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In the Supreme Court of
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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

RESPONDENT LEXINGTON INSURANCE COMPANY'S
RESPONSE TO THE INNOCENCE NETWORK'S AND
SERVICE EMPLOYEES INTERNATIONAL UNION,
LOCAL 925'S *AMICUS CURIAE* BRIEFS

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ARGUMENT

Prefatory Note

Lexington Insurance Company (“Lexington”) submits this brief in response to the *amicus curiae* briefs filed by the Innocence Network and Service Employees International Union, Local 925 (“SEIU”). To a large degree, the Innocence Network’s and SEIU’s *amicus curiae* briefs contain distractions, omissions and baseless factual assertions. A few instances warrant mention at the outset.

Rather than respond to Lexington’s actual arguments, the Innocence Network and SEIU construct and then counter imaginary arguments. While they profess familiarity with the issues and the parties’ positions, their filings demonstrate otherwise. For example, the Innocence Network portrays Lexington as arguing that it is not an insurer at all. (Innocence Network Br. 1) SEIU portrays Lexington as arguing that Donald Slagle is not an insured under the Joint Self-Insurance Liability Policy (“JSILP”) or excess policies. (SEIU Mot. 3) Tellingly, neither *amicus curiae* provides any supporting citations to Lexington’s respondent brief. The reason is that Lexington has never disputed that it is an insurer, and agrees that Slagle is an additional insured under, and a third-party beneficiary of, the JSILP and excess policies:

— Slagle is a third-party beneficiary of the interlocal agreement and JSILP

— 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.

(Lexington Br. 43 n.7, 55)

Equally untethered to the circumstances of this case is the Innocence Network and SEIU’s contention that Lexington refused to defend Clark County (“the County”) and Slagle in the underlying action. (Innocence Network Br. 1, 4, 5 n.2, 18; SEIU Br. 8) The *amici curiae* unsurprisingly do not point to any provision of the excess policies whereby Lexington assumed a duty to defend before exhaustion of Washington Counties Risk Pool’s (“WCRP”) obligations under the JSILP. Nor do the *amici curiae* explain how Lexington could have owed a duty to defend where WCRP, the County and Slagle never tendered¹ the claims to Lexington by affirmatively asking Lexington to assume the defense. (CP 7091-92) The

¹ Although WCRP notified Lexington of the claims, 18 days before trial in the underlying action began, notice is not the same as tender. (CP 966, 3144-47, 7091) *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 427, 983 P.2d 1155 (1999) (“We agree ... that an insurer cannot be expected to anticipate when or if an insured will make a claim for coverage; the insured must affirmatively inform the insurer that its participation is desired.”); *see also Madera W. Condo Ass’n v. First Specialty Ins. Corp.*, No. C12-0857, 2013 WL 4015649, at *5 (W.D. Wash. Aug. 6, 2013) (applying Washington law) (“[S]imply putting an insurer on notice of a claim does not constitute tender sufficient to trigger the duty to defend.”). As for the County and Slagle, neither communicated with Lexington before the trial. (CP 7091-92)

mistaken belief that Lexington's duty to defend under the excess policies is identical to WCRP's duty to defend under the JSILP, despite clear policy language to the contrary, illustrates the Innocence Network's and SEIU's lack of familiarity with the coverage issues before this Court.

While the Innocence Network purports to offer guidance on when coverage is triggered, its *amicus curiae* brief falls short of that goal. The Innocence Network does not cite any contract provisions, or posit how the allegations of the underlying complaint fit within the parameters of the JSILPs' and excess policies' "occurrence" definitions and deemer clause. Instead, the Innocence Network expounds the legal theories of recovery on which the underlying action was based. (Innocence Network Br. 1, 3, 8, 12-20) But the nature and extent of the County and Slagle's tort liability to Larry Davis and Alan Northrop were put to rest long ago. Those matters are not germane to the separate issue of whether the underlying complaint alleged injury caused by an "occurrence" during the policy periods long after Davis and Northrop had been prosecuted and incarcerated.

Finding nothing in the excess policies to refute the trial court's ruling that Davis and Northrop's claims do not trigger coverage, the Innocence Network launches personal attacks. The Innocence Network declares that by adhering to the excess policies' terms and conditions, Lexington committed "disingenuous" and "underhanded" conduct akin to wrongfully

imprisoning two innocent men for 17 years. (Innocence Network Br. 16-19) That assertion is unfair, unfounded and unsupported. Lexington's position that its excess policies were not triggered by a two-decades-old claim—a position with which the trial court ultimately agreed—is the product of nothing more than utmost fidelity to the contracts into which it entered with the County and WCRP for eleven years. Simply because a stranger to the excess policies is now unhappy with the parties' negotiated bargain is no basis for belatedly unraveling their agreements.

1. Reply to the Innocence Network's assertion that when the underlying tort claims accrued equates to when the excess policies were triggered (Innocence Network Br. 3-4, 8-9, 12-14).

This assertion betrays a fundamental misunderstanding of the standard for determining when the occurrence-based excess policies at issue were triggered. The standard is found within the contracts themselves, not outside the contracts among tort law principles that dictate when a claim accrues for statute of limitations purposes. The rationale for why the trigger-of-coverage and statute-of-limitations standards cannot be conflated² is discussed in detail throughout Lexington's cited cases.

² The Innocence Network recites that the trial court found that the underlying tort claims "accrued" in 1993. (Innocence Network Br. 3, 14) That is incorrect. The trial court found that Davis' and Northrop's injuries were caused by conduct that took place in 1993, properly employing the trigger-of-coverage standard. (CP 9507-08)

(Lexington Br. 41-42) The Innocence Network has no answer to these numerous authorities that have rejected the same argument it presses here.

Because it attempts to engraft tort law principles onto a contractual dispute, the Innocence Network misfires when it contends that the underlying claims entailed a “complicated chronology” because they were “difficult to uncover.” (Innocence Network Br. 3-4, 8-9, 12-14) It does not matter when Davis and Northrop discovered that the underlying claims had matured into completed causes of action to be able to timely sue the County and Slagle. What matters is when Davis’ and Northrop’s injuries took place, notwithstanding the particular legal theories under which damages could have been sought. *Transcont’l Ins. Co. v. Wash. Pub. Util. Dists.’ Util. Sys.*, 111 Wn. 2d 452, 465, 760 P.2d 337 (1988) (holding that an “occurrence” takes place when the injury commences). And neither petitioners nor the *amici curiae* dispute that Davis and Northrop suffered injuries in 1993, when they were imprisoned. (CP 155-56)

Further derailing the Innocence Network’s position are the excess policies themselves. They provide that coverage may be triggered before a claimant’s cause of action accrues. Because “occurrence” is defined in terms of an accident or event, rather than the elements of a tort, it is possible that a claimant could sustain injuries without yet having standing to sue the insured. (CP 95, 437) The Innocence Network’s assiduous

avoidance of any discussion of the policy language, or acknowledgement that the contracts guide this Court’s review, undermines any value that its *amicus curiae* brief might otherwise have. In short, the Innocence Network asks this Court to do precisely what it should not do: “stray[] from fundamental rules of contract interpretation and rewrite[] the parties’ insurance contract by applying principles of tort law instead of rules of contract construction.” *Moeller v. Farmers Ins. Co. of Wash.*, 173 Wn. 2d 264, 281, 267 P.3d 998 (2011) (Madsen, C.J., dissenting).

2. Reply to the Innocence Network’s assertion that the County and Slagle’s alleged post-1993 misconduct triggered subsequent policies (Innocence Network Br. 3, 5, 14-15).

The Innocence Network fares no better than petitioners in explaining how their theory jibes with the terms of the excess policies. The underlying complaint did not allege that the County and Slagle’s post-1993 misconduct—continued suppression of exculpatory evidence—was causally distinct from their original misconduct, or that it yielded new and different injuries. Instead, the Innocence Network agrees that post-1993 misconduct merely prolonged Davis’ and Northrop’s preexisting injuries: “delayed” exoneration ensured that Davis and Northrop “stayed” incarcerated, such that they lost “additional” years of their lives. (Innocence Network Br. 5, 15) Because all post-1993 misconduct and ensuing injuries flowed from “continuous or repeated” exposure to

“substantially the same” conditions—the County and Slagle’s original misconduct—there is but one occurrence, in 1993. (CP 95, 437)

Even if the underlying complaint could be construed as alleging a continuous occurrence, the excess policies’ deemer clause precludes any post-1993 policy from being triggered: “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) Davis and Northrop expressly alleged in the underlying complaint that both 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 employ [*sic*] him.” (CP 171) Like petitioners, the Innocence Network mounts no challenge to Lexington’s argument that these allegations squarely invoke the deemer clause.

3. Reply to the Innocence Network’s reliance on other exonerees’ personal stories as bearing on whether Davis and Northrop’s claims triggered the excess policies (Innocence Network Br. 8-12).

The Innocence Network goes even further astray from the coverage issues before this Court when it imports anecdotes about other exonerees, none of whom are even tangentially connected to this case. These

anecdotes, in addition to being bereft of record support, do not inform the analysis of whether there was an “occurrence” during the policy periods. As even the Innocence Network concedes, evaluation of the duty to defend is confined to “the four corners of the [underlying] complaint.” (Innocence Network Br. 5 n.2) As such, the Innocence Network’s need to rely on irrelevant and non-factual matters outside the underlying complaint—not to mention the record—only reinforces the trial court’s conclusion that Davis and Northrop’s claims did not trigger coverage under the policies.

4. Reply to the *amici curiae*’s assertion that Lexington abandoned the County and Slagle by refusing to defend them (Innocence Network Br. 1, 4, 5 n.2, 17-18; SEIU Br. 1, 8).

This assertion is built on the mistaken premise that Lexington owed a duty to defend in the first instance. The *amici curiae* lack any support in the record for this premise because Lexington is an excess insurer whose duty to defend could not have arisen before payment of the JSILP’s limits—a condition precedent that did not occur before the underlying action concluded. (CP 92-93, 359) The *amici curiae* also remain silent in the face of undisputed evidence that WCRP, the County and Slagle never tendered the claims to Lexington, necessarily eliminating the possibility of any breach of a duty to defend. (CP 7091-92, 8346) *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 141, 29 P.3d 777 (2001) (“Certainly breach of the duty to defend cannot occur before tender.”). Nor do the *amici curiae*

explain why petitioners moved for summary judgment against WCRP concerning the duty to defend, but not Lexington—a tacit concession that Lexington owed no such duty. (CP 330-57, 6101-02)

For this reason, SEIU fails in its quest to excuse the County and Slagle’s unauthorized settlement and breach of the excess policies’ anti-assignment provision. This type of self-help remedy is available where, as SEIU admits, an insurer “incorrectly denie[s] a defense.” (SEIU Br. 8) SEIU’s cited cases confirm that a covenant judgment is tied to the duty to defend. (SEIU Br. 10) All involved insurers that, unlike Lexington, acted in bad faith while defending the insured. *Bird v. Best Plumbing Grp., LLC*, 175 Wn. 2d 756, 764, 287 P.3d 551 (2012); *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn. 2d 903, 914, 169 P.3d 1 (2007); *Besel v. Viking Ins. Co. of Wis.*, 146 Wn. 2d 730, 736, 49 P.3d 887 (2002); *Miller v. Kenny*, 180 Wn. App. 772, 785-86, 799, 325 P.3d 278 (2014).

For the same reason, the Innocence Network is wrong when it states that “this is no run-of-the-mill” bad faith case. (Innocence Network Br. 17) In fact, with respect to Lexington, it is not a bad faith case at all. Just as Lexington did not breach a duty to defend it did not owe, Lexington similarly did not breach a duty to indemnify after the underlying consent judgment was entered. By the time Davis and Northrop demanded indemnity, Lexington had already joined this declaratory judgment action

to adjudicate its rights and obligations under the excess policies. (CP 1, 17, 5079-85) *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn. 2d 872, 875, 297 P.3d 688 (2013) (holding that an insurer may file a declaratory judgment action to resolve doubts about its coverage obligations).

In any event, extra-contractual liability is not an issue properly before this Court. Because petitioners did not move for summary judgment on their bad faith claims below, the trial court did not render a ruling concerning that category of liability. (CP 330-57, 4107-15, 6101-02) Accordingly, there is nothing for this Court to review and nothing on which the *amici curiae* can appropriately comment.

5. Reply to SEIU's concern that the trial court's ruling strips Slagle of any benefits under the JSILP and excess policies simply because he is a public employee (SEIU Br. 3, 5, 8-12).

SEIU's concern is unfounded, in that it far overgeneralizes the trial court's holding. The court did not find that *no* public employee is entitled to benefits under *any* self-insurance agreement or follow-form excess policy. The court held merely that *this* public employee was not entitled to benefits under *these* self-insurance agreements and follow-form excess policies. And the ruling was grounded not in Slagle's status as a public employee, as SEIU represents, but in the fact that the underlying complaint alleged an "occurrence" that took place years before the first JSILP and excess policy inception. (CP 9507-08) Once confined to its

intended parameters, the court’s ruling exemplifies the basic proposition that each coverage dispute turns on its own merits.

Just as unfounded is SEIU’s contention that Lexington urges this Court to “deprive” Slagle of his insured status and independent right to avail himself of the JSILP’s and excess policies’ benefits. (SEIU Br. 5) Lexington agrees that Slagle is an additional insured under the excess policies because he was a WCRP member county employee acting within the scope of his employment. (CP 429, 432; Lexington Br. 43 n.7, 55) There is likewise no debate that Slagle may enforce the excess policies independently of, but not to a greater extent than, the County. (CP 438) The point SEIU misses, however, is that insured status alone is not enough. In other words, insured status—whether named or additional—does not absolve the party asserting coverage of its burden to prove that the policies have been triggered. *Wellbrock v. Assurance Co. of Am.*, 90 Wn. App. 234, 241, 951 P.2d 367 (1998) (holding that the party asserting coverage must prove an occurrence within the policy period). The fact remains that petitioners did not establish this threshold showing.

6. Reply to the *amici curiae*’s assertion that the consent judgment is reasonable (Innocence Network Br. 3-4, 15-16; SEIU Br. 5).

Citing cases where exonerees won judgments in proportionally greater amounts than that for which Davis and Northrop settled, the

Innocence Network and SEIU appear to contend that the consent judgment was inadequate. To the extent this is their position, it is misguided. Davis and Northrop compromised their claims for \$34,500,000, a matter that cannot now be revisited. (CP 178)

If the *amici curiae* urge this Court to determine in the first instance that the consent judgment is a reasonable amount, the assertion similarly withers under scrutiny. Because the trial court has not yet passed on reasonableness, that issue is not before this Court. Petitioners concede the point: “[I]ssues pertaining to the reasonableness of the settlement ... have no bearing on the outcome of this appeal.” (C/S Reply Br. 43) Thus, the *amici curiae* cannot unilaterally inject reasonableness into these proceedings. RAP 12.1(a) (stating that a reviewing court generally decides a case based solely on the issues set forth by the parties in their briefs); *State v. Gonzalez*, 110 Wn. 2d 738, 752 n.2, 757 P.2d 925 (1988) (holding that arguments raised only by *amici curiae* need not be considered).

7. Reply to the Innocence Network’s assertion that Davis and Northrop should be compensated because they were injured, regardless of Lexington’s liability (Innocence Network Br. 15-20).

That Davis and Northrop were wrongfully convicted and imprisoned, and deserve compensation for their injuries, is as uncontentious as it is immaterial. The Innocence Network’s assertion merely begs the question of whether Lexington is liable for indemnifying the consent judgment

under the terms of its excess policies. On the latter point, however, the Innocence Network contributes nothing of substance to the discourse.

The Innocence Network's fear that Davis and Northrop will go uncompensated for their injuries is meritless. The County has already paid Davis and Northrop \$5,250,000 each, as a result of the parties' settlement of the underlying action. (CP 178, 191-92, 205-09) The Innocence Network neglects to mention that, attendant to the settlement agreement, Davis and Northrop voluntarily elected to forego collection of the remaining \$24,000,000 of the consent judgment from the County and Slagle—the culpable tortfeasors. (CP 178, 190-97, 211-15) Davis and Northrop thereby assumed the risk that, as the trial court correctly held, the JSILP and excess policies did not cover their claims.

The Innocence Network falls back on an appeal to vague notions of public policy—that Lexington should indemnify the consent judgment simply because Davis and Northrop were injured. This assertion is a thinly veiled plea to discard the contracts into which the County, WCRP and Lexington entered. The Innocence Network's position ignores the equally important countervailing public policy of freedom of contract, and is irreconcilable with the judicial prohibition against rewriting a policy to achieve a desired result. *Findlay v. United Pac. Ins. Co.*, 129 Wn. 2d 368, 380, 917 P.2d 116 (1996) (“We will not, under the guise of public policy,

rewrite a clear contract between the parties.”); *Am. States Ins. Co. v. Delean's Tile & Marble, LLC*, 179 Wn. App. 27, 35, 319 P.3d 38 (2013) (“Where the policy’s language does not provide coverage, we may not rewrite the policy to do so.”). Consequently, this Court should reject the Innocence Network’s invitation to find Lexington liable absent any contractual basis for doing so.

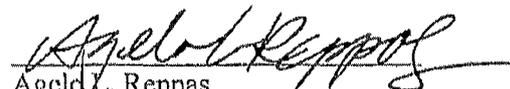
CONCLUSION

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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DECLARATION OF SERVICE

On said day below, I e-mailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of Respondent Lexington Insurance Company's Response to the Innocence Network's and Service Employees International Union, Local 925's *Amicus Curiae* Briefs, Supreme Court Cause No. 91154-1, to the following parties:

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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: April 27, 2016 at Seattle, Washington.



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Subject: Case #91154-1, Washington Counties Risk Pool, et al. v. Clark County, et al.

Good afternoon:

Attached for filing is Respondent Lexington Insurance Company’s Response to The Innocence Network’s and Service Employees International Union, Local 925’s *Amicus Curiae* Briefs, in *Washington Counties Risk Pool, et al. v. Clark County, et al.*, Cause No. 91154-1.

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Thank you,

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