

Consolidated No. 79222-4
(Formerly Court of Appeals No. 55256-2-I)

No. 79381-6
(Formerly Court of Appeals No. 57725-5-I)

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

KEVIN J. LOCKE and TORI LOCKE,
Respondents,
v.
THE CITY OF SEATTLE,
Petitioner.

MARGARET A. LINDELL, Personal Representative for the
Estate of GARY R. LINDELL, deceased,
Respondent,
v.
THE CITY OF SEATTLE,
Petitioner.

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**CITY OF SEATTLE'S RESPONSE TO BRIEF OF AMICUS
CURIAE WASHINGTON STATE TRIAL LAWYERS
ASSOCIATION FOUNDATION**

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I. INTRODUCTION

The Washington State Trial Lawyers Association Foundation (“WSTLAF”) limits its remarks to (1) sovereign immunity and (2) quid pro quo under a due process analysis. WSTLAF makes no argument on the privileges and immunities clause of art. I, section 12, under either an equal protection analysis or under an independent state analysis, even though this Court has stated that “Violation of equal protection is probably the better constitutional argument.” *Manor v. Nestle Food Company*, 131 Wn.2d 439, 449-50 n.4, 932 P.2d 628, *as amended*, 945 P.2d 1119 (1997).

II. LEOFF VIOLATES SOVEREIGN IMMUNITY

WSTLAF argues that Washington’s statutory waiver of sovereign immunity that authorized suit against governmental entities “to the same extent as if they were a private person or corporation” (RCW 4.96.010(1)) should be read to authorize suit even when no private entity can be sued. In effect, WSTLAF argues that the legislature can, *sub silentio*, amend a statute in an unrelated chapter in complete derogation of common law and long-standing and fundamental workers’ compensation principles.

The movement in the 1960s to authorize suit against the government in situations when other entities could be liable resulted from a view that when government accidentally (and negligently) causes injury,

government should pay for the damages – in the same way and to the same extent as private entities. No more and no less.

The intention and effect of the sovereign immunity waiver, as Justice Utter stated in *Hunter v. North Mason High School*, 85 Wn.2d 810, 818, 539 P.2d 845 (1975), was to place the government “on an equal footing” with private parties defendant. *Hunter*, 85 Wn.2d at 818. In *Hunter*, this Court invalidated on equal protection grounds (applying a rational basis test) a statute that provided local government with protection from suit in the form of a shorter limitations period. The Court concluded that the only possible rationale for a statute favoring the government (by setting a shorter statute of limitations for parties suing the government compared to other plaintiffs) was protection of the public treasury. This Court held that such statutes violate equal protection:

In light of these considerations, the only function the special treatment given governmental bodies seems to perform is the simple protection of the government from liability for its wrongdoing. *Our State has clearly and unequivocally abjured any desire to so insulate itself from liability, however, in its absolute waiver of sovereign immunity, which places the government on an equal footing with private parties defendant.*

Hunter, 85 Wn.2d at 817-18 (emphasis added).

Justice Sanders relied upon *Hunter* and opined in his partially concurring and partially dissenting opinion in *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56 (2005):

Hunter is clear. A statute the purpose of which is to favor the government in litigation lacks rational basis.

Habitat Watch, 155 Wn.2d at 428 (J. Sanders, partially concurring and partially dissenting). Likewise here, a statute the purpose of which is to disfavor the government in litigation lacks rational basis.

WSTLAF's argument that there should be local government liability when there is no private liability analogy is particularly incongruous when one recalls that fire fighters, and other governmental employees, had no right to sue even when they received no workers' compensation protection. See *Lynch v. City of North Yakima*, 37 Wash. 657, 80 P. 79 (1905), cited by WSTLAF. Such suits were barred by sovereign immunity. The irrational legislation of LEOFF that transforms a handful of public employees into the only employees who can both benefit under workers' compensation and sue for additional damages in negligence cannot stand.

WSTLAF argues that RCW 41.26.281 should be read to, *sub silentio*, amend the sovereign immunity waiver to allow suit against local government when no private entity would be liable. WSTLAF's argument fails for several reasons.

First, even assuming *arguendo* that RCW 41.26.281 could somehow operate to override RCW 4.96.010(1), RCW 41.26.281 cannot

override the Washington Constitution or the United States Constitution. State and federal constitutional equal protection principles prohibit statutory favoritism in litigation and require workers' compensation statutes to provide immunity for employers. *See* prior briefing herein, including Brief of Appellant in *Lindell v. City of Seattle*, pages 10-38; Reply Brief of Appellant in *Lindell v. City of Seattle*, pages 2-20.

Second, the sovereign immunity waiver has already been described as an "unequivocal" waiver of sovereign immunity in tort litigation, placing government on an "equal footing" with private parties defendant. *Hunter v. North Mason High School*, 85 Wn.2d 810, 539 P.2d 845 (1975) The legislature cannot disfavor government and place government on an unequal footing with private parties defendant.

Third, WSTLAF's argument that RCW 41.26.281 overrides RCW 4.96.010(1) fails because of subject in title requirements. Washington Constitution, art. II, sec. 19. This Court declared an amendment to LEOFF invalid on this very ground in *Fray v. Spokane Cy.*, 134 Wn.2d 637, 952 P.2d 601 (1998), holding that a legislative attempt to clarify that the right to sue provisions of RCW 41.26.281 only applied to Plan I members was unconstitutional in that the bill violated subject in title requirements. If the bill in *Fray* violates subject in title requirements, the subject bill is violative of subject in title requirements. The bill at issue

here added the right to sue section now found in RCW 41.26.281 and made no mention of an intention to amend or impact the sovereign immunity waiver statute (RCW 4.96.010(1)) which is found in an entirely separate title and chapter.

WSTLAF argues that sovereign immunity of local governmental entities derives solely from the State, arguing that “the City’s claim of sovereign immunity here must be one recognized by the State itself.” (WSTLAF Amicus Brief 5) WSTLAF has apparently overlooked the fact that the State has not authorized suit against itself by comparable state employees such as members of the Washington State Patrol. (RCW ch. 43.43.) *See* page 18 of the City’s Brief of appellant in *Lindell v. City*. Thus, the State has not waived sovereign immunity in a comparable situation. (Even if it had, such act would be invalid under art. I, section 12. *Alton V. Phillips v. State*, 65 Wn.2d 199, 396 P.2d 537 (1964).)

WSTLAF argues that RCW 41.26.281 is a “straight-forward waiver” of municipalities’ sovereign immunity. There is nothing straight-forward about the right to sue provision in LEOFF. RCW 41.26.270 purports to provide immunity and states that the benefits under LEOFF “shall be to the exclusion of any other remedy, proceeding or compensation for personal injuries or sickness, caused by the governmental employer” and states that “all civil actions and civil causes

of actions by such law enforcement officers and fire fighters against their governmental employers for personal injuries or sickness are hereby abolished”. RCW 41.26.270 also states that the relationship of LEOFF members to their employers “is similar to that of workers to their employers” and states that removal of police and fire fighters from RCW Title 51 (and creation of benefits under LEOFF) “necessitates . . . (2) protection for the governmental employer from actions at law . . .” RCW 41.26.281 then takes away the immunity given in RCW 41.26.270.

Furthermore, even this Court in *Taylor v. City of Redmond*, 89 Wn.2d 315, 571 P.2d 1388 (1977), failed to comprehend the funding requirements for LEOFF. In *Taylor*, this Court stated that Plan I members could sue because “industrial insurance premiums are not paid by municipalities” (89 Wn.2d at 319-20) but expressly declined to decide whether Plan II members could sue because they are covered under RCW Title 51 workers’ compensation. It appears that the parties in *Taylor* failed to inform the Court that LEOFF, from its inception, required employers of Plan I members to provide funding for benefits. 1969 WASH. LAWS EX. SESS., CH. 209, § 8(2); RCW 41.50.110.

WSTLAF argues that RCW 64.40.020 is a comparable example of statutory authorization of liability against local government, citing *Wilson v. City of Seattle*, 122 Wn.2d 814, 863 P.2d 1336 (1993). RCW 64.40.020

and *Wilson* are not comparable. RCW 64.40.020 authorizes suit in situations where there can be no comparable private action – that is, in land use permitting. There is no private entity comparison. While there is a debate amongst the commentators and the courts as to the appropriateness of authorizing (by legislation or by court decisions) liability against local government where there is no private entity comparison¹, these commentators (including one of the authors of WSTLAF’s brief) agree that there can be no governmental liability where there is a private entity analogy and no liability exists. (See discussion in pages 20-24 of City’s Reply Brief of Appellant filed here in *Lindell v. City of Seattle*.) WSTLAF cites to no court or commentator that has opined that there could or should be governmental liability where there is no private entity liability.

WSTLAF also argues that art. II, section 26 of the Washington Constitution authorizes the legislature to permit suit against government in situations where no one else can be sued. WSTLAF reads too much into art. II, section 26. As this Court stated in *Northwestern & Pacific Hypotheek Bank v. State*, 18 Wash. 73, 75, 50 P. 586 (1897):

¹ Compare MICHAEL TARDIF AND ROB MCKENNA, WASHINGTON STATE’S 45-YEAR EXPERIMENT IN GOVERNMENT LIABILITY, 29 Seattle U L.Rev. 1 (2005); with DEBRA L. STEPHENS AND BRYAN P. HARNETIAUX, THE VALUE OF GOVERNMENT TORT LIABILITY:

By this provision [art. II, section 26] we think it was intended that the state might be permitted to be sued *in like manner as an individual*, and it was left to the legislature to determine in what court such suits should be brought, and to prescribe the method of procedure.”

(Emphasis added.) The view in *Northwestern* is entirely consistent with the legislative waiver that authorizes suit against governments “to the same extent as if they were a private person or corporation.” RCW 4.96.010(1). See also *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1965) (allegedly tortious conduct “must be analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation”). Here, liability is unconstitutional in all analogous situations. Thus, there can be no liability against LEOFF employers.

III. QUID PRO QUO REQUIREMENT OF IMMUNITY

While recognizing that the City’s quid pro quo argument applies to equal protection/privileges and immunities, WSTLAF has chosen to make no argument on these issues, focusing entirely on due process. WSTLAF concedes that the quid pro quo requirement of immunity from suit in workers’ compensation law has an equal protection/privileges or

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immunities component. (See footnote 8 at page 11² and footnote 10 at page 13³). Yet WSTLAF fails to present any argument on these important principles.

Several United States Supreme Court and Washington Supreme Court cases discuss equal protection and/or Washington's privileges and immunities clause in art. I, section 12, in connection with workers' compensation statutes. *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917); *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915); *Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325, 162 P. 546 (1917). More recent cases agree: *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 932 P.2d 628, *as amended*, 945 P.2d 1119 (1997); *Epperly v. City of Seattle*, 65 Wn.2d 777, 399 P.2d 591 (1965).

Manor discussed the "grave constitutional questions" presented and noted that "equal protection is probably the better argument" as compared to due process. 131 Wn.2d at 449-50 n.4. While *Manor* relied

² "The impact of the *quid pro quo* analysis on the City's privileges and immunities/equal protection arguments is not addressed in this brief. This analysis does surface in the City's privileges and immunities/equal protection arguments. See (Locke) City of Seattle Sup. Br. at 12; (Lindell) City of Seattle Reply Br. at 15-16." (WSTLAF Br. fn. 8 at p. 11.)

³ "The cases discussed by the City may have some relevance to the equal protection/privileges and immunities claims before the Court, issues not addressed in this brief." (WSTLAF Br. fn. 10 at p. 13.)

upon equal protection principles, the Court did not say that due process concerns are absent.

Nevertheless, WSTLAF chooses to entirely bypass equal protection and privileges and immunities discussion, arguing instead that due process principles do not require a minimum baseline of immunity from suit in workers' compensation statutes. WSTLAF is without any on point authority for this novel proposition.

WSTLAF says it is not clear that workers' compensation statutes must provide employers with immunity from suit under the Washington Constitution ("Nor is there a clear constitutionally-based *quid pro quo* pronouncement by this Court, grounded in the Washington Constitution." WSTLAF Br. p. 12. (Emphasis added.)) WSTLAF is mistaken. First, this Court has made clear pronouncements on the immunity requirement under the Washington Constitution. *Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325, 162 P. 546 (1917); *State v. Daggett*, 87 Wash. 253; *Manor v. Nestle Food Co.*, 131 Wn.2d 439; *Epperly v. City of Seattle*, 65 Wn.2d 777.

Secondly, the *quid pro quo* immunity requirement is not only grounded in the Washington Constitution but also in the United States Constitution. WSTLAF largely avoids discussion of settled workers'

compensation law except to concede, as it must, that *Mountain Timber* so holds. (WSTLAF's Brief of Amicus Curiae, p. 11.)

Instead of analyzing this workers' compensation statute under settled workers' compensation cases, WSTLAF relies on irrelevant case law. WSTLAF cites to *Duke Power Co. v. Carolina Env. Study Gp.*, 438 U.S. 59, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978). *Duke* held that a \$560 million limitation on liability for nuclear accidents resulting from federally licensed private nuclear power plants was constitutionally valid, holding that a substitute statutory remedy need not be identical to common law remedies. WSTLAF also cites to *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711, *as amended*, 780 P.2d 260 (1989), where this Court held that a statute which limited recovery in tort for noneconomic damages was unconstitutional as violative of the right to trial by jury. Neither *Duke* nor *Sofie* provides any support for the proposition that a class of employees can both benefit under workers' compensation and sue for additional tort damages. WSTLAF's reliance on them is misplaced.

The last case cited by WSTLAF not only fails to support its argument but wholly supports the City's position. *State ex rel. Fletcher v. Carroll*, 94 Wash. 531, 536, 162 P. 593 (1917). In *Fletcher*, the Court held that where workers' compensation type benefit rights were granted to

City of Seattle civil servants under its charter, city council action authorizing additional payments was invalid.

In *Fletcher*, two Seattle City Light lineworker assistants were seriously injured (both were severely burned; one lost an arm and one lost a leg) when they inadvertently came into contact with a live wire. They received workers' compensation benefits granted under the Seattle City Charter. The city council wanted to provide additional compensation and passed a special ordinance authorizing certain sums. The mayor vetoed the ordinances. The city council thereupon passed the ordinances over the veto. Upon demand on the city comptroller for payment, the city comptroller, acting on the advice of the legal department for the city, refused to make payment.

The *Fletcher* plaintiffs then brought an action in mandamus requesting that the City be compelled to make payment in conformity with city council action. The trial court ruled in favor of plaintiffs and directed that the writ of mandate be issued. The City appealed to the Supreme Court. This Court reversed and held that the City was without authority to make payment in amounts above that made under workers' compensation. In doing so, the Court engaged in an extensive discussion of the objects and purposes of workers' compensation and observed that the trial judges and appellate judges of the day were well aware of the "evils" of litigation

that led to the enactment of workers' compensation laws that provided sure and certain benefits without regard to fault and provided the employer with immunity from suit, stating:

Remedies which do away with these evils and mete out substantial justice to the parties involved, so far from being lightly overturned by the courts, should be upheld by them to the last extreme of their constitutional power.

94 Wash. at 536.

WSTLAF would have this Court begin the unraveling of workers' compensation laws by eliminating the fundamental tenet of immunity as a requirement. Workers' compensation statutes have been in effect for nearly 100 years. Any case that holds that employers need not be immune would inevitably result in lobbies to legislate other exceptions in other hazardous industries. Such action will not go unnoticed by private employers. If private employers are not able to maintain their immunity after bearing the burden of funding workers' compensation benefits, they will vote with their feet and move to other states where, without exception, immunity is mandated.

IV. CONCLUSION

Locke v. City of Seattle, 133 Wn.App. 696, 137 P.3d 52 (2006), *rev. granted*, 158 Wn.2d 1025 (2007), is an anomaly. And *LEOFF* is an anomaly. No other legislature has compelled one class of employers to

fund workers' compensation benefits without immunity. And no court other than the *Locke* panel has held such a system to be constitutional. Art. I, section 12, was enacted to protect against the legislative granting of this type of special favoritism. No principle of law is more settled than the fundamental tenet of workers' compensation that employers compelled to fund no-fault workers' compensation benefits must be provided with immunity from suit.

DATED this 13th day of June, 2007.

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