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NO. _____
(Formerly Court of Appeals No. 55256-2-I)

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

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**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,**

Petitioners,

and

**JAMES SEWELL, MOLLY DOUCE, JOHN CAMERON and "JOHN DOES" 1-5
in their individual capacities; THE STATE OF WASHINGTON, its subdivisions
and agencies; and the WASHINGTON STATE PATROL,**

Defendants.

**APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Michael Spearman, Judge**

PETITION FOR REVIEW OF CITY OF SEATTLE

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I. IDENTITY OF PETITIONER

Petitioner City of Seattle (“City”) seeks review of the decisions designated in Section II.

II. DECISION TO BE REVIEWED

This court should review Division I’s June 19, 2006, decision, partially published as *Locke v. City of Seattle*, ___ Wn. App. ___, 137 P.3d 52 (2006), and the July 24, 2006, denial of reconsideration. (Appendices A and B.)

III. ISSUES PRESENTED FOR REVIEW

Plaintiff/respondent Kevin Locke was a fire fighter recruit when he fell from a ladder at recruit school. Although workers’ compensation covered his injuries, RCW 41.26.281 of the Law Enforcement Officers’ and Fire Fighters’ Act (LEOFF) also grants LEOFF members the privilege to sue their employers, albeit giving lip service to the intention to abolish civil actions (RCW 41.26.270). The issues presented are:

1. Does the Decision that fire fighter recruits are LEOFF members involve an issue of substantial public interest this Court should determine?
2. Does the panel’s holding that compelling governmental employers to fund workers’ compensation benefits without the constitutionally mandated quid pro quo of protection from suit does not

violate the State or Federal privileges and immunities, equal protection, and/or due process clauses raise significant questions of law under the State or Federal Constitutions or conflict with this Court's decisions?

3. Does the holding that LEOFF does not violate sovereign immunity despite creating a cause of action against public employers that does not and cannot exist against private employers conflict with this Court's decisions or raise an issue of substantial public interest this Court should determine?

4. Does the Decision that the City has the burden of proving the "amount received or receivable" under RCW 41.26.281 conflict with decisions of the Court of Appeals or raise an issue of substantial public interest this Court should determine?

5. Does the Decision affirming a large future economic damages award unsupported by the evidence conflict with decisions of this Court and the Court of Appeals?

IV. STATEMENT OF THE CASE

Plaintiff was a City fire fighter recruit. (6/10/04 RP 46) Recruits do not become probationary fire fighters until graduation from recruit school. (5/26/04 RP 118-19; 5/27/04 AM RP 116, 126; 6/28/04 RP 222) While performing a drill in recruit school, plaintiff fell off a ladder and, among other things, sustained orthopedic leg injuries. (CP 4-6)

Plaintiff received workers' compensation benefits. (6/29/04 RP 105-06, 115-16) He also sued the City for negligence under RCW 41.26.281. (CP 1-11) After a jury found the City liable, the trial court entered judgment against it for \$1,513,663.88. (CP 4089-91, 4505-07) In a partially published decision, Division I affirmed.

V. ARGUMENT

This case involves the constitutionality and interpretation of a statutory scheme—LEOFF. Thus, the panel's decision does not merely affect the City of Seattle and its LEOFF employees. Rather, it affects LEOFF employers and employees around the State as well as taxpayers whose taxes ultimately fund LEOFF. Consequently, not only does the panel's decision present significant questions of law under the State and Federal Constitutions, it also involves issues of substantial importance this Court should determine. Moreover, as will be discussed, the panel's decision meets all other criteria for review under RAP 13.4(b).

A. THE ERRONEOUS DECISION THAT A RECRUIT IS A LEOFF MEMBER ADVERSELY AFFECTS ALMOST EVERY LEOFF EMPLOYER IN THE STATE.

Plaintiff received RCW tit. 51 workers' compensation benefits. (6/29/04 RP 105-06, 115-16) Typically, courts have no jurisdiction where an injured employee who has received such benefits seeks to sue his employer for 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, the LEOFF statute 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.

RCW 41.26.281 (emphasis added). Thus, plaintiff had to be a LEOFF member to bring this suit. If he was not, the trial court had no jurisdiction due to RCW 51.04.010.

“Member” includes every “fire fighter . . . employed in that capacity.” RCW 41.26.030(8). A “fire fighter” is one actively employed as such, RCW 41.26.030(4)(a), in other words, someone—

. . . employed in a uniformed fire fighter position by an employer on a full-time, fully compensated basis, **and . . . hav[ing] 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.**

WAC 415-104-225(2) (emphasis added).

Division I's holding that plaintiff was a “member” mistakes recruits for probationary fire fighters. Unlike recruits, probationary fire fighters have graduated from recruit school and fight real fires alongside full-fledged fire fighters. (5/26/04 RP 118-19; 5/27/04 AM RP 116, 126;

6/28/04 RP 222). *Cf. Fann v. Smith*, 62 Wn. App. 239, 814 P.2d 214 (1991) (former police cadets contribute to LEOFF only after being sworn in as officers).

By essentially holding that a raw recruit has “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,” the panel has vastly expanded virtually every municipal employer’s liability under LEOFF. Moreover, the public interest is not served by imposing legal responsibility for fighting fires on fire fighter recruits—*i.e.*, trainees who have not even graduated from fire fighter recruit school. Consequently, the Decision involves an issue of substantial public interest that should be determined by this Court. RAP 13.4(b)(4).

B. THIS COURT SHOULD REVIEW THE PANEL’S HOLDING THAT RCW 41.26.281 IS CONSTITUTIONAL AND DOES NOT VIOLATE SOVEREIGN IMMUNITY.

Applying the rational basis test under an equal protection analysis, the panel held that neither WASH. CONST., Art. I, § 12 nor the City’s sovereign immunity was violated by the special privileges granted to LEOFF members at the expense of municipalities and their taxpayers. But using the rational basis test to determine whether RCW 41.26.281 violates art. I, § 12, the privileges and immunities clause, conflicts with *Andersen v.*

King County, ___ Wn.3d ___, 138 P.3d 963 (2006), decided two days after the panel denied the City's motion for reconsideration. Thus, the panel's decision presents a significant question of law under the State Constitution. Moreover, there are significant questions of law under the Federal Constitution, and the panel's decision conflicts with other decisions of this Court. RAP 13.4(b)(1) and (3).

1. RCW 41.26.281's Express Grant of Positive Favoritism to a Select Class Violates Wash. Const. Art. I, § 12.

Andersen reaffirmed this Court's holding in *Grant Cy. Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) ("*Grant Cy. I*") that a statute that grants positive favoritism to a particular class is subject to an independent state analysis under WASH. CONST. art. I, § 12. That is, in certain situations (such as *Grant Cy. II* and here), where positive favoritism results, the courts must engage in an analysis of the separate and greater protections provided to citizens of the state under the Washington Constitution. *Andersen*, 138 P.3d 963, and *State v. Gunwall*, 106 Wn.2d 54, 59-63, 720 P.2d 808 (1986).

Andersen clarified that an Art I, § 12 analysis involves separate tests depending upon whether the effect of the challenged statute is positive favoritism or discrimination. *Andersen's* discussion and analysis of the state's privileges and immunities clause provides substantial

guidance as to the proper analysis under Art. I, § 12 of a challenged statute that grants positive favoritism to a person or select class.

Art. I, § 12 was intended to specifically prohibit positive favoritism towards a select few. *Andersen*, 138 P.3d at 971. As Justice Chambers explained (dissenting on other grounds), the analysis is two-fold:

This text [of Art. I, § 12] envisions a two part analysis: (1) has a law been passed granting a citizen, class, or corporation a privilege or immunity, and if so, (2) does that privilege or immunity belong equally to all of us? *The clause applies only if the law grants a privilege or immunity, though, of course, it may be susceptible to other constitutional challenges.*

138 P.3d at 1040 (emphasis supplied; internal citations omitted). Justice J.M. Johnson (concurring) agreed:

This text [of Art. I, §12] requires a two-part analysis: (1) Does a law grant a citizen, class, or corporation "privileges or immunities," and if so, (2) Are those "privileges or immunities" equally available to all?

138 P.3d at 993. Thus, the first question is necessarily whether the statute grants a citizen, class, or corporation a privilege or immunity.

Here, the panel wrongly held that LEOFF does not implicate any Art. I, § 12 privileges or immunities, stating that “[t]he 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.” Slip op. at 10. But *Andersen* recognized the rights to sue (and defend

against suits) and to possess property and not have it taken to fund a no-fault system do implicate Art. I, § 12, as well as the Federal Constitution. For example, Justice J. M. Johnson cited to “the classic statement of the law on privileges and immunities under article IV of the United States Constitution” as including both “the right to acquire and possess property of every kind” and “to institute and maintain actions of any kind in the courts of the state”. *Andersen*, 138 P.3d at 994 (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551-52, 4 Wash. C.C. 371 (C.C.E.D.Pa. 1823)); *see also Grant Cy. II*, 150 Wn.2d at 812-813. The Decision thus conflicts with this Court’s decision in *Andersen* for this reason as well.

The Decision also conflicts with *Alton V. Phillips Co. v. State*, 65 Wn.2d 199, 396 P.2d 537 (1964) (cited in *Grant Cy. Fire Protection Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 731, 42 P.3d 394 (2002) (“*Grant Cy. I*”). *Phillips* invalidated under Art. I, § 12 a special bill allowing a particular person to sue and depriving the State of the benefit of a statute of limitations. Unlike the panel here, *Phillips* did not apply a “minimal scrutiny” analysis; rather, it held that a special bill enacted by the legislature exempting one company from a statute of limitations violated Art. I, § 12 because it conferred a special privilege to sue on one company – even though it was the State’s own bill that authorized suit against itself.

Under the independent state analysis required under Art I, § 12, and recognized by *Andersen* and *Phillips*, the unconstitutionality of RCW 41.26.281 is patent. It grants to LEOFF members the privilege to both receive LEOFF benefits and maintain actions against employers. Such a privilege is not equally available to all because all other employers compelled to fund workers' compensation benefits must be protected from actions in negligence. RCW tit. 51. And all other employees in hazardous industries are barred from suit. RCW tit. 51. It is precisely this type of legislative grant of a privilege to a politically active class of citizens that Art. I, § 12 was designed to prohibit. (*Andersen*, 138 P.3d at 972.) The legislature itself recognized that this unusual special grant to both “benefit under this chapter and also have cause of action against the governmental employer” is a special “privilege”. RCW 41.26.281. Local governments are entitled to the same protections as private entities under Art. I § 12. *See Grant Cy. II*, 150 Wn.2d at 813.

The second part of the Art. I, § 12 independent state analysis test is whether the privilege granted by the challenged statute is equally available to all. Outside of LEOFF, no other employees or employers are similarly situated.

2. Applying the “Minimal Scrutiny” Analysis Is Contrary to Nationally Recognized Workers’ Compensation Principles.

Although workers’ compensation laws exist in every state, the Decision does not cite to a single on point case. In contrast, the absolute constitutional prohibitions (under both equal protection and due process) against such a workers’ compensation statute are well-established, both by this Court and by the highest court in this nation. *Mountain Timber Co. v. Washington*, 243 U.S. 219, 233, 37 S. Ct. 260, 61 L. Ed. 685 (1917); *Manor v. Nestle Food Co.*, 131 Wn.2d 439, 449, n.4, 932 P.2d 628, 945 P.2d 1119 (1997); *Epperly v. City of Seattle*, 65 Wn.2d 777, 779 n.1, 399 P.2d 591 (1965) (requiring employers to fund benefits without receiving immunity presents “grave constitutional questions”); *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915). Indeed, the United States Supreme Court has recognized employers’ constitutional rights would be violated if the *quid pro quo* of protection from suit were not included¹:

¹This Court has recognized that immunity from suit is a “fundamental tenet” of workers’ compensation laws:

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 Wn.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:

. . . 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. The cases addressing the constitutional requirement of workers' compensation laws to provide immunity from suit have discussed it under both equal protection and due process principles. *State v. Daggett*, 87 Wash. 253, 151 P. 648 (1915) (equal protection); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 233, 37 S. Ct. 260, 61 L. Ed. 685 (1917) (due process); *Manor*, 131 Wn.2d at 449 n.4 ("Violation of equal protection is probably the better constitutional argument").

The Decision's reasoning that the special privilege granted LEOFF members to sue for damages in excess of workers' compensation benefits is justified by occupational hazards is puzzling and logically unsound. Worker's compensation laws were originally enacted *only* for those

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).

workers “in hazardous industries.” *Mountain Timber*, 243 U.S. 219 at 233; *see also Wineberg v. Dept. of Labor & Indus.*, 57 Wn.2d 779, 359 P.2d 1046 (1961). The inherent hazards of an occupation cannot be the “rational basis” for both granting the right to sue (to fire fighters and law enforcement officers) and eliminating the right to sue (for all other workers). The panel’s conclusion is further belied by the fact that Washington State Patrol members (no less engaged in law enforcement than police LEOFF members) do not have a comparable right to sue under their workers’ compensation system. RCW ch. 43.43.

3. LEOFF Does Not Satisfy Even a Minimal Scrutiny Analysis.

As discussed *supra*, the panel applied the wrong test. However, LEOFF cannot even meet the more liberal “minimal scrutiny” analysis. All workers’ compensation decisions recognize that such statutes satisfy constitutional scrutiny only if they provide the employer *quid pro quo* protection from suit. While some cases apply due process principles, others apply equal protection principles in recognizing that protection from suit is mandated. *Manor*, 131 Wn.2d at 450 n.4 (“Violation of equal protection is probably the better constitutional argument”); *Daggett*, 87 Wash. 253 (equal protection).

The minimal scrutiny analysis under equal protection requires three inquiries: (1) does the classification apply alike to all class members; (2) does some basis in reality exist for distinguishing between those within and without the class; and (3) does the classification have a rational relation to the statute's purposes? *Locke*, Slip op. at 10.

The panel held that LEOFF 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*,” Slip op. at 13 (emphasis supplied). This conclusion is contrary to the entire body of workers’ compensation laws. There is no minority view. Workers’ compensation was originally limited to ultrahazardous occupations. If the hazards of one’s occupation can provide a rational basis for allowing sure and certain benefits in addition to the right to sue, this basis would have been recognized long before now. The recognition of the equal protection and due process violations occurred in the first instance in connection with ultrahazardous employments. The Decision’s superficial disregard of these well recognized principles requires review.

Second, it cannot be said that there is “some basis in reality” for distinguishing between those within and without the class. 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. mining, logging, construction work).²

Third, there is no legislative support for the panel's conclusion that a statutory provision allowing LEOFF members to sue in tort has a "rational relation" to the legislative purpose to create "'a strong incentive for improved safety.'" *Locke*, Slip op. at 11. **Nothing** in RCW ch. 41.26 suggests that the purpose of the act is to create such an incentive. The purpose was to provide a system of death, disability, and retirement benefits. RCW 41.26.020.

4. The Decision Ignores LEOFF Due Process Implications.

The Decision failed to even discuss the due process implications of LEOFF. The United States Supreme Court analyzed the quid pro quo requirement for workers' compensation under due process principles in *Mountain Timber*, 243 U.S. at 233-34. As will be next discussed, there can be no public liability where there can be no private liability.

² The legislature itself, in rewriting RCW 51.12.010 to expand industrial insurance coverage from only certain enumerated "ultrahazardous" occupations to "embrace all employments which are 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 nonhazardous employment for purposes of compensating injured workers.

5. The Ruling that RCW 4.96.010 Waived the City's Sovereign Immunity Was in Error.

The panel erroneously held, contrary to Supreme Court authority directly on point, that RCW 4.96.010 unequivocally waived the City's sovereign immunity. Rather, that statute provides, in pertinent part:

(1) All local governmental entities ... shall be liable for damages arising out of their tortious conduct ... *to the same extent as if they were a private person or corporation.*

(Emphasis supplied.) In failing to recognize the statute's express limitation of the sovereign immunity waiver, the panel erred and disregarded binding precedent.

The panel's reliance upon *Evangelical United Brethren Church of Adna v. State*, 67 Wn.2d 246, 407 P.2d 440 (1965) is misplaced. *Evangelical* expressly prohibits liability against governmental entities where there is no analogous private liability, stating:

Essentially, then, the official conduct giving rise to liability must be *tortious*, and it must be analogous, in some degree at least, to the chargeable misconduct and liability of a private person or corporation.

Id. at 253 (italics in original). 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.

15 KARL B. TEGLAND, WASHINGTON PRACTICE, *Civil Procedure*, § 45.2 (1st ed. 2003) (emphasis supplied; footnotes omitted). The U.S. Supreme Court also recently recognized the sovereign immunity bar where no analogous private cause of action exists in *United States v. Olson*, 126 S. Ct. 510, 163 L. Ed. 2d 306 (2005).³

This Court recognized this principle in *Edgar v. State*, 92 Wn.2d 217, 595 P.2d 534 (1979), in interpreting RCW 4.92.090 – the limited waiver of sovereign immunity for the State. Like RCW 4.96.010 and 28 U.S.C. § 1346(b)(1), RCW 4.92.090 waives sovereign immunity only “to the same extent as if [the State] were a private person or corporation.” Thus, where private employers cannot be required to both fund workers’ compensation and be liable in tort, neither can public employers.

Ignoring Supreme Court cases on point, the panel instead cited to several cases involving exceptions to the public duty doctrine in

³ The Federal Tort Claims Act, 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.”

erroneously concluding that public liability can exist where there is no private entity liability analogy. These cases are inapposite.

Contrary to the panel's assumption, cases involving exceptions to the public duty doctrine do have private liability analogies as required by *Evangelical, Edgar*, Art. I, § 12, and RCW 4.96.010. For example, with regard to protecting people from the criminal acts of another, Washington courts rely on RESTATEMENT (SECOND) OF TORTS, §§ 315, 316-9 (1965); *Taggart v. State*, 118 Wn.2d 195, 218, 822 P.2d 243 (1992). Furthermore, because reported decisions do not address every issue that could have been raised in a particular case, the fact that a public duty doctrine case may not address a separate defense does not mean that the court has made a determination on that issue. The issue here is whether there is a private entity analogy – not whether any public duty doctrine exception exists.

C. REQUIRING LEOFF EMPLOYERS TO PROVE THE “AMOUNT RECEIVED OR RECEIVABLE” UNDER RCW 41.26.281 CONFLICTS WITH OTHER COURT OF APPEALS DECISIONS AND ADVERSELY AFFECTS ALL LEOFF EMPLOYERS.

RCW 41.26.281 says a LEOFF member can recover from an employer only the excess over “the amount received or receivable under this chapter.” *Hansen v. City of Everett*, 93 Wn. App. 921, 971 P.2d 111, *rev. denied*, 138 Wn.2d 1009 (1999), recognized this means the employee has a cause of action for “excess damages”—*i.e.*, damages exceeding the

amount received or receivable under LEOFF. *Id.* at 929. It is elementary that plaintiff has the burden of proving all elements of a cause of action. *Jeffers v. City of Seattle*, 23 Wn. App. 301, 311, 597 P.2d 899 (1979).

Yet the panel said the City had the burden of proving the amount received or receivable. This is contrary to decisions of the Court of Appeals, *Hansen* and *Jeffers*. In addition, an issue of substantial public importance this Court should decide is presented since the Decision will affect every suit brought by a LEOFF member under RCW 41.26.281. RAP 13.4(b)(2) and (4).

D. UPHOLDING A FUTURE ECONOMIC DAMAGES AWARD UNSUPPORTED BY THE EVIDENCE CONFLICTS WITH DECISIONS OF THIS COURT AND THE COURTS OF APPEALS.

The jury awarded \$514,000 in future economic damages. (CP 4090) The panel upheld this award, stating:

We find that Locke presented evidence that, given his permanent injuries, his increasing pain, and his medical treatments for those conditions, he would need such treatments over the next approximately 33 years at a cost of \$160 per treatment and would need such treatment more than once a week.

(Slip op. at 31) The panel got the \$160 from testimony of a physical therapist, who testified she charged plaintiff \$160 per visit. (Slip op. at 31) The panel ignored that not only did no one testify plaintiff would need physical therapy for the rest of his life, but the physical therapist testified to exactly the opposite –plaintiff would need only 2-3 more months of

physical therapy every other week followed by 2-3 more months once a month, for a maximum total of \$1,440. (6/7/04 PM RP 50-51)

While Washington law allows a jury to determine future medical expenses, no Washington case allows a jury to award future medical expenses in direct contravention to the only competent testimony on the issue. Yet that is what the panel essentially held.

The panel also cited plaintiff's testimony that he was still undergoing massage and rolfing treatments. But there was *no* evidence of what these treatments cost, even in the past. *Cf. Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997) (medical bills relevant to prove future treatment costs). To assume massage and rolfing treatments cost the same as physical therapy—\$160 per session—is rank speculation. A verdict cannot be based on speculation. *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wn.2d 747, 753, 818 P.2d 1337 (1991). The Decision is contrary to decisions of this Court and the Court of Appeals.

VI. CONCLUSION

Every criterion set forth in RAP 13.4(b) calls for this Court's review. Not only does the panel's decision conflict with decisions of this Court and the Courts of Appeals, it presents significant constitutional issues and issues of substantial public importance that require this Court's

review because of the impact on LEOFF employers and employees and the taxpayers of this State.

Thus, this Court should accept review and reverse. Alternatively, the case should be remanded for a new trial on liability and damages.

Dated this 21st day of August 2006.

REED McCLURE

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KEVIN J. LOCKE,)	
)	
Respondent,)	
)	
and TORI LOCKE, husband and wife)	
and the marital community composed)	
thereof,)	
)	No. 55256-2-1
Plaintiff,)	
)	
v.)	
)	DIVISION ONE
THE CITY OF SEATTLE, a municipal)	
Corporation, and THE CITY OF)	
SEATTLE FIRE DEPARTMENT,)	
)	
Appellants,)	
)	
and the STATE OF WASHINGTON,)	
its subdivisions and agencies, and the)	
WASHINGTON STATE PATROL,)	PUBLISHED IN PART
JAMES SEWELL, MOLLY DOUCE,)	
JOHN CAMERON, and "JOHN DOES")	
1-5, in their individual capacities,)	
)	
Defendants.)	FILED: June 19, 2006

DWYER, J. — Fire fighter trainee Kevin Locke was injured during a training exercise. A jury found the city of Seattle negligent and returned a substantial verdict in Locke's favor. The city now appeals from the judgment entered on the verdict, raising constitutional, statutory, evidentiary, instructional, and procedural challenges. Finding no error, we affirm.

APPENDIX A

FACTS

Kevin Locke was hired by the Seattle Fire Department as a fire fighter trainee.¹ The city enrolled him as a “fire fighter” member of the Law Enforcement Officer and Fire Fighter Retirement System (LEOFF) on April 19, 2000.¹

From June 25 through June 29, 2000, Locke’s class of fire fighter recruits trained at the Washington State Patrol Fire Training Academy in North Bend, Washington. On June 29, during an exercise drill, Locke fell from a 50-foot ladder and was injured.

Locke sued the city of Seattle for negligence.² Locke brought his claim pursuant to RCW 41.26.281, which provides LEOFF members with the right to bring personal injury claims against their governmental employers.

At trial, Locke argued that the city’s fire department employees negligently conducted the training exercise, causing him to suffer from heat, exhaustion, and dehydration, which, along with operational aspects of the training drill, created unsafe conditions that caused him to fall and be injured. The city moved for summary judgment arguing, among other things, that Locke was not a LEOFF member, and that he had assumed the risk of being injured. The trial court denied the motion.

¹ Persons who first became LEOFF members on or after October 1, 1977 are enrolled in LEOFF Plan 2. RCW 41.26.030(29).

² Originally, Locke also sued the State of Washington, the Washington State Patrol, and several city and state employees for negligence and violation of 42 U.S.C. §1983. The claims related to §1983, the State, the State Patrol, and individual employees were dismissed. Locke's wife also voluntarily dismissed her claims.

Locke's case was heard by a jury from May 17 to July 7, 2004. At trial, the parties presented testimony from a large number of witnesses and submitted hundreds of exhibits. On July 13, 2004, the jury returned a 10 to 2 verdict for Locke, but found him 10 percent at fault, resulting in a total award of \$1,842,800.

The city moved for remittitur, arguing that there was a defect in the jury's calculation of damages. The trial court granted the motion, recalculated the damages, and entered judgment in the amount of \$1,513,663.88. The trial court subsequently denied the city's motion for a new trial.

On appeal, the city challenges the basis for Locke's suit on constitutional and statutory grounds and assigns error to numerous trial court rulings. The parties are well aware of the extensive record in this case, very little of which pertains to the city's appellate arguments. Accordingly, the facts relevant to the issues presented will be discussed in connection with the resolution of those issues.

DISCUSSION

The majority of the city's appeal concerns statutory and constitutional arguments regarding the LEOFF statute, RCW 41.26. We therefore begin with a brief description of LEOFF, as provided in Fray v. Spokane County, 134 Wn.2d 637, 952 P.2d 601 (1998):

In 1969, the Legislature enacted a comprehensive benefits plan for police officers and fire fighters titled the "Washington Law Enforcement Officers' and Fire Fighters' Retirement System Act," commonly referred to as LEOFF. This system of benefits was codified as RCW 41.26. LEOFF was amended in 1971 to provide greater benefits to injured police officers and fire fighters than they

would receive under the workers' compensation system. One such benefit codified in former RCW 41.26.280 [now RCW 41.26.281] granted LEOFF members a "right to sue" their employers for negligence. This new provision read as follows:

If injury or death results to a member from the intentional or negligent act or omission of [the] member's governmental employer, the member, the 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.

Fray, 134 Wn.2d at 643-44 (footnotes omitted). The Fray court also explained that LEOFF members have been entitled to sue their governmental employers for negligent and intentional injuries since 1971, and that a 1992 amendment purporting to repeal that right with regard to LEOFF Plan 2 members was invalid. Id., at 656.

I. RCW 4.96.010 Waives Municipal Sovereign Immunity

We first address the city's claim that it is entitled to sovereign immunity from its LEOFF-member employees' tort claims. The city relies on RCW 4.96.010(1), which provides:

All local governmental entities, whether acting in a governmental or propriety 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.

Although the statute generally waives a municipality's sovereign immunity, the city nonetheless contends that the phrase, "to the same extent as if they were a private person or corporation," operates to provide the city with sovereign immunity from claims under LEOFF because a private person or

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corporation would not be required to pay into a worker's compensation fund and still be subject to an employee's tort suit.

The city's argument is inconsistent with Washington Supreme Court decisions holding that RCW 4.96.010 permits different rules of liability for the tortious conduct of governmental entities as compared with private persons. See Bailey v. Forks, 108 Wn.2d 262, 265, 737 P.2d 1257, 753 P.2d 523 (1987); King v. City of Seattle, 84 Wn.2d 239, 243, 525 P.2d 228 (1974), overruled on other grounds by Nielson v. Eisenhower & Carlson, 100 Wn. App. 584, 999 P.2d 42 (2000); Evangelical United Brethren Church v. State, 67 Wn.2d 246, 253, 407 P.2d 440 (1965). The difference in municipal liability compared to a private party's liability set forth in these cases does not preclude the applicability of RCW 4.96.010 to municipalities. As the Supreme Court explained:

[I]t is well recognized that RCW 4.96.010 was not intended to create new duties where none existed before. Rather, it was to permit a cause of action in tort if a duty could be established, just the same as with a private person.

J & B Dev. Co. v. King County, 100 Wn.2d 299, 305, 669 P.2d 468 (1983), reversed on other grounds by Meaney v. Dodd, 111 Wn.2d 174, 759 P.2d 455 (1988), and Taylor v. Stevens County, 111 Wn.2d 159, 759 P.2d 447 (1988). See also Beal v. City of Seattle, 134 Wn.2d 769, 784, 954 P.2d 237 (1998) (explaining public duty doctrine).

The correct interpretation of RCW 4.96.010 is that if a government is found to have engaged in tortious conduct under applicable substantive law, which may or may not be different for government than for private parties, then

the government will be liable for such tortious conduct “to the same extent as if they were a private person or corporation.” See Taylor v. City of Redmond, 89 Wn.2d 315, 319, 571 P.2d 1388 (1977) (sovereign immunity waived by RCW 4.96.010 for suits brought by LEOFF Plan 1 members).

This reading of RCW 4.96.010 is consistent with the principle that the legislature is not presumed to do a meaningless act. Taylor v. City of Redmond, 89 Wn.2d at 319 (“[I]t is a fundamental principle of statutory construction that courts must not construe statutes so as to nullify, void or render meaningless or superfluous any section or words of same.”). RCW 41.26.281 places a statutory duty on municipal corporations such as the city not to injure employee fire fighters or police officers by negligent acts or omissions. This satisfies the public duty doctrine and establishes a cause of action that is in turn permitted by RCW 4.96.010. Bailey, 108 Wn.2d at 269; Halvorson v. Dahl, 89 Wn.2d 673, 676, 574 P.2d 1190 (1978).

In sum, the city’s sovereign immunity from claims brought under the LEOFF statute is waived by RCW 4.96.010.

II. RCW 41.26.281 Does Not Violate Washington Constitution Article II, Section 19 or Article I, Section 12

We next address the city’s arguments regarding the constitutionality of RCW 41.26.281. The city argues that RCW 41.26.281 is unconstitutional because it violates both article II, section 19, and article I, section 12 of the state constitution.

We apply de novo review when interpreting a statute and when applying constitutional rights. State v. Manro, 125 Wn. App. 165, 170, 104 P.3d 708, review denied, 155 Wn.2d 1010 (2005); State v. Salavea, 151 Wn.2d 133, 140, 86 P.3d 125 (2004). Statutes are presumed to be constitutional. In no doubtful case should the courts pronounce legislation to be contrary to the constitution, and all doubts should be resolved in favor of constitutionality. State ex rel. Smilanich v. McCollum, 62 Wn.2d 602, 606, 384 P.2d 358 (1963).

A. Washington Constitution Article II, Section 19

The city claims that RCW 41.26.281 is unconstitutional because the title of the bill enacting it violates article II, section 19 of the Washington Constitution. Article II, section 19 provides that "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." The purpose of article II, section 19 is to "assure that the members of the legislature and the public are generally aware of what is contained in proposed new laws." State v. Thorne, 129 Wn.2d 736, 757, 921 P.2d 514 (1996). "The title to a bill need not be an index to its contents; nor is the title expected to give the details contained in the bill." Washington Fed'n of State Employees v. State, 127 Wn.2d 544, 555, 901 P.2d 1028 (1995) (quoting Treffry v. Taylor, 67 Wn.2d 487, 491, 408 P.2d 269 (1965)). It is enough that the title "would lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of the law." Young Men's Christian Ass'n v. State, 62 Wn.2d 504, 506, 383 P.2d 497 (1963). Where the legislature has chosen a general title, that title will be granted a liberal

construction. "So long as the title embraces a general subject, it is not violative of the constitution even though the general subject contains several incidental subjects or subdivisions." Kueckelhan v. Fed. Old Line Ins. Co., 69 Wn.2d 392, 403, 418 P.2d 443 (1966).

The "right to sue" provision in LEOFF, RCW 41.26.281, was originally contained in a 1971 bill entitled "An Act Relating to Law Enforcement Officers and Fire Fighters." Laws of 1971, 1st Ex. Sess., ch. 257, § 15.³ The city contends that "[n]o one reading this title would dream that it included a waiver of governmental employers' sovereign immunity."

We disagree. As explained above, RCW 4.96.010, which was enacted in 1967, waived municipal sovereign immunity. Laws of 1967, ch. 164, § 1, *amended by* Laws of 1993, ch. 449, § 2.⁴ The LEOFF benefit system became law in 1970. Laws of 1970, 1st Ex. Sess., ch. 6, § 2(1), p. 35. The challenged effect was, therefore, accomplished not by chapter 41.26 RCW, as argued by the city, but by chapter 4.96 RCW.

Moreover, the title of the bill ("An Act Relating to Law Enforcement Officers and Fire Fighters") is constitutionally sufficient. The title embraces a general subject and indicates the scope and purpose of the legislation. It properly gives notice that would lead to an inquiry into the body of the act

³ The "right to sue" provision was originally codified as RCW 41.26.280. With minor changes, it was recodified as RCW 41.26.058 by Laws of 1991, ch. 35, § 28. It was recodified again as RCW 41.26.281 by Laws of 1992, ch. 72, § 11. The city's argument is not directed to either the 1991 or 1992 legislation.

⁴ The State's sovereign immunity is waived by RCW 4.92.090, enacted by Laws of 1961, ch. 136, § 1, *amended by* Laws of 1963, ch. 159, § 2.

regarding the benefits granted to law enforcement officers and fire fighters, including the right to bring a cause of action alleging negligence against their municipal employers.

B. Washington Constitution Article I, Section 12

The city also argues that the LEOFF statute violates article I, section 12 of the state constitution⁵ by requiring the city to pay worker's compensation benefits to LEOFF Plan 2 members without giving the city any corresponding immunity from suit.

The city's position is wrong on several grounds. First, article I, section 12 distinguishes between a "municipal corporation," such as the city, and other corporations and citizens. As held in City of Seattle v. State, 103 Wn.2d 663, 668, 694 P.2d 641 (1985), the city "does not itself have rights under the equal protection clauses of the state and federal constitutions." See also Grant County Fire Protection Dist. 5 v. City of Moses Lake, 150 Wn.2d 791, 83 P.3d 419 (2004). The State grants municipal corporations many privileges and immunities that are not shared by citizens and private corporations. For example, the city of Seattle may tax its residents to raise money for activities such as fire fighting. Nothing in section 12 prohibits the State from imposing additional requirements on its municipal corporations in connection with such activities.

⁵ "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."

Also, the city does not and cannot argue either that a fundamental right is implicated or that private employers or LEOFF members are members of a suspect class. In an equal protection analysis, where a challenge to a provision does not implicate a fundamental right or suspect class, as those terms are defined in established case law, a court shall apply “minimal scrutiny.” Yakima County Deputy Sheriff’s Ass’n v. Bd. of Comm’rs, 92 Wn.2d 831, 835-36, 601 P.2d 936 (1979). When employing such scrutiny, the court engages in three inquiries:

First, does the classification apply alike to all members within the designated class? ...

Second, does some basis in reality exist for reasonably distinguishing between those within and without the designated class? ...

Third, does the challenged classification have any rational relation to the purposes of the challenged statute? More specifically, does the difference in treatment between those within and without the designated class serve the purposes intended by the legislation?

Id. (citations omitted).

Minimal scrutiny is called for in this case because no “privileges or immunities,” as that term is used in article I, section 12, are implicated. The power to bring suit for negligence against an employer – or, conversely, the right to avoid such a suit – is not a privilege or immunity under article I, section 12.⁶

⁶ See Paulson v. Pierce County, 99 Wn.2d 645, 664 P.2d 1202 (1983) (minimal scrutiny applied in article I, section 12 challenge where liability for flood control activities was precluded for counties but not municipalities); Campos v. Dep’t of Labor & Indus., 75 Wn. App. 379, 880 P.2d 543 (1994) (minimal scrutiny applied in article I, section 12 challenge where the right to seek adjustment to workers' compensation claims was limited by a statute of limitations).

In applying the three steps of “minimal scrutiny” to RCW 41.26.281, we find that the provision is clearly applied alike to all members of the designated class. First, the provision applies to all members of the LEOFF system. Second, “some basis in reality” exists to distinguish the designated class, in that the class is distinguished by the definition established for “member” under the LEOFF system. And, third, the challenged classification has a rational relation to the purposes of the challenged statute. As the Supreme Court explained in Hauber v. Yakima County, 147 Wn.2d 655, 56 P.3d 559 (2002),

While the Industrial Insurance Act immunizes most employers from job related negligence suits, fire fighters and police officers, because of the vital and dangerous nature of their work, are provided extra protection and are allowed to both collect workers' compensation and bring job related negligence suits against their employers.

Hauber, 147 Wn.2d at 660 (citing RCW 51.04.010 and RCW 41.26.281).⁷

In Hansen v. City of Everett, 93 Wn. App. 921, 926, 971 P.2d 111 (1999), this court further explained the purposes and effects of RCW 41.26.281: “By exposing an employer to liability for negligent acts toward its employees, the statute creates a strong incentive for improved safety.” We also explained that RCW 41.26.281 provides a limited quid pro quo to the city in exchange for providing worker’s compensation because employers are entitled to deduct

⁷ In Hauber, the court found that the county had statutory immunity against a suit brought by the estate of an emergency search and rescue volunteer and fire fighter who was killed while voluntarily attempting to save a diver. The court found that, “[i]f Hauber had responded to the call as a fire fighter or pursuant to a mutual aid agreement, he may have been entitled to bring suit against the city for negligence under RCW 41.26.281 by application of RCW 38.52.080.” Hauber, 147 Wn.2d at 661. Because the court found that Hauber was not acting as a fire fighter at the time of his death, but, rather, that he responded as volunteer, the county was immune pursuant to RCW 38.52.190. Id.

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worker's compensation payments from damages otherwise proved in a lawsuit against the employer. Hansen, 93 Wn. App. at 927.

Locke's claim against his employer in this lawsuit based on negligence is limited to the amount in "excess of damages over the amount received or receivable under [LEOFF]." Gillis v. City of Walla Walla, 94 Wn.2d 193, 196, 616 P.2d 625 (1980), overruled on other grounds by Flanigan v. Dep't of Labor & Indus., 123 Wn.2d 418, 423, 869 P.2d 14 (1994). "The offset is applied regardless of the nature or type of disability benefits under LEOFF." Hansen, 93 Wn. App. at 927.

Thus, traditional subrogation or collateral source principles are not necessarily applicable. Regardless of the percentage of comparative fault the jury might assess to a claimant, the municipal employer is entitled to an offset representing 100 percent of the LEOFF benefits paid plus the present value of LEOFF benefits to be paid in the future. Similarly, the offset is against the total verdict awarded, without regard to categorizations of special or general damages. Gillis, 94 Wn.2d at 196. This formula treats municipal defendants more favorably than most other tortfeasors or subrogors.

To establish a claim, LEOFF members must also prove that their employers acted negligently or intentionally. Therefore, the city is protected from product liability claims vis-à-vis their employees since those are not based on negligence. Soproni v. Polygon Apartment Partners, 137 Wn.2d 319, 971 P.2d 500 (1999).

Thus, RCW 41.26.281 serves vital governmental purposes, satisfying the “rational basis” inquiry. It gives extra protection to fire fighters and law enforcement officers because of the hazardous nature of their occupations, thereby encouraging discipline and efficiency in the workplace. Moreover, under the statute, the governmental employer receives benefits not available to private parties subject to suits in negligence. In this context, the governmental employer occupies a middle ground between nonemployer tortfeasors and nongovernmental employer tortfeasors. The legislature had a “rational basis” for the establishment of this middle ground. There is no constitutional infirmity.

III. Fire Fighter Trainees May Be Members of LEOFF

The city next contends that the trial court erred in denying the city’s motion for summary judgment dismissal of Locke’s claim on the ground that Locke was not a LEOFF Plan 2 member at the time of his injury. On appeal, the city frames the issue thusly:

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?

Br. of Appellants at 3. The city argues that, as a matter of law, Locke, as a fire fighter trainee, could not be a member of LEOFF, that the trial court erred in denying the city’s motion for summary judgment on this issue, and that the claim against the city must be dismissed. We disagree.

Locke opposed the city’s motion by submitting a Department of Retirement Systems’ enrollment form completed by the city, which confirms that

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the city enrolled Locke as a "fire fighter" in LEOFF Plan 2 with April 19, 2000 listed as his first date of employee eligibility. Locke also submitted a September 15, 2003 letter from the Seattle Fire Department which states, "Since the effective date of your appointment to Fire Fighter, April 19, 2000, you have been a LEOFF II Retirement System member."

An employer's understanding of whether its employee is a LEOFF member is a relevant and proper consideration in determining whether the employee is, in fact, a LEOFF member. Tucker v. Dep't of Ret. Sys., 127 Wn. App. 700, 709, 113 P.3d 4 (2005). Locke's submissions show that the city itself considered Locke to be a LEOFF member prior to the initiation of this lawsuit. This evidence was sufficient to defeat the motion.⁸

Moreover, we find unavailing the city's argument that, as a matter of statutory construction, Locke "could not have been a [LEOFF] member." Reply Br. of Appellants at 1. Statutory construction is a question of law that we review de novo. Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994); Rettkowski v. Dep't of Ecology, 128 Wn.2d 508, 515, 910 P.2d 462 (1996). "The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Rabanco Ltd. v. King County, 125 Wn. App. 794, 800, 106 P.3d 802 (2005) (quoting Dep't of Ecology v. Campbell & Gwinn,

⁸ Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). "Absent ambiguity, a statute's meaning must be derived from the wording of the statute itself without judicial construction or interpretation." Hansen v. City of Everett, 93 Wn. App. 921, 924-25, 971 P.2d 111 (1999) (quoting Fray, 134 Wn.2d at 649).

Our examination begins with RCW 41.26.030(4)(a), which defines a "fire fighter" as:

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

The classification "fire fighter" is further defined in Washington Administrative Code (WAC) 415-104-225, which sets forth the Department of Retirement Systems rules regarding LEOFF membership and gives specific guidance regarding whom the legislature intended to include. It provides:

(2) Fire fighters. You are a fire fighter if you are employed in a uniformed fire fighter position by an employer on a full-time, fully compensated basis, and as a consequence of your employment, you have the 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.

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

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

legislature's purpose in enacting the statute all support denial of the city's claim of error.

IV. Burden of Proof on Statutory Set-Off.

The city also assigns error to several of the trial court's instructions to the jury. In its first jury instruction challenge, the city focuses on jury instructions 18 and 20, which pertain to the parties' respective burdens of proof on damages. Instruction 18 informed the jury that Locke had the burden of proving damages such as pain and suffering and future economic damages. Instruction 20 stated that the city, in order to establish the amount of the offset, had the burden of proving the amount of benefits received and receivable.

The city argues that instructions 18 and 20 improperly gave inconsistent directions regarding the parties' respective burdens of proof. We disagree.

The focus of the city's argument is that instruction 20 was incorrect because Locke should have had the burden of proving the amount "received and receivable." However, in its answer to Locke's complaint the city raised the issue of its entitlement to an offset such as that reflected in instruction 20. The city's pleading was proper under CR 8(c), which states that a party shall affirmatively plead any matter constituting an avoidance or affirmative defense. CR 8(c); Rainier Nat'l Bank v. Lewis, 30 Wn. App. 419, 422, 635 P.2d 153 (1981). The burden of proof is thereby placed upon the party asserting the avoidance or affirmative defense. See Gleason v. Metro. Mortgage Co., 15 Wn. App. 481, 551 P.2d 147 (1976) (accord and satisfaction); Tacoma Commercial

Bank v. Elmore, 18 Wn. App. 775, 573 P.2d 798 (1977); 3A LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: RULES PRACTICE CR 8 at 138 (4th ed. 1992). Because the city's contention that it was entitled to the statutory offset was in the nature of an avoidance,⁹ instruction 20 correctly stated the law.

The remainder of this opinion has no precedential value. Therefore, it will be filed for public record in accordance with the rules governing unpublished opinions. RCW 2.06.040.

V. Assumption of Risk

The city raises several arguments related to its contention that Locke assumed the risk of being injured during fire fighter training. We begin with the city's claim that the trial court erred in denying its motions for summary judgment and judgment as a matter of law related to that defense.

First, the city waived its right to challenge the trial court's denial of its CR 50 motion relating to assumption of risk because it presented evidence after its motion was denied. Washington law provides that, "[o]nce a defendant puts on a case, any challenge to the sufficiency of the evidence before the court at that time is waived." Hill v. Cox, 110 Wn. App. 394, 403, 41 P.3d 495 (2002) (citing Carle v. McChord Credit Union, 65 Wn. App. 93, 97 n.3, 827 P.2d 1070 (1992); Goodman v. Bethel Sch. Dist. 403, 84 Wn.2d 120, 123, 524 P.2d 918 (1974)).

⁹ Shinn Irrigation Equip., Inc. v. Marchand, 1 Wn. App. 428, 430-31, 462 P.2d 571 (1969).

Regarding the trial court's denial of the city's summary judgment motion on this issue, we engage in the same inquiry as the trial court. Marincovich v. Tarabochia, 114 Wn.2d 271, 274, 787 P.2d 562 (1990).

The city argues that Locke assumed the risks inherent in fire fighting as a matter of law under the professional rescuer doctrine.¹⁰ However, RCW 41.26.281 specifically permits "professional rescuers" to sue their employers for injuries caused by their employers' negligence. Therefore, the legislature has concluded that the "professional rescuer doctrine" does not apply to such suits.

The city's claim that it was entitled to judgment as a matter of law on implied primary assumption of the risk, or at least entitled to have the jury decide that issue, is equally unavailing. The city ignores a crucial element of implied primary assumption of risk, which is that "the plaintiff 'must have had a reasonable opportunity to act differently or proceed on an alternate course that would have avoided the danger.'" Home v. North Kitsap Sch. Dist., 92 Wn. App. 709, 721, 965 P.2d 1112 (1998) (quoting Zook v. Baier, 9 Wn. App. 708, 716, 514 P.2d 923 (1973)).

At trial, Locke presented expert testimony supporting his contention that he had no real alternative to participating in the drill that led to his injury if he wanted to remain a fire fighter. And, in response to the city's summary judgment

¹⁰ The city relies on Maltman v. Sauer, 84 Wn.2d 975, 978, 530 P.2d 254 (1975), and Hamilton v. Martinelli & Associates, 110 Cal. App. 4th 1012, 1014, 2 Cal. Rptr. 3d 168, 175 (2003), which involved suits against third parties for negligence, not statutory suits against employers. The holdings of those cases are inapplicable to the issue raised here.

motion, Locke submitted evidence that his actions were not voluntary because not completing the drill might have resulted in his losing his job.¹¹

Viewing the evidence in the light most favorable to Locke, there were disputed material facts as to whether Locke had voluntarily assumed the risk. Thus, the trial court properly denied the city's motions for summary judgment and judgment as a matter of law related to that defense.

The city also assigns error to the trial court's refusal to give its proposed instructions relating to assumption of risk. We review alleged errors of law in jury instructions de novo. Boeing Co. v. Key, 101 Wn. App. 629, 632, 5 P.3d 16 (2000). Jury instructions are sufficient if they (1) are supported by substantial evidence, (2) permit each party to argue its theory of the case; (3) are not misleading, and (4) when read as a whole, properly inform the trier of fact of the applicable law. Boeing, 101 Wn. App. at 633; State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998). An erroneous instruction does not require reversal unless prejudice is shown. Boeing, 101 Wn. App. at 633. An error is not prejudicial unless it presumptively affects the outcome of the trial. Boeing, 101 Wn. App. at 633. Whether to give a particular jury instruction, however, is within the trial court's discretion. Boeing, 101 Wn. App. at 632. A trial court abuses its discretion when its ruling is manifestly unreasonable or based on

¹¹ The day before Locke fell, Chief Douce told the recruits she might have to call Chief Daniels and let him know that only seven or eight of the fifteen recruits would be graduating. Clerk's Papers (CP) at 2168 (excerpt from transcript of Greg Shoemake's Dec. 15, 2000 Department of Labor and Industries interview). The day of the fall, Chief Douce also told the recruits, "[Y]ou guys are going to stay as long as it takes because you guys owe us four hours from yesterday." CP at 2359 (excerpt from April 3, 2003 Deposition of Lt. William "Brady" O'Brien).

untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

If a party is dissatisfied with a proposed instruction, it is the duty of that party to propose an appropriate alternative instruction. If the court declines to give the proposed alternative instruction, the party must take exception to that ruling to preserve the issue for appeal. Hoglund v. Raymark Indus., Inc., 50 Wn. App. 360, 368, 749 P.2d 164 (1987); CR 51(f). This duty applies both to the instruction the court determines to give and the instruction the court determines not to give. The failure to object before the jury is instructed violates CR 51(f). Peterson v. Littlejohn, 56 Wn. App. 1, 11, 781 P.2d 1329 (1989).

Although the city expressed its dissatisfaction with Locke's proposed assumption of risk jury instructions, it failed to propose a legally correct alternative instruction. The city's proposed instruction 42 purported to be an unmodified version of Washington Pattern Jury Instruction (WPI) 13.03 on implied primary assumption of risk. However, the proposed instruction omitted the third paragraph of WPI 13.03,¹² which is to be used "if there is an issue whether the plaintiff voluntarily accepted the risk." 6 WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 13.03, note on use at 157 (4th ed. 2002). The trial court did not err by declining to give this instruction.

¹² "[A person's acceptance of a risk is not voluntary if that person is left with no reasonable alternative course of conduct [to avoid the harm] [or] [to exercise or protect a right or privilege] because of the defendant's negligence.]"

The city's proposed instruction 46 was also legally incorrect. It specifically referred to an affirmative defense, "express" assumption of risk, which had no basis in fact. Since the city provided no correct assumption of risk instruction, its special verdict form C, proposed instruction 51 (CP 4030-33), was also properly rejected by the trial court.¹³ Because the city did not properly object to the trial court's rejection of its proposed assumption of risk jury instructions, it is barred from challenging the instructions given. See Couch v. Mine Safety Appliances Co., 107 Wn.2d 232, 244-45, 728 P.2d 585 (1986).

VI. Evidence of Department of Labor and Industries Violations

The Department of Labor and Industries (DLI) issued several citations against the Seattle Fire Department in connection with Locke's fall. The city contends that the trial court abused its discretion in several respects relating to statements by Locke's counsel and witnesses regarding those citations.

Prior to trial, the court ruled that the citations themselves could not be admitted as exhibits, but the fact that the city was cited could be admitted into evidence. Locke's counsel then referred to the citations in his opening statement. Locke's expert witness also testified regarding the citations. When Locke attempted to elicit testimony about the citations from a second expert witness, the court sustained the city's hearsay and relevance objections to those questions.

¹³ For similar reasons, the court's instructions 6 and 17 and the special verdict form were not defective. The city's complaint in each instance was that these instructions did not refer to assumption of risk. However, the city failed to propose appropriate alternative instructions.

The city then moved for a mistrial, arguing that Locke impermissibly referenced the DLI citations in his opening statement but then failed to prove as much in his case in chief. The city also proposed a curative instruction to strike “any and all statements relating”¹⁴ to the citations. The trial court refused to declare a mistrial or give the city’s proposed curative instruction, but noted that it would instruct the jury that attorneys’ remarks are not evidence and that the jury must disregard any statements or remarks unsupported by evidence.

The record demonstrates that, in determining evidentiary issues regarding the DLI references and denying the city’s motion in limine, motion for reconsideration, and proposed curative instruction, the trial court was properly guided by Cantu v. City of Seattle, 51 Wn. App. 95, 752 P.2d 390 (1988). The trial court weighed the various factors under ER 403 and permitted admission of some evidence regarding the agency findings, while excluding other evidence. See Cantu, 51 Wn. App. at 99-100; see also Goodman v. Boeing Co., 75 Wn. App. 60, 877 P.2d 703 (1994), aff’d, 127 Wn.2d 401, 899 P.2d 1265 (1995); Conrad v. Alderwood Manor, 119 Wn. App. 275, 283, 78 P.3d 177 (2003). We find no abuse of discretion.

The city also claims that the trial court erred in denying its motion for a mistrial on the ground that testimony regarding the DLI violations caused undue prejudice. This court applies an abuse of discretion standard in reviewing the trial court’s denial of a mistrial. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d

¹⁴ CP at 4045.

1014 (1989). A reviewing court will find an abuse of discretion “only ‘when no reasonable judge would have reached the same conclusion.’” Id. (quoting Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711(1989)). A trial court’s denial of a motion for mistrial will only be overturned when there is a “substantial likelihood” that the error prompting the mistrial affected the jury’s verdict. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) (quoting State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991)).

The trial court denied the motion for a mistrial, explaining:

With regard to the motion for mistrial, to the extent that plaintiffs have not proved up those violations, the [Department of Labor and Industries] violations, the jury has been instructed and will be instructed that they are to disregard any remarks, statements, or arguments that are not supported by the evidence. And I have no reason to believe that the jury will not be able to abide by that instruction. So the motion for mistrial, likewise, will be denied.

VRP (June 29, 2004) at 203. That instruction was, in fact, given.

The trial court’s reasoning was sound and its instructions to the jury were proper. A jury “is presumed to have followed the court’s instructions.” State v. Riker, 123 Wn.2d 351, 370, 869 P.2d 43 (1994). Accordingly, any error committed by the trial court in allowing references to the DLI citations complained of was cured by its instruction to the jury to disregard the references. The trial court did not abuse its discretion in denying the motion for a mistrial.

The last matter relating to evidence of the fire department’s safety violations involves the expert testimony of Fire Chief John Gablehouse. During his opening statement, Locke’s counsel stated that Chief Gablehouse, the

Seattle Fire Department's Safety Officer, concluded that the Seattle Fire Department violated 32 safety rules and that about half of those violations contributed to Locke's fall. During Chief Gablehouse's direct testimony, the city objected to several of his statements. However, the city repeatedly failed to object on the ground of relevance to the testimony it now claims was irrelevant. The record shows that, while the city raised other objections, it did not raise relevancy objections to the testimony.¹⁵ ER 103(a)(1) requires, inter alia, a timely objection or motion to strike before error may be predicated on a ruling admitting evidence. The city may not properly assign error to a trial court ruling that admits such evidence in the absence of a timely and specific objection, stated on the same basis as urged on appeal. ER 103(a)(1); State v. Ferguson, 100 Wn.2d 131, 138, 667 P.2d 68 (1983); Boyd v. Kulczyk, 115 Wn. App. 411, 416-17, 63 P.3d 156 (2003).

The city did object on the ground of relevance to two portions of testimony regarding the city's actions after Locke's fall. Over objection, Chief Gablehouse testified that the training division (1) "failed to notify division of injury for investigative purposes, serious injury," and (2) "willfully failed to submit all material and data related to the accident for investigative purposes." VRP (June 21, 2004) at 8. The city's stated objection was that Chief Gablehouse's opinion related to something that occurred after Locke was injured, and "has no relevance whatever to this proceeding." Id.

¹⁵ See VRP (July 21, 2004) at 5-6, 11-13, 16-20, and 180-81.

The determination of the relevance of proffered evidence is a matter within the discretion of the trial court. Facts tending to establish a party's theory or qualify or disprove the testimony of an adversary are relevant. Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 706, 575 P.2d 215 (1978); Bloomquist v. Buffelen Mfg. Co., 47 Wn.2d 828, 289 P.2d 1041 (1955). The trial court could reasonably have determined that Chief Gablehouse's challenged testimony tended to support Locke's position that the city was negligent, or to cast doubt on the city's contention that it was not negligent. See, e.g., State v. Graham, 130 Wn.2d 711, 725, 927 P.2d 227 (1996) (furtive gestures or evasive behavior are circumstantial evidence of consciousness of guilt). Therefore, it was not an abuse of discretion for the trial court to overrule the city's objections.

The city also argues that the trial court erred when it permitted Locke's expert to respond to a question regarding the effect of the absence of a safety officer when Locke was injured. Although the relevance of this fact is questioned on appeal, the only objection made at trial was that the question called for speculation. The trial court properly overruled that objection. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 315, 858 P.2d 1054 (1993) (physician permitted to testify he would not have prescribed medication if he had been informed of risks); Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wn.2d 747, 753-56, 818 P.2d 1337 (1991) (parent permitted to testify about what she would have done had she been aware of a particular risk). Moreover, because the city did not object on the

grounds of relevance, its present claim of error on that basis was waived. ER 103(a)(1).

The city also challenges the admission of portions of Chief Gablehouse's testimony¹⁶ on the basis that it was not a proper subject for expert testimony. With respect to the challenged portions, however, the record shows that the city either did not object on that basis,¹⁷ that it raised no objections at all,¹⁸ or that it did not raise this objection.¹⁹ Therefore, the present claims of error relating to that testimony were waived. ER 103(a)(1).

Regarding one portion of Chief Gablehouse's testimony, after he was asked a question but before he could answer, the City Attorney stated, "your honor, move to strike all of these opinions as expressing legal opinions."²⁰ The trial court denied the motion. We review a trial court's ruling on a motion to strike for an abuse of discretion. Orion Corp. v. State, 103 Wn.2d 441, 462, 693 P.2d 1369 (1985).

It was not an abuse of discretion for the trial court to deny the motion to strike because the city did not specify the testimony it wanted stricken. In any event, Chief Gablehouse's opinions were properly admitted as admissions pursuant to ER 801 because, as a battalion chief in the Seattle Fire Department,

¹⁶ VRP (July 21, 2004) at 14-15, 23-24, and 77.

¹⁷ Id. at 14-15.

¹⁸ Id. at 23-24.

¹⁹ Id. at 77.

²⁰ VRP (July 21, 2004) at 18.

he oversaw department safety procedures, he conducted an investigation of Locke's fall, and he submitted a report of his investigation to the department.

VII. Claim of Error Relating to Jury Instruction 13 Was Waived

The city next assigns error to jury instruction 13, which was based on an administrative code section that the city claims was inapplicable. The city did not argue that exception below.

CR 51(f) states in relevant part:

Counsel shall then be afforded an opportunity in the absence of the jury to make objections to the giving of any instruction and to the refusal to give a requested instruction. The objector shall state distinctly the matter to which he objects and the grounds of his objection, specifying the number, paragraph or particular part of the instruction to be given or refused and to which objection is made.

This procedure allows the court to correct mistakes in instructions and avoid the unnecessary expense of a new trial. Trueax v. Ernst Home Ctr., Inc., 124 Wn.2d 334, 339, 878 P.2d 1208 (1994). If a party's exception fails to apprise the court of the specific points of law or of the alleged defect in the instruction in the context of the litigation, those points and defects will not be considered on appeal. Stewart v. State, 92 Wn.2d 285, 298, 597 P.2d 101 (1979).

At trial, the city's noted exception was:

I'm preserving my objection on the Court's instructions 11 and 12, and let's see, 13 with respect to our basic position that the vertical standard didn't apply in this circumstance. It is improper for the court to determine, as a matter of law, that no administrative rule was violated.

VRP (July 7, 2004) at 12. The first part of the exception (“that the vertical standard didn’t apply”) applies only to instruction 12 and does not relate to instruction 13. The second part of the exception makes no sense, in that the court was not determining that “no administrative rule was violated.”

Thus, the city’s exception to instruction 13 not only failed to comply with CR 51(f), but also failed to apprise the trial court of the points of law raised in this appeal about that instruction. Because this argument was not properly raised at trial, we decline to review this claim of error on appeal. RAP 2.5(a).

VIII. Trial Court Properly Cured Jury Miscalculation

The city also argues that the trial court committed reversible error requiring a new trial because the jury failed to follow the court’s instructions.

Question 4 on the special verdict form asked the jury:

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?

The jury answered “\$24,133.00.”

In the city’s motion for a new trial or for remittitur, it requested that the judgment based on the verdict be reduced by a setoff of \$163,113. This figure was obtained by adding \$24,133 (the jury’s answer to question 4) to \$138,980 (the stipulated offset).

The court granted the city the relief it requested. The judgment on jury verdict stated that the “Net Verdict Amount after reduction of LEOFF off-set and 10% comparative fault” was \$1,511,718. That amount reflects that the court

reduced the judgment by the amount requested by the city. Subtracting \$163,113 from the jury award of \$1,842,800 equals \$1,679,687. The court then reduced that amount by 10% for comparative fault. Ten percent of \$1,679,687 is \$167,969 (after rounding). Subtracting \$167,969 from \$1,679,687 leaves \$1,511,718, the amount of the net verdict. Therefore, the city received precisely what it asked for, it suffered no prejudice, and it has no basis for appealing the judgment on this issue.

IX. Economic Damages Award

The city argues on appeal, as it did in its motion for a new trial, that there was not substantial evidence to support the jury award of \$514,000 in economic damages.

We may not substitute our judgment for that of the jury so long as there is evidence that, if believed, would support the verdict. State v. O'Connell, 83 Wn.2d 797, 839, 523 P.2d 872 (1974). Generally, the determination of damages is within the province of the jury and courts are reluctant to interfere. Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). The law strongly presumes the adequacy of the verdict. Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 422 P.2d 515 (1967). We examine the record provided to this court to determine whether there was sufficient evidence to support the verdict. Palmer, 132 Wn.2d at 197.

Locke presented substantial evidence related to the cost of his future medical care and treatment. He submitted medical bills and records showing

the costs of treatments that he had received and that he testified he would continue to need. Locke also testified that, as of the time of trial, he was still undergoing care and paying for massage and rolfing treatments. He further testified that physical therapy and massage therapy improved his condition. Karen Colara, a licensed physical therapist, testified that Locke will never have a normal gait, that his injuries are permanent, and that he was seeing a rolfing therapist, a massage therapist, and a chiropractor. She also testified that Biosports, her physical therapy facility, charged Locke \$160 per visit, and had charged Locke more than \$10,000 for his treatment between August 2002 and May 2004. Instruction 19 advised the jury that "the average life expectancy of a male aged forty three years is 32.43 years."

We find that Locke presented evidence that, given his permanent injuries, his increasing pain, and his medical treatments for those conditions, he would need such treatments over the next approximately 33 years at a cost of \$160 per treatment and would need such treatment more than once a week. A weekly expense of \$320 for such treatment over the next 33 years would total about \$550,000, even without considering the effects of inflation or a worsening of Locke's conditions as he ages.

Because the jury's award of economic damages lies within the range of evidence presented by the parties to this action, the trial court did not abuse its discretion by denying the CR 59(a) motion for a new trial. Palmer, 132 Wn.2d at 198.

X. Post-Verdict Motion for Periodic Payment of Damages

Finally, the city assigns error to the trial court's denial of its post-verdict motion for periodic payments. The trial court properly denied the motion based on Esparza v. Skyreach Equip., Inc., 103 Wn. App. 916, 15 P.3d 188 (2000). In that case, this court ruled that the trial court did not abuse its discretion by 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. Esparza, 103 Wn. App. at 944.

Had the city filed its motion before the economic experts testified, the jury might have been provided testimony necessary to aid it in determining the duration of payments, the portions allotted to future medical care and future earnings, and the effect periodic payments might have on the award. In the absence of such determinations by the jury, the imposition of periodic payments by the trial court would have been arbitrary and untenable. The trial court correctly denied the motion.

Affirmed.

Deary, J.

WE CONCUR:

Becker, J.

Grosse, J.

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

RECEIVED

JUL 25 2006

REED MCCLURE

KEVIN J. LOCKE,)
)
Respondent,)
)
and TORI LOCKE, husband and wife)
and the marital community composed)
thereof,)
)
Plaintiff,)
)
v.)
)
THE CITY OF SEATTLE, a municipal)
Corporation, and THE CITY OF)
SEATTLE FIRE DEPARTMENT,)
)
Appellants,)
)
and the STATE OF WASHINGTON,)
its subdivisions and agencies, and the)
WASHINGTON STATE PATROL,)
JAMES SEWELL, MOLLY DOUCE,)
JOHN CAMERON, and "JOHN DOES")
1-5, in their individual capacities,)
)
Defendants.)

No. 55256-2-1

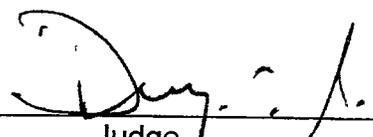
ORDER DENYING MOTION
FOR RECONSIDERATION

Appellants, the City of Seattle and the Seattle Fire Department, have filed a motion for reconsideration of the opinion filed June 19, 2006, and the panel has determined that said motion should be denied. Now, therefore, it is hereby

ORDERED that appellant's motion for reconsideration is denied.

DATED this 24th day of July, 2006.

FOR THE PANEL:



Judge

APPENDIX B