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No. 79381-6

(Court of Appeals No. 57725-5-1)

(King County No. 05-2-05740-8)

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

MARGARET A. LINDELL, Personal Representative for the Estate of
GARY R. LINDELL, deceased,

Respondent,

vs.

THE CITY OF SEATTLE, a municipal corporation

Petitioner.

BRIEF OF APPELLANT

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LEWIS H. ORLAND & KARL B. TEGLAND, *WASHINGTON PRACTICE*,
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I. NATURE OF THE CASE

This wrongful death action arises out of the death of retired Seattle Police Officer Gary Lindell on March 13, 2002. Plaintiff alleges that decedent's death resulted from sequelae of injuries sustained in a fall from Officer Lindell's service horse on May 4, 1999, during a training exercise with the Seattle Police Mounted Patrol Unit. Plaintiff brings this action for negligence against Officer Lindell's employer, the City of Seattle ("the City"). (CP 657-63)

Officer Lindell received, and his widow continues to receive, benefits under the workers' compensation law that applies to police and fire personnel (the Law Officers' and Fire Fighters' Retirement System Act ("LEOFF"), RCW Chapter 41.26). (CP 160-63) LEOFF contains standard workers' compensation immunity language. RCW 41.26.270. However, the following section (RCW 41.26.281) then contains an exception which authorizes suit for intentional and negligent conduct for damages above the benefits recoverable under the chapter. The exception for negligence eliminates the immunity.

The City challenges the right to sue provisions of LEOFF (RCW 41.26.281) based upon sovereign immunity and constitutional provisions. The City submits that LEOFF employers are entitled to the same quid pro quo of immunity from suit that all other employers are constitutionally

entitled to when they are compelled to fund a no-fault workers' compensation system.

II. ASSIGNMENTS OF ERROR

The trial court erred in:

1. Denying the City's motion for summary judgment on constitutional issues (CP 1545-49); and
2. Denying the City's motion for summary judgment on sovereign immunity (CP 1545-49).

III. ISSUES PRESENTED

1. Does LEOFF violate the Washington Constitution, article I, section 12, by compelling LEOFF employers to fund workers' compensation benefits without the constitutionally mandated quid pro quo of protection from suit?
2. Does LEOFF violate sovereign immunity by creating a cause of action against public employers that does not and cannot exist against private employers?

IV. STATEMENT OF THE CASE

A. Statement of Relevant Facts

LEOFF, RCW Chapter 41.26, was originally enacted in 1969. (1969 WASH. LAWS EX. SESS. CH. 209). The purpose of the chapter was "to provide for an actuarial reserve system for the payment of death,

disability, and retirement benefits to law enforcement officers and fire fighters . . .” RCW 41.26.020. However, LEOFF also includes workers’ compensation type benefits. RCW 41.26.150. From its inception, LEOFF required that LEOFF employers provide funding. 1969 WASH. LAWS EX. SESS. CH. 209, § 8(2) (requiring employer contributions); RCW 41.50.110.

LEOFF was amended in 1971 to, among other things, add the express immunity language of RCW 41.26.270 (1971 WASH. LAWS EX. SESS. CH. 257 § 14) and the exceptions in what is now RCW 41.26.281 (1971 WASH. LAWS EX. SESS. CH. 257 § 15).

LEOFF was amended in 1977 to create a two-tiered system. (1977 WASH. LAWS EX. SESS. CH. 294). Plan I includes personnel in the system prior to October 1, 1977. RCW 41.26.030(28). Plan II includes personnel who entered the system October 1, 1977, or later. RCW 41.26.030(29). Personnel who were hired prior to March 1, 1970 (and retired after March 1, 1970) are entitled as well to benefits under the Police Relief and Pensions in First Class Cities Act, RCW 41.20 (hereinafter “pre-LEOFF”). In other words, these individuals receive the best of both pre-LEOFF and LEOFF I. (CP 160-163)

Plan I members continue to receive all benefits, including workers’ compensation type benefits under LEOFF. Plan II members are treated

differently. LEOFF provides that Plan II members receive workers' compensation benefits in RCW Title 51. RCW 41.26.480.

LEOFF was amended in 1985 to separate the provisions for duty and non-duty disability LEOFF Plan I benefits to clarify that duty disability benefits are to be treated as workers' compensation benefits. (1985 WASH. LAWS REG. SESS. CH. 102) This resolved a tax issue resulting from the inclusion of non-duty disability benefits in LEOFF.

Because Officer Lindell was a sworn Seattle police officer prior to March 1, 1970, he was covered under both Plan I of LEOFF and pre-LEOFF. (CP 161)

Like RCW Title 51 does for other workers, LEOFF provides for "sure and certain" benefits for police and fire personnel killed, disabled or injured at work.¹ (CP 160-61.) Like RCW Title 51, LEOFF compels LEOFF employers to provide funding (1969 WASH. LAWS EX. SESS. CH. 209 § 8; RCW 41.50.110) and members are entitled to benefits whether or not the employer was negligent. RCW 41.26.270.

Unlike RCW Title 51, LEOFF authorizes members to sue in negligence for injuries above those received or receivable under LEOFF. RCW 41.26.281. Thus, members are always entitled to receive the sure

and certain LEOFF or RCW Title 51 benefits for injuries and death – plus they can sue in tort for negligence for any and all additional damages.

B. Statement of Procedure

The City moved for summary judgment challenging, among other things, the LEOFF statute on constitutional and sovereign immunity principles. (CP 164-205.) The trial court denied the City’s motion for summary judgment. (CP 1545-49.) The trial court certified the challenges to the LEOFF statute to Division I pursuant to RAP 2.3(B)(4). (CP 1538-39.) The City moved for discretionary review by Division I. Similar challenges to the LEOFF statute were pending in Division I, in *Locke v. City of Seattle*, No. 55256-2-I. On June 19, 2006, Division I issued its opinion in *Locke v. City of Seattle*, 133 Wn. App. 696, 137 P.3d 52 (2006). On July 5, 2006, a commissioner for the Court of Appeals denied the City’s motion for discretionary review (relying on *Locke*); on September 29, 2006, a three-judge panel denied the City’s motion to modify.

Pursuant to RAP 13.5, the City asked the Supreme Court to accept discretionary review on several issues. On January 3, 2007, the Supreme Court accepted review “only on the issues of sovereignty and the State

¹ Actually, Plan I members are statutorily entitled to even more generous benefits in that they are granted LEOFF disability benefits even when the disability did not incur in the line of duty in any way. RCW 41.26.125.

Constitution's Privileges and Immunities clause." The Court consolidated this case under *Locke v. City of Seattle*, Supreme Court No. 79222-4, which was accepted for review on the same date.

V. ARGUMENT

Several times in the past century, Washington and other courts have expressed "grave" concerns about the very idea of removing employer immunity from an industrial insurance statute. It is everywhere agreed that *only* the quid pro quo of immunity from civil actions renders workers' compensation laws constitutionally permissible. Yet Washington alone has purportedly removed employer immunity from one class of workers' compensation laws: those involving law enforcement officers and firefighters.

The time has come to address the "grave" concerns echoed in cases that remain vital and cogent over the years. Although numerous cases have dealt with the statute in question here, RCW 41.26.281, not one word has been addressed to the constitutionality of compelling funding of workers' compensation benefits while depriving municipal employers of immunity from civil suits. This Court is respectfully requested to reverse on sovereign immunity and constitutional grounds.

A. Burden of proof

A party challenging the constitutionality of a state statute is required to prove the unconstitutionality of the statute beyond a reasonable doubt. *Island Cy. v. State*, 135 Wn.2d 141, 955 P.2d 377 (1998). While it is assumed that the Legislature, being sworn to uphold the constitution, has considered the constitutionality of its enactments, it is ultimately the judiciary who must decide, as a matter of law, whether a statute violates some constitutional mandate. Accordingly, where a court is convinced that there is no reasonable doubt that the statute violates the constitution, that statute is void as a matter of law. *Island Cy.*, 135 Wn.2d at 147. Here, the LEOFF statute violates numerous provisions of the state constitution and sovereign immunity and must be declared void as a matter of law.

B. The LEOFF Statute

In addition to being a retirement and pension system, the Law Officers' and Fire Fighters' Retirement System Act ("LEOFF"), RCW Chapter 41.26, is a workers' compensation statute that, like RCW Title 51, provides for "sure and certain" benefits for police and fire personnel killed or injured in the line of duty. The statutory scheme compels municipalities to fund the benefits provided under LEOFF. RCW 41.50.110. Likewise, employers including municipalities must fund

workers' compensation benefits for other covered workers under RCW Title 51. The LEOFF statute is similar to the workers' compensation statute (RCW Title 51) in that it allows for sure and certain relief for workers injured or killed on the job. However, the LEOFF statute deprives employers of the quid pro quo that justifies requiring employers to fund such a system; LEOFF workers can also sue in tort for negligence.

As such, employers are required to fund the LEOFF compensation system but receive no protection from tort lawsuits. Thus, if an employer of a police officer or firefighter is not at fault, the police officer or firefighter is entitled to benefits funded by the employer. If the employer is at fault, the employee receives LEOFF benefits – and is *also* entitled to any and all tort damages above the benefits funded by the employer.

The drafters of Substitute Senate Bill 354 (1971 WASH. LAWS EX. SESS. CH. 257 §§ 14 and 15) were considerably less than straightforward when they provided immunity from suit with one hand only to take it away with the other. That is, Section 14 (codified as RCW 41.26.270), in some 217 words, declared that the relationship between LEOFF members and their employers is “similar to that of other workers to their employers”. Section 14 then states that the removal of law enforcement officers and fire fighters from workers' compensation coverage under Title 51 necessitated two things: (1) the continuance of “sure and certain

relief” for LEOFF employees; and (2) “protection for the governmental employer from actions at law”. RCW 41.26.270 then boldly purports to abolish all civil actions:

. . . to that end all civil actions and civil causes of action by such law enforcement officers and fire fighters against their governmental employers for personal injuries or sickness are hereby abolished, except as otherwise provided in this chapter.

RCW 41.26.270 (copy attached hereto as Exhibit A).

This section closely matches the immunity section for the workers’ compensation statute for most workers, RCW Title 51, RCW 51.04.010 which states:

. . . to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

But we all know that the devil is in the details. And the details show that while the exception in Title 51 is for intentional conduct (RCW 51.24.020), the exception in Ch. 41.26.281 is for intentional *and negligent* conduct:

If injury or death results to a member from the intentional or negligent act or omission of a member’s governmental employer, the member, widow, widower, child or dependent of 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.

RCW 41.26.281.

The legislative history of SSB 554 (now codified as RCW 41.26.270 and 41.26.281) contains no hint that the exception entirely consumed any immunity. In fact, the only reference in the legislative history contains the assurance to cities that the immunity language was in the bill. (Journal of the House 1971 1st Ex. Sess., p. 1750-51). Of course, it is true that the immunity language was in the bill. Unfortunately, left unsaid was that the seemingly innocuous exception at the end entirely wiped out the immunity.

A review of workers' compensation laws shows that the immunity for negligence actions is not optional. Immunity is mandatory.

C. Workers' compensation statutes *must* provide immunity

Workers' compensation statutes were quickly dubbed "The Great Compromise" because of what was accomplished. The statutes compelled employers to fund systems that provide compensation for injuries whether or not the employer was at fault. At the same time, these statutes provided employers with the quid pro quo of immunity from suit for all actions except for intentional torts. The Supreme Court stated in *Stertz v. Industrial Ins. Comm'n*, 91 Wash. 588, 590-91, 158 P. 256 (1916), that:

Our act came of a great compromise between employers and employed. Both had suffered under the old system, the employers by heavy judgments of which half was opposing lawyers' booty, the workmen through the old defenses or exhaustion in wasteful litigation. Both wanted peace. The master, in exchange for limited liability, was willing to pay on some claims in the future where in the past there had been no liability at all. The servant was willing, not only to give up trial by jury, but to accept far less than he had often won in court; provided he was sure to get the small sum without having to fight for it. All agreed that the blood of the workman was the cost of production, that the industry should bear the charge.

Stertz, 91 Wash. at 590-91.

Constitutional challenges by certain employers quickly established that, so long as such systems provided the quid pro quo of protection from suit, they were constitutional under equal protection and due process. Absent the quid pro quo of protection from suit for negligence actions, they could not and cannot withstand constitutional challenge. These principles have been consistently recognized for almost 100 years.

Soon after workers' compensation statutes were enacted throughout the country, the U.S. Supreme Court was presented with constitutional challenges to the duty upon employers to fund such systems. The cases upheld the statutes but did so with the clear caveat: they must include the quid pro quo of immunity from suit in order to withstand both equal protection and due process mandates. *Mountain Timber Co. v. Washington*, 243 U.S. 219, 233, 37 S. Ct. 260, 61 L. Ed. 685 (1917) (equal

protection and due process); *New York Central R.R. Co. v. White*, 243 U.S. 188, 37 S. Ct. 247, 61 L. Ed. 667 (1917). *Mountain Timber* summarized the fundamental purpose of the act:

. . . the fundamental purpose of the act is to abolish private rights of action for damages to employees in the hazardous industries (and in any other industry, at the option of employer and employees), and to substitute a system of compensation to injured workmen and their dependents out of a public fund established and maintained by contributions required to be made by the employers in proportion to the hazard of each class of occupation.

Mountain Timber, 243 U.S. at 233. The Court continued:

. . . yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the quid pro quo for the burdens imposed upon him, so that if the act is not valid as against employees, it is not valid as against employers.

Mountain Timber, 243 U.S. at 234.

No court has altered these basic and fundamental principles of workers' compensation.

Two Washington cases quickly defined the limits of a workers' compensation statute. That is, they determined that where the legislature could not provide immunity, the legislature could not include such employees within the persons who could benefit under workers' compensation.

In *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915), plaintiff (an injured seaman) petitioned the court to compel the Industrial Insurance Commission to collect premiums from his employer, a steamboat company operating vessels in Puget Sound. The statute included reference to steamboats. The Court denied the petition, holding that a company operating vessels upon Puget Sound could not be required to contribute to the workers' compensation accident fund because the state was without authority to provide immunity for federal maritime claims. The court relied upon the equal protection clause of the fourteenth amendment to the Constitution of the United States, stating:

The owner of the steamboat, if he should pay the percentage of his pay roll specified, and his injured seamen should pursue their remedy in admiralty, would receive no protection from the act, and yet would be subject to its burdens. If the act were given this construction it might well be doubted whether it would not offend against that provision of the fourteenth amendment to the Constitution of the United States which provides that:

No state shall make or enforce any law which shall 'deny to any person within its jurisdiction the equal protection of the laws.'

Daggett, 87 Wash. at 258. *Accord, Shaughnessy v. Northland S.S. Co.*, 94 Wash. 325, 162 P. 546 (1917) (act manifestly contemplates that all employers and all employees who are compelled to come under the act "shall enjoy such privileges and immunities equally, in harmony with the guaranty of section 12 of article 1 of our state Constitution.").

These principles have been recognized repeatedly over the ensuing years. The court in *Epperly v. City of Seattle*, 65 Wn.2d 777, 399 P.2d 591 (1965), recognized that a workers' compensation scheme that imposed a duty to fund the system without protecting the employer from tort liability would present "grave constitutional questions," stating:

We are impressed, as was the trial court, 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* which have not been adequately argued.

Id. at 787, n.1. (Emphasis supplied.)

Manor v. Nestle Food Co., 131 Wn.2d 439, 932 P.2d 628, as amended 945 P.2d 1119 (1997), noted that immunity from suit is a "fundamental tenet" of workers' compensation laws and held that a parent corporation was immune because it, as a self-insurer under Title 51, was responsible for funding industrial injury benefits:

This Court has "consistently held that when an employer ... pays its industrial insurance premiums pursuant to the Act the employer may no longer be looked to for recourse." *Seattle First Nat'l Bank v. Shoreline Concrete Co.*, 91 Wash.2d 230, 241, 588 P.2d 1308 (1978). We should not now disregard *this fundamental tenet* of the IIA.

Manor, 131 Wn.2d at 456. (Emphasis supplied). *Manor* quoted from Professor Larson – the premier authority on workers’ compensation laws:

By fulfilling its obligations to Manor under Title 51, Nestle should a fortiori, be entitled to its side of the quid pro quo central to the entire workers’ compensation statutory design: it should be immune from suit by Manor. In the words of the late Professor Larson, “*immunity follows compensation responsibility.*” 2A ARTHUR LARSON, WORKMEN’S COMPENSATION LAW § 72.33, at 14-290.3 (1993).

Id. at 450. (Emphasis supplied.)

D. LEOFF violates article I, section 12 of Washington’s Constitution

Article I, section 12 provides greater protections where a grant of positive favoritism is involved; if there is no grant of positive favoritism, an issue is analyzed under equal protection principles consistent with the U.S. Constitution. *Andersen v. King Cy.*, 158 Wn.2d 1, 13-19, 138 P.3d 963 (2006); *State v. Gunwall*, 106 Wn.2d 54, 59-63, 720 P.2d 808 (1986). LEOFF violates article I, section 12 under both standards.

A review of cases regarding workers’ compensation laws shows that a statutory scheme which imposes a duty on an employer to fund a no-fault workers’ compensation system while providing no protection from suit for negligent conduct is unconstitutional under federal equal protection principles and also specifically under article I, section 12 of the state Constitution.

1. Traditional equal protection analysis

The historical workers' compensation cases analyzed the issue under traditional equal protection. *See* above Section V.C. The *Locke* panel disregarded these fundamental tenets and held the LEOFF statute to not be unconstitutional because a "rational basis" exists due to the "vital and dangerous nature of their work" to create a "middle ground" by providing "a limited quid pro quo." That reasoning is flawed because (1) the "vital and dangerous nature" of work has never allowed for the elimination of and cannot eliminate the absolute requirement for a workers' compensation statute to provide immunity; (2) there can be no middle ground that fails to provide immunity; and (3) the "limited quid pro quo" is illusory.

a. **The "vital and dangerous" nature of work cannot eliminate the requirement for a workers' compensation statute to provide employers with immunity**

The *Locke* panel held that the existence of a perceived "rational basis" (that LEOFF members are engaged in "vital and dangerous work") can operate to eliminate the requirement of immunity in a workers' compensation system. The *Locke* panel's application of the minimal scrutiny analysis is inconsistent with nationwide established workers' compensation principles.

Notably, although workers' compensation laws exist in every state, neither the *Locke* panel, nor counsel for Locke or Lindell, has cited to a single case that would support the panel's conclusion. In contrast, the absolute constitutional prohibition under traditional equal protection principles against such a workers' compensation statute that fails to provide protection from suit is well-established, both by the highest court in this state and by the highest court in this nation. *Mountain Timber, supra*, 243 U.S. 219, 233; *Shaughnessy, supra*, 94 Wash. 325, 330; *Epperly, supra*, 65 Wn.2d at 787 n.1, (requiring an employer to fund benefits without receiving immunity from suit presents "grave constitutional questions"); *State v. Daggett, supra*, 87 Wash. 253; *Manor, supra*, 131 Wn.2d 439.

The *Locke* panel's reasoning that the special privilege granted to LEOFF members to sue for damages in excess of workers' compensation benefits is justified by the hazardous nature of their occupation is logically unsound in light of the fact that worker's compensation laws were originally enacted – as the *Mountain Timber* court recognized – *only* for those workers "in hazardous industries." *Mountain Timber*, 243 U.S. at 233; *see also Wineberg v. Dep't. of Labor & Indus.*, 57 Wn.2d 779, 359 P.2d 1046 (1961). The *Locke* panel's conclusion that occupational hazards justify a special right to sue for damages over and beyond

guaranteed benefits, when it was precisely such hazards that led to the enactment of legislation to *eliminate* the right to sue in exchange for guaranteed benefits, creates an inconsistency that simply cannot be reconciled in law or logic. The inherent hazards of an occupation cannot be the “rational basis” for both granting the right to sue (to firefighters and law enforcement officers) and eliminating the right to sue (for all other workers).

The *Locke* panel’s conclusion is further belied by the facts that (1) workers in industries that are objectively equally or more hazardous than firefighting and law enforcement are not granted such rights to sue; and (2) Washington State Patrol members (no less engaged in law enforcement than certain LEOFF members) are not covered under LEOFF and do not have a comparable right to sue under the workers’ compensation system available to them. RCW Ch. 43.43.

Where it remains established that the State cannot compel private companies that employ workers engaged in hazardous occupations (such as electrical linework, logging, mining and construction work) to fund workers’ compensation systems without receiving protection from suit, the *Locke* panel erred in concluding that municipalities can be compelled to fund such a system, without protection from suit, for a select class of employees.

In light of the fact that no court in the nation has allowed the “vital and dangerous” nature of any workplace, no matter how dangerous or vital, to justify a departure from the fundamental tenet that workers’ compensation statutes must provide immunity from suit, the *Locke* panel’s application of such a test, with limited and flawed reasoning, should not stand. The statute at issue does not meet even the minimal requirements of the rational basis (or minimal scrutiny) test for equal protection.

b. The LEOFF statute cannot satisfy a minimal scrutiny analysis

A “minimal scrutiny” analysis consists of three distinct inquiries: (1) whether the classification applies alike to all members within the designated class; (2) whether some basis in reality exists for reasonably distinguishing between those within and without the designated class; and (3) whether the challenged classification has any rational relation to the purposes of the challenged statute. *Locke*, 137 P.3d at 58.

First, in stating that RCW 41.26.281 satisfies the “rational basis” inquiry in that “[i]t gives extra protection to fire fighters and law enforcement officers *because of the hazardous nature of their occupations*,” 137 P.3d at 59 (emphasis supplied), the *Locke* panel’s conclusion is defeated by its own logic. If LEOFF members are to be specially benefited *because of the hazards of their occupation*, then to

survive the rational basis test the class deserving special benefits must not be limited only to LEOFF members, but rather must consist of *all* workers employed in hazardous occupations. At best, LEOFF members are but a small subset of the larger class of workers who encounter equal or greater hazards as an inherent part of their occupation and for whom workers' compensation laws that specifically eliminated a right to sue were originally enacted. *See Wineberg*, 57 Wn.2d 779 (workers' compensation in this state was originally limited to ultrahazardous occupations); *see also* Section V.C., above.

Second, it cannot be said that there is "some basis in reality" for distinguishing between those within and without the designated class, regardless of whether the designated class is defined (as the panel does) as LEOFF members or (as logic would dictate) as all workers engaged in hazardous occupations. If the designated class consists only of LEOFF members who are, as the panel concludes, to be specially benefited "because of the hazardous nature of their occupations," there can be no "basis in reality" for distinguishing between workers engaged in certain "hazardous occupations" (law enforcement or firefighting) and those engaged in equally if not more hazardous lines of work (e.g. electrical linework, logging, mining, construction work). On the other hand, if the designated class is instead more logically defined to consist of all workers

engaged in “hazardous occupations,” then not only is there inconsistency within the class (in that some are entitled to bring suit where others are not), but the legislature itself, in rewriting RCW 51.12.020 to expand industrial insurance coverage from only certain enumerated “ultrahazardous” occupations to “embrace all employments within the legislative jurisdiction of the state,” explicitly recognized that there was *no* rational basis for distinguishing between employers of persons engaged in hazardous versus non-hazardous employment for purposes of compensating injured workers. This is because it is readily apparent that any workplace serious injury or death is a tragedy to the affected person and family.

The LEOFF statute itself belies this argument in that RCW 41.26.270 expressly states the relationship of police and firefighters “is similar to that of workers to their employers”—not different, and like RCW Title 51, provides that “all civil actions ... are hereby abolished.”

Further, case law provides no support for plaintiff’s argument that the existence of risks inherent in police work and firefighting is a rational basis for maintaining a right to sue under LEOFF. The work of seamen and loggers is well recognized as among the most hazardous types of work—far more hazardous than police work or firefighting. Yet employers of loggers and seamen cannot be compelled to fund a workers’

compensation fund without receiving immunity from suit. *Mountain Timber, supra; Daggett, supra*. One needs only to consult the Bureau of Labor Statistics, U.S. Department of Labor, to see that many occupations involve greater risk of injury and death than those of police and firefighters (the most hazardous occupations currently being logging, fishing, pilots and navigators, structural metalworkers, drivers-salesworkers, roofers, electrical power installers, farmworkers, construction laborers and truck drivers). (See <http://www.bls.gov/news.release/pdf/cfoi.pdf>.) (CP 1305-22)

In fact, the first workers' compensation laws were limited specifically to *extra* hazardous occupations (for example, foundries, blast furnaces, mines, wells, gas works, logging, lumbering, railroads, etc.). See *Mountain Timber*, 243 U.S. at 229; 1 A. Larson, *Workers' Compensation Law*, § 2.07 at 2-13 (2002). Courts have consistently held that all employers required to fund workers' compensation benefits must receive the quid pro quo of immunity from suit when the only occupations covered by workers' compensation laws were extra hazardous in nature.

Many recent cases where plaintiffs tried to avoid the mandated immunity were rejected by this Court. These cases involve tragedies every bit as compelling as those involving police and fire personnel. For example, in *Minton v. Ralston Purina Co.*, 146 Wn.2d 385, 47 P.3d 556

(2002), plaintiff suffered severe head and bodily injuries when a condensate collector exploded at the bakery where he worked. In a unanimous opinion, this court held that the claimant had to be limited to his rights to workers' compensation because "In exchange for such relief, the employee forfeits certain rights to pursue alternative tort or other remedies." *Minton*, 146 Wn.2d at 390.

Another sympathetic case is found in *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 109 P.3d 805 (2005), where plaintiffs were two school teachers who sued their school district for injuries caused by a severely disabled special education student. The student had assaulted the staff approximately 96 times during a school year. The two plaintiffs suffered most of the injuries. This Court held that the exclusive remedy provisions of Title 51 barred plaintiffs' action. In doing so, this Court referenced the "grand compromise" that granted Washington employers immunity from lawsuits arising from workplace injuries. *Vallandigham*, 154 Wn.2d at 26.

A recent case involving serious injuries to a minor is found in *Schuchman v. Hoehn*, 119 Wn. App. 61, 79 P.3d 6 (2003), where a 14-year-old girl was bagging ice at an ice company when her hands and arms were pulled into the auger at the bottom of the ice tub.

The facts in *Provost v. Puget Sound Power and Light Co.*, 103 Wn.2d 750, 696 P.2d 1238 (1985), are compelling. In *Provost*, Roger Provost was a member of a Puget Sound Power and Light Company crew responding to an emergency. Provost was severely injured when he was pinned between two trucks. His injuries included fractures to both hips, two broken legs, and severed arteries in both legs. His right leg was subsequently amputated near the hip. This Court held that a consortium claim by Provost's wife was barred under the exclusive remedy provisions of Title 51, noting that the courts are entirely without jurisdiction over negligence claims.

To hold that this fundamental tenet of immunity could be removed specifically *because* of the hazardous nature of a particular occupation would have to apply in both a public and a private setting. For example, if the Legislature adopted an exception to Title 51 for electrical lineworkers due to the vital and dangerous nature of their work, making employers of lineworkers both subject to suit and required to fund workers' compensation benefits, one would expect such employers to bring constitutional challenges. There is no question but that such a statute would be found to be unconstitutional. However, if the hazardous nature of police work and firefighting could form a "rational basis" for such a system, it could justify such a system for lineworkers. The *Locke* decision

severely undermines the very foundation of workers' compensation. No case (other than the *Locke* decision) in the entire United States has been located that even suggested that such an exception could withstand constitutional scrutiny.

The statute at issue is unique – probably because it cannot withstand constitutional challenge. Since workers' compensation laws exist in every state in the nation, one would expect that, if a rational basis could allow a legislature to compel a particular type of employer to both fund workers' compensation benefits and be subject to suit, plaintiff would have brought such a statute (and cases addressing the constitutionality thereof) to this Court's attention. The City has found no such case.

The bar to suit is jurisdictional. *Seattle-First National Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 588 P.2d 1308 (1978); *Newby v. Gerry*, 38 Wn. App. 812, 690 P.2d 603 (1984). The courts are without jurisdiction to entertain negligence actions by employees against their employers if the employers are required to fund workers' compensation systems. This is a fundamental tenet that cannot be altered.

c. Workers' compensation law has no "middle ground"

There is no "middle ground" in workers' compensation law for immunity requirements. While some constitutional concepts are not "immutably frozen like insects trapped in Devonian amber" (*Dillenburg v. Kramer*, 469 F.2d 1222, 1226 (9th Cir. 1972), the fundamental constitutional concept that workers' compensation statutes must provide immunity from suit is a principle that is as immutably frozen as a legal concept can be. The panel's decision in *Locke, supra*, 133 Wn. App. 696, violates the very foundation upon which every workers' compensation statute rests. Without the promised immunities, there can be no obligation to fund benefits.

d. Locke's "limited quid pro quo" is illusory

The *Locke* panel created from whole cloth what it called a "middle ground", holding that the fact that LEOFF only authorizes suit for damages in excess of those "received or receivable" under that chapter. However, this restriction simply avoids double recovery. The only effect of not having to pay that amount in a LEOFF lawsuit is that the employer does not have to pay twice – a circumstance not comparable to any other personal injury tort situation. The panel's reference to collateral source misses the point. The source here is not "collateral."

The panel also said LEOFF employers receive a “limited quid pro quo” because they cannot be sued for product liability claims. LEOFF members are not consumers and LEOFF employers are not in the business of introducing products into trade or commerce. Consequently, this meaningless immunity cannot be the “quid pro quo”.

2. LEOFF is unconstitutional under an independent state analysis of article I, section 12

This Court in *State v. Gunwall, supra*, 106 Wn.2d at 59-63, recognized six nonexclusive neutral criteria relevant to determining whether the constitution of the State of Washington should be considered as extending broader rights to its citizens than does the United States Constitution. Here, the City submits that an equal protection analysis of Washington’s Constitution consistent with the United States Constitution leads to a conclusion of unconstitutionality. However, LEOFF is also unconstitutional under an independent state analysis. That is, the City submits that LEOFF is unconstitutional under established law of both traditional equal protection analysis and under an independent state analysis.

In determining whether to engage in an independent state analysis, Washington courts generally engage in an analysis of the *Gunwall* factors. *State v. Gunwall*, 106 Wn.2d 54. However, there is no need for such an

analysis where this Court has already determined that a provision of the Washington constitution independently applies to a specific legal issue. *Centimark Corp. v. Dep't of Labor and Industries*, 129 Wn. App. 368, 119 P.3d 865 (2005). Here, this Court in *Shaughnessy* in 1917 recognized that article I, section 12 applies to a workers' compensation statute and requires immunity in such a statute. Also, in *Alton V. Phillips Co. v. State*, 65 Wn.2d 199, 396 P.2d 537 (1964), this Court held that a special bill waiving the statute of limitations for one entity violated the privileges and immunities clause of article I, section 12.

Even though the applicability of article I, section 12 has been established, we will review the *Gunwall* factors: (1) The textual language of the State Constitution; (2) Significant differences in the texts of parallel provisions of the federal and state constitutions; (3) State constitutional and common law history; (4) Preexisting state law; (5) Differences in structure between the federal and state constitutions; and (6) Matters of particular state interest or local concern.

Applying those factors here, first, the language of the State Constitution is different from the U.S. Constitution in ways relevant here. Article I, section 12, of the Washington Constitution makes specific reference to the prohibition against granting special privileges and immunities and makes specific reference to municipal corporations:

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 second *Gunwall* factor is also met. There are significant differences in the language of the fourteenth amendment to the U.S. Constitution, § 1, which provides, in pertinent part:

No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Third, as this Court recognized in *Andersen*, the history of Washington's privileges and immunities clause is quite different than the federal Constitution, stating:

As we explained in *Grant County II*, the text of the federal constitution shows concern with “majoritarian threats of invidious discrimination against nonmajorities,” while the state provision “protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens.” *Grant County II*, 150 Wn.2d at 806-07. We recognized our framers’ “concern with avoiding favoritism” to a select group and that this “clearly differs from the main goal of the equal protection clause, which was primarily concerned with preventing discrimination against former slaves.” *Grant County II*, 150 Wn.2d at 808 . . .

Andersen, 158 Wn.2d at 14.

The LEOFF statute violates exactly the concerns that led to enactment of Washington’s privileges and immunities clause: the concern with favoritism to a select group.

The fourth *Gunwall* factor likewise supports an independent state analysis. Preexisting state case law has held that Washington’s privileges and immunities clause would be violated by a workers’ compensation statute that did not provide immunity. *Shaughnessy*, 94 Wash. 330.

The fifth *Gunwall* factor also supports an independent state analysis. That factor relates to differences in structure between the federal and state constitutions. As the court stated in *Gunwall*, Washington’s Constitution “serves to limit the sovereign power”. That is, the state cannot overstep its power and provide positive favoritism to politically active groups.

The sixth factor relates to matters of particular state interest or local concern. In many senses, workers’ compensation statutes and the requirements thereof are of concern throughout the country. No exception to the absolute requirement of immunity from suit has been identified anywhere in the country. Here, the LEOFF statute is also of particular interest to municipalities in the State of Washington because it only affects municipalities here. As such, the issues presented are of particular state and local concern.

The *Locke* panel, with extremely limited analysis, held the LEOFF statute does not implicate any article I, section 12 privileges or immunities, stating:

. . . 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.

133 Wn. App. at 707.²

This holding is directly contrary to prior decisions of this Court (*Shaughnessy, supra*, 94 Wash. at 330; *Alton V. Phillips Co., supra*, 65 Wn.2d 199 (cited in *Grant Cy. Fire Protection Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 732, 42 P.3d 394 (2002) (“*Grant Cy. F*”)) and is contrary to the recent extensive analysis of article I, section 12 in *Andersen v. King Cy., supra*, 158 Wn.2d at 13-19 (2006).

Andersen’s constitutional analysis re-affirmed the holding in *Grant Cy. Fire Protection Dist. v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d

² The two cases relied upon by the panel for this conclusion provide no support. *Paulson v. County of Pierce*, 99 Wn.2d 645, 664 P.2d 1202 (1983), held that counties could be provided with immunities from suit that municipalities do not have; it did not address whether private entities could be provided with immunities municipalities do not have. *Campos v. Dep’t. of Labor & Indus.*, 75 Wn. App. 379, 880 P.2d 543 (1994), rev. denied, 126 Wn.2d 1004 (1995), held no violation of equal protection existed where different limitations periods applied to reopening of workers’ compensation claims based upon whether the closing date was before or after July 1, 1981. The court held that, since the changes in the limitations period applied to all claimants, there was no constitutional violation.

419 (2004) (“*Grant Cy. II*”) that, where a statute grants “positive favoritism” to a “select few” or a particular class, the statute is subject to an independent state analysis under article I, section 12. *Andersen*, 158 Wn.2d at 16. We need only review one of the earliest workers’ compensation cases mentioned above to determine that the *Locke* panel was wrong when it held that neither the power to bring suit nor conversely the right to avoid suit is a privilege or immunity under article I, section 12. This Court recognized otherwise in *Shaughnessy*, *supra*, 94 Wash. 325, making specific reference to article I, section 12 of the state Constitution, stating:

... the act . . . manifestly contemplates that *all employers* and *all employees* 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 § 12 of art. 1 of our state constitution. This evident spirit of the act, we think, points to a legislative intent to make the act applicable only to those relations of employer and employee which are in the legislative control of the state untrammelled by the laws of the United States and the jurisdiction of the courts of the United States which might have the effect of rendering the privileges and immunities for which the act provides, unequal as between employers or unequal as between employees.

Shaughnessy, 94 Wash. at 330. (Emphasis in original.)

Alton V. Phillips, 65 Wn.2d 199, like *Shaughnessy*, held that a special bill authorizing suit beyond the applicable limitations period is a

privilege or immunity under article I, section 12. Grounding its decision on the privileges and immunities clause, *Alton V. Phillips* invalidated a special bill allowing a corporation to sue, thus depriving the State of the benefit of a statute of limitations. The special bill violated the privileges and immunities clause even though it was the State's own bill that authorized suit against itself. Here, a special bill benefits a class of citizens rather than just one. However, article I, section 12 equally prohibits special bills that benefit a "class of citizens".

The *Locke* panel concluded that neither the privilege of a special right to sue granted only to a "select few", nor being deprived of an immunity from suit enjoyed by other employers after being required to fund a workers' compensation system implicated article I, section 12. Regrettably, the *Locke* panel did not have the benefit of this Court's recent extensive discussion in *Andersen* of what constitutes an article I, section 12 "privilege or immunity".

Justice J. M. Johnson, concurring in *Andersen*, cited Justice Bushrod Washington's "classic statement of the law on privileges and immunities under article IV of the United States Constitution" in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52, 4 Wash. C.C. 371 (C.C.E.D.Pa. 1823), which protects both "the right to acquire and possess property of every kind" and "to institute and maintain actions of every kind in the courts of

the state”. *Andersen*, at 138 P.3d at 994. *See also Grant Cy. II*, 150 Wn.2d at 812-13. *Shaughnessy* and *Alton V. Phillips* likewise recognize that issues regarding rights to bring suit and assert affirmative defenses implicate article I, section 12.

This Court has recognized that municipalities are entitled to raise constitutional issues where they are directly affected. The right of municipalities to claims rights under the privileges and immunities clause found in article I, section 12 of the Washington Constitution was recognized in *Grant Cy. II*, where the Court stated that a municipality that is directly affected has standing to assert rights under the privileges and immunities clause. In *Grant Cy. II*, the Supreme Court reaffirmed its view that the privileges and immunities clause of the Washington constitution requires an independent constitutional analysis separate from the equal protection clause of the United States Constitution, applying *Grant Cy. I*. *Grant Cy. II* discussed both direct and representational municipal standing. *Grant Cy. II*, 150 Wn.2d at 802-03. Here, there can be no debate that Washington cities (and their inhabitants and taxpayers) are directly affected by the LEOFF statute.

Even the State had standing to assert rights under the privileges and immunities clause in *Alton V. Phillips, supra*, where the legislature had enacted a special bill authorizing suit. The prohibitions against

enactment of special legislation for “citizen(s), class(es) of citizens or corporation(s)” is broad. The Washington Constitution bars the political process from favoring any citizens or classes of citizens over others in privileges to sue and in immunities from suit.

The standing of municipalities to challenge the constitutionality of a workers’ compensation statute has been recognized in a line of cases from Connecticut. Those cases hold that municipalities have standing to raise constitutional issues such as equal protection and due process in order to challenge statutes; otherwise, taxpayers have no voice. A compelling statement of the Connecticut court’s reasoning is found in *Ducharme v. City of Putnam*, 161 Conn. 135, 285 A.2d 318, 320 (1971):

Here, the municipality, although a creation of the state government, is in disagreement with the state legislature about the interpretation of the constitution. It is a party which is adversely affected by the contested legislation and is properly in court on nonconstitutional questions. In the absence of some overriding reason which we do not find, such as the existence of a more appropriate party to raise the question, or a statute prohibiting municipalities from litigating constitutional issues, it would be an abdication of judicial responsibility for this court, having before it a controversy between a municipality and another party and having been apprised of the asserted constitutional infirmity in a legislative act, adversely affecting the interests of the municipality and its inhabitants, to adjudicate only the nonconstitutional questions when the latter may not be dispositive of the basic dispute. We hold, therefore, that the defendant municipality has sufficient legal interest and standing to raise constitutional issues in the present proceeding.

285 A.2d at 320; *accord: Bergeson v. City of New London*, 269 Conn. 763, 850 A.2d 184 (2004); *Duncan v. City of Charlotte*, 234 N.C. 86, 66 S.E.2d 22 (1951).

The reasoning of the Connecticut court in *Ducharme* is similar to that expressed by this Court in *Grant Cy. I* and *Grant Cy. II* cited above and also in *City of Seattle v. State of Washington*, 103 Wn.2d 663, 694 P.2d 641 (1985), where the Supreme Court held that Seattle had standing to challenge the constitutionality of two statutes governing annexations.

Similarly, the U.S. Supreme Court held that a Washington State agency had standing to challenge the constitutionality of a state statute in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). Likewise, the Washington Supreme Court reached the merits in *City of Marysville v. State of Washington*, 101 Wn.2d 50, 676 P.2d 989 (1984), where Marysville challenged the constitutionality of a statute in a declaratory judgment action. The Court did not even discuss standing – apparently accepting the city’s standing as implicit.

Ignoring precedent and logic, *Locke* asserts that, because article I, section 12 grants municipalities *greater* privileges and immunities (for example, the right of municipal corporations to levy taxes), article I, section 12 must also authorize municipalities to be specially burdened.

Nothing in article I, section 12 even remotely supports such a *non sequitur*. Article I, section 12 does not fail to mention municipalities – rather, municipalities are especially called out as being authorized to receive privileges and immunities that private entities do not have. Nothing in article I, section 12 authorizes legislation that deprives municipalities of privileges or immunities.

Even if this theory could be limited to police and firefighters on some unidentified basis, this suggestion can be set to rest by looking at the conceptual difference between responsibilities owed to the general public and responsibilities owed to employees. There is a vast difference between public duties (duties owed to the general public) and employer’s duties (even if the employer is a governmental entity). An obligation to govern is far removed from the role of governmental entities as employers.

The *Locke* panel’s holding that municipalities can be specially burdened because they can be specially benefited under article I, section 12 violates a plain reading of that constitutional protection:

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.

Where the constitution expressly references municipal corporations, it would be incongruous to hold that municipal

corporations are not entitled to the stated protections. Further, *Grant Cy. II* specifically held that municipalities have rights under this constitutional provision.

Municipalities are corporations. Corporations are expressly included within the protections of Wash. Const., article I, section 12. Notably there is one exception: municipalities can be *granted* privileges and immunities that others do not have. Nothing in article I, section 12, suggests that municipalities can be *deprived of* privileges and immunities granted to others.

The express carving out of municipalities as having privileges and immunities that others do not have shows the special role that municipalities have as governing units (with governmental immunities for public duties long recognized). A decision that municipalities could be deprived of immunities that similarly situated employers have would fly in the face of fundamental principles of governmental immunity. Under plaintiff's argument, rather than being specially protected from liability because of their role as government, municipalities could be subject to liabilities not recognized anywhere.

E. Plaintiff's claim is barred by sovereign immunity

Any alleged cause of action under RCW 41.26.281 is barred by sovereign immunity. Municipalities, like the state, can only be liable if

there is a private liability analogy. While sovereign immunity has been, in large part, waived by statute, it has not been waived beyond the wording of the statutory language. RCW 4.96.010 provides, in pertinent part:

4.96.010. Tortious conduct of local governmental entities--Liability for damages

(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.*

(Emphasis supplied)

There has never been a blanket waiver of sovereign immunity. Municipalities can only be liable in tort “*to the same extent as if they were a private person or corporation.*” (Emphasis supplied) RCW 4.96.010. Since LEOFF allows for sure and certain relief while not eliminating tort liability, and since no private analogy for liability exists, the LEOFF statute violates sovereign immunity. Governmental entities cannot be liable without the same type of liability being imposed on private entities.

The *Locke* panel held RCW 4.96.010 unequivocally waived the City’s sovereign immunity. The Court was mistaken. Like Mark Twain’s famous remark, “The report of my death was an exaggeration,” any suggestion of the *total* abolition of sovereign immunity is unfounded. The

waiver of sovereign immunity for municipalities, although broad, is limited: liability against a governmental entity is barred where there is no analogous private liability.

Locke's reliance upon *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1966), is misplaced. *Evangelical* expressly prohibits liability against governmental entities where there is no analogous private liability. *Evangelical* explicitly held the sovereign immunity waiver is limited:

Essentially, then, the 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.

67 Wn.2d at 253. [Italics in original; underlined emphasis supplied]

This principle that governmental liability cannot exist without a comparable private entity liability is hornbook law:

The state, whether acting in its governmental or proprietary capacity, is liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

It is incumbent upon the plaintiff to show that the state's conduct would be actionable if it were done by a private person in a private setting. If the plaintiff would have no cause of action against a private person for the same conduct, then the plaintiff has no cause of action against the state.

LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE, Vol. 15 § 661 (5th Ed. 1996). (Emphasis supplied; footnotes omitted.) *See also* *U.S. v. Olson*, 126 S. Ct. 510, 546 U.S. 43, 163 L. Ed. 2d 306 (2005), where the Court analyzed the federal waiver of immunity (28 U.S.C. § 1346(b)(1)) which matches Washington’s statute in that both waive immunity *only* to the extent that a private entity could be sued for the same conduct.

The Washington Supreme Court applied this principle in *Edgar v. State*, 92 Wn.2d 217, 595 P.2d 534 (1979), when it interpreted RCW 4.92.090 – the analogous waiver of sovereign immunity for the State. The *Edgar* court held RCW 4.92.090 required a party suing the State “to show that the conduct complained of constitutes a tort which would be actionable if it were done by a private person in a private setting.” *Edgar*, 92 Wn.2d at 226.

Ignoring cases on point, the *Locke* panel instead cited several public duty doctrine cases and erroneously concluded public liability can exist where there is no private entity liability analogy. These cases are inapposite and irrelevant. The conflating of public duty and sovereign immunity was the subject of recent comment by Judge Robin Hunt in *Donohoe v. State*, 135 Wn. App. 824, 142 P.3d 654, 657-58 (2006), in which she notes the waiver of sovereign immunity, although “broad”, is

“circumscribed” by the statute’s plain language which limits 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 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. The day to analyze sovereign immunity separately from public duty has arrived.

The public duty doctrine goes to the issue of duty. Sovereign immunity is an affirmative defense. The Supreme Court of Illinois explains the distinction between the public duty doctrine and sovereign immunity this way:

Under the inapplicable concept of sovereign immunity, despite any apparent duty, the governmental entity is immune from tort liability. This does not occur from a denial of the tort’s existence, but rather because the existing liability in tort is disallowed. In contrast, [under the rationale of the public duty rule] the tort liability or duty never existed.

Zimmerman v. Village of Skokie, 183 Ill.2d 30, 46, 697 N.E.2d 699 (1998).

Recent cases have recognized that sovereign immunity remains a valid defense. In *State v. Thiessen*, 88 Wn. App. 827, 828, 946 P.2d 1207 (1997), the court held that under the doctrine of sovereign immunity, the State could not be liable for interest on its debt absent the State’s consent.

In that case, the court held that the State did not give its consent, and, therefore, interest could not be awarded. *Accord, State v. Lee*, 96 Wn. App. 336, 979 P.2d 458 (1999). As *State v. Turner*, 114 Wn. App. 653, 59 P.3d 711 (2002), stated:

As a matter of sovereign immunity, "the state cannot, without its consent, be held to interest on its debts." But only the Legislature can adopt a blanket waiver, which it has not done here.

114 Wn. App. at 660. (Citations omitted)

Municipalities can only be liable in tort "*to the same extent as if they were a private person or corporation.*" (Emphasis supplied) RCW 4.96.010. Since LEOFF allows for sure and certain relief while not eliminating tort liability, and since LEOFF applies only to governmental entities, the LEOFF statute violates sovereign immunity. Governmental entities cannot be liable without the same type of liability being imposed on private entities.

The United States Supreme Court recently recognized the sovereign immunity bar where no private cause of action exists, *United States v. Olson, supra*, 126 S. Ct. 510. The Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b)(1), authorizes suits against the United States "under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the

act or omission occurred.” The federal waiver of immunity matches our state's waiver of immunity in that both waive immunity ONLY to the extent private entities can be sued.

The *Olson* court re-affirmed that governmental liability does not exist without companion private liability under the federal tort waiver of immunity statute. Since the Legislature cannot require private employers to both fund workers' compensation and be liable in tort, the Legislature cannot make public employers fund LEOFF and be liable in tort.

F. These issues were not resolved or discussed in prior LEOFF decisions

The plaintiff here relies heavily upon *Taylor v. City of Redmond*, 89 Wn.2d 315, 571 P.2d 1388 (1977), arguing that *Taylor* resolved the issues presented herein. A careful reading shows that *Taylor* supports the City's argument.

In *Taylor*, the court was addressing whether a LEOFF Plan I member could sue. In holding that a LEOFF Plan I member could sue, the court noted that municipalities were not in the position of both funding workers' compensation benefits for LEOFF Plan I members and being subject to suit (apparently thinking that municipalities did not fund LEOFF), stating:

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 319-20. The *Taylor* court was mistaken in its unstated assumption that municipalities do not fund LEOFF benefits. In fact, municipalities have been required to fund LEOFF benefits ever since LEOFF was created. 1969 Wash. Laws Ex. Sess. Ch. 209 § 8; RCW 41.50.110. Thus, since the *Taylor* court was not aware of the funding obligations of municipalities, it did not resolve or even discuss whether municipalities could be required to fund a workers' compensation system without being provided with immunity from suit.

Rather, the *Taylor* court expressly declined to reach the question of whether LEOFF Plan II members could sue. The court was aware that LEOFF Plan II members receive workers' compensation under RCW Title 51 and knew that employers of LEOFF II members are required to fund such systems, stating:

That issue, however, is not before us and we make no determination thereon.

Taylor, 89 Wn.2d at 320.

Plaintiff here argues that the *Taylor* court expressly reached the issues presented here. The foregoing shows that the *Taylor* court

expressly *declined* to reach the question of whether municipalities that are required to fund a workers' compensation system could be subject to suit.

These issues also were not addressed in *Gillis v. Walla Walla*, 94 Wn.2d 193, 616 P.2d 625 (1980), where the Court recognized that the legislature intended to provide the quid pro quo of employer protection from suit:

[T]he declaration of policy in RCW 41.26.270 indicates a legislative concern that there be sure and certain relief for a member's injuries, on the one hand, and protection for the employer from actions at law on the other. Appellant's interpretation of the statutory system would undermine this legislative intent. Pain, suffering, and to a lesser extent, disability and disfigurement are components of most personal injury actions. Accordingly, if appellant's position is accepted, members would be able to sue their governmental employers every time personal injury resulted from an intentional act or a negligent act or omission. This constant exposure to legal action would make both the extent of the relief and the protection from litigation uncertain thus destroying the clear legislative policy set forth in RCW 41.26.270.

Gillis, 94 Wn.2d at 197.

In *Gillis*, the Court addressed whether tort damages should be reduced by LEOFF benefits. The Court apparently assumed that the employer was receiving some protection under their analysis. However, as discussed above, any perceived protection is illusory. Even without the LEOFF statute or any workers' compensation statute, if an employee had a cause of action in tort against his employer, any benefits paid or funded by

the employer would be offset against any recovery. There would be no bar based upon collateral source because the source of the monies would not be collateral – it would be direct. The “offset” simply avoids a double recovery.

These issues were also not addressed in *Fray v. Spokane Cy.*, 134 Wn.2d 637, 952 P.2d 601 (1998). In *Fray*, this Court held that a legislative attempt to clarify that the right to sue provisions of RCW 41.26.281 only applied to Plan I members was unconstitutional in that the bill violated subject in title requirements.

VI. CONCLUSION

No one can denigrate the public service performed by sworn fire and law enforcement employees. But no one should denigrate the service performed by workers in other vital and dangerous industries. Workers’ compensation statutes applicable to firefighters and police officers must meet the same basic constitutional requirements as other workers’ compensation statutes. Municipalities and their taxpayers cannot be liable in tort where there is no and can be no private liability analogy.

The only justification for requiring employers to fund workers’ compensation laws was that employers were given immunity from negligence actions in return. Here, that justification is entirely absent. If municipalities do not have the same protections from liability as other

employers, the statutory scheme is unconstitutional and suit is barred by sovereign immunity.

Because governmental employers of police and fire personnel are required to fund a workers' compensation-type benefits program with only illusory protection from suit, this court should hold that RCW 41.26.281 is unconstitutional and violates sovereign immunity.³ This Court should reverse.

DATED this 16th day of March, 2007.

Respectfully submitted,

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³ The remainder of the LEOFF statute will remain in full force and effect. RCW 41.26.901 provides that if any provisions of the LEOFF act are invalid, the remainder of the act will not be affected.

RCW 41.26.270

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**. The legislature further declares that removal of law enforcement officers and fire fighters from workers' compensation coverage under Title 51 RCW **necessitates** the (1) continuance of sure and certain relief for personal injuries incurred in the course of employment or occupational disease, which the legislature finds to be accomplished by the provisions of this chapter and (2) **protection for the governmental employer from actions at law**; and to this end the legislature further declares that the benefits and remedies conferred by this chapter upon law enforcement officers and fire fighters covered hereunder, **shall be to the exclusion of any other remedy, proceeding, or compensation for personal injuries or sickness**, caused by the governmental employer except as otherwise provided by this chapter; and **to that end all civil actions and civil causes of actions by such law enforcement officers and fire fighters against their governmental employers for personal injuries or sickness are hereby abolished**, except as otherwise provided in this chapter.

EXHIBIT A