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SUPREME COURT
STATE OF WASHINGTON

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No. 79222-4
(Court of Appeals No. 55256-2-1)

BY D.J. MERRITT

SUPREME COURT
OF THE STATE OF WASHINGTON

KEVIN J. LOCKE and TORI LOCKE, husband and wife and the
marital community composed thereof,

Respondent,

vs.

THE CITY OF SEATTLE, a municipal corporation; THE CITY
OF SEATTLE FIRE DEPARTMENT; JAMES SEWELL,
MOLLY DOUCE,

Petitioners,

and JOHN CAMERON AND, "JOHN DOES" 1-5, in their individual
capacities, and the STATE OF WASHINGTON, its subdivisions and
agencies, and the WASHINGTON STATE PATROL,

Defendants.

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STATE OF WASHINGTON

**CITY OF SEATTLE'S ANSWER TO MEMORANDUM
OF AMICUS CURIAE, WASHINGTON STATE ASSOCIATION
OF MUNICIPAL ATTORNEYS**

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A. Identity of Answering Party

Petitioner City of Seattle (“City”) submits this answer to the Memorandum by Amicus Curiae Washington State Association of Municipal Attorneys (“WSAMA”).

B. Issues

1. Did the Court of Appeals ignore the fundamental tenets and purposes of workers’ compensation and violate both the United States Constitution and the Washington Constitution, and Sovereign Immunity?
2. Has the Washington Supreme Court previously addressed the City’s arguments?

C. Argument

1. The Court of Appeals Ignored the Fundamental Tenets and Purposes of Workers’ Compensation and Violated both the United States Constitution and the Washington Constitution, and Sovereign Immunity

Amicus WSAMA discusses the underlying federal and state constitutional bases for the absolute quid pro quo of immunity from suit in return for compelling employers to fund workers’ compensation benefits. WSAMA’s discussion is consistent with briefing submitted by the City and amicus throughout this litigation. That is, the bases for the mandate of providing immunity from suit in workers’ compensation statutes are found in both the State and Federal Constitutions. See Trial Brief of City

Defendants, heading C “RCW 41.26.281 is unconstitutional under the equal protection and due process clauses of the state and federal constitutions.” CP 3223; Brief of Appellants, p. 17, “The Washington Supreme Court has many times questioned the constitutionality of requiring an employer to pay workers’ compensation benefits without the quid pro quo of immunity from tort liability.” The City cited to cases applying the privileges and immunities clause in the Washington Constitution, Article I § 12, and also cited to cases which discuss the mandate of providing immunity from suit applying federal constitutional provisions. *State ex rel. Jarvis v. Daggett*, 87 Wash. 253, 258, 151 P. 648 (1915) (equal protection); *Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325, 330, 162 P. 546 (1917) (privileges and immunities clause of the Washington State Constitution, Article I, § 12). The Brief of Amicus Curiae Washington State Association of Municipal Attorneys filed in the Court of Appeals discussed at considerable length the constitutional bases and cited to, among other cases, *Mountain Timber Company v. Washington*, 243 U.S. 219, 37 S. Ct. 260, 61 L. Ed. 685 (1917) (equal protection) and *New York Central R.R. Co.*, 243 U.S. 188, 37 S. Ct. 247, 61 L.Ed. 667 (1917) (due process).

The Court of Appeals applied a federal 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. Since the Court of Appeals applied the federal test, the parties must address the Court’s flawed reasoning under the federal constitution.

Contrary to the Court of Appeals’ conclusion, no “hazardous employment” exception to the immunity requirement for workers’ compensation laws has been located anywhere in the country and cannot be developed because of equal protection and due process principles. Established workers’ compensation case law has long and consistently 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. The court in *Mountain Timber*, 243 U.S. 219, discussed equal protection, but also relied upon the reasoning in *New York Central R.R. Co.*, 243 U.S. 188, where the Court discussed the due process implications that can only be satisfied by the quid pro quo of protection from tort liability.

The privileges and immunities clause of the Washington Constitution (Article I, § 12) provides an additional basis of protection to

employers in this State, including municipal employers. *Shaughnessy, supra*, is of particular interest here because the Court of Appeals 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, 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 that workers' compensation statutes must provide immunity from suit in order to comply with the privileges and immunities clause of Article I, § 12, stating:

The employer is compelled to contribute to the accident fund certain specified amounts, according to the hazardous nature of the work of his employés, and in return therefor is furnished indemnity against all claims of his employés for injuries received in the course of their employment. Thus the act in effect provides for compulsory insurance both for the employer and the employé, and manifestly contemplates that all employers and all employés 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. The Court of Appeals disregarded all of them.

All of the constitutional provisions that protect private employers are relevant here; it is simply of no moment that the employer is a municipality. The privileges and immunities clause by its very terms provides protections to municipalities. Equal protection applies where, as here, a municipality is directly affected. *City of Seattle v. State*, 103 Wn.2d 663, 669, 694 P.2d 641 (1985). And due process applies (along with the privileges and immunities clause and equal protection clause) because governmental entities cannot be liable where there is no private liability based upon sovereign immunity protections.

Like Mark Twain's famous remark, "The report of my death was an exaggeration", any rumors of the *total* abolition of sovereign immunity are unfounded. No legal scholar, nor case, so holds. The waiver of sovereign immunity for municipalities, although broad, is limited: imposing liability against a governmental entity is barred where there is no analogous private liability. This prohibition, codified by the legislature in

RCW 4.96.010, operates as a legislative reservation of immunity rights for government. “[T]he 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.” *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 253, 407 P.2d 440 (1965). *Accord, Edgar v. State*, 92 Wn.2d 217, 595 P.2d 534 (1979).

This issue has been the subject of recent comment by Judge Robin Hunt in *Donohoe v. State*, ___ Wn.App. ___, 142 P.3d 654 (Div. II, 2006), in which that court notes the waiver of sovereign immunity is “broad though circumscribed” by the statute’s plain language limiting governmental liability “...to the same extent as if it were a private person or corporation.” Is there, *Donohoe* wonders, a “private entity analogue for the State’s...” allegedly tortious conduct? If not, there can be no liability. Because this issue was not briefed by the parties and the case was resolved on other issues, the *Donohoe* court left the issue “... for another day when the issues are squarely presented and briefed”. *Id.* at 658. That day has arrived. At bottom, the resolution of the sovereign immunity issue is nothing more than a hunt for the existence of a cause of action possessed by a private person allowing suit against an employer for damages

sustained in a covered, on-the-job injury. The Court of Appeals, understandably, failed to find such a cause of action because, of course, there is none. Undeterred, the court below merely disregarded this longstanding, fundamental requirement.

The Court of Appeals has abandoned nearly 100 years of consistent caselaw that compels immunity. As Amicus WSAMA succinctly stated (page 8), “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. The Washington Supreme Court has never addressed the City’s arguments

Amicus WSAMA challenged plaintiff’s suggestion that the Supreme Court has already addressed the issues raised by the City. The City agrees with WSAMA: this Court has never addressed these challenges.

Neither *Fray v. Spokane Cy.*, 134 Wn.2d 637, 952 P.2d 601 (1998), nor *Gillis v. City of Walla Walla*, 94 Wn.2d 193, 616 P.2d 625 (1989), come even marginally close to discussing these issues. *Fray* held that an amendment to LEOFF that clearly provided no right to sue to LEOFF II members (members employed after October 1, 1977) was

unconstitutional. *Gillis* addressed how an offset for payments made should be handled.

While *Taylor v. City of Redmond*, 89 Wn.2d 315, 571 P.2d 1388 (1977), holds that LEOFF I members (those employed prior to October 1, 1977) are not barred by RCW Title 51 immunity provisions, the court did not address workers' compensation principles compelling immunity where employers are required to fund such benefits. This holding, however, was based on the Court's erroneous belief that municipal employers do not fund LEOFF benefits:

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. Significantly here, LEOFF II members (LEOFF members employed after October 1, 1977, now called "Plan 2" members) do receive RCW Title 51 industrial insurance benefits which are funded by LEOFF employers. RCW 41.26.480. Whether or not Locke was a LEOFF II

member¹ when he was injured, there is no dispute that he received RCW Title 51 industrial insurance benefits funded by the City of Seattle.

D. Conclusion

The Supreme Court should accept review, reverse the judgment against the City, and render judgment in the City's favor. Alternatively, the case should be remanded for a new trial on liability and damages.

Respectfully submitted November 22, 2006.

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¹ The issue regarding whether Locke as a firefighter recruit was or could have been a LEOFF II member is a separate issue.