

No. 57725-5

79381-6

**DIVISION I OF THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON**

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

Respondent,

vs.

THE CITY OF SEATTLE, a municipal corporation

Petitioner.

**REPLY TO ANSWER TO CITY OF SEATTLE'S MOTION FOR
DISCRETIONARY REVIEW AND RESPONSE TO
PLAINTIFF'S MOTION TO STRIKE**

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A. Workers' compensation statutes *must* provide immunity

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

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

Constitutional challenges by certain employers based upon the equal protection and due process clauses quickly established that, so long as such systems provided the quid pro quo of protection from suit, they were constitutional. Absent the quid pro quo of protection from suit for negligence actions, they could not and cannot withstand constitutional

challenge. These principles have been consistently recognized for almost 100 years.

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

We are impressed, as was the trial court, with the incongruous result necessarily flowing from the plaintiff's theory under which the owner of the premises who either directly or indirectly pays the insurance premium based on the hazards of his undertaking gets no protection from the employees of the contractor who may be injured in the course of the work for which the premiums are paid. *The construction of the statute to permit such a result presents grave constitutional questions* which have not been adequately argued.

Id. at 787 n.1 [emphasis supplied].

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

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

Manor, 131 Wn.2d at 456 [emphasis supplied]. *Manor* quoted from Professor Larson—the premier authority on workers’ compensation laws:

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

Id. at 450 [emphasis supplied].

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 Company v. Washington*, 243 U.S. 219, 233, 37 S.Ct. 260, 61 L.Ed. 685 (1917) (due process); *Manor, supra*, (“Violation of equal protection is probably the better constitutional argument.” 131 Wn.2d at 449, n.4.)

The *Daggett* case is particularly compelling here. That Court discussed constitutionality issues where the issue was whether seamen were covered by the provisions of the Workmen’s Compensation Act. The court held that seamen were not covered under the Act and, further, that they could not be covered under the Act. The reason for this impossibility was that the State of Washington was without authority to

protect the employers from suits in admiralty in federal courts. And, since the legislature could not provide any protection from suit, it could not impose a duty to fund the workmen's compensation system. The court described this as a violation of equal protection. *Id.* at 258.

Plaintiff here argues that the existence of a perceived "rational basis" can operate to eliminate the quid pro quo requirement for a workers' compensation system. The LEOFF statute itself belies this argument in that RCW 41.26.270 expressly states the relationship of police and firefighters "is similar to that of workers to their employers"—not different, and like RCW Title 51, provides that "all civil actions ... are hereby abolished."

Further, case law provides no support for plaintiff's argument that the risks inherent in police work and firefighting is a rational basis for maintaining a right to sue under LEOFF. The work of seamen and loggers is well recognized as among the most hazardous types of work—far more hazardous than police work or firefighting. Yet employers of seamen and loggers cannot be compelled to fund a workers' compensation fund without receiving immunity from suit. *Daggett, supra*. One needs only to consult the Bureau of Labor Statistics, U.S. Department of Labor, to see that many occupations involve greater risk of injury and death than those of police and firefighters (the most hazardous occupations currently being

logging, fishing, pilots and navigators, structural metalworkers, drivers-salesworkers, roofers, electrical power installers, farmworkers, construction laborers and truck drivers). (See <http://www.bls.gov/news.release/pdf/cfoi.pdf>, which was an exhibit before the trial court.)

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

To now argue that this fundamental tenet could be removed specifically *because* of the hazardous nature of a particular occupation would have to apply in both a public and a private setting. For example, if the Legislature adopted an exception to Title 51 for loggers, making employers of loggers both subject to suit and required to fund workers' compensation benefits, one would expect such employers to bring constitutional challenges. There is no question but that such a statute would be found to be unconstitutional. However, if the hazardous nature

of police work and firefighting could form a “rational basis” for such a system, it could justify such a system for loggers. No case in the entire United States has ever held that such an exception for an extra hazardous occupation could withstand constitutional scrutiny. The statute at issue is unique – probably because it cannot withstand constitutional challenge. Since workers’ compensation laws exist in every state in the nation, one would expect that, if a rational basis could allow a legislature to compel a particular type of employer to both fund workers’ compensation benefits and be subject to suit, plaintiff would have brought such a statute (and cases addressing the constitutionality thereof) to this Court’s attention. The City has found no such case.

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

B. The LEOFF statute provides no immunity from negligence suits

The LEOFF statute at issue here gives lip service to providing protection from suit. RCW 41.26.270 (“all phases of the premises are

withdrawn from private controversy” and “sure and certain relief for workers . . . is hereby provided to the exclusion of every other remedy, proceeding or compensation” and “all civil actions and civil causes of action for personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished. . .”) However, the following six words (“except as in this title provided”), along with RCW 41.26.281, take the protection away. The court in *Gillis v. Walla Walla*, 94 Wn.2d 193, 197, 616 P.2d 625 (1980), observed a legislative intention to provide sure and certain relief while providing protection for the employer from negligence actions at law. However, the *Gillis* court apparently overlooked the fact that any protection from suit is illusory.

C. Workers’ compensation statutes applicable to governmental employers *must* provide immunity from suit.

The only question that remains is whether the fundamental tenet of immunity from suit can be removed from a workers’ compensation system solely because it is funded by governmental employers (i.e. taxpayers), rather than by private employers. There is no recognized exception that would allow taxpayers to be required to fund a such a system without immunity from negligence suits.

The plaintiff here relies heavily upon *Taylor v. City of Redmond*, 89 Wn.2d 315, 571 P.2d 1388 (1977), arguing that *Taylor* resolved the

issues presented herein. A careful reading shows that *Taylor* supports the City's argument. In *Taylor*, the court was addressing whether a LEOFF I member could sue. In holding that a LEOFF I member could sue, the court noted that municipalities were not in the position of both funding workers' compensation benefits for LEOFF I members and being subject to suit (apparently thinking that municipalities did not fund LEOFF), stating:

Also worth noting are the facts that police and fire fighters receive no benefits under workmen's compensation, and industrial insurance premiums are not paid by municipalities. Instead, the benefits accorded police and fire fighters are under LEOFF.

Taylor, 89 Wn.2d at 319-20. The *Taylor* court was mistaken in its unstated assumption that municipalities do not fund LEOFF benefits. In fact, municipalities have been required to fund LEOFF benefits ever since LEOFF was created. 1969 Wash. Laws Ex. Sess. Ch. 209 § 8; RCW 41.50.110. Thus, since the *Taylor* court was not aware of the funding obligations of municipalities, it did not resolve or even discuss whether municipalities could be required to fund a workers' compensation system without being provided with immunity from suit.

Rather, the *Taylor* court expressly declined to reach the question of whether LEOFF II members could sue. The court was aware that LEOFF II members receive workers' compensation under RCW Title 51 and knew

that employers of LEOFF II members are required to fund such systems, stating:

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

Taylor, 89 Wn.2d at 320. Plaintiff here argues that the *Taylor* court expressly reached the issues presented here. The foregoing shows that the *Taylor* court expressly *declined* to reach the question of whether municipalities that are required to fund a workers' compensation system could be subject to suit.

1. Municipalities have standing to raise constitutional issues when they are directly affected.

Municipalities have standing—including representational standing on behalf of their citizen taxpayers. Municipalities are entitled to raise constitutional issues where they are directly affected. The right of municipalities to claims rights under the privileges and immunities clause found in Article I Section 12 of the Washington Constitution was recognized in *Grant Co. Fire Protection Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004) (“Grant Cy. II”), where the court stated that a municipality that is directly affected has standing to assert rights under the privileges and immunities clause. In *Grant Cy. II*, the Supreme Court reaffirmed its view that the privileges and immunities

clause of the state constitution requires an independent constitutional analysis separate from the equal protection clause of the United States Constitution, applying *Grant Co. Fire Protection Dist. No. 5 v. City of Moses Lake*, 145 Wn.2d 702, 42 P.3d 394 (2002) (“*Grant Cy. I*”). *Grant Co. II* discussed both direct and representational municipal standing. *Grant Cy. II*, 150 Wn.2d at 802-3. Here, there can be no debate that Washington cities (and their inhabitants and taxpayers) are directly affected by the LEOFF statute.

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

Here, the municipality, although a creation of the state government, is in disagreement with the state legislature about the interpretation of the constitution. It is a party which is adversely affected by the contested legislation and is properly in court on nonconstitutional questions. In the absence of some overriding reason which we do not find, such as the existence of a more appropriate party to raise the question, or a statute prohibiting municipalities from litigating constitutional issues, it would be an abdication of

judicial responsibility for this court, having before it a controversy between a municipality and another party and having been apprised of the asserted constitutional infirmity in a legislative act, adversely affecting the interests of the municipality and its inhabitants, to adjudicate only the nonconstitutional questions when the latter may not be dispositive of the basic dispute. We hold, therefore, that the defendant municipality has sufficient legal interest and standing to raise constitutional issues in the present proceeding.

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

The reasoning of the Connecticut court in *Ducharme* is similar to that expressed by the Washington Supreme Court in *Grant County I* and *Grant County II* cited above and also in *City of Seattle v. State of Washington*, 103 Wn.2d 663, 694 P.2d 641 (1985), where the Supreme Court held that Seattle had standing to challenge the constitutionality of two statutes governing annexations. Similarly, the U.S. Supreme Court held that a Washington State agency had standing to challenge the constitutionality of a state statute in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977). Likewise, the Washington Supreme Court reached the merits in *City of Marysville v. State of Washington*, 101 Wn.2d 50, 676 P.2d 989 (1984), where Marysville challenged the constitutionality of a statute in a

declaratory judgment action. The Court did not even discuss standing – apparently accepting the city’s standing as implicit.

2. The LEOFF statute is unconstitutional.

Plaintiff has cited to no cases from any state to support her claim that the LEOFF statute is constitutional. The City has shown that there is no justification for treating public employers differently than private employers in this context. Just as private employers cannot be compelled to pay for an injury to an employee without regard to fault without protection from suit, likewise public employers cannot be compelled to do so without protection from suit. Such a payment for an injury not caused by the public employer would be an unconstitutional gift in violation of art. II, § 25 of the Washington State Constitution. Further, such a system would violate the privileges and immunities clause, art. I § 12, and the equal protection and due process clauses of the United States Constitution. As discussed above, the City has standing to raise constitutional issues on behalf of its citizens.

Recently, during argument before a three-judge panel at the Court of Appeals, Division I, in *Locke v. City of Seattle*, No. 55256-2-I, the Honorable C. Kenneth Grosse suggested that, since municipalities can be burdened with governmental responsibilities that private entities do not have, perhaps municipalities can be compelled to fund workers’

compensation systems without the quid pro quo benefit of immunity from suit that similarly situated private employers have. Under this analysis, all governmental employees could receive workers' compensation benefits and have the right to sue, whether they are employed in hazardous occupations or not.

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

Judge Grosse's suggestion was in the context of the question as to whether municipalities can claim protections under the privileges and immunities clause found in the Washington Constitution, art. I, § 12, which states:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Where the constitution expressly references municipal corporations, it would be incongruous to hold that municipal corporations are not

entitled to the stated protections. Further, *Grant Cy. II* specifically held that municipalities have rights under this constitutional provision.

Here, the LEOFF statute violates the privileges and immunities clause of the Washington constitution and the equal protection and due process clauses of the United States Constitution. Similarly situated employees in equally and more hazardous occupations receive workers' compensation benefits but have no right to sue—thus, under the LEOFF statute, publicly employed police and firefighters have a privilege to sue that does not belong equally to all citizens. Also, the employers of other workers have immunity from suit that does not equally belong to all citizens or corporations.

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

The express carving out of municipalities as having privileges and immunities that others do not have shows the special role that municipalities have as governing units (with governmental immunities

for public duties long recognized). A decision that municipalities could be deprived of immunities that similarly situated employers have would fly in the face of fundamental principles of governmental immunity. Under plaintiff's argument, rather than being specially protected from liability because of their role as government, municipalities could be subject to liabilities not recognized anywhere. If the LEOFF statute is not found to be unconstitutional, taxpayers will have no voice. That would be the ultimate Catch-22 for taxpayers. If the LEOFF statute is allowed to stand, the United States Constitution and the Washington State Constitution would be mere scraps of paper providing no protection for taxpayers.

Notably, plaintiff here has not adopted Judge Grosse's suggestion, presumably because the reasoning cannot withstand analysis.

Rather, plaintiff relies heavily on her rational basis argument. As discussed above, such argument fails in the context of both public and private employment. If a rational basis argument could save the LEOFF statute, the same argument would apply equally to private employers. No case has been found supporting this argument.

3. The LEOFF statute also violates sovereign immunity

In addition to violating constitutional principles of due process and equal protection, the right to sue provision of the LEOFF statute also violates sovereign immunity because there can be no public liability where there is no private liability. RCW 4.96.010 sets forth the parameters of the waiver of sovereign immunity as follows:

(1) All local governmental entities, whether acting in a governmental or proprietary capacity, shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their past or present officers, employees, or volunteers while performing or in good faith purporting to perform their official duties, *to the same extent as if they were a private person or corporation.*

[Emphasis supplied.]

Thus, sovereign immunity is only waived for tortious conduct “to the same extent as if they were a private person or corporation.” Here, only governmental employers of police and firefighters are subject to workers’ compensation obligations while not being relieved of tort liability. There is and can be no comparable private liability.

Plaintiff here fails to even attempt to distinguish the cases cited in the City’s opening brief, relying entirely upon the *Taylor* opinion which provides no rationale and no analysis as to whether or how a public employer could be subjected to tort liability when a private employer

could not be. Rather, as discussed above, the *Taylor* court assumed, wrongly and without authority, that municipalities are not required to fund LEOFF benefits. Thus, the court did not discuss whether such a system would violate constitutional or sovereign immunity principles and expressly stated that it did not reach the issue. Having not addressed the issues presented herein, the *Taylor* case cannot be dispositive of the issues.

Other than the *Taylor* case (which did not reach any of the issues presented by the City), plaintiff here provides no analysis and no authority for depriving municipalities of the protections that every other employer receives. One can only assume that if authority existed to support plaintiff's position, plaintiff would have presented it.

As discussed in the City's opening brief, the United States Supreme Court recently recognized the sovereign immunity bar where no private cause of action exists in *United States v. Olson*, 126 S. Ct. 510, 163 L. Ed. 2d 306 (2005). The Washington Supreme Court adopted similar reasoning in *Edgar v. State*, 92 Wn.2d 217, 595 P.2d 534 (1979), where the court was construing RCW 4.92.090, the companion waiver of sovereign immunity for the State. Here, since the Legislature cannot require private employers to both fund workers' compensation and be liable in tort, the Legislature cannot make public employers fund LEOFF and be liable in tort.

Further, if RCW 41.26.281 is read to remove sovereign immunity, it is nevertheless unconstitutional because the bill enacting it violates art. II, § 19 of the state constitution (the single subject and subject in title provisions). The bill containing RCW 41.26.281 violates both the subject-in-title and single-subject requirements of art. II, § 19. The title of the bill is “An Act relating to law enforcement officers and firefighters.” 1971 Wash. Laws, 1st Ex. Sess., ch. 257. This title gives no notice that the bill expands governmental liability beyond the restrictions of RCW 4.96.010(1).

D. Equine immunity

Plaintiff engages in a fundamentally flawed analysis in attempting to extricate mounted patrol activities from the scope of RCW 4.24.540. First, plaintiff relies on *Matthews v. Elk Pioneer Days*, 64 Wn. App. 433, 824 P.2d 541 (1992) to argue that mounted patrol activities fall outside the scope of “equine activities” as contemplated by RCW 4.24.540. *Matthews* is inapposite to the present case. In *Matthews*, the plaintiff was injured when a canopy support fell on her while she was watching entertainment on an outdoor stage at a community festival. The Superior Court found the defendant festival committee immune from liability under the Recreational Land Use Statute, RCW 4.24.210. Applying the rule of *ejusdem generis* – that the connotation of a general word may be restricted

to a meaning analogous to specific words – the Court of Appeals reversed, holding that the festival activities at issue in *Matthews* were not substantially similar to the recreational activities encompassed by RCW 4.24.210. *Matthews*, 64 Wn. App. at 437-38.

Here, plaintiff attempts to apply the *ejusdem generis* reasoning of the *Matthews* court to the present case to argue that “mounted patrol activities” fall outside the scope of the Equine Immunity Statute, RCW 4.24.540. Such application of this rule to the language of RCW 4.24.540 is, however, unnecessary. In the present case, unlike in *Matthews*, the statute is clear on its face in including activities that are inherent to mounted patrols (i.e., training and riding) and extending immunity to municipal sponsors thereof. RCW 4.24.540 provides that “an **equine activity sponsor** or an **equine professional** shall not be liable for an injury to or the death of a **participant engaged in an equine activity.**” [Emphasis supplied.] The statute is clear in including in its definition of “equine activity sponsor” a “corporation” which “provides the facilities” for “an equine activity.” RCW 4.24.530(3). “Equine professional” explicitly includes “a person engaged for compensation (a) in instructing a participant.” RCW 4.24.530(6). “Participant” is clearly defined as “**any** person, whether amateur or professional, who directly engages in an equine activity.” RCW 4.24.530(4) [emphasis supplied]. “Engages in an

equine activity” explicitly includes a person who “rides” or “trains” an equine. RCW 4.24.530(5). Finally, “equine activity” is defined to include “equine training” (RCW 4.24.530(2)(b)), “riding ... an equine belonging to another” (RCW 4.24.530(2)(d)), and “equine activities of **any type** however informal or impromptu that are sponsored by an equine activity sponsor” (RCW 4.24.530(2)(e)). [Emphasis supplied.]

When words in a statute are plain and unambiguous, the court need not engage in acts of statutory construction and must instead apply the statute as written unless the statute clearly evidences an intent to the contrary. *Johnson Forestry Contracting, Inc. v. Washington State Dep’t. of Natural Resources*, 131 Wn. App. 13, 23, 126 P.3d 45 (2006) (citing *Enter. Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 988 P.2d 961 (1999)). Here, the language of RCW 4.24.530-.540 is clear on its face; when exclusions are intended, such exclusions are made explicit (see, e.g., RCW 4.24.530(5) (“engages in an equine activity” does **not** include a person who participates in the equine activity but does not ride, train, drive, or ride as a passenger upon an equine); RCW 4.24.540(2)(a) (equine immunity statute does **not** apply to the horseracing industry)).

Here, there is no dispute that the City of Seattle is a municipal corporation which provides the facilities for riding and training of horses –

i.e., an equine activity sponsor as defined by RCW 4.24.530(3).¹ To the extent that plaintiff may seek to blame Officer Scot Hansen or Sgt. Steve Wilske for Officer Lindell's injuries, there can be no dispute that both are "equine professionals" as defined by RCW 4.24.530(6). Plaintiff alleges, and for purposes of the underlying motion the City does not dispute, that Officer Lindell was injured while riding his horse during a Mounted Patrol training session – i.e., "engaged in an equine activity" as clearly encompassed by RCW 4.24.530(2)(b), (d) and RCW 4.24.530(5). While plaintiff makes great note of the lack of specific inclusion of the phrase "mounted patrol activities" in the definitions provided by RCW 4.24.530, plaintiff's argument falls flat in light of both (1) the explicit nonexclusivity of RCW 4.24.530(3), which includes **but is not limited to** certain enumerated "equine activities," and (2) the blanket inclusivity of "other equine activities **of any type**" as provided by RCW 4.24.530(2)(e) [emphasis supplied]. To adopt plaintiff's reasoning would mean that any "equine activity" not explicitly listed in the definition of "equine activity sponsor" under RCW 4.24.530(3) would be outside the scope of RCW 4.24.540, thereby rendering meaningless the very definition of "equine

¹ That these horses are mounted patrol horses is irrelevant for purposes of application of the statute; in defining "equine," the statute makes no distinction between horses engaged in professional pursuits as compared with barnyard nags, rodeo steeds, fairground ponies – or even unbroken wild horses.

activity” as provided by RCW 4.24.530(2) except to the minimal extent that equine activities included in RCW 4.24.530(2) are also specifically included in RCW 4.24.530(3).

When interpreting a statute, a court is required to assume the Legislature meant exactly what it said and apply the statute as written. *State v. Roggenkamp*, 153 Wn.2d. 614, 106 P.3d 196 (2005). Under the plain language of the statute, the City (an equine activity sponsor as defined by RCW 4.24.530(3)) and its equine professionals as defined by RCW 4.24.530(6) (Officer Scot Hansen and Sgt. Steve Wilske) cannot be liable for injuries sustained by Officer Lindell (a participant as defined by RCW 4.24.530(4)) while riding his horse (engaged in an equine activity as defined by RCW 4.24.530(2) and (5)). Where the Legislature has specifically stated those persons and industries to which RCW 4.24.540 does **not** apply (i.e., persons who participate in the equine activity but do not ride, train, drive, or ride as a passenger upon an equine under RCW 4.24.530(5) and horseracing under RCW 4.24.540(2)(a)), and where in the same statute the Legislature has been explicit in its nonexclusivity (including as an equine activity “other equine activities of any type” under RCW 4.24.530(2)), to read into the statute a Legislative intent to exclude riding of mounted patrol horses during mounted patrol activities would be in gross derogation of well-established rules of statutory construction.

Second, plaintiff's argument that if RCW 4.24.540 applies, the paddock for Mounted Patrol officers would be the only working environment that the City would have no obligation to make safe is fundamentally flawed in its assumption that the duty to provide a safe work environment is in fact governed by RCW 41.26.281.² RCW 41.26.281 imposes no such duty; it only addresses when a cause of action for negligence exists. RCW 4.24.540 in no way abrogates any duty to comply with WISHA requirements. Rather, RCW 4.24.540 eliminates any private cause of action that a participant in any equine activity would otherwise have under common law (with certain exceptions not relevant here).

Finally, plaintiff engages in a belabored recitation of her version of the facts underlying this case in her attempt to argue that a genuine issue of material fact exists as to whether one or more of the exceptions to the immunity provided RCW 4.24.540 applies. While such recitation might be appropriate should this Court accept review, it is unnecessary for the purposes of the present motion. With respect to the trial court's ruling on RCW 4.24.540, the City seeks discretionary review of the trial court's

² Plaintiff specifically alleges that the obligation to provide a safe working environment arises under RCW 46.21.281; as there is no RCW 46.21.281, the City assumes this is a typographical error and RCW 41.26.281 is the statutory cite intended.

conclusion that RCW 4.24.540 does not apply to mounted patrol activities; because the trial court did not reach the issue of whether or not any exceptions applied, any such discussion is irrelevant for the purposes of whether or not this Court should accept review.

E. Assumption of the risk bars this action

Without discussing the cases cited by the City, plaintiff merely argues that the cases cited by the City from the early 1900's and from 1965 should be disregarded because they are too old. Those cases have not been overruled and are still good law; if any inference can be drawn from their age, it can only be that the opinions have stood the test of time. Further, because workers' compensation laws eliminated those causes of action for most employees to which the assumption of the risk defense might be raised, one necessarily researches cases that pre-date workers' compensation laws in order to find applicable cases regarding assumption of the risk in an employment setting. This is because courts are, and have been for nearly a century, without jurisdiction over claims for injury arising during the course of employment in the vast majority of situations.

Rather than address the cases cited by the City that arise in an employment context, plaintiff instead relies heavily upon *Kirk v. Washington State University*, 109 Wn.2d 448, 746 P.2d 285 (1987), for the contention that implied primary assumption of the risk can operate as a

damage reducing principle but not as a complete bar on summary judgment. Plaintiff's reliance on *Kirk* is misplaced. The *Kirk* case analyzed the issue in the context of sports participants – in particular, that of a 17-year-old cheerleader, a situation not remotely relevant here. A very recent Division I case recognized that implied primary assumption of the risk can operate as a complete bar in certain settings. *Taylor v. Baseball Club of Seattle, L.P.*, ___ Wn. App. ___, ___ P.3d ___ (2006), No. 55803-0-I, ordered published March 22, 2006. In *Baseball Club*, the court held that being hit by a baseball is an inherent risk of attending a baseball game, even during warm-up activities, applying the doctrine of implied primary assumption of the risk. This court held that implied primary assumption of the risk in that situation is a complete bar.

Primary implied assumption of the risk should operate as a complete bar in an employment context, just as it did in common law actions against employers. Here, Officer Lindell was a seasoned police officer, with well over 30 years experience as a Seattle police officer (he was hired as a cadet in 1965 and was sworn as a police officer in 1968). He actively sought to be in the Mounted Unit and had equine experience prior to joining the unit. Officer Lindell had as much subjective understanding of the presence and nature of the specific risks of his job as

anyone in the Seattle Police Department and voluntarily chose to encounter the risks.

The conditions under which Officer Lindell was working were readily apparent. He could not help but be aware he was riding without a helmet. He was well acquainted with the horse he was riding and the paddock in which he was riding. It was most likely Officer Lindell himself who arranged for the hogfuel covering the paddock surface to be removed (he was the only smoker in the group and the Parks Department employee who removed the excess material recalls being directed to do so by a smoker). Further, Officer Lindell himself often arranged for new hogfuel to be brought in as needed. Lastly, Officer Lindell expressly stated after his injury "I knew what I was doing" in a discussion with a fellow officer while describing a discussion with his wife regarding her desire for him to sue over his head injury. He cannot now be said to have not understood the nature of the risks of participation in the mounted patrol unit.

Even if plaintiff had produced any evidence suggesting that Officer Lindell did not know of the risks involved in his actions, it is established law in this state that a plaintiff cannot deny knowledge of the obvious to defeat assumption of the risk. *Perry v. Seattle School District #1 and City of Seattle*, 66 Wn.2d 800, 405 P.2d 589 (1965). Here, not only did Officer

Lindell affirmatively state his subjective appreciation of the risks inherent in his actions, the Legislature itself has explicitly recognized the obvious risks in riding horses – including falling off a horse – in enacting the equine immunity statute (*see above*). It makes no sense that the equine immunity statute could be read to impute assumption of the risk to an amateur rider with potentially minimal or no horseback riding experience but decline to extend the same assumption of the risk to a Mounted Patrol rider with considerable experience and expertise.

In an employment setting, Washington courts have long held that assumption of the risk is a complete bar to tort recovery by a servant from his master where the risks and dangers pertaining to his employment are known to him or discoverable by the exercise of ordinary care on his part. The City cited numerous cases in its opening brief for this principle. Plaintiff avoids any discussion of them by merely stating that they are too old.

In *Lynch v. City of North Yakima*, 37 Wash. 657, 80 P. 79 (1905), the plaintiff, employed as a teamster in the fire department of a city, sought to recover for injuries sustained when he was kicked by a horse he had been training to rush from its stall when a fire alarm bell sounded. The plaintiff was barred from recovery for his injuries even though he may not have been injured had the city provided him with an “electric whip.”

The Supreme Court sustained the trial court's demurrer to the complaint, holding that:

It must be presumed that when [plaintiff] accepted the position of teamster he had at least an ordinary knowledge of the nature of horses. This, with his seven weeks' experience in handling this particular team of horses, should have given him a familiarity with the character of these animals. He was in as good a position as anyone well could be to know of the dangers reasonably to be expected from them. If, with that opportunity, knowledge, and experience, he could see nothing vicious or dangerous about the horses, we are unable to see how knowledge of their viciousness could be imputed to the city.

Lynch, 37 Wn. at 663. The same holds true here. If Officer Lindell, with his experience in horseback riding and as a sworn police officer, his certification in mounted patrol activities, his years of experience as a trainee or member of the Mounted Patrol, and his months of experience riding and training with Donovan, was unable to appreciate the risks inherent in his actions, any appreciation of the risks encountered by Officer Lindell cannot, as a matter of law, be imputed to the City.

F. The Fellow Servant Rule bars this action.

Even where employees have a right to sue their employer (that is, where employees do not have workers' compensation benefits), such actions are subject to the Fellow Servant Rule. Plaintiff's brief on the Fellow Servant Rule (pages 42-45) relies heavily on *Taylor and Fray v. Spokane Cy.*, 134 Wn.2d 637, 952 P.2d 601 (1998). However, neither

Taylor nor *Fray* even discussed the Fellow Servant Rule. As such, those cases provide no support for plaintiff.

One has only to read the *Taylor* and *Fray* cases to see why neither mentions the Fellow Servant Rule. Both cases were dismissed on summary judgment because the trial court held that the exclusive remedy for the injuries was the sure and certain relief of workers' compensation and that, therefore, the Superior Court lacked jurisdiction over the controversy. Both cases were remanded for further proceedings.

The other cases relied upon by plaintiff do discuss the Fellow Servant Rule but support dismissal. In *Plemmons v. Antles*, 52 Wn.2d 269 (1958), and in *Buss v. Wachsmith*, 190 Wash. 673 (1937), an employee of defendant was the sole cause of a driving accident. Those cases came under an exception to the Fellow Servant Rule where the accident is caused solely by the other worker and the instrumentality was exclusively under his control. This exception was noted in *Garcia v. Brulotte*, 25 Wn. App. 818 (1980), rev'd on other grounds, 94 Wn.2d 794, 620 P.2d 99 (1980), where the court said:

Although we follow the [Fellow Servant] rule, we have grafted an exception upon it. We explained that exception in *Buss* and repeated it in *Plemmons v. Antles*, 52 Wash.2d 269, 324 P.2d 823 (1958). We said that we will not extend the bar to recovery when the servant whose negligence causes the injury has the exclusive control of the instrumentality by which the injury is inflicted. The

reasoning behind that exception is based on the theory that the exclusive control of the vehicle which creates the danger is a nondelegable duty and remains the responsibility of the master. As far as the operation of the instrumentality is concerned, the operator stands in the shoes of the master and is considered a vice-principal, not a fellow servant.

Garcia, 25 Wn. App. at 821.

It is readily apparent that the exclusive control of the instrumentality by which the injury is inflicted exception has no application here. Officer Lindell was mounted on his usual horse, chose to lean far to his right, became unstable and fell.

Plaintiff also argues that the LEOFF statute should be read to include any negligence of any employee. The language of the statute does not support plaintiff's reading. The LEOFF statute does not state that a LEOFF member has a cause of action as a result of a negligent act or omission of fellow servants. It says that a cause of action exists if injury or death results "from the intentional or negligent act or omission of a member's *governmental employer*". RCW 41.26.281 [emphasis supplied]. This provision is consistent with the Fellow Servant Rule that requires plaintiff to prove that the injury resulted from the negligent act or omission of a "principal". Plaintiff has provided no support for the contention that other members of the mounted patrol could be viewed as "principals" of the Seattle Police Department.

The Fellow Servant Rule remains good law in the State of Washington. It has long been held in Washington that an employer is not liable for the injuries or death of an employee who is injured in the course of his work through the negligence of a fellow servant. *Bennett v. Messick*, 76 Wn.2d 474, 475-6, 457 P.2d 609 (1969); *see also* Restatement (Second) of Agency, § 474.

The evidence in this case is that all members of the Mounted Patrol were responsible for maintaining the paddock area where Officer Lindell fell. All members of the Mounted Patrol were involved in making the common decision not to wear helmets. Mounted Patrol personnel were, by definition, fellow servants of Officer Lindell. *See* Restatement (Second) of Agency, § 475.

G. This Court should accept discretionary review

The issue here is whether review should be accepted prior to trial. These important issues will undoubtedly reach the Washington Supreme Court, if not the United States Supreme Court. The LEOFF statute is a unique statute that violates all established law on exclusive remedy mandates of workers' compensation statutes. It would be burdensome on municipalities to have to defend this type of lawsuit at considerable disruption and expense to the affected fire and police departments and municipal employers. Presently pending before Division I of the Court of

Appeals is *Locke v. City of Seattle*, No. 55256-2-I. The Locke trial lasted more than eight weeks. It would be a tremendous waste of judicial and municipal resources for more LEOFF cases to proceed through extensive discovery disruptive to an operating police department (or fire department), hiring of expert witnesses, and trial before complete review of these important constitutional and sovereign immunity challenges.

Plaintiff argues that the City has presented an “all or nothing” approach in its motion for discretionary review. That is incorrect. The City simply believes that the issues are interrelated and that the best approach would be for review to be accepted on all issues presented rather than piecemeal. While the trial court has only certified the LEOFF issues pursuant to RAP 2.3(b)(4) as involving “a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation”, the City submits that appellate review of the other issues will materially advance the ultimate termination of this litigation. However, if the Court of Appeals does not agree that discretionary review should be granted on the other issues, the City still seeks review of the issues surrounding the LEOFF statute.

H. Response to plaintiff's Motion to Strike

Plaintiff argues that the City's motion for discretionary review should be stricken in its entirety even though it was timely filed. The entire basis for this contention is that the note for motion was filed two days after the motion was filed. Plaintiff provides no support for the contention that striking of the motion for discretionary review would be warranted. The only reason that the note for motion was filed after the motion was because counsel for the City contacted plaintiff's counsel to arrange for a mutually convenient date for argument. Plaintiff's counsel did not return the call for two or three days, resulting in a later filed note for motion. This did not result in a later hearing because the court had limited openings in its schedule. Thus, plaintiff has not been prejudiced or even affected in any way.

I. Conclusion

For the foregoing reasons, the City asks this Court to deny plaintiff's motion to strike and to accept discretionary review pursuant to RAP 2.3(b).

DATED this 29th day of March, 2006.

Respectfully submitted,

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