

**DIVISION I OF THE COURT OF APPEALS
FOR 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.

MOTION FOR DISCRETIONARY REVIEW

THOMAS A. CARR
Seattle City Attorney

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

Attorneys for Petitioners

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

A. Identity of Petitioner

The City of Seattle (hereinafter “the City”), defendant, asks this Court to accept review of the decision designated in Part B of this motion.

B. Decision Below

The City seeks review of the “Order Denying Defendant’s Motion for Summary Judgment and for Declaratory Relief” entered by the Honorable Mary Yu on January 9, 2006, submitted herewith in the Addendum. The trial court ruled, *inter alia*, that the Law Enforcement Officers’ and Fire Fighter’s Retirement System Act, RCW 41.26, which imposes obligations on municipalities to fund a workers’ compensation system for police and fire personnel without providing protection from suit, is unconstitutional and is violative of sovereign immunity. The trial court also ruled that the equine immunity statute, RCW 4.24.540, does not apply to mounted patrol units. The trial court also rejected the City’s motion for summary judgment on assumption of risk and the Fellow Servant Rule.

The trial court certified the challenges to the LEOFF statute for appellate review pursuant to RAP 2.3(b)(4), finding that its decision involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order

may materially advance the ultimate termination of the litigation. The order certifying the LEOFF issues is submitted herewith in the Addendum.

C. Issues Presented for Review

The first issue is whether the superior court has committed an obvious error which would render further proceedings useless.

The second issue is whether the superior court has committed probable error and the decision substantially alters the status quo.

The third issue is whether the superior court has so far departed from the accepted and usual course of judicial proceedings as to call for review by the appellate court.

D. Statement of the Case

1. Factual summary

This wrongful death action arises out of the death of retired Seattle Police Officer Gary Lindell on March 13, 2002. Plaintiff alleges that decedent's death resulted from sequelae of injuries sustained in a fall from his service horse on May 4, 1999, during a training exercise with the Seattle Police Mounted Patrol Unit. For purposes relevant to this motion, the City accepts as true the factual allegations as stated above and provides the following introductory summary.

While mounted on his horse, and without receiving any direction from anybody to do so, Officer Lindell attempted to pick up a piece of

twine from the ground in the paddock area of the Mounted Patrol training facility. He lost his balance, was unable to recover his mount, and fell to the ground. He sustained a significant head injury, but largely recovered except for intermittent seizure activity. He was unable to return to sworn duty due to his seizures and thus received a disability retirement. Seeking to continue his police employment, and while receiving his disability retirement, Gary Lindell returned to work for the Seattle Police Department in a civilian capacity. Almost three years later, he experienced a seizure. He died that evening at the hospital.

a. LEOFF statute

Officer Lindell's medical bills, time loss, and disability retirement were entirely paid as a result of the provisions of the LEOFF statute. Since his death, his widow has received beneficiary (widow's) survivor pension benefits under the LEOFF I system. She is entitled to receive that benefit until she dies, whether or not she remarries. She also received a LEOFF I death benefit of \$150,000. She also received other death benefits, including a U.S. Department of Justice death benefit of \$259,038.

Officer Lindell and his widow were entitled to the LEOFF "sure and certain" benefits under a workers' compensation program applicable to police and fire personnel without regard for proof of any negligence on the part of his employer, the City of Seattle. The City was required to

fund that workers' compensation system and disability retirement system whether or not it was at fault. RCW 41.50.110. Allowing this lawsuit to proceed deprives the City of the quid pro quo protection from suit that is the foundation of every workers' compensation system in the country.

b. Facts regarding assumption of risk

Assuming *arguendo* that an employee could both have "sure and certain" benefits and have the right to sue, such a suit would be subject to the common law defenses applicable to suits by employees against their employers. Such common law suits are barred where the employee knows the risks of the job and the injury arises out of those risks. Here, Officer Lindell was in as good or better a position as anyone to know of risks associated with (1) being in the mounted patrol; (2) riding without helmets; (3) the paddock surface; (4) riding Police Horse Donovan; (5) his own skill level; and (6) his own choice of equipment. Even after his accident, Officer Lindell expressly conceded that he had assumed the risks that led to his injury. The evidence shows that he told 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."

1. Assignment to mounted patrol. It is undisputed that service in the mounted patrol was voluntary and Officer Lindell actively sought to be in the unit. He reported that he had extensive experience with

horses when he sought the assignment. He was temporarily assigned to the unit during the summer months of 1997 (May 15 to September 15) and again during the summer months of 1998. He then stayed in the unit following his 1998 temporary summer assignment. He never asked to be re-assigned out of the unit. He was injured May 4, 1999.

2. **Helmets.** Plaintiff claims the City was negligent in not requiring helmets for patrol officers. Officer Lindell obviously knew he was not wearing a helmet.

3. **Paddock surface.** Plaintiff claims that the surface of the paddock where the mounted unit trained was too hard. The evidence shows that it was most likely Officer Lindell himself who directed a Parks Department employee to scrape off the excess hogfuel from the surface, leaving the paddock with a harder surface than before. He knew as well as anyone what the surface was like. Also, Officer Lindell himself ordered new hogfuel to be delivered when it was needed.

4. **Police Horse Donovan.** Plaintiff seeks to blame Officer Lindell's horse for his fall. However, Officer Lindell selected Donovan as his regular mount. After being assigned to the Mounted Patrol for several months, Officer Lindell had to select a new horse because the one he had been riding was retired. He then rode several different horses and ultimately selected Donovan to ride on a regular basis. Officer Lindell

liked riding Donovan and made no complaint to anyone about him. Officer Lindell attended a weeklong training class with Donovan in March of 1999 and continued to ride Donovan regularly until he fell from Donovan and was injured on May 4, 1999. Officer Lindell knew Donovan's skills as well as anyone.

5. Training of Officer Lindell. Plaintiff alleges that Officer Lindell was not properly trained but falls short of claiming that he lacked sufficient skill to participate in the mounted patrol. Officer Lindell claimed he had considerable equine experience when he sought to join the mounted unit. In addition, he received training while in the mounted patrol. In any event, Officer Lindell was as familiar as anyone about his skill level.

6. Equipment. Plaintiff alleges that this accident may not have happened had Donovan been placed in his bridle and bit and reins on the day of the accident instead of a rope halter. If Donovan was wearing a rope halter at the time of Officer Lindell's accident, it was Officer Lindell's decision alone to use the rope halter instead of a bridle and bit and reins.

c. Facts regarding Fellow Servant Rule

Plaintiff claims that one or more persons at the Seattle Police Department are at fault for Officer Lindell's injuries and death. While not

being specific, plaintiff has attempted to put blame onto other police officers and on one or more sergeants who were assigned to the mounted unit at different times. Even where an employee is allowed to sue his employer for workplace injuries (that is, where such actions are not barred by workers' compensation laws), the employee must prove that the injury was caused by a principal or vice-principal of the employer. Liability cannot be based upon fault of a fellow servant or fellow employee.

Here, the facts do not support a claim that a principal or vice-principal of the City was at fault. There is no evidence that any member of the Seattle Police Department other than Officer Lindell and his fellow officers in the Mounted Patrol unit were responsible for maintaining the paddock area, or that any member of Seattle Police Department other than Officer Lindell or his fellow officers in the Mounted Patrol ordered excess hogfuel on the paddock surface to be removed. There is no evidence that anyone other than Officer Lindell and his fellow officers in the Mounted Patrol made the decision that helmets would not be worn. Finally, there is no evidence that anyone in the Seattle Police Department other than Officer Lindell and his fellow officers in the Mounted Patrol had any knowledge about the selection of Donovan to be in the mounted unit or was involved in training of either the officers or the horses.

d. Facts regarding equine immunity statute

With respect to how Officer Lindell's accident occurred, plaintiff alleges only that Officer Lindell fell from his horse while participating in a training activity. Plaintiff does not allege that the equipment or tack chosen and placed on Donovan on the day of the accident was faulty or defective in any way or that the equipment or tack caused Officer Lindell to fall from his horse. Plaintiff presented no evidence, and does not argue, that Officer Lindell lacked the ability to engage safely in mounted patrol training or that Officer Lindell lacked the ability to safely manage Donovan. Nor is there any evidence that Officer Lindell's injury resulted from a dangerous latent condition on the premises.

Further, there is no evidence that Officer Lindell's accident was anything other than an unfortunate accident. There is no evidence that the City – or any of Officer Lindell's superiors – acted with willful or wanton disregard for Officer Lindell's safety or with premeditated intent to bring about injury to Officer Lindell.

2. Procedural history

Plaintiff alleges the City was somehow negligent in connection with (a) the condition of the training facility; (b) the fact that mounted patrol officers generally did not wear helmets; and (c) some alleged failure to properly train Officer Lindell and/or his horse and/or other officers.

In its motion for summary judgment, the City argued that abolishment of liability for negligence--the very foundation of every workers' compensation system—is absent in the workers' compensation system that applies to police and firefighters in the State of Washington (the Law Officers' and Fire Fighters' Retirement System Act ("LEOFF"), RCW Chapter 41.26). Workers' compensation systems have only been found to be constitutional when they provide the quid pro quo of protection from suit. The City challenged the statutory framework of LEOFF as violative of the due process and privileges and immunities clauses of the Washington State Constitution, the prohibitions against extra compensation and special legislation under Article II, §§ 25, 28 of the Washington State Constitution, the requirements of Article II, § 19 of the Washington State Constitution, and sovereign immunity.

Also, the City sought dismissal under RCW 4.24.540, which provides immunity for injuries arising out of equine activities. Further, the City argued that plaintiff's claims fail under the assumption of risk doctrine and the Fellow Servant Rule.

E. Argument Why Review Should Be Accepted

- 1. The superior court has committed an obvious error which would render further proceedings useless.**

RAP 2.3(b)(1) authorizes discretionary review where the superior court committed an obvious error which would render further proceedings useless. Here, allowing this lawsuit to go forward without appellate review of the issues presented would be useless. The superior court committed obvious errors in not dismissing the lawsuit.

a. LEOFF STATUTE

The very foundation of workers' compensation laws requires that employers must be provided with immunity from suit if they are compelled to fund workers' compensation systems that provide benefits without regard to fault. This is an absolute constitutional requirement. As our Supreme Court put it, the absence of such immunity presents "grave constitutional questions". *Epperly v. City of Seattle*, 65 Wn.2d 777, 787 n.1, 399 P.2d 591 (1965), reiterated in *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 449, n.4, 932 P.2d 628 (1997).

The cases addressing the constitutional requirement of workers' compensation laws to provide immunity from suit have discussed it under both equal protection and due process principles. *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915) (equal protection); *Mountain Timber Company v. Washington*, 243 U.S. 219, 233, 37 S.Ct. 260, 61 L.Ed. 685 (1917) (due process); *Manor, supra*, ("Violation of equal protection is probably the better constitutional argument." 131 Wn.2d at 449 n.4.)

The LEOFF statute gives lip service to providing protection from suit (RCW 41.26.270); however, the following section (RCW 41.26.281) takes the protection away. The court in *Gillis v. Walla Walla*, 94 Wn.2d 193, 197, 616 P.2d 625 (1980), observed a legislative intention to provide sure and certain relief while providing protection for the employer from negligence actions at law. However, the *Gillis* court apparently overlooked the fact that any protection from suit is illusory.

The right to sue provision of the LEOFF statute also violates sovereign immunity because there can be no public liability where there is no private liability. RCW 4.96.010 sets forth the parameters of the waiver of sovereign immunity as follows:

(1) All local governmental 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.*

[Emphasis supplied.]

The foregoing language shows that sovereign immunity is only waived for tortious conduct “to the same extent as if they were a private person or corporation.” Here, only governmental employers of police and firefighters are subject to workers’ compensation obligations while not being relieved of tort liability.

Recent cases have recognized that sovereign immunity remains a valid defense. In *State v. Thiessen*, 88 Wn. App. 827, 828, 946 P.2d 1207 (1997), the court held that under the doctrine of sovereign immunity, the State could not be liable for interest on its debt absent the State's consent. In that case, the court held that the State did not give its consent, and, therefore, interest could not be awarded. *Accord*, *State v. Lee*, 96 Wn.App. 336, 979 P.2d 458 (1999). As *State v. Turner*, 114 Wn. App. 653, 59 P.3d 711 (2002), stated:

As a matter of sovereign immunity, "the state cannot, without its consent, be held to interest on its debts." . . .
.But only the Legislature can adopt a blanket waiver, which it has not done here.

114 Wn. App. at 660 (citations omitted).

The United States Supreme Court recently recognized the sovereign immunity bar where no private cause of action exists in *United States v. Olson*, 126 S.Ct. 510, 163 L.Ed.2d 306 (2005). The Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b)(1), authorizes suits against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." The federal waiver of immunity matches our state's waiver of immunity in that both waive immunity ONLY to the extent private entities can be sued. The *Olson*

court re-affirmed that governmental liability does not exist without companion private liability under the federal tort waiver of immunity statute.

The Washington Supreme Court adopted similar reasoning in *Edgar v. State*, 92 Wn.2d 217, 595 P.2d 534 (1979), where the court was construing RCW 4.92.090, the companion waiver of sovereign immunity for the State. RCW 4.92.090 waives the State's sovereign immunity for tortious conduct, but allows liability only "to the same extent as if [the State] were a private person or corporation." The court held that this statute required a person 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. Applying that principle here, since the Legislature cannot require private employers to both fund workers' compensation and be liable in tort, the Legislature cannot make public employers fund LEOFF and be liable in tort.

Further, if RCW 41.26.281 is read to remove sovereign immunity, it is nevertheless unconstitutional because the bill enacting it violates Article II, § 19 of the state constitution. That provision provides that "No bill shall embrace more than one subject, and that shall be expressed in the title." The bill containing RCW 41.26.281 violates both the subject-in-title and single-subject requirements of Article II, § 19. The title of the bill

is “An Act relating to law enforcement officers and firefighters.” 1971 Wash. Laws, 1st Ex. Sess., ch. 257. This title gives no notice that the bill expands governmental liability beyond the restrictions of RCW 4.96.010(1). If RCW 41.26.281 is read to waive the City’s sovereign immunity (i.e., expand the RCW 4.96.010 waiver of sovereign immunity), it is unconstitutional under Article I, § 19 as embracing more than one subject and failing to express its subject in the title. If RCW 41.26.281 is not read to waive sovereign immunity, then the City is immune from suit under RCW 4.96.010. There is no middle ground.

An additional reason why discretionary review is appropriate here on the LEOFF challenges is that substantially similar constitutional and sovereign immunity challenges to the LEOFF statute are presently pending before Division I of the Court of Appeals in *Locke v. City of Seattle*, No. 55256-2 I. Argument in *Locke* is scheduled for March 7, 2006. It would be useless to proceed through discovery and trial in the instant lawsuit while challenges to the right to even bring such an action are pending before the Court of Appeals in a similar case.

b. Equine immunity

Likewise, the superior court’s holding that the equine immunity statute (RCW 4.24.540) does not apply to Mounted Patrol activities is an obvious error and further trial court proceedings would be useless without

appellate review. The risks of riding horses are so apparent that the Legislature saw fit to enact a statute providing for immunity for most equine activities. Rules of statutory construction require that a court must assume that the legislature means exactly what it says; a court is not free to disregard the plain language of a statute. *Western Telepage, Inc. v. City of Tacoma Dep't of Financing*, 140 Wn.2d 599 (2000). This is particularly true where, as here, the legislature has specified in a definition section the meanings and limitations it intends to place on its words. *Seattle v. State*, 54 Wn.2d 139 (1959).

In the present case, the City – a municipal corporation – falls squarely within the definition of an “equine activity sponsor” as provided by RCW 4.24.530(3). A person participating in a training activity falls squarely within the definition of a “participant” as provided by RCW 4.24.530(4). Members of mounted patrols fall squarely within the definition of “equine professional” as provided by RCW 4.24.530(6). Mounted Patrol training and/or riding falls squarely within the definition of “equine activity” as provided by RCW 4.24.530(2). Where the legislature intends to exclude a certain group from the scope of a statute, the legislature has evidenced an ability to do so with explicit language. *See, e.g.,* RCW 4.24.540(2)(a), which explicitly excludes the horse racing industry from the statute. Under principles of statutory construction, the

superior court committed obvious error by reading into the statute a legislative intent to exclude a riding organization such as the Mounted Patrol where the legislature itself explicitly declined to do so. Such error further violates the City's sovereign immunity in that it allows a municipal employer to be liable for injuries sustained by professional horse riders in its employ where a private corporation could not be.

c. Assumption of the risk and Fellow Servant Rule

The superior court also committed obvious error which would render further proceedings useless by declining to dismiss plaintiff's claim under the doctrines of assumption of the risk and the Fellow Servant Rule.

First, the evidence in this case shows that Officer Lindell had full subjective understanding of the presence and nature of the specific risk and voluntarily chose to encounter the risk. The conditions under which Officer Lindell was working were readily apparent. He was well acquainted with the horse he was riding. He was well aware that 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; as the evidence shows, it was most likely Officer Lindell himself who arranged for the hogfuel covering the paddock surface to be removed and it was often Officer Lindell who arranged for new hogfuel to be brought in as needed. Furthermore, Officer Lindell expressly stated that he recognized

and assumed the risks inherent in working with horses and serving with the Mounted Patrol, 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.” Notably, plaintiff has never alleged that Officer Lindell did not appreciate the risks inherent in his actions or in his chosen employment.

Even if plaintiff had produced any evidence suggesting that Officer Lindell did not know of the risk involved in his actions, it is established law in this state that a plaintiff cannot deny knowledge of the obvious to defeat assumption of the risk. *Perry v. Seattle School District #1 and City of Seattle*, 66 Wn.2d 800, 405 P.2d 589 (1965). Here, not only did Officer Lindell affirmatively state his subjective appreciation of the risks inherent in his actions, 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 E(I)(b), above). It makes no sense that the equine immunity statute could be read to impute assumption of the risk to an amateur rider with potentially minimal or no horseback riding experience but decline to extend the same assumption of the risk to a Mounted Patrol rider with considerable experience and expertise.

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 risks and dangers pertaining to 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.339 (1911). 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 the fire department of a city, sought to recover for injuries sustained when he was kicked by a horse he had been training to rush from its stall when a fire alarm bell sounded. It was held that the plaintiff could not recover from the city for his injuries even though he may not have been injured had the city provided him with an “electric whip.” The supreme court sustained the trial court’s demurrer to the complaint, holding that:

It must be presumed that when [plaintiff] accepted the position of teamster he had at least an ordinary knowledge of the nature of horses. This, with his seven weeks’ experience in handling this particular team of horses, should have given him a familiarity with the character of these animals. He was in as good a position as anyone well could be to know of the dangers reasonably to be expected from them. If, with that opportunity, knowledge, and experience, he could see nothing vicious or dangerous about the horses, we are unable to see how knowledge of their viciousness could be imputed to the city.

Lynch, 37 Wn. at 663. The same holds true here. If Officer Lindell, with his self-reported experience in horseback riding, his certification in mounted patrol activities, his years of experience as a trainee or member

of the Mounted Patrol, and his months of experience riding and training with Donovan, was unable to appreciate the risks inherent in his actions, any appreciation of the risks encountered by Officer Lindell cannot, as a matter of law, be imputed to the City.

Second, it has long been held in Washington that an employer is not liable for the injuries or death of an employee who is injured in the course of his work through the negligence of a fellow servant. *Bennett v. Messick*, 76 Wn.2d 474, 475-6, 457 P.2d 609 (1969); *see also* Restatement (Second) of Agency, § 474. The evidence in this case is that all members of the Mounted Patrol were responsible for maintaining the paddock area where Officer Lindell fell. All members of the Mounted Patrol were involved in making the common decision not to wear helmets. Mounted Patrol personnel were, by definition, fellow servants of Officer Lindell. *See* Restatement (Second) of Agency, § 475. In declining to dismiss plaintiff's claims under the Fellow Servant Rule, the superior court committed obvious error which would render further proceedings useless.

2. The superior court's has committed probable error and the decision substantially alters the status quo.

RAP 2.3(b)(2) authorizes discretionary review where the superior court committed probable error and the decisions substantially alters the status quo or substantially limits the freedom of a party to act. For the

reasons stated in Section E(1), above, the superior court committed obvious (and therefore probable) error in declining to enter judgment for the City on the issues briefed above. The superior court's decision denying the City's motion for summary judgment substantially alters the status quo in that, by disregarding constitutional, statutory, and common law immunities that must be available without regard to whether an employer is governmental or private, the court's decision effectively expands the parameters of the legislature's limited waiver of sovereign immunity under RCW 4.96.010 in such a way that it allows a governmental entity to be liable not to the *same* extent as if it were a private person or corporation, but effectively allows governmental entity to be liable well *beyond* the extent that a private person or corporation could be under the same circumstances. Further, the superior court's decision also substantially disrupts the status quo in that members of the Mounted Patrol and other Seattle Police Department personnel will be required to recall events that happened nearly seven years ago and will be compelled to expend considerable time and effort in participating in extensive discovery and a potentially lengthy trial.

3. The superior court has so far departed from the accepted and usual course of judicial proceedings as to call for review by the appellate court.

RAP 2.3(b)(3) authorizes discretionary review where the superior court has so far departed from the accepted and usual course of judicial proceedings as to call for review by the appellate court. Here, in committing obvious error as briefed above, the superior court so far departed from the accepted and usual course of judicial proceedings (1) by disregarding the constitutionally-mandated *quid pro quo* requirement that employers are entitled to absolute immunity from suit if they are compelled to fund workers' compensation systems that provide benefits without regard to fault (*see* Section E(1)(a), above); (2) by disregarding the plain, unambiguous language of RCW 4.96.010 which limits a governmental entity's waiver of sovereign immunity only to the extent as if it were a private person or corporation (Section E(1)(a), above); (3) by disregarding the plain, unambiguous language of the Washington State Constitution under Article II, § 19, which requires that a bill embrace no more than one subject, which shall be expressed in the title; (4) by disregarding the plain, unambiguous language of RCW 4.24.540, which provides immunity to equine providers for injuries sustained in equine activities; and (5) by disregarding established case law that bar a

plaintiff's action under the doctrine of assumption of the risk and the Fellow Servant Rule.

Where a superior court has disregarded such established constitutional, statutory, and common law precedent, discretionary review is proper. See *Folise v. Folise*, 113 Wn. App. 609, 54 P.3d 222 (2002), *rev. denied*, 149 Wn.2d 1027, 78 P.3d 656 (2003) (discretionary review where the trial court departed from the accepted and usual course of judicial proceedings by ignoring unambiguous language in the statutory scheme and relevant case law).

F. Conclusion

For the foregoing reasons, the City defendants ask this Court to accept discretionary review pursuant to RAP 2.3(b).

DATED this 21st day of February, 2006.

Respectfully submitted,

THOMAS A. CARR
Seattle City Attorney

By:



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

Attorneys for Defendant City of Seattle

ADDENDUM

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SEATTLE CITY ATTORNEY

THE HONORABLE MARY YU

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

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

Plaintiff,

vs.

CITY OF SEATTLE, a municipal corporation,

Defendant.

No. 05-2-05740-8 SEA

ORDER DENYING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
AND FOR DECLARATORY RELIEF

THIS MATTER, having come on duly and regularly for hearing before the Honorable Mary Yu of the above-entitled Court pursuant to the Defendant City of Seattle's Motion for Summary Judgment and for Declaratory Relief in the above-entitled cause, and the parties having appeared by and through their respective counsel of record, and the Court having heard argument of counsel submitted in support of and opposition to said Motion, and the Court having read and considered the records and files herein, including:

- A. Defendant City of Seattle's Motion for Summary Judgment and for Declaratory Relief;
- B. Declaration of Lt. Steve Wilske and attachments thereto;
- C. Declaration of Sgt. Terri MacMillan;

ORIGINAL

- 1 D. Declaration of Off. Tamara McClincy;
- 2 E. Declaration of Fred Treadwell
- 3 F. Declaration of Nick Borer and attachments thereto
- 4 G. Declaration of Marcia M. Nelson and attachments thereto;
- 5 H. Plaintiffs' Memorandum in Opposition to Defendant's Motion for Summary
- 6 Judgment to Dismiss;
- 7 I. Declaration of Todd W. Gardner with the following exhibits:
- 8 1) Declaration of Plaintiff's expert, Rod Bergen. *Except for portions noted shuckler*
- 9 2) Plaintiff's First Interrogatories to City of Seattle, #17-19, and Supplemental
- 10 Answer to #43.
- 11 3) CR 30(b)(6) Notice and matrix showing who was identified in response.
- 12 4) Paul Suguro deposition, pp. 6-19, 24-44 with exhibits.
- 13 5) S.L. Demps deposition, pages 4-5, 20-31.
- 14 6) Michael Fann deposition, pages 4-14, 22-23.
- 15 7) Geoff Getchman deposition, pages 14-15, 19-36, 43-48, 56-66, 78-79, 83-85,
- 16 88-91 and exhibits 2 and 3.
- 17 8) Terri MacMillan deposition, pages 4-6, 13-21, 31-32, 46-53, 57-58.
- 18 9) Kevin Stoops deposition, pages 5-13, 22.
- 19 10) Paul Stimmel deposition, pages 4-11, 30-31, 42-45, 55-58.
- 20 11) Scot Hansen deposition, pages 4-64, 70-71, 78-79, 86-88.
- 21 12) Steve Mathisen deposition, pages 6-11, 31-36, 40-42, 52-72.
- 22 13) Tamara McClincy deposition, pages 9-19, 22-29, 41-50, 57-58, 70-76.
- 23 14) Steve Wilske (Oct. 18, 2005) deposition, pages 7-14, 23-43, 46-57, 61-77, 83-
- 24 87, 90-92, 103-104.
- 25

1 15) Steve Wilske (Nov. 10, 2005) deposition, pages 3-12.

2 16) City of Seattle documents concerning Donovan, pp. 1091, 1096-1103
3 produced in response to Plaintiff's First Requests for Production.

4 17) RCW 4.24.530-540 and legislative history.

5 18) Court's Order Allowing Overlength Brief (Defendant's Motion for Summary
6 Judgment)

7 J. Defendant City of Seattle's Reply to Plaintiff's Response to the City's Motion for
8 Summary Judgment.

9 K. Second Declaration of Rebecca Boatright, with the following exhibits:

10 A. Plaintiff's Answer to Interrogatory No. 33 of Plaintiff's Answers to the City's
11 First Interrogatories and Requests for Production.

12 B. Plaintiff's Response to Request for Production No. 6 and a true and correct
13 copy of Officer Lindell's Reis Ranch Certificate, submitted in response
14 thereto.

15 C. Excerpt from the Deposition of Officer Scot Hansen.

16 L. Declaration of Troy Peterson with attachments.

17 M. Third Declaration of Marcia M. Nelson, with the following exhibits:

18 A. Copy of web page www.bls.gov/oco/ocos158.htm.

19 B. Copy of web page www.bls.gov/news.release/pdf/cfoi.pdf.

20 N. *Def. City of Seattle's Resp. to Pl. Motion for Leave to File Amended Compl. + Motion*
21 *and the Court having considered the following issues:* *to Strike Gardner*
22 *Decl. (VA)*

- 23 1) Whether the City is immune from liability under RCW 4.24.540;
- 24 2) Whether Officer Lindell assumed the risk of injury;
- 25 3) Whether plaintiff's claim is barred by the Fellow Servant Rule;
- 4) Whether RCW 41.26.281 is unconstitutional under the equal protection and due
process clauses of the Washington State Constitution;
- 5) Whether RCW 41.26.281 is violative of the prohibitions against extra compensation
and special legislation under Article II §§ 25, 28 of the Washington State
Constitution;
- 6) Whether RCW 41.26.281 is violative of the requirements of Article § 19 of the
Washington State Constitution; and
- 7) Whether plaintiff's claim is barred by sovereign immunity.

and the Court being fully advised in the premises, now, therefore,

1 IT IS HEREBY IT IS HEREBY that RCW 4.24.530-540 does not apply to activities of
2 the Seattle Mounted Patrol and, therefore, the City is not immune from liability for the plaintiff's
3 claims based upon said statutes.

4 IT IS FURTHER ORDERED that RCW 41.26.281 is ~~constitutional~~ ^{not unconstitutional} 

5 IT IS FURTHER ORDERED that plaintiff's claims are not barred by the doctrine of
6 sovereign immunity.

7 IT IS FURTHER ORDERED that genuine issues of material fact exist with respect to the
8 defendant's assumption of risk and fellow servant rule affirmative defenses, and that the
9 defendant has the right to ask that the trial judge consider submitting jury instructions on these
10 defenses, should the evidence justify their submission, and that the plaintiff has the right to move
11 that these affirmative defenses be stricken.
12

13 IT IS FURTHER ORDERED that the oral ruling of the Court as set forth on the record
14 on December 23, 2005 shall by reference be incorporated into this Order.

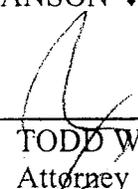
15 IT IS HEREBY ORDERED that Defendant City of Seattle's Motion for Summary
16 Judgment and Declaratory Relief is **DENIED**.

17 DONE IN OPEN COURT on Jan 9, 2006.

18 
19 _____
20 THE HONORABLE MARY YU

21 Presented by:

22 SWANSON ❖ GARDNER, P.L.L.C.

23 By 
24 TODD W. GARDNER, WSBA #11034
Attorney for Plaintiffs

25 SWANSON ❖ GARDNER, P.L.L.C.

Attorneys at Law
4512 Talbot Road South
Renton, Washington 98055
(425) 226-7920
Facsimile (425) 226-5168

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Copy Received:

THOMAS A. CARR
SEATTLE CITY ATTORNEY

By _____
MARCIA M. NELSON, WSBA #8166
Assistant City Attorney
Attorneys for Defendant

COPY RECEIVED
05 JAN 10 AM 9:25
SEATTLE CITY ATTORNEY

The Honorable Mary Yu
Noted for Monday, January 9, 2006
Without Oral Argument
Moving Party: Defendant City of Seattle

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

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

Plaintiff,

Vs.

CITY OF SEATTLE, a municipal corporation,

Defendant.

No. 05-2-05740-8SEA

[PROPOSED] ORDER OF
CERTIFICATION PURSUANT TO RAP
2.3(B)(4)

THIS MATTER having come on duly and regularly without hearing before the undersigned judge of the above-entitled Court pursuant to the Defendant City of Seattle's Motion To Certify Order in the above-entitled cause, and the Court having read and considered the records and files herein, including:

1. Defendant City of Seattle's Motion to Certify Order;
2. ~~Any responses and replies thereto;~~ *Plaintiff's opposition*
3. *Defendant's Reply* 

[PROPOSED] ORDER OF CERTIFICATION PURSUANT TO RAP
2.3(b)(4) - 1

ORIGINAL

Thomas A. Carr
Seattle City Attorney
600 Fourth Avenue, 4th Floor
P.O. Box 94769
Seattle, WA 98124-4769
(206) 684-8200

1 and the Court being fully advised in the premises, Now, Therefore

2 IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the undersigned judge
3 of the King County Superior Court, pursuant to RAP 2.3(b)(4), hereby certifies (1) that the order
4 denying the City of Seattle's motion for summary judgment based upon sovereign immunity,
5 constitutional provisions *Re: the LEOFF statute (41.26.270 + .281)* and ~~the equine immunity statute~~ involve controlling questions of law as
6 to which there is substantial ground for differences of opinion and (2) that immediate review of
7 the order may materially advance the ultimate termination of the litigation.

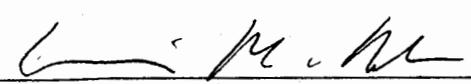
8 DONE IN OPEN COURT this 9 day of January, 2006.

9
10 
11 THE HONORABLE MARY YU

12 Presented by:

13 THOMAS A. CARR
14 Seattle City Attorney

15 By:

16 
17 MARCIA M. NELSON, WSBA #8166
18 REBECCA BOATRIGHT, WSBA #32767
19 Assistant City Attorneys

20 Attorneys for Defendant,
21 The City of Seattle
22
23

*the city has advised the
ct. that a similar
issue is pending before the
ct. therefore it would
benefit all parties if this
issue were resolved at
the same time.
This matter is stayed
pending the ct. of
Appeals acceptance of
review. If denied
by the matter,
will proceed in
accordance with the
case schedule.*