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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

v.

CLARK COUNTY, a municipal corporation;
DONALD SLAGLE, an individual, LARRY DAVIS, an individual,
and ALAN NORTHROP, an individual,

Petitioners.

DAVIS/NORTHROP'S REPLY ON THEIR
MOTION FOR DISCRETIONARY REVIEW

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A. INTRODUCTION

Nothing in the responses of the Washington Counties Risk Pool (“WCRP”) and Vyrle Hill should deter this Court from granting the motion of petitioners Larry Davis and Alan Northrop (“Davis/Northrop”) for direct discretionary review on the key public policy issues presented in this case. In fact, respondent Lexington Insurance Company (“Lexington”) *agrees* with Davis, Northrop, Clark County, and Detective Donald Slagle (“County/Slagle”) that immediate appellate review is merited. Moreover, this Court should honor the trial court’s certification of those issues for immediate appellate review. RAP 2.3(b)(4).

This Court needs to resolve the question of how insurance policies issued by risk pools should be interpreted.¹ If the trial court’s decision, based on WCRP’s argument, were allowed to stand, Washington local governments and the hundreds of thousands of Washington public employees insured by risk pool liability policies (and non-profits and non-profit employees) will be deprived of the benefits and protections afforded every other insured in Washington by this Court’s well-developed

¹ Hidden in the argument advanced by WCRP is the contention that the traditional insurance contract and extracontractual remedies provided to insureds by Washington’s insurance common law should not be available to the insureds that risk pools cover, something this Court should not tolerate, particularly where our courts, and WCRP itself, have applied Washington’s insurance common law to policies issued by risk pools to their insureds.

insurance common law decisions issued over the years. These protections start with the duty to defend that arises at the inception of every case and include all contractual and extra-contractual remedies available to insureds in this state.

B. RESPONSE TO WCRP/LEXINGTON RESTATEMENT OF THE FACTS

WCRP attempts to “restate” the facts at issue in this case, but in “restating” the facts it ignores the core facts here and actually misstates important aspects of the record.

WCRP cannot sanitize the fact that the County/Slagle's misconduct as to Larry Davis and Alan Northrop, innocent men who were wrongfully arrested, convicted, and incarcerated, was not isolated to single events in 1993. The County destroyed DNA evidence in 2006 and withheld other exculpatory evidence throughout the long period of Davis/Northrop's confinement including *Brady* evidence in Detective Slagle's desk file. App. 376-89. Judge Bryan allowed evidence to be admitted at trial regarding events that took place after 2009. App. 62; Clark Cty. App. 189.

WCRP *misleads* this Court by contending it “is not an insurer, but a group of 26 counties that have joined together to self insure losses and jointly purchase excess insurance.” WCRP opp. at 1. It even goes as far

as to claim its activities relate to its “small membership – the 26 county-members of the Pool.” *Id.* at 5.

WCRP serves not only its county members, but it provides liability coverage for the activities of *tens of thousands of county employees*, like Detective Slagle, who are employed by those counties. WCRP is not a “Mom and Pop” operation with limited membership. The most recent 2013 Risk Manager audit of WCRP’s finances confirms that WCRP addresses claims in *the millions of dollars*. App. 1101-02.

Further, WCRP distorts its role in this case. WCRP did not “self-insure” as to the primary liability created by Davis/Northrop’s claims against the County/Slagle. *WCRP transferred each and every dollar of this risk to commercial carries like Lexington.*² App. 776-805.

Finally, it is important to be clear as to what RCW 48.62 permits WCRP to do. WCRP asserts it is not an “insurer.” WCRP opp. at 1, 4. That is a vast oversimplification of what WCRP actually does. WCRP is correct that it “is not a traditional for-profit insurance company” and that RCW 48.01.050 provides a limited exemption from the definition of an “insurer” under the Insurance Code. WCRP opp. at 4, 5. But that

² Thus, WCRP is inaccurate when it claims in its opposition at 12 that Lexington, American International Insurance Group, and Ace American Insurance Company were “excess insurers.” Those commercial insurers provided first dollar coverage above Clark County’s deductible.

exemption is for purposes of certification, financial solvency requirements, marketing of its coverage, and taxation under the Code. More to the point, the policies that WCRP issues constitute insurance under RCW 48.01.050; it routinely engages in insurance transactions as defined by RCW 48.01.060.³ WCRP *is* in the business of insurance. RCW 48.01.030.

To be precise, WCRP does provide insurance to its members, as it effectively *concedes* when it notes that RCW 48.62, a part of the Insurance Code, allows it to “jointly self-insure risks, jointly purchase insurance or re-insurance, and jointly contract for risk management, claims and administrative services.” WCRP *opp.* at 4. Ultimately, WCRP’s actions constitute “insurance.” It transfers risk to commercial insurers, for which the County paid premiums;⁴ it has always represented this risk transfer to be insurance. App. 838-65.

³ WCRP solicits insurance from both counties and commercial insurers, negotiates commercial insurance policies, executes and binds insurance contracts with these commercial insurers on behalf of its members, and then engages in claims handling including making coverage decisions and working with re-insurers and excess insurers, all of which are insurance transactions. RCW 48.01.060.

⁴ “Insurance” and “self-insurance” are defined terms under both the common law and the insurance code in Washington. RCW 48.01.040 (“insurance” means “a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies”); RCW 48.62.021(6) (“self-insurance” means “a formal program of advance funding and management of entity financial exposure to a risk of loss that is not transferred through the purchase of an insurance policy or contract.”); *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 696-97, 186 P.3d 1188 (2008) (“insurance involves risk shifting, while self-insurance involves risk retention”).

Nowhere in its opposition does WCRP dispute the fact referenced in the Davis/Northrop motion at 10 that its insuring agreements at issue here is a typical occurrence-based general liability policy. WCRP's policies at issue contain a declarations page and employ the terminology of a liability insurance policy such as "named insured," "exclusions," "definitions," "occurrence" and the like. App. 173-249. WCRP's policies issued to the County were insurance policies.⁵

With respect to the County's actions below, WCRP implies, without any authority, that the County is somehow barred from pursuing the present action against WCRP/Lexington because the County specifically did not seek judicial review of the WCRP decision to deny coverage. WCRP opp. at 7, 8-10. Such an argument is baseless. The County/Slagle tendered the Davis/Northrop lawsuit to WCRP/Lexington; they denied coverage. App. 250-81. Not only did WCRP/Lexington then sue the County/Slagle, WCRP cancelled the County's membership in the risk pool, as WCRP acknowledges. WCRP opp. at 11-12. Faced with the Davis/Northrop federal court lawsuit and their financial exposure

⁵ WCRP claims that a "self-insured entity is not subject to the statutory or common law duties of an insurer" and cites to a number of cases involving actual self-insurance. WCRP opp. at 19. WCRP then attempts to stretch those cases to apply to this situation where it has transferred all of the risk to commercial insurers through re-insurance and excess insurance, but those cases do not stand for that proposition. They simply hold that where an entity does not transfer the risk of loss it is self-insured. Here, WCRP transferred 100% of the risk of loss to commercial insurers.

occasioned by WCRP/Lexington's bad faith denial of a defense or indemnification, the County/Slagle were entitled to take, and did take, steps to protect themselves by entering into a covenant judgment settlement, a protective mechanism for insureds abandoned by insurers well-recognized under Washington's insurance common law.

C. ARGUMENT WHY DIRECT REVIEW SHOULD BE GRANTED

(1) This Court Should Honor the Trial Court's RAP 2.3(b)(4) Certification of the Issues in This Case

WCRP contends in its opposition at 25-28, virtually as an afterthought, that this Court should *disregard* the trial court's certification of the issues under RAP 2.3(b)(4).⁶ Most troubling, however, is WCRP's assertion that the trial court's RAP 2.3(b)(4) order was somehow defective because it allegedly did not contain findings addressing the various specific rules requirements of RAP 2.3(b)(4). WCRP opp. at 26. WCRP's argument is disingenuous, at best.

⁶ RAP 2.3(b)(4) certification is appropriate where three criteria are met – a controlling question of law, substantial grounds for differences of opinion on that question, and immediate review on the question may materially advance the ultimate termination of the case.

The primary purpose of certification and early discretionary review is practical – to avoid continuing protracted and extensive litigation after an early ruling on a controlling issue, especially where little or conflicting appellate authority on the issue exists and the entirety of the litigation must be revisited if the ruling on the issue was later overturned. *United States v. Am. Soc'y of Composers, Authors & Publishers*, 333 F. Supp.2d 215, 221 (S.D.N.Y. 2004) (quoting *German v. Fed Home Loan Mortgage Corp.*, 896 F. Supp. 1385, 1398 (S.D.N.Y. 1995)). *C.F. Robbins Co. v. Lawrence Mfg. Co.*, 482 F.2d 426, 429-30 (9th Cir. 1973).

The trial court *amply* articulated its rationale for RAP 2.3(b)(4) certification on the record here, addressing *each* of the elements that rule. App. 1052-54. Moreover, despite *extensive* carping about the questions certified to this Court by WCRP's trial counsel, and *extensive* editorial changes to the order at WCRP's request, App. 1055-60, 1073, reflected in the interlineations by WCRP's counsel in the actual order, App. 41-42, WCRP never raised the adequacy of the RAP 2.3(b)(4) order's findings at any time below. App. 1055-73. This Court should decline to address issue not raised in the trial court. RAP 2.5(a).

This Court should honor the trial court's RAP 2.3(b)(4) certification for all the reasons articulated in the Davis/Northrop motion for discretionary review at 6-7. The trial court was presented with clearly articulated reasons for certification by the County/Slagle and Davis/Northrop in their RAP 2.3(b)(4) motions and replies below. This case met the RAP 2.3(b)(4) criteria.

First, a controlling question of law is present. The trial court here fully recognized that its decision not to apply Washington's insurance common law, and the remedies it affords insureds, to risk pools was a gateway issue affecting the parties and the disposition of numerous issues yet remaining in the case, describing it as "the fundamental building block

of this case that this Court finds is going to decide matters—majority of matters as we move forward." App. 1053.

WCRP's belated argument that the issues presented to this Court are not gateway issues, opp. at 27, is belied by its own express assertion below that these *were* gateway issues. It specifically argued in its opposition to certification below at 2 that "the Court's previous rulings will be dispositive of the remaining issues in the case."

Second, there are substantial grounds for a difference of opinion on the gateway issue. For WCRP to claim that there are "no substantial grounds for difference of opinion" is truly baseless. It argued *repeatedly* below that the question of governing law was one of first impression.⁷ Obviously, there are differing grounds on issues of first impression. But, as will be noted *infra*, Davis/Northrop have argued consistently that there is controlling authority that risk pools are governed by Washington's

⁷ WCRP stated in its briefing below that "[n]o published Washington case has yet ruled on whether a risk pool should be interpreted to be an insurer or a self-insurer, or whether insurance law principles should apply to anything other than an 'insurer' as defined by statute," DR 346; "[N]o Washington court has ruled that a risk pool is an 'insurer,' that any risk pool policy should be interpreted through the prism of insurance law, or that the duty to defend under a risk policy is subject to the same rules as insurance policy." DR 351. That same argument was advanced by Lexington in its opposition to the Davis/Northrop summary judgment motion at 9: "As this Court has previously held, Washington's statutes and the language in the JSLIP establish that the JSLIP is not traditional insurance and thus should not be viewed through the prism of Washington insurance law."

insurance common law with its extensive contractual and extracontractual remedies.

Finally, immediate review will advance the ultimate, and correct, resolution of the issues here, contrary to WCRP's argument in its opposition at 28. As will be discussed *infra* in greater detail, the issue of governing law affects all subsequent issues, both substantive and discovery-related, in this case, as the trial court recognized in discussing the impact of the gateway or "building block" ruling on the applicable law. App. 1053.

Immediate review will materially advance the termination of the litigation because it will determine what law governs the claims in this case, the appropriate parties to prosecute those claims, whether the claims can be decided as a matter of law as a result of the estoppel from the breach of the duty to defend or the breach of other legal or contractual duties, and even whether the common law and statutory bad faith claims are viable.⁸ In short, once the threshold and controlling legal questions

⁸ Numerous dispositive motions await decision by the trial court. The County/Slagle must also immediately amend their pleadings if this case proceeds, and then engage in the substantial discovery that needs to be completed, especially with respect to the negligence, constitutional, and bad faith claims.

are resolved on appeal, it will guide the course of remaining discovery,⁹ claims, dispositive motions, and trial in this lawsuit.

In sum, in order to correctly resolve the key issue in this case and its attendant, consequent issues so as to advance the proper resolution of this case, this Court should honor the trial court's RAP 2.3(b)(4) certification and grant review.

(2) Review Is Proper under RAP 2.3(b)(1) or (2)¹⁰

⁹ WCRP/Lexington have resisted discovery denying they are subject to this Court's decision in *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013) allowing insureds access to claims adjustment materials, notwithstanding the attorney-client and work product privileges. WCRP alone has produced a 400-page privilege log of documents and communications that are discoverable under *Cedell*. Motion at 18. The issue presented for certification here impacts even the scope and type of discovery that must be allowed in this lawsuit in order to support the remaining claims being asserted by Davis/Northrop.

¹⁰ WCRP asserts that RAP 2.3(b)(2) is inapplicable here as the provision "is properly limited to equitable orders, such as injunctions, that affect the rights of parties outside the context of litigation, citing Geoffrey Crooks, *Discretionary Review of Trial Court Decisions under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1545-46 (1986). Commissioner Crooks, however, specifically noted at 1546 that RAP 2.3(b)(2) was *initially* intended to be viewed as WCRP claims, but that initial understanding of the rule *no longer controls*:

The practice has not reflected the drafters' intended distinction between the two subsections based on the type of trial court order being challenged. Indeed, petitioners commonly argue, without regard to the type of trial court decisions, that the standards of both subsections are met. This should not be particularly surprising. Nothing in subsection (b)(2) limits its applicability to cases involving injunctions and the like. And its probable error standard is somehow more comfortable to deal with than the subsection (b)(1) obvious error standard. Probable error is simply easier to claim and find than obvious error. Also, from the appellate court commissioner's point of view, to label a trial court's good faith effort as obvious error seems needlessly harsh and insulting, and perhaps a bit arrogant. Finally, there is some incongruity in indentifying error as obvious in an appellate court ruling that merely

Northrop/Davis agree with Lexington that discretionary review is appropriate in this case under RAP 2.3(b)(1) or (2).¹¹ The trial court here committed obvious or probable error in its gateway decision that Washington's insurance common law is inapplicable to risk pools. RAP 2.3(b)(1, 2) and in the decisions following from that initial erroneous determination.

(a) The Trial Court's Decision Conflicts with Unambiguous Decisions of This Court and the Court of Appeals

grants review and allows the issue to proceed to a full appellate hearing on the merits.

See also, WSBA, 1 *Washington Appellate Practice Deskbook* 10-10 (2011) in which the authors stated that the limitation of RAP 2.3(b)(2) to injunctive relief and the like "is misleading; this ground has been used to address a broad range of decisions that affect the course of litigation but may not affect the case of the merits."

Even if this Court determines that RAP 2.3(b)(2) only applies to orders having an impact outside the courtroom, the trial court's gateway decision plainly has impacts on matters outside the courtroom where WCRP and all other risk pools in our state will ignore Washington's insurance common law in making defense and indemnification decisions regarding their insureds.

Simply put, RAP 2.3(b)(2) is very much at play in this case.

¹¹ Davis/Northrop agree with Lexington's contention that three issues should be considered by this Court: (1) the legal principles governing the interpretation of policies issued by the WCRP; (2) the duty of WCRP/Lexington to defend the County/Slagle; (3) the validity of the County/Slagle's assignment of claims to Davis/Northrop. Lexington MDR resp. at 2-3.

The initial gateway issue of which legal principles apply to the interpretation of the WCRP policies is not an academic one because it affects not only how the courts must interpret such policies, it also affects the remedies, both contractual and extracontractual, Washington's insurance common law affords insureds.

This Court and the Court of Appeals have applied Washington's insurance common law to policies issued by risk pools to their members. WCRP seeks to downplay the significance of those decisions, WCRP opp. at 20-21, but those decisions fully demonstrate that this Court and the Court of Appeals believed risk pool policies *were subject to Washington insurance common law principles*.

WCRP's attempt to distinguish *Transcontinental Ins. Co. v. Wash. Pub. Util. Dist. Util. System*, 111 Wn.2d 452, 760 P.3d 337 (1988) and *PUD No. 1 of Klickitat County v. International Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994) as pertaining only to excess insurance policies issued by commercial insurers, WCRP answer at 20, is particularly disingenuous.

First, it is undisputed that Lexington and other commercial insurance carriers here provided 100% of the coverage provided by WCRP to members like the County between 2002 and 2010 through re-insurance and excess insurance policies. Motion at 2 n.1, 10 n.5. Through its deductible, the County chose not to participate in WCRP's self-insured retention. Thus, only commercial insurance is, in fact, at issue here.

Second, those cases reflect the principle, true in the present case, that re-insurance policies ordinarily follow the fortunes of the underlying

policy and that excess policies follow the form of the underlying primary policy. WCRP fashioned its policies after traditional liability policies. App. 834.

Third, and most significantly, WCRP fails to cite this Court's decision in *Wash. Pub. Util. Dists. Util. Sys. v. Public Utility Dist. No. 1 of Clallam County*, 112 Wn.2d 1, 771 P.2d 701 (1989) (cited by Davis/Northrop in their motion at 11). There, *this Court expressly construed the risk pool insuring agreement under Washington insurance common law principles. Id.* at 10-18. There is simply no ambiguity in this Court's application there of insurance common law interpretative principles to a risk pool insuring agreement and its exclusions. *Id.* WCRP, in effect, attempts to mislead this Court by failing to cite this case. RPC 3.3(a)(3).

Finally, WCRP relegates the applicable Court of Appeals decisions to a mere footnote. WCRP opp. at 21 n.5. Critically, in both *City of Okanogan v. Cities Ins. Ass'n of Wash.*, 72 Wn. App. 697, 865 P.2d 576 (1994) and *Colby v. Yakima County*, 133 Wn. App. 386, 136 P.3d 131 (2006), the Court of Appeals applied insurance common law principles in interpreting the insuring agreements issued by risk pools to their members. Division III described the Cities' risk pool insuring agreement as a

“policy” and construed it as such. 72 Wn. App. at 701. Similarly, the *Colby* court treated WCRP’s joint self-insurance liability policy, the *same* policy at issue here, as an insurance policy subject to Washington insurance common law principles of construction. 133 Wn. App. at 391-93.

These cases have clearly applied the principles for interpretation of Washington’s insurance common law, contrary to WCRP’s argument. Consequently, insofar as one of the key issues here is whether there was “occurrence” and a consequent duty on the party of WCRP/Lexington to defend the County/Slagle, that issue is plainly governed by this Court’s well-developed decisional law on the duty to defend that was set forth in the Davis/Northrop motion at 12-15. As evidenced in cases like *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 329 P.3d 59 (2014) or *American Best Foods, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 229 P.3d 693 (2010), that law favors insureds with respect to the duty to defend.

WCRP pays scant attention to this Court’s prevailing insurance coverage principles. WCRP opp. at 22-33. WCRP, in fact, has no real answer to the proposition that coverage under its policies issued to the County between 2002 and 2010 was triggered by multiple discrete and

continuing events. Motion at 13-15.¹² Indeed, WCRP's contention that there was a single triggering event *was specifically rejected by this Court in Transcontinental*, 111 Wn.2d at 464-70, a fact *nowhere* revealed in WCRP's opposition.

Finally, while it is unambiguous that Washington's insurance common law applies to the interpretation of insuring policies or agreements issued by risk pools to their members, there is no case law expressly adopting the contractual and extracontractual remedies available

¹² Lexington contends in its answer to the statement of grounds for direct review that a single triggering event for the Davis/Northrop claims is appropriate. All of the cases cited in note 27 to Lexington's answer to the statement of grounds for direct review for the so-called "majority rule" are "manifestation" trigger of coverage cases. Washington *rejects* such a principle.

Moreover, Lexington is disingenuous in citing an unpublished authority – a superior court commissioner's ruling – in support of its position as well. Answer at 9-10 n.28. This Court should disregard such "authority." An unpublished ruling by a trial court commissioner cannot overrule this Court's controlling decision in *Transcontinental*.

Ultimately, WCRP/Lexington contend for a blatantly unfair result. Davis and Northrop languished in prison *17 years*. They made every effort to overturn their unjust convictions. If WCRP/Lexington are correct about the accrual of their claims against the County/Slagle and the occurrence under the policies, the Davis/Northrop claims would be time-barred and no insurance coverage would apply for their wrongful arrest, conviction, and prolonged incarceration, even though they presented their claims against the County/Slagle as soon as they learned they had been harmed, i.e. when exonerating DNA evidence came to light.

Without discussing this merits issue at length, Davis/Northrop note that any claim under 42 U.S.C. § 1983 for wrongful conviction or incarceration accrues *only* upon the vacation of the conviction. *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed.2d 383 (1994); *Cabrera v. City of Huntington Park*, 159 F.3d (9th Cir. 1998). Moreover, there were *multiple* specific instances of County/Slagle misconduct during multiple policy periods evidencing a continuing pattern of misconduct that invoked WCRP/Lexington's insurance coverage under Washington "continuous trigger" of coverage. App. 57-62, 376-89.

to insureds under Washington's insurance common law for insureds of risk pools. This is plainly an issue for this Court.

The rationale for allowing insureds to take whatever steps necessary to protect themselves once abandoned in bad faith by an insurer was discussed in the Davis/Northrop motion at 15-16.¹³ Again, WCRP offers only a short discussion of that issue. WCRP opp. at 22.

The trial court's decision that County/Slagle could not assign their claims against WCRP/Lexington to Davis/Northrop constituted obvious or probable error in light of this Court's decision in *PUD No. 1 of Klickitat County* where *this Court expressly permitted the risk pool insureds to assign their claims against the excess insurers despite anti-assignment provisions in those insurers' policies*. This Court upheld the assignments after any losses occurred: "...even though a policy specifically prohibits assignments, an assignment of a claim, a cause of action, or proceeds may nonetheless be valid if made after the events giving rise to liability have already occurred when the assignment is made." 124 Wn.2d at 800. This is also consistent with the broad assignment authority afforded the State and its municipal subdivisions in RCW 4.92.120: "Claims against the state arising out of tortious conduct may be assigned voluntarily, involuntarily,

¹³ WCRP did not address the question of the implications for the application of Washington's insurance common law for insureds' *remedies* for risk pool misconduct referenced in WCRP's motion at 8 n.3.

and by operation of law to the same extent as like claims against persons may be so assigned.” Any limitation on assignment in the WCRP Interlocal Agreement barring an insured’s ability to protect itself in a covenant judgment is equally ineffective.¹⁴

The trial court erred in its decisions on the applicable law, WCRP/Lexington's duty to defend County/Slagle, and the ability of County/Slagle to assign their claims against WCRP/Lexington to Davis/Northrop.

(b) By Actual Practice, WCRP Recognized the Application of Washington Insurance Law Principles to its Policies

WCRP has no answer to Davis/Northrop’s assertion that it applied Washington insurance common law principles to the interpretation of its policies. Motion at 10. Indeed, this Court has noted recently in *Worthington v. Westnet*, ___ Wn.2d ___, ___ P.3d ___, 2015 WL 276401 (2015) that a party’s own documents are not controlling on an issue as a matter of law “because the document does not reveal whether [the party], in fact, behaves consistently with [the documents].” *Id.* at *4.

¹⁴ WCRP erroneously claims that the County assigned its “rights in the pool.” WCRP’s answer to the statement of grounds for direct review at 1. This claim is false. The County did not assign its rights in the pool. Instead, it assigned only claims for damages under its insurance policies. Nothing was assigned under the Interlocal Agreement.

WCRP told its members that it provides insurance to them. App. 778-805, 834, 838-47, 861-65. Its members understood that they were receiving insurance coverage. App. 809-17. WCRP issued "Certificates of Liability Insurance." App. 853.

WCRP has consistently applied Washington insurance principles including the duty to defend in construing its insurance contracts. WCRP Senior Claims Manager Susan Looker testified that she has applied the duty to defend when making claims determinations for the past twenty-five years. App. 871-74.

Moreover, WCRP has applied the common law of insurance to its policies in coverage disputes with its re-insurers. For example, in a dispute with Chartis (AIG) over the timing of an occurrence, WCRP applied the "continuous trigger" principle to occurrences under its policy, a principle of Washington's insurance common law. App. 959-62.¹⁵

In yet another case, WCRP made the same argument to its re-insurer, (Chartis/AIG), as to the number of occurrences under the WCRP policy. WCRP argued that Washington insurance law regarding the timing of an occurrence *did* apply to its policies. App. 964-75. WCRP

¹⁵ WCRP's recognition that under Washington insurance law, a continuous wrongful act that includes conduct both before and after the policy periods covered by the policy triggers coverage is contrary to its position here where the County relied upon the same principle when it tendered the Davis/Northrop claims to WCRP.

has applied Washington's common law on insurance for the past twenty-five years. It was not until it was faced with the three largest claims that any County had faced that it made an about face and claimed for the first time that it was not subject to the common law on insurance. This is the basis of the equal protection and due process claims against WCRP and its Executive Director, Vyrle Hill.¹⁶

It is disingenuous for WCRP to claim that Washington's insurance common law does not apply to it. It has applied that very same law to its policies when such law benefited it. It is only claiming that those laws do not apply in order to attempt to deny the County/Slagle claims here.

(c) RCW 48.01.050 Does Not Exempt WCRP's Policies from Washington's Insurance Common Law Interpretive Principles or Remedies

The central thrust of WCRP's legal analysis in opposing discretionary review is that RCW 48.01.050 exempts risk pools from Washington's insurance common law. WCRP opp. at 16-20. This is simply untrue. WCRP makes far too much of that statute. It exempts risk pools from the extensive requirements in Title 48 RCW governing the

¹⁶ Hill filed an opposition to the Davis/Northrop motion in which he asserts that there are four claims against him in this case. Hill opp. at 4. That is not true. The only claims asserted against Hill are for due process and equal protection claims based on WCRP's application of a new and arbitrary standard to deny the claims of an individual insured – Donald Slagle. Contrary to Hill's arguments the issues on which review is sought are central to the claims against him.

financial requirements for insurers. It nowhere exempts insurance policies issued by risk pools from insurance common law interpretative standards or the remedies afforded insureds under that common law when a risk pool engages in misconduct toward its insured.

First, contrary to WCRP's assertion in its opposition at 17, risk pools *are* creatures of Title 48 RCW, the Insurance Code. The very fact that the Legislature deemed it necessary to enact RCW 48.62 authorizing risk pools is significant. The Legislature itself said so:

This chapter is intended to provide the exclusive source of local government entity authority to individually or jointly self-insure risks, jointly purchase insurance or reinsurance, and to contract for risk management, claims, and administrative services.

RCW 48.62.011. Moreover, if, as WCRP contends, WCRP opp. at 17, RCW 39.34 pertaining to the interlocal agreements were the source of its authority, RCW 48.62 would be *unnecessary*; risk pools could exist simply by contract without any obligation to meet the regulatory requirements set out in RCW 48.62. Obviously, that is not the case.

Second, in practical application, regulation of WCRP by the state's Department of Enterprise Services is largely financial in nature, as the three recent Risk Manager audits of WCRP demonstrate. App. 1077-1105. The fact that DES's Risk Manager only assesses WCRP's financial

viability lends credence to Davis/Northrop's argument that RCW 48.01.050 is confined solely to exempting risk pools from the financial responsibilities of commercial insurers found in Title 48 RCW. This is also entirely consistent with the specific regulatory authority of the Risk Manager over risk pools set forth in WAC 200-100 and WAC 200-110.

Finally, WCRP's interpretation of RCW 48.01.050 is belied by the specific provisions of Title 48 RCW itself. *Nothing* in RCW 48.01.050 or RCW 48.62 exempts risk pools from Washington's insurance common law. As required by *Dep't of Ecology*, in interpreting RCW 48.01.050, this Court must look to the context of the statute in Title 48 RCW to understand its precise meaning. RCW 48.01.050 exempts risk pools from being "insurers" under Title 48 RCW. An "insurer" is specifically defined in RCW 48.01.050 itself as "every person engaged in the business of making contracts of insurance..." The status of an "insurer" under Title 48 RCW is largely financial in nature. An insurer must obtain a certificate to do business in Washington, meeting solvency requirements. RCW 48.050.030. An insurer is subject to Washington's premium tax. RCW 48.14.020. Moreover, the Insurance Commissioner has the authority to examine the records and assure the financial solvency of insurers. RCW

48.03.010. WCRP, regulated under RCW 48.62, is appropriately exempted from those financial requirements.

But WCRP can cite *no authority* that exempts it from the broader requirements of RCW 48.01.030 requiring it to act in the public interest. WCRP is in “the business of insurance.”¹⁷ It is subject to applicable portions of Title 48 RCW: “All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed with this state, and all persons having to do therewith are governed by this code.” RCW 48.01.020.¹⁸ RCW 48.01.060 further defines multiple insurance transactions in which WCRP engaged.¹⁹

In sum, RCW 48.01.050 does not exempt WCRP from the interpretative principles or remedies afforded insureds under Washington’s insurance common law.

¹⁷ Indeed, RCW 48.01.030 even applies to independent adjusters, allowing a bad faith action to be brought by an insured against such an adjuster acting as a representative of the insurer. *Lease Crutcher Lewis LLC v. National Union Fire Ins. Co. of Pittsburg, PA*, 2009 WL 3444 762 (W.D. Wash. 2009) at *2.

¹⁸ WCRP is a “person” within the broad statutory definition of that term. RCW 48.01.070. As the term includes “insurer,” a person under RCW 48.01.020 is intended by the Legislature to capture a broader array of individuals and organizations.

¹⁹ WCRP also provides claims handling services including making coverage decisions that ultimately apply to the commercial insurance carriers who provide the actual coverage at issue in this case.

(d) WCRP's Contention that Washington's Insurance Common Law Interpretative Principles and Remedies Do Not Apply to Risk Pool Insureds Is Unsound and Unworkable

A final reason why the trial court committed obvious or probable error here is that it offers little real guidance on the nature of the "contract principles" that will govern the interpretation of risk pool policies issued to their members. Nor did it justify the disparate treatment of insureds under such policies as compared to insureds under commercial insurance policies.

Davis/Northrop reiterated this concern as well as the question of whether the trial court's decision also denies risk pool insureds the panoply of *remedies* such as bad faith actions and covenant judgment settlements afforded insureds covered under commercial insurance by Washington's insurance common law. Motion at 8 n.3. WCRP is not candid about its position on these questions because it fails to address them anywhere in its opposition.

As noted *supra*, WCRP's policies issued to member counties like the County here also cover their numerous employees like Slagle. Those policies employ the *terminology of insurance*. They reference "occurrences," "duty to defend," "named insureds," and "exclusions," all terms with familiar meanings under Washington's insurance common law.

WCRP offers *no principled rationale* why this Court's interpretive principles for the duty to defend, or exclusions, to name only a few, should be any different for insureds of risk pools than insureds of commercial insurers. The same policy rationale that impelled this Court to construe the duty to defend broadly in favor of insureds and to treat exclusions narrowly as to commercial insurance should apply with equal force to insureds of risk pools. When a municipality or police officer is sued, they are owed a defense at the inception of the case. As was true in *Expedia*, neither should be forced to prove the liability case against them in order to obtain a defense from their insurer. Any other interpretation of an insurance policy would be absurd and defeat the purpose of insurance.

Similarly, just as a commercial liability insurer owes what amounts to a quasi-fiduciary to its insureds, *Van Noy v. State Farm Mut. Ins. Co.*, 142 Wn.2d 784, 793, 16 P.3d 374 (2001), a risk pool owes a similar duty to its insureds. From such a common law duty and RCW 48.01.030 flow the extracontractual remedies available to insureds such as cause of action for bad faith, with coverage by estoppel when the insurer/risk pool acts in bad faith, *Evans v. Continental Cas. Co.*, 40 Wn.2d 614, 627-28, 245 P.2d 470 (1952) (recognizing bad faith tort); *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 823 P.2d 499 (1992) (harm in bad faith claim

presumed where duty to defend is breached; remedy for bad faith includes coverage by estoppel), or the availability of covenant judgment settlements in which the insured may freely assign its claims against an insurer risk/pool when abandoned by them. *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 737, 49 P.3d 887 (2002). *Bird v. Best Plumbing*, 175 Wn.2d 756, 765, 287 P.3d 551 (2012) (settlement amount presumed to be harm to insured).

WCRP would have Washington courts disregard decades of interpretive case law, and construct from scratch a whole new approach to the interpretation of risk pool insurance policies and the rights and remedies of risk pool insureds. Simply put, that makes no sense whatsoever and is fraught with all sorts of opportunities for risk pools to seriously harm their insureds. This Court should reject such a conception of the law.

(3) The Trial Court's Gateway Decision Affects Future Proceedings in This Case

The trial court's decision on the gateway issue of the governing legal principles for the interpretation of risk pool insurance policies has already had profound implications in this case: The trial court determined the WCRP policies did not require it to defend the County/Slagle from the Davis/Northrop claims and it invalidated the County/Slagle's assignment

of their claims against WCRP/Lexington to Davis/Northrop, a key feature of any traditional covenant judgment settlement under Washington's insurance common law. As noted in the Davis/Northrop motion at 16-20, this "building block" decision will have significant future repercussions in the case. As to Davis/Northrop, future proceedings may be "useless" (RAP 2.3 (b)(1)) as they will no longer be able to conduct discovery or to present claims against WCRP/Lexington through counsel of their choice. The trial court's decision will also impact the remaining claims in the case, given the extensive array of dispositive motions, discovery and fee-related issues that remain. The trial court's decision substantially altered the status quo or substantially limited Davis/Northrop's freedom to act. RAP 2.3(b)(2).

WCRP offers *no specific answer* to any of the arguments on the future impact of the trial court's gateway decision that Davis/Northrop have advanced. *Nowhere* does it deny, for example, that it has stonewalled responses to discovery, citing privilege, despite this Court's decision in *Cedell*. *Nowhere* does it or Hill deny that the trial court's gateway decision on the governing local principles will be argued in connection with the pending motions and the motions likely to be filed in the trial court.

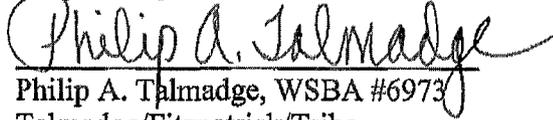
Davis/Northrop have established the necessary element of RAP 2.3(b)(1, 2) regarding the impact of the trial court decision on future proceedings below.

D. CONCLUSION

This is a Supreme Court case. Nothing presented in the WCRP or Hill oppositions to the Davis/Northrop motion for discretionary review should dissuade this Court from granting direct discretionary review to honor the trial court's certification of the case for review under RAP 2.3(b)(4). This Court must vindicate the appellate decisions on insurance principles applying to risk pools and Washington's insurance common law on the duty to defend, and covenant judgment settlements. Absent direct review, the trial court's error on these rulings will affect this case and untold other cases involving risk pools. The remainder of this case will be irreparably tainted by the trial court's gateway decision. The potential for a waste of judicial resources, and unnecessary expense and efforts by the parties, is clearly present.

DATED this 14th day of February, 2015.

Respectfully submitted,



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Reply on Motion for
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DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of Davis/Northrop's Motion for Leave to File Over-length Reply on Discretionary Review and Davis/Northrop's Reply on their Motion for Discretionary Review in Supreme Court Cause No. 91154-1 to the following parties:

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Original filed with:
Washington Supreme Court
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: February 11th, 2015, at Seattle, Washington.

A handwritten signature in black ink, appearing to read 'Roya Kolahi', written over a horizontal line.

Roya Kolahi, Legal Assistant
Talmadge/Fitzpatrick/Tribe

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Subject: RE: Washington Counties Risk Pool et al., v. Clark County, Washington, et al. Cause No. 91154-1

Received 2-11-2015

Supreme Court Clerk's Office

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Subject: Washington Counties Risk Pool et al., v. Clark County, Washington, et al. Cause No. 91154-1

Good Afternoon:

Attached please find Davis/Northrop's Reply on their Motion for Discretionary Review, and Davis/Northrop's Motion for Leave to File Over-length Reply on Discretionary Review in Supreme Court Cause No. 91154-1 for today's filing. Per our phone conversation, I will be sending you the supplemental appendix to the Reply via U.S. mail. Thank you.

Sincerely,

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