" as a "fire fighter" as required by WAC 415-104-225(2) and RCW 41.26.030(4)(a). See *Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 28, 100 P.3d 814 (2004) ("fire fighter" under volunteer fire fighters' pension system must possess duties including fighting fires); *Tucker v. Dep't of Retirement Systems*, 127 Wn. App. 700, 712, 113 P.3d 4 (2005) (temporary fire fighter helper training to be fire fighter was not "fire fighter" under LEOFF); *Int'l Ass'n of Fire Fighters Local 3266 v. Dep't of Retirement Sys.*, 97 Wn. App. 715, 721, 987 P.2d 115 (1999) (technicians whose primary duty was to operate airport not "fire fighters"); *Fann v. Smith*, 62 Wn. App. 239, 814 P.2d 214 (1991) (former police cadets contributed to LEOFF only after being sworn in as officers).

Because plaintiff was a recruit, not a "fire fighter", he was not a LEOFF "member" entitled to sue his employer for negligence under RCW 41.26.281. The trial court thus had no jurisdiction. RCW 51.04.010, *Dougherty*, 150 Wn.2d at 314. Nonetheless, the panel ruled that recruits could be "fire fighters", stating, "The statute does not distinguish between levels of training." 133 Wn. App. at 712. But RCW 41.26.030(4)(a)

requires a person claiming “fire fighter” status to be “actively employed” as a fire fighter. Recruits are not, since they cannot fight real fires.

Significantly, WAC 415-104-225(2)(d) expressly says probationary fire fighters—*i.e.*, those who have graduated from recruit school—are LEOFF members:

You are a fire fighter if you meet the requirements of this section regardless of your rank or status as a probationary or permanent employee . . . .

WAC 415-104-225(2)(d). (5/26 RP 118-19; 5/27 AM RP 116, 126; 6/28 RP 222) By mentioning probationary fire fighters but not recruits, the regulation recognizes that probationary fire fighters have the authority and responsibility to fight real fires, but recruits do not. If recruits were intended to qualify as “fire fighters”, the regulation would have said so.

“[P]roperly promulgated, substantive agency regulations have the ‘force and effect of law.’” *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 445, 932 P.2d 628, *as amended*, 945 P.2d 1119 (1997) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979)). Further, “[t]he Legislature’s failure to amend a statute interpreted by administrative regulation constitutes legislative acquiescence in the agency’s interpretation of the statute.” *Id.* at 445 n.2. Yet the panel impermissibly substituted its judgment for what it thought the statute and

regulation *should* say. *State v. Klein*, 156 Wn.2d 103, 121, 124 P.3d 644 (2005).

The panel also said that because the City personnel department treated plaintiff as a LEOFF member, the City's summary judgment motion on his status as a LEOFF "member" was properly denied. 133 Wn. App. at 710. But, because plaintiff was not a LEOFF "member," the trial court had no jurisdiction. RCW tit. 51 removes jurisdiction over employees' negligence claims against employers for workplace injuries. *Dougherty*, 150 Wn.2d at 314. Subject matter jurisdiction cannot be waived, or created by estoppel. RAP 2.5(a)(1); *In re Personal Restraint of Dalluge*, 152 Wn.2d 772, 782 n.5, 100 P.3d 279 (2004); *J & J Drilling, Inc. v. Miller*, 78 Wn. App. 683, 690, 898 P.2d 364 (1995).

Moreover, whether a fire fighter recruit is a LEOFF "member" is a question of law. This Court is not bound by a stipulation of law, even had there been one. *Rusan's, Inc. v. State*, 78 Wn.2d 601, 606, 478 P.2d 724 (1970). Indeed, in *Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 28, 100 P.2d 814 (2004), the employee and her governmental employer had both paid into the volunteer fire fighters pension system for 20 years in the mistaken belief that the employee was eligible for pension benefits. This Court held that the employee was not eligible.

**B. RCW 41.26.281 IS UNCONSTITUTIONAL.**

This case presents a simple syllogism: (1) Any workers' compensation statute that fails to provide employers immunity is unconstitutional; (2) LEOFF is a workers' compensation statute that fails to provide employers with immunity; thus, (3) LEOFF is unconstitutional.

No workers' compensation statute can compel an employer to fund benefits without providing the quid pro quo of immunity from negligence suits. *Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325, 162 P. 546 (1917) (Art. I, § 12 and U.S. CONST. amend. XIV); *accord*, *Hildahl v. Bringolf*, 101 Wn. App. 634, 650, 5 P.3d 38 (2000), *rev. denied*, 142 Wn.2d 1020 (2001). The U. S. Supreme Court agrees under the U.S. Constitution, amend. XIV. *Mountain Timber Co. v. Washington*, 243 U.S. 219, 233-34, 236, 37 S. Ct. 260, 61 L. Ed. 685 (1917). LEOFF violates this fundamental principle.

Art. I, § 12 provides greater protections where a grant of positive favoritism is involved; if there is no grant of positive favoritism, an issue is analyzed under equal protection principles consistent with the U.S. Constitution.<sup>2</sup> *Andersen v. King County*, 158 Wn.2d 1, 13-16, 138 P.3d

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<sup>2</sup> The City incorporates by reference pages 27-30 of its Brief of Appellant in *Lindell v. City of Seattle*, No. 79381-6, consolidated herewith.

963 (2006); *State v. Gunwall*, 106 Wn.2d 54, 59-63, 720 P.2d 808 (1986).

LEOFF violates Art. I, § 12 under both standards.

**1. Traditional Equal Protection Analysis.**

Where positive favoritism is not created, Art. I, § 12 claims are analyzed on federal equal protection grounds. U.S. CONST. amend. XIV, § 1. Even under that test, workers' compensation statutes cannot pass constitutional muster without providing employers immunity from suit. There is no minority view.

The absolute constitutional prohibition under equal protection of a workers' compensation statute that fails to provide protection from suit is well established as inviolate, as recognized by both this Court and by the U.S. Supreme Court. *Mountain Timber*, 243 U.S. 219, (equal protection); *Shaughnessy*, 94 Wash. 325, (equal protection under U.S. CONST. amend. XIV and Art. I, § 12); *Epperly v. City of Seattle*, 65 Wn.2d 777, 779 n.1, 399 P.2d 591 (1965) ("grave constitutional questions"); *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915) (seamen could not receive workers' compensation benefits because the State could not protect employers from federal suits in admiralty); *see also Manor v. Nestle Food Co.*, 131 Wn.2d 439, 449, n.4, 932 P.2d 628, *as amended*, 945 P.2d 1119 (1997) (equal protection).

Departing from precedent, the panel created what it called a “middle ground”, holding that the offset for LEOFF benefits received or receivable provides sufficient quid pro quo. But the offset simply avoids double recovery. Here, the City, a self-insured employer, paid the entire workers’ compensation benefits of \$138,980. (6/29 RP 99, 103, 106-08, 119; CP 4090) The offset’s only effect is that LEOFF employers do not have to pay *twice*—a circumstance not comparable to any other personal injury tort situation. The panel’s reference to collateral source misses the point. The source here is not “collateral.”

The panel also said LEOFF employers receive a “limited quid pro quo” because they cannot be sued for product liability claims. LEOFF members are not consumers and LEOFF employers are not in the business of introducing products into trade or commerce. Consequently, this meaningless immunity cannot be the “quid pro quo”.

The panel opines that LEOFF does not violate equal protection because there is a “rational basis” for such a system (the “vital and dangerous nature of their work”). 133 Wn. App. at 708. Such logic disregards the original “fundamental purpose” of workers’ compensation statutes to “abolish private rights of action . . . *in the hazardous industries*. . .”. *Mountain Timber*, 243 U.S. at 233. The conclusion that occupational hazards justify a special right to sue, when it was precisely such hazards

that led Legislatures to eliminate the right to sue in exchange for guaranteed benefits, creates an inconsistency that cannot be reconciled. The inherent hazards of an occupation cannot be the “rational basis” for both granting the right to sue (to fire fighters and law enforcement officers) and eliminating the right to sue (for all other workers).

The panel’s conclusion is further belied by the undisputed facts that (1) workers in industries that are equally or more hazardous than firefighting and law enforcement (logging, mining, construction work, etc.) are not granted such rights to sue; and (2) Washington State Patrol members, who are not covered under LEOFF, do not have a comparable right to sue under their workers’ compensation system. RCW ch. 43.43.

Further, *Shaughnessy* predates *Gunwall*’s independent state analysis and the use of the term “positive favoritism” (*Andersen*, 158 Wn.2d 1), and thus was analyzed under traditional equal protection principles. *See* 94 Wash. at 325 (recognizing workers’ compensation statutes must provide immunity to all employers under Art. I, § 12). The same is true of *Alton V. Phillips Co. v. State*, 65 Wn.2d 199, 396 P.2d 537 (1964) (invalidating special bill waiving statute of limitations because it deprived State of immunity from suit that others have). These cases recognize that equal protection mandates that such immunities must apply equally to all.

## 2. Independent State Analysis.

Where a statute engages in positive favoritism to a particular class, it is subject to an independent state analysis of the separate and greater protections under Art. I, § 12. *Andersen*, 158 Wn.2d at 16. The panel declined to apply an independent state analysis, erroneously concluding that creating a class of persons who can sue when others cannot, thus depriving certain employers from an immunity that others have, is neither a privilege nor an immunity under Art. I, § 12. See 133 Wn. App. at 707. This is contrary to *Andersen*, which recognized that issues involving rights to sue do implicate privileges and immunities clauses. See 158 Wn.2d at 60-61 (concurrence) (quoting *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823)).

Ignoring precedent and logic, *Locke* holds that, because Art. I, § 12 grants municipalities *greater* privileges and immunities, it must authorize municipalities to be specially burdened. Nothing in Art. I, § 12 supports this *non sequitur*. Art. I, § 12 does not fail to mention municipalities—municipalities are especially authorized to receive privileges and immunities that private entities do not have. Municipalities have rights under this constitutional provision when, as here, they are directly affected. *Grant County Fire Protection District v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004) (*Grant Cy. II*).

The test under the independent state analysis is whether the statute grants to some a privilege or immunity not granted 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.

WASH. CONST. art. I, § 12. LEOFF is doubly flawed: it grants an unconstitutional *privilege* while taking away a constitutionally-mandated *immunity*. LEOFF members have the privilege to sue their employers while this privilege is denied to other employees, even those with employment equally or more hazardous. And, LEOFF employers are deprived of the constitutionally-required quid pro quo of immunity from suit enjoyed by every other employer required to fund workers' compensation benefits.

If allowed to stand, the panel's decision would transform Washington into the only state authorizing a statute requiring an employer to fund a workers' compensation system without the constitutionally mandated quid pro quo of protection from suit. 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.

**C. THE CITY HAS SOVEREIGN IMMUNITY FROM THIS SUIT.**

By allowing LEOFF members to sue for employer negligence, LEOFF also violates the well-established principle that municipalities

cannot be sued absent an analogous private cause of action. Specifically, RCW 4.96.010 allows liability only “*to the same extent as if they were a private person or corporation.*” (Emphasis added.) Yet, the panel held municipalities can be sued even though private entities cannot.

The panel’s reliance on *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965), is misplaced.

*Evangelical* said:

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

67 Wn.2d at 253 (italics in original; boldface added). This principle is hornbook law:

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.

15 K. B. TEGLAND, WASHINGTON PRACTICE, *Civil Procedure*, § 45.2 (1st ed. 2003) (footnote omitted). Indeed, in *Edgar v. State*, 92 Wn.2d 217, 595 P.2d 534 (1979), this Court held that RCW 4.92.090 requires 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.” *Id.* at 226.

The *Locke* panel cited several public duty doctrine cases. Conflating public duty and sovereign immunity was recently criticized in *Donohoe v. State*, 135 Wn. App. 824, 832-33, 142 P.3d 654 (2006). The public duty doctrine and sovereign immunity are unrelated concepts. The former deals with duty while the latter is an affirmative defense:

“Under the inapplicable concept of sovereign immunity, despite any ‘apparent duty,’ the governmental entity is immune from tort liability. This does not occur from a denial of the tort’s existence, but rather because the existing liability in tort is disallowed. In contrast, [under the rationale of the public duty rule] the tort liability or duty never existed.”

*Zimmerman v. Village of Skokie*, 697 N.E.2d 699, 708 (Ill.1998). *Accord*, *Steinke v. South Carolina Dept. of Labor, Licensing & Regulation*, 520 S.E.2d 142 (S.C. 1999). The public duty doctrine is not applicable here.

The City is entitled to dismissal under sovereign immunity because municipalities cannot be liable unless there is a private entity analogy. Not only is there no private entity analogy, there can never be one. No private employer could be compelled to fund a workers’ compensation system without receiving the mandated quid pro quo of immunity from suit. Courts throughout the country have consistently recognized this absolute requirement. *Mountain Timber*, 243 U.S. 219; *New York Central Railroad Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917).

This Court has recognized that immunity from negligence suits is mandated by Art. I, § 12. *Shaughnessy*, 94 Wash. at 332.

The parties have not found a comparable statute elsewhere. It was not until this case came before this Court that plaintiff, citing *Holmberg v. Brent*, 161 Vt. 153, 636 A.2d 333 (1993), claimed, “Washington is also not alone in allowing fire fighters to sue employers or their agents.” (Response to Brief of Amicus Curiae, Washington State Association of Municipal Attorneys in Support of Petitioners’ [sic] Application [sic] for Discretionary Review 12) To the contrary, *Holmberg v. Brent*, 161 Vt. 153, 636 A.2d 333 (1993), states<sup>3</sup>:

... plaintiff’s only recourse would be to sue the village, his employer, directly for the fire chief’s alleged negligence, but such an action is barred under the exclusive remedy provision of the workers’ compensation statutes. See 21 V.S.A. § 622.

636 A.2d at 335.

The panel cited to *Taylor v. City of Redmond*, 89 Wn.2d 315, 571 P.2d 1388 (1977), for the proposition that RCW 4.96.010 waives

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<sup>3</sup> The Vermont court did hold that the plaintiff was not barred from suing the fire chief personally because Vermont, unlike Washington, allows suits against fellow workers. *Holmberg*, 636 A.2d 333, 334, n.2. However, the plaintiff must show the duty owed by the fellow worker is a personal duty, not simply a corporate duty to maintain a safe workplace. *Dunham v. Chase*, 165 Vt. 543, 674 A.2d 1279 (1996). Washington law does not allow such actions. RCW 51.24.030(1). *Marsland v. Bullitt Co.*, 71 Wn.2d 343, 346, 428 P.2d 586 (1967).

sovereign immunity for LEOFF Plan I suits. *Taylor* did not involve constitutional challenges or a challenge under the “to the same extent as if they were a private person or corporation” language of RCW 4.96.010. *Taylor* merely recognized the removal of the historical bar to such suits that preexisted RCW 4.96.010. This Court specifically limited its holding to LEOFF Plan I members, recognizing that Plan II members such as plaintiff (if he is a member) receive benefits under RCW tit. 51 and that LEOFF employers must fund those benefits. *Taylor* also erroneously believed municipal employers do not fund LEOFF benefits for Plan I members and thus did not address the questions raised here. *Compare* 89 Wn.2d at 319-20, *with* 1969 WASH. LAWS EX. SESS. ch. 209, § 8(2) (requiring employer contributions). The panel erred in relying on *Taylor* for a principle not discussed.

**D. PLAINTIFF HAD THE BURDEN OF PROOF UNDER RCW 41.26.281.**

RCW 41.26.281 allows LEOFF members to sue their governmental employers “for any excess of damages over the amount received or receivable under this chapter.” The “amount received or receivable under this chapter” is an element of a LEOFF member’s cause of action. A plaintiff has the burden of proving all elements of his or her cause of action. *Jeffers v. City of Seattle*, 23 Wn. App. 301, 311, 597 P.2d 899 (1979). The panel should have ruled plaintiff had the burden of

proving “the amount received or receivable”. Indeed, the jury here awarded \$514,000 in “future economic damages” but determined the amount received or receivable to be only \$24,133. (CP 4090)

When the Legislature intended to make an amount an offset, it knew how to do so. For example, RCW 41.40.300 expressly provides for an offset of workers’ compensation or pension benefits against amounts owed under the public employees retirement system.<sup>4</sup>

The Legislature could have easily used similar offset language in RCW 41.26.281 if it had so chosen. Instead, it authorized the LEOFF member to recover only the excess “over the amount received or receivable.” Different language signifies different intent. *Cazzanigi v. General Electric Credit Corp.*, 132 Wn.2d 433, 446, 938 P.2d 819 (1997). The burden of proving “the amount received or receivable” should have been on plaintiff, not the City.

That the City had raised the issue as an affirmative defense (*see* 133 Wn. App. at 713) is meaningless. The City should not be penalized for raising the issue as an affirmative defense in an excess of caution.

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<sup>4</sup> The statute says:

Any amounts which may be paid or payable under the provisions of any workers’ compensation, or pension, or similar law on account of any disability shall be offset against and payable in lieu of any benefits payable from funds provided the employer under the provisions of this chapter on account of the same disability.

In any event, the question of amounts received or receivable is not an affirmative defense. Affirmative defenses are avoidances. 133 Wn. App. at 713. RCW 41.26.281 does not make the “amount received or receivable” an avoidance. Instead, it authorizes a LEOFF member to recover amounts in excess of “the amount received or receivable.” Thus, it is the plaintiff who must first prove the amount received or receivable so he or she may then prove damages exceeding that amount. In other words, plaintiff has the burden of proof.

**E. THE FUTURE ECONOMIC DAMAGES AWARD IS CONTRARY TO THE EVIDENCE.**

The panel upheld the jury’s \$514,000 future economic damages award (CP 4090), stating:

[Karen Calara] testified that Biosports, her physical therapy facility, charged Locke \$160 per visit . . . .

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 per treatment and would need such treatment more than once a week.

(Slip op. at 31) But ***no one*** claimed plaintiff would need physical therapy the rest of his life. In fact, Calara, the physical therapist, testified ***exactly the opposite***—she said plaintiff would need only 2-3 more months of physical therapy every other week followed by 2-3 more months once a month, for a maximum cost of \$1,440. (6/7 PM RP 50-51)

The panel also cited plaintiff's testimony about massage and rolfing treatments. The panel cited "medical bills and records showing the costs of treatment that he had received." (Slip op. at 30-31) But there were *no* bills or records on the cost of past, present, or future rolfing or massage sessions. The parties stipulated to a non-itemized lump sum for past economic damages, including lost wages and medical expenses (*e.g.*, surgery). (CP 4090; 6/29 RP 151) The jury had no way of estimating what the past—let alone future—rolfing and massage sessions cost. *Cf. Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997) (medical bills relevant to prove future treatment costs).

Instead, the panel speculated that massage and rolfing cost the same as physical therapy—\$160 per session. A verdict cannot be based on speculation. *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wn.2d 747, 753, 818 P.2d 1337 (1991). It was incumbent on plaintiff to prove his damages. He failed to do so. Even if the City's liability is upheld, the future economic damages award must be reversed.

## V. CONCLUSION

Since he had no "legal authority and responsibility" to fight fires, plaintiff was not a LEOFF "member" entitled to bring this suit. Even if he were, the LEOFF statute authorizing him to do so is unconstitutional and

were, the LEOFF statute authorizing him to do so is unconstitutional and violates sovereign immunity because the City was also paying him workers' compensation benefits. This Court should reverse.

DATED this 14<sup>th</sup> day of March, 2007.

**REED McCLURE**

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