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NO. 55256-2-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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

Respondents,

vs.

THE CITY OF SEATTLE, a municipal corporation; and THE CITY OF  
SEATTLE FIRE DEPARTMENT,

Appellants,

and

JAMES SEWELL, MOLLY DOUCE, JOHN CAMERON and "JOHN  
DOES" 1-5 in their individual capacities,

Defendants,

and

THE STATE OF WASHINGTON, its subdivisions and agencies; and the  
WASHINGTON STATE PATROL,

Respondents.

APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Michael Spearman, Judge

BRIEF OF APPELLANTS

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DIVISION I

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## I. NATURE OF THE CASE

A 39-year-old fire fighter trainee fell off a ladder during training. He received \$138,980 in workers' compensation benefits and then sued his employer, the City. A jury found the City liable for more than \$1,500,000.

## II. ASSIGNMENTS OF ERROR<sup>1</sup>

The trial court erred in:

- A. Entering judgment (CP 4505-07);
- B. Denying the City's motion for new trial (CP 4552-53);
- C. Denying the City's motion for a mistrial regarding plaintiff's references to Department of Labor & Industries citations, the City's failure to appeal, and payment of fines (6/29/04 RP 203);
- D. Denying the City's motion to reconsider the order regarding admissibility of DLI citations and/or reports (5/19/04 RP 598);
- E. Denying the City's CR 50 motion to dismiss based on failure to state a claim, unconstitutionality, and sovereign immunity (6/29/04 RP 6);
- F. Denying the City's CR 50 motion to dismiss based upon plaintiff's voluntary assumption of known risks (6/29/04 RP 202-04);

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<sup>1</sup> Copies of challenged instructions and verdict form given and proposed instructions and proposed special verdict form not given are included in the Appendix.

G. Denying the City's motion for summary judgment (CP 2681-88);

H. Denying the City's motion in limine to preclude mention of Department of Labor & Industries citations, fines, and the City's decision not to appeal (5/19/04 PM RP 598; 5/20/04 RP 15);

I. Admitting expert testimony that certain WAC regulations were applicable and that the City had violated these regulations (*E.g.*, 6/21/04 RP 14-15, 17-18, 23-24, 77);

J. Giving Instruction No. 6 to the extent it did not refer to the City's assumption of risk defense (CP 4065);

K. Giving Instruction No. 13 (CP 4072);

L. Admitting evidence regarding the WAC regulation on which Instruction No. 13 was based (6/21/04 RP 14-15);

M. Giving Instruction No. 17 to the extent it did not refer to the City's assumption of risk defense (CP 4076);

N. Giving Instruction No. 20 to the extent it placed the burden of proof on the City (CP 4080);

O. Giving the Special Verdict form to the extent it did not include an assumption of the risk question (CP 4089-91);

P. Failing to give the City's second supplemental proposed instruction no. 42 (CP 4020);

Q. Failing to give the City's second supplemental proposed instruction no. 46 (CP 4024-25);

R. Failing to give the City's second supplemental proposed instruction no. 63 (CP 4045);

S. Failing to give the City's proposed special verdict form denominated second supplemental proposed instruction no. 51 (CP 4030-33);

T. Admitting evidence of claimed safety violations that even plaintiff admitted were irrelevant (*E.g.*, 6/21/04 RP 4-30);

U. Denying the City's motion to make the future economic damages award payable in periodic payments as required by RCW 4.56.260(1) (CP 4353);

V. Refusing to give the City's proposed curative instruction on the Department of Labor & Industries' citation information (6/30/04 RP 121).

### **III. ISSUES PRESENTED**

A. Did the trial court have jurisdiction of this matter?

1. Is a recruit in fire fighter training school who is eligible for workers' compensation benefits under RCW tit. 51 a "member" entitled to sue the City under RCW 41.26.281? (Assignments of Error ("AE") A, G)

2. If not, is RCW 41.26.281 constitutional? (AE A, E)

B. Does the City have sovereign immunity for this suit because, contrary to RCW 4.96.010, its liability is not “to the same extent as if [it] were a private person or corporation”? (AE A, E)

C. Does the professional rescuer rule or implied primary assumption of the risk bar, as a matter of law, suit by a fire fighter trainee who fell off a ladder while trying to effect a practice rescue in recruit training? (AE A, F, G)

D. Should the jury have been permitted to decide whether a fire fighter trainee in recruit training assumed the risk of falling off a ladder while trying to effect a practice rescue? (AE A, J, M, O, P Q, S)

E. Did the trial court commit prejudicial error by allowing evidence about citations for safety violations levied against the City by the Department of Labor & Industries? (AE A, C, D, H, R, V)

F. Regardless of whether such evidence was admissible, was plaintiff’s mentioning it during opening statement but failing to then follow through with proof prejudicial? (AE A, C, R, V)

G. Should the jury have been given a curative instruction to disregard the Department of Labor & Industries citation information? (AE A, R, V)

H. Did the trial court commit prejudicial error in allowing expert testimony that the City had violated various WAC regulations? (AE A, I)

I. Was it prejudicial error to admit evidence of alleged safety violations that even plaintiff conceded had nothing to do with his accident? (AE A, T)

J. Was it prejudicial error to instruct the jury on a WAC safety regulation that did not even apply to the City? (AE A, K, L)

K. Is a new trial required because the burden of proof instructions of Instruction No. 18 and Instruction No. 20 were inconsistent? (AE A, N)

L. Even if Instructions No. 18 and 20 were not inconsistent, is a new trial required because Instruction No. 20 should have placed the burden of proving what amounts were received or receivable as required by RCW 41.26.281 on plaintiff? (AE A, N)

M. Is a new trial required because it is clear from the face of the special verdict form that the jury failed to follow the instruction set forth in Question No. 4 of that form? (AE A)

N. Was there substantial evidence to support the entire \$514,000 future economic damages award? (AE A, B)

O. Did the jury properly determine the “amount received or receivable” as \$24,133 under RCW 41.26.281 when it found \$514,000 in future economic damages? (AE A, B)

P. Did the trial court err in refusing the City’s request to order that future economic damages be paid in periodic installments as required by RCW 4.56.260(1)? (AE A, U)

#### **IV. STATEMENT OF THE CASE**

##### **A. STATEMENT OF RELEVANT FACTS.**

Plaintiff/respondent Kevin Locke, then age 39, was a retired Air Force navigator. (6/23/04 RP 24-32; Ex. 1) He was running a fledgling beer brewing business that had yet to turn a profit (6/23/04 RP 40-41, 58, 186), and wanted to earn some money in a job that would allow him to continue his beer business. (6/23/04 RP 59-60) He enjoyed challenging physical activities like rock climbing and triathlons, so did not want a desk job. Accordingly, he chose fire fighting. (6/23/04 RP 58-60, 149; 6/24/04 RP 77-78)

After passing a civil service examination, plaintiff joined the recruit training class of the fire department of defendant/appellant City of Seattle. Recruit training was to last 13 weeks. (CP 2120-22; 5/25/04 RP 24; 6/23/04 RP 60-61, 65)

In late June 2000, plaintiff's recruit class was taken to the Washington State Patrol Fire Training Academy in North Bend, Washington, for a four-day, live fire training session.<sup>2</sup> (5/25/04 RP 25; 6/16/04 RP 138) At the end of the last day, the recruits engaged in a non-live-fire ladder drill known as the "Ozark drill". During this drill, plaintiff fell 30 feet off a ladder while trying to rescue a mannequin from a rooftop. (5/25/04 RP 87, 92-94, 140; 6/2/04 PM Pt. 1 RP 28; 6/10/04 RP 55)

Although he suffered serious injuries to his back, leg, and foot, and his gait will never be completely normal, plaintiff has nevertheless recovered enough so his physician has placed no physical restrictions on him. (5/24/04 RP 116-17, 169; 6/2/04 AM RP 904; 6/7/04 PM RP 41-42) By the time of trial, he was working as a Seattle Fire Department dispatcher and had engaged in such activities as traveling, attending a cabinetmaking class, and designing and painting booths for a saloon a friend was opening. (6/23/04 RP 20, 154-55, 168-70; 6/24/04 RP 108)

At the time of the accident, plaintiff was an employee of the City of Seattle. (CP 2) A workers' compensation benefits application was

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<sup>2</sup> Live fire training involves putting out fires in a structure. (5/25/04 RP 206) *See also* WAC 296-305-01005.

filed on his behalf. The City is self-insured for workers' compensation benefits. (6/29/04 RP 99, 103)

Under the workers' compensation law, the City is obligated to pay for all of plaintiff's wage loss and medical treatment necessary for him to reach maximum medical improvement. (6/29/04 RP 105-06, 115-16) The parties stipulated that by the time of trial, the City had paid \$138,980 in workers' compensation benefits for medical expenses and lost wages. If plaintiff's condition thereafter worsens, the claim may be reopened so that future benefits can be paid. (6/29/04 RP 106-08, 119; CP 4090)

**B. STATEMENT OF PROCEDURE.**

Plaintiff sued the City of Seattle, its fire department, the State of Washington, the Washington State Patrol, and several City and State employees, for negligence and violation of 42 U.S.C. § 1983.<sup>3</sup> (CP 1-11) The section 1983 claims were dismissed. (CP 2681-88, 2746-48) The remaining claims against the State, State Patrol, and all the employee defendants were also dismissed. (CP 2746-48, 3797-98, 3913-14)

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<sup>3</sup> Plaintiff's wife was originally a plaintiff, but her claims were voluntarily dismissed. (CP 1-11, 3746-47)

Plaintiff sued the City under RCW 41.26.281, a statute under the Law Enforcement Officers' & Firefighters' Act. (CP 4080) RCW 41.26.281 provides:

If injury or death results to a member from the intentional or negligent act or omission of a member's governmental employer, the member . . . shall have the privilege to benefit under this chapter and also have cause of action against the governmental employer as otherwise provided by law, for any excess of damages over the amount received or receivable under this chapter.

The trial court denied the City's motion for summary judgment that, *inter alia*, plaintiff was not a "member" under this statute and had assumed the risk. (CP 180-83; 2681-88)

After a 2-month trial, the jury returned a 10-2 verdict for plaintiff, but found him 10 percent at fault. (CP 4089-91; 7/13/04 RP 19-39) The jury found damages in a special verdict form as follows (CP 4090):

|                         |                |
|-------------------------|----------------|
| Past economic damages   | \$8,800.00     |
| Future economic damages | \$514,000.00   |
| Non-economic damages    | \$1,320,000.00 |
| TOTAL                   | \$1,842,800.00 |

The jury also answered the following question (CP 4090):

What do you find to be the total amount received or receivable by Kevin Locke or on his behalf, under the Law Enforcement Officers' and Fire Fighters' Retirement

System, Chapter 41.26 RCW, including the stipulated amount of \$138,980?

ANSWER \$24,133

Judgment for \$1,513,663.88 was entered. (CP 4505-07) The City's motion for new trial or remittitur was denied. (CP 4552-53)

## V. ARGUMENT

The City appeals from the denials of its motions for new trial, judgment as a matter of law, summary judgment, and various other trial court rulings. The duty of this court is to determine the rights of the parties. This is true even if the attorneys representing the parties were unable or unwilling to argue applicable law. *Maynard Investment Co. v. McCann*, 77 Wn.2d 616, 623, 465 P.2d 657 (1970).

Legal, procedural, and factual questions are at issue. Legal issues are reviewable *de novo*. *State v. Balch*, 114 Wn. App. 55, 60, 55 P.3d 1199 (2002). Procedural issues not involving legal questions are reviewable for abuse of discretion. II WSBA, WASHINGTON APPELLATE PRACTICE DESKBOOK § 18.5 (3d ed. 2005). Whether substantial evidence supports a verdict depends on whether there is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004).

**A. THE TRIAL COURT LACKED JURISDICTION.**

For the injuries at issue here, plaintiff received RCW tit. 51 workers' compensation benefits. Typically, courts have no jurisdiction where, as here, an injured employee who has received such benefits seeks to sue his employer for alleged negligence that caused the injuries. RCW 51.04.010; *see Dougherty v. Department of Labor & Industries*, 150 Wn.2d 310, 314, 76 P.3d 1183 (2003). However, RCW 41.26.281 of the Law Enforcement Officers' and Firefighters' Act (LEOFF) provides:

If injury or death results to a *member* from the intentional or negligent act or omission of a member's governmental employer, the *member* . . . shall have the privilege to benefit under this chapter and also have cause of action against the governmental employer as otherwise provided by law, for any excess of damages over the amount received or receivable under this chapter.

(Emphasis added.) In other words, to sue the City, plaintiff had to be a "member" under RCW 41.26.281. As will be discussed, he was not. And even if he was, RCW 41.26.281 is unconstitutional.

**1. Plaintiff Was Not a "Member."**

The LEOFF statute, RCW 41.26.030(8) defines "member" to include "every . . . fire fighter who is employed in that capacity." RCW 41.26.030(4)(a) defines "firefighter" to mean:

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*; . . . .

(Emphasis added.) WAC 415-104-225(2) further provides:

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 legal authority and responsibility to direct or perform fire protection activities that are required for and directly concerned with preventing, controlling and extinguishing fires.*

(a) “Fire protection activities” may include incidental functions such as 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 the primary duty of your position is preventing, controlling and extinguishing fires.*

. . . .

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

(Emphasis added.)

Plaintiff was a recruit whose “employment” and “duty” were to attend a 13-week recruit school. (5/25/04 RP 24; 5/27/04 RP 143; CP 191, Ex. I [file exhibit Sub 51A was transmitted to the Court of Appeals separately from the clerk’s papers]) Until he graduated from recruit school, he would not be assigned to the operations division to fight real fires. (5/25/04 RP 165; 5/27/04 AM RP 116, 124, 126) As a recruit, he

had no “legal authority and responsibility to direct or perform fire protection activities that are required for and directly concerned with preventing, controlling and extinguishing fires” within the meaning of WAC 415-104-225(2). Consequently, he was not “actively employed” *as a fire fighter*, and his primary duty was *not* “preventing, controlling, and extinguishing fires,” as required by RCW 41.26.030(4)(a) and WAC 415-104-225(2)(a). See *Tucker v. Department of Retirement Sys.*, \_\_\_ Wn . App. \_\_\_, \_\_\_ P.3d \_\_\_, 2005 WL 1217188 (May 24, 2005) (temporary fire fighter helper training to be fire fighter was not “fire fighter” under LEOFF); cf. *Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 28, 100 P.3d 814 (2004) (“fire fighter” under volunteer fire fighters’ pension system must possess duties including fighting fires); *International Ass’n of Fire Fighters Local 3266 v. Department of Retirement Sys.*, 97 Wn. App. 715, 987 P.2d 115 (1999) (airport technicians whose primary duty was to operate airport not “fire fighters”).

WAC 415-104-225(2)(d) does provide that persons who meet the requirements of the section qualify as “fire fighters” even if they are *probationary* employees. But only recruits who graduate from recruit school are probationary fire fighters. (5/26/04 RP 118-19; 5/27/04 AM RP 116, 126; 6/28/04 RP 222) See also *Tucker*, 2005 WL 1217188, at ¶ 7 (probationary fire fighter enrolled in LEOFF Plan 2). Since plaintiff had

not yet graduated from recruit school when the accident occurred, he was not yet a probationary employee.

Thus, the trial court had no jurisdiction to entertain this suit. RCW 51.04.010. The City should have been granted summary judgment on this basis. (CP 182-84; *see* CP 3217) The judgment against the City must be reversed and the case remanded for entry of judgment in the City's favor.

## **2. The City Enjoys Sovereign Immunity.**

In any event, the City retains its sovereign immunity and cannot be liable to plaintiff. Although RCW 4.96.010(1)<sup>4</sup> generally waives this immunity for political subdivisions, it does so only so they may be liable for tortious conduct “to the same extent as if they were a private person or corporation.” RCW 41.26.281 does *not* make the City liable for tortious conduct to “members” “to the same extent as if [it] were a private person or corporation.”

A private person or corporation in a situation similar to the City's —*i.e.*, one who is sued as an employer for a job-related injury by an

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<sup>4</sup> The statute provides in pertinent part:

(1) All local governmental 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. . . .

employee—would enjoy immunity under RCW tit. 51. Moreover, as will be discussed in subsection 3 *infra*, a private person or corporation could not constitutionally be forced to pay workers compensation without the quid pro quo of employer immunity. Yet that is exactly what RCW 41.26.281 requires the City to do. Consequently, RCW 4.96.010’s waiver of sovereign immunity does not apply.

RCW 41.26.281 cannot be read to waive the City’s sovereign immunity. Indeed, that statute provides that members shall “have cause of action against the governmental employer *as otherwise provided by law*” (emphasis added). Thus, the Washington Supreme Court has ruled:

As to the “cause of action against the governmental employer as otherwise provided by law,” contained in RCW 41.26.280, we look to RCW 4.96.010. Since under the common law the sovereign has traditionally enjoyed immunity from suits by its employees or subjects, there is no cause of action under the common law. . . .

*Taylor v. City of Redmond*, 89 Wn.2d 315, 320, 571 P.2d 1388 (1977).

Further, if RCW 41.26.281 were read to waive the City’s sovereign immunity, it would be unconstitutional as violating WASH. CONST. ART. II, section 19, which provides that “[n]o bill shall embrace more than one subject, and that shall be expressed in the title.” One purpose behind this provision is to guarantee that legislators and the public are given notice of

the subject matter of a bill. *Washington State Grange v. Locke*, 153 Wn.2d 475, 491, 105 P.3d 9 (2005).

The title of the bill containing RCW 41.26.281 is “An Act Relating to law enforcement officers and fire fighters.” 1971 Wash. Laws, 1<sup>st</sup> Ex. Sess., ch. 257. No one reading this title would dream that it included a waiver of governmental employers’ sovereign immunity. Moreover, if RCW 41.26.281 were read to waive sovereign immunity, the bill contained more than one subject—(1) firefighter benefits, and (2) waiver of their governmental employer’s immunity. The trial court erred in failing to grant the City judgment as a matter of law on this issue. (CP 3853-54; *see also* CP 3225-26)

### **3. RCW 41.26.281 Is Unconstitutional.**

In any event, even if plaintiff is a “member” and even if the City does not have sovereign immunity, the LEOFF scheme that requires the City to pay workers’ compensation to “members” without giving it any corresponding immunity violates WASH. CONST. ART. I, § 12. That constitutional provision provides:

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.

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. *See, e.g., Zahler v. Department of Labor & Industries*, 125 Wash. 410, 417-19, 217 P. 55 (1923); *State ex rel. Jarvis v. Daggett*, 87 Wash. 253, 258, 151 P. 648 (1915); *see generally Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325, 330, 162 P. 546 (1917). For example, in *Epperly v. City of Seattle*, 65 Wn.2d 777, 399 P.2d 591 (1965), the court stated:

We are impressed . . . with the incongruous result necessarily flowing from the plaintiff's theory under which the owner of the premises who either directly or indirectly pays the insurance premium based on the hazards of his undertaking gets no protection from the employees of the contractor who may be injured in the course of the work for which the premiums are paid. ***The construction of the statute to permit such a result presents grave constitutional questions . . . .***

*Id.* at 779 n.1 (emphasis added).

More recently, in *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 932 P.2d 628, 945 P.2d 1119 (1997), the court again addressed the issue. There a self-insured parent of plaintiff's employer paid plaintiff \$455,000 in workers' compensation benefits under a regulation that deemed the parent the employer of its wholly owned subsidiaries' employees. Plaintiff then sought to sue the parent as a third party. The supreme court ruled that the parent was immune, explaining:

[T]he true victim of an equal protection violation under the Court of Appeals holding would be self insured, statutory employers like Nestle. WAC 296-15-023(2) makes a self-insuring, parent company like Nestle responsible to compensate injured employees of its subsidiaries. The Act contemplates, and WAC 296-15-023(2) makes express, that an employer seeking self-insured status must decide either to have all of its subsidiaries or divisions self-insured, or *all* of its subsidiaries or divisions covered by the state fund. As Nestle is financially responsible for compensation to injured workers, so should it be immune from suit by injured workers. ***To hold otherwise would deny Nestle the immunity from suit the IIA grants to all employers—a result without logic or justice.***

*Id.* at 449 (boldface emphasis added).

In the instant case, RCW 41.26.281 denies the City the immunity the Industrial Insurance Act grants to all employers—a result without logic or justice. Indeed, the LEOFF statute, RCW 41.26.270, declares in part:

The legislature of the state of Washington hereby declares that the relationship between members of the law enforcement officers' and fire fighters' retirement system and their governmental employers ***is similar to that of workers to their employers*** and that the sure and certain ***relief granted by this chapter is desirable, and as beneficial*** to such law enforcement officers and fire fighters ***as workers' compensation coverage is to persons covered by Title 51 RCW.*** . . .

(Emphasis added.) *See also* RCW 4.96.010 (waiving local government sovereign immunity “to the same extent as if they were a private person or corporation”).

Thus, the Legislature has expressly recognized that the relationship between fire fighters and their employers is no different than the

relationship of other employees and their employers. The Washington Supreme Court has done so also, explaining the LEOFF system as follows:

This relationship is a reciprocal trade-off for the benefit of law enforcement officers, fire fighters and their governmental employers alike. *It is similar to the workers' compensation scheme covering workers and their employers under RCW Title 51.*

*Gillis v. City of Walla Walla*, 94 Wn.2d 193, 195, 616 P.2d 625 (1980) (emphasis added). Yet the Legislature arbitrarily chose to require fire fighters' employers to pay workers' compensation without giving them the same immunity enjoyed by other employers. The City should have been granted judgment as a matter of law. (CP 3851-53; *see also* CP 3223-25)

This court need go no further. Should this court conclude, however, that plaintiff could properly sue the City, there are other reasons why reversal is required

**B. PLAINTIFF ASSUMED THE RISK.**

Plaintiff was training to become a professional fire fighter. Fire fighting is an inherently dangerous and physically challenging job. By deciding he wanted to become a fire fighter and go through recruit training, plaintiff assumed the risks inherent in the job.

The trial court refused to grant the City summary judgment or judgment as a matter of law on this issue. (CP 2770-71) Although it properly denied plaintiff's motion in limine to preclude evidence

regarding the City's assumption of the risk theory, the trial court ultimately refused to instruct the jury on the issue. (CP 180, 3476, 3490, 3654) As will be discussed, either the City's motions should have been granted or, at the very least, the jury should have been given the City's proposed assumption of risk instructions and special verdict form. (CP 180-87, 3229, 3903-08, 4020, 4024-25, 4030-33)

**1. Plaintiff Assumed the Risk as a Matter of Law Under the Professional Rescuer Doctrine.**

One type of assumption of the risk is the professional rescuer doctrine. Under that doctrine, “[t]hose dangers which are inherent in professional rescue activity, and therefore foreseeable, are willingly submitted to by the professional rescuer when he accepts the position and the remuneration inextricably connected therewith.” *Maltman v. Sauer*, 84 Wn.2d 975, 978, 530 P.2d 254 (1975). The doctrine is applicable even if the plaintiff is injured during training. *See Hamilton v. Martinelli & Assocs.*, 110 Cal. App. 4<sup>th</sup> 1012, 2 Cal. Rptr. 3d 168, 175 (2003).

The professional rescuer doctrine precludes plaintiff from recovering here. Fire fighting is an inherently risky occupation. To be able to fight fires and rescue victims, firefighters must be able to climb ladders, carry heavy weights, withstand extreme heat conditions, and work in adverse weather conditions. These risks are inherent in the job and

were accepted by plaintiff when he began training to become a fire fighter. The trial court erred in failing to grant the City summary judgment or judgment as a matter of law based on the professional rescuer doctrine.

**2. Plaintiff Assumed the Risk.**

Even if the professional rescuer doctrine per se does not apply as a matter of law, the City was entitled to either judgment as a matter of law on implied primary assumption of the risk or at least to have the jury decide that issue. To prove assumption of the risk, “[t]he evidence must show the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk, and (3) voluntarily chose to encounter the risk.” *Kirk v. Washington State Univ.*, 109 Wn.2d 448, 583, 746 P.2d 285 (1987). Assumption of risk is generally a question of fact. *See Home v. North Kitsap School Dist.*, 92 Wn. App. 709, 723, 965 P.2d 1112 (1998).

Plaintiff’s theory was that he fell off the ladder due to heat exhaustion and dehydration. But there was evidence that no one told him to climb the ladder and that he took it upon himself to do so, even though, as he later admitted, he was “exhausted.” He admitted knowing that the first three days of training had been hot and that he was concerned with

keeping himself hydrated because of the heat.<sup>5</sup> He admitted getting sick once before in hot, humid weather while in flight school in Florida and that he had been ill during drills the day before. (6/24/04 RP 15-16, 41, 129-30, 137) Yet, as he later testified, he had decided he was going to do whatever it took to get through drill school:

Q. . . . on the fourth day, did you check the temperatures for what the fourth day was going to be like?

A. No, sir.

Q. And that was even after you had had the trouble with the heat on the third day, you didn't wonder to yourself, what's it going to be like tomorrow, I better check?

A. No, I mean —the training was there to go to and I was going to go.

Q. You were going to go whatever the temperature was?

A. Well, I was going to do my best with whatever, yeah, whatever we had up there.

(6/24/04 RP 129)

There was also evidence that before taking the mannequin, plaintiff was warned by fellow recruits who were about to hand it to him that it was very heavy. Nonetheless, plaintiff told them to give it to him. (5/25/04 RP 88) Furthermore, plaintiff acknowledged he had been taught techniques to

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<sup>5</sup> Indeed, to participate in the recruit training, plaintiff had to have obtained his emergency medical technician certificate. (CP 2121)

prevent falling off a ladder. (6/24/04 RP 57) Indeed, the risk of falling off a ladder is obvious. *See Ridge v. Kladnick*, 42 Wn. App. 785, 788, 713 P.2d 1131 (game participant agrees to accept obvious and necessary risks inherent in game), *rev. denied*, 106 Wn.2d 1011 (1986).

Under these circumstances, the trial court should have granted the City judgment as a matter of law. At the very least, a properly instructed jury could have found that plaintiff had assumed the risk. The trial court committed reversible error in refusing to give the City's proposed instructions and special verdict form that would have allowed the jury to determine whether plaintiff assumed the risk. A new trial is required.

**C. ALLOWING REFERENCES TO DEPARTMENT OF LABOR & INDUSTRIES CITATIONS WAS REVERSIBLE ERROR.**

The Department of Labor & Industries had investigated the accident and cited the City for safety violations. Before trial, the City moved in limine to preclude reference to the DL&I citations. (CP 2892-2925) The trial court agreed that the citations themselves could not be admitted as exhibits, but ruled that the fact that the City was cited could be admitted into evidence. (5/19/04 PM RP 598; 5/20/04 RP 15; CP 3575-76) Consequently, in opening statement, plaintiff's attorney told the jury:

The Washington State Department of Labor and Industries also conducted an investigation of this incident. The Washington State Department of Labor and Industries took recorded statements or deposition transcripts of some of the

lieutenant instructors at the academy and some of the recruits.

After their investigation they concluded that there were 13 violations of Washington State safety codes related to Kevin Locke's fall. *The Washington State Department of Labor and Industries fined the Seattle Fire Department \$25,500, and they paid the fine. They did not appeal the fine.*

(5/24/04 RP 37) (emphasis added). At plaintiff's behest, one of his experts also testified as follows (6/2/04 PM Pt. 2 RP 36-37):

Q. Now you testified that you reviewed the citations that the Washington State Department of Labor and Industry levied against the Seattle Fire Department. And with respect to all these questions about the safety standard for firefighters, WAC 296305, did the Washington State Department of Labor and Industries cite the Seattle Fire Department for not having a safety officer?

A. Yes, they did.

On cross, the same expert testified (6/2/04 PM Pt. 2 RP 43):

Q. And you were asked about the citation, the state citations against the City of Seattle from Labor and Industries.

A. Right.

Q. Did you notice that the state, two of those citations related to Shoemate operating the aerial?

A. I know that of all the citations and the \$25,000 fine they got some of them weren't directly related to Kevin Locke's fall.

Q. Two of them were Shoemate operating the aerial ladder and driving the aerial truck, right?

A. Correct.

No one claims that the way the aerial truck was driven or the aerial ladder was operated had anything to do with plaintiff's accident.

Plaintiff also attempted to question another expert about the citations (6/21/04 RP 48- 50, 55):

Q. And as the Seattle Fire Department safety officer in charge of this investigation related to Kevin Locke, did you stay informed regarding the results of the L and I investigation?

MR. FULLER: Objection, relevance.

THE COURT: Sustained.

Q. Did you subsequently become aware that the Washington State Department of Labor and Industries cited the Seattle Fire Department for numerous back violations related to Kevin Locke's fall at the Washington State Patrol Fire Training Academy?

MR. FULLER: Objection, hearsay.

THE COURT: Sustained.

Q. After the Seattle Fire Department was cited by the Washington State Patrol fire -- strike that. After the Seattle Fire Department was cited by the Washington State Patrol - - strike that, that one, too. After the Seattle Fire Department was cited by the Washington State Department of Labor and Industries, were you consulted by anyone within the Seattle Fire Department with respect to those --

MR. FULLER: Objection, relevance, assumes facts not in evidence.

THE COURT: Sustained.

Q. Were you asked to comment regarding the -- were you asked to give your opinion regarding whether or not to pay the fine assessed by the Washington State Department of Labor and Industries?

MR. FULLER: Objection, hearsay.

THE COURT: Sustained.

Q. Chief, after the Washington State Department of Labor and Industries assessed or found the violations and assessed a fine to the Seattle Fire Department, were you contacted by any of your supervisors?

A. Yes, sir.

....

Q. . . . And did Chief Burke want your opinion as to whether or not the Seattle Fire Department should pay the \$25,500 fine that was assessed?

[Objection sustained.]

Except as noted in the above quotations, plaintiff did not attempt to prove all the violations he told the jury were included in the citation, or that the City had been fined, or that the City had elected not to appeal.

The City moved for a mistrial because although plaintiff had told the jury in opening statement about the citation, fine, and the City's failure to appeal, plaintiff had failed to attempt to prove as much during his case in chief. (CP 3909-12) The trial court refused to declare a mistrial or give the City's proposed curative instruction. (6/29/04 RP 203; 6/30/04 RP 121; CP 3942-43, 4045)

**1. The Citation Information Was Inadmissible.**

The trial court committed prejudicial error by denying the City's motion in limine to preclude mention that the Department of Labor & Industries had fined the City for 13 violations of the WAC safety

regulations—some of which plaintiff's own expert admitted were not relevant—and that the City elected not to appeal.

First, in a judicial proceeding, it is the trial judge who decides whether such regulations apply, and the jury which decides whether the regulations were violated and if so, whether such violations constituted negligence. *See Hyatt v. Sellen Constr. Co.*, 40 Wn. App. 893, 898-99, 700 P.2d 1164 (1985) (expert could not testify whether Department of Labor & Industries regulations applied and whether defendant violated them). Allowing the jury to hear that the Department of Labor & Industries had already made these determinations usurps the role of both trial judge and the jury. *See State v. Clausing*, 147 Wn.2d 620, 628-29, 56 P.3d 550 (2002). As one leading authority has explained:

[A] witness should not testify that a violation [of law] did or did not occur. Instead, the applicable statute or rule should be given to the jury in the form of jury instructions, and the jurors themselves decide whether the statute or rule was violated.

5 K. Tegland, WASHINGTON PRACTICE EVIDENCE § 402.14, at 261 (4th ed. 1999) (footnote omitted).

Second, the Labor & Industries citation information (including the fine and the City's failure to appeal) was no different than traffic citations, which have long been held inadmissible to prove negligence. *See Hadley v. Maxwell*, 144 Wn.2d 306, 314 n.3, 27 P.3d 600 (2001). Traffic citations

are inadmissible because they constitute hearsay, are consistent with innocence, and thus simply not probative. *Id.* The same is true with Department of Labor & Industries citations. For example, the City might well have decided not to appeal given its limited resources, not because it did not believe it would succeed.

Third, even if some of the Labor & Industries information were admissible, plaintiff's own expert admitted not all of the safety violations found by the Department related to plaintiff's fall. (6/2/04 PM Pt. 2 RP 43) These violations, even if the other violations were admissible, were totally irrelevant. Because irrelevant evidence is not admissible, ER 402, it is an abuse of discretion to admit it. *See, e.g., Northington v. Sivo*, 102 Wn. App. 545, 549, 8 P.3d 1067 (2000); *Garcia v. Providence Med. Center*, 60 Wn. App. 635, 806 P.2d 766, *rev. denied*, 117 Wn.2d 1015 (1991).

Not only was this evidence inadmissible, plaintiff's mentioning in opening statement all 13 violations, the fine, and the City's failure to appeal, was extremely prejudicial. The jury was essentially told that not only had an agency of the State found the City culpable for plaintiff's accident, but that the City had essentially admitted that that State agency was right. Of course, that went to the heart of the instant matter, thereby depriving the City of a fair trial. A new trial is required.

**2. A Mistrial Should Have Been Granted or a Curative Instruction Given.**

Regardless whether the Labor & Industries citation information was admissible, a mistrial should have been granted or, at the very least, the City's proposed curative instructions should have been given. (6/29/04 RP 203; CP 3942-43, 4045) The mistrial (or the curative instructions) was necessary because plaintiff made no attempt to prove what he told the jury in opening statement: that the Department of Labor & Industries had fined the City \$25,000 for 13 safety violations, which the City elected not to appeal.

The Washington Supreme Court has declared:

[I]n bringing before the jury in an opening statement facts which are entirely irrelevant to the issues to be tried, and deliberately interrogating witnesses concerning a matter which has no bearing upon the issues, may easily be so highly prejudicial as not to be curable by instructions.

*Duval v. Inland Nav. Co.*, 90 Wash. 149, 154, 155 P. 768 (1916). As discussed *supra*, the evidence was inadmissible and should not have been mentioned in opening statement, let alone during questioning of witnesses.

Even if the citation information had been relevant, mentioning it to the jury in opening statement is grounds for a new trial. *Mattson v. Bryan*, 92 Idaho 587, 448 P.2d 201, 206 (1968). *Cups Coal, Co. v. Tennessee River Pulp & Paper Co.*, 519 So.2d 932 (Ala. 1988), provides a helpful comparison. There, plaintiff sued for trespass to property and conversion

of coal. Plaintiff's attorney told the jury in opening statement that the evidence would show that a principal of one of the defendants had been tried and convicted of theft of the coal that was the subject of the tort case.

Under Alabama law, the conviction was inadmissible as substantive evidence that the defendant had committed the acts on which the tort case was based. The evidence was, however, admissible for other purposes. Nevertheless, the court ruled that the mention of the conviction in opening statement was prejudicial and required a new trial:

[T]he uneradicated effect of this remark was to invite the jury to consider the prior conviction as substantive evidence that the defendants committed the acts complained of in these subsequent civil actions. . . . [T]his is a purpose for which the evidence cannot be used . . . .

*Id.* at 934.

*Taake v. WHGK, Inc.*, 228 Ill. App. 3d 692, 592 N.E.2d 1159, *app. denied*, 146 Ill. 2d 653 (1992), also provides a helpful comparison. There defense counsel told the jury in opening statement what one of plaintiff's experts would say. However, plaintiff did not call, and had not intended to call, the expert at trial. The appellate court ruled a new trial was required even though the jury had twice been told that opening statements were not evidence:

[W]e do not believe this can cure the obviously improper and prejudicial effect the remarks here may have had upon the jury. The remarks of counsel, once lodged in the minds

of the jury, could not be erased by an instruction, and allowing the trial to continue permitted defendant to secure the benefit of his statement to the same extent as if he had introduced evidence to prove it.

*Id.* at 700, 592 N.E.2d at 1165-66.

The same is true here. Once plaintiff's counsel mentioned that the Department of Labor & Industries had fined the City for 13 safety violations that the City did not appeal, the genie was out of the bottle and could not be put back in. A mistrial should have been declared. At the very least, one or both of the City's curative instructions should have been given. (CP 3909-12, 3492-43, 4045) Either way, a new trial is required.

**D. ALLOWANCE OF EVIDENCE THAT EVEN PLAINTIFF ADMITTED WAS IRRELEVANT WAS REVERSIBLE ERROR.**

**1. Plaintiff Admitted Many Claimed Safety Violations Were Irrelevant.**

One of plaintiff's experts was John Gablehouse, the fire department safety officer who investigated the accident. (6/17/04 RP 170, 174) He claimed to have found 32 safety violations. (6/21/04 RP 4) The trial court not only allowed him to testify about *all* 32 of them (6/21/04 RP 4-30), but also permitted plaintiff's counsel to repeatedly refer to the 30 or so violations:

Q, Did you answer questions [by the media] regarding the 32 violations of the Seattle Fire Department that—the thirty-two violations that you testified about here today?

[Objection overruled.]

A. Yes, sir, I did.

....

Q. . . . And do you recall what you told Firehouse Magazine?

[Objection sustained.]

Q. Was Firehouse—did the Firehouse Magazine reporter ask you questions regarding the thirty some odd violations of the Seattle Fire Department policy?

[Objection sustained.]

....

Q. Now, you used that document to cite the Seattle Fire Department in your report for one of the thirty-one violations; correct?

A. Yes, I believe so, yes.

(6/21/04 RP 63, 69-70; 6/22/04 RP 38) Indeed, in closing argument, plaintiff's attorney referred to the violations again (7/7/04 RP 92):

He [Chief Gablehouse] prepared this report, turned it into the chief, contained thirty-one violations of departmental policy, some of which are duplicative. But as he testified, he felt that these factors contributed to the fall.

Plaintiff's closing argument was in error—the evidence showed that many of the 32 had nothing to do with plaintiff's accident.<sup>6</sup> *Indeed,*

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<sup>6</sup> For example, Gablehouse testified the manufacture's recommended weight limit for the aerial ladder and NFPA load limits were exceeded, that the tops of ground ladders should have been secured, that an untrained recruit was operating the aerial, that there was a failure to comply with decontamination, respiratory protection, and clothing standards, failure to ensure that participants were wearing hardhats, inadequate tracking of where recruits were located during training, and failure to adequately assist with investigation of plaintiff's accident. (6/21/04 RP 5-6, 8-9, 11-13, 16-20, 180-81) No one claimed these alleged violations had anything to do with plaintiff's accident.

*plaintiff's attorney was well aware of this, having admitted as much in his opening statement (5/24/04 RP 36-37):*

After this incident there was an investigation by the Seattle Fire Department Battallion [*sic*] Chief John Gablehouse, who's the safety officer at the Seattle Fire Department. . . . And his conclusion is that the Seattle Fire Department violated 32 of their own safety rules during this incident.

There was stuff falling from the building that you saw, people weren't wearing hard hats. He didn't look just at Kevin's fall, he looked at the whole four days up at the fire patrol academy. ***So of those 32 violations, only about half of them you could say contributed to Kevin Locke's fall.***

(Emphasis added.) Chief Gablehouse himself conceded some violations did not directly relate to the accident. (6/21/04 RP 181, 185-86) Yet the trial court allowed plaintiff to elicit testimony about all 32 violations.

“Evidence which is not relevant is not admissible.” ER 402. A trial court abuses its discretion when it admits irrelevant evidence. *See, e.g., Northington v. Sivo*, 102 Wn. App. 545, 549, 8 P.3d 1067 (2000) (trial court abused discretion in allowing irrelevant settlement evidence); *Garcia v. Providence Medical Center*, 60 Wn. App. 635, 806 P.2d 766 (trial court abused discretion in allowing evidence of plaintiff's prior abortions as relevant to claim for emotional distress where expert testified prior abortions played no role in current emotional distress), *rev. denied*, 117 Wn.2d 1015 (1991).

The irrelevant evidence was also unfairly prejudicial. For example, Gablehouse's testimony that there was a lack of cooperation and violation of standards in the investigation of plaintiff's accident suggested to the jury that the fire department had engaged in a cover-up. The testimony about other admittedly irrelevant safety violations was designed to convey to the jury the impression that the fire department had recklessly disregarded the safety of its recruits. Because irrelevant, prejudicial evidence was admitted, a new trial is required.

**2. Evidence of What a Safety Officer Would Have Done During the Ladder Drill Was Irrelevant.**

Plaintiff repeatedly introduced evidence that there had been no safety officer appointed during the North Bend training. (*E.g.*, 6/1/04 RP 627-28, 631-32; 6/2/04 PM Pt. 1 RP 21, 26-28) Consequently, it was not surprising that the jury had several questions regarding safety officers. (CP 3675, 3784, 3788, 3964, 3969) However, one of plaintiff's experts testified (6/2/04 PM Pt. 1 RP 26-28):

Q The second factor you mentioned was no safety officer. Could you explain your answer?

A Well, a safety officer is called for in several codes and standards, and the safety officer is a person that has control of the scene. Safety officer, if need be, can stop the fire chief from doing something. Safety officer is in charge of safety at the scene.

....

Q And what is your understanding about whether or not a safety officer was present up at North Bend from June 26th through June 29th, 2000?

A There was not a safety officer present.

....

Q Well, was the safety officer -- in your opinion was the safety officer required to be present for this last drill of the day on June 29th, 2000? What has been referred as this Ozark Rescue Drill?

A *No, the safety officer was required for live fire training, but not just for a ladder drill.*

(Emphasis added.) The expert's opinion that no safety expert was required for the Ozark ladder drill is consistent with WAC 296-305-05501(2)(h), which provides that "[a] safety officer shall be appointed for all live fire training evolutions."

However, even though he had just testified a safety officer was not required for the ladder drill, the expert then testified (6/2/04 PM Pt. 1 RP 28):

Q Well, what good would the safety officer had done if it wasn't required during the Ozark ladder drill?

....

[A.] The safety officer, had there been one, could have, first of all, that late in the day not even run that drill. Said, no, they've done enough, they're dragging. Secondly, once the drill started when there was confusion amongst the recruits on what they were supposed to do could have stopped it. And then there was several parts of the drill that were unsafe and the safety officer could have stopped it.

When that mannequin started coming over the parapet you could see the condition of it. The safety officer could have stopped it right then.

Allowing this testimony was reversible error. The witness had just admitted a safety officer was not required to have been present during the drill where plaintiff was injured. Yet plaintiff then elicited testimony from the expert about what the safety officer “could have” done had one been present. Because a safety officer was not required for the Ozark ladder drill, this testimony was both irrelevant and speculative.

As discussed in subsection C.1 *supra*, admitting irrelevant evidence is an abuse of discretion. Furthermore, expert testimony must be based on the facts of the case. *Hegre v. Simpson Dura-Vent Co.*, 50 Wn. App. 388, 395, 748 P.2d 1131, *rev. denied*, 110 Wn.2d 1024 (1988). Speculative expert testimony should be excluded. *Griswold v. Kilpatrick*, 107 Wn. App. 757, 761, 27 P.3d 246 (2001).

The testimony was also prejudicial because it allowed the jury to find the City liable for not having a safety officer present during the Ozark ladder drill even though one was not required. A new trial is necessary.

**E. ALLOWING EXPERT TESTIMONY THAT CERTAIN WAC REGULATIONS APPLIED AND WERE VIOLATED WAS REVERSIBLE ERROR.**

Chief Gablehouse, one of plaintiff’s experts, was allowed to testify that certain WAC regulations applied to the City and that the City had

violated those regulations. (*See, e.g.*, 6/21/04 RP 14-15, 17-18, 23-24, 77)

As discussed in subsection C.1 *supra*, this was error, since deciding whether a regulation applies to a given situation is a duty for the court and deciding whether the regulation has been violated is a duty for the jury.

**F. INSTRUCTION NO. 13 AND RELATED EVIDENCE ALLOWED THE JURY TO APPLY AN INAPPLICABLE WAC REGULATION.**

Plaintiff claimed the recruits had not been given sufficient rest breaks on the day of the accident. Instruction No. 13 told the jury that an administrative rule required that employers give employees certain rest periods. (CP 4072) The administrative rule referenced was WAC 296-126-092. WAC 296-126-002 defines “employee” as “an employee who is employed in the business of his employer” and “employer” as “any person, firm, corporation, partnership, business trust, legal representative, or other business entity which engages in any business, industry, profession, or activity in this state and employs one or more employees, unless exempted by chapter 49.12 RCW or these rules.”

WAC 296-126-092 was adopted pursuant to RCW ch. 49.12. WAC 296-126-001. But RCW 49.12.005(3)(a) provides that “employer” “does not include any . . . municipal or quasi-municipal corporation.” The City of Seattle is a municipal corporation. Therefore, WAC 296-126-092 does not apply.

WAC 296-305, which sets forth fire fighter safety standards, confirms WAC 296-126-092 does not apply. WAC 296-305-01003(6) states:

The provisions of this chapter shall be supplemented by the provisions of the general safety and health standards of the department of labor and industries, chapters 296-24 (including part G-2, Fire protection), 296-62, and 296-800 WAC. . . .

WAC 296-126, and specifically, WAC 296-126-092, are not mentioned. For that reason as well, WAC 296-126-092 does not apply. *See McGahuey v. Hwang*, 104 Wn. App. 176, 182, 15 P.3d 672, *rev. denied*, 144 Wn.2d 1004 (2001).

Because Instruction No. 13 essentially told the jury that WAC 296-126-092 did apply, giving Instruction No. 13 was error.

For the same reasons, allowing evidence of WAC 296-126-092 violations was erroneous. (6/21/04 RP 14-15) Indeed, this evidence was also impermissible hearsay as the witness who gave it, Chief Gablehouse, said he had had to call the Department of Labor & Industries to find out whether the WAC applied. (6/21/04 RP 14-15) Although experts may, in an appropriate situation, rely on hearsay, reliance on what a lay person says the law is is improper. ER 703; see subsection C.1 *supra*. A new trial is required.

**G. THE BURDEN OF PROOF INSTRUCTIONS WERE ERRONEOUS.**

Even if plaintiff qualifies as a LEOFF member entitled to sue the City under RCW 41.26.281, that statute provides he can recover only the excess over “the amount received or receivable.” Under workers’ compensation law, the City would have to pay future medical expenses required for plaintiff to reach maximum medical improvement, even if incurred after the claim had been closed. (6/29/04 RP 107, 119)

Instruction No. 18 allowed the jury to award future medical expenses. (CP 4077-78) But under RCW 41.26.281, any such future medical expenses payable by the City were part of the “amount . . . receivable” that the City does not have to pay as part of this lawsuit. *Mooney v. Eastern Associated Coal Corp.*, 174 W. Va. 350, 326 S.E.2d 427, 430-31 (1984).

Instruction No. 18 properly told the jury that “[t]he burden of proving damages rests upon the plaintiff.” But Instruction No. 20 told the jury that “[t]he burden of proving the benefits received and receivable rests upon the defendant City.” (CP 4078, 4080)

The two instructions were inconsistent since Instruction No. 18 said plaintiff had the burden of proving future medical expenses, but Instruction No. 20 placed that burden on the City. It is prejudicial error to give irreconcilable instructions upon a material issue. *Smith v. Rodene*, 69

Wn.2d 482, 486, 418 P.2d 741, 423 P.2d 934 (1966). The issue was material since the City was liable, if at all, only for the excess plaintiff received or would receive in workers' compensation benefits. RCW 41.26.281.

Even if the two instructions were not inconsistent, a new trial is required. The burden of proving the amount received and receivable should have been placed on plaintiff.

Pursuant to RCW 41.26.281, plaintiff had a cause of action against the City *only* “for any excess of damages over the amount received or receivable under this chapter.” The amount received or receivable under RCW ch. 41.26 was thus an element of his cause of action. A plaintiff has the burden of proving all elements of his or her cause of action. *Jeffers v. City of Seattle*, 23 Wn. App. 301, 311, 597 P.2d 899 (1979).

Moreover plaintiff is the *only party who could shoulder the burden* of providing the “amount received or receivable” since plaintiff—like all other plaintiffs—had the burden of proving his future economic damages including future medical expenses. But if, as plaintiff claims, he was a “member” qualified to sue under RCW 41.26.281, his future medical expenses covered by workers' compensation benefits would be an “amount . . . receivable” under RCW 41.26.281. Since plaintiff had the burden of proving such future medical expenses as damages, the City

could not at the same time have the burden of proving them as part of the “amount . . . receivable” under RCW 41.26.281. A new trial is required.

**H. THE JURY’S FAILURE TO FOLLOW INSTRUCTIONS REQUIRES A NEW TRIAL.**

The special verdict form contained the following question:

What do you find to be the total amount received or receivable by Kevin Locke or on his behalf, under the Law Enforcement Officers’ & Fire Fighters’ Retirement System, Chapter 41.26 RCW, *including the stipulated amount of \$138,980?*

(CP 4090) (emphasis added). The jury answered, “\$24,133.00.” (CP 4090) Clearly, the jury failed to follow the instruction’s directive *to include* the stipulated amount of \$138,980. A new trial is required.

*Nichols v. Lackie*, 58 Wn. App. 904, 795 P.2d 722 (1990), *rev. denied*, 116 Wn.2d 1024 (1991), provides a helpful comparison. There the jury awarded \$2,217.65, even though they had been instructed that if they found for plaintiff, their damages had to include \$3,988.19 in medical care. Finding the jury had failed to follow instructions, the Court of Appeals ordered a new trial.

The instant case is on all fours with *Nichols*. Here, the jury was instructed that if it found for plaintiff, it had to determine the total amount received or receivable by him under LEOFF *including* \$138,980. The jury did not include the \$138,980, instead finding the amount received or receivable was only \$24,133. As will be discussed, the \$24,133 is all the

more suspect given that the jury awarded \$514,000 in future economic damages, the great majority of which must have been for future medical care. Under these circumstances, reversal is required. *See also Tuthill v. Palermo*, 14 Wn. App. 781, 545 P.2d 588 (new trial required where jury returned \$24,953.28 general verdict and special verdict under each of three theories for \$24,953.28), *rev. denied*, 87 Wn.2d 1002 (1976).

**I. THE FUTURE ECONOMIC DAMAGES AWARD IS UNSUSTAINABLE.**

**1. The \$514,000 Future Economic Damages Award Was Not Supported by Substantial Evidence.**

A jury verdict must be supported by “substantial evidence.” *Canon, Inc. v. Federal Ins. Co.*, 82 Wn. App. 480, 486, 918 P.2d 937 (1996), *rev. denied*, 131 Wn.2d 1002 (1997). Evidence is “substantial” if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise. *Guijosa v. Wal-Mart Stores, Inc.*, 144 Wn.2d 907, 915, 32 P.3d 250 (2001). As will be discussed, the \$514,000 future economic damages award is not supported by substantial evidence.

Before the case went to the jury, the parties stipulated to dismissal of plaintiff’s claims for future earnings and impairment to future earnings capacity. (CP 3816-17) The jury was instructed, over the City’s exception, that if it found for plaintiff, it should consider “[t]he reasonable value of necessary medical care, treatment and services *with reasonable probability* to be experienced in the future” and “[t]he reasonable value of

a business lost.” (CP 4077) (emphasis added). The jury awarded \$514,000 in future economic damages. (CP 4090)

As will be discussed, there was a complete absence of substantial evidence to support this award. The evidence showed that plaintiff was entitled to no more than \$49,000 in lost future business and \$1,440 in future medical treatment (physical therapy).

Plaintiff’s business valuation expert testified that plaintiff’s loss of his fledgling brewery business amounted to \$49,000, \$37,000 more than the defense expert’s \$12,000 valuation. (6/14/04 RP 220; 6/29/04 RP 26) Plaintiff’s physical therapist testified plaintiff should have 2-3 more months of physical therapy every other week followed by 2-3 more months of such therapy once a month, at a cost of \$160 per visit, for a maximum total of \$1,440. (6/7/04 PM RP 50-51)

The business lost (\$49,000) and the future physical therapy costs (\$1,440) totaled \$50,440. The jury, however, awarded \$463,560 more, for a total of \$514,000 in future economic damages.<sup>7</sup> In contrast, plaintiff’s past medical expenses and wage loss totaled only \$147,780. (CP 4090)

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<sup>7</sup> In addition, in answer to the question of what was the total amount received or receivable by plaintiff under LEOFF, including the stipulated amount of \$138,980, the jury answered \$24,133. Although this amount is suspect, given that the jury did not include the \$138,980 it was instructed to include, *see* subsection H *supra*, if this court were to treat the \$24,133 as future medical expenses, there would still be \$375,444 of the \$514,000 unsupported by the evidence.

Significantly, plaintiff's other medical witnesses not only failed to testify that there was, as Instruction No. 18 required, "reasonable probability" plaintiff would incur necessary medical care, treatment or services in the future, they admitted they could not so testify. For example, plaintiff's orthopedic surgeon admitted he could not testify on a more probable than not basis whether plaintiff's arthritis would get worse in the future. He also testified that plaintiff's 10 percent scoliosis was "pretty readily" tolerated, so he did not have an opinion on whether it would cause long-term symptoms. (5/24/04 RP 114, 147, 154-56) When asked whether arthritis could be cured, plaintiff's internist mentioned knee replacement, but admitted no one had suggested knee replacement was in plaintiff's future. (6/2/04 AM RP 824, 839, 888)

Similarly, one defense expert testified plaintiff had no need for future medical treatment. (7/1/04 AM RP 104) Another said that although there was a possibility he might eventually need a subtalar fusion, this was not probable. (7/1/04 PM Pt. 1 RP 4-5)

Even plaintiff's attorneys admitted his need for future medical treatment was speculative. Just before plaintiff took the stand, his attorneys moved to preclude cross-examination that the amount received or receivable under RCW 41.26.281 would be more than the \$138,000 already paid by the City:

THE COURT: I'm asking you, I take it, that that was the motion?

MR. O'BRIEN: Yes.

THE COURT: To preclude suggesting in cross examination that he has received more than \$138,000, that's the only issue right now.

MR. O'BRIEN: It is also—your Honor, [Mr. Fuller] keeps talking about this received or receivable under a separate statute, under LEOFF that Mr. Locke is not entitled to, he has not made application for, and Lieutenant Wyatt said he is not eligible for. *And I don't want anything around, "You're anticipating getting something in the future," it's pure speculation at this point.*

(6/23/04 RP 16) (emphasis added). Under these circumstances, more than half of the \$514,000 future damages award is not supported by substantial evidence and must be reversed.

**2. The City Is Not Required to Pay Damages for Future Medical Treatment Covered by Workers' Compensation.**

Even if the \$514,000 future economic damages award were supported by the evidence, the City was not required to pay this award to the extent it included damages for future medical treatment covered by workers' compensation. RCW 41.26.281; *Cecil v. D&M Inc.*, 205 W. Va. 162, 517 S.E.2d 27, 36 (1999) (employer not required to pay that part of verdict representing future medical expenses where plaintiff was entitled to recover "excess of damages over the amount received or receivable" under workers' compensation statute). This is because under RCW

41.26.281, plaintiff could recover, if at all, only the excess above the total amount “received or receivable” by plaintiff in workers’ compensation benefits.

As discussed in subsection H *supra*, the jury did not follow instructions when it purported to determine the total amount “received or receivable.” Moreover, even if this court were to determine that the jury’s finding of \$24,133 as the amount “received or receivable” under LEOFF must stand, that amount bears no resemblance to the \$514,000 the jury awarded in future economic damages. As discussed *supra*, of this amount, only \$49,000 could be for future lost business, so the \$465,000 balance must have been for future medical treatment.

**J. FUTURE ECONOMIC DAMAGES MUST BE PAID IN INSTALLMENTS.**

Even if this court were to uphold the \$514,000 future economic damages award, the trial court erred in entering judgment that included that amount in a lump sum. After the verdict, the City asked that the judgment provide for periodic payment of these future economic damages, as authorized by RCW 4.56.260(1). (CP 4210-15) That statute provides:

In an action based on fault seeking damages for personal injury or property damage in which a verdict or award for future economic damages of at least one hundred thousand dollars is made, the court . . . *shall*, at the request of a party, enter a judgment which provides for the periodic payment in whole or in part of the future economic damages. . . .

(Emphasis added.) “Shall” is mandatory. *State v. A.M.R.*, 147 Wn.2d 91, 96, 51 P.3d 790 (2002); *Roberts v. King County*, 107 Wn. App. 806, 815, 27 P.3d 1267 (2001), *rev. denied*, 145 Wn.2d 1024 (2002). The refusal to order periodic payments at the City’s request was error. (CP 4353)

It is true that *Esparza v. Skyreach Equip., Inc.*, 103 Wn. App. 916, 15 P.3d 188 (2000), *rev. denied*, 144 Wn.2d 1004 (2001), ruled that a trial court did not abuse its discretion in refusing to convert a future economic damages award to periodic payments where the defendant failed to notify the plaintiff of its intention to request periodic payments until after the jury returned its verdict. Relying primarily on *Green v. Franklin*, 190 Cal. App. 3d 93, 235 Cal. Rptr. 312, *app. dismissed*, 484 U.S. 960 (1987), *Esparza* ruled that a defendant should give notice of its intent to request periodic payments ““at the very least, before a plaintiff’s economic experts are called to testify.”” 103 Wn. App. at 943.

*Esparza* should not apply. First, even if the City had given notice before plaintiff’s economic expert testified, it would not have made a difference. Plaintiff’s economic expert testified *after* plaintiff’s health care providers. (5/24/04 RP 91-192; 6/2/04 AM RP 823-912; 6/7/04 AM RP 67-96; 6/7/04 PM RP 4-125; 6/8/04 RP 168-218; 6/14/04 RP 210-53) Other than his physical therapist, who said plaintiff needed \$1,440 worth of physical therapy, none of his health care providers claimed he had need

for future medical treatment, let alone what such treatment would cost. Absent dollar figures for future medical treatment, the economic expert could not have testified meaningfully about present and future values.

Second, the City could not have reasonably anticipated plaintiff would seek more than \$100,000 in future economic damages, as the periodic payments statute requires. Although plaintiff's interrogatory answers claimed unspecified damages for future medical treatment, he did not explain what this treatment would be or how much it would cost. Instead, he said he would supplement his interrogatories. The record shows no evidence of such supplementation. (CP 4312-13, 4325) Indeed, although plaintiff's early proposed instructions would have allowed the jury to find future medical expenses, by July 2, near the end of trial, plaintiff was proposing a special verdict form that allowed recovery of only past damages. (CP 3949, 4338-39)

Under these circumstances, the City could reasonably assume that plaintiff did not intend to seek future medical damages of at least \$100,000. Consequently, there was no reason for it to give notice of intent to request periodic payments before the verdict was returned.

Third, the City respectfully urges this court to reconsider *Esparza*. RCW 4.56.260(1) does not impose an advance notification requirement.

Instead, it says the trial court “*shall*, at the request of a party” require periodic payments. As discussed *supra*, “shall” is mandatory.

Moreover, the California Supreme Court depublished *Green*, the primary California case relied upon by *Esparza*. Unpublished Washington Court of Appeals decision cannot be cited. See *Johnson v. Allstate Ins. Co.*, 126 Wn. App. 510, 519, 108 P.3d 1273 (2005). Washington courts should not decide cases based on a depublished California Court of Appeal case.

## VI. CONCLUSION

This suit should have never gone to trial. Plaintiff was not a “member” as required by RCW 41.26.281, which, in any event, is unconstitutional. Moreover, the City did not waive its sovereign immunity, and plaintiff consented to the risks of being a fire professional rescuer when he entered drill school.

Even if this court does not dismiss as a matter of law, the City was deprived of a fair trial. The jury was allowed to reach a verdict based on WAC regulations that did not apply and evidence even plaintiff admitted was irrelevant. The verdict was tainted by references to the Department of Labor & Industries citations, fines, and the City’s failure to appeal. And not only was the jury improperly precluded from deciding whether plaintiff assumed the risk, it was improperly instructed that the burden of

proving “the amount received or receivable” was the City’s. The jury failed to include even the stipulated amount in that amount.

Under these circumstances, this court should reverse and either remand for entry of judgment in the City’s favor or for a new trial.

**DATED this 23<sup>rd</sup> day of June 2005.**

**REED McCLURE**

By *Pamela A Okano*  
**Pamela A. Okano**      **WSBA #7718**  
**Attorneys for Appellant**

**THOMAS A. CARR**  
**Seattle City Attorney**

By *Pamela A Okano*  
**Gregory D. Fuller, WSBA #7915**  
**Assistant City Attorney, Attorney for**  
**Appellant**

*per telephone  
authorization*

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**FILED**

KING COUNTY, WASHINGTON

JUL 08 2004

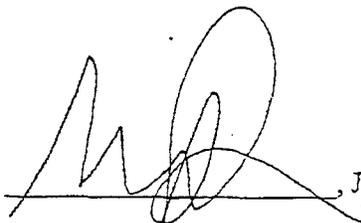
SUPERIOR COURT CLERK  
BY GLENNA J. JONES  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

KEVIN LOCKE and TORI LOCKE, )  
 )  
 Plaintiffs )  
 )  
 vs. )  
 )  
 CITY OF SEATTLE, )  
 )  
 Defendant. )

No. 02-2-07237-2 SEA

COURT'S INSTRUCTIONS TO THE JURY

 Judge

Dated this 7 day of July, 2004

**ORIGINAL**

Instruction No. 6

(1) The plaintiff claims that the City of Seattle was negligent for not providing training supervision and not using reasonable safeguards regarding the physical condition of firefighting recruits and that such negligence was a proximate cause of injuries and damage to plaintiffs. The City of Seattle of Seattle denies this claim.

(2) The City of Seattle claims that plaintiff Kevin Locke was contributorily negligent and that such negligence was a proximate cause of his own injuries and damage. Plaintiff denies these claims.

(3) The City of Seattle further denies the extent of the plaintiff Kevin Locke's claimed damage.

The foregoing is merely a summary of the claims of the parties. You are not to consider the summary as proof of the matters claimed; and you are to consider only those matters that are admitted or are established by the evidence. These claims have been outlined solely to aid you in understanding the issues.

Instruction No. 13

An administrative rule provides that:

(1) Employees shall be allowed a rest period of not less than 10 minutes, on the employer's time, for each 4 hours of working time. Rest periods shall be scheduled as near as possible to the midpoint of the work period. No employee shall be required to work more than three hours without a rest period.

(2) Where the nature of the work allows employees to take intermittent rest periods equivalent to 10 minutes for each 4 hours worked, scheduled rest periods are not required.

Instruction No. 17

The plaintiff has the burden of proving each of the following propositions:

First, that the City of Seattle acted, or failed to act, in one of the ways claimed by the plaintiff and that in so acting or failing to act, the City of Seattle was negligent;

Second, that the plaintiff was injured;

Third, that the negligence of the City of Seattle was a proximate cause of the injury to the plaintiff.

The City of Seattle has the burden of proving both of the following propositions:

First, that the plaintiff acted, or failed to act, in one of the ways claimed by the City of Seattle, and that in so acting or failing to act, the plaintiff was negligent;

Second, that the negligence of the plaintiff was a proximate cause of the plaintiff's own injuries and was therefore contributory negligence.

Instruction No. 20

Because Mr. Locke was acting within the scope of his employment when he was injured, the City was required to pay him Workers' Compensation benefits. Mr. Locke may recover from the City of Seattle damages in excess of what he received or ~~will~~<sup>may</sup> receive in the future from the City. The benefits Mr. Locke received include time loss compensation and payment of his medical bills. Benefits Mr. Locke ~~will~~<sup>may</sup> receive in the future from the City include a permanent partial disability award and future medical treatment. You are not bound by the limitations of the benefits Mr. Locke is entitled to receive from the City of Seattle Workers' Compensation unit.

You will be asked to determine the amount of the benefits received and receivable by Mr. Locke.

The burden of proving the benefits received and receivable rests upon the defendant City of Seattle and it is for you to determine, based upon the evidence, whether any particular element has been proved by a preponderance of the evidence.

**FILED**

IN THE SUPERIOR COURT OF THE STATE OF KING COUNTY, WASHINGTON  
WASHINGTON FOR KING COUNTY

JUL 13 2004

KEVIN LOCKE and TORI )  
LOCKE, )  
Plaintiffs, )  
vs. )  
CITY OF SEATTLE, )  
Defendant. )  
\_\_\_\_\_ )

SUPERIOR COURT CLERK  
BY GLENNA J. JONES  
DEPUTY

No.02-2-07237-2 SEA

SPECIAL VERDICT FORM

We, the jury, answer the questions submitted by the court as follows:

QUESTION 1: Was the defendant negligent?

ANSWER: YES (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 1, sign this verdict form and notify the bailiff. If you answered "yes" to Question 1, answer Question 2.)

QUESTION 2: Was the negligence of the defendant a proximate cause of injury to the plaintiff, Kevin Locke?

ANSWER: YES (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 2, sign this verdict form and notify the bailiff. If you answered "yes" to Question 2 as to the defendant, answer Question 3.)

**ORIGINAL**

QUESTION 3: What do you find to be the total amount of plaintiff's damages, if any?

ANSWER: Past economic damages \$ 8,800.<sup>00</sup>  
Future economic damages \$ 514,000.<sup>00</sup>  
Non-economic damages \$ 1,320,000.<sup>00</sup>  
Total \$ 1,842,800.<sup>00</sup>

(INSTRUCTION: If you answered Question 3 with any amount of money, answer Question 4. If you found no damages, sign this verdict form and notify the bailiff.)

QUESTION 4: What do you find to be the total amount received or receivable by Kevin Locke or on his behalf, under the Law Enforcement Officers' and Fire Fighters' Retirement System, Chapter 41.26 RCW, including the stipulated amount of \$138,980?

ANSWER \$ 24,133.<sup>00</sup>

(INSTRUCTION: Proceed to Question 5)

QUESTION 5: Was the plaintiff also negligent?

ANSWER: YES (Write "yes" or "no")

(INSTRUCTION: If you answered "no" to Question 5, sign this verdict form and notify the bailiff. If you answered "yes" to Question 5, answer Question 6.)

QUESTION 6: Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?

ANSWER: YES (Write "yes" or "no")

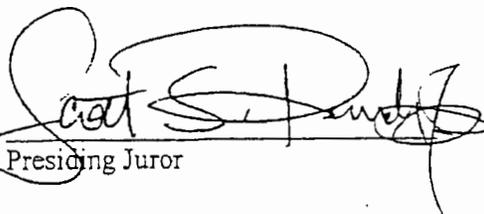
(INSTRUCTION: If you answered "no" to Question 6, sign this verdict form and notify the bailiff. If you answered "yes" to Question 6, answer Question 7.)

QUESTION 7: Assume that 100% represents the total combined negligence that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the plaintiff's negligence?

ANSWER: 10 %

*(INSTRUCTION: Sign this verdict form and notify the bailiff.)*

DATE: 7/13/2004

  
Presiding Juror

The Honorable Michael Spearman  
Trial Date: May 17, 2004

**FILED**

KING COUNTY, WASHINGTON

**ORIGINAL**

JUL 06 2004

SUPERIOR COURT CLERK  
BY GLENNA J. JONES  
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR KING COUNTY

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

Plaintiffs, )

vs. )

THE CITY OF SEATTLE, a municipal )  
corporation, )

Defendants. )

No. 02-2-07237-2SEA

DEFENDANT CITY OF SEATTLE'S  
SECOND SUPPLEMENTAL PROPOSED  
JURY INSTRUCTIONS AND SPECIAL  
VERDICT FORM

[NUMBERED AND CITED]

Defendant City of Seattle submits its Second Supplemental Proposed Jury Instructions and Special Verdict Form their proposed jury instructions, along with its proposed special verdict form.

Numbered copies of the City' first supplemental proposed instructions, and original proposed instructions (included those withdrawn at this time) as well as new proposed instructions together with the special verdict form are all attached hereto.

Said defendants reserve the right to submit additional instructions. Such instructions may become necessary depending on how the Court rules on various issues now that the parties

DEFENDANT CITY OF SEATTLE'S SECOND SUPPLEMENTAL  
PROPOSED JURY INSTRUCTIONS AND SPECIAL VERDICT  
FORM - 1

Thomas A. Carr  
Seattle City Attorney  
600 Fourth Avenue, 4th Floor  
Seattle, WA 98101  
Page 3973  
(206) 684-3200

Instruction No. 42

It is a defense to an action for personal injury that the person injured impliedly assumed a specific risk of harm.

A person impliedly assumes a risk of harm, if that person knows of the specific risk associated with a course of conduct or an activity, understands its nature, voluntarily chooses to accept the risk by engaging in that conduct or activity, and impliedly consents to relieve the defendant of a duty of care owed to the person in relation to the specific risk.

WPI (4th) 13.03 - Assumption of Risk—Implied Primary

- Given
- Given as Modified
- Refused
- Withdrawn

Instruction No. 46

(1) The plaintiff claims that the defendant was negligent in one or more of the following respects:

- A. not affording plaintiff adequate opportunity to rest and rehabilitate between evolutions given the weather conditions;
- B. not providing plaintiff with an adequate mannequin for use in the Ozark Rescue Drill; and
- C. not training plaintiff to rescue a mannequin from a tormentor poles ladder.

The plaintiff claims that one or more of these acts was a proximate cause of injuries and damage to plaintiff. The defendant denies these claims.

(2) In addition, the defendant claims as an affirmative defense that the plaintiff was contributorily negligent in one or more of the following respects:

- A. not limiting his physical excursion while attempting a mannequin rescue so that plaintiff could maintain his hold on the ladder;
- B. abandoning the knee in the groin technique plaintiff was taught to safely handle unconscious victims during ladder rescues;
- C. undertaking to rescue a mannequin when he was too tired to do so safely;
- D. not communicating with other recruits that he was afraid of falling, and that he was in the process of attempting to drop the mannequin; and
- E. not maintaining a stable footing on the ladder from which he fell.

The defendant claims that one or more of these acts was a proximate cause of plaintiff's own injuries and damage. The plaintiff denies these claims.

(3) In addition, the defendant claims and plaintiff denies the following affirmative defenses:

A. that plaintiff's accident arose out of condition(s), risk(s) or danger(s) of which he had specific knowledge and to which plaintiff expressly and impliedly consented, and that the risk(s) of injury or harm from such were voluntarily, knowingly, impliedly, and expressly assumed by plaintiff thereby barring and/or reducing proportionately plaintiff's recovery, if any; and

B. the plaintiff's alleged damages and/or injuries were proximately caused by the negligent actions and/or omissions of third persons over whom defendant had no control, including but are not limited to the State of Washington, the Washington State Patrol, and employees thereof.

(4) The defendant further denies that plaintiff was injured or sustained damage respecting his business.

(5) The defendant further denies the nature and extent of plaintiff's claimed injuries and damages.



Defendant City of Seattle : \_\_\_\_\_  
 Non-Party Washington State : \_\_\_\_\_  
 Non-Party John Cameron : \_\_\_\_\_  
 Non-Party Tracy Caldwell : \_\_\_\_\_  
 Non-Party Rchard Smith : \_\_\_\_\_

(INSTRUCTION: If you answered "no" to Question 2 as to the defendant, sign this verdict form and notify the bailiff. If you answered "yes" to Question 2 as to the defendant, answer Question 3.)

QUESTION 3: Was such negligence a proximate cause of injury to the plaintiff?

(Answer "yes" or "no" after the name of the defendant and each non-party, if any, found negligent by you in Question 2.)

| ANSWER:                             | Yes   | No    |
|-------------------------------------|-------|-------|
| Defendant <u>City of Seattle</u> :  | _____ | _____ |
| Non-Party <u>Washington State</u> : | _____ | _____ |
| Non-Party <u>John Cameron</u> :     | _____ | _____ |
| Non-Party <u>Tracy Caldwell</u> :   | _____ | _____ |
| Non-Party <u>Rchard Smith</u> :     | _____ | _____ |

(INSTRUCTION: If you answered "no" to Question 3 as to the defendant, sign this verdict form and notify the bailiff. If you answered "yes" to Question 3 as to the defendant, answer Question 4.)

QUESTION 4: What do you find to be the amount of plaintiff's damages, if any, in excess of the stipulated \$138,980.00 already paid by defendant to Kevin Locke or on his behalf, or in excess of any future payments receivable under the Law Enforcement Officers' and Fire Fighters'

Retirement System, Chapter 41.26 RCW? Do not consider the issue of contributory negligence, if any, in your answer and do not add in the stipulated amount already paid.

ANSWER (a) Past Economic Damages \$ \_\_\_\_\_

ANSWER (b) Past Non-Economic Damages \$ \_\_\_\_\_

TOTAL \$ \_\_\_\_\_

*(INSTRUCTION: If you answered Question 4 with any amount of money, answer Question 5. If you found no damages in Question 4, sign this verdict form and notify the bailiff.)*

QUESTION 5: Was the plaintiff also negligent?

ANSWER: \_\_\_\_ (Write "yes" or "no")

*(INSTRUCTION: If you answered "no" to Question 5, sign this verdict form and notify the bailiff. If you answered "yes" to Question 5, answer Question 6.)*

QUESTION 6: Was the plaintiff's negligence a proximate cause of the injury or damage to the plaintiff?

ANSWER: \_\_\_\_ (Write "yes" or "no")

*(INSTRUCTION: If you answered "no" to Question 6, sign this verdict form and notify the bailiff. If you answered "yes" to Question 6, answer Question 7.)*

QUESTION 7: Assume that 100% represents the total combined fault that proximately caused the plaintiff's injury. What percentage of this 100% is attributable to the plaintiff's negligence, what percentage of this 100% is attributable to the negligence of the defendant, and what percentage of this 100% is attributable to each non-party whose negligence was found by you in

Question 3 to have been a proximate cause of the injury to the plaintiff? Your total must equal 100%.

ANSWER:

|              |                         |   |      |
|--------------|-------------------------|---|------|
| To plaintiff | <u>Kevin Locke</u>      | : | ___% |
| Defendant    | <u>City of Seattle</u>  | : | ___% |
| Non-Party    | <u>Washington State</u> | : | ___% |
| Non-Party    | <u>John Cameron</u>     | : | ___% |
| Non-Party    | <u>Tracy Caldwell</u>   | : | ___% |
| Non-Party    | <u>Rchard Smith</u>     | : | ___% |
| TOTAL:       |                         |   | 100% |

*(INSTRUCTION: Sign this verdict form and notify the bailiff.)*

DATE: \_\_\_\_\_

\_\_\_\_\_  
Presiding Juror

WPI (4th) 45.23 - Special Verdict Form-Personal Injury Wrongful Death-Single Defendant-Contributory Negligence-Empty Chairs (Modified using WPI (3<sup>rd</sup>) 45.23)  
RCW 41.26.281

Given  
 Given as Modified  
 Refused  
 Withdrawn

Instruction No. 63

You are instructed to disregard any and all references to any Washington State, Department of Labor and Industries WISHA citations or fines in the evidence in this case, and to disregard any and all statements relating to whether any such citations or fines were appealed or paid by the City of Seattle.

Such information is entirely irrelevant to your deliberations herein, and you shall draw no inferences or conclusions concerning such information during your deliberations in this case.

*Snyder v. Sotta*, 3 Wn.App. 190, 192-93, 473 P.2d 213 (1970); see also *State v. Rinkes*, 70 Wash.2d 854, 862, 425 P.2d 658 (1967)