Consolidated under No. 79222-4
(Court of Appeals No. 55256-2-I and No. 57725-5-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KEVIN J. LOCKE and TORI LOCKE

Respondents,

vs.

THE CITY OF SEATTLE,

Petitioner.

MARGARET LINDELL, personal representative for the Estate of GARY R. LINDELL, deceased,

Respondents,

v.

THE CITY OF SEATTLE

Petitioner.

ANSWER TO AMICUS BRIEF OF INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS

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I. THE TRIAL COURT AND THE COURT OF APPEALS CORRECTLY CONCLUDED THAT MR. LOCKE WAS A LEOFF MEMBER

A. The Trial Court And The Court Of Appeals Properly Considered The Evidence In This Case Concerning Mr. Locke Together With The Applicable Law.

The International Association of Fire Fighters ("IAFF") provides cogent policy and legal reasons why "Fire Fighters In Training Are Members of LEOFF." IAFF Brief, p. 2. While Respondent ("plaintiff" or "Mr. Locke") generally agrees with the IAFF, it is not necessary for this Court to accept completely the IAFF analysis in order to affirm the trial court and the Court of Appeal's decision on this issue. That is because the evidence in this record justifies a ruling that Mr. Locke was a LEOFF member without a holding that all Fire Fighters In Training are necessarily always LEOFF members.

The record in this case includes a Washington Department of Retirement Systems enrollment form completed by the City of Seattle ("City" or "defendant"), which confirmed that the City enrolled Mr. Locke as a "fire fighter" in LEOFF Plan II effective April 19, 2000. CP 2123-25. That form was completed by the City before Mr. Locke's accident. Following the accident, the Seattle Fire Department sent Mr. Locke a letter dated September 15, 2003, which stated that "[s]ince the effective date of your appointment to Fire Fighter, April 19, 2000, you have been a

LEOFF II Retirement System member." CP 2123-25. This letter from defendant thus admitted both that Mr. Locke was a fire fighter since April 19, 2000, and was a LEOFF member on April 19, 2000.

Neither the enrollment form nor the letter were generated as part of the litigation although Mr. Locke submitted them in opposition to the City's motion for summary judgment. The City did not submit any evidence that the enrollment form or letter were unauthorized or were mistaken. After the trial court denied summary judgment, the City did not raise this issue at trial although Mr. Locke testified during trial that he was a LEOFF member:

> Q. Have you ever – since you joined the Seattle Fire Department, have you ever not been a member of the Law Enforcement Fire Fighters Retirement System?
>
> A. No, no. I received a letter at some point that said I was a LEOFF member from the day I started on April 19th.

[6/23/04 RP 146] In fact, after losing the summary judgment, the City, in its CR 50 motion, conceded to the trial court that Mr. Locke <u>was a LEOFF II member</u>:

> Recruit Locke was a fire fighter recruit for the City of Seattle undergoing training at the State of Washington's Fire Training Academy in North Bend. As such, he is an employee of the City and is covered under Plan II of the Law Officers' and Fire Fighters' Retirement System Act (LEOFF), RCW Chapter 41.26.

CP 3845.

It stands to reason that the City's characterization of Mr. Locke, its own employee, as both a "fire fighter" and as a "LEOFF II member" is entitled to weight. The City, which employed Mr. Locke, must have known his job duties and also presumably knew the statutory[1] and regulatory definition[2] of a fire fighter under LEOFF. If the City had not

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[1] RCW 41.26.030(4)(a) defines a "fire fighter" as:

> Any person who is serving on a full time, fully compensated basis as a member of a fire department of an employer and who is serving in a position which requires passing a civil service examination for fire fighter, and who is actively employed as such.

[2] WAC 415-104-225(2) provides in relevant part:

> (2) Fire fighters. You are a fire fighter if you are employed in a uniformed fire fighter position by an employer on a full-time, fully compensated basis, and as a consequence of your employment, you have the <u>legal authority and responsibility to direct or perform fire protection activities</u> that are required for and directly concerned with preventing, controlling and extinguishing fires.
>
> > (a) "Fire protection activities" <u>may include</u> incidental functions <u>such as</u> housekeeping, equipment maintenance, grounds maintenance, fire safety inspections, lecturing, performing community fire drills and inspecting homes and schools for fire hazards. These activities qualify as fire protection activities only if <u>the primary duty of your position</u> is preventing, controlling and extinguishing fires.

believed that Mr. Locke had "the legal authority and responsibility to direct or perform fire protection activities that are required for and directly concerned with preventing, controlling and extinguishing fires," it would not have called him a fire fighter and would not have enrolled him in LEOFF II as a "fire fighter" and so informed him in writing.

Tucker v. Department of Retirement System, 127 Wn. App. 700, 113 P.3d 4 (2005), holds that an employer's understanding of whether its employee was a LEOFF member was important in determining whether the employee was a LEOFF member:

> DRS's [Department of Retirement System] application and interpretation of former RCW 41.26.030 relief on significant evidence that (1) neither the fire Marshall nor Fire District No. 6 considered Tucker's (ETA-funded fire fighter helper position eligible for LEOFF membership. . . .

127 Wn. App. at 709. The plaintiff, the City, and the IAFF continue to rely on Tucker, supra. See Supplemental Brief of City of Seattle, p. 4; IAFF Brief, p. 7. Thus, evidence that, at the time of the accident,

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* * *

> (d) You are a fire fighter if you meet the requirements of this section regardless of your rank and status as a probationary or permanent employee or your particular specialty or job title. (Emphasis added.)

"Include" implies a partial listing and is a term of "enlargement." BLACK'S LAW DICTIONARY (7th ed), p. 766; Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349, 359, 20 P.3d 921 (2001).

defendant considered him a fire fighter and an eligible LEOFF member was a sound basis both for denying summary judgment and for concluding that Mr. Locke met the statutory and regulatory LEOFF definitions of fire fighter.

B. The Court Of Appeals Correctly Held That Fire Fighter Trainees May Be Members Of LEOFF.

The Court of Appeals did not hold that fire fighter trainees are always LEOFF II members regardless of their responsibilities and the relevant facts. Rather, it held that "Fire Fighter Trainees May Be Members Of LEOFF" (id. at 710), and that under the facts of this case, Mr. Locke was a LEOFF member. The Court of Appeals ruled that plaintiff's evidence was sufficient to defeat the City's motion for summary judgment. It also utilized evidence in denying the City's claim that Mr. "Locke could not have been a [LEOFF] member." Locke v. City of Seattle, 133 Wn. App. 696, 711, 137 P.3d 52 (2006) (emphasis added). In addition to the evidence discussed above, the evidence considered by the Court of Appeals showed that Mr. Locke was injured when "during an exercise drill, Locke fell from a 50-foot ladder" (id. at 700), and that Mr. Locke was injured while in a training academy where fire fighters "must encounter dangerous conditions to prepare themselves to perform safely and effectively in actual emergencies." Id. at 717. That is why the Court ruled "the evidence presented, the wording of the relevant administrative

code provisions, the language of the relevant statute, and the legislature's purpose in enacting the statute, all support denial of the City's claim of error." Id. (emphasis added).

Points raised in the IAFF Brief help explain flaws in the City's attempt to explain away this evidence and to argue that Mr. Locke could not have been a fire fighter under the LEOFF definition. The City argues that this Court in Schrom v. Board of Directors, 153 Wn.2d 19, 100 P.3d 814 (2004), held that a fire fighter under volunteer fire fighter's pension system must possess duties including fighting fires and that secretaries for the volunteer fire districts were not fire fighters even though the governmental employer had paid into the retirement system. However, as the IAFF points out at pages 6-7 of its Brief, Schrom considered training to fight fires to be part of fire fighting duties as long as those duties "include fighting fires if a fire were ever to occur." 153 Wn.2d at 23, 28. In Schrom, the court affirmed an administrative hearing which, after considering all of the evidence, concluded that secretaries in the volunteer fire districts were not fire fighters. The only hearing in this case was the summary judgment which went against the City, because there were disputed issues of material fact.

Schrom also relied on the definition of fire fighter set forth at RCW 41.24.010(3) and the dictionary definition of fire fighter. 153

Wn.2d at 27-28. The LEOFF statute and implementing regulations contain a different definition of fire fighter. That is the relevant definition for purposes of this case. Schrom, supra, 153 Wn.2d at 27; State v. Sullivan, 143 Wn.2d 162, 175, 19 P.3d 1012 (2000). As the IAFF points out, both the LEOFF statute and implementing regulations broaden the definition of "fire fighter" by referring to the employees "position" rather than the employee's "specific activities", e.g., WAC 415-104-225(2)(a). The City admitted that Mr. Locke's position was "fire fighter." CP 2123-25. The fact that his job title may have been fire fighter "trainee" does not exclude him in light of WAC 415-104-225(2)(d). As the Court of Appeals in this case explained:

> Training for fire suppression, as Locke was doing when he fell, is clearly a "fire protection activity" that is "required for and directly concerned with preventing, controlling and extinguishing fires." WAC 415-104-225(2). We are not persuaded by the city's attempts to argue otherwise. We also reject the city's argument that trainees such as Locke are not qualified LEOFF members because they are not fully-trained fire fighters. The statute does not distinguish between levels of training.

Locke, supra, 133 Wn. App. at 712.

In Hauber v. Yakima County, 147 Wn.2d 655, 664, 56 P.3d 559 (2002), this Court held that a fire chief's "subjective belief" that a fire fighter was responding to a mutual aid call was not enough to impose liability upon the county. In Hauber, the term "mutual aid agreement" was

statutorily defined to be a specific agreement that pledged mutual aid. The evidence in Hauber showed there was no such agreement. 147 Wn.2d at 663-64. The facts are different in this case, which has nothing to do with mutual aid agreements. As the IAFF Brief states, neither the statute nor the WAC:

> . . . specifically references training requirements, such as those found in national standards of the National Fire Protection Association (NFPA), for becoming a "fire fighter" for purposes of professionally fighting a fire.[2]
>
> [2] Indeed, the State of Washington has no regulatory requirements for fighting fires or engaging in fire suppression.

IAFF Brief, p. 4.

The City cites no testimony in this case that unequivocally prevents a fire fighter in Mr. Locke's position from having legal authority and responsibility to fight fires. Rather, the evidence cited at pages 3-4 of the City's Supplemental Brief, showed that probationary fire fighters are LEOFF members (which is not inconsistent with fire fighter trainees also being LEOFF members), and that fire fighter trainees are not assigned to the "operations division" (which does not define the fire fighter trainee's authority and responsibility). Moreover, unlike Hauber, the documents signed by the City were on LEOFF forms or specifically referred to LEOFF.

The City argues that it cannot stipulate to jurisdiction, waive lack of jurisdiction, or waive a matter of law. However, CP 2123-25 and Mr. Locke's testimony quoted above are neither stipulations nor the basis of waiver. Rather, they constitute affirmative evidence including admissions. Moreover, the IAFF Brief will explain the purposes of the LEOFF provision which are also described by the Court of Appeals:

> Furthermore, the city's proposed construction of WAC 415-104-225(2)(a) is contrary to the legislative purposes of LEOFF. The LEOFF system was established to provide retirement and other benefits to those who engage in the inordinately hazardous occupations of law enforcement and fire fighting. RCW 41.26.281, the statutory provision that grants LEOFF members the right to bring negligence actions against their governmental employers, gives those employers "a strong incentive for improved safety." Hansen, 93 Wn. App. at 926. That purpose plainly extends to fire fighters while they are in training academies, where they must encounter dangerous conditions to prepare themselves to perform safely and effectively in actual emergencies. We reject the city's proposed narrow definition of "fire fighter" in part because it discounts the value placed by the legislature upon those who undertake the risks involved in fire fighter training.

II. RCW 41.26.281. IS CONSTITUTIONAL

A. RCW 41.26.281 Withstands The Traditional Privileges And Immunities And Equal Protection Analysis Under Washington And Federal Law.

The IAFF Brief canvases both the Washington and federal cases relied upon by the City in claiming that the Washington and federal constitutions "require that employers must be completely immune from suit in exchange for obligations under a workers' compensation system. IAFF Brief, p. 12. Those cases include Mountain Timber Co. v. Washington, 243 U.S. 219 (1917); Shaughnessy v. Northland SS Co., 94 Wash. 325, 162 P. 546 (1917); State v. Daggett, 87 Wash. 253, 152 P. 648 (1915); 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).

The IAFF Brief correctly points out that none of those cases hold that employers be completely immune from suit in exchange for obligations under a workers compensation system. For example, Mountain Timber, supra, 243 U.S. at 233-234 and 236, describes the statutory quid pro quo, but does not hold that the statute would be unconstitutional in its absence. The holding of the court was that the statute was constitutional. Similarly, the various Washington cases, while

raising questions about the constitutionality of a statute lacking a quid pro quo, decided the cases on statutory rather than constitutional issues.

The IAFF Brief also disagrees with the City about its reliance on Hildahl v. Bringolf, 101 Wn. App. 634, 5 P.3d 38 (2000). The City claimed that Hildahl, supra, was in accord with its claim that "[n]o workers' compensation statute can compel an employer to fund benefits without providing the quid pro quo of immunity from negligence suits." City Supplemental Brief, p. 7. However, the IAFF Brief correctly points out that the Hildahl court referred to both Manor, supra, and Epperly, supra, but found that:

> . . . it is not unconstitutionally arbitrary to provide RCW 51.08.070 employers with immunity from civil suit, while denying immunity to RCW 51.12.070 "person[s] . . . who let[] a contract" for work and who are "responsible primarily and directly for all [industrial insurance] premiums upon the work."

Id. at 651.

The fact that RCW 41.26.281 only applies to police and fire fighters is not a proper basis for overturning the statute on constitutional grounds. Both the United States Supreme Court and this Court hold that a legislature is allow to deal with an issue "one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489,

99 L.Ed. 563, 573, 75 S. Ct. 461 (1955). As stated by this Court in State v. Kent, 87 Wn.2d 103, 111, 549 P.2d 721 (1976):

> Finally, equal protection does not require that a state choose between attacking every aspect of a problem and not attacking the problem at all. *Washington Statewide Organization of Stepparents v. Smith*, 85 Wn.2d 564, 571, 536 P.2d 1202 (1975). The legislature has the discretion not to deal with an evil or class of evils all within the scope of one enactment, but to approach the problem piecemeal and learn from experience. *McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 809, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969).

See also Deputy Sheriff's Ass'n v. Comm'rs, 92 Wn.2d 831, 836, 601 P.2d 936 (1979) (Legislature may address a problem piecemeal without violating an individual's rights under equal protection clause). City of Seattle v. State, 103 Wn.2d 663, 694 P.2d 641 (1985) (same).

In DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 147-149, 960 P.2d 919 (1998), which this Court found to be one of the "rare" cases found unconstitutional under the rational basis standard, this Court agreed that the classification did not bear a rational relationship to the purpose of the statute. That is not the case here. As the IAFF Brief demonstrates at pages 19-21, police officers and fire fighters not only engage in dangerous and vital activities, but do so in circumstances where "no employee is ordinarily permitted by the department to refuse an order or depart from procedure – even if following such an order or procedure might lead to

injury or death." Id. at 19. The Legislature reasonably could have concluded that, as explained at page 20 of the same brief:

> . . . RCW §41.26.281 ensures that the obedience fire and police departments demand of their employees rests on trust that those departments will not negligently make orders or standard operating procedures that endanger them.

Id. at 20. This completely satisfies the rational basis test. At the same time, as the IAFF points out, and as discussed at some length in the Court of Appeal's decision (133 Wn. App. at 708-710), RCW 41.28.281 provides a quid pro quo to the City because it "treats municipal defendants more favorably than most other tortfeasors or subrogors", and protects the City from product liability claims, vis-à-vis, their employees. See also Hansen v. City of Everett, 93 Wn. App. 921, 926, 971 P.2d 111 (1999) and Gillis v. City of Walla Walla, 94 Wn.2d 193, 196, 616 P.2d 625 (1980).

B. RCW 41.28.281 Satisfies The Independent Analysis Of The Privileges And Immunities Provision Of The Washington Constitution (Art. 1, Sec. 12).

The IAFF Brief correctly points out that the independent privileges and immunities analysis is not a "heightened scrutiny" test. IAFF Brief, p. 21. Rather, (a) the text of the constitutional provision, (b) Washington cases, which utilize an independent analysis (such as Redford v. Spokane Street Ry. Co., 15 Wash. 419, 46 P. 650 (1896) and Fitch v. Applegate, 24

Wash. 25, 64 P. 147 (1901)), and (c) cases from states with similar privileges and immunity provisions,[3] all support the conclusion that an act is constitutional under privileges and immunities if it is "uniform in its operation insofar as it operates at all." Redford, supra, 15 Wash. at 422. That is exactly what happened under RCW 41.28.281 as discussed at pages 6-14 of Respondent's Supplemental Brief. Furthermore, the benefits of that statute are open to all who choose to become police officers or fire fighters. Id.

C. The City Is Not Entitled To Sovereign Immunity.

The Court of Appeals in this case correctly concluded that "RCW 4.96.010 Waives Municipal Sovereign Immunity" (Locke, supra, 133 Wn. App. at 702), and explained its rationale at pages 702-704. Plaintiff has previously discussed this issue at some length, including at pages 18-20 of Respondent's Supplemental Brief. The IAFF argues that RCW 41.26.281 is also itself a waiver of sovereign immunity, and points out that "[b]efore the Court of Appeals, the City appeared to admit that RCW §41.26.281 itself waives municipal sovereign immunity . . . ." IAFF Brief, p. 24. Plaintiff does not believe that this Court need rely on that argument because it was not decided by the Court of Appeals, and the

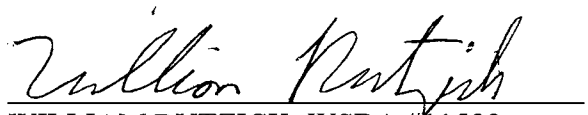
[3] Those cases include McAunich v. Mississippi, etc. R.R. Co., 20 Iowa 338 (1866); State of Oregon v. Andrew Clark, 291 Ore. 231, 630 P.2d 810 (1981), Vance Eugene Hunter v. State of Oregon and City of Bend, 306 Ore. 529, 761 P.2d 502 (1988).

argument based on its RCW 4.96.010 is more than sufficient. However, it is relevant that the Legislature in passing RCW 41.26.281 believed that sovereign immunity would not bar claims under that section because otherwise the passage of RCW 41.26.281 would have been a useless act. The Legislature, of course, is not presumed to do a useless act. Taylor v. City of Redmond, 89 Wn.2d 315, 319, 571 P.2d 1388, 1390 (1977).

III. CONCLUSION

For the foregoing reasons, and the reasons previously argued, the decision of the trial court and the Court of Appeals should be affirmed..

RESPECTFULLY SUBMITTED this 7th day of **May, 2007.**



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