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In the Supreme Court of the State of Washington

WASHINGTON COUNTIES RISK POOL; AMERICAN INTERNATIONAL GROUP, INC.; LEXINGTON INSURANCE COMPANY, INC.; Vyrle HILL; J. William ASHBAUGH; and ACE AMERICAN INSURANCE COMPANY,

Plaintiffs-Respondents,

v.

CLARK COUNTY; Donald SLAGLE; Larry DAVIS; and Alan NORTHROP,

Defendants-Petitioners.

Appeal from the Washington Superior Court
for Cowlitz County, Case No. 13-2-01398-4
Honorable **Marilyn K. Haan**, Judge Presiding

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STATEMENT OF FACTS

Prefatory Note: The Record Set Straight

Defendants' briefs are riddled with factual misstatements that must be corrected upfront. For example, defendants misstate that American International Group, Inc. ("AIG, Inc.") is an insurer and reinsurer. (D/N Br. 35; C/S Br. 1-3, 7-10, 18, 20, 57)[1] AIG, Inc. is a holding company and does not issue insurance policies or reinsurance certificates. NASDAQ, http://www.nasdaq.com/markets/spos/company/american-international-group-inc-1878-55084 (last visited Jan. 15, 2016).

Next, the County and Slagle misidentify the parties before this Court by referring to AIG, Inc. instead of solely Lexington Insurance Company ("Lexington"). (C/S Br. 1-57) The orders under review do not concern AIG, Inc. (CP 8041-54, 9505-08) Nor is AIG, Inc. even a party to this action, as defendants stipulated below. (CP 7059-61)

Defendants also treat Washington Counties Risk Pool ("WCRP") and Lexington as though they are one and the same. (D/N Br. 14, 16, 18, 25, 46, 49; C/S Br. 1-2, 11, 13, 16, 19) WCRP and Lexington are independent entities and, as an excess insurer, Lexington is not similarly situated to WCRP concerning the duty to defend. (CP 54-131) Defendants propose no theory by which WCRP's conduct could be imputed to Lexington.

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[1] Larry Davis and Alan Northrop's brief is abbreviated "D/N Br." Clark County ("the County") and Donald Slagle's brief is abbreviated "C/S Br."

Defendants' briefs contain additional errors, which will be addressed below. Consequently, Lexington submits its own statement of facts.

The Parties

Davis and Northrop were wrongfully convicted and imprisoned in 1993 for crimes they did not commit. (CP 153-56) They were exonerated and released in 2010. (CP 146) Slagle was the Clark County Sheriff's Department detective who led the investigation. (CP 153-56) The County was Slagle's employer and a member of WCRP, a governmental entity joint self-insurance program. (CP 1) Lexington issued to WCRP excess liability policies, under which the County was an insured. (CP 54, 91)

WCRP Touts Itself As A Preferential Alternative To Insurance

WCRP is a cooperative program in which participating members share joint liability when an individual member's assets are insufficient to cover its liability. (CP 1228) WCRP's mission statement is to be "a county controlled liability pool free of the insurance world," such that "insurance in the traditional sense need not be purchased." (CP 4546, 4549) WCRP's membership is limited to Washington's 39 counties. (CP 21, 5448)

WCRP was created nearly 30 years ago to combat the problem of cost-prohibitive commercial insurance. (CP 2, 7514) At the time, governmental entities were confronting a trend of skyrocketing premiums for the renewal of identical policies; fewer insurers willing to offer

coverage; and inability to obtain coverage on the desired terms. (CP 7514) In response, the legislature authorized governmental entities to band together for purposes of jointly self-insuring, purchasing insurance and securing risk management services. (CP 7514)

As a risk pool, WCRP is unlike a traditional commercial insurer in several ways: WCRP provides member counties with the ability to self-insure, rather than purchase commercial insurance; WCRP is exempt from insurance premium taxes; and WCRP is overseen by the Office of Risk Management, not the Office of the Insurance Commissioner. (CP 1232, 2629, 6932-33, 7516, 7555-56, 7564-68)

The result is that WCRP is able to offer member counties advantages over commercial insurance: cost savings and stabilization; input into writing coverage, which is tailored to county government operations and associated liability exposures; control over claims handling and resolution; an administrative appeals process that allows member counties to challenge adverse coverage decisions; and protection against arbitrary cancellation of coverage. (CP 4567, 4641-43, 5498, 7521)

And because it is not an insurer, as the County's 2013 annual financial report explains, WCRP is not subject to insurance law: "[U]nder Washington law [WCRP] is not an insurance company, and therefore, not subject to the rules governing insurance policy interpretation." (CP 7587)

The instrument that dictates WCRP's responsibilities, and governs its operations, is an interlocal agreement. (CP 20-27) The interlocal agreement requires WCRP to provide joint self-insurance coverage for claims involving torts committed by WCRP, member counties and their officers, employees or agents. (CP 24) WCRP must also procure umbrella coverage for member counties and obtain reinsurance. (CP 23)

The County's Hybrid Liability Protection Program

In 1993, nine years before it joined WCRP, the County was uninsured. (CP 6251) In 2000, two years before it joined WCRP, the County bought an excess liability policy from an undisclosed insurer. (CP 7560) In 2002, after the County saw its annual premium for that policy more than double for the same coverage, the County joined WCRP. (CP 359, 7560-61) As a condition of admission to the risk pool, the County approved the interlocal agreement's terms. (CP 4727, 4738, 7562-63)

Once it became a WCRP member, the County was protected against liability claims through a hybrid program of self-insurance, excess insurance and reinsurance. (CP 112, 3865-81, 7090, 9856) WCRP issued to its member counties, including Clark County, a Joint Self-Insurance Liability Policy ("JSILP") annually from October 1, 2003 to October 1, 2010. (CP 9856) The JSILP protects WCRP, as well as member counties and their employees acting within the scope of their employment. (CP

432) The JSILP affords joint self-insurance of $10,000,000 per occurrence, subject to a deductible ranging from $10,000 to $500,000. (CP 31, 33, 429-30, 1219-21, 6933) Each year, the County selected the highest deductible. (CP 31, 429-30)

At the excess level, Lexington issued to WCRP a first-layer excess policy, under which the County was an insured, annually from October 1, 2003 to October 1, 2010. (CP 4230-87, 4308-4326, 4349-69, 4392-4414, 4439-71) Each first-layer excess policy affords coverage of $10,000,000 per occurrence, over the JSILP's $10,000,000 per occurrence limits. (CP 7090) Lexington also issued to WCRP a second-layer excess policy, under which the County was an insured, annually from October 1, 2005 to October 1, 2010. (CP 4289-4306, 4328-47, 4371-90, 4416-38, 4474-95) Each second-layer excess policy affords coverage of $5,000,000 per occurrence, over the JSILP's and first-layer excess policy's combined $20,000,000 per occurrence limits. (CP 7090)

As for reinsurance of its self-insured claims, WCRP obtained such coverage over the years through various reinsurers.[2] (CP 5432, 5449) WCRP was not reinsured for the entirety of its liability under the JSILP. (CP 5432, 5449) There was no coverage for claims up to $100,000. (CP

[2] Although Lexington was also a reinsurer during certain policy periods, Lexington is a party to this action solely in its excess insurer capacity; no claims have been asserted by or against Lexington in its reinsurer capacity. (CP 14-17, 112, 1719-26, 5994-6005)

5432, 5449) Because some member counties' deductibles were less than $100,000, WCRP was not reinsured for the shortfall. (CP 5432, 5449)

The JSILP Covers Only Torts That Occur During The Policy Period

As a reminder that WCRP is not an insurer and does not issue insurance policies, each JSILP includes a prefatory notice to that effect:

> **NOTICE: THE FOLLOWING LIABILITY COVERAGE IS PROVIDED BY THE WASHINGTON COUNTIES RISK POOL, A JOINT SELF-INSURANCE PROGRAM .... THE WASHINGTON COUNTIES RISK POOL IS NOT AN INSURANCE COMPANY AND THIS LIABILITY COVERAGE IS NOT TRADITIONAL INSURANCE.**

(CP 431)

The JSILP requires that the occurrence take place during the policy period: "[WCRP] shall pay on behalf of the named insured and other insureds ... all sums of monetary damages which an insured shall become obligated to pay ... for bodily injury, personal injury, property damage, errors and omissions, and advertising injury caused by an occurrence during the policy period .... " (CP 431; emphasis omitted) WCRP has a duty to defend a lawsuit seeking covered damages. (CP 431)

An "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same conditions, which results in bodily injury, property damage, or errors and omissions." (CP 437; emphasis omitted) With respect to personal injury and advertising injury,

"occurrence" is defined as "an event, including continuous or repeated exposure to substantially the same conditions." (CP 437) All losses flowing from continuous or repeated exposure to substantially the same general conditions arise from one occurrence. (CP 432) There is no occurrence where the County expects or intends the injury. (CP 436)

The JSILP contains a "deemer clause," which provides that an occurrence spanning multiple policy periods will not be considered to have taken place after the County discovers that its conduct is allegedly injurious—notwithstanding that a continuous occurrence is assigned to one policy period:

> An occurrence that takes place during more than one policy period will be deemed for all purposes to have taken place during the last policy period in which any part of the occurrence took place, and shall be treated as a single occurrence during such policy period. No occurrence will be deemed to have taken place after the insured has knowledge of the alleged bodily injury, property damage, personal injury, errors and omissions, or advertising injury that gave rise to the occurrence.

(CP 431; emphasis omitted)

Defendants contend that the pre-2004 JSILPs omit a deemer clause. (D/N Br. 13; C/S Br. 9) Their record citations do not support that assertion. (CP 361-94, 1028-1117, 4230-4495) The referenced JSILPs are unexecuted draft documents that do not identify Clark County—or any county—as the named insured. (CP 361, 374, 384, 1028, 1041, 1051)

The JSILP also contains various conditions with which the County must comply. (CP 38-39) These conditions include the requirement that the County cooperate with WCRP in all respects and the prohibition against making any voluntary payments or assuming any obligations, other than at the County's expense. (CP 38-39)

The County Ratifies The Contracts' Anti-Assignment Provisions

The interlocal agreement prohibits member counties from assigning rights under the agreement to third parties: "No county may assign any right, claim or interest it may have under this Agreement. No creditor, assignee or third-party beneficiary of any county shall have any right, claim or title to any part, share, interest, fund, premium or asset of [WCRP]." (CP 26) This is because WCRP's assets are reserved for the exclusive benefit of member counties. (CP 22) If WCRP sues to enforce this or any other term against a member county, the interlocal agreement permits the prevailing party to recover attorneys' fees. (CP 26)

The JSILP contains a nearly identical anti-assignment provision: "No insured shall assign any right, claim or interest it may have under this policy. No creditor, assignee or third-party beneficiary of any insured shall have any right, claim or title to any part, share, interest, fund, premium or asset of [WCRP]." (CP 40)

The County approved the interlocal agreement and the annual JSILP containing these anti-assignment provisions. (CP 2625, 4727, 4736, 4738, 7563, 7572-73) Consistent with its mission to allow the membership to write its own coverage, WCRP's Board of Directors—composed of one director from each member county—ratifies the annual JSILP. (CP 483, 1233, 7572-73) Every JSILP iteration in the record contains an anti-assignment provision. (CP 372, 382-83, 394, 406, 416-17, 427, 439, 450)

The Excess Policies Follow Form To The JSILP's Occurrence And Anti-Assignment Provisions

Under the excess policies, Lexington owes no duty to indemnify until exhaustion of the underlying JSILP's limits: "We will pay on behalf of the Insured that portion of the loss which the Insured will become legally obligated to pay as compensatory damages ... by reason of exhaustion of all applicable underlying limits ...." (CP 57; emphasis omitted)

The excess policies follow form to and incorporate the JSILP's non-conflicting terms: "It is agreed that this policy, except as herein stated, is subject to all conditions, agreements and limitations of and shall follow the underlying policy/ies in all respects ...." (CP 96; emphasis omitted) Because the excess policies are silent about the timing of an occurrence, and do not contain an independent deemer clause or anti-assignment provision, the excess policies incorporate the JSILP's corresponding terms. (CP 96, 431, 439) Thus, Davis and Northrop's contention that the

excess policies do not address when an occurrence needs to take place or contain an anti-assignment provision is incorrect. (D/N Br. 14, 61 n.57)

The excess policies also follow form to and incorporate the JSILP's occurrence provisions. (CP 96, 432, 436-37) Although the excess policies contain an independent "occurrence" definition, it is similar to and not inconsistent with the JSILP's "occurrence" definition: "[A]n event, including continuous or repeated exposures to conditions, neither expected or intended from the standpoint of the Insured. All such exposure to substantially the same general conditions shall be deemed one occurrence." (CP 95, 432, 436-47; emphasis omitted)

Also like the JSILP, the excess policies' coverage is subject to certain conditions. (CP 62) These conditions mandate the County's cooperation with Lexington and forbid voluntary payments or assumption of obligations without consent, other than at the County's expense. (CP 62)

The Excess Policies Do Not Follow Form To The JSILP With Regard To The Duty To Defend

The excess policies do not follow form to or incorporate the JSILP's terms to the extent those terms are inconsistent. (CP 92) Inconsistent terms include, among others, the duty to investigate and defend. (CP 92) Under the JSILP, WCRP has an immediate duty to defend the County against a lawsuit seeking covered damages. (CP 431) In contrast, Lexington has a delayed duty to defend—it does not arise, if at all, before payment of the

JSILP's limits: "This section [defense] shall apply to claims resulting from occurrences not covered by any underlying insurance due to exhaustion of any aggregate limits by reason of any losses paid thereunder." (CP 92; emphasis omitted) Otherwise, Lexington "shall not be called upon to assume charge of the investigation, settlement or defense." (CP 93)

The Underlying Action: Davis And Northrop Allege Misconduct And Injuries That Occurred Nine Years Before The County Joined WCRP

Over two decades ago, in 1993, the County and Slagle investigated, convicted and incarcerated Davis and Northrop for rape, kidnapping and burglary. (CP 160-66) After the results of previously unavailable DNA testing exonerated Davis and Northrop in 2010, the Clark County Superior Court overturned their convictions. (CP 155) The County then dismissed the charges, ending Davis and Northrop's 17-year ordeal. (CP 155)

Two years later, Davis and Northrop sued the County and Slagle. (CP 133) They asserted federal civil rights claims and a variety of state law tort claims. (CP 147-49) The original underlying complaint alleged that Slagle had employed suggestive identification procedures during the investigation, and had suppressed exculpatory evidence during the course of the investigation and trials. (CP 133-35) The underlying complaint also alleged that the County, aware of Slagle's disciplinary record, improperly trained, supervised and retained him. (CP 133-34)

Davis and Northrop alleged that this misconduct occurred before and during 1993, the year they were convicted and imprisoned. (CP 133-34, 139-46) Although Davis and Northrop also alleged that the County refused their request for DNA testing in 2004, the alleged effect of this refusal was to ratify Slagle's 1993 misconduct. (CP 134) Davis and Northrop did not allege that the County's 2004 misconduct caused distinct injuries, only that it prolonged their preexisting injuries. (CP 134, 149-50)

Trying To Plead Into Coverage, Davis And Northrop Allege Ongoing Acts And Injuries Causally Related To The 1993 Acts And Injuries

After WCRP denied coverage, and with the County's consent, Davis and Northrop amended the underlying complaint. (CP 7626-54) They did not add new claims or parties, only facts—all of which admittedly arose from the same misconduct alleged in the original complaint. (CP 7628-29)

Davis and Northrop now alleged that the County and Slagle had failed to correct their original misconduct every year from 1993 to 2010. (CP 155-56, 167-69) These allegations were an extension of the same injurious conduct that had taken place and caused injuries in 1993: continued suppression of exculpatory evidence; continued improper training, supervision and retention; and continued defense of Davis' and Northrop's wrongful convictions. (CP 155-56, 167-69)

The amended complaint also added nominally new misconduct. (CP 159) For example, it alleged that Slagle was accused by others of more

wrongdoing and declared unfit for duty in 2004. (CP 159) Davis and Northrop did not allege that these later infractions expanded the grounds of the County and Slagle's liability or caused them new and distinct injuries. (CP 159) Instead, Davis and Northrop alleged that Slagle's later infractions did not prompt the County to correct its 1993 misconduct:

> On November 19, 2004, a psychological evaluation found Detective Slagle unfit for duty. This should have been a wake up signal for Clark County to initiate an investigation into Det. Slagle's handling of the ... rape case. Unfortunately, no investigation occurred and Clark County continued to claim that Davis and Northrop were guilty of a crime that they did not commit.

(CP 159)

The amended complaint further alleged that Davis and Northrop continued to suffer from their 1993 injuries, which were prolonged until at least 2010. (CP 174) These injuries—sex offender status, hepatitis C, post-traumatic stress disorder and restless legs syndrome, among others—all allegedly began during and stemmed from their 1993 convictions and incarceration: "all of which began during or stem from [Davis'] imprisonment and ordeal;" and "various physical and mental injuries during and after [Northrop's] imprisonment." (CP 174)

The County And Slagle Know At The Outset That Their Misconduct Is Allegedly Injurious

The amended complaint alleged that Slagle's tenure with the Clark County Sheriff's Office had generated a long and checkered disciplinary

record, including incidents of unlawful arrest, excessive force and dereliction of duty. (CP 158-59) The amended complaint further alleged that this disciplinary record had alerted the County and Slagle in 1993 to Slagle's dangerous propensities, and the virtual certainty that their misconduct was injurious to Davis and Northrop:

> [The County and Slagle] were on notice by 1993 and thereafter regarding Det. Slagle's propensity toward misconduct and substandard police work, and knew or should have known that constitutional violations and other errors foreseeably would occur if the County's [*sic*] continued to employee [*sic*] him.

(CP 171)

As to certain evidence bearing adversely on the victim's credibility, the amended complaint alleged that the County had discovered its "obvious" exculpatory value soon after the 1993 trials. (CP 165-66) The amended complaint alleged that failure to disclose the evidence during the 1993 trials had prejudiced Davis' and Northrop's defenses. (CP 166)

WCRP, But Not Lexington, Denies Coverage

The County and Slagle requested a defense and indemnity from WCRP. (CP 359, 451-54, 5934, 7656) WCRP denied coverage for both versions of the underlying complaint, which alleged one occurrence that took place before the JSILP incepted and before the County became a WCRP member. (CP 279, 283, 359, 454-82, 7658-62, 7669-80, 7809) WCRP declined Davis and Northrop's request to attend a mediation two

months before the underlying civil trial against the County and Slagle commenced. (CP 4781, 4783)

Not until 18 days before the underlying civil trial commenced, however, did Lexington first learn of the lawsuit. (CP 966, 3144-47, 7091) WCRP, not the County and Slagle, notified Lexington that its excess policies could potentially be implicated. (CP 3141-47, 7091) Lexington acknowledged receipt of the notice within six days. (CP 1646)

WCRP advised Lexington that Davis and Northrop had demanded payment of the JSILP's and excess policies' combined limits. (CP 3141-44) WCRP also advised that it had denied coverage, but would not render a final decision until exhaustion of the administrative appeals process. (CP 7091) WCRP did not ask Lexington to assume the defense or accede to the policy limits demand. (CP 4123) No one asked Lexington to attend the mediation or participate in settlement discussions. (CP 7091)

Defendants misrepresent the record when they assert that WCRP, the County and Slagle tendered the claim to Lexington, which denied coverage and refused to defend or indemnify. (D/N Br. 14; C/S Br. 2, 16, 18-19, 55) The evidence that the County and Slagle cite, WCRP's claims manager's deposition testimony, establishes the opposite:

> Q. Did you tender the Davis and Northrop case to any of the excess insurers?
>
> A. No.

(CP 8346) In fact, the County and Slagle never requested a defense or indemnity from Lexington. (CP 7091-92) Because its insureds had not demanded anything of it, Lexington did not deny coverage. (CP 5468)

Without Prior Notice To Lexington, The County and Slagle Settle

After ten trial days, the parties settled the underlying action. (CP 178) The County and Slagle agreed to entry of a judgment against them in the amount of $34,500,000, to be split equally between Davis and Northrop. (CP 178) The consent judgment compensated injuries "all as a result of being wrongfully convicted and incarcerated." (CP 191) The County also agreed to satisfy $10,500,000 of the consent judgment, and to assign to Davis and Northrop "any and all" of the County and Slagle's "claims, rights, interests, causes of action, and choses in action" against WCRP and Lexington. (CP 190-97, 205-09) Davis and Northrop covenanted not to execute against the County or Slagle on the unsatisfied portion of the consent judgment. (CP 178, 193-97, 211-15)

The same day, the County and Slagle advised WCRP of their intent to settle. (CP 360, 5895) Contrary to the County and Slagle's unsupported claim, they gave Lexington no advance notice. (CP 7091-92; C/S Br. 19)

The Federal Court Does Not Decide If The Settlement Is Reasonable

Pursuant to the settlement agreement, the court in the underlying action entered the consent judgment. (CP 182, 610, 616) Soon after, in

connection with Davis and Northrop's request for a reasonableness hearing on the consent judgment's amount, WCRP and Lexington moved to intervene. (CP 613, 4521, 4926) The federal court allowed intervention, but declined to decide reasonableness. (CP 615, 617, 737-45, 4930)

After The County Admits That It Breached The Interlocal Agreement And JSILP, It Is Expelled From The Risk Pool

Seven weeks before the underlying action settled, anticipating that the County may be considering an assignment-of-rights, WCRP cautioned that the interlocal agreement and JSILP forbade the arrangement. (CP 4783-84) Davis and Northrop also contemplated the possibility, as they provided for the contingency in the assignment-of-rights that the agreement would be found unenforceable. (CP 207) When it learned that the County had ignored the warning and agreed to an assignment-of-rights anyway, WCRP notified the County on four occasions that it had breached the interlocal agreement and JSILP. (CP 3092, 3094, 3096-97, 3099-100)

The County's risk manager concurred. (CP 5544) When he notified WCRP's executive director of the settlement, the County's risk manager conveyed his displeasure in no uncertain terms:

> I advised our Board against attempting to assign rights of the JSLIP [*sic*] contract ... multiple times. I advised our Prosecutor's Office against attempting to do it. ... I expressed to our board in person, we were throwing the other 26 BOCC's [Board of County Commissioners] under the bus in an attempt to save us money, now the whole Pool has to defend our actions ....

(CP 5544) The County, banking on Davis and Northrop's inability to collect the consent judgment, dismissed the risk manager's misgivings: "The answer given back to me was this, 'if the Plaintiffs [Davis and Northrop] can't collect on this, and the Pool will not have to pay, then why would the Pool care, since it allows us [the County] to settle a case for something Plaintiff's [*sic*] will never collect on?'" (CP 5544)

Months later, the County's risk manager maintained his position that the assignment-of-rights breached the interlocal agreement. (CP 3121, 4884) *The Columbian* even published his remarks in an article: "We went against the interlocal agreement (by agreeing to that)." (CP 4884)

Despite these admissions, and another member county's concern that the County's self-serving behavior had exposed the entire risk pool, WCRP allowed the County an opportunity to cure the breach. (CP 2264-65, 3096-97) In a last-ditch plea to remain in the risk pool, the County apologized to WCRP and blamed a "rogue deputy prosecuting attorney." (CP 2259) The County also confessed that it had caved under pressure: "We were pushed, cajoled, and bullied [by Davis and Northrop's attorneys] into offering up our rights under any assets and coverages afforded us through the Pool and it's [*sic*] insurer's [*sic*]." (CP 4882)

Ultimately, the County could not satisfactorily cure the breach, leading to termination of its membership and cancellation of the 2013-

2014 JSILP that had been issued to the County. (CP 4968-69) The move was unprecedented in WCRP's then 25-year history. (CP 4884) But so was the assignment-of-rights—no other member county had ever before attempted to enter into such an agreement. (CP 5710)

The Present Coverage Action

WCRP filed this action against the County, Slagle, Davis and Northrop, seeking a declaration of its rights and obligations under the interlocal agreement and JSILP. (CP 747-54) Lexington joined the lawsuit, seeking a declaration of its rights and obligations under the excess policies.[3] (CP 1) Only after Lexington joined the lawsuit did Davis and Northrop first demand indemnity from Lexington for the underlying consent judgment—even though there has been no adjudication, because a reasonableness hearing has not yet been held, that the consent judgment is not the product of fraud or collusion. (CP 1, 4930, 5079-85)

The County, Slagle, Davis and Northrop asserted mirror-image counterclaims, as well as multiple contractual and extra-contractual counterclaims. (CP 1719-26, 5994-6005) They sought to recover the unsatisfied portion of the underlying consent judgment, in addition to the $10,500,000 that the County had previously contributed. (CP 1726, 6005-

[3] Lexington did so in conformance with this Court's directive: an insurer that is uncertain about its coverage obligations may file a declaratory judgment action to resolve those doubts. *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn. 2d 872, 875, 297 P.3d 688 (2013).

06) Defendants did not join as a party the undisclosed insurer that had issued excess policies to the County in 2000 and 2001. (CP 7560-61)

The Parties' Cross-Motions For Summary Judgment

The parties cross-moved for summary judgment on whether the JSILP's and excess policies' coverage provisions had been triggered. (CP 330-57, 6101-02, 7067-86) Defendants moved for partial summary judgment against WCRP, but not Lexington, on the ground that WCRP breached a duty to defend. (CP 330-57, 6101-02) Lexington moved for partial summary judgment against defendants on the ground that it owed no duty to indemnify. (CP 7067-86)

The parties also cross-moved for summary judgment on the validity of the assignment-of-rights. (CP 4107-15, 4503-33, 4980, 4984, 5593) WCRP moved for a declaratory judgment that the agreement was void under the interlocal agreement. (CP 4503-33) Defendants moved for partial summary judgment against Lexington on the ground that the JSILP's anti-assignment provision, which the excess policies incorporate, was unenforceable. (CP 4107-15) In their oppositions, Lexington and WCRP requested a grant of summary judgment. (CP 4980, 4984, 5593)

The Rulings Below

The trial court disposed of the parties' motions in two orders. (CP 8041-54, 9505-08) First, the court held that the JSILP did not afford

coverage to the County and Slagle in connection with the underlying action. (CP 9508) Based on the underlying complaint's allegations, the court found that all misconduct took place in 1993. (CP 9507-08) Because the misconduct preceded the County's WCRP membership, the alleged occurrence did not take place during any JSILP's effective dates. (CP 9508) The court concluded that WCRP owed no duty to defend. (CP 9507-08) Accordingly, the court denied partial summary judgment to defendants. (CP 9508, 9825-29)

The court did not expressly hold that WCRP also owes no duty to indemnify, or resolve Lexington's pending motion for partial summary judgment concerning its duty to indemnify. (CP 7067-86, 9508) But the court's ruling that WCRP owed no duty to defend implicitly means that neither WCRP nor Lexington, a follow-form excess insurer, owes a duty to indemnify. (CP 9506, 9508)

Second, the court held that the assignment-of-rights was null and void. (CP 8041-54) The court determined that the interlocal agreement's and JSILIP's anti-assignment provisions were unambiguous, and therefore declined to consider extrinsic evidence as an interpretive aid. (CP 8049-50) The court observed that the County, which was of equal bargaining power with WCRP, had ratified the provisions. (CP 8048-52)

With regard to the excess policies, the court determined that they follow form to the JSILP and incorporate its anti-assignment provision. (CP 8054) For the same reasons that the County and Slagle could not assign their rights under the interlocal agreement and JSILP, they could not assign their rights under the excess policies. (CP 8054)

Accordingly, the court granted declaratory judgment to WCRP; granted partial summary judgment to WCRP and Lexington; and denied partial summary judgment to defendants. (CP 8050, 8054, 9842) After prevailing, WCRP successfully moved for an attorneys' fees award under the interlocal agreement. (CP 9944-72) The court has not yet determined the amount of such fees. (CP 10202) The court then certified its orders for interlocutory review. (CP 9860) This appeal followed. (CP 9862, 9904)

SUMMARY OF THE ARGUMENT

Once adversaries, defendants now align themselves in a joint effort to foist onto Lexington the duty to satisfy a multimillion-dollar consent judgment—one that Lexington neither negotiated nor even knew about before the County and Slagle unilaterally and surreptitiously entered into it. Defendants demand retroactive coverage for torts that the County and Slagle committed over twenty years ago, when the County was uninsured and before it joined WCRP and became a beneficiary of the JSILP and Lexington excess policies. The underlying complaint accused the County

and Slagle of malfeasance during the 1993 criminal investigation and trials, culminating in Davis' and Northrop's convictions and imprisonment the same year. Tellingly, Davis and Northrop do not dispute that they suffered injuries immediately. It follows that any potential occurrence took place in 1993, long before the excess policies incepted.

To create the impression that subsequent events triggered coverage during the excess policies' effective dates, defendants highlight the underlying complaint's allegations that the County and Slagle failed to correct their malfeasance—in turn, prolonging Davis' and Northrop's injuries—every year of their incarceration. But the County and Slagle's passivity, rather than constituting new torts that generated distinct injuries, was merely a consequence of the very wrongdoing that had already taken place and caused injuries in 1993. That the *effect* of the wrongdoing was continuous does not mean that the wrongdoing *itself* was continuous.

Defendants seek refuge in the continuous trigger theory, under which every policy in effect during Davis and Northrop's 17-year incarceration would be triggered. Defendants urge this Court to be the first to adopt the continuous trigger theory, as applied to wrongful conviction and imprisonment claims. Every jurisdiction to have considered this assertion has rejected it. To forge a minority position would be impolitic. Finding

coverage for a loss that everyone but Lexington knew was in progress when it issued the excess policies would violate the known loss doctrine.

There is another basis on which to affirm the ruling that WCRP, and consequently Lexington, owes no duty to indemnify. The County and Slagle's assignment-of-rights breached the JSILP's anti-assignment provision, which the excess policies incorporate. Regarding this provision, the enforceability of which differs between contract law and insurance law, it is critical to recognize that WCRP is not an insurer and the JSILP is not an insurance policy. Thus, the validity of the JSILP's anti-assignment provision does not turn on insurance law precepts. All that matters is that it is sufficiently specific to encompass all defendants' counterclaims.

The public policy implications of nullifying the anti-assignment provision militate against doing so. Released from the proscription's constraining effects, a risk pool's member counties would have no disincentive to engage in self-serving behavior, to the risk pool's collective detriment. Such a holding would also dampen parties' freedom to contract as they see fit. Defendants invoke the judicial process in hopes of upending the bargain that the County struck with WCRP and Lexington for more than a decade—after the County consistently ratified the JSILP and excess policies' anti-assignment provision and after the County reaped

the considerable benefits of that bargain. This Court should not bestow on defendants a better deal than the one the County negotiated for itself.

Just as the anti-assignment provision is enforceable under the JSILP, so too is it enforceable under the excess policies. The excess policies follow form to more than just the anti-assignment provision; they also follow form to WCRP's contractual liability, given that the excess policies were designed to match the JSILP's coverage. As such, both contracts must be interpreted identically. This is accomplished by construing the JSILP on its own merits, then applying the same result to the excess policies. The excess policies, which are not standalone contracts and have no meaning independent of the JSILP, cannot be interpreted differently. Accordingly, absence of coverage under the JSILP automatically equates to absence of coverage under the excess policies.

It comes as no surprise to defendants that the assignment-of-rights turned out to be worthless. The County knew at the outset that the JSILP and excess policies did not afford coverage for such a stale claim. This is why the County never tendered the claim to Lexington—because it would have been a futile endeavor. The County also knew at the outset that the unauthorized assignment-of-rights might jeopardize its entitlement to the JSILP's and excess policies' benefits, but deemed this an acceptable risk. The County calculated that it was giving away nothing by assigning rights

to nonexistent insurance proceeds, and that the assignment-of-rights was of no concern to WCRP and Lexington as the claim was not covered.

Davis and Northrop were equally apprised of the possibility that the assignment-of-rights was void. They were not compelled to accept an assignment-of-rights as a condition of settling the underlying action, and could have insisted on collecting the entire consent judgment from the County alone. Davis and Northrop assumed the risk that the assignment-of-rights would be adjudicated to be unenforceable, and factored this consideration into their decision to settle on such terms nevertheless.

Against this backdrop, it is apparent that defendants' pursuit of coverage is a contrivance. What they are truly seeking is a judicial remedy for strategic decisions that proved unwise in hindsight: the County's election to be uninsured in 1993, the policy period into which Davis and Northrop's claims fell; and Davis and Northrop's acceptance of a worthless assignment-of-rights. This Court should not absolve them of the consequences of those decisions, under the guise of contract interpretation.

ARGUMENT

1. The standard of review is *de novo*.

This Court, which may affirm on any basis found in the record, reviews a summary judgment ruling *de novo*. *Washburn v. City of Fed. Way*, 178 Wn. 2d 732, 753 n.9, 310 P.3d 1275 (2013). Summary judgment

should be granted where there are no material fact issues and the movant is entitled to judgment as a matter of law. CR 56(c).

2. The excess policies do not cover the underlying consent judgment, as the alleged occurrence took place before the first policy period.

2.1 The duty to indemnify is narrower than the duty to defend.

An insurer's duties to defend and indemnify are distinct. *Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 884, 91 P.3d 897 (2004). The duty to defend arises at the outset of the underlying action, when the complaint against the insured alleges potential liability that is potentially covered. *Id.* at 883. The duty to indemnify is narrower. *Id.* at 884. It arises after the underlying action concludes, when there is proof that the insured has actual liability that is actually covered. *Id.* The party asserting coverage must prove an occurrence within the policy period. *Wellbrock v. Assurance Co. of Am.*, 90 Wn. App. 234, 241, 951 P.2d 367 (1998).

2.2 The alleged occurrence took place in 1993, when Davis and Northrop were injured due to conviction and incarceration.

An occurrence is the event that causes injury to a claimant. *Id.* at 243. Where there is one proximate and uninterrupted cause, such that all ensuing injuries and damages are within the scope of that cause, there is one occurrence. *Truck Ins. Exch. v. Rohde*, 49 Wn. 2d 465, 472, 303 P.2d 659 (1956). This means that an occurrence takes place concurrently with

the commencement of injuries or damages. *Transcont'l Ins. Co. v. Wash. Pub. Util. Dists.' Util. Sys.*, 111 Wn. 2d 452, 465, 760 P.2d 337 (1988).

In the context of an insured's liability for civil rights violations and other torts grounded in wrongful conviction and imprisonment, no Washington appellate court has decided the timing of the occurrence. The lone case is an unpublished trial court opinion, which holds that the occurrence takes place at the time of conviction and imprisonment. *Clark Cnty. v. Wash. Counties Risk Pool*, No. 12-2-00557-6 (Wash. Super. Ct. Jan. 10, 2013) (finding no coverage where the County and its employees' torts took place before the JSILP incepted). (CP 42-49) Given the dearth of Washington authorities, this Court may seek guidance elsewhere. *State v. Evans*, 159 Wn. 2d 402, 410-11, 150 P.3d 105 (2007).

Other jurisdictions agree. The occurrence takes place at the time of conviction and imprisonment, when the claimant first suffers injury. *TIG Ins. Co. v. City of Elkhart*, --- F. Supp. 3d ---, 2015 WL 4899426, at *6 (N.D. Ind. 2015) (applying Indiana law); *Gulf Underwriters Ins. Co. v. City of Council Bluffs*, 755 F. Supp. 2d 988, 1006-07 (S.D. Iowa 2010) (applying Iowa law); *Sarsfield v. Great Am. Ins. Co. of N.Y.*, 833 F. Supp. 2d 125, 130 (D. Mass. 2008) (applying Massachusetts law), *aff'd*, 335 F. App'x 63 (1st Cir. 2009); *N. River Ins. Co. v. Broward Cnty. Sheriff's Office*, 428 F. Supp. 2d 1284, 1290-91 (S.D. Fla. 2006) (applying Florida

law); *Coregis Ins. Co. v. City of Harrisburg*, No. 1:03-CV-920, 2006 WL 860710, at *10 (M.D. Pa. Mar. 30, 2006) (applying Pennsylvania law); *Idaho Counties Risk Mgmt. Program Underwriters v. Northland Ins. Cos.*, 147 Idaho 84, 90-92, 205 P.3d 1220 (2009); *Indian Harbor Ins. Co. v. City of Waukegan*, 2015 IL App (2d) 140293, ¶¶ 38-44, 33 N.E.3d 613 (2015); *City of Lee's Summit v. Mo. Pub. Entity Risk Mgmt.*, 390 S.W.3d 214, 220-21 (Mo. Ct. App. 2012).

The rationale for this holding is that wrongful conviction and imprisonment causes instantaneous harm. *Genesis Ins. Co. v. City of Council Bluffs*, 677 F.3d 806, 804 (8th Cir. 2012) (applying Iowa law) (stating that in the malicious prosecution context,[4] "[t]he wrong and damage are practically contemporaneous"); *City of Erie, Pa. v. Guar. Nat'l Ins. Co.*, 109 F.3d 156, 163 (3d Cir. 1997) (applying Pennsylvania law) (holding that malicious prosecution occurs upon the filing of charges, when the resulting injuries—incarceration, humiliation, physical hardship and legal expenses—manifest themselves); *Coregis*, 2006 WL 860710, at *10 (stating that constitutional deprivations attendant to wrongful prosecution are evident at the time of arrest and incarceration).

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[4] Cases involving coverage for malicious prosecution are instructive, because a malicious prosecution claim is analogous to a claim for constitutional injuries arising from wrongful conviction and incarceration. *Genesis*, 677 F.3d at 808; *City of Lee's Summit*, 390 S.W.3d at 220.

The insured's failure to correct its tortious conduct after conviction and imprisonment, extending the claimant's injuries into later policy periods, does not occasion a new and separate occurrence. *Gulf*, 755 F. Supp. 2d at 1002 (holding that ongoing failure to correct past errors was one occurrence that took place before the subject policy incepted); *Selective Ins. Co. of S.C. v. City of Paris*, 681 F. Supp. 2d 975, 984 (C.D. Ill. 2010) (applying Illinois law) (holding that the insureds' policy period actions, which prolonged the claimant's imprisonment, were irrelevant to determining when coverage was triggered); *Sarsfield*, 833 F. Supp. 2d at 130 (concluding that the insureds' continued concealment of their misconduct was not a separate wrongful act during the policy period), *aff'd*, 335 F. App'x 63, 67-68 (1st Cir. 2009) (affirming the judgment on this basis); *Coregis*, 2006 WL 860710, at *11 (disagreeing that continued suppression of exculpatory evidence triggered all policies in effect during that time); *Idaho Counties*, 147 Idaho at 90-92 (holding that failure to train employees was one occurrence, where the omission took place and caused injury before the policy incepted, even though continued suppression of exculpatory evidence prolonged the injury); *Indian Harbor*, 2015 IL App (2d) 140293, ¶ 40 (holding that ongoing suppression of exculpatory evidence, which prolonged the claimant's incarceration, was merely a continuation of the original misconduct and resultant harm).

The explanation is simple. After conviction and incarceration, the insured's failure to correct its tortious conduct does not cause the claimant new or distinct injuries. *Sarsfield*, 833 F. Supp. 2d at 130; *Coregis*, 2006 WL 860710, at *12. In other words, all subsequent injuries—whether they be prolonged, worsening or additional—stem from a single proximate cause, comprising one occurrence. *Idaho Counties*, 147 Idaho at 89.

This result is consistent with Washington law, which in other contexts assigns liability for the entire loss to the policy in effect when the insured's tortious conduct causes harm—notwithstanding that some harm continues after the policy expires. *See Villella v. Pub. Emps. Mut. Ins. Co.*, 106 Wn. 2d 806, 812, 725 P.2d 957 (1986) (recognizing that the policy in effect when the insured's negligence causes property damage is liable for all damages, including those accruing after the policy expires); *see also Allstate Ins. Co. v. Cameron*, No. C05-1312, 2006 WL 314337, at *5-6 (W.D. Wash. Feb. 8, 2006) (applying Washington law) (finding no occurrence where the insured's conduct caused bodily injury before the policy incepted, even though the injury subsequently worsened).

Here, the JSILP's and excess policies' coverage cannot be triggered absent an occurrence during the contracts' effective dates. (CP 96, 430-31) The foregoing framework dictates that the occurrence, if any, took place when the County and Slagle's misconduct impacted Davis and Northrop.

Turning to the underlying complaint, its thrust was the County and Slagle's malfeasance before and during the 1993 criminal investigation and trials. (CP 153-76) Davis and Northrop accused Slagle of having employed suggestive identification procedures and suppressing exculpatory evidence. (CP 153, 157-58, 160-66, 170-73) Davis and Northrop accused the County of having improperly trained, supervised and retained Slagle. (CP 154, 157-59, 170-73) This misconduct allegedly culminated in Davis's and Northrop's 1993 convictions and incarceration. (CP 166, 173) It was at that moment that their injuries—conviction and imprisonment and ensuing humiliation, fear, distress, reputational damage, legal fees and loss of liberty—came to fruition. (CP 173-74)

Although the underlying complaint also alleged that the County and Slagle failed to correct their original misconduct after 1993, these allegations did not establish a new or continuing occurrence. Ongoing suppression of exculpatory evidence, improper training, supervision and retention and defense of the convictions was the identical behavior that had already taken place and caused injuries in 1993. (CP 155-56, 167-69)

Moreover, the underlying complaint did not allege that the County and Slagle's failure to correct their 1993 misconduct caused distinct injuries. One example is the allegation that the County refused Davis and Northrop's request for DNA testing in 2004. (CP 167-68) The impact of

the County's refusal was simply to ratify Slagle's 1993 misconduct, prolonging Davis' and Northrop's preexisting injuries. (CP 167-68) Another example is the allegation that Slagle was accused of additional wrongdoing and declared unfit for duty in 2004. (CP 159) Davis and Northrop did not allege that Slagle's later infractions against others or changed status harmed them anew, only that the County missed a chance to remedy Slagle's mishandling of the 1993 investigation. (CP 159)

Similarly, the underlying complaint's allegations of injuries after 1993 did not establish a new or continuing occurrence. The underlying complaint alleged that all such injuries, transpiring between 2003 and 2010, began at the time of and stemmed from the 1993 convictions and incarceration. (CP 174) And Davis and Northrop expressly conceded in the settlement agreement that the consent judgment compensated injuries "all as a result of being wrongfully convicted and incarcerated." (CP 191)

These allegations collectively pinpoint 1993 as the year in which the alleged occurrence took place. Post-1993 misconduct and injuries, all bearing a causal nexus to the original misconduct and injuries, comprise the same alleged occurrence. To be sure, Davis and Northrop will likely suffer the ill effects of their ordeal for the rest of their lives. But this does not mean that coverage is triggered in perpetuity, exposing the County and its future insurers to indefinite liability.

The JSILP and excess policies confirm this conclusion. They provide that all injuries flowing from "continuous or repeated" exposure to "substantially the same" conditions constitute a single occurrence. (CP 95, 432, 437) This language aggregates into one occurrence a series of related acts of law enforcement misconduct, including misconduct taking place after criminal charges are filed. *TIG*, 2015 WL 4899426, at *8.

Because the alleged occurrence took place entirely in 1993, before the County joined WCRP, no JSILP or excess policy was ever triggered. (CP 359) Consequently, there is no coverage. *Wellbrock*, 90 Wn. App. at 243 (finding no coverage where the loss takes place before the policy incepts).

This finding led the trial court to hold correctly that WCRP owed no duty to defend. (CP 9508) The court did not expressly extend its ruling to hold that Lexington owes no duty to indemnify. (CP 9508) But this fact is no impediment to this Court's ability to grant such relief. Affirmance of the ruling that WCRP owed no duty to defend necessarily means that neither WCRP nor Lexington, a follow-form excess insurer, owes a duty to indemnify.[5] *Allstate*, 121 Wn. App. at 884 (holding that the duty to indemnify is narrower than the duty to defend).

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[5] The opposite is not true. If this Court finds that WCRP owed a duty to defend, whether and to what extent Lexington owes a duty to indemnify must be determined on remand. *Kirk v. Mt. Airy Ins. Co.*, 134 Wn. 2d 558, 564, 951 P.2d 1124 (1998) (holding that there can be a duty to defend absent a duty to indemnify).

Defendants' cited case does not advance their position. (D/N Br. 13-14 n.10, 54 n.53; C/S Br. 36 n.13) *In re Feature Realty Litig.*, 468 F. Supp. 2d 1287 (E.D. Wash. 2006) (applying Washington law). There, the claimant sued the insured for delaying approval of a plat amendment. *Id.* at 1289. The delay spanned multiple years, including the policy's effective dates. *Id.* at 1293, 1298. Coverage was triggered by a wrongful act during the policy period. *Id.* at 1293. "Wrongful act" included mere allegations of a wrongful act, an "extremely expansive" definition that encompassed more than just negligence. *Id.* at 1300. The court found coverage, in that the insured's delay was a continuous wrongful act. *Id.* at 1302-03.

Because *Feature Realty* concerned a different triggering event, the case offers no guidance. The court concentrated on when the wrongful conduct took place—not when the claimant sustained damages, which was "immaterial" to the analysis. *Id.* at 1295 n.2. The court distinguished occurrence-based policies, like the JSILP and excess policies, on this very basis. *Id.* And unlike wrongful conviction and imprisonment claims, where the wrongful act and resultant injury are contemporaneous, it is impossible to infer that the *Feature Realty* claimant sustained damages as soon as the insured delayed approval of the plat amendment.

Defendants retort that the underlying complaint expressly alleged tortious conduct and injuries during the JSILPs' and excess policies'

effective dates. (D/N Br. 50-52; C/S Br. 41-43) Defendants erroneously ascribe significance to Davis and Northrop's artful pleading, fashioned for purposes of evading WCRP's coverage denial. *Hart v. Ticor Title Ins. Co.*, 126 Hawai'i 448, 458 n.19, 272 P.3d 1215 (2012) (disapproving of any attempt to bootstrap a duty to defend through artful pleading).

Grasping at straws, defendants distort the record. Davis and Northrop profess that Lexington advocated below that insurance law does not govern the occurrence analysis, accusing Lexington of a lack of candor before this Court. (D/N Br. 16, 24 n.19, 30) The County and Slagle also represent this to be Lexington's litigation position, which they declare contradicts Lexington's "own documents." (C/S Br. 4, 11, 13, 24, 57)

Both assertions are divorced from the record. Defendants cite no evidence of Lexington's supposed about-face. And with good reason: Lexington nowhere argued below that insurance law is irrelevant to resolving the issue of when the alleged occurrence took place. (CP 7067-86) The documents on which the County and Slagle rely to demonstrate otherwise are letters that Lexington did not author. (CP 10489-506)

2.3 A continuous trigger theory does not apply because Davis' and Northrop's injuries are not latent.

Defendants do not dispute that the County and Slagle's malfeasance injured Davis and Northrop when they were convicted and imprisoned. To escape the inevitable conclusion that neither WCRP nor Lexington owes

coverage, defendants ask this Court to adopt a continuous or multiple trigger theory.[6] (D/N Br. 52-54; C/S Br. 44) Under this theory, because Davis and Northrop sustained continuing injuries, every policy in effect during their 17-year imprisonment would be triggered.

Of all defendants' assertions, none has been more thoroughly vetted and repudiated. *City of Erie*, 109 F.3d at 165 (observing that no court has adopted the multiple trigger theory in a malicious prosecution case); *TIG*, 2015 WL 4899426, at *6 (noting the lack of authority to support the "universally-rejected" multiple trigger theory, as applied to wrongful conviction and imprisonment claims); *accord Genesis*, 677 F.3d at 815-16; *Sarsfield*, 833 F. Supp. 2d at 131; *N. River*, 428 F. Supp. 2d at 1292; *City of Lee's Summit*, 390 S.W.3d at 221-22.

Understanding why the continuous trigger theory has been discredited requires examination of the theory's origins: toxic torts. Such cases involve latent injuries, where there is a considerable time lapse between the initial injurious exposure and eventual manifestation of the injury. *City of Erie*, 109 F.3d at 164. A continuous trigger theory allays any concern that the long latency period would permit insurers to cancel coverage. *Id.*

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[6] "Continuous trigger" and "multiple trigger" are synonymous terms. R. Steven Rawls, *Coverage Trigger: Getting It Right for the Right Reason*, IRMI, http://www.irmi.com/articles/expert-commentary/coverage-trigger-getting-it-right-for-the-right-reason (last visited Jan. 15, 2016).

The considerations that underpin the continuous trigger theory do not translate to wrongful conviction and imprisonment claims. As the tortious conduct is immediately injurious, there is no interval during which an insurer may cancel coverage. *Sarsfield*, 833 F. Supp. 2d at 132; *see also N. River*, 428 F. Supp. 2d at 1292 (finding that the policy terms "exposure" and "generally harmful conditions" "conjure images of lead based paint and asbestos fibers, not false imprisonment and malicious prosecution").

Washington law likewise recognizes that the continuous trigger theory is confined to instances of latent injury. *See Villella*, 106 Wn. 2d at 813 (stating that the continuous trigger theory was adopted to resolve coverage for injuries arising from asbestos exposure); *see also Cameron*, 2006 WL 314337, at *6 (noting, in a coverage dispute not involving a latent injury, that the court knew of no Washington case that has found coverage for conduct that first caused injury before the policy incepted).

A contrary rule would negate the contracting parties' intent. *Sarsfield*, 833 F. Supp. 2d at 132. An insured cannot reasonably expect retroactive coverage for torts committed years—possibly decades—earlier. *Id.*; *see also N. River*, 428 F. Supp. 2d at 1290 (stating that a contrary rule would "strain logic"). Nor can an insured reasonably expect that coverage will be triggered on the fortuitous occasion of the claimant's exoneration, rather than when his injuries come to light. *N. River*, 428 F. Supp. 2d at 1290.

Similarly, an insurer does not anticipate being saddled with a risk for which it was not compensated. *Id.* (finding it "inconceivable" that an insurer's premium calculations include an analysis of the risk of malfeasance over the course of earlier prosecutions); *see also Newfane v. Gen. Star Nat'l Ins. Co.*, 14 A.D.3d 72, 81, 784 N.Y.S.2d 787 (2004) (finding it unreasonable to infer that by issuing a policy, an insurer intends to assume liability for damages arising from torts committed years earlier).

Compelling policy reasons further militate against adoption of a continuous trigger theory, as applied to wrongful conviction and incarceration claims. Doing so would permit a tortfeasor with knowledge of its potential liability to shift that burden to an unwary insurer. *Newfane*, 14 A.D.3d at 88. Such an outcome would violate the known loss doctrine. *Pub. Util. Dist. No. 1 of Klickitat Cnty. v. Int'l Ins. Co.*, 124 Wn. 2d 789, 805 881 P.2d 1020 (1994) (holding that the doctrine bars coverage where the insured knew, when purchasing the policy, that the loss would occur).

Defendants' cited cases illustrate the point: the continuous trigger theory does not extend beyond latent injury claims. (D/N Br. 53-54 n.53; C/S Br. 44) *Am. Nat'l Fire Ins. Co. v. B&L Trucking & Constr. Co., Inc.*, 134 Wn. 2d 413, 418-19, 424, 951 P.2d 250 (1998) (pollution caused arsenic contamination four years later); *Certain Underwriters at Lloyd's London v. Valiant Ins. Co.*, 155 Wn. App. 469, 471-72, 474, 229 P.3d 930

(2010) (faulty construction of a building caused water intrusion five years later); *City of Okanogan v. Cities Ins. Ass'n of Wash.*, 72 Wn. App. 697, 698-99, 703, 865 P.2d 576 (1994) (faulty construction and maintenance of a culvert caused crop damage over 20 years later); *Gruol Constr. Co., Inc. v. Ins. Co. of N. Am.*, 11 Wn. App. 632, 633, 635-36, 524 P.2d 427 (1974) (faulty construction of a building caused dry rot four years later).

Defendants' inability to identify a single case anywhere in the country that has applied the continuous trigger theory to wrongful conviction and incarceration claims is not the only sign that their position is flawed. Not even the continuous trigger theory imposes liability on an insurer after the injury is apparent. *City of Okanogan*, 72 Wn. App. at 703 (finding no coverage for a continuing loss after the insured had notice of the injury).

The JSILP and excess policies incorporate this concept, specifying that there is no occurrence once the insured learns that its conduct is allegedly injurious. The JSILP's deemer clause, to which the excess policies follow form, states: "No occurrence will be deemed to have taken place after the insured has knowledge of the alleged bodily injury, property damage, personal injury, errors and omissions, or advertising injury that gave rise to the occurrence." (CP 96, 431; emphasis omitted)

According to the underlying complaint, the County and Slagle learned that their conduct was allegedly injurious no later than 1993:

> [The County and Slagle] were on notice *by 1993* and thereafter regarding Det. Slagle's propensity toward misconduct and substandard police work, and knew or should have known that constitutional violations and other errors foreseeably would occur if the County's [*sic*] continued to employee [*sic*] him.

(CP 171; emphasis added) In 1993, the County also knew of the "obvious" exculpatory value of certain evidence, the suppression of which prejudiced Davis' and Northrop's defenses. (CP 165-66) As their own words prove, the alleged occurrence ended "[y]ears before the [p]olicy was a glimmer in the Defendants' collective eye." *N. River*, 428 F. Supp. 2d at 1291.

2.4 When the underlying claims accrued has no bearing on when the alleged occurrence took place, a distinct inquiry.

Davis and Northrop contend that coverage was not triggered until their tort claims accrued. (D/N Br. 52-53 n.52) The same assertion has been rejected. *Genesis*, 677 F.3d at 815; *City of Erie*, 109 F.3d at 161-62; *TIG*, 2015 WL 4899426, at *7; *Gulf*, 755 F. Supp. 2d at 1008; *Sarsfield*, 833 F. Supp. 2d at 130; *Cameron*, 2006 WL 314337, at *4; *Idaho Counties*, 147 Idaho at 90; *Indian Harbor*, 2015 IL App (2d) 140293, ¶ 31.

This is true for two reasons. First, when a claim accrues for statute of limitation purposes is a separate inquiry from when the occurrence takes place for insurance coverage purposes. *TIG*, 2015 WL 4899426, at *7. The dates do not necessarily correspond. *City of Erie*, 109 F.3d at 161. What is more, statutes of limitation serve a different function and reflect a different

policy concern. *Id.* Whereas statutes of limitation expedite litigation and discourage stale claims, trigger of coverage protects the contracting parties' reasonable expectations. *Id.* As such, when a claim accrues is not dispositive of when the occurrence takes place. *Id.*

Second, equating accrual of the underlying claim with trigger of coverage is at odds with the policy language. An occurrence-based policy defines "occurrence" in terms of injury, not a completed cause of action. *Gulf*, 755 F. Supp. 2d at 1008; *Cameron*, 2006 WL 314337, at *4.

The same is true here. The JSILP and excess policies define "occurrence" to mean an accident or event that results in injury or damage. (CP 95, 437) The contracts do not qualify that coverage will be triggered only upon maturation of a cause of action against the insured. Davis and Northrop's relegation of this argument to a footnote, and the County and Slagle's failure to raise the argument at all, evinces its frailty.

3. The contracts' anti-assignment provisions are enforceable, rendering the assignment-of-rights void on multiple fronts.

3.1 By breaching the interlocal agreement's anti-assignment provision, the County and Slagle forfeited any right to the JSILP's and excess policies' proceeds.

Solely by virtue of its WCRP membership, and concomitant ratification of the interlocal agreement, was the County—and, by

extension, Slagle[7]—able to avail itself of the JSILP's and excess policies' benefits. Once the County joined the risk pool, WCRP became contractually obligated to provide joint self-insurance. (CP 24) WCRP was also required to obtain excess insurance coverage for its member counties for claims involving torts committed by member counties and their employees. (CP 23) In exchange, the County and Slagle were bound by the interlocal agreement's prohibition against assignment of any "right, claim or interest" under the agreement, including the right to access the risk pool's joint self-insurance and excess insurance coverage. (CP 26)

The County and Slagle materially breached this provision in the course of settling the underlying action, when they assigned "any and all" of their rights to Davis and Northrop. (CP 178, 193, 205-09) This broad assignment-of-rights, which was not restricted to any particular rights, encompassed the County and Slagle's rights under the interlocal agreement. Indeed, the County conceded the violation. (CP 4884)

As a consequence of the County and Slagle's material breach, they forfeited any right they may have had to collect the JSILP's and excess policies' proceeds. WCRP's and Lexington's duty to indemnify could not have arisen, if at all, until after the underlying consent judgment was entered. But by then, the County and Slagle had already consummated the

[7] Slagle is a third-party beneficiary of the interlocal agreement and JSILP, as explained in detail below.

forbidden assignment-of-rights. (CP 178, 182, 197) And no court has determined, because a reasonableness hearing has not yet been held, that the consent judgment is not the product of fraud or collusion. (CP 4930) As such, WCRP and Lexington are relieved of any obligation to indemnify the underlying consent judgment. *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 725, 281 P.3d 693 (2012) (holding that a party's material breach relieves the other party of any further contractual duties).

3.2 Defendants waived any challenge to the ruling that the JSILP and excess policies separately bar the assignment-of-rights.

Defendants mount no challenge to the trial court's holding that the JSILP's anti-assignment provision, which the excess policies incorporate, voids the assignment-of-rights. Instead, they assail only the court's enforcement of the interlocal agreement's anti-assignment provision. (D/N Br. 55, 60-64; C/S Br. 46, 51-52) The key point defendants miss is this: the JSILP and excess policies are an *independent* source of prohibition. Accordingly, defendants cannot prevail unless they establish that the assignment-of-rights withstands scrutiny under *both* contracts.

This, defendants did not do. The County and Slagle are silent concerning the JSILP and excess policies' anti-assignment provision. While Davis and Northrop make glancing reference to it in a footnote, such cursory treatment does not preserve the issue for appeal. (D/N Br. 61 n.57) *State v. N.E.*, 70 Wn. App. 602, 606, n.3, 854 P.2d 672 (1993)

(declining to address assertions raised in footnotes). In fact, Davis and Northrop expressly limit the appeal to the interlocal agreement's anti-assignment provision. (D/N Br. 5) Thus, any purported error has been waived and cannot be resurrected in the reply briefs. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn. 2d 801, 809, 828 P.2d 549 (1992) (stating that arguments not raised in an appellant's opening brief are waived). This Court should devote as much attention to the issue as defendants do: none.

Defendants insist that Lexington and the trial court focused on the interlocal agreement, to the exclusion of the JSILP and excess policies. (D/N Br. 20, 61 n.57; C/S Br. 23, 46-47) The record shows otherwise. Lexington did not rely on the interlocal agreement below, as it is not a party to that contract. (CP 4970-80) And the trial court held that the interlocal agreement bars the assignment-of-rights in addition to—not instead of—the JSILP and excess policies. (CP 8052-54)

3.3 General contract law, not insurance law, governs enforceability of the JSILP's anti-assignment provision.

3.3.1 *WCRP is not a commercial insurer and the JSILP is not a commercial insurance policy.*

Preliminarily, this Court must decide a threshold question: whether a risk pool is a self-insurer that issues a joint self-insurance agreement, or whether a risk pool is an insurer that issues an insurance policy. It is a difference with distinction, in that the law governing enforceability of the

JSILP's anti-assignment provision—contract law generally or insurance law specifically—is outcome determinative. *Compare Portland Elec. & Plumbing Co. v. City of Vancouver*, 29 Wn. App. 292, 295, 627 P.2d 1350 (1981) (enforcing an anti-assignment provision in a non-insurance contract, when the provision is sufficiently specific), *with Klickitat Cnty.*, 124 Wn. 2d at 800 (refusing to enforce an anti-assignment provision in an insurance contract, when the assignment occurs after the loss has arisen).

In its respondent brief, WCRP ably argues why it is not an insurer and the JSILP is not an insurance policy. For brevity's sake, Lexington adopts by reference those sections of WCRP's respondent brief. RAP 10.1(g) (allowing adoption by reference of another party's brief).

It follows that, as the trial court correctly held, contract law governs enforceability of the JSILP's anti-assignment provision. (CP 8048, 8054) *Clark Cnty.*, No. 12-2-00557-6, slip op. at 3 (holding that insurance law does not govern the JSILP). (CP 44) Davis and Northrop disparage the court's analysis as "skimpy," because the court did not define the contours of WCRP's extra-contractual liability. (D/N Br. 29 n.26, 30) Davis and Northrop did not, however, ask the court to decide that issue as they did not move for summary judgment on their extra-contractual counterclaims. (CP 330-57, 4107-15, 6101-02)

For this reason, defendants' extended detour into bad faith law misses the mark. (D/N Br. 31-33, 37, 44) The same is true of their primer on the consequences of breaching the duty to defend. (D/N Br. 53-58, 62-63; C/S Br. 2, 5, 38, 45, 47, 53-54) That discussion does not apply to Lexington, which did not owe—much less breach—a duty to defend. Defendants neither posit how Lexington could owe a concurrent duty to defend with WCRP, nor cite any policy provision whereby Lexington agreed to provide a defense after WCRP denied coverage. The absence of any such obligation explains why the County and Slagle never demanded that Lexington assume their defense, and why defendants did not direct their motion for summary judgment concerning the duty to defend against Lexington. (CP 330-57, 6101-02, 7091-92) Whatever the County and Slagle's motivation for settling the underlying action in the midst of trial, it certainly was not because Lexington had abandoned them to their fate.

Defendants' cited cases are inapposite. (D/N Br. 40-42, 60; C/S Br. 25-30) *Klickitat Cnty.*, 124 Wn. 2d 789; *Wash. Pub. Util. Dists.' Utils. Sys. v. Pub. Util. Dist. No. 1 of Clallam Cnty.*, 112 Wn. 2d 1, 771 P.2d 701 (1989); *Transcont'l*, 111 Wn. 2d 452; *Colby v. Yakima Cnty.*, 133 Wn. App. 386, 136 P.3d 131 (2006); *City of Okanogan*, 72 Wn. App. 697.

None holds that insurance law governs a self-insurance agreement. *Klickitat County* and *Transcontinental* applied insurance law to insurance

policies, not a self-insurance agreement. While *Clallam County*, *Colby* and *City of Okanogan* applied insurance law to self-insurance agreements, no party had argued that contract law and insurance law yielded different outcomes. Defendants' conclusion that these cases settled the conflict, when the issue was never even presented, is fallacious. *In re Stockwell*, 179 Wn. 2d 588, 600, 316 P.3d 1007 (2014) (stating that a judicial opinion is not authority for what was not before it).

3.3.2 *The JSILP is not a total risk transfer simply because WCRP reinsured some of its contractual liability.*

Defendants attempt to recast the JSILP as traditional commercial insurance, seizing on the fact that WCRP reinsured some of its contractual liability. Fixating on but one attribute of insurance, defendants proclaim that reinsurance converted the JSILP from a risk-retention to a risk-transfer agreement. (D/N Br. 2, 4-5, 35, 45; C/S Br. 2, 4, 10-11, 31) Defendants' contention falls flat.

The notion that reinsurance transformed the JSILP's fundamental character depends entirely on extrinsic evidence. The JSILP itself states that WCRP, in addition to its duty to defend lawsuits seeking covered damages, "shall pay on behalf of the named insured and other insureds ... all sums of monetary damages which an insured shall become obligated to pay." (CP 431) This represents a risk-retention agreement, considering

that WCRP's individual and collective membership is both the indemnitor and indemnitee. (CP 432, 483, 1233, 7572-73)

The reinsurance agreements cannot negate the JSILP's terms so as to eradicate WCRP's self-insurer status. *Hollis v. Garwall, Inc.*, 137 Wn. 2d 683, 695, 974 P.2d 836 (1999) (holding that extrinsic evidence cannot contradict a contract's written terms or show another intent). By ignoring the JSILP, defendants tacitly concede that the JSILP is not insurance.

In any event, WCRP's procurement of reinsurance did not accomplish a complete risk transfer. The reinsurers collectively reinsured that portion of WCRP's liability under the JSILP for a member county's exposure in excess of $100,000 per occurrence. (CP 5432, 5449) While reinsurance covered all of WCRP's contractual liability above the County's $500,000 deductible, this fact does not render the JSILP the functional equivalent of insurance. Not all member counties' deductibles were high enough to reach the reinsured layer. (CP 5432, 5449) Some had deductibles of less than $100,000, meaning that WCRP was not reinsured for the shortfall. (CP 5432, 5449) Thus, it is plainly false that WCRP alone could never be liable for any portion of the risk above a member county's deductible and below the first-layer excess policies' attachment point.

Defendants' protestations to the contrary prove too much. If there is no contingency under which WCRP would owe indemnity to the County,

then the JSILP fails the definition of "insurance:" "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies." RCW 48.01.040. In the end, defendants succeed only in unwittingly reinforcing that the JSILP is self-insurance.

3.4 Under general contract law, the JSILP and excess policies' common anti-assignment provision is valid and enforceable.

3.4.1 *The JSILP's anti-assignment provision is both specific and integral to WCRP's cooperative existence.*

Rights under a non-insurance contract cannot be assigned where the contract specifically prohibits assignment. *Portland*, 29 Wn. App. at 295; *see also Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn. 2d 816, 830, 881 P.2d 986 (1994) (finding that even an anti-assignment provision aimed at prohibiting assignment of contractual performance bars assignment of a breach of contract claim, where the provision contains specific language to this effect). Assignment is also forbidden when it contravenes public policy. *Berschauer*, 124 Wn. 2d at 829. The provision's purpose is to protect a party's right to select those with whom it deals. *Portland*, 29 Wn. App. at 295. Violation of an anti-assignment provision renders the assignment void against the obligor. *Id.*

Applying these principles here, the JSILP's anti-assignment provision is valid. For one, the language is specific. The provision is not couched in general terms by referring to the contract as a whole. Rather, it more

precisely bars assignment of rights, claims and interests under the JSILP: "No insured shall assign any right, claim or interest it may have under this policy. No creditor, assignee or third-party beneficiary of any insured shall have any right, claim or title to any part, share, interest, fund, premium or asset of [WCRP]." (CP 40) This is just what the County and Slagle attempted to do—to assign "claims, rights, [and] interests." (CP 193)

The import of the JSILP's prohibition was unmistakable. WCRP warned the County beforehand that the JSILP forbade an assignment-of-rights. (CP 4783-84) The County's own risk manager advised against the assignment-of-rights for the same reason. (CP 5544) But the County dismissed these admonitions and, fully aware that it was violating the anti-assignment provision, executed the agreement anyway. (CP 5544)

Enforcing the anti-assignment provision also comports with the purpose of such a provision. WCRP's assets are reserved for the exclusive benefit of its membership, limited to Washington counties. (CP 21-22) These facts show WCRP and the member counties' intent to confine their dealings to one another. The anti-assignment provision furthers this objective by ensuring that when disputes arise under the JSILP, WCRP is answering to those with whom it has a relationship and who have a vested interest in a resolution that is not anathema to the risk pool's vitality.

Negating the anti-assignment provision would have the opposite effect, by creating rights in favor of and duties to private citizens. As the contracting parties' identity is a valuable component of the JSILP's fabric, it matters that the entity to whom WCRP becomes obligated is one of its own. *Rapid Settlements Ltd.'s Application for Approval of Structured Settlement Payment Rights v. Symetra Assigned Benefits Serv. Co.*, 133 Wn. App. 350, 370, 373, 136 P.3d 765 (2006) (applying North Carolina law) (rejecting the notion that it makes no difference to the obligor to whom it pays the debt, under law similar to Washington's).

What is more, negating the anti-assignment provision would contravene public policy. WCRP's membership would operate under constant threat that the JSILP will be unraveled as soon as a member county decides that a particular provision is no longer advantageous to its individual interests. Sanctioning the County and Slagle's rogue behavior would also encourage other member counties to do the same. The result: erosion of member counties' trust in each other, destroying the cooperative spirit that is integral to a risk pool's existence.

It is disingenuous for the County belatedly to protest that the anti-assignment provision is unenforceable. The County's contemporaneous conduct belies that characterization. The County ratified the JSILP's anti-assignment provision every year for 11 years—and never once objected to

its validity. (CP 1233, 7572-73) It was due to the County's keen awareness of this proscription that it had to be "pushed, cajoled, and bullied [by Davis and Northrop's attorneys] into offering up [its] rights." (CP 4882) Even the County's own risk manager admitted that the assignment-of-rights breached the JSILP. (CP 4884)

Davis and Northrop knew it too. They recognized in the assignment-of-rights the possibility that the agreement could be found unenforceable. (CP 207) Bluntly put, Davis and Northrop gambled that this contingency would never come to pass—and lost. This Court should not intervene to save them from the consequences of nothing more than a failed strategic decision. There is but one conclusion: the assignment-of-rights is void, as the trial court correctly held. (CP 8052-54)

Defendants' cited authorities, discussing assignments in the context of insurance policies, do not compel a different result. (D/N Br. 57-62; C/S Br. 47-50) *ABAB, Inc. v. StarNet Ins. Co.*, No. CIV-12-461, 2014 WL 5448887, at *2-3 (W.D. Okla. Oct. 22, 2014) (applying Oklahoma law); *Wehr Constructors, Inc. v. Assurance Co. of Am.*, 384 S.W.3d 680, 688 (Ky. 2012); *Klickitat Cnty*, 124 Wn. 2d at 800; *Safeco Ins. Co. of Am. v. Butler*, 118 Wn. 2d 383, 397, 823 P.2d 499 (1992); *Trinity Universal Ins. Co. of Kan. v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 199-02, 312 P.3d 976 (2013); *Kagele v. Aetna Life & Cas. Co.*, 40 Wn. App. 194, 197, 698

P.2d 90 (1985); *Kiecker v. Pac. Indem. Co.*, 5 Wn. App. 871, 877, 491 P.2d 244 (1971); STEVEN PLITT, ET AL., COUCH ON INS. § 35:8 (3d ed. 1997). A different rule applies to non-insurance contracts, like the JSILP.

Equally unpersuasive are defendants' cited authorities discussing assignments in the context of non-insurance contracts. (D/N Br. 58-60; C/S Br. 50-51) *Berschauer*, 124 Wn. 2d at 829-30 (finding that a general provision forbidding assignment of "any interest" did not encompass a breach of contract claim); *Burleson v. Blankenship*, 193 Wn. 547, 551, 76 P.2d 614 (1938) (holding that a provision barring assignment of a party's total interest did not bar assignment of its partial interest); *224 Westlake*, 169 Wn. App. at 716-18 (evaluating a provision that barred assignment without the obligor's consent, which could not be unreasonably withheld).

Each case is readily distinguishable. Unlike *Berschauer*'s general anti-assignment provision, which applied to "any interest," the JSILP's anti-assignment provision applies more specifically to "any right, claim or interest." (CP 40) Unlike *Burleson*, where the party assigned only part of its interest, the County and Slagle purported to assign "any and all" of their interests. (CP 193, 205) And unlike *224 Westlake*, where the anti-assignment provision allowed assignment with the obligor's consent, the JSILP's anti-assignment provision contains no similar exception. (CP 40)

The law against them, defendants turn to Slagle. Defendants declare that Slagle, a separate named insured, is not bound by the anti-assignment provision; he never agreed to the JSILP's terms; and the separation-of-insureds provision grants him rights independent of the County's. (D/N Br. 61 n.58; C/S Br. 46-47) The argument is not even minimally cogent.

Foremost, its factual predicate is lacking. Slagle is not a named insured. (CP 429, 432) Slagle's insured status arises because he belongs to a defined class of additional insureds: member counties' employees acting within the scope of their employment. (CP 429, 432) Thus, Slagle is a third-party beneficiary. *Key Dev., LLC v. Port of Tacoma*, 173 Wn. App. 1, 29, 292 P.3d 833 (2013) (holding that a third-party beneficiary is not a party to the contract, but directly benefits from it).

As a third-party beneficiary, Slagle's rights are no greater than the County's. *Marina Tenants Ass'n v. Deauville Marina Dev. Co.*, 181 Cal. App. 3d 122, 132, 226 Cal. Rptr. 321 (1986). This means that to secure contractual benefits, Slagle "must take that contract as he finds it" and "cannot select the parts favorable to him and reject those unfavorable to him." *Sanders v. Am. Cas. Co. of Reading, Pa.*, 269 Cal. App. 2d 306,

310, 74 Cal. Rptr. 634 (1969). Put another way, Slagle cannot upset the parties' bargain so as to tailor the JSILP and excess policies to his liking.[8]

The separation-of-insureds provision is irrelevant to the analysis. That provision does not purport to endow additional insureds with greater rights than the County, the named insured. (CP 438)

3.4.2 *The excess policies, which follow form to the JSILP in all respects, prohibit assignment to the same extent.*

The result is the same under the excess policies. When the excess policies follow form to and incorporate the JSILP's terms, like the anti-assignment provision, they do so "in all respects." (CP 96) This signifies that the JSILP and excess policies' coverage is coterminous. *Newmont USA Ltd. v. Am. Home Assurance Co.*, 795 F. Supp. 2d 1150, 1168 (E.D. Wash. 2011) (applying Washington law) (stating that a follow-form excess policy is designed to match the underlying contract's coverage); *accord Certain Underwriters at Lloyd's London v. Travelers Prop. Cas. Co. of Am.*, 161 Wn. App. 265, 269 n.3, 256 P.3d 368 (2011).

To achieve coterminous coverage, the excess policies must be interpreted identically to the JSILP. If WCRP owes no coverage under the JSILP, due to the County and Slagle's breach of the anti-assignment

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[8] Another example of Slagle's attempt to do so is his treatment of the interlocal agreement. For purposes of the anti-assignment provision, Slagle professes to be a "bystander" to the contract. (D/N Br. 63 n.60) Yet in the next breath, he demands an attorneys' fees award under the same contract—suddenly a bystander no longer. (D/N Br. 64-66)

provision, then the same is true of Lexington under the excess policies. That is to say, the follow-form excess policies cannot be construed independently of or in isolation from the JSILP. ANNE M. PAYNE & JOSEPH WILSON, 31 N.Y. PRAC. SERIES § 17:3 (2015) (explaining that a court must first interpret the underlying policy, then apply that interpretation to the follow-form excess policy).

Any other result would be incongruous. It makes no sense to impart one meaning to the JSILP and another meaning to the excess policies, when the language is the same. *NCR Corp. v. Transp. Ins. Co.*, 344 Wis. 2d 494, 508-09, 823 N.W.2d 532 (2012) (finding it "peculiar" for a follow-form excess policy to be interpreted and applied differently from the underlying contract); ANNE M. PAYNE & JOSEPH WILSON, 31 N.Y. PRAC. SERIES § 17:3 (2015) (stating that courts generally apply the same interpretation to the same language).

Under these circumstances, the trial court properly recognized that defendants cannot recover under the excess policies for the same reason that they cannot recover under the JSILP—because the County and Slagle violated the contracts' common anti-assignment provision. (CP 8052-54) Defendants attack the ruling as exempting Lexington wholesale from insurance law. (D/N Br. 4, 41 n.41; C/S Br. 57) The court's holding is not so sweeping. The court held simply that because the interlocal

agreement's and JSILP's anti-assignment provisions were enforceable, so too was the Lexington excess policies' incorporated anti-assignment provision. (CP 8054) There is nothing erroneous about that ruling, given that the County—like all its fellow member counties—agreed to be bound by these contractual provisions when it joined WCRP.

The fallout of the worthless assignment-of-rights is twofold. First, Davis and Northrop acquired no rights against Lexington. As strangers to the excess policies, they have no standing to assert any claims against Lexington. *Trinity*, 176 Wn. App. at 199-02 (holding that absent assignment, a claimant has no standing to assert the insured's rights).

Second, by violating the JSILP's anti-assignment provision, to which the excess policies follow form, the County and Slagle materially breached the excess policies. The result is that, as explained above, Lexington is relieved of any further contractual obligations.

Even assuming that the County and Slagle retain some rights against Lexington, the value of those rights must be determined on remand. Because the trial court held that the JSILP—and, by implication, the excess policies—were never triggered, the court had no occasion to evaluate whether and to what extent the contracts cover the underlying consent judgment. And coverage, which is subject to the JSILP's and excess policies' numerous terms and conditions, is by no means a

foregone conclusion. The County and Slagle, due to their violation of the contracts' cooperation clauses and prohibition against making voluntary payments or assuming obligations without Lexington's consent, may have forfeited their right to indemnity for some or all of the underlying consent judgment. (CP 38-39, 62) These and any related issues should be decided in the first instance on remand. *In re Marriage of Brockopp*, 78 Wn. App. 441, 446, 898 P.2d 849 (1995) (finding remand appropriate where the trial court rendered no findings or conclusions on an issue).

4. Defendants are not entitled to either a common law or contract-based attorneys' fees award against Lexington.

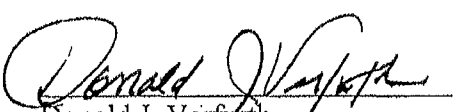
Defendants seek an attorneys' fees award pursuant to common law authority. (D/N Br. 64; C/S Br. 55-56) *E.g.*, *Olympic Steamship Co., Inc. v. Centennial Ins. Co.*, 117 Wn. 2d 37, 52-53, 811 P.2d 673 (1991). Even accepting defendants' optimism that they will prevail, a common law attorneys' fees award is improper. By assigning their rights and covertly settling without Lexington's consent, the County and Slagle breached the excess policies' terms. (CP 40, 61) This Court does not reward such recalcitrance, regardless of whether defendants are entitled to coverage. *Klickitat Cnty.*, 124 Wn. 2d at 815 (refusing to award common law attorneys' fees to a risk pool that had settled without its insurers' consent, breaching the policies, even though the risk pool was entitled to coverage).

As for who is entitled to an attorneys' fees award under the interlocal agreement, WCRP or defendants, Lexington is indifferent. (D/N Br. 64-65; C/S Br. 54-56) RCW 4.84.330 (permitting an attorneys' fees award to a prevailing party where the disputed contract authorizes such fees). The interlocal agreement does not authorize attorneys' fees against Lexington, a stranger to that contract. (CP 26) To the extent defendants seek contract-based attorneys' fees from Lexington, the stratagem is a nonstarter.

CONCLUSION

Lexington respectfully requests that this Court affirm the trial court's orders in all respects; enter judgment for Lexington declaring that it owes no duty to indemnify any party for any portion of the underlying consent judgment; and grant such further relief as this Court deems just.

Respectfully submitted,



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On 01/15/2016 declarant served the within: Brief of Respondent, Lexington Insurance Company **upon:**

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Dear Sir or Madam:

Attached for filing in searchable .pdf format is the Brief of Respondent, Lexington Insurance Company.

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SEDGWICK INSURANCE LAW BLOG

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Attached for filing in searchable .pdf format is the Brief of Respondents Washington Counties Risk Pool and Respondent Washington Counties Risk Pool's Motion for Leave to File Overlength Brief.

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