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SUPREME COURT
OF THE STATE OF WASHINGTON

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WASHINGTON COUNTIES RISK POOL; LEXINGTON
INSURANCE COMPANY; AMERICAN INTERNATIONAL GROUP,
INC; VYRLE HILL, Executive Director of the Washington Counties
Risk Pool, in both his individual capacity and official capacity; and
ACE AMERICAN INSURANCE COMPANY,

Respondents,

v.

CLARK COUNTY, WASHINGTON, a municipal corporation;
DONALD SLAGLE, an individual; LARRY DAVIS, individually, and
as assignee of Clark County and of Donald Slagle; and ALAN
NORTHROP, individually, and as assignee of Clark County and of
Donald Slagle,

Petitioners.

WASHINGTON COUNTIES RISK POOL OPPOSITION TO
MOTIONS FOR DISCRETIONARY REVIEW

SMITH GOODFRIEND, P.S.

BENNETT BIGELOW &
LEEDOM, P.S.

By: Howard M. Goodfriend
WSBA No. 14355
Catherine W. Smith
WSBA No. 9542

By: William J. Leedom
WSBA No. 2321

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

601 Union Street, Suite 1500
Seattle, WA 98101
(206) 622-5511

Attorneys for Respondent WCRP

 ORIGINAL

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A. Introduction.

In two interlocutory orders, the trial court gave effect to the Legislature's unambiguous declaration in RCW 48.01.050 that two or more governmental entities "that join together and organize to form an organization for the purpose of jointly self-insuring or self-funding are not an 'insurer' under this code." The trial court properly held that respondent Washington Counties Risk Pool is not an insurer, but a group of 26 counties that have joined together to self-insure losses and jointly purchase excess insurance. The trial court properly held that petitioner Clark County's rights and obligations are governed by the Interlocal Agreement that Clark County signed when it joined the Pool, which expressly prohibits an assignment of "any right, claim or interest it may have" as a member of the Pool. And the trial court properly held that any right to a defense of the claims asserted by petitioners Davis and Northrop against the County and its agent, Detective Donald Slagle, must be determined by reference to the plain language of the member counties' joint self insuring agreement with the Pool and each other, rather than by the statutory and common law duties imposed upon commercial liability insurers.

The trial court committed no obvious error in following clear and unambiguous statutory language that distinguishes a self-insuring intergovernmental risk pool from a commercial insurer. Ignoring that neither this Court nor the Court of Appeals has ever held that a statutory governmental risk pool is an “insurer” under Title 48, petitioners conflate the rights and duties of the Pool with those of commercial insurers, such as respondent Lexington Insurance Co., from whom the Pool purchased excess coverage as authorized by RCW 48.62.031. Further, rather than “render[ing] further proceedings useless,” RAP 2.3(b)(1), the trial court’s two interlocutory orders relating to the Pool anticipate further proceedings to resolve numerous remaining claims, including claims entirely unrelated to the duties of an insurer, any one of which could give rise to additional appellate issues upon entry of a final judgment in this multi-claim, multi-party litigation

The trial court’s certification, which contains no findings addressing the criteria of RAP 2.3(b)(4), is entitled to no deference and is not sufficient to overcome the strong presumption against piecemeal review. Immediate appellate review will not “materially advance the ultimate termination of the litigation,” RAP 2.3(b)(4),

but will only delay it, leading to multiple appeals and causing undue delay and expense to the taxpayers of the 26 counties in the Pool.

The Pool and its 26 member counties ask this Court to deny the two motions for discretionary review so that an appellate court may consider all appellate issues on review of the final judgment.

B. Restatement of Facts.

Petitioners misstate the nature of the self-insurance undertaken by the cooperating counties who have joined the Pool and the relevant facts concerning the claims of Davis and Northrop. None of the petitioners support their two Motions for Discretionary Review with citations to the record. This response cites to Respondent's Appendix to Response to Motions for Discretionary Review as ("DR ___").

- 1. When the Legislature authorized the creation of the Pool to allow local governmental entities to self-insure it exempted the Pool from the definition of "insurer" in Title 48.**

The Pool is a creature of statute, dating from the enactment of the Interlocal Cooperation Act in 1967, which enabled local governments to cooperate to provide services in a manner most suited to the economic needs and development of their communities. See RCW 39.34.010, RCW 39.34.900, RCW 39.34.920. The Legislature expressly limited such agreements to

public entities: “[a]ny two or more public agencies may enter into agreements with one another for joint or cooperative action pursuant to the provisions of this chapter[.]” RCW 39.34.030.

In 1979, the Legislature found “that local governmental entities in this state are experiencing a trend of vastly increased insurance premiums for the renewal of identical insurance policies, that fewer insurance carriers are willing to provide local governmental entities with insurance coverage, and that some local governmental entities are unable to obtain desired insurance coverage.” Laws 1979, 1st Ext. Sess., Ch. 256, § 1. That Legislature as a consequence amended Title 48 RCW to allow local governments to jointly self-insure risks, jointly purchase insurance or reinsurance, and jointly contract for risk management, claims and administrative services. *See* RCW ch. 48.62. In enacting this legislation, the Legislature specifically exempted such local governmental self-insuring risk pools from the definition of an insurer under Title 48:

Two or more local governmental entities, under any provision of law, that join together and organize to form an organization for the purpose of jointly self-insuring or self-funding *are not an ‘insurer’ under this code.*

RCW 48.01.050 (emphasis added).

2. The Pool, formed by Washington counties to self-insure, is governed by an Interlocal Agreement that prohibits assignment. Clark County joined the pool in 2002.

Representatives from over two dozen Washington counties formally agreed to create the Washington Counties Risk Pool in November 1987. (DR 118-23) The Pool is not a traditional for-profit insurance company. Its small membership – the 26 county-members of the Pool – jointly self-insure as a collective, and purchase excess or reinsurance to cover potential liabilities.

Under the authority granted to them by the Interlocal Cooperation Act, RCW ch. 39.34, the counties drafted an Interlocal Agreement, Bylaws and claim management procedures in 1988. (DR 125, 134-42) Their intent was to create a pool “into which counties would contribute sufficient funding to create an actuarially sound program to cover predictable losses and costs.” (DR 106-07) Membership in the Pool is limited to Washington State counties. Individuals or any entity other than a Washington State county cannot join or buy into the Pool. (DR 136) See RCW 48.62.031; RCW 39.34.030(2).

The State Risk Manager approved the Interlocal Agreement, which was initially signed by each of the original 24 member

counties. *See* RCW 39.34.050. (DR 125) The Interlocal Agreement establishes a board of directors, made up of one representative from each member county, (DR 138-39), and requires the Pool to provide joint self-insurance coverage for liability claims arising from the negligent or other tortious conduct, errors or omissions of the Pool and member counties, their officers, employees or agents. (DR 139) The Pool also provides umbrella coverage for its member counties, reinsurance coverage for self-insured claims, and establishes deductibles and limits of coverage to its member counties. (DR 138)

The Interlocal Agreement reflects the self-insuring nature of the Pool: Each member county “shall have contingent liability for the liabilities of the Pool in the event the assets of the Pool are not sufficient to cover its liabilities,” with deficits “financed through fair and reasonable retroactive assessments levied against each member county as determined by the Board.” (DR 139) In the event of termination of the Pool, each member county is obligated for its fair share of funds to cover final disposition of covered claims. (DR 140)

The Interlocal Agreement also contains a clear prohibition against assignment:

Article 21
Prohibition Against Assignment

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 the Pool.

(Dr 141) (emphasis added).

Under the Pool's Bylaws, the member counties themselves determine whether a claim should be covered by the Pool. A member county must submit a claim to the Pool's Claims Manager, who "shall make a written determination of coverage." (DR 392) "A party aggrieved by the Claims Manager's written determination to deny coverage" may make a first level appeal to the Executive Director. (DR 393) If the Executive Director affirms the Claims Manager's written decision, the decision may be appealed to the Executive Committee, comprised of eleven representatives of the member counties plus the Executive Director as a non-voting member. The Executive Committee then holds a hearing to determine whether coverage was appropriately denied. (DR 394)

Clark County participated in the creation of the Pool in 1987, (DR 118), but elected not to join the Pool until 2002, after its commercial liability insurance premiums doubled. The Clark County Board of County Commissioners approved and signed the

Interlocal Agreement on August 20, 2002. (DR 131-32, 143) Clark County's Risk Manager Mark Wilsdon served as Clark County's Director Representative to the Pool. (DR 145-47)

3. **In 2012, the Pool rejected Clark County's claim for defense and indemnity of Davis' and Northrop's claims arising from their arrest, prosecution and incarceration in 1993, nine years before Clark County joined the Pool.**

In 1993, nine years before it elected to join the Pool, Clark County charged and convicted petitioners Alan Northrop and Larry Davis for the crime of rape. Petitioner Donald Slagle, a Clark County detective, was the lead investigator of these crimes. Northrop and Davis were exonerated through DNA testing in 2010. In August 2012, Northrop and Davis filed suit in U.S. District Court for the Western District of Washington against Slagle and Clark County. (DR 149-67) Their complaint alleged that Slagle's highly suggestive identification procedures and failure to disclose exculpatory evidence, as well as Clark County's inadequate supervision of Slagle, all occurring in or before 1993, breached a common law duty of care, inflicted emotional distress, and violated Northrop's and Davis' constitutional rights. (DR 163-65)

Clark County's risk manager Wilsdon tendered the complaint to the Pool. On November 13, 2012, Claims Manager Susan Looker

notified Wilsdon that the Pool had no duty to defend or indemnify Clark County or Slagle because the arrest, trial and incarceration of Davis and Northrop took place in 1993, nine years before Clark County joined the Pool. (DR 398-401) The Pool's Executive Director, respondent Vyrle Hill, affirmed that determination on January 3, 2013. (DR 403-11) The Executive Committee affirmed Mr. Hill's decision after a hearing on Clark County's administrative appeal, which was held in March 2013. (DR 413)

Clark County did not seek judicial review of the Executive Committee decision and defended itself against the Davis/Northrop claims in federal court. In June 2013, three months before trial and two months after the Pool had definitively denied coverage, Clark County stipulated to an amendment of Davis' and Northrop's federal complaint (DR 415-17), which largely repeated the allegations in the original complaint but for the first time contained a claim for "ongoing unlawful and unconstitutional conduct." (Clark County/Slagle App. 151)

Ms. Looker denied the County's renewed tender to the Pool on the ground that Davis and Northrop first suffered damages resulting from Clark County's alleged wrongful conduct in 1993. (DR 419-23) The Pool's Executive Director upheld that decision in

the first level administrative appeal (DR 430-41), and the Executive Committee affirmed on November 1, 2013. (DR 454)

On July 3, 2013, while Clark County's appeal under the Pool's Bylaws was still pending, counsel for Northrop and Davis demanded the Pool attend a mediation scheduled without prior notice to the Pool on July 12, 2013, and threatened that if it did not participate in the mediation the Pool would be liable as an insurer for bad faith. (DR 169-71) On July 9, 2013, the Pool's Executive Director Hill notified Northrop's and Davis' counsel, as well as Clark County, that both the Interlocal Agreement (DR 141) and the Joint Self Insurance Policy (DR 452), which defines the member counties' defense and indemnity rights and obligations, expressly prohibit any assignment by a member County, and reiterated that pursuant to RCW 48.01.050 the Pool was not an insurer. (DR 173-74)

- 4. Clark County paid \$10.5 million in cash to Davis and Northrop and, in violation of the Interlocal Agreement, purported to assign Davis and Northrop the County's rights as a member of the Pool.**

On September 27, 2013, nine days into the civil rights jury trial before U.S. District Court Judge Robert Bryan and while the Pool's coverage denial was still under review, Clark County settled by paying Davis and Northrop \$10.5 million and agreeing to a

stipulated judgment for \$34.5 million in return for a covenant not to execute beyond the sum of \$10.5 million. (DR 176) Clark County and Slagle agreed to an “assignment of rights against all Defendants *insurers*, including, without limitation, the Washington Counties Risk Pool.” (DR 176)

Under the October 23, 2013 Settlement Agreement Clark County assigned “any and all contractual, extra-contractual, tort . . . claims,” including violation of the Insurance Fair Conduct Act, against the Pool. (DR 185) The Clark County Board of County Commissioners ratified the agreement against the advice of its representative to the Pool, Clark County Risk Manager Wilsdon, who told the Board the assignment was prohibited by the Interlocal Agreement. (DR 178-80)

Davis and Northrop sought a determination from Judge Bryan that the settlement was reasonable under RCW 4.22.060. Judge Bryan refused to exercise supplemental jurisdiction and dismissed without prejudice Davis’ and Northrop’s request for a reasonableness determination. (DR 222-30)

After repeated notices to Clark County that the assignment violated the Interlocal Agreement and demands that Clark County cure its violation (DR 219-20), the Pool members voted on April 28,

2014, to cancel Clark County's membership in the Pool. (DR 240-41)

5. After the Pool and its excess insurers brought this declaratory judgment action, Davis, Northrop, Clark County and Slagle added parties and asserted a dozen counterclaims.

On November 4, 2013, the Pool filed this lawsuit in Cowlitz County against Clark County, Slagle, Davis and Northrop, seeking a declaratory judgment that the purported assignment of rights by Clark County and Slagle to Davis and Northrop was null and void, and that the Pool had no duty to defend or indemnify Clark County or Slagle in the federal litigation. (DR 38-45) On November 22, 2013, respondent Lexington Insurance Company, the Pool's excess insurer, sought similar relief as a plaintiff in an amended complaint. (DR 46-62)

Davis and Northrop ultimately added four new parties – William Ashbaugh, outside coverage counsel for the Pool,¹ Vyrle Hill, Executive Director of the Pool, and excess insurers American International Group and Ace American Insurance Company – and alleged twelve different counterclaims: (1) breach of the duty to defend; (2) breach of the duty to settle; (3) breach of the duty to

¹ Petitioners voluntarily dismissed their counterclaims against Mr. Ashbaugh after he filed a motion to dismiss under CR 12(b)(6). (DR 455-58)

indemnify; (4) common law bad faith; (5) negligence; (6) violation of the Consumer Protection Act); (7) violation of the Insurance Fair Conduct Act; (8) Due Process violations; (9) Equal Protection violations; (10) declaratory judgment; and two claims for intentional interference with contractual relations. (DR 262-324)

6. The trial court held that the Pool was not an insurer, that the assignment was invalid, and that the Pool did not have a duty to defend the Davis/Northrop claims.

On November 13, 2014, Cowlitz County Superior Court Judge Marilyn Haan (“the trial court”) granted a declaratory judgment for the Pool, ruling that under RCW 48.62.031 and RCW 48.01.050, the Pool is not an insurer, and that Clark County’s purported assignment was null and void based on the express language of the anti-assignment provision in the Interlocal Agreement. (DR 21-35)² The trial court separately granted summary judgment to respondent Lexington, holding that Lexington’s “Follow Form Excess Policy” is also non-assignable. (DR 34)

² The trial court also ruled that the Pool was entitled to reasonable attorneys’ fees and costs as a result of Clark County’s breach of the Interlocal Agreement. (DR 30) The trial court has not yet established the amount of fees to be awarded.

Ignoring these separate summary judgment rulings and conflating the separate roles of the self-insuring Pool and its commercial excess liability insurer, petitioners erroneously assert that the trial court ruled that “the common law on insurance did not apply to the policies issued by WCRP/Lexington” (Davis/Northrop MDR 4) – a statement that is not contained in the trial court’s memorandum decisions. (DR 8-11, 21-34)

On November 26, 2014, the trial court ruled on summary judgment that under the definition of “occurrence” in the Pool’s Joint Self Insurance Liability Policy (DR 450), all of the conduct that formed the basis of both the original and Amended Complaint occurred at the time of the investigation, arrest, conviction and incarceration of Davis and Northrop in 1993, nine years before Clark County joined the Pool in 2002. (DR 10-11) The trial court ruled the Pool had no duty to defend Clark County, or through the County, its employee Slagle. (DR 11)

The trial court entered summary judgment orders on December 12, 2014. (DR 1-7, 12-20) On the joint motions of Clark County, Slagle, Northrop and Davis, the trial court also certified the question “whether Washington’s common law on insurance applies to the issues decided by the Court as set forth in [the court’s]

orders” for discretionary review pursuant to RAP 2.3(b)(4). (DR 35-36)

C. Argument Why Review Should Be Denied.

1. This Court, not the trial court, determines whether review is appropriate under RAP 2.3.

Discretionary review of an interlocutory decision is disfavored. This Court exercises its independent judgment whether to grant discretionary review in light of a strong presumption in favor of one appeal from a final judgment and against piecemeal review of interlocutory decisions. *See, e.g., Fox v. Sunmaster, Inc.*, 115 Wn.2d 498, 503-04, 798 P.2d 808 (1990) (noting the “undesirability of piecemeal review”); *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, ¶ 5, 232 P.3d 591 (“Piecemeal appeals of interlocutory orders must be avoided in the interests of speedy and economical disposition of judicial business.”) (quotation omitted), *rev. denied*, 169 Wn.2d 1029 (2010).

This Court long ago identified the benefits of avoiding “more than one appeal in the same action.” *Post v. City of Spokane*, 35 Wash. 114, 116, 76 Pac. 510 (1904) (quotation omitted). “Because the normal [appellate] process will impose additional delays, it usually makes little sense to grant an interlocutory review that will

put a case on hold, before trial, for several years.” Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev. 1541, 1551 (1986). Petitioners cannot overcome that presumption against piecemeal review on the basis of the trial court’s two rulings, which follow the unambiguous language of RCW 48.01.050. Those orders present no grounds for discretionary review under either RAP 2.3(b)(1) or (4).³

2. The trial court’s orders follow the Legislature’s unambiguous declaration that a self-insuring risk pool is not an “insurer” under Title 48 and were not obvious error under RAP 2.3(b)(1).

By treating the Pool and its excess insurers as the same entity (e.g., “WCRP/Lexington”) and contending that the Pool is subject to the rules governing commercial liability insurers under

³ This Court should summarily reject petitioners’ reliance on RAP 2.3(b)(2), which requires the petitioners to establish that “the superior court has committed probable error . . . [that] substantially alters the status quo or substantially limits the freedom of a party to act.” RAP 2.3(b)(2) is properly limited to equitable orders, such as injunctions, that affect the rights of the parties outside the context of the litigation. Crooks, 61 Wash. L. Rev. at 1545-46. “[W]here a trial court’s action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court’s action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2).” *State v. Howland*, 180 Wn. App. 196, 207, ¶ 24, 321 P.3d 303 (2014). This Opposition therefore addresses the RAP 2.3(b)(1) criteria that govern interlocutory orders and their effect on ongoing litigation, and the trial court’s RAP 2.3(b)(4) certification.

Title 48 and Washington common law, petitioners flout the Legislature's unambiguous declaration that a governmental self-insurance pool does not fall within the statutory definition of an "insurer":

Two or more local governmental entities, under any provision of law, that join together and organize to form an organization for the purpose of jointly self-insuring or self-funding *are not an "insurer" under this code.*

RCW 48.01.050 (emphasis added). The trial court correctly interpreted this unambiguous statutory language exempting the Pool from the requirements of Title 48 in concluding that the Pool is not subject to the common law duties of insurers. Its rulings do not conflict with any decisions from this Court or the Court of Appeals, and are not obvious error under RAP 2.3(b)(1).

The Pool is not a "creature[]" of Title 48 RCW," as petitioners contend, once again wrongly treating the Pool and its excess insurers as one in the same entity. (Davis/Northrop MDR 8) Instead, the Pool was created under the statutory authority of counties to join together for joint or cooperative action under RCW 39.34.030. Title 48 is relevant to the Pool only insofar as it authorizes local governments to join together to form self-insurance programs and directs governmental entities that wish to jointly self-

insure to draft agreements that comply with ch. 39.34 RCW. RCW 48.62.031(2). The Legislature enacted ch. 48.62 RCW in response to a crisis in the availability of public liability insurance, and to give local governmental entities “maximum flexibility” to jointly self-insure as an *alternative* to purchasing commercial liability insurance. RCW 48.62.011.

Petitioners’ reliance on “[t]his Court’s body of law on an insurer’s duty to defend” (Davis/Northrop MDR 12)⁴ ignores entirely the Legislature’s unambiguous statement that the Pool is not an “insurer’ under this code.” RCW 48.01.050. The Legislature did not limit this exemption to the “financial solvency requirements and management obligations set forth elsewhere in Title 48 RCW,” as petitioners assert. (Clark County/Slagle MDR 14) The trial court did not err in following the Legislature’s plain statutory directive, let alone commit an “obvious” error, as required for discretionary review under RAP 2.3(b)(1). *See State v. Howland*, 180 Wn. App. 196, 205, ¶ 20, 321 P.3d 303 (2014) (denying discretionary review because trial court committed no probable error in exercising

⁴ *See also* Davis/Northrop MDR 15 (after “insurer . . . breached duty to defend” petitioners obtained “assignment of the insured’s rights against the insurer); Clark County/Slagle MDR 17 (“County/Slagle “followed this authorized and well-worn path that permits an insured to assign claims for damages against an insurer”) (emphasis added).

discretion to deny a hearing under statute stating trial court “may” grant a hearing on inmate’s application for conditional release from state hospital).

The Legislature authorized the creation of the Pool “[f]or the purpose of carrying out a joint *self-insurance program*,” RCW 48.62.034 (emphasis added), and to grant local governments “maximum flexibility in *self-insuring*.” RCW 48.62.011 (emphasis added). A self-insured entity is not subject to the statutory or common law duties of an insurer, regardless whether that self-insured entity protects itself from risks through reinsurance or excess insurance, as the Pool did here through the coverage it purchased from respondent Lexington. *See, e.g., Kyrkos v. State Farm Mut. Auto Ins. Co.*, 121 Wn.2d 669, 674-75, 852 P.2d 1078 (1993) (self-insurance is not insurance under UIM statute); *Bordeaux, Inc. v. Am. Safety Ins. Co.*, 145 Wn. App. 687, 694-95, ¶¶ 16-17, 186 P.3d 1188 (2008), *rev. denied*, 165 Wn.2d 1035 (2009); *Cann v. King County*, 86 Wn. App. 162, 164, 937 P.2d 610 (same), *rev. denied*, 133 Wn.2d 1007 (1997).

Although it chose not to join the Pool until 2002, Clark County was among those counties that participated in the formation of the Pool and its organizational structure in 1988. (DR 118) The

Interlocal Agreement, the Bylaws and the Joint Self Insurance Policy, in contrast to the liability policies issued by commercial insurers, are not contracts of adhesion. *See Averill v. Farmers Ins. Co. of Wash.*, 155 Wn. App. 106, ¶ 20, 229 P.3d 830 (commercial insurance policies are generally considered contracts of adhesion), *rev. denied*, 169 Wn.2d 1017 (2010). Petitioners ignore the structure of the self-insuring Pool in advancing the notion that Clark County may, in essence, sue itself, by assigning the right to pursue a claim against the county members of the Pool, one of which was Clark County.

There is no support for petitioners' assertion that an intergovernmental risk pool is subject to the common law duties governing an insurer – an assertion properly rejected by the trial court. (DR 26-28) In both *Transcontinental Insurance Co. v. Washington Public Utilities Dist. Utility System*, 111 Wn.2d 452, 760 P.2d 337 (1988) and *PUD No. 1 of Klickitat County v. International Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994) (Davis/Northrop MDR 11-12, Clark County/Slagle MDR 14), the Court considered an insured's rights under "special excess liability policies," 111 Wn.2d at 454-55, or "excess coverage" policies, 124 Wn.2d at 793, issued by commercial insurers, not by a self-insured

risk pool. The Court of Appeals cases relied upon by petitioners similarly do not subject a risk pool to the duties of commercial insurers.⁵

The cases cited by petitioners establish only that intergovernmental risk pools have been parties to disputes with governmental entities, their agents, or their insurers, not that the risk pools themselves are subject to the duties of commercial insurers. Because neither this Court nor the Court of Appeals has ever subjected a risk pool to the duties of insurers under Title 48 or the common law, the trial court's rulings do not conflict with established appellate precedent and do not constitute "obvious error" within the meaning of RAP 2.3(b)(1). *Compare Washington State Dep't of Labor & Indus. v. Davison*, 126 Wn. App. 730, 735-36, ¶¶ 12-13, 109 P.3d 479 (2005) (trial court committed obvious error in ignoring contrary precedent).

⁵ In *City of Okanogan v. Cities Ins. Ass'n of Washington*, 72 Wn. App. 697, 865 P.2d 576 (1994), Division Three held that losses arising from a settlement between a city and property owners were foreseeable and did not qualify as covered "occurrences" that would entitle the city to indemnity by a municipal risk pool. In *Colby v. Yakima County*, 133 Wn. App. 386, 136 P.3d 131 (2006), the court held that a former district court judge was not entitled to indemnity for his legal fees in defending a Commission on Judicial Conduct disciplinary proceeding. (See *Davis/Northrop* 12 n.6, *Clark County/Slagle* 15)

The trial court properly applied established contract principles in enforcing the prohibition against a Pool member's assignment of its rights in the Pool. (DR 27) The trial court correctly relied on the statutes limiting membership in the Pool to local governmental entities and on the Interlocal Agreement signed by Clark County, which plainly and unambiguously prohibits the assignment of "any right, claim or interest [a County] may have under this Agreement." (DR 29) *See Robbins v. Hunts Food & Indus., Inc.*, 64 Wn.2d 289, 294, 391 P.2d 713 (1964) (contracts are not assignable if assignment is expressly prohibited by the contract itself or by statute).

In its November 21, 2014 ruling, the trial court also properly ruled that the Pool had no duty to defend or indemnify the Davis/Northrop claims asserted in either the original or the Amended Complaint because the "investigation, arrest, conviction and incarceration of Davis and Northrop . . . occurred in 1993," predating by nine years "Clark County joining the Pool in 2002." (DR 11) This ruling was not error even under the commercial

insurance case law that petitioners seek to apply.⁶ *See, e.g., White v. Allstate Ins. Co.*, 124 Wn. App. 60, 64-65, 98 P.3d 496 (2004) (“Because the loss in this case occurred before the policy went into effect, we hold that the [occurrence] is not covered under the insurance policy as a matter of law”), *rev. denied*, 154 Wn.2d 1009 (2005); *Allstate Ins. Co. v. Cameron*, 2006 WL 314337 *6 (W.D. Wash. 2006) (“[T]he court is aware of no Washington court that has imposed liability on an insurer for an act that took place entirely before a policy period and first resulted in an injury to the aggrieved party before the policy period.”)

This Court should deny review because the trial court’s rulings refusing to subject the Pool to the duties of commercial liability insurers under Title 48 followed clear statutory language and conflict with no precedent. Its rulings were not obvious error.

⁶ The property insurance cases relied upon by Petitioners to assert that the relevant “occurrence” comprised the entire course of Davis’ and Northrop’s incarceration are clearly inapposite, as they involve latent and harmful conditions to real property. *E.g., Gruol Const. Co., Inc. v. Insurance Co. of North America*, 11 Wn. App. 632, 636, 524 P.2d 427 (property coverage for dry rot and defective backfilling), *rev. denied*, 84 Wn.2d 1014 (1974) (Davis/Northrop MDR 13 n.8). Davis’/Northrop’s Amended Complaint filed on the eve of trial in federal court raised no new occurrence or event, but claimed that the original wrongful conviction and incarceration resulted in “ongoing” harm. *Transcontinental*, in which bondholders alleged a series of “multiple, distinct events,” 111 Wn.2d at 466, is therefore also inapposite.

3. The trial court's rulings do not render further proceedings useless.

The trial court's rulings will necessitate additional proceedings, rather than "render further proceedings useless" justifying review under RAP 2.3(b)(1). Petitioners in fact recognize that the trial court's rulings, including the denial of their motion for summary judgment alleging a breach of the duty to defend, necessarily envision additional decisions before their counterclaims, several of which are entirely unrelated to their attempt to hold the Pool to the duties of a liability insurer, are all dismissed. (Davis/Northrop MDR 17; Clark County/Slagle MDR 19) Discretionary review of the denial of summary judgment is especially disfavored precisely because of the likelihood that further proceedings may raise additional appealable issues. *See DGHI Enters. v. Pac. Cities, Inc.*, 137 Wn.2d 933, 949, 977 P.2d 1231 (1999).

Davis' and Northrop's contention that the rulings deprive them of the right to participate in further proceedings is also meritless because they remain parties to a host of unadjudicated claims, including constitutional claims, negligence claims and claims for interference with contract, as they concede in arguing

that “there is substantial litigation left to undertake in this case.” (Davis/Northrop 17)⁷ While respondents believe petitioners’ counterclaims can each be resolved on summary judgment, the pendency of these remaining claims, each of which may raise other appealable issues, weighs against, not in favor of, discretionary review, and in no event establishes that the trial court’s rulings “render further proceedings useless.” *See Crooks*, 61 Wash. L. Rev. at 1550 (“the prospect of two ‘long and expensive’ trials . . . ignore[s] the possibility that interlocutory review may simply substitute two long and expensive appeals[.]”).

4. The trial court’s certification for interlocutory review failed to address the criteria of RAP 2.3(b)(4) and is entitled to no deference.

Immediate interlocutory review under RAP 2.3(b)(4) will result in piecemeal review with no corresponding benefit to judicial economy. The strong policy disfavoring piecemeal review equally informs this Court’s de novo review of the trial court’s certification under RAP 2.3(b)(4), which, by its terms, provides that

⁷ While RAP 2.3(b)(2) is inapplicable, the trial court’s rulings do not affect the rights or freedom of any of the petitioners to act outside of this litigation. Davis and Northrop have already been paid over \$10 million by Clark County and will suffer no further prejudice to their freedom. Clark County/Slagle fails to allege any impact of the trial court’s rulings outside of the instant litigation.

“discretionary review *may* be accepted” upon the trial court’s certification. (emphasis added) The drafter’s comments to RAP 2.3(b)(4) confirm that this Court exercises independent judgment on whether an issue is properly certified under the criteria of the rule. Drafter’s Comments, 1998 Amendment to RAP 2.3(b) (The appellate court may, “in its discretion, permit an appeal to be taken from such order”); Drafter’s Comments, 2002 Amendment (“review under any of the enumerated grounds [in RAP 2.3(b)] is discretionary”), *reprinted in* Tegland, *2A Wash. Pract: Rules Practice* at 181-82 (8th Ed. 2014).

The trial court’s RAP 2.3(b)(4) certification order does not contain any findings addressing the rule’s requirement that the trial court’s decision raise “a controlling question of law as to which there is a substantial ground for a difference of opinion and that immediate review of the order may materially advance the litigation.” *See* WSBA, *Appellate Practice Deskbook* § 6.4(2) (3rd Ed. 2005) (certification entitled to substantial weight if “supported by findings or an explanation of its reasoning.”). Even if the trial court’s order contained the requisite findings, they could not be sustained on this record.

The trial court's refusal to hold the Pool to the duties of an insurer is not a "gateway" issue (Davis/Northrop MDR 7) because its decisions will expedite and not delay the entry of a final judgment on claims that contravene a clear legislative directive. Moreover, the trial court's two rulings present a "controlling question of law" within the meaning of RAP 2.3(b)(4) only as to some of the claims in this action: the Pool's declaratory judgment on the validity of the assignment, and the petitioners' counterclaims asserting the Pool's liability under standards applicable to a commercial liability insurer.

Further, and as discussed in response to petitioners' assertion of "obvious error" under RAP 2.3(b)(1), piecemeal review is particularly inappropriate because there can be no "substantial ground for a difference of opinion." RAP 2.3(b)(4). In holding that the County's assignment of its rights in the Pool was barred by the Interlocal Agreement and that the Pool had no obligation to defend claims for damages occurring nine years before Clark County's admission to the Pool, the trial court applied clear contract language and the unambiguous legislative determination that the Pool is not an "insurer" under Washington law. RCW 48.01.050.

Critically, immediate appellate review will hinder, and not “materially advance the ultimate termination of the litigation,” RAP 2.3(b)(4), wasting scarce public resources on multiple appeals, and trial court proceedings that will span many years instead of the next several months. The application of insurance law has no bearing on Slagle’s claims that the Pool and its Executive Director violated his constitutional rights (DR 318-19), or the petitioners’ claims that the Pool tortiously interfered with the federal court settlement agreement between Northrop/Davis and Clark County/Slagle. (DR 320-21) While each of those claims, as well as petitioners’ remaining counterclaims seeking to hold the Pool to the duties of an insurer, can be resolved on summary judgment, they should all be brought to final judgment for the sake of the Pool, its Executive Director, its member counties and their taxpayers, and to allow the appellate court to consider all issues in one appeal from a final judgment.

D. Conclusion

This Court should deny direct discretionary review.

Dated this 26th day of January, 2015.

SMITH GOODFRIEND, P.S.

BENNETT BIGELOW &
LEEDOM, P.S.

By: _____

Howard M. Goodfriend

WSBA No. 14355

Catherine W. Smith

WSBA No. 9542

By: _____

William J. Leedom

WSBA No. 2321

Attorneys for Respondent WCRP

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 26, 2015, I arranged for service of the foregoing Washington Counties Risk Pool Opposition to Motions for Discretionary Review, to the court and to the parties to this action as follows:

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| Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929 | <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger (appendix only) <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail |
| William J. Leedom David M. Norman Amy M. Magnano Bennett Bigelow & Leedom PS 601 Union Street, Suite 1500 Seattle, WA 98101 | <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger (appendix only) <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail |
| Timothy K. Ford David J. Whedbee Tiffany Cartwright MacDonald Hoague & Bayless 705 2nd Ave., Ste. 1500 Seattle, WA 98104-1796 | <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger (appendix only) <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail |
| John R. Connelly Micah R. LeBank Connelly Law Offices 2301 N 30th St. Tacoma, WA 98403 | <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger (appendix only) <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail |

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|---|---|
| <p>Ian Hale Michael E. Farnell Parsons Farnell & Grein, LLP 1030 SW Morrison Street Portland, OR 97205</p> | <p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail (appendix only) <input checked="" type="checkbox"/> E-Mail</p> |
| <p>Philip A. Talmadge Talmadge/Fitzpatrick 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126</p> | <p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger (appendix only) <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p> |
| <p>Christopher Horne Taylor Hallvik Clark County Prosecuting Attorney, Civil Division P.O. Box 5000 Vancouver, WA 98666-5000</p> | <p><input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail (appendix only) <input checked="" type="checkbox"/> E-Mail</p> |
| <p>Troy A. Biddle Donald J. Verfurth Gordon & Rees LLP 701 5th Avenue, Suite 2100 Seattle, WA 98104</p> | <p><input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger (appendix only) <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p> |
| <p>Bradley S. Keller Devon S. Richards Byrnes Keller Cromwell, LLP 1000 Second Avenue, 38th Floor Seattle, WA 98104</p> | <p><input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger (appendix only) <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p> |
| <p>Thomas M. Jones Brendan Winslow-Nason Cozen O'Connor 1201 Third Avenue, Suite 5200 Seattle, WA 98101</p> | <p><input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> Messenger (appendix only) <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail</p> |

DATED at Seattle, Washington this 26th day of January,

2015.

V. Vigoren

Victoria K. Vigoren