

FILED
COURT OF APPEALS
BY _____

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STATE OF WASHINGTON

BY _____
DEPUTY

No. 34654-1-II

COURT OF APPEALS,
DIVISION TWO
OF THE STATE OF WASHINGTON

Terry Linville and Julie Linville, Husband and wife, individually and on behalf of J.L., a minor; Timothy Ryan and Tammi Ryan, husband and wife, individually and on behalf of T.H.R., a minor; Michael Murray and Iesha L. Hall, individually and on behalf of D.H., a minor; Yvonne Poplawski, individually and on behalf of H.K., a minor, and on behalf of a class of similarly situated,

APPELLANTS

vs.

STATE OF WASHINGTON,

RESPONDENT

REPLY BRIEF OF APPELLANT

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COME NOW the Appellants and respectfully submit the Brief in Reply to the Brief of Respondent. Appellants' Opening Brief adequately addressed the arguments of the Respondent, but Appellant has now been provided a copy of the transcript of proceedings from the lower court and the following is provided in supplement to the Appellants' Opening Brief.

Page 13 of Opening Brief: The trial judge based his ruling denying Class Certification on the numerosity issue (RP 3/3/06 page 16 line 16). Ironically, the trial court denied certification of the Class without prejudice to bring the issue back after additional discovery (RP 3/3/06 page 16 line 19) but at the same hearing continued to deny discovery on the issue (RP 3/3/06 page 10 line 1, RP 2/10/06 page 24 line 17, RP 3/17/03 page 10 line 13)

"First of all, I do agree with the State that the defendant in this case is the Office of the Insurance Commissioner. It is not the entire breadth of the State of Washington...Therefore, I will not compel the Office of the Insurance Commissioner to search through databases or documents of other agencies in order to supplement the answers that they have already filed." RP 2/10/06 page 27 line 3, 20.

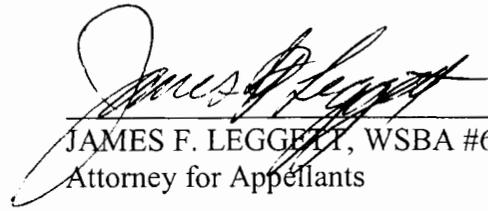
As presented to the trial court, the Respondent State is partially correct. 1. The State does not assert any sort of immunity of its officers or the State herein (RP 3/17/06 page 38 line 12). 2. The issue of statutory interpretation and whether or not the Appellants were intended beneficiaries of RCW 48.88 is a question of law for determination by the court (RP 3/17/06 page 32 line 4) However, the issues of failure to enforce and the conduct of the staff of the Office of the Insurance Commissioner in first,

determining there was no requirement to activate the Joint Underwriting Association and second, the continued determination that there was no need to activate the J.U.A. each year to the present are fact based. What did the staff know about whether there existed or exists a policy of liability insurance provided by an "admitted" insurer in Washington available to in home day care operators which does not exclude coverage for sexual molestation of children in care by any one other than the licensee (RP 3/17/06 page 6 line 6 - 25)? The Appellants were surely harmed by this failure and said harm was reasonably foreseeable, but again this is a fact based issue which cannot be resolved without the discovery denied by the trial court. (RP 3/17/06 page 34 line 4). The measure of the conduct as negligent, reckless, intentional or criminal cannot be determined without that same discovery (RP 3/17/06 page 8 line 19 - page 9 line 16).

"I can't make a bare allegation of that without doing discovery. If it comes out, and I said in my pleadings, if it comes out in the discovery that the reasons behind not activating the Joint Underwriting Association were an accommodation to insurance carriers who didn't want to have the Joint Underwriting Association created as a competition and in conjunction with allowing them to continue that specific exclusion for sexual assault in a daycare setting contrary to RCW 48 and the implementing WAC, then, yes, we are going to be trying a case upon the reasons why agents in the Insurance Commissioner's Office took action as they did, and it may be that the Attorney General will be my co-counsel.

However, I can't make that type of bare allegation without completing discovery." (RP 3/17/06 page 8 line 24 - page 9 line 16).

RESPECTFULLY SUBMITTED this 10th day of August, 2006

A handwritten signature in cursive script, appearing to read "James F. Leggett", is written over a horizontal line. The signature is fluid and somewhat stylized.

JAMES F. LEGGETT, WSBA #6630
Attorney for Appellants

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CERTIFICATE OF SERVICE OF REPLY BRIEF OF APPELLANT

I certify that on the 10th day of August, 2006, I caused a true and correct copy of this Certificate and of the Reply Brief of Appellants was duly served upon the following in the manner indicated:

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