No. 32769-8

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

---

WASHINGTON COUNTIES RISK POOL, a public entity,

Respondent,

v.

TAMARA MARIE CORTER, a married individual,
STEVE GROSECLOSE, an individual,

Appellants,

and

DOUGLAS COUNTY, a municipal corporation,

Respondent.

---

# BRIEF OF WASHINGTON COUNTIES RISK POOL

---

J. William Ashbaugh
HACKETT, BEECHER & HART
1601 Fifth Avenue, Suite 2200
Seattle, WA 98101-1651
Telephone: 206 624 2200
E-mail: washbaugh@hackettbeecher.com

## TABLE OF CONTENTS

Page

## TABLE OF AUTHORITIES

Page

Other Citations

## I. INTRODUCTION

The Washington Counties Risk Pool (the "Pool" or "WCRP") is a public entity authorized by RCW 48.62.031 and RCW 39.34. Pursuant to these statutes, local government entities are permitted to join together to jointly self-insure, jointly purchase insurance or reinsurance for liability and property risks and jointly contract for or hire personnel to provide risk management, claims and administrative services. The WCRP was formed in 1988 in response to Washington counties' experience with vastly increased premiums and fewer private insurers willing to offer coverage. Under RCW 48.01.050, the WCRP is specifically excluded from the definition of "insurer" under Washington law. Douglas County is a member of the WCRP.

As will be described in detail below, liability coverage is afforded to member counties pursuant to the WCRP Interlocal Agreement, the WCRP By-Laws and the applicable Joint Self-Insurance Liability Policy ("JSILP").

Steve Groseclose, an employee of Douglas County, was sued by his former wife, Tamara Corter, in March 2012. The WCRP provided a defense to Mr. Groseclose under a reservation of rights to later deny coverage for any judgment awarded against

him. Corter's claims against Groseclose proceeded to trial and the jury rendered a verdict against him. After a judgment was entered against Groseclose, the WCRP exercised its reservation of rights, informing him that the Pool would not indemnify him for the judgment and that if he disagreed with this decision he was required to appeal it through the administrative review process in the WCRP's By-Laws. Groseclose chose not to follow through with the appeal process and instead purported to assign his rights against the Pool to Corter in exchange for her agreement not to execute on the judgment against him she obtained in her lawsuit until all avenues of recovery against the Pool were exhausted. Groseclose's failure to exhaust the administrative appeal process is a bar to subsequent legal action against the Pool.

This Court should affirm the trial court's decision on summary judgment below to enforce this procedural bar against Groseclose and his assignee, Corter.

## II. RESTATEMENT OF THE CASE

### A. The Washington Counties Risk Pool History and Formation.

In 1967, the Legislature enacted the Interlocal Cooperation Act, to enable local governmental units to cooperate with one another to provide services and facilities in a manner most suited to

the geographic and economic needs and development of local communities. *See* RCW 39.34.010, RCW 39.34.900, and 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 forming such an agreement under the statute, the public entities must specify (1) the agreement's duration; (2) the precise organization, composition and nature of the entity created thereby and the powers delegated thereto; (3) the purpose or purposes of the agreement; (4) the manner of financing the joint or cooperative undertaking; (5) the permissible method to be employed in accomplishing the partial or complete termination of the agreement and for disposing of property upon the partial or complete termination; and (6) any an other necessary and proper matters. RCW 39.34.030(3)(a)-(f).

Subsequent to creation of the Interlocal Cooperation Act, in the late 70's, many cities, counties, school districts and other local government entities in Washington State found that they were unable to afford insurance through traditional insurance carriers. Recognizing this brewing crisis, in 1979, the Legislature added

sections to Title 48 RCW, to allow these local governmental entities to join together to jointly self-insure risks, jointly purchase insurance or reinsurance, and jointly contract for risk management, claims and administrative services. As stated in the session laws from the 1979 1st Extraordinary Session:

> NEW SECTION. Section 1. The legislature finds 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 governments are unable to obtain desired insurance coverage.
>
> It is the intent of this legislation to clearly provide for the authority of local government entities to individually self-insure, purchase individual insurance coverage, and obtain risk management services. It is also the intent of this legislation to grant local governmental entities the maximum flexibility to enter into agreements with each other to provide joint programs, which include programs for the joint purchasing of insurance, joint self-insurance, joint self-insuring, and joint contracting for or hiring personnel to provide risk management services.[1]

In crafting this legislation, in the final new section, the Legislature set forth its intention that, in enabling these entities to form together to jointly self-insure, they did not then become

[1] Washington Laws, 1979 1st Extraordinary Session, Chapter 256.

"insurers" subject to regulation by the Insurance Commissioner in Washington:

> "Insurer" as used in this code includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society....Two or more local governmental entities, as defined in section 2 of this 1979 act, which pursuant to section 4 of this 1979 act or any other provision of law join together and organize to form an organization for the purpose of jointly self-insuring shall not be deemed an "insurer" under this code.[2]

The WCRP was formed in 1988 pursuant to RCW 48.62.031 and RCW 39.34. CP 199, 203-211. Liability coverage is afforded to member counties pursuant to the Interlocal Agreement, the WCRP By-Laws and the applicable Joint Self-Insurance Liability Policies ("JSILP"). CP 199, 212-225, 226-238.

The WCRP By-Laws contain the following pertinent provisions:

**ARTICLE 8**
**COVERAGE DETERMINATION AND APPEAL**

**A. COVERAGE DETERMINATIONS.**

1. COVERAGE. Within a reasonable time after receipt of notice of a Claim or Summons and Complaint against a member county or person claiming coverage or protection rights under the Pool's Joint Self Insurance Liability Policy ("JSILP"), the Pool's Claims Manager

[2] Session law, Chapter 256, Section 12 (emphasis in the original).

shall make a written determination of coverage afforded the member county and/or person ("party") not inconsistent with Washington state law and the Pool's Claims Handling Policies and Procedures.

2. DETERMINATION. Upon making a determination of coverage, the Claims Manager shall notify the affected party in writing.

3. NOTIFICATION. The written determination of coverage prepared by the Claims Manager shall advise the party of one or more of the following:

a. Whether the Pool will provide legal counsel for defense of the Claim or Complaint.

b. Whether the Pool is reserving any rights to make subsequent determinations regarding coverage or protections to the member county and/or affected parties. See Article 8.B.3.

c. Whether the Pool is denying rights to coverage or protections to the member county and/or affected parties for one or more of the claims made in the Claim or the appeal process contained herein.

4. WRITTEN REASONS. If the Claims Manager determines that the Pool should reserve its rights to make subsequent determinations regarding coverages to be afforded a party, or determines that coverages should be denied a party, then the written notice of such a determination shall also state in a concise form the reasons for any such

reservation of rights or denial of rights to coverages.

5. WRITTEN RESERVATION. If a denial of coverages to be afforded a party cannot be made until after the facts of the Claim or Complaint are determined by a court of law or other legal forum, the Claims Manager shall make a final determination of coverage within a reasonable time after the final decision of the court or other legal forum. The final determination shall be in writing, include the reasons for denial of coverage, and be sent to the affected parties. The member county and/or affected parties for whom coverage is denied shall reimburse the Pool for its costs of defense including, without limitation, attorney's fees.

6. DETERMINATION FINAL UNLESS APPEALED. All written determinations of coverage shall be final and binding upon the member county and other affected parties. A notice of appeal from the determination of coverage may be filed in the manner specified at Article 8.B below.

* * *

**B. APPEAL.**

1. FIRST LEVEL (ADMINISTRATIVE) APPEAL: A party aggrieved by the Claims Manager's writer determination to deny coverage may appeal to the Executive Director. The appeal must be submitted to the Executive Director within thirty (30) days after the issuance of the Claims Manager's written determination.

* * *

c. DECISION FINAL UNLESS APPEALED: The decision of the Executive Director shall be final and binding on the appellant(s) unless appealed to the Executive Committee as provided in Article 8.B.2. below.

2. SECOND LEVEL (EXECUTIVE COMMITTEE) APPEAL: The decision of The Executive Director may be appealed to the Executive Committee.

* * *

e. DECISION FINAL. The Executive Committee's decision shall be final. Exhaustion of this appeal process shall be a condition precedent to any subsequent legal action by an aggrieved party.

3. NO APPEAL OF POOL'S RESERVATION OF RIGHTS. The Pool's defense of an insured under a reservation of rights is not subject to appeal. An insured may appeal the Pool's decision to limit coverage as communicated within a written reservation of rights notice using the appeal process described earlier in Articles 8.B.1 and 8.B.2 herein, but only after a decision of the court or other legal forum has been made on the legal and factual issues of the underlying claim(s) which gave rise to the Pool's reservation of rights.

CP 220-223.

Among other terms and conditions, the applicable JSILP with respect to the Underlying Litigation contains the following provisions:

> **NOTICE: THE FOLLOWING LIABILITY COVERAGE IS PROVIDED BY THE WASHINGTON COUNTIES RISK POOL, A JOINT SELF-INSURANCE PROGRAM AUTHORIZED BY RCW 48.62.031. THE WASHINGTON COUNTIES RISK POOL IS NOT AN INSURANCE COMPANY AND THIS LIABILITY COVERAGE IS NOT TRADITIONAL INSURANCE.**

CP 229.

**B. *Corter v. Groseclose and Douglas County.***

On March 23, 2012, defendant Corter filed a lawsuit against Douglas County and Steve Groseclose. The Complaint asserted claims against Douglas County and Steve Groseclose for the deprivation of Corter's constitutional right to privacy under 42 U.S.C. § 1983. CP 241-247.

On April 18, 2012, the WCRP agreed to provide a defense to defendant Groseclose under a reservation of rights to later deny coverage for any judgment awarded against him. The Pool appointed attorney Heather Yakely to defend Mr. Groseclose at the Pool's expense. CP 249-252.

On September 20, 2013, the Court in the Underlying Litigation entered an order granting Douglas County's Motion for Summary Judgment, dismissing Corter's claims against Douglas County with prejudice. CP 254-266.

On September 30, 2013, after the Court in the Underlying Litigation had dismissed Douglas County on summary judgment, the WCRP reiterated its commitment to defendant Groseclose to provide a defense subject to a reservation of rights to later deny coverage for any judgment against him. CP 268.

Corter's claims against defendant Groseclose proceeded to trial and on October 30, 2013 the jury returned a verdict in favor of Corter in the amount of $60,000. This verdict was reduced to judgment on October 31, 2013. CP 270-272.

On November 6, 2013, after the jury verdict and judgment was entered against Groseclose in the Underlying Litigation, the WCRP informed defendant Groseclose that it was enforcing its prior reservation of rights to deny coverage for any judgment against him and that, consistent with the WCRP's By-laws, Groseclose had 30 days from that date to appeal the Pool's decision to the WCRP Executive Director. CP 274-275.

On December 4, 2013, Groseclose and Corter entered into an Agreement under which the parties agreed to the following: (1) Corter and Groseclose stipulated that the subjects of the Agreement were the judgments entered by the Court in the Underlying Litigation in the amount of $60,000 and a second judgment yet to be entered by the Court in an amount of Corter's attorneys fees and costs; (2) Groseclose agreed to assign to Corter "all rights, privileges, claims and causes of action that he may have against Douglas County and/or the Risk Pool/insurers affiliated with Douglas County and its agents"; and (3) Corter agreed to a qualified covenant not to execute or enforce judgment against Groseclose "unless and until all possible avenues of settlement, litigation, and appeals against [Douglas County and/or the Risk Pool/insurers affiliated with Douglas County and its agents] have been completely exhausted and have not resulted in a judgment or settlement against those parties." CP 277-281.

Neither defendant Groseclose nor defendant Corter appealed to the Pool's Executive Director the Pool's November 6, 2013 decision to enforce its prior reservation of rights to deny coverage for any judgment against him. CP 200-201.

C. ***WCRP v. Groseclose and Corter and Douglas County.***

On January 17, 2014, the WCRP filed its complaint for declaratory relief in Douglas County Superior Court against Tamara Corter, Steve Groseclose and Douglas County. CP 1-52. Groseclose and Corter filed their answer and a cross-claim for declaratory relief against Douglas County on February 20, 2014. CP 58-70. Douglas County filed its answer and cross-claim for declaratory relief against Corter and Groseclose on February 25, 2014. CP 53-57. Douglas County filed its motion for summary judgment on its cross-claim against Corter and Groseclose on June 27, 2014. CP 75-76. The WCRP filed its motion for summary judgment on its claim for declaratory relief against Groseclose and Corter on July 1, 2014. CP 188-198.

Corter's and Groseclose's cross-motion for summary judgment was filed on July 9, 2014. CP 282-307. The trial court heard oral argument on August 7, 2014 and entered summary judgments in favor of the WCRP and Douglas County and final judgment in their favor on August 22, 2014. CP 380-383. This appeal followed.

In their opening brief on appeal, Corter and Groseclose do not dispute the fact that the WCRP provided Groseclose with a

defense attorney in the Underlying Litigation at no cost to Groseclose and do not dispute that on November 6, 2013, the WCRP informed Groseclose that, consistent with the WCRP's By-laws, Groseclose had 30 days from that date to appeal the Pool's decision to enforce its reservation of rights to the WCRP Executive Director. CP 274-275. In addition, Groseclose and Corter do not dispute that Groseclose did not appeal the WCRP's enforcement of its reservation of rights and that under Article 8.B.2.e of the By-Laws, exhaustion of the mandatory appeal process is a condition precedent to any subsequent legal action by an aggrieved party. CP 220-223. Finally, Corter does not dispute that any rights she may have by virtue of Groseclose's assignment of his rights are subject to defenses the WCRP has against Groseclose.

## III. AUTHORITY AND ARGUMENT

### A. The WCRP is not an Insurance Company.

The trial court granted summary judgment for the Pool on the basis that because Groseclose did not exhaust the internal appellate review process mandated by the Pool's By-Laws, neither he nor his assignee Corter could challenge the Pool's decision to enforce its reservation of rights and deny Groseclose

indemnification for Corter's judgment against him. In an argument first raised in this appeal and non-responsive to the basis for either the Pool's or Douglas County's summary judgments, Corter and Groseclose repeatedly refer to the Pool as an insurance company and contend that the Pool's Joint Self-Insurance Policy should be considered an insurance contract. The Court should not consider this argument. RAP 2.5(a); *Columbia Park Golf Course, Inc. v. City of Kennewick*, 160 Wn.App. 66, 91, 248 P.3d 1067 (Div. III 2011). However, even if the Court does consider this non-responsive argument, it is contrary to Washington law.

The Legislature enacted Chapter 48.62 in order to give public entities the option to jointly self-insure as **an alternative** to purchasing traditional commercial insurance. Nothing in the statute indicates that, by virtue of exercising that option, these public entities then become insurers, subject to insurance law. In fact, in the final section of the new legislation on joint self insurance for public entities, the Legislature expressly stated that: "[t]wo or more local governmental entities...which...join together and organize to form an organization for the purpose of jointly self-insuring shall not be deemed an 'insurer' under this code." The insurance code also makes this equally clear. Chapter 48.01 RCW is the Washington

State insurance code. RCW 48.01.010. The insurance code expressly states that risk pools comprised of two or more local governmental entities are not insurers:

> "Insurer" as used in this code includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society. A reciprocal or interinsurance exchange is an "insurer" as used in this code. Two or more hospitals that join and organize as a mutual corporation pursuant to chapter 24.06 RCW for the purpose of insuring or self-insuring against liability claims, including medical liability, through a contributing trust fund are not an "insurer" under this code. **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**. Two or more affordable housing entities that join together and organize to form an organization for the purpose of jointly self-insuring or self-funding under chapter 48.64 RCW are not an "insurer" under this code. Two or more persons engaged in the business of commercial fishing who enter into an arrangement with other such persons for the pooling of funds to pay claims or losses arising out of loss or damage to a vessel or machinery used in the business of commercial fishing and owned by a member of the pool are not an "insurer" under this code.

RCW 48.01.050.

The composition and functions of the Pool also demonstrate that the Pool is not an insurer. Unlike a traditional insured-insurer relationship, where an individual or entity purchases insurance from

a for-profit company, here, the 26 members of the Pool are jointly self-insuring as an association of counties, and then above a certain limit, are purchasing excess or reinsurance to cover additional liabilities. Individuals or any entity other than a Washington State county cannot join or buy its way into the Pool; rather, under Chapter 39.34 RCW and 48.62 RCW, and the Pool's Interlocal Agreement, membership in the Pool is limited to Washington State counties. CP 204.

The member counties also have obligations and benefits that no insured assumes through the purchase of traditional insurance. As dictated by statute, RCW 48.62.060, and the terms of the Interlocal Agreement, each member county of the Pool has contingent liability for the liabilities of the Pool in the event that the Pool does not have sufficient assets to cover its liabilities. CP 207. In contrast, when an insured purchases a policy from a traditional insurance carrier, that individual has no liability for that insurer's potential contingent liabilities, and certainly has no obligation to shoulder its co-insured's potential contingent liabilities.

As set forth in the Interlocal Agreement, all income and assets of the Pool, including surplus funds, are for the exclusive benefit of the member counties, and used solely for Pool purposes. CP 205. No purchaser of traditional insurance has access to any of its insurer's assets, beyond the coverage that was purchased. Moreover, each of the member counties understands that by joining

the Pool, it is electing to join an association of counties, and that the Pool is not an insurer, or subject to insurance law principles.

The Pool's JSILP also reflects, in unambiguous bolded terms, that the Pool is not an insurer:

> **NOTICE: THE FOLLOWINGLIABILITY COVERAGE IS PROVIDED BY THE WASHINGTON COUNTIES RISK POOL, A JOINT SELF-INSURANCE PROGRAM AUTHORIZED BY RCW 48.62.031. THE WASHINGTON COUNTIES RISK POOL IS NOT AN INSURANCE COMPANY AND THIS LIABILITY COVERAGE IS NOT TRADITIONAL INSURANCE.**

CP 229.

This is not an ambiguous statement. This provision is not hidden or buried in a mass of small print; instead, it is in bold, and in all-capital letters.

The cases and treatises that have addressed this issue also provide that risk pools are not insurance companies and are not subject to insurance law provisions, and that self-insurance policies are not insurance and should be guided by traditional contract principles. A case out of California aptly illustrates this point. In *City of South El Monte v. Southern California Joint Powers Insurance Authority*, 45 Cal.Rptr.2d 729 (1995), the member city sued the defendant risk pool for failing to defend the City against a lawsuit brought by an electroplating business that was forced to

shut down because of a City noise reduction ordinance. *Id.* at 730. The trial court granted the city's motion for summary judgment, concluding in relevant part that a contract of indemnity existed between the City and the pool, and that insurance law was applicable to coverage disputes. *Id.* at 738.

The appellate court disagreed, and reversed the summary judgment order. In doing so, the court engaged in a lengthy discussion of why risk pools are formed and why ordinary insurance coverage interpretation rules do not apply. Specifically, the *City of South El Monte* court stated:

> Both parties agree coverage of claims under the Program will be determined by the terms and definitions of the excess insurance policies. However, **the issue arises whether principles of insurance law should be used to resolve questions of coverage. Under the facts of this case, our answer is no. Considering the purpose of the pooling arrangements, we determine questions of coverage are properly answered by relying on rules of contract law that emphasize the intent of the parties**. Given a local entity's broad power to insure against all potential liabilities and to do that through joint power pooling arrangements, principles governing insurance carriers and insurance law have no applicability, absent consent of the parties to the pooling agreement.
>
> Joint authority pools are member-directed. Municipalities best understand the nature of their risks and losses and a "sense of ownership in the pool endeavor [is] an important motivation in practicing risk management." The pools are the creation of the

membership and reflect the local perspective on matters the members have elected to pool and share. **Members agree to abide by the terms of their joint powers agreements and programs and agree to pool prescribed losses. They have the authority to self-insure as they deem appropriate and to provide additional coverage as necessary**. This authority is based on the members' perceptions of which risks they elect to pool and which risks they do not.

**Members jointly determine the scope and extent of their own coverage**. They do so by creating member-written agreements and programs tailored to suit the needs of the participating entities. The governing bodies of these pooling arrangements interpret the agreements and programs to implement the intent of the members. The joint powers agreement, by-laws and the self-insurance program, with related coverage memoranda, provide the framework within which to determine the rights, liabilities, and intentions of the pools and their respective members.

In our case, an analysis of duty to defend and coverage issues must give full effect to the intent of the member cities of the Authority as reflected in the policies and procedures adopted by the Executive Committee with the approval of the Board of Directors. The Authority, through its members, agreed to adopt the definition of occurrence in the excess insurance policies to decide the issue of what is a covered claim. **They did not agree to also incorporate principles governing insurance carriers and insurance law into coverage decisions. It is this Agreement by the member cities that is the crux of the coverage determination**.

*City of South El Monte*, 45 Cal.Rptr.2d at 734-35 (emphasis added) (internal citations omitted).[3]

The risk pool in the *El Monte* case is on all fours with the Washington Counties Risk Pool. Like in *El Monte*, the Pool's member counties agree to be bound by their joint powers agreement; here, the Interlocal Agreement. Like in *El Monte*, where the members created their own coverage document, here, in creating the JSILP and amending it when necessary, the member counties jointly determined the scope and extent of their own coverage.

In another analogous case, *City of Arvada v. Colorado Intergovernmental Risk Sharing Agency*, 19 P.3d 10 (Colo. 2001), where the Colorado Supreme Court affirmed summary judgment for a risk pool after it denied coverage of a breach of leasehold claim, the court stated:

> [A]n insurance pool is, in essence, an extension of each member, as the funds that provide the coverage come directly from the members, and the type and extent of coverage is determined collectively by the members themselves. **Thus, self-insurance pools are more properly linked to simple self-insurance than to insurance companies**.

19 P.3d at 13 (emphasis added).

---

[3] *See also Southgate Recreation & Park Dist. v. California Ass'n for Park & Rec. Ins.*, 130 Cal.Rptr.2d 728, 730 (2003) (recognizing *City of South El Monte*'s rule that risk pools are not considered insurance, and that "questions of defense and coverage are answered by relying on rules of contract law that emphasize the parties' intent").

The *City of Arvada* court continued:

> It is clear from these definitions ["insurance" and "insurer"] that a self-insurance pool does not qualify as either an insurance company or an insurer. Self-insurance pools are not in the *business* of making contracts of insurance, as they are not for-profit associations. Furthermore, insurance pools do not undertake the indemnification of a third party. **Rather, an insurance pool is, in essence, an extension of each member, as the funds that provide the coverage come directly from the members, and the type and extent of coverage is determined collectively by the members themselves. Thus, self-insurance pools are more properly likened to simple self-insurance than to insurance companies**.

*Id.* at 13 (emphasis added).

## B. Assignees take their rights subject to any defenses a person may have against the assignor.[4]

Under Washington law it has long been settled that an assignee takes her rights subject to any defenses a person may have against her assignor. *See. e.g. Pacific Northwest Life Ins. Co. v. Turnbull*, 51 Wn. App. 692, 700, 754 P.2d 1262 (1988); *Federal Finance Company, Inc. v. Humiston*, 66 Wn.2d 648, 651-52, 404 P.2d 465 (1965). Therefore, to the extent Groseclose may not

[4] For purposes of its summary judgment below, the Pool specifically preserved and did not waive its argument that Groseclose was not allowed to assign his rights to Corter under the applicable JSILP.

dispute a coverage determination by the WCRP with respect to any duty to indemnify him for the judgment entered against him by Corter, Corter also may not dispute that coverage determination on her assigned claim from Groseclose.

### C. Groseclose failed to exhaust his administrative appellate rights under the WCRP By-Laws and is thus precluded from challenging the WCRP's decision to refuse to indemnify him.

Pursuant to Article 8.A.5, on November 6, 2013, after the jury in the Underlying Litigation returned its verdict and judgment was entered against him, the Pool informed Mr. Groseclose in writing that it was enforcing its prior reservation of rights to deny coverage for that judgment. CP 274-275. The Pool also informed him that consistent with Article 8.B.3 of the By-laws, he was now authorized to appeal the Pool's decision to the Executive Director of the Pool within the next 30 days. *Id.* Neither Mr. Groseclose nor Ms. Corter chose to appeal the Pool's enforcement of its reservation of rights within the allotted 30 days. CP 200-201. Under Article 8.B.2.e of the By-Laws, exhaustion of the appeal process outlined in Article 8.B of the By-Laws is a condition precedent to any subsequent legal action by an aggrieved party. CP 220-223.

Having failed to exhaust their right to appeal the Pool's initial decision to enforce its reservation of rights under the WCRP By-Laws, Groseclose and Corter are now barred from challenging the Pool's decision herein.

**D. Groseclose is bound by the WCRP By-Law Appeal Requirements.**

The WCRP appointed attorney Heather Yakely to defend Groseclose in the Underlying Litigation. Ms. Yakely defended Groseclose through trial and post verdict motions. The WCRP paid all of Ms. Yakely's invoices in connection with her representation of Groseclose. Ms. Yakely's representation of Groseclose was made pursuant to written reservation of rights letters issued to Mr. Groseclose, which letters were required under WCRP By-Law Article 8.A. CP 220-221. Article 8.A governs the coverage determination of the WCRP with respect to a "member county *or person claiming coverage or protection rights* under the Pool's Joint Self-Insurance Liability Policy ("JSILP"). *Id.* After the verdict against Groseclose was entered in the Underlying Litigation was returned and judgment entered against him, the WCRP specifically informed Groseclose that the Pool was enforcing its reservation of rights and would refuse to pay the judgment Corter obtained

against him and that Groseclose that pursuant to Article 8.B.3 of the By-Laws he now had the right to appeal the WCRP's decision to enforce its reservation of rights and that the appeal process was governed by Articles 8.B.1 and 8.B.2. CP 274-275; CP 221-222.

Despite having accepted the benefit of a defense provided in the Underlying Litigation pursuant to the Interlocal Agreement, WCRP By-Laws and applicable JSILP, Groseclose continues to claim that he is not bound by their terms and conditions. Groseclose is specifically contemplated as a potential covered party under these documents. CP 207 - Article 14 of the Interlocal Agreement; CP 220-223 - Article 8 of the By-Laws. Therefore, to the extent Groseclose accepted those benefits and seeks to make the WCRP pay for the judgment entered against him in the Underlying Litigation he is subject to any defenses the WCRP may raise to Groseclose's claims that may exist in these documents. *Kinne v. Lampson*, 58 Wn.2d 563, 567; 364 P.2d 510 (1961); *Shaffer v McFadden*, 125 Wn. App. 364, 369, 104 P.3d 742 (2005). One of those defenses is the requirement that Groseclose exhaust the appeal requirements in Article 8 of the By-Laws. Groseclose does not dispute that he failed to exhaust these requirements.

## E. The "Futility" exemption from the Exhaustion Doctrine under RCW 34.05.534(3)(b) is not applicable.

Groseclose next argues that even if he were subject to the appeal requirements in the WCRP By-Laws, because any appeal would have been futile, he is relieved from fulfilling them under RCW 34.05.534 (3)((b). This statute is part of the Administrative Procedure Act ("APA"). The Administrative Procedure Act codified in RCW 34.05 only applies to state agencies and was not intended to include local agencies that are not concerned with statewide programs or part of a statewide system. *Riggins v. Housing Authority of Seattle*, 87 Wn.2d 97, 99-100, 549 P.2d 480 (1976); *Kitsap County Fire Protection District No. 7, v. Kitsap County Boundary Review Board*, 87 Wn. App. 753, 757, 943 P.2d 380 (1997).

The WCRP consists of a pool of local government entities that have joined together to jointly self-insure pursuant to RCW 48.62.031 and RCW 39.34 and is neither a statewide program nor part of a statewide system. Therefore, RCW 34.05.534 and the case law interpreting that statute have no application to the coverage appeals process described in the WCRP By-Laws.

## F. Even if the Administrative Procedure Act did apply, the "Futility" Exemption from the Exhaustion Doctrine under RCW 34.05.534 would not.

Exhaustion is required when: (1) a claim is cognizable in the first instance by an agency alone; (2) the agency has clearly established mechanisms for the resolution of complaints by aggrieved parties; and (3) the administrative remedies provide the relief sought. *Buechler v. Wenatchee Valley College*, 174 Wn. App. 141, 153, 298 P.3d 110 (2013). The exhaustion doctrine advances a number of sound policies; among others, it avoids premature interruption of the administrative process, provides full development of the facts and gives an agency the opportunity to correct its own errors. *Id.* Futility that will excuse exhaustion arises only in rare factual situations. *Id.* at 154. A party's subjective belief that an internal administration procedure is futile is insufficient to establish futility. *Id.* Moreover, futility is not shown by speculation that appeal would have been futile. *Id.*

Because the initial reservation of rights letter and post-judgment letter enforcing the reservation of rights utilize the same factual reasoning, Groseclose contends that any appeal would be futile. Groseclose's argument rests on pure speculation. This argument completely ignores the two level appeals process in the

WCRP By-Laws. CP 221-223. The First Level Appeal is made to the WCRP Executive Director and allows the aggrieved party to present a written statement of why the Claims Manager's decision was incorrect. *Id.* The Second Level Appeal – if necessary -- is made to the Executive Committee of the WCRP Board of Directors and allows the aggrieved party to submit a written statement, engage in oral argument at a hearing before the Executive Committee and present documentary evidence. *Id.* Groseclose's argument simply ignores this process and invites the Court to speculate as to the outcome of any appeals. Therefore, even if the futility exemption from the exhaustion doctrine under RCW 34.05.534 applied – and the WCRP denies that it does apply – the Court would still be required to enforce requirement that Groseclose exhaust the appeal requirements in the By-Laws.

**G. In the alternative, because Mr. Groseclose was not or purporting to act in good faith within the scope of his duties at the time of the conduct giving rise to Ms. Corter's lawsuit, the WCRP has no duty to indemnify Mr. Groseclose.**

The WCRP's duty to indemnify Mr. Groseclose for the judgment against him is conditioned upon Mr. Groseclose acting or purporting to act in good faith within the scope of his official duties

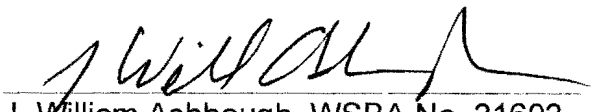
for Douglas County at the time of his conduct giving rise to Ms. Corter's lawsuit. CP 230. The WCRP joins in the briefing filed by respondent Douglas County in this regard.

## IV. CONCLUSION

For the foregoing reasons, the WCRP respectfully requests that the Court affirm the trial court.

Respectfully submitted this 18th day of February 2015.

HACKETT, BEECHER & HART



J. William Ashbaugh, WSBA No. 21692
Attorneys for Washington Counties
Risk Pool

CERTIFICATE OF SERVICE

The undersigned hereby declares under penalty of perjury under the laws of the State of Washington that on February 18, 2015, she caused the Brief of Washington Counties Risk Pool to be served on the following parties of record by sending copies via U.S. Mail (postage prepaid):

COUNSEL FOR APPELLANTS CORTER AND GROSECLOSE:

Jeffrey R. Caffee
Van Siclen, Stocks & Firkins
721 45th Street NE
Auburn, WA 98002

COUNSEL FOR RESPONDENT DOUGLAS COUNTY:

Steven M. Clem
Douglas County Prosecuting Attorney
P.O. Box 360
Waterville, WA 98858-0360

Signed in Seattle, WA this 19th day of February 2015.

Linda Voss

Linda Voss
Hackett, Beecher & Hart