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79222-4

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STATE OF WASHINGTON

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

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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,

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

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RESPONDENTS' BRIEF IN RESPONSE TO BRIEF OF AMICUS  
CURIAE, WASHINGTON STATE ASSOCIATION OF MUNICIPAL  
ATTORNEYS IN SUPPORT OF PETITIONERS' APPLICATION  
FOR DISCRETIONARY REVIEW

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## I. REVIEW SHOULD BE DENIED

On February 3, 2006, the Washington State Department of Municipal Attorneys (“WSAMA”) previously filed an Amicus Brief in this case. That brief argued that the protection from suit provided by RCW §41.26.270 was “illusory” and that the “LEOFF statute is unconstitutional,” Feb. 3 WSAMA Brief, pp. 2, 6. WSAMA changed the title of the argument in its October 18, 2006 Amicus Brief to “The Purpose of Industrial Insurance Supports Petitioners.” However, WSAMA’s argument at pp. 2-6 of this Amicus Brief is mostly word for word the same as its argument at pp. 7-10 and pp. 3-4 of its February 3 Amicus Brief.

WSAMA’s argument is no more correct now than it was in February. Notably, WSAMA, as well as the petitioner, City of Seattle, is challenging a state law as violating the Washington Constitution. WSAMA has a formidable burden in challenging RCW §41.26.281 as violative of Article I, §12 of the Washington Constitution. The statute “is presumed constitutional and the party challenging it has a heavy burden of proof.” Philippides v. Bernard, 151 Wn.2d 376, 391, 88 P.3d 939 (2004). That has been true in Washington since the early 1900’s. In O’Connell v. Conte, 76 Wn.2d 280, 283-84, 456 P.2d 317 (1969), this Court held:

It is the “established rule of law in this state that an enactment is presumptively valid, and the burden is upon the challenger to prove that the questioned classification does not rest upon a reasonable basis.”

The O'Connell court reaffirmed a 1910 holding that a legislative classification should be affirmed unless:

it is so manifestly arbitrary, unreasonable, inequitable, and unjust that it will cause an imposition of burdens upon one class to the exclusion of another without reasonable distinction.

Id. (emphasis added).<sup>1</sup>

WSAMA argues that “RCW §41.26.281 deprives employers who are required to fund the LEOFF system any protection from employee lawsuits.” (emphasis added) Id. at 6. WSAMA’s argument is wrong for four separate reasons.

1. Governmental employers such as defendant are protected from suits from LEOFF members based on claims other than intentional action or negligence claims, e.g., they are protected from product liability claims and strict liability claims. WSAMA’s assertion that the public employer is deprived of any protection from employee lawsuits ignores cases such as Almquist v. Finley Sch. Dist. No. 53, 114 Wn. App. 395, 57 P.3d 1141 (2002), in which a public entity was found liable for millions of

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<sup>1</sup> See also Fitch v. Applegate, 24 Wash. 25, 31-32, 64 P. 147 (1901), where this court, in an Article 1, Section 12 challenge, quoted approvingly that “[t]he legislature may also deem it desirable to prescribe peculiar rules for the several occupations.” (Emphasis added.)

dollars based on a product liability claim with no claim of negligence or intentional act. The limitation on product liability and strict liability claims granted by LEOFF is a benefit to defendant and other LEOFF employers.

The circumstance that the LEOFF statute protects public employers from some but not all tort claims by employees does not mean there is no “quid pro quo” for employers. Indeed, Title 51 does not protect employers from all tort claims by employees. See RCW §51.24.020, Birklid v. The Boeing Co., 127 Wn.2d 853, 873-74, 904 P.2d 278 (1995). This has never been interpreted as obliterating the legislative quid pro quo. Id. at 874.

2. WSAMA’s argument is also inconsistent with Gillis v. Walla Walla, 94 Wn.2d 193, 195-96, 616 P.2d 625 (1980). Gillis held that a public employer received some protection from LEOFF when this Court rejected the worker’s claim that pain and suffering damages were not subject to the LEOFF offset. Id. at 196. This court held that:

. . . the value of benefits received and the present value of benefits receivable under the chapter are to be offset against the gross verdict obtained for personal injury against the covered governmental employer.

The offset of benefits received against the gross verdict protects public employers from lawsuits that would otherwise be filed. Id. at 198.

RCW §41.26.281 only permits an action “for any excess of damages over the amount received or receivable under this chapter.” This statutory limitation on damages to those over future amounts “receivable” provides the public employer legal protection not provided to other employers or third parties. The plaintiff in an ordinary tort action can sue for all future damages and there is no authority requiring such a plaintiff to reduce his or her claim because of promised future payments by the tortfeasor. Under RCW §41.26.281, however, the only damages which properly can be sought are those in excess of amounts “received or receivable.” With the maximum potential damages available in such lawsuits being substantially reduced in many cases because of this provision, the number of such lawsuits likely will be substantially reduced.<sup>2</sup>

3. In Hansen v. City of Everett, 93 Wn. App. 921, 971 P.2d 111 (1999), the Court of Appeals described a third benefit of the LEOFF program for employers which is that “[a]n employer gains additional protection under the LEOFF program because LEOFF medical services payable are reduced by collateral sources.” Hansen, supra, 93 Wn. App. at

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<sup>2</sup> By way of example, many employees would file a lawsuit if total damages were \$200,000 and would find a lawyer to do so on a contingency basis. If future benefits under LEOFF are \$150,000 so the maximum damages are \$50,000, it is less likely that an employee would choose to sue for \$50,000 or that an attorney would take the case on a contingent basis.

927. For example, in Pub. Safety Ass'n v. Bremerton, 104 Wn. App. 226, 235, 15 P.3d 688 (2001), the court permitted a LEOFF offset based on payments under Medicare. This provision gives LEOFF employers a benefit not provided to other employers who, under RCW §51.36.010 and §51.04.030 must provide medical services even if the worker has other sources of insurance or payment for medical expenses such as Medicare. See Buell v. Aetna Casualty & Sur. Co., 14 Wn. App. 742, 746-47, 544 P.2d 759 (1976).

4. Finally, even assuming, contrary to the above, that the State does not provide a “quid pro quo” to LEOFF employers, the States “police power” permits it to impose requirements on employers without a “quid pro quo”.<sup>3</sup> For example, under WISHA (RCW §49.17), the State can impose on employers an obligation to spend money for safety equipment for their employees without giving the employers a corresponding financial benefit. As explained in State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 196, 117 P. 1101 (1911), the State has authority under its police power to adopt classifications so long as the classifications

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<sup>3</sup> If anything, the State’s police power to impose conditions on public entities which it creates is greater than its police power over individuals. See Dept. of Labor & Industries v. Cook, 44 Wn.2d 671, 679, 269 P.2d 962 (1954); where this Court held:

A municipal corporation may not invoke the equal protection clause of the fourteenth amendment of the constitution of the United States in opposition to the will of its creator. *Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 77 L. Ed. 1015, 53 S. Ct. 431.

have any reasonable basis. Clausen has repeatedly been cited for that proposition. See, e.g., Markham Adver. Co. v. State, 73 Wn.2d 405, 424-25, 439 P.2d 248 (1968) (approving State’s authority to prevent the maintenance of billboards on certain roadways without providing a direct benefit to the billboard companies or landowners).

Hildahl v. Bringolf, 101 Wn. App. 634, 5 P.3d 388 (2000) is also on point. In Hildahl, defendant relied on Manor v. Nestle Food Co., 131 Wn.2d 439, 932 P.2d 628 (1997), and Epperly v. Seattle, 65 Wn.2d 777, 787, n. 1, 399 P.2d 591 (1965). He claimed that his rights to due process and equal protection were violated because he had to pay an industrial insurance premium (although he was not an employer) without being afforded the quid pro quo of immunity from suit. The court disagreed with defendant’s claims. 101 Wn. App. at 649-651. It found the *dicta* in Epperly unpersuasive and held it was constitutional to impose tort liability on defendant even though he had to pay the premiums which he could only recover from the actual employer if the employer were solvent.

**A. The City Of Seattle Did Not Raise In The Court Of Appeals, And The Court Of Appeals Did Not Decide, Federal Constitutional Issues.**

WSAMA echoes the City of Seattle’s claim that this Court should decide federal constitutional issues, e.g., the Court of Appeal’s decisions “involves significant questions of law under the Constitution of the United

States and of the State of Washington.” WSAMA Brief, p. 1. However, as the Lockes explained at page 14 of their answer to the City of Seattle’s Petition, the City of Seattle never raised any federal constitutional claim in its briefing and argument in the Court of Appeals. Since the City discussed federal constitutional issues in the trial court, see, e.g., CP 3223, the omission of such a federal constitutional argument was not inadvertent. Rather, it was an intentional decision to confine argument to State constitutional issues.<sup>4</sup>

Having lost on State constitutional issues in the Court of Appeals, the City of Seattle raised for the first time on appeal, federal constitutional issues in its Petition to this Court. Had federal constitutional issues been raised in the Court of Appeals, the Lockes would have addressed those issues both in briefing and in argument, and the Court of Appeals undoubtedly would have addressed those arguments. It is both contrary to RAP 2.5 and unfair for the City to raise federal constitutional issues in this Court after ignoring them entirely in the Court of Appeals. Furthermore, generally speaking, this Court does not review assignments of error not made to the Court of Appeals but raised in a petition for review to this

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<sup>4</sup> WSAMA did cite to Mountain Timber Co. v. Washington, 243 U.S. 219, 37 S.Ct. 260, 61 L.Ed. 685 (1917), in its earlier Amicus Brief in the Court of Appeals. However, “[a]ppellate courts will not usually decide an issue raised only by amicus.” Noble Manor v. Pierce County, 133 Wn.2d 269, 272, n. 1, 943 P.2d 1378 (1997).

Court. Bender v. City of Seattle, 99 Wn.2d 582, 598-99, 664 P.2d 492 (1983); Ravenscoft v. Water Power Co., 136 Wn.2d 911, 926-27, 969 P.2d 75 (1988). Neither the City nor WSAMA gave good reasons why the general rule should not apply here.

**B. The Legislature May Constitutionally Decide To Promote The Safety Of Fire Fighters And Police Officers Although Such Safety Might Conflict With A Hypothetical Concern Over A Loss Of “Paramilitary” Discipline.**

RCW §41.26.281 both provides extra protection for fire fighters and police officers and promotes their safety. In Hauber v. Yakima County, 147 Wn. 2d 655, 660, 56 P.3d 559 (2002), this court explained:

While the Industrial Insurance Act immunizes most employers from job related negligence suits, firefighters 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.

RCW §51.04.010; RCW §41.26.281.

In Hansen v. City of Everett, *supra*, 93 Wn. App. at 926, the Court of Appeals held that “[b]y exposing an employer to liability for negligent acts toward its employees, the statute creates a strong incentive for improved safety.” A “strong incentive for improved safety” is an important value – fostered by RCW §41.26.281, which supports its constitutionality. WSAMA asks this Court to ignore those values and to speculate that RCW §41.26.281 also produces a “nearly unseen, insidious

and corrosive affect . . . on the orderly functioning of our police and fire department by encouraging our police officers and fire fighters to sue another.” Amicus Brief, p. 6. Even though the LEOFF statute has been in effect for almost forty years, WSAMA does not cite any evidence that a “fire commander” ever hesitated to send fire fighters into a building to rescue people because of liability concerns, and that, therefore, “members of the public are injured or killed.” Instead, WSAMA simply makes up a hypothetical. A statute in effect for almost forty years cannot properly be found unconstitutional based on hypothetical “facts” in the absence of any actual evidence supporting the claim of unconstitutionality.

Amicus also relies on two out of state cases. Haynes v. Police Board, 688 N.W. 2d 794, 797, 293 Ill. App. 508 (1<sup>st</sup> Dist. 1997), dealt with a police officer’s failure to follow a direct order, which seems of little relevance to this case. Kaya v. Partington, 681 A.2d 256 (R.I. 1996) was not a constitutional challenge and thus adds little to a discussion of whether the Washington Legislature could reasonably have believed that police officers’ and fire fighters’ safety was a legitimate basis for a law passed 37 years ago which has remained in effect since then.

**C. Many States, Including Washington, Vary The Quid Pro Quo Between Employers And Employees Struck Under The Various Workers Compensation Statutes.**

As discussed above, RCW 41.26.270 and .281 creates a quid pro quo for public employers by barring some claims by employees against such employers, e.g., product liability and strict liability claims and also by providing non-LEOFF employees with additional advantages not offered to non-LEOFF employers. Amicus is wrong in arguing that Washington is unique in permitting employees to pursue some claims against employers. WSAMA Brief, p. 8. States vary considerably in what claims they bar as part of the workers compensation quid pro quo. For example, while a minority of states bar all claims by employees against employers (which is apparently the position Amicus likes), more than three-fourths of the states, including Washington, permit lawsuits against employers for intentional torts. As discussed in Larson's Workers' Compensation Law, § 103.01, pp. 103-3-103-4:

Of the states that do recognize an exception to exclusivity for intentional torts, some have codified this exception in their statutes.<sup>5</sup> The exception has been judicially created in other jurisdictions.<sup>6</sup>

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<sup>5</sup> Jurisdictions that have such an exception in their statutes are Arizona, California, Hawaii, Idaho, Kentucky, Louisiana, Maryland, Michigan, New Jersey, North Dakota, Oregon, South Dakota, Washington, and West Virginia.

<sup>6</sup> Jurisdictions whose exception was created by case law are Alaska, Arkansas, Colorado, Connecticut, Delaware, District of Columbia, Florida, Illinois, Indiana (Workers' Compensation Law), Iowa, Kansas, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, New York, North Carolina, Ohio, Oklahoma, South Carolina, Tennessee, Texas, Utah, and Wisconsin.<sup>5</sup>

States also do not uniformly limit the ability of employees to sue employers to "intentional torts." For example, California allows employees to sue employers for removal of or failure to install power press operator guards,<sup>6</sup> while Texas allows employers to be sued for

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<sup>5</sup> Larson, supra, §111.02[1] also explains how a number of states permit employees to sue co-employees:

In nine jurisdictions, immunity to common-law suit is extended only to the employer.<sup>1</sup> An injured employee can therefore sue his or her own co-employee for the latter's negligence.<sup>2</sup> In fourteen additional states, although co-employee liability for negligence has been abolished by statute, it has been retained, either by statute or by judicial decision, for intentional wrongs.<sup>3</sup>

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<sup>1</sup> Currently only the following five jurisdictions limit immunity to employers: Arkansas, Missouri, Maryland, Vermont, and the Federal Employees Compensation Act.

Alabama has extended immunity to workers sued in tort by co-workers. See *Reed v. Brunson*, 527 So. 2d 102 (Ala. 1988), and *Jones v. Lowe*, 611 So. 2d 345 (Ala. 1992).

<sup>2</sup> For a list of citations by jurisdiction, see the Digest at the end of the volume.

<sup>3</sup> See Ch. 111, § 111.03[1] ns.1-12, below. See also the entries in Ch. 111, § 111.03[1] n.1, for *Iowa* and *Wyoming* (gross negligence).

<sup>6</sup> **§ 4558. Liability of employer for removal of or failure to install power press operation guard.**

(b) An employee, or his or her dependents in the event of the employee's death, may bring an action at law for damages against the employer where the employee's injury or death is proximately caused by the employer's knowing removal of, or knowing failure to install, a

exemplary damages in wrongful death cases in which the employer was grossly negligent.<sup>7</sup>

Washington is also not alone in allowing fire fighters to sue employers or their agents. For example, in Holmberg v. Brent, 161 Vt. 153, 636 A.2d 333 (1993), the Vermont Supreme Court allowed a public fire fighter to sue his fire chief under the following circumstances:

In March 1987, plaintiff was injured while employed as a firefighter by the Village of Bellows Falls Fire Department, when, in response to an emergency call, he slid down a fire pole and landed on the cement floor below. Sometime before the incident, defendant, as fire chief, had ordered the removal of a pad surrounding the base of the pole. Plaintiff brought a negligence action, alleging that removing the pad

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point of operation guard on a power press, and this removal or failure to install is specifically authorized by the employer under conditions known by the employer to create a probability of serious injury or death.

(c) No liability shall arise under this section absent proof that the manufacturer designed, installed, required, or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer. Proof of conveyance of this information to the employer by the manufacturer may come from any source.

Cal. Lab Code § 4558 (2006).

<sup>7</sup> SECTION 4.01. EXCLUSIVE REMEDY; EXEMPLARY DAMAGES.

(a) Except as provided by Subsection (b) of this section, a recovery of workers' compensation benefits under this Act is the exclusive remedy of an employee or legal beneficiary against the employer or an agent, servant, or employee of the employer for the death of or a work-related injury sustained by a covered employee.

(b) This section does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence. For the purposes of this section, "gross negligence" has the meaning assigned to it by Section 41.001, Civil Practice and Remedies Code.

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had created an unreasonably dangerous condition and caused his injury. Plaintiff received workers' compensation benefits, but sought damages from defendant under 21 V.S.A. § 624, n.1 which permits suits against third parties responsible for injury.

(Footnote omitted.)

**D. The Court Of Appeal's Decision Was Grounded In Washington Law, Including Prior Decisions Of This Court.<sup>8</sup>**

WSAMA misunderstands respondents' (the "Lockes") position contained at pages 2-4 of their Answer to Petition for Review of City of

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<sup>8</sup> The WSAMA Amicus Brief does not address the statutory sovereign immunity issue. However, respondents believe that the City will nevertheless use its "Answer" to this brief (which completely supports the City's position), to reargue sovereign immunity issues, particularly the case of Donohoe v. State of Washington, \_\_\_ Wn. App. \_\_\_, 142 P.3d 654 (Div. II 2006), which it submitted as supplemental authority. Donohoe does not refer to 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). The Court of Appeal's decision in Locke v. City of Seattle, 133 Wn. App. 696, 137 P.3d 52 (2006), quotes and relies on J&B Dev. Co., *supra*, as follows:

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 non 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).

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).

133 Wn. App. at 703-704. Neither the City of Seattle in its Petition nor WSAMA either cite or distinguish J&B Dev. Co. Furthermore, neither brief refutes the Court of Appeal's analysis in Locke.

Seattle. The Court of Appeals decision in this case was firmly grounded in prior cases of this Court, both in and out of the context of the LEOFF statute. In Taylor v. Redmond, 89 Wn.2d 315, 571 P.2d 1388 (1977); Fray v. Spokane County, 134 Wn.2d 637, 952 P.2d 601 (1998), Gillis v. Walla Walla, *supra*; Hauber v. Yakima County, *supra*, this Court has repeatedly affirmed the LEOFF structure. Although this Court in those cases did not specifically reject all of the City's arguments in this case, the Court of Appeal's analysis is complete and correct. It is defendant City of Seattle and WSAMA which are challenging this Court's prior rulings. For example, both the City and WSAMA suggest without proof that this Court's decision in Taylor v. Redmond, *supra*, was based on a misapprehension of the funding source for LEOFF. *See, e.g.*, WSAMA Brief, p. 9.

As both this Court in Hauber, *supra*, and the Court of Appeals in Hansen, *supra* and Locke, *supra* recognize, the LEOFF statute strikes a proper and constitutionally permitted balance between the rights of fire fighters and police officers whose lives often depend on their employers providing them with appropriate training and orders, and the rights of those public employers.<sup>9</sup> The LEOFF statute has served well both public

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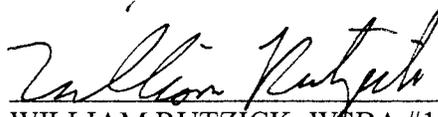
<sup>9</sup> The importance to these employees of the LEOFF statute can be seen by the Brief of *Amicus Curiae* International Association of Fire Fighters which was submitted in the Court of Appeals in this case.

employers and employees over the past 37 years. It has also served the public's interest during this same time period. The Court of Appeal's decision reaffirming the constitutionality of the LEOFF program acknowledges that the Washington Legislature did not act unconstitutionally in setting up and maintaining the LEOFF program. It also permits police officers and fire fighters to continue to benefit from this crucial program when they are most in need of assistance. There is no sound basis for upsetting the balance struck by the Washington Legislature.

## II. CONCLUSION

For the reasons stated herein and previously stated, the petition should be denied.

RESPECTFULLY SUBMITTED this 27<sup>th</sup> day of **November, 2006.**



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