

No. 57725-5

79381-6

**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.

**RESPONDENT'S MEMORANDUM AND MOTION IN
OPPOSITION TO MOTION FOR DISCRETIONARY REVIEW**

Todd W. Gardner, WSBA #11034
Attorneys for Respondent

Swanson ❖ Gardner, P.L.L.C.
4512 Talbot Road South
Renton, WA 98055
(425) 226-7920

FILED
COURT OF APPEALS
DIVISION I
2006 MAR 27 PM 4:15

ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND MOTION TO STRIKE.....	1
A. Relevant Procedural History.....	1
B. Motion to Strike.....	2
II. STATEMENT OF FACTS.....	4
A. Accident of May 4, 1999.....	4
B. Donovan.....	6
C. Training Facility -- The Paddock.....	11
D. Seattle Mounted Patrol Officer Training.....	14
E. Evaluation of Horse and Rider.....	16
F. Tack.....	18
G. Assumption of Risk.....	19
III. LEGAL ARGUMENT.....	20
A. RCW 41.26.281 is Constitutional and the Doctrine of Sovereign Immunity Does Not Apply.....	20
1. Art. I, § 12.....	21
2. Article II, § 25.....	25
3. Article II, § 28.....	26
4. Article II, § 19.....	26
5. The Superior Court Did Not Commit Obvious or Probable Error By Concluding That The LEOFF Statute Is Unconstitutional.....	28
B. Sovereign Immunity.....	29
C. Washington's Equine Immunity Statute --RCW 4.24.530-540.....	29
1. These Statutes Do Not Apply to the Mounted Patrol.....	29
2. A Genuine Issue of Material Fact Exists as to Whether One or More of the Exceptions to the Immunity Statute Apply to This Case.....	32
D. Assumption of Risk.....	38
E. Fellow Servant Rule.....	42
IV. CONCLUSION.....	45
APPENDIX A- Notice of Discretionary Review to Court of Appeals	
APPENDIX B - Cover & Sign. pgs of Motion for Discretionary Review	
APPENDIX C- Notice of Motion	

TABLE OF AUTHORITIES

Washington Cases

	Page
<i>Bennett vs. Messick</i> , 76 Wn.2d 474, 457 P.2d 609 (1969).....	45
<i>Bickford vs. City of Seattle</i> , 104 Wn. App. 109, 17 P.3d 1240 (2001).....	28
<i>Buss v. Wachsmith</i> , 190 Wash. 673, 70 P.2d 417 (1937).....	44
<i>Brown vs. Stevens Pass Inc.</i> , 97 Wn. App. 519, 984P.2d 448 (1999).....	40
<i>In re Boot</i> , 130 Wn.2d 553, 566, 925 P.2d 964 (1986).....	26, 27
<i>Locke vs. City of Seattle</i> , 55256-2-I.....	1
<i>Elford vs. City of Battle Ground</i> , 97 Wn. App. 229, 941 P.2d 678 (1997).....	28
<i>Fray vs. Spokane County</i> , 134 Wn.2d 637, 643, 952 P.2d 601 (1998).....	21,23,24,27,28,43
<i>Gillis vs. City of Walla Walla</i> , 94 Wn.2d 193, 616 P.2d 625 (1980).....	23,28
<i>Gossett vs. Farmers Insurance Co.</i> , 133 Wn.2d 954, 979, 948 P.2d 1264 (1997).....	24
<i>Hansen vs. City of Everett</i> , 93 Wn. App. 921, 971 P.2d 111 (1999).....	28
<i>Hauber vs. Yakima County</i> , 147 Wn.2d 655, 660, 56P.3d 559 (2002).....	23,24,28
<i>Island County vs. State</i> , 135 Wn.2d 141, 955 P.2d 377 (1998).....	21

<i>Kirk vs. Washington State University</i> , 109 Wn.2d 448, 746 P.2d 285 (1987).....	38,39
<i>Matthews vs. Elk Pioneer Days</i> , 64 Wn.App, 433, 439, 824 P.2d 541, <i>rev. denied</i> , 119 Wn.2d 1011, 133 P.2d 386 (1992).....	30,32
<i>Mayberry vs. Seattle</i> , 53 Wn.2d 716, 721, 336 P.2d 878 (1959).....	45
<i>McNeal vs. Allen</i> , 95 Wn.2d 265, 621 P.2d 1285 (1980).....	29
<i>Nielsen vs. Port of Bellingham</i> , 107 Wn. App. 662, 27 P.3d 1242, <i>rev. denied</i> , 145 Wn.2d 1027, 42 P.3d 974 (2001).....	29
<i>Patrick vs. Sferra</i> , 70 Wn.App. 676, 855 P.2d 320 (1993).....	36,37
<i>Plemmons vs Antles</i> , 52 Wn.2d to 69, 271-72, 324 P.2d 823 (1958).....	44
<i>Scott vs. Pacific West Mountain Resort</i> , 119 Wn.2d 484, 498-99, 834 P.2d 6 (1992).....	40
<i>Seeley vs. State</i> , 132 Wn.2d 776, 788, 940 P.2d 604 (1997).....	23
<i>Taylor vs. City of Redmond</i> , 89 Wn.2d 315, 571 P.2d 1388 (1977).....	22,28,29,43
<i>In re Woods</i> , 154 Wn.2d 400, 412, 114 P.3d 607 (2005).....	23
<i>YMCA vs. State</i> , 62 Wn.2d 504, 506, 383 P.2d 497 (1963).....	27
<i>Wagenblast vs. Odessa School District No. 105</i> , 110 Wn.2d 145, 148, 758 P.2d 968 (1988).....	38
Constitutions	
Art. I, § 12.....	21

Article II, § 19.....	26
Article II, § 25.....	25
Article II, § 28.....	26

Statutes

RCW 4.24.540(2)(b)(B).....	37
RCW 4.96.010.....	29
RCW 4.24.210.....	30
RCW 4.24.530.....	29
RCW 4.24.530(1).....	31
RCW 4.24.530(3).....	31
RCW 4.24.540.....	29,33,34
RCW 41.26.....	22,27
RCW 41.26.030.....	22
RCW 41.26.030 (8).....	43
RCW 41.26.270	1
RCW 41.26.281.....	20,22,23,24,25,26,29,32,42,43,44
RCW 51.04.010.....	23

Rules and Regulations

RAP 2.3(b)(1, 2 & 3).....	2
RAP 2.3(b)(4).....	2

RAP 2.3(4).....	46
RAP 6.2(b).....	3
RAP 6.2(c).....	2
RAP 17.4(a).....	2,3

Other Authorities

Laws of 1971, 1 st Ex. Sess. Ch. 257.....	23,26
Legislative History, chapter 292 sections 1 and 2 (1989).....	31
Restatement (Second) of Agency § 474-475.....	45
WPI 15.01 and 15.04.....	34

I. INTRODUCTION AND MOTION TO STRIKE

A. Relevant Procedural History

The Petitioner seeks discretionary review of an Order denying its Motion for Summary Judgment entered by the Honorable Mary Yu on January 9, 2006. Judge Yu entered an Order of Certification only with respect to the Petitioner's contention that the LEOFF statute (RCW 41.26.270 and .281) is unconstitutional. The Certification was entered, according to Judge Yu, only because a similar issue is pending before the Court of Appeals. The reference is to *Locke vs. City of Seattle*, 55256-2-I. In that case a firefighter trainee sought compensation pursuant to RCW 41.26.270 and .281 as the result of the City's negligence for damages above and beyond compensation provided under the LEOFF statute. The City moved to dismiss on constitutional grounds -- arguments identical to those that are now presented in the case at bar. The Trial Court denied the motion. The jury returned a verdict in favor of Mr. Locke and the City appealed.

The Appeal was heard by Judges Becker, Grosse and Dwyer on March 7, 2006. Questions posed by the Panel strongly suggest that the City's appeal will be denied, at least with respect to the constitutional argument. Counsel for both the petitioner and the respondent in the case at bar attended oral argument in the *Locke* matter.

The Petitioner does not seek review on the basis of RAP 2.3(b)(4). Instead, the Petitioner argues that review should be accepted on the basis of RAP 2.3(b)(1, 2 & 3), arguing that the Superior Court has committed obvious error that would render further proceedings useless, probable error and the decision of the Superior Court substantially alters the status quo or substantially limits the freedom of a party to act, or that the Superior Court has so far departed from the usual and accepted course of judicial proceedings as to call for review by the Appellate Court. In short, even though a limited issue (constitutionality of the LEOFF statute) was certified by the Superior Court, the Petitioner does not move for acceptance of discretionary review on that basis. Instead, the Petitioner seeks review of all of the arguments it presented in its Motion for Summary Judgment, including the constitutional argument, on the bases of obvious or probable error.

B. Motion to Strike

Respondent moves to strike the Petitioner's Motion for Discretionary Review on the basis of its violation of RAP 17.4(a). A motion for discretionary review is governed by RAP 17. See, RAP 6.2(c). The Order Denying Petitioner's Motion for Summary Judgment to Dismiss was signed by the Superior Court on January 9, 2006. The City's Notice for Discretionary Review was signed on February 7, 2006 and received by

Respondent's counsel on February 8, 2006. Petitioner filed its Motion for Discretionary Review on February 22, 2006. However, it did not include a Note of the time and date set for oral argument with the motion, as required by RAP 17.4(a). The relevant portion of this rule states as follows:

"Except in the special circumstances defined in sections (b), (c), and (d), **a motion which is to be decided by a commissioner or the clerk *must be accompanied by a notice of the time and date set for oral argument of the motion.***" RAP 17.4(a). (Emphasis provided).

None of the special circumstances identified in this rule are applicable to the case at bar. When requesting discretionary review of the denial of a motion for summary judgment the least that should be expected of the Petitioner is that the rules be followed. Almost every filing was on or about the "last date" available under the Rules of Appellate Procedure. Failing to include a note setting forth the time and date for oral argument together with the motion violates RAP 17.4(a). A Note setting forth the date and time for hearing the motion was not filed until February 24, 2006. It did not accompany the filing of the Motion and was filed more than 15 days after the Notice of Discretionary Review was signed and filed. See, RAP 6.2(b). There is no question that this is a technical violation of the rules. However, if the rules are not followed with respect to a motion for discretionary review of a denial of a motion for summary judgment, then

the rules serve no purpose. Petitioner's Motion for Discretionary Review should be stricken.

II. STATEMENT OF FACTS

A. Accident of May 4, 1999

A genuine issue of material fact exists as to the exact sequence of events that led to Officer Lindell's tragic fall from Donovan on May 4, 1999. There is no dispute that this accident occurred during a training session under the supervision of Training Officer Scot Hansen in the Seattle Mounted Patrol's Discovery Park training facility (hereinafter referred to as the "paddock") at approximately 1:30 p.m. There is also no dispute that Officer Lindell fell off of the right side of Donovan as he was moving at a medium lope, landing onto his feet, but facing backwards, and that he fell backwards onto his tailbone and then with the back of his head against the ground resulting in a severe brain injury and skull fracture. For the purpose of this motion, the City indicates that it does not dispute plaintiff's allegation that Officer Lindell died on March 13, 2002 as a result of a massive seizure secondary to the brain damage he sustained on May 4, 1999.

Detective Suguro was assigned to investigate this accident and arrived at the scene at approximately 4:00 p.m. on May 4, 1999. His report indicates that he was advised by the Officer in charge of the Seattle

Mounted Patrol, Sergeant Wilske, that Officer Lindell, Officer McClincy, and Officer Mathisen were riding their horses in the paddock and that Officer Hansen and Sergeant Wilske were working with his horse on the ground. Another horse, Bo, was free in the paddock.

Detective Suguro interviewed Officers Hansen and Mathisen at 4:00 p.m. and documented what they witnessed. The Detective testified that he knew nothing about horseback riding and that all of the terms used to describe Donovan's behavior in his report would have come from these two scene witnesses. His summary of the information provided to him by Officers Hansen and Mathisen is as follows:

“Sergeant Mathisen and Officer Hansen said they saw Officer Lindell riding Donovan in the southwest area of the paddock at 1330 hr. Donovan was moving at a medium lope, not a full gallop. Officer Lindell’s right arm was around Donovan’s neck. Officer Lindell’s head was down at approximately the same level as Donovan’s neck. Donovan started to come up on his hind legs and his head was porpoising. Officer Lindell and Donovan moved from the paddock east through the car wash. The car wash is a series of black plastic strips hanging from a wire attached to a telephone pole. Donovan’s rear hoof’s were approximately 10” off the ground. Officer Lindell and Donovan moved towards the eastern side of the paddock. Officer Lindell came off Donovan’s right side landing on his feet. Officer Lindell landed facing the opposite direction Donovan was traveling. Officer fell onto his back with his head snapping back onto the ground. Officer Lindell was unconscious when Sergeant Wilske and Officers’ Hansen, McClincy and Mathieson approached him. Officer Lindell was bleeding from the back of his head. Seattle Fire Department responded and treated

Officer Lindell. Officer Lindell was airlifted to Harborview Medical Center. Sergeant Wilske said the equipment (saddle and rope halter) from Donovan was placed into a secured area. The equipment was checked by Officer Hansen and found to be in good working order.”

The City previously moved to strike consideration of Detective Suguro’s Follow-Up Report as part of its response to plaintiff’s Motion to Amend her Complaint. That motion was denied. The City’s scene witnesses now claim after six years after the accident that Officer Lindell attempted to reach down and pickup a piece of bailing twine on the ground, that may or may not have been attached to a blue plastic tarp, and lost his balance, and that Donovan simply started moving from a complete stop, to a walk and then to a lope before Officer Lindell lost control and fell.

As can be seen from the information discovered concerning Donovan’s history and the assessment of plaintiff’s expert, Mr. Bergen, a reasonable inference from information concerning Donovan’s history combined with the witness accounts contained in Detective Suguro’s report would support the description of the accident as set forth in that report on May 4, 1999.

B. Donovan

Donovan was purchased by the City on December 9, 1993. There was a 60-day return policy. Unfortunately, the City failed to complete its

evaluation of Donovan as a Mounted Patrol horse within 60 days.

Donovan was initially evaluated by Officer Collins. Her evaluation states:

"His main problem is one of not wanting to WHOA."
(Emphasis in original).

Officer Stimmel completed the City's formal Evaluation of Donovan in March, 1994 and issued a three page "Horse Evaluation" to Sergeant Pierce on March 27, 1994. His Evaluation included the following conclusions:

"During the past three days however Donovan has returned to his old and bad habit of spinning off to his left for no apparent reason from time to time and has refused to enter alleys at times by dropping his head and then backing up quickly for a distance of 10-12 feet before stopping."

"As I attempted to step out of the intersection and onto the sidewalk at this location Donovan stepped onto the curb with his front feet and the (sic) quickly jumped off the curb and spun to his left 90 °. This time as I attempted to turn him back to his right by direct reining with my right hand he started to sidepass to his left even against my repeated use of the left spur. On 3-26-94 I rode Donovan in Volunteer Park and along Broadway and again his performance was less than expected."

"It appears that Donovan is a stubborn horse and will resist situations that he chooses to escape from. At this point I do not know how reliable Donovan will be because it is hard to determine how much he is actually learning and whether he is truly responding to the riders cues, or displaying the benevolence he shows towards most incidents."

Mr. Bergen notes in his Declaration that horses "do not forget old patterns." Deposition testimony establishes that Donovan certainly did not

forget what is described in his Evaluation by Officer Stimmel as his "old and bad habit of spinning off to his left for no apparent reason." Officer McClincy, who rode Donovan as her regular mount for a period of time up to around 1997 testified that his move was to buck and spin to his left. Sergeant Wilske testified that he rode Donovan after Officer Lindell was injured and found out at that time that Donovan had a tendency to unexpectedly spin to his left. He testified that he fell on two occasions from Donovan, one that occurred during training, and that on each occasion Donovan unexpectedly spun to his left.

Lieutenant Getchman, the supervisor in charge of the Seattle Mounted Patrol at the time Officer Lindell was injured, described his impression of Donovan as follows:

“Q. Okay. What, if anything, did you know about Donovan before Gary got hurt?

A. Zero.

Q. What, if anything, did you learn about Donovan after Gary was hurt?

A. Donovan seemed to be a little bit more independent-minded than the other horses.

Q. How did you learn that?

A. By watching the horses. The others were rather not in a sense sedate, but they were cooperative with the rider. Donovan sometimes was not.

Q. Is that based on your own observations?

A. Yes.”

The various Declarations submitted by the City in support of its Motion all described Donovan as a wonderful horse that apparently has all

of the Boy Scout qualities one would want in a Mounted Patrol horse. These witnesses are either quite attached to Donovan, very involved with horses and/or are still employees of the Seattle Police Department. Donovan is now retired and is being taken care of by Sergeant Wilske. Officer McClincy claims in her Declaration that Officer Lindell "loved Donovan." Officer Hansen owns his own horses and is currently working as a consultant/instructor for people who ride horses on trails. Certainly, a reasonable inference from the City's own Horse Evaluation of Donovan as documented in 1994 by Officer Stimmel, Lieutenant Getchman's own observations and the deposition testimony of Sergeant Wilske and Officer McClincy would be that Donovan had a habit of unexpectedly spinning to his left, was a stubborn horse who had a problem of not wanting to "WHOA," and was not as cooperative with his rider as the other police horses.

Donovan's accident history, both before and after Officer Lindell was unseated by Donovan, supports the conclusion of plaintiff's expert, Mr. Bergen, that Donovan was not suited to serve as a Mounted Patrol horse. On 8 (eight) separate occasions, police Officers have been thrown or fallen from Donovan. (Officer McClincy was thrown from Donovan on three occasions (injured at least twice) prior to Officer Lindell's accident), (Sergeant Wilske fell off of Donovan twice when he spun to his left

unexpectedly -- once during training), (Officer Mathisen recalls that Sergeant Smith fell off of Donovan), (Officer Stimmel saw Officer Pitts fall off of Donovan during training), and Officer Lindell's accident. Also, Officer McClincy described an incident at the Kingdome where she started to lose control of Donovan as he did "his thing" of bucking and spinning to his left, but with the help of others she got him under control before she was thrown.

The City has no organized way of documenting incidents involving its police horses, a practice or lack thereof that draws considerable criticism from plaintiff's expert Rod Bergen. There is no way to verify whether there have been more riders who have been thrown off of Donovan other than the 8 incidents recalled by various witnesses during their depositions as set forth above. However, not a single City Mounted Patrol Officer who has been deposed could recall another horse who has had anything even approaching the number of incidents in which an Officer has fallen or been thrown from Donovan. Without question, the evidence when examined in a light most favorable to the plaintiff provides sufficient foundation for the opinion of plaintiff's expert that Donovan should never have been serving as a Mounted Patrol horse at the time Officer Lindell was injured.

C. Training Facility -- The Paddock

The paddock was "constructed" in 1995 at the site of what had been a paved parking lot. Construction consisted of grading the surface down to what has been described as "glacial till," "hard surface," and "hardpan." Mr. Stoops, the Seattle employee designated by the City to answer questions concerning the construction of the paddock, testified that the Police Department placed 12-18 inches of soft material on top of the graded surface in 1995 and that every time he saw the paddock thereafter, up to the time the facility was abandoned in 2001 and he directed the restoration of the site, there was always more than 12 inches of soft material on top of the graded surface in the paddock.

Captain Fann testified that the Mounted Patrol, prior to 1999, had a regular program by which replacement hogsfuel was ordered by the Sergeant or someone under his authority from a private vendor on a fairly regular basis, whenever it needed to be replaced. Captain Fann was the Lieutenant in charge of supervising the Mounted Patrol from 1997 through early 1999. He testified that he would approve the invoices for the delivery of replacement hogsfuel to the Mounted Patrol facility on a fairly regular basis and that the Mounted Patrol seemed to have a program in place to know when they needed more hogsfuel. He never turned down or denied payment for replacement hogsfuel.

Unfortunately, in 1999 the Sergeant and Lieutenant in charge of the Mounted Patrol were completely unaware of the policy for replacing muddy or soiled hogsfuel, had no idea how to accomplish this task and were not oriented by their predecessors when they took over their respective positions in 1999. Sergeant Wilske had been up on a horse exactly three times in his life prior to becoming the Sergeant in charge of the Mounted Patrol in approximately January, 1999. His predecessor, Sergeant Vela, had already left the Mounted Patrol before Sergeant Wilske arrived, giving him no opportunity to be oriented. Similarly, Lieutenant Getchman testified that he was not oriented at all by his predecessor, Lieutenant Fann, when he took over responsibility for the Mounted Patrol in March or April, 1999. He also testified that he knew nothing about horseback riding or the Mounted Patrol when he took over, had no idea whether soft material was needed for the Paddock, how it was to be ordered or how much was needed until after Officer Lindell was injured and that he devoted only 5% of his time to supervision of the Mounted Patrol.

Interrogatory answers and the testimony of Mr. Demps, a Seattle Parks Department employee, establish that the hogsfuel that had been in place in the paddock in early 1999 was scraped into a pile by Mr. Demps at the request of the Mounted Patrol (probably Officer Hansen with the

concurrence and approval of Sergeant Wilske) no later than March 5, 1999 -- two months before Officer Lindell was injured. Hogsfuel was never ordered to replace the muddy and soiled hogsfuel that had been scraped into a pile. The Mounted Patrol continued to train in the paddock, in spite of the lack of a layer of protective material over the hard pan, up through May 4, 1999.

Lieutenant Getchman investigated the cause of Officer Lindell's accident and in his official report to his supervising captain concluded as follows:

"3) Probable Causes of Injury:

.....

c. The most evident unsafe condition leading to Gary's injury is the paddock surface. Every professional riding arena polled in western Washington has a ground cover of at least 4" to 6" of soft earth. The materials used vary from sand, loam, wood chips, or a combination of those. Experienced as well as inexperienced riders will fall from their horses during training activities and the arena floor is designed to absorb the impact of those falls, whether the riders wear helmets or not. In this case, the glacial till at the MPU Paddock had not been covered to a depth sufficient to prevent injury."

4) Recommendations

.....

b. The paddock should be covered with soft earth as soon as possible. (Emphasis in original).

Both Sergeant Wilske and Lieutenant Getchman agreed in their depositions that the most evident unsafe condition leading to Officer Lindell's injury was the hard paddock surface. In addition to Lieutenant Getchman's report, Sergeant Wilske completed the "Investigating Supervisor's Report of Employee's Industrial Injury." In the section "What further steps could be taken by the department to prevent a recurrence" Sergeant Wilske answered on May 5, 1999 as follows:

"Obtain appropriate protective gear. Replace outside paddock with quality fill appropriate to its use as a police training facility for horses."

Lieutenant Getchman and Sergeant Wilske still agree that both experienced and inexperienced riders will fall on occasion during training. One of Officer McClincy's falls off of Donovan, one of Sergeant Wilske's falls off of Donovan, Officer Lindell's injury and the falls of Officer Pitts and Sergeant Smith were all during training. Lieutenant Getchman said that he learned about the probability of falls during training from reading horseback riding magazines that were in the Seattle Mounted Patrol Discovery Park facility where this paddock was located. In short, any reasonable individual in charge of the Mounted Patrol would have been well aware that falls from a horse were expected during training.

D. Seattle Mounted Patrol Officer Training

Prior to 1999 there had been some efforts to document the training that was provided to Mounted Patrol Officers on training days. Unfortunately, the manner in which training was provided in 1999 was haphazard at best. Mr. Bergen testifies in his Declaration that Officer Hansen was not properly trained to be a Training Officer. Mr. Bergen points out that no Training Officer should ever use a facility for training after the protective layer of hogsfuel has been removed or allow a horse to run free in the paddock during training. He also states that Training Officers should be working with all of the Officers on one exercise at the same time, should never have any training exercises involving an attempt to pick up a cone or other object from the ground, should not leave a tarp with a rope or twine attached to it lying loose in the paddock and should have directed the Officers on the afternoon of May 4, 1999 to use a bridle and bit. Photos taken by Detective Suguro and the reports of Lieutenant Getchman and Sergeant Wilske prove that the hogsfuel had been scraped into a pile and not replaced. Detective Suguro's report indicates that a horse, Bo, was running loose during the May 4, 1999 training session, Officer Hansen testified that he was working on the ground with Sergeant Wilske while the other three officers were working independently on their horses, Sergeant Wilske said there was a training exercise designed to try to pick cones up off the ground and Officer Hansen testified that he

usually told officers to use a bridle and bit when they were going to be training on their horse in the paddock but did not do so on May 4, 1999.

Mr. Bergen also points out that no Training Officer should have permitted, supervised or organized training in the paddock before replacement hogsfuel was acquired to cover the hardpan surface. *After* Officer Lindell was injured, the Mounted Patrol was prohibited by Lieutenant Getchman from using the paddock for training until new hogsfuel could be obtained to cover the surface. Sergeant Wilske also prohibited training in the paddock after Officer Lindell was hurt, in part because he didn't want anyone else to fall and hurt himself or herself on the paddock's hard surface.

E. Evaluation of Horse and Rider

Officer Stimmel was selected by the City to respond to questions about Donovan identified in plaintiff's CR 30(b)(6) deposition notice. Officer Stimmel testified that it was important from the standpoint of safety for someone in charge to evaluate the ability of the rider, understand the history and disposition of the horse and correctly match horse and rider. However, in 1998-1999 there was no such system in place at the Seattle Mounted Patrol. Sergeant Wilske, Training Officer Hansen, Officer McClincy and Officer Mathisen all testified that Mounted Patrol officers were simply allowed to choose their regular mount from the

horses that were not currently claimed by other Officers as their own regular mounts. Similar testimony is provided in the Declarations attached by the City to its Motion for Summary Judgment. Plaintiff's expert, Rod Bergen, states in his Declaration that the City's actions in 1998-1999 or lack thereof, was negligent.

Officer Hansen, the individual described as the most experienced horseback rider during the year in 1998-99 when Officer Lindell was a permanent member of the Mounted Patrol, only knew that Donovan had been involved in one incident in which an Officer (Officer McClincy) had been thrown from this horse. Donovan had not been anyone's regular mount since Officer McClincy switched to a different horse in 1997 after she had been thrown by Donovan on three occasions. When Officer Lindell started as a permanent member of the Mounted Patrol in 1998 he first selected Hercules as his mount and switched to Donovan sometime during his one year in the Mounted Patrol before his May 4, 1998 injury. Testimony indicates that Officer Lindell rode Hercules longer than he rode Donovan. Therefore, we can surmise that Officer Lindell rode Donovan for something less than 6 months before he was injured.

There was also no formal evaluation or performance testing of new Mounted Patrol officers. The only way any Mounted Patrol officer could learn anything about the disposition or history of the horses in the

Mounted Patrol was by word of mouth. Given the fact that the Training Officer (Officer Scot Hansen) only knew about one of the three times Officer McClincy was thrown from Donovan nor was he aware about the time she almost lost control of Donovan in the Kingdome or about the nature of Donovan's Evaluation by Officer Stimmel, word of mouth was a poor substitute for clear, complete and simple documentation of each horse's disposition and an organized method for matching horse and rider. Sergeant Wilske, who rode Donovan after Officer Lindell's injury, only learned about his old and bad habit of spinning to the left after he started riding Donovan. Not surprisingly, both of his falls from Donovan occurred when Donovan unexpectedly spun to his left. Being thrown off a horse is a tough way to learn about his disposition.

F. Tack

Officer Hansen has testified that generally he would tell officers under his supervision to use a bridle and bit when training on a horse in the paddock. Often he simply left it up to the discretion of the individual rider. Mr. Bergen says that this is inappropriate. The Training Officer must direct the officers to the type of tack to be used during training. Using the same tack that is generally used during patrol is most appropriate. Officer Hansen testified that a bridle and bit were used during patrol.

Officer Lindell was using a rope halter on May 4, 1999. A rope halter does not have a bit and it is only pressure on the horse's nose from the rope that encourages the horse to stop. As noted by Mr. Bergen, use of a bridle and bit would have made it easier for Officer Lindell to control Donovan. The bit is a metal bar that goes into the horse's mouth and pulling back on the reins applies pressure on the horse's sensitive gums, encouraging it to stop.

G. Assumption of Risk

Police departments are quasi-military organizations with authority established by rank similar to the military. Officer Hansen was the Training Officer. Mounted Patrol Officers are under the supervision of the Training Officer during training, such as during the events of May 4, 1999. A police department is not a democracy and Sergeant Wilske was in charge of the Mounted Patrol. What he says, goes, even though he knew little to nothing about horseback riding when he took over command in January, 1999. As pointed out by Mr. Bergen, no one can voluntarily assume the risk of an injury during training when one does not have control over where and when the training is to take place.

In addition, there is no evidence that Officer Lindell had a subjective understanding of the nature and extent of his risk of injury that was "assumed" by training in the paddock, even if he had complete control

(which he did not) over where and how he trained. Sergeant Wilske testified that he was not aware of the risk of injury from falling during training on a hard surface until *after* Officer Lindell was injured. Lieutenant Getchman learned of the risk of injury from training on a hard surface and that falls during training were to be expected only *after* Officer Lindell was injured. Officer Hansen never did see the hard surface of the paddock as a risk either to himself or the officers he was training. If the Lieutenant, Sergeant and Training Officer did not have a subjective understanding of the risk posed by training on a hard surface, such as the surface of the paddock on May 4, 1999, how can one reasonably conclude that Officer Lindell had a subjective understanding of the nature and extent of this risk? Testimony indicating that Officer Lindell had participated in picking up rocks and throwing them out of the paddock enclosure does not establish that no genuine issue of material fact exists as to his subjective understanding of the risk posed by training on such a hard surface.

III. LEGAL ARGUMENT

A. **RCW 41.26.281 is Constitutional and the Doctrine of Sovereign Immunity Does Not Apply**

The City asks the Court to find that RCW 41.26.281 is unconstitutional. Under the applicable burden of proof the City must

establish that this statute is unconstitutional beyond a reasonable doubt. *Island County vs. State*, 135 Wn.2d 141, 955 P.2d 377 (1998). Policemen and firefighters have had the right to seek damages for acts of negligence or intentional misconduct from their employers since 1971. *Fray vs. Spokane County*, 134 Wn.2d 637, 643, 952 P.2d 601 (1998). Although this statute, or identical language in its predecessor, has been part of Washington law for 34 years and has been discussed and interpreted by numerous Washington Supreme Court and Appellate Court cases during that time, the City now takes the position that it is unconstitutional.

1. Art. I, § 12

The City's argument is primarily based upon a claim that this statute constitutes an unconstitutional violation of the equal protection clause of the Washington Constitution, Article I, § 12. In support of its argument, the City does not cite a single case suggesting that this particular statute does not pass constitutional muster or that any similar statutes in other states have ever been declared to be unconstitutional. Instead, the City relies primarily on older workman's compensation cases that predate the establishment of the LEOFF system for police and firefighters. Our Supreme Court has noted that cases decided before LEOFF was enacted have no bearing on statutory construction issues

involving LEOFF (RCW 41.26 et. seq.). *Taylor vs. Redmond*, 89 Wn.2d 315, 318, 571 P.2d 1388 (1977).

RCW 41.26.281 reads as follows:

"If injury or death results to a member from the intentional or negligent act or omission of a member's governmental employer, a member, the widow, where were, child or dependent of the member shall have the privilege to benefits under this chapter and also have cause of action against the governmental employer as otherwise provided by law, for any excess of damages over the amount received or receivable under this chapter."

The Statute provides, in clear and unambiguous language, the right of police officers and firefighters (defined as "members" in RCW 41.26.030) to pursue claims against their employer if injury or death results from an intentional or negligent act or omission, subject to the provision that recovery may only be had for damages in excess over the amount received or receivable under this chapter. The municipality receives the full benefit or offset for all workers' compensation benefits, paid and to be payable in the future, from whatever damages are awarded by the judge or jury. In some circumstances, this could lead to the recovery of no additional damages by the police officer or firefighter in the litigation, even if negligence was established, should damages be awarded by the jury be less than what was previously paid or was payable in the future by way of

workers' compensation benefits. See, *Gillis vs. City of Walla Walla*, 94 Wn.2d 193, 616 P.2d 625 (1980).

This statute, commonly referred to as the "right to sue" provision, was enacted in 1971. Laws of 1971, 1st Ex. Sess. Ch. 257. As recently noted by our Supreme Court, this law was enacted by the Legislature "to provide greater benefits to injured police officers and firefighters than they would receive under the workers' compensation system." *Fray vs. Spokane County*, supra at p. 643. Recently, our Supreme Court highlighted the reasoning behind providing police officers and firefighters with this benefit:

"While the Industrial Insurance Act immunizes most employers from job-related negligence suits, firefighters and police officers, because of the vital and dangerous nature of their work, are provided extra protection and are allowed to both collect workers' compensation and bring job related negligence suits against their employers. RCW 51.04.010, 41.26.281." *Hauber vs. Yakima County*, 147 Wn.2d 655, 660, 56P.3d 559 (2002).

Washington's Supreme Court has consistently considered the equal protection clause in our state Constitution to be substantially similar to the equal protection clause in the federal Constitution and "treated them accordingly." *Seeley vs. State*, 132 Wn.2d 776, 788, 940 P.2d 604 (1997). Under the equal protection clause, persons similarly situated with respect to the purposes of the law must receive like treatment. *In re Woods*, 154

Wn.2d 400, 412, 114 P.3d 607 (2005). In this case, the "rational relationship test" applies. *Gossett vs. Farmers Insurance Co.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997).

The rational relationship test is described as follows:

"Under the rational relationship test, a classification will be upheld unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives and the burden is on the challenger to show that the classification is purely arbitrary. A classification will be upheld against an equal protection challenge if there is any conceivable set of facts that would provide a rational basis for the classification." *Gossett vs. Farmers Insurance Co.*, supra at p. 979. (Citations omitted).

There is nothing arbitrary about recognizing the fact that firefighters and police officers perform "vital and dangerous" services to the public requiring "extra protection" under the law. *Hauber vs. Yakima County*, supra, at p. 660. The City's motion makes no effort to analyze whether or not RCW 41.26.281 violates the equal protection clauses of our state or federal constitutions as required by our common law. Therefore, the City has not met its burden of proof of establishing, beyond a reasonable doubt, that providing firefighters and police officers with the right to sue is "wholly irrelevant to the achievement of legitimate state objectives" or is a classification that is "purely arbitrary." *Gossett vs. Farmers Insurance Co.*, supra at p. 979. There is a rational basis for this classification as expressly recognized by our Supreme Court in *Hauber vs.*

Yakima County, supra and *Fray vs. Spokane County*, supra. The City's argument is without merit.

2. Article II, § 25

The City also contends that RCW 41.26.281 violates Article II, § 25 of the Washington State Constitution on the basis that it constitutes the legislative grant of extra compensation to a public officer. The City cites no authority nor case law in support of this novel argument. Frankly, a right to pursue a claim based upon negligent or intentional misconduct does not constitute compensation. It only provides police officers and firefighters the right to ask a judge or jury for damages if injured by the negligence of his or her employer, subject to an offset for benefits paid or payable in the future. RCW 41.26.281. This certainly does not constitute a violation of our Constitution.

Under the strained analysis of the City, any workman's compensation benefits provided after any public employee was disabled from working by an on a job injury would constitute "extra compensation" provided "after" the services have been rendered and, therefore, be in violation of Article II, § 25 of our Constitution. The City's analysis, particularly without the citation of the single case, does not establish, beyond a reasonable doubt, that RCW 41.26.281 is unconstitutional under Article II, § 25.

3. Article II, § 28

Similarly, the City contends, without any case authority or citation, that RCW 41.26.281 violates Article II § 28 of our Constitution because it releases or extinguishes the "indebtedness, liability or obligation" of police officers to the City. The statute does no such thing. It simply provides police officers and firefighters the right to bring a cause of action. It does not release any indebtedness, liability or obligation, because none exist. In fact, the City receives an offset for benefits previously paid or payable in the future from any damages awarded pursuant to RCW 41.26.281. The sanctity of benefits previously paid or payable is expressly recognized by the statute.

4. Article II, § 19

Finally, the City contends that RCW 41.26.281 violates Article II, § 19 of our Constitution. The City argues that the title of Laws of 1971, 1st Extra Session, Ch. 257 does not express the subject of the law. The title of this bill is as follows:

"And Act relating to law enforcement officers and
firefighters."
Laws of 1971 1st Ex. Sess. Ch. 257

Our Supreme Court has held that Article II, § 19 is to be liberally construed in favor of the validity of the legislation. *In re Boot*, 130 Wn.2d

553, 566, 925 P.2d 964 (1986). The title is sufficient if it gives notice that would lead to an inquiry into the body of the act. *In re Boot*, supra; *YMCA vs. State*, 62 Wn.2d 504, 506, 383 P.2d 497 (1963). Clearly, a title that specifically notes that this act relates to law enforcement officers and firefighters should naturally lead to an inquiry by municipal employers of these classes of individuals into the body of the act.

The City strains to analogize its argument to the holding in *Fray vs. Spokane County*, supra. In *Fray* our Supreme Court determined that a 1992 bill titled "An Act relating to making technical corrections" to various statutes was unconstitutional. This Act purported to recodify the statute that provided police officers with the right to pursue a cause of action against their employer for injuries caused by negligence or intentional misconduct. Although not noted in the bill, this recodification would have resulted in elimination of the "right to sue" for police officers who were members of LEOFF II, but not those who were covered under LEOFF I. The Court held that since the title of the legislation did not so much as mention the subject of the act that readers of the title would not be lead to an inquiry into the body of the act itself. The court held that this was misleading and unconstitutional.

Clearly, the 1971 act correctly set forth the subject of this legislation, which included several sections now part of RCW 41.26, as an

act pertaining to police officers and firefighters. Any employer of police officers or firefighters, or a legislator who had an interest in such provisions pertaining to the employment of these public servants, would be led to read the body of the bill and understand its contents. Under the City's analysis the title of the legislation would be required to summarize every section of the bill in order to pass constitutional muster. This is not the law.

5. **The Superior Court Did Not Commit Obvious or Probable Error By Concluding That The LEOFF Statute Is Unconstitutional.**

Firefighters and law enforcement officers have had the right to bring actions against their employers for negligent or intentional misconduct for the last 34 years. The statute that provides police officers, firefighters and their families with this right has been interpreted and evaluated by numerous decisions in this state and its constitutionality has never been questioned. See, *Hauber vs. Yakima County*, supra; *Fray vs. Spokane County*, supra; *Gillis vs. City of Walla Walla*, supra; *Taylor vs. Redmond*, supra; *Bickford vs. City of Seattle*, 104 Wn.App. 109, 17 P.3d 1240 (2001); *Hansen vs. City of Everett*, 93 Wn.App. 921, 971 P.2d 111 (1999); *Elford vs. City of Battle Ground*, 97 Wn.App. 229, 941 P.2d 678 (1997). The City has failed to prove, beyond a reasonable doubt, that

these cases are wrong and, 34 years after this statute was enacted, that RCW 41.26.281 should be declared unconstitutional.

B. Sovereign Immunity

The City's argument that plaintiff's claim is barred by sovereign immunity ignores the express holding of our Supreme Court in *Taylor vs. Redmond*, supra. The Court in *Taylor* expressly held that RCW 4.96.010 provides police officers and firefighters with the right to bring a negligence action against their employer as "a cause of action against the governmental employer as otherwise provided by law" as granted to said individuals by RCW 41.26.281. *Taylor vs. Redmond*, supra at p. 320. This issue has already been expressly decided and the City offers no authority suggesting that *Taylor* has been overruled.

C. Washington's Equine Immunity Statute --RCW 4.24.530-540

1. These Statutes Do Not Apply to the Mounted Patrol

A long-standing principle of statutory construction is that statutes in derogation of common law must be strictly construed and no intent to change the law will be found unless it appears with clarity. *McNeal vs. Allen*, 95 Wn.2d 265, 621 P.2d 1285 (1980); *Nielsen vs. Port of Bellingham*, 107 Wn. App. 662, 27 P.3d 1242, review denied, 145 Wn.2d 1027, 42 P.3d 974 (2001). It is important to note that statutes that provide immunity "should be strictly construed and limited so that only that

immunity which is necessary to serve the particular societal interests involved is recognized." *Matthews vs. Elk Pioneer Days*, 64 Wn.App, 433, 439, 824 P.2d 541, *review denied*, 119 Wn.2d 1011, 133 P.2d 386 (1992).

The Court in *Matthews* was faced with the need to determine whether the recreational land use immunity statute (RCW 4.24.210) applied when a temporary outdoor structure fell over during an outdoor stage performance put on by the Elks on the grounds of their facility near Spokane. The Court noted that the trend in Washington law is toward abrogation of many of the statutory and common law immunities for negligence. *Id.* The Court cited several authorities that demonstrate that "our society generally assumes persons and entities should be accountable for their negligence." *Id.* The court concluded that the statute did not provide immunity in the circumstances presented in that case because it determined that the Legislature did not intend "outdoor recreation" to include activities that could be held either outdoors or indoors. *Id.* This construction demonstrates the extent to which our Courts go to limit the scope and extent of immunity statutes that are in derogation of common law.

The first issue that must be decided by the Court is whether these statutes, when construed and limited so that only the immunity which is

necessary to serve the particular societal interests recognized by the statutes, apply to the Seattle Mounted Patrol. RCW 4.24.530(1) provides, subject to the exceptions in subsection (2) of this section, that an "equine activity sponsor" is shielded from liability. The term "equine activity sponsor" is defined in RCW 4.24.530(3) as follows:

(3) "Equine activity sponsor" means an individual, group or club, partnership, or corporation, whether or not the sponsor is operating for profit or nonprofit, which sponsors, organizes, or provides the facilities for, an equine activity including but not limited to: Pony clubs, 4-H clubs, hunt clubs, riding clubs, school and college sponsored classes and programs, therapeutic riding programs, and, operators, instructors, and promoters of equine facilities, including but not limited to stables, clubhouses, ponyride strings, fairs, and arenas at which the activity is held.

None of the examples of an equine activity sponsor in the statute come anywhere close to describing organizations such as the Seattle Mounted Patrol where the participant is an employee who is required to engage in training and police work on horseback as part of his or her duties as police officers. Similarly, the Legislative History of these statutes, chapter 292 sections 1 and 2 (1989), establishes that the purpose of these statutes was to protect organizations like clubs and stables who were having a difficult time procuring liability insurance. There is no mention of professional organizations, like the Seattle Mounted Patrol, as

entities that require some sort of statutory immunity because of the need for liability insurance.

Moreover, if this statute is construed as applying to this employer/employee situation, the only working environment under the control of the City of Seattle that it would not have an obligation pursuant to RCW 46.21.281 to make safe for its police and fire fighters would be the paddock for the officers who are assigned to serve in the Mounted Patrol. It would be nonsensical for only Mounted Patrol officers to not have the right to seek damages for the negligence of their employer when every other police officer has that right. In short, a strict construction of this statute should lead the Court to the conclusion that it does not apply to the Seattle Mounted Patrol where officers are riding horses in the paddock as part of their duties and responsibilities as a police officer under the direction of their superiors. Applying this statute to the Seattle Mounted Patrol will not serve the purpose of this statute and, therefore, it should be constructed as not extending to the facts of this case pursuant to the holding of *Matthews vs. Elk Pioneer Days*, supra.

2. **A Genuine Issue of Material Fact Exists as to Whether One or More of the Exceptions to the Immunity Statute Apply to This Case**

As noted above, Respondent contends that the Superior Court did not commit either obvious or probable error in reaching the conclusion

that the equine immunity statute does not apply to a mounted patrol. However, even if the Court concluded that this decision constitutes "obvious or "probable error," the decision does not substantially alter status quo or limit of freedom of a party to act because it is clear that at least one of the exceptions to the statute would be applicable to the case at bar. Therefore, even if it was concluded that the statute applied, the facts in this case strongly support the conclusion that one of the exceptions to the statute applies, rendering it inapplicable on that basis to this litigation.

There are multiple exceptions to the immunity statute. If a genuine issue of material fact exists as to the application of any of these potential exceptions, denial of the City's motion was appropriate.

Tack. The first exception reads as follows:

(b) Nothing in subsection (1) of this section shall prevent or limit the liability of an equine activity sponsor or an equine professional:

(i) If the equine activity sponsor or the equine professional:

(A) Provided the equipment or tack and the equipment or tack caused the injury;"
RCW 4.24.540.

There is no question that the City supplied the tack used by Officer Lindell on May 4, 1999. The tack consisted of a western saddle and a rope halter. There is evidence presented by way of the Declaration of plaintiff's expert, Rod Bergen, that providing a rope halter, rather than a bridle and bit, would significantly impact the ability of Officer Lindell to

bring Donovan under control once he lost his balance so that he would be able to get off the horse without falling and striking his head. Mr. Bergen is clearly an extremely well-qualified expert on the issue of Mounted Patrol training. Mr. Bergen's qualifications include having been honored by a national organization as its National Mounted Patrol Training Officer of the Year in 2001. Officer Hansen, the Training Officer, generally advised the officers he was in charge of training to use a bridle and bit when training on the horse in the paddock. He failed to do so on May 4, 1999. A question of fact exists as to whether the tack that was provided was a cause of Officer Lindell's tragic accident. As the Court is well aware, there may be more than one proximate cause of an injury. See, WPI 15.01 and 15.04.

Provided the Horse. The second exception reads as follows:

(b) Nothing in subsection (1) of this section shall prevent or limit the liability of an equine activity sponsor or an equine professional:

(i) If the equine activity sponsor or the equine professional:

(B) Provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity, determine the ability of the equine to behave safely with the participant and determine the ability of the participant to safely manage the particular equine;"
RCW 4.24.540

There is no question that the materials provided by the plaintiff in opposition to this motion create a genuine issue of material fact as to

whether this exception to the statutory immunity applies in this case. The Declaration of Rod Bergen provides his opinion that the City failed to reasonably determine the ability of Officer Lindell to safely participate in training, to determine the ability of Donovan to behave safely with Officer Lindell or any other Mounted Patrol officer and to determine the ability of Officer Lindell to safely manage Donovan. There is considerable evidence that Donovan had the worst accident history, in terms of riders lost or thrown, of any horse in the Mounted Patrol. Before Officer Lindell was hurt Donovan had thrown Officer McClincy on three separate occasions, injuring her twice. Donovan had been described as "stubborn" and having an "old and bad habit" of unexpectedly spinning to his left. Officer McClincy almost lost control of Donovan when he tried to do "his thing" in the Kingdome, which she described as spinning to his left and bucking. Lieutenant Getchman recalled from his observations of Donovan that he had a mind of his own and was more difficult to control than the other horses. The City has made no effort to document incidents involving its Mounted Patrol horses and neither the supervising Sergeant or Training Officer were aware of Donovan's history at the time Officer Lindell served as a permanent Mounted Patrol officer from May, 1998 to May 4, 1999. It is plaintiff's expert's opinion that Donovan should not have been utilized as a Mounted Patrol horse in 1999 at all.

The City did not have any policy in 1998-99 as to how to properly match the horse to the Officer. If there is no policy, no clear performance standards for horseback riding skills to become a Mounted Patrol Officer and no effort to properly match horse with Officer, then it is impossible for the City to claim that they did so reasonably. If you don't even perform the tasks required by the statute, how can the City claim to have performed them reasonably?

It is important to note that if this exception applies there is no obligation on the part of the plaintiff to show that the failure to properly evaluate Donovan or properly match Officer Lindell with a Mounted Patrol horse was a cause of his injuries. That condition is not part of this exception. Other exceptions, such as providing the equipment or tack, or an act or failure to act that constitutes a willful or wanton disregard for the safety of a participant, specifically require that said conduct caused the injury. On the other hand, this particular exception does not include a requirement that it cause the injury. One should not re-write a statute like this that limits liability to include a clause that is not part of the statute that would serve to expand statutory immunity. Such an interpretation would clearly violate our rules of statutory construction as set forth above.

The only Washington appellate court case that discusses this statute provides at least indirect support for plaintiff's position. In *Patrick*

vs. Sferra, 70 Wn.App. 676, 855 P.2d 320 (1993) the plaintiff was given a certificate good for one month of unlimited horseback riding on a safe horse by the defendant who operated a stable. After the gift certificate had expired the plaintiff took possession of the defendant's horse. A couple of months later the plaintiff was injured when the horse took off and the plaintiff lost control and fell. The court held that the equine immunity statute did not apply after the plaintiff had assumed ownership of the horse. However, the Court discussed this specific exception, RCW 4.24.540(2)(b)(B), and noted as follows:

"During the time Patrick was riding pursuant to the auction certificate for one month of free riding, Sferra, as a stable owner and operator, provided the equine, and was subject to the statutory duties. If this incident had occurred during that period, **there would be a jury issue as to whether Sferra had fulfilled her statutory obligations.**" *Patrick vs. Sferra*, supra at 681. (Emphasis provided).

In short, a genuine issue of material fact would have existed in *Patrick* had the injury occurred before the horse was sold or given to the plaintiff by the defendant. Similarly, a jury issue exists in the case at bar, making Summary Judgment inappropriate.

Plaintiffs have provided strong evidence indicating that this exception to the statute does apply to the facts of this case. At the very least the testimony and other materials presented by the plaintiff together

with the opinion set forth by expert Ron Bergen create a genuine issue of material fact resulting in the failure of the City's Motion for Summary Judgment to Dismiss on the basis of the equine immunity statute.

In short, plaintiffs do not believe that this statute applies to an employee/employer relationship or to claims that police officers or firefighters are statutorily permitted to pursue by Washington law. Even if the statute was found to apply, genuine issues of material fact exist with respect to the application of at least two of the exceptions to statutory immunity, any of which would serve to eliminate application of the statutory immunity.

D. Assumption of Risk

The City's assumption of risk argument is based upon Washington case law that discusses implied primary assumption of risk. See, *Kirk vs. Washington State University*, 109 Wn.2d 448, 746 P.2d 285 (1987). There is no contention that there was "express" primary assumption of risk because that would require a contract between the parties indicating that the "defendant" shall not be liable for its negligence to the "plaintiff." *Wagenblast vs. Odessa School District No. 105*, 110 Wn.2d 145, 148, 758 P.2d 968 (1988).

Washington law with respect to the doctrine of assumption of risk was reevaluated following the adoption of principles of comparative fault

in 1981. *Kirk vs. Washington State University*, supra at 452. Therefore, it would be inappropriate to rely on the numerous cases cited in the City's motion decided in 1905, 1908, 1910, 1911, 1913, 1919 and 1965, aside from their historical value.

The Court in *Kirk* provided a long list of examples for which assumption of risk in recreational activity cases would *not* apply, including the following:

1. Spilled water on a go-cart race course.
2. Risk of a golfer of being hit by a golf ball due to an inadequate warning.
3. Diving into a public lake into water that is too shallow.
4. Injury in a recreational flag football game caused by another player who was violating the rules.
5. High school football player injured during a drill did not assume risks of improper supervision and inadequate safety equipment.
6. Spectator who walked onto a raceway after the race did not assume all risks of unauthorized vehicles racing around the track.
7. Hunter did not assume risk of being negligently shot by companion.
8. Skater did not assume risks of unusually hard and slippery ice at defendant's rink, even though known.
9. A high school football player did not voluntarily assume all risks of playing "jungle" football at coaches' request without equipment.
10. Student skier did not assume unknown risk of improperly adjusted paintings fitted by defendant. *Kirk vs. Washington State University*, supra at 456-57.

As noted by the Washington Supreme Court in a subsequent case, the plaintiff cheerleader in *Kirk* did assume the risks inherent in the sport of cheerleading but did not assume the risks caused by the university's negligent provision of dangerous facilities or improper instruction or

supervision. Those were not risks "inherent" in the sport and therefore she did not assume the risk and relieve the defendant of those duties. *Scott vs. Pacific West Mountain Resort*, 119 Wn.2d 484,498-99, 834 P.2d 6 (1992). The court went on to note that to the extent the plaintiff continued to practice on a dangerous surface without instruction as a cheerleader she may have "unreasonably assumed the risk i.e., have been contributorily negligent. This unreasonable assumption of the risk is assumption in the secondary sense which does not bar all recovery." *Scott vs. Pacific West Mountain Resort*, supra at 499. Similarly, Officer Lindell did not assume the risks caused by the City's negligent provision of dangerous facilities or improper instruction or supervision.

In order for the City to prevail on its Motion for Summary judgment on the basis of application of implied primary assumption of risk it must establish all of the following:

1. Officer Lindell had a full subjective understanding of,
2. The presence and nature of a specific risk, and
3. Voluntarily chose to encounter the risk.

Scott vs. Pacific West Mountain Resort, supra; *Brown vs. Stevens Pass Inc.*, 97 Wn. App. 519, 984 P.2d 448 (1999).

There is no evidence submitted by the City that Officer Lindell had a full subjective understanding of the risk presented by training in the paddock without a new layer of soft earth or hogsfuel. The risk is not the

simple risk of falling from a horse. Everybody who gets up on a horse knows they can fall. The risk is what would happen if an Officer fell in the paddock after the hogsfuel has been removed and before it was replaced with a new layer of hogsfuel or soft earth. The City has the obligation of demonstrating that there is no issue of material fact as to Officer Lindell's subjective understanding of this risk. Frankly, the subjective understanding of his supervisors strongly supports the plaintiff's position that a reasonable inference from the evidence in this case is that neither Officer Lindell nor the other Mounted Patrol officers had a full subjective understanding of their risk of injury. None of his supervisors understood the risk of injury imposed by training in the paddock without a soft protective surface until after Officer Lindell was injured. If they did not have a full subjective understanding of this risk, how can the City prove that Officer Lindell had a full subjective understanding of this risk? "Testimony" presented by the City that Officer Lindell indicated after his brain injury to another Officer that he did not want to sue and knew what he was doing does not constitute irrefutable evidence of a full subjective understanding on May 4, 1999 of the risk prevented by training in the paddock without a new layer of protective hogsfuel.

Officer Lindell is a police officer who was assigned to work in the Mounted Patrol. He was subject to the chain of command. As noted by

Rod Bergen, police agencies are quasi-military organizations. More so than most employer/employee situations, Officer Lindell was subject to the command of his superior officers and others to whom they had designated authority. Officer Hansen was the designated Training Officer. He had control over where and how Officer Lindell and the other Mounted Patrol officers were to train. Training Officer Hansen is the individual who organized and supervised the May 4, 1999 training session in the paddock where Officer Lindell was injured.

Plaintiff contends that as a matter of law an employee cannot be said to have "voluntarily encountered a risk" that he was required to encounter as part of his job at the direction of his supervisor. At the very least, the issue of whether Officer Lindell "voluntarily" participated in the training required by his position as a Mounted Patrol Officer on May 4, 1999 is a question of fact. In short, the doctrine of implied primary assumption of risk does not apply in this case to relieve the City of liability. Any form of assumption of risk that may apply is effectively nothing different than the doctrine of comparative fault, which could serve to reduce plaintiff's damages in this case.

E. Fellow Servant Rule

Plaintiff has the right to bring a cause of action against the City pursuant to RCW 41.26.281, which reads as follows:

"If injury or death results to a member from the intentional or negligent act or omission of a member's governmental employer, the member, the widow, widower, child, or dependent of the member shall have the privilege to benefit under this chapter and also have cause of action against the governmental employer as otherwise provided by law, for any excess of damages over the amount received or receivable under this chapter."

The definition of "member" includes any law enforcement officer. RCW 41.26.030 (8).

Cases in which compensation has been awarded to a police officer under this chapter include *Taylor vs. City of Redmond*, 89 Wn.2d 315, 571 P.2d 1388 (1977) in which the plaintiff police officer brought an action against his employer, Redmond, for a gunshot wound caused by another police officer employed by the City of Redmond, and *Fray vs. Spokane County*, 134 Wn.2d 637, 952 P.2d 601 (1998) in which a deputy was injured as a result of the negligence of his employer's dispatcher for failing to send backup assistance. Clearly the other officer in *Taylor* and the police dispatcher in *Fray* were co-employees and "fellow servant's" of the plaintiffs. Nonetheless, plaintiffs were permitted to pursue their causes of action under RCW 41.26.281, or its predecessor. There is no indication that the "fellow servant rule" would apply to causes of action expressly permitted to be brought by a police officer against his or her employer pursuant to RCW 41.26.281. Frankly, since a municipality can only act through its employees, any case brought against an employer by a police

officer would be based upon the negligence of another employee or "fellow servant." Therefore, this portion of the City's motion and its incorrect interpretation and application of the fellow servant rule, if accepted by the Court, would completely eviscerate the rights provided to firemen and police officers by RCW 41.26.281.

Even if the fellow servant rule was applicable to this case, its meaning is misstated by the City. The fellow servant rule does not apply if the allegedly negligent co-employee has any supervisory authority or power to control the activities of the plaintiff. *Plemmons vs Antles*, 52 Wn.2d to 69, 271-72, 324 P.2d 823 (1958). See also, *Buss v. Wachsmith*, 190 Wash. 673, 70 P.2d 417 (1937). Under those circumstances, the negligent co-employee is considered to be the agent or alter ego of the employer. *Plemmons vs. Antles*, supra. In the case at bar, the contentions are that the various Officers in charge of operating and supervising the Mounted Patrol Unit, including the supervising Sergeant, Lieutenant and Training Officer, were negligent. These individuals were in charge of the Mounted Patrol and the training of Mounted Patrol officers. Officer Lindell was acting under their authority and supervision as an Officer in the Mounted Patrol. Therefore, the fellow servant rule does not apply to the case at bar.

The case cited by the City, *Bennett vs. Messick*, 76 Wn.2d 474, 457 P.2d 609 (1969) held that there is another exception to the fellow servant rule. Under the exception set forth by the Supreme Court in *Bennett* if the allegedly negligent employee has complete control over whatever instrumentality led to the co-employee's injury, the fellow servant doctrine did not apply. The City does not cite any Washington cases adopting the Restatement (Second) of Agency § 474-475. Even if the Restatement was adopted, because of the supervisory authority of the allegedly negligent City employees, this doctrine does not apply.

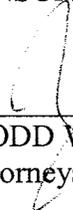
IV. CONCLUSION

It has long been the law in this state that judicial policy disfavors interlocutory review. *Mayberry vs. Seattle*, 53 Wn.2d 716, 721, 336 P.2d 878 (1959). Therefore, it is rare for the Court of Appeals to accept discretionary review of the denial of a Motion for Summary Judgment. The Petitioner apparently seeks to have all of its grounds for its Motion for Summary Judgment reviewed by the Court on the basis that obvious or probable error was committed by the Superior Court. The only issue that would "render further proceedings useless" or would "substantially alter the status quo" is the contention by the Petitioner that the statute in question is unconstitutional. This is the only issue that was certified by the Superior Court. However, the Petitioner's Motion for Discretionary

Review does not rely upon RAP 2.3(4) in any respect. Presumably, it is because the Petitioner wants review only if it is of all of the arguments it presented in support of its motion at the trial court level. If so, it is problematic for the City to argue that the superior court committed "obvious" or "probable" error by concluding that the statute is not unconstitutional, given the fact that it has been in existence for over 30 years and has been interpreted, without any suggestion that it is unconstitutional, by at least seven prior Supreme Court or Appellate Court cases. Given the City's strategic decision to seek an "all or nothing" acceptance of Discretionary Review, the motion should be denied in its entirety.

Respectfully submitted on March 24, 2006.

SWANSON ❖ GARDNER, P.L.L.C.

By  _____
TODD W. GARDNER, WSBA #11034
Attorneys for Respondent

The Honorable Joan E. DuBuque

Received

FEB - 8

**Law Office of
Swanson & Gardner**

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

NOTICE FOR DISCRETIONARY REVIEW
TO COURT OF APPEALS

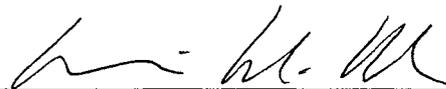
[CLERK'S ACTION REQUIRED]

The defendant City of Seattle seeks review by the designated appellate court of the Order Denying Defendant's Motion for Summary Judgment and for Declaratory Relief, entered on January 9, 2006.

A copy of the decision is attached to this notice.

1 DATED this 7th day of February, 2006.

2 THOMAS A. CARR
3 Seattle City Attorney

4 By: 
5 MARCIA M. NELSON, WSBA #8166
6 REBECCA BOATRIGHT, WSBA #32767

7 Assistant City Attorneys
8 Attorneys for Defendant City of Seattle

9 Other Parties Requiring Notice:

10 NAME: Todd W. Gardner
11 Swanson Gardner
12 ADDRESS: 4512 Talbot Road South
13 Renton, WA 98055
14 TELEPHONE NO.: (425) 226-7920
15 ATTORNEY FOR: Plaintiff Margaret Lindell
16
17
18
19
20
21
22
23

Received

FEB 22 2007

No. 57725-5

Law Office of
Swanson & Gardner

**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

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

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

Received

FEB 28 2009

No. 57725-5

Law Office of
Swanson & Gardner

**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.

NOTICE OF MOTION

THOMAS A. CARR
Seattle City Attorney

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

Attorneys for Petitioners

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

APPENDIX C

COPY

TO: Respondent, Margaret A. Lindell, Personal Representative for the Estate of GARY R. LINDELL, deceased; and

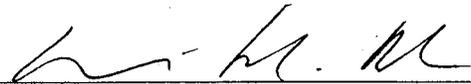
TO: Todd W. Gardner, of Swanson Gardner, Her Attorney:

The City of Seattle, petitioner, will bring on for hearing its Motion for Discretionary Review on Friday, March 31, 2006, at 9:30 a.m., or as soon thereafter as the motion can be heard. The address of the place of hearing is 600 University Street, Seattle, WA.

DATED this 24th day of February, 2006.

THOMAS A. CARR
Seattle City Attorney

By:



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

Attorneys for Petitioner, City of Seattle