

Consolidated Under No. 79222-4

(Court of Appeals No. 55256-2-I)

(Court of Appeals No. 57725-5-I)

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
2007 JUN 13 4: 21  
BY RONALD R. CARPENTER  
CLERK *RJC*

**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.

---

**RESPONDENT LINDELL'S BRIEF IN RESPONSE  
TO BRIEF OF AMICUS CURIAE OF WASHINGTON CITIES  
INSURANCE AUTHORITY**

---

Todd W. Gardner, WSBA #11034  
Attorneys for Respondent Lindell

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

## TABLE OF CONTENTS

I. INTRODUCTION	1
II. LEGAL ARGUMENT	1
A. WASHINGTON'S PRIVILEGES AND IMMUNITIES CLAUSE APPLIES ONLY TO FUNDAMENTAL RIGHTS	1
B. EVEN UNDER AN INDEPENDENT STATE PRIVILEGES AND IMMUNITIES ANALYSIS, CLASSIFICATIONS RATIONALLY RELATED TO A LEGITIMATE STATE INTEREST ARE NOT UNCONSTITUTIONAL	3
III. CONCLUSION	6

## TABLE OF AUTHORITIES

### Cases

<i>Anderson v. King County</i> 158 Wn.2d 1, 63, ___ P. 3 <sup>rd</sup> ___ (2006)	2,4
<i>DeYoung v. Providence Medical Center</i> 136 Wn. 2d 136, 144, 960 P.2d 919 (1998)	3
<i>Grant County Fire Protection District v. Moses Lake,</i> 150 Wn.2d 791, 812, 83 P.3d 419 (2004)	2
<i>Hauber v. Yakima County</i> 147 Wn. 2d 655, 56 P.3d 559 (2002)	4,6
<i>State ex rel. Bacich v. Huse</i> 187 Wash. 75, 80, 59 P.2d 1101 (1936)	3
<i>State v. Vance</i> 29 Wash. 435, 458, 70 P.34 (1902)	2
<i>Yakima County Deputy Sheriff's Association v. Board of Commissioners</i> 92 Wn.2d 831, 839, 601 P.2d 936 (1979)	3

### Statutes

RCW 41.26.281	1,3,4
---------------	-------

### Constitutional Provisions

Article 1 §12 of the WA St. Constitution	1,2,3
--	-------

## I. Introduction

Respondent Margaret A. Lindell, as Personal Representative for the Estate of Gary R. Lindell, submits this brief in response to the brief of amicus Washington Cities Insurance Authority. The purpose of this brief is to address the Court's most recent discussions of Article I, §12 of the Washington Constitution. The conclusion is that under any of the variously nuanced applications of Article I, §12, RCW 41.26.281 is constitutional.

## II. Legal Argument

### A. Washington's Privileges and Immunities Clause Applies Only to Fundamental Rights

Washington's privileges and immunities clause is set forth in Article I, §12 of our Constitution:

"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 State Constitution, Article I, §12.*

Assuming, for the sake of argument, that under a *Gunwall* analysis our privileges and immunities clause requires an independent constitutional review of RCW 41.26.281, in order for the Petitioner to carry its heavy burden of establishing that this law is unconstitutional it must first demonstrate that the right to sue one's employer for damages when the

employer is negligent is a "fundamental right." *Grant County Fire Protection District v. Moses Lake*, 150 Wn.2d 791, 812, 83 P.3d 419 (2004); *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902). See also, *Anderson v. King County*, 158 Wn.2d 1, 63, \_\_\_ P.3d \_\_\_ (2006) (J. M. Johnson, J., separate opinion concurring in the judgment only); *Id.* at p. 127 (Chambers, J., concurring in the dissent); *Id.* at p. 135 (Fairhurst, J., dissenting). Only if the Court concludes that the right to sue one's employer for damages when his or her employer is negligent is a "fundamental right" has there been a "privilege or immunity" granted by the challenged statute subject to review under Article I, §12.

In general, one could certainly argue that the right to be compensated by a negligent party is a fundamental right which belongs to the citizens of this state by reason of such citizenship, but it is difficult to rationally contend that the rather narrow and circumscribed right granted by this statute (the right to compensation from a negligent employer for damages in excess of benefits paid and to be paid via LEOFF Worker's Compensation) is a fundamental right. If it is, how could it have been constitutional for the State to have statutorily eviscerated this "fundamental right" of all of its citizens when it originally passed the Industrial Insurance Act; a statutory scheme that eliminates employer's rights to sue their employer for damages proximately caused by his or her

employer's negligence, in exchange for certain statutory benefits whenever an employee is hurt on the job? In short, if this Court concludes that the right to sue one's employer for damages in excess of Worker's Compensation benefits when the employer is negligent is not a "fundamental right" then the privileges and immunities clause of the Washington State Constitution, Article I, §12, does not apply.

**B. Even Under an Independent State Privileges and Immunities Analysis, Classifications Rationally Related to a Legitimate State Interest are Not Unconstitutional**

Amicus recognizes that if reasonable grounds exist for the Legislature's distinction between those who fall within the class and those who do not, there is no violation of the privileges and immunities clause and the statute is constitutional. See, Brief of Amicus Curiae Washington City's Insurance Authority, page 14. See also, *DeYoung v. Providence Medical Center*, 136 Wn.2d 136, 144, 960 P.2d 919 (1998); *State ex rel. Bacich v. Huse*, 187 Wash. 75, 80, 59 P.2d 1101 (1936). In addition to the well-established principles of deference to the Legislature's right to pass legislation and presumption that such legislation is constitutional, it has been suggested that this Court affords more deference to the Legislature when considering economic statutes (such as RCW 41.26.281) than it does when considering regulations curtailing personal liberties. See, *Yakima County Deputy Sheriff's Association v. Board of Commissioners*, 92

Wn.2d 831, 839, 601 P.2d 936 (1979) (Utter, C. J., concurring); *Anderson v. King County*, supra at p. 136 (Fairhurst, J., dissenting).

Amicus contends that there are no reasonable grounds for providing this narrow benefit to police officers and firefighters pursuant to RCW 41.26.281. It is at this point that the argument of Amicus flies in the face of this Court's unanimous holding in *Hauber v. Yakima County*, 147 Wn.2d 655, 56 P.3d 559 (2002):

"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 worker's compensation and bring job-related negligence suits against their employers." *Id.* at p. 660.

Amicus suggests that simply because there are other occupations that are, in their opinion, "vital and dangerous" that this argument renders RCW 41.26.281 unconstitutional. Under such an analysis, it would be unconstitutional to ever attempt to establish a classification of certain occupations for the receipt of benefits not provided to members of all other occupations. Otherwise, how would one ever decide what occupation is vital and dangerous "enough" to qualify? Frankly, there is a very simple way to conclude that police officers and firefighters perform vital and dangerous services that permit the classification established by the Legislature; namely that these employees are public servants who

provide services essential to maintaining public safety that benefit all citizens. Police officers and firefighters are public employees who are responsible for the safety and well being of the citizens of this State. Certainly one can argue, as has Amicus, that there are other dangerous professions such as logging and mining, but while they are certainly dangerous, there is a distinct difference between the benefits provided by employees in those private occupations and the public service provided to all citizens by firefighters and police officers.

In addition, the analysis presented by Amicus at page 16 of its brief effectively undermines the entire premise of its argument. Amicus correctly notes that the Industrial Insurance Act originally applied only to "extra hazardous" occupations. In effect a privilege was statutorily provided to a limited number of citizens: only those who worked in extra hazardous occupations. Under Amicus' argument, the original Industrial Insurance Act would have been unconstitutional, because it listed those occupations it deemed to be extra hazardous and provided individuals working in those fields with benefits not provided to individuals employed in any other occupations. Just as there was a rational basis for including only employees working in "extra hazardous" occupations in the original Worker's Compensation system, there is a rational basis for providing firefighters and police officers with a right to seek compensation from a

negligent employer, less an offset for all benefits paid and payable via Worker's Compensation.

Finally, if the Court was to accept the argument of Amicus and Petitioner, then the entire LEOFF statutory scheme would be unconstitutional. It includes only firefighters and police officers. LEOFF provides benefits to firefighters and police officers not available to other employees simply because those employees are not included within LEOFF. Of course, the City of Seattle's only interest is in the portion of LEOFF that holds it accountable for its negligence when said negligence is a proximate cause of an injury to one of its employees.

In short, there are reasonable grounds for the legislature to provide the benefits of RCW 41.26.281 to firefighters and police officers. To hold otherwise would require that this Court overrule, in part, its unanimous opinion issued only five years ago in *Hauber v. Yakima County*, supra.

### **III. Conclusion**

For the reasons set forth above and in briefs previously filed by Respondents and the various briefs filed by Amicus' supporting the Respondents' position, Respondent Lindell respectfully requests that the Court affirm the denial of the City of Seattle's Motion for Summary Judgment.

Respectfully submitted on June 12, 2007.

SWANSON ❖ GARDNER, P.L.L.C.

By   
\_\_\_\_\_  
TODD W. GARDNER, WSBA #11034  
Attorneys for Respondent Lindell