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SUPREME COURT  
STATE OF WASHINGTON  
2005 NOV 23 P 2:33

No. 79381-6

(formerly No. 57725-5-I in the Court of Appeals) C. J. HERRITT

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

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

Respondent,

vs.

THE CITY OF SEATTLE, a municipal corporation

Petitioner.

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**CITY OF SEATTLE'S REPLY IN SUPPORT OF CITY'S  
MOTION FOR DISCRETIONARY REVIEW**

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**1. Factors Governing Acceptance of Review**

Plaintiff argues that the factors set forth in RAP 4.2 “Direct Review of Superior Court Decision by Supreme Court” govern this case. Plaintiff is incorrect. The City’s Motion for Discretionary Review is governed by RAP 13.5 and the factors set forth therein. This case meets those factors.

**2. Reply re Statement of the Case**

Plaintiff’s statement of the case neglects to mention that the evidence points to Ofc. Lindell – and no one else – as the person who directed that softer soils be removed from the paddock area. Also, the evidence shows Ofc. Lindell ordered new soils to be delivered as needed. Plaintiff also neglected to mention that Ofc. Lindell selected Donovan to ride. Further, plaintiff overlooks the fact that Ofc. Lindell – entirely by his own choice – was attempting to pick up an object from the ground while mounted on Donovan. In doing so, he lost his balance and could not regain his mount. Plaintiff dwells on outdated information (from 5 to 6 years earlier) regarding Donovan when Donovan first started mounted patrol service. Contrary to plaintiff’s suggestions, the evidence showed that officers who were in the mounted patrol at the time of Ofc. Lindell’s accident had confidence in Donovan and viewed him as one of the most solid and well-trained horses in the unit.

**3. Grounds for Relief and Argument**

**A. RCW 41.26.281 is unconstitutional and violates sovereign immunity.**

**1. RCW 41.26.281 violates equal protection, due process and the privileges and immunities clause**

Plaintiff argues that Art. I, § 12 of the Washington Constitution is only violated when *one* citizen or corporation receives a special privilege or immunity, as in *Alton V. Phillips Co. v. State*, 65 Wn.2d 199, 396 P.2d 537 (1964). The plain language in Art. I, § 12, defeats plaintiff's argument. Art. I, § 12 is violated when a "class of citizens" (such as LEOFF members or all other employers here) receive a special privilege or immunity. The test under the privileges and immunities clause is whether the statute grants a citizen, *class of citizens*, or corporation a privilege or immunity that it does not grant to all:

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

Washington Constitution, Art. I, § 12. (Emphasis added.)

Plaintiff seems to contend that, if everyone within the specially benefited "class of citizens" is treated the same, there is no constitutional violation of Art. I, § 12. Plaintiff is incorrect. The comparison is between the specially benefited "class of citizens" and other citizens. If plaintiff

were correct, employers of any type of workers (such as lineworkers, loggers or any other hazardous industry) could be compelled to fund workers' compensation benefits and be subject to suit. No case in the entire country has been located that supports this contention. Cases throughout the country recognize this prohibition under equal protection and due process. The Washington Constitution (Art. I, § 12) provides additional protections to employers. In fact, *Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325, 330, 162 P. 546 (1917), expressly recognized the unconstitutionality of a workers' compensation system that fails to provide immunity and analyzed the issue under the privileges and immunities clause of the Washington State Constitution, Art, I, § 12.

The Court of Appeals in *Locke v. City of Seattle*, 133 Wn. App. 696, 137 P.3d 52 (2006), *pet. for rev. pending*, inexplicably held that the privileges and immunities clause is not implicated by a workers' compensation statute that fails to provide immunity from suit, stating:

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

*Locke v. City of Seattle*, 133 Wn. App. 696, at 707, 137 P.3d 52 (2006). This holding is directly contrary to *Shaughnessy*, 94

Wash. 325 (1917), where the Court held workers' compensation statutes *must* provide immunity from suit in order to comply with the privileges and immunities clause of Art. I, § 12:

The employer is compelled to contribute to the accident fund certain specified amounts, according to the hazardous nature of the work of his employes, and in return therefor is furnished indemnity against all claims of his employes for injuries received in the course of their employment. Thus the act in effect provides for compulsory insurance both for the employer and the employe, and manifestly contemplates that all employers and all employes who are compelled to come under the act and have their rights each as against the other controlled and determined by its provisions shall enjoy such privileges and immunities equally, in harmony with the guaranty of section 12 of article 1 of our state Constitution.

*Shaughnessy*, 94 Wash. at 330.

In short, the constitutional prohibitions against compelling employers to fund workers' compensation benefits are several: equal protection and due process clauses, and the privileges and immunities clause. In *Locke*, the Court of Appeals disregarded all of them and disregarded binding precedent.

Plaintiff here relies heavily upon the analysis set forth in *Locke* even though plaintiff is well aware that the City is seeking review by this Court in *Locke*. The *Locke* panel applied an equal protection "minimal scrutiny" test to the LEOFF statute and held it met that test "because of the vital and dangerous nature" of the work of police and firefighters. *Locke*,

133 Wn. App. at 707. There is no “hazardous employment” exception to the immunity requirement for workers’ compensation laws. Established workers’ compensation case law has long recognized that a workers’ compensation statute that fails to provide immunity from suit violates equal protection and due process, even for the most hazardous occupations. *Mountain Timber v. State of Washington*, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685, discussed equal protection but also relied upon the reasoning in *New York Central Railroad Company v. White*, 243 U.S. 188, 37 S.Ct. 247, 61 L.Ed. 667 (1917), where the Court discussed the due process implications that can only be satisfied by the quid pro quo of protection from tort liability.

The suggestion in *Locke* that the hazardous nature of a particular employment can eliminate a fundamental tenet of workers’ compensation laws is without logic or precedent. To the contrary, it violates precedent. In *Mountain Timber*, the Court recognized the fundamental purpose of workmen’s compensation was to abolish private rights of action in hazardous industries:

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

made by the employers in proportion to the hazard of each class of occupation.

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

Workers' compensation statutes were quickly dubbed "The Great Compromise" because of what was accomplished. The statutes compelled employers to fund systems that provide compensation for injuries whether or not the employer was at fault. At the same time, these statutes provided employers with the quid pro quo of immunity from suit for all actions except for intentional torts. The Supreme Court stated in *Stertz v. Industrial Ins. Com'n*, 91 Wash. 588, 590-91, 158 P. 256 (1916), that:

[o]ur act came of a great compromise between employers and employed. Both had suffered under the old system, the employers by heavy judgments of which half was opposing lawyers' booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master in exchange for limited liability was willing to pay on some claims in the future where in the past there had been no liability at all. The servant was willing not only to give up trial by jury but to accept far less than he had often won in court, provided he was sure to get the small sum without having to fight for it. All agreed that the blood of the workman was a cost of production, that the industry should bear the charge.

Constitutional challenges by employers (equal protection and due process clauses) quickly established that, so long as such systems provided the quid pro quo of protection from suit, they were constitutional. Absent the quid pro quo of protection from suit for negligence actions, they could

not and cannot withstand constitutional challenge. These principles have been consistently recognized for almost 100 years.

The *Locke* panel disregarded nearly 100 years of workers' compensation law recognized throughout the country in holding that the right to sue provision in LEOFF is not unconstitutional under an equal protection analysis. Plaintiff here wants this Court to likewise ignore established law and compel municipalities to continue to defend this and other LEOFF lawsuits. The City asks this Court to accept review here, and in the *Locke* case, and reverse the *Locke* Court of Appeals decision which is an anomaly in the entire country. It is one thing to be part of a well-reasoned minority, but quite another to reject the collective, considered wisdom of every jurisdiction in the country.

## **2. RCW 41.26.281 violates sovereign immunity**

Sovereign immunity principles mandate that there can be no governmental liability where there is no private liability. Plaintiff here fails to even discuss this issue (page 9), relying instead entirely upon *Taylor v. City of Redmond*, 89 Wn.2d 315, 319, 571 P.2d 1388 (1977) and *Locke*. *Locke* provides no support because the opinion is flawed and because the City is seeking review in *Locke* by this Court.

*Taylor* also provides no support for plaintiff because the court in *Taylor* assumed that employers did not fund LEOFF I benefits. While

*Taylor*, holds that LEOFF I members (those employed prior to October 1, 1977) are not barred by Title 51 immunity provisions, the Court did not address workers' compensation principles compelling immunity where employers are required to fund such benefits. That is because the Court believed that municipal employers do not fund LEOFF benefits, stating:

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

*Taylor*, 89 Wn.2d at 320 (emphasis added). Contrary to the Court's assumption, LEOFF employers have been statutorily required to fund LEOFF since 1969. 1969 Wash. Laws Ex. Sess., ch. 209, § 8; RCW 41.50.110.

*Taylor* did not discuss sovereign immunity in the context presented here. *Taylor* merely noted that the historical prohibition against suits against governmental employers had been removed by RCW 4.96.010. *Taylor* did not address the remaining prohibition, codified by the legislature in RCW 4.96.010, which prohibits suits against municipalities where there is no analogous cause of action against a private entity:

(1) All local government entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to

perform their official duties, *to the same extent as if they were a private person or corporation.*

RCW 4.96.010.

*Locke* relied upon *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 407 P.2d 440 (1966), in disregarding sovereign immunity. This reliance is misplaced. *Evangelical* expressly prohibits liability against governmental entities where there is no analogous private liability:

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

67 Wn.2d at 253 [italics in original; underlined emphasis supplied.] Plaintiff here failed to even discuss *Evangelical*, *Edgar v. State*, 92 Wn.2d 217, 595 P.2d 534 (1979), or *U.S. v. Olson*, 126 S. Ct. 510, 546 U.S. 43, 163 L. Ed. 2d 306 (2005), even though the City cited to all three cases in its opening Motion. It can only be assumed that plaintiff has no articulable response, instead merely calling the City's argument "convoluted."

The argument is not convoluted. Rather, it is very simple. The principle that governmental liability cannot exist without analogous private entity liability is hornbook law:

The state, whether acting in its governmental or proprietary capacity, is liable for damages arising out of its

tortious conduct to the same extent as if it were a private person or corporation.

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

LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE, Vol. 15 § 661 (5<sup>th</sup> Ed. 1996) [emphasis supplied; footnotes omitted].

Plaintiff has not and cannot show that the City's alleged "conduct would be actionable if it were done by a private person in a private setting." Therefore, the City (and other cities) should not be compelled to undertake the enormous time and expense required to defend this or any other LEOFF lawsuits. The City is aware of three other pending LEOFF suits against other municipalities in the State: Aberdeen, Centralia and Tacoma. The City asks this Court to accept discretionary review and bring an end to an unconstitutional statute.

**B. The Fellow Servant Doctrine bars this claim.**

Plaintiff argues in response to the City's argument on the fellow servant doctrine that other LEOFF cases involve negligence by fellow servants. Nowhere does plaintiff show that anyone raised the fellow servant doctrine as a defense. As such, those cases cannot be considered to be authority on the doctrine.

Although the evidence points to Ofc. Lindell as the individual who expressly requested the paddock surface to be scraped, generally speaking all mounted patrol officers, along with a laborer, maintained the paddock area. Further, all members made the common decision not to wear helmets. In fact, they adamantly opposed wearing helmets. Those members were all fellow servants of Ofc. Lindell.

**C. The Assumption of Risk Doctrine bars this Claim**

Plaintiff argues that this Court should ignore assumption of the risk cases that arise in the employment context merely because the cases are old. This argument is unavailing. The evidence shows: (1) Ofc. Lindell knew as well as anyone the condition of the paddock since it was he who ordered softer soils removed; (2) the mounted patrol unit as a whole decided not to wear helmets and he was a part of the unit making that decision; (3) Ofc. Lindell chose what horse to ride; and (4) Ofc. Lindell alone chose to reach to the ground from a mounted position to try to pick up something. Nobody told him to engage in that behavior.

Plaintiff has identified nobody with greater knowledge than Ofc. Lindell who should have done something to reduce the risks to Ofc. Lindell. As this Court recognized in *Lynch v. City of North Yakima*, 37 Wash. 657, 80 P. 79 (1905), the plaintiff, being “in as good a position as anyone well could be to know of the dangers reasonably to be expected,”

could not recover from the city for his injuries, even though he may not have been injured had the city provided him with additional equipment. *Lynch*, 37 Wn. at 663.

None of the situations mentioned by plaintiff arise in an employment setting. As such, they have no relevance here.

Plaintiff suggests that implied primary assumption of the risk can never operate as a complete bar. A recent Division I case recognized that implied primary assumption of the risk can operate as a complete bar in some situations. *Taylor v. Baseball Club of Seattle, L.P.*, 132 Wn. App. 32, 130 P.3d 835 (2006). In *Baseball Club*, the court held that being hit by a baseball is an inherent risk of attending a baseball game, even during warm-up activities, applying the doctrine of implied primary assumption of the risk. Under this implied primary assumption of risk, defendant must show that plaintiff had full subjective understanding of the specific risk, both its nature and presence, and that he or she voluntarily chose to encounter the risk. The City here has shown that Ofc. Lindell had a full subjective understanding of the specific risk. He knew he was not wearing a helmet; he knew the condition of the paddock; and he knew the horse he was riding. He even expressly conceded his subjective knowledge when refusing to sue during his lifetime, saying, "I knew what I was doing."

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

Plaintiff’s argument that the equine immunity statute does not apply to mounted patrol units is dependent upon the erroneous assumption that the equine immunity statute is in derogation of the common law. Plaintiff is incorrect. As shown in the City’s opening brief, applying common law principles, plaintiff’s lawsuit would be barred by assumption of the risk. The obvious risks of riding horses and working with horses were well recognized at common law and assumption of the risk barred such actions. See *Lynch, supra*. As at least one court has held, the risk of injury from falling from a horse should be known “doubtless, as a matter of common sense.” *Hund v. Gramse*, 5. A.D.3d 1036, 1038, 774 N.Y.S.2d 220 (N.Y. 2004).

Plaintiff also argues that the absence of mounted patrol from the list of equine activities included in equine immunity coverage means that they are excluded as a matter of law. Plaintiff overlooks the words “but not limited to” in RCW 4.24.530(3). The Legislature expressly chose to not limit applicability of the equine immunity statute to the listed activities. Rather, the Legislature shows an intention that the statute be applied broadly. Rules of statutory construction require courts to assume

that the legislature means exactly what it says; a court is not free to disregard the plain language of a statute.

**4. Conclusion**

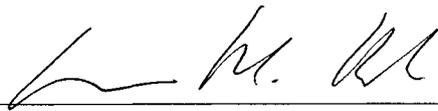
For the foregoing reasons, the City respectfully requests that this Court accept discretionary review.

DATED this 27<sup>th</sup> day of November, 2006.

Respectfully submitted,

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