

COURT OF APPEALS,
DIVISION TWO
OF THE STATE OF WASHINGTON

Terry Linville and Julie Linville, Husband and wife, individually and on behalf of J.L., a minor; Timothy Ryan and Tammi Ryan, husband and wife, individually and on behalf of T.H.R., a minor; Michael Murray and Iesha L. Hall, individually and on behalf of D.H., a minor, Yvonne Poplawski, individually and on behalf of H.K., a minor, and on behalf of a class of similarly situated,

APPELLANTS

vs.

STATE OF WASHINGTON,

RESPONDENT

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BRIEF OF APPELLANT

James F. Leggett, WSBA #6630
Leggett & Kram, Attorneys at Law
Attorneys for Appellants
1901 South I Street
Tacoma WA 98405-3810
Telephone: (253) 272-7929

ORIGINAL

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(A) Assignments of Error:

1. The Trial Court erred in entering the Order on Motion to Compel dated 10 February, 2006.
2. The Trial Court erred in entering the Protective Order dated 10 February, 2006.
3. The Trial Court erred in entering the Order on Motion to Continue State's Motion for Summary Judgment dated 3 March, 2006.
4. The Trial Court erred in entering the Order to Certify Plaintiff Class dated 3 March, 2006.
5. The Trial Court erred in entering the Order on Renewed Motion to Continue State's Motion for Summary Judgment dated 17 March, 2006.
6. The Trial Court erred in finding that the case involved no genuine issue of material fact and entering the Order Granting Defendant's Motion for Summary Judgment dated 17 March, 2006.

Issues Pertaining to Assignments of Error

1. Did the Trial Court abuse its discretion in denying repeated Motions to allow discovery on the issues which were involved in the State Defendant's Motion for Summary Judgment and to Continue the hearing on the Motion until completion of such discovery? (Assignments of Error 1, 2, 3, 4, 5, & 6)
2. Did the Trial Court commit an error of law in its interpretation and application of the scope of discovery authorized pursuant to CR 26, 33, & 34 where the party from which discovery is sought is a corporation or government? (Assignments of Error 1, 2, 3, 4, 5, & 6)

3. Did the Trial Court abuse its discretion in Denying the Certification of the Plaintiff Class without allowing discovery as to the number in the Class and failing to make a rigorous analysis of the propriety of the Class? (Assignment of Error 4)
4. Were there grounds for a CR 56(f) continuance of the Hearing on Summary Judgment? (Assignment of Error 5 & 6).
5. Was there an issue of fact which precluded grant of Summary Judgment? (Assignment of Error 6).
6. Were Plaintiffs denied due process and equal protection of the law by the denial of discovery against the State? (Assignment of Error 1, 2, 3, 4, 5, & 6).

(B) Statement of the Case:

This action was commenced on 14 November, 2005 by filing and service of the Complaint which was amended to add Ms. Poplawski once the 60 days expired for her Tort Claim against the State (CP 988). In conjunction with the Trial Court's Denial of Plaintiffs' Motion to Compel (CP 357) and Grant of the State's Motion for Protective Order (CP 359), the Court ordered the State to file proposed discovery circumventing the objections it raised to obtain the Protective Order. The State filed its proposed discovery on 9 March, 2006 (CP 1036). Even faced with this proposed discovery suggested by the State, the Trial Court denied the renewed CR 56(f) Motion to Continue (CP 1034) the hearing on the State's Motion for Summary Judgment on 2 March, 2006 (CP 1251), which was orally renewed at the Summary Judgment Hearing 17 March, 2006, and the Court granted the State's Motion For Summary Judgment, Dismissing the action (CP 1246). The Trial Court denied the Plaintiffs' Motion to Certify the Class (CP 1021). Timely Notice of Appeal was filed on 10 April, 2006 (CP 1253).

This case involves the failure of the State of Washington to implement RCW 48.88 (CP 4). In the early eighties, homeowner insurers were pulling out of the market where a homeowner conducted a day care in the home due to the potential for liability for sexual abuse of children in care by other than the licensee. (48.88.010. Intent A - 8; 48.88.030. Plan for joint underwriting association A- 9; 48.88.050. Policies--Liability limits--Rating plan A - 9; 48.88.070. Rules, A - 9).

The Insurance Commissioner's Office attempted to remedy the situation by enacting WAC 284-30-700 (A - 10). This was an effort to eliminate the risk to insurers of the Courts interpreting policies to cover sexual abuse by approving exclusion of that coverage. (CP 4 A - 13 - 17) However, the Legislature was not satisfied with that approach in that it wanted coverage for sexual abuse of clients of in-home daycare providers. Therefore, the Legislature passed and the Governor signed legislation establishing a Joint Underwriting Association to provide coverage of at least \$100,000 for sexual assault of clients of in-home daycare providers.

There was a dispute between the House and the Senate as to whether the Commissioner would be required to establish a Joint Underwriting Association or whether he would have discretion to determine if it was needed. The House prevailed and the discretionary language was removed (CP 4 See legislative record attached A-1-8).

In response to the Statute, the Insurance Commissioner's Office enacted regulations intended to comply with the intent of the Statute, to include WAC284-78-100 (A - 13). However, in-spite of the removal of the discretion from the Insurance Commissioner by the Legislature, the Insurance Commissioner wrote such discretion into

the implementing regulations, WAC 284-78-030 (A - 10) (CP 4 A - 18 - 26). It is interesting to note that the Insurance Commissioner's Office went to great lengths not to be involved in providing information to daycare licensees about insurance availability nor to keep records thereof (CP 4 A - 26).

The determination of the issues requires obtaining evidence of the agents of the State's knowledge of Legislative Intent and what the State knew or, in the exercise of due care, should have known at the time and subsequently. The evidence at this point available to all the parties is that no "admitted" insurer of general application writes homeowner liability coverage for in-home daycare licensees which does not contain an exclusion of coverage for sexual abuse of a client by other than the licensee (CP 39 Letter to McKenna, A- 9 - 11). Further, all evidence obtained to-date indicates that no "admitted" carrier has provided coverage as required by RCW 48.88 (CP 4 A - 21). The Plaintiff Class is comprised of victims of this sexual assault.

The evidence on these issues is buried in the files of the State of Washington (CP 4 A-12). The Plaintiffs do not know the specific location of each relevant document, i.e. Legislative archives, State Archives, the Insurance Commissioner's Office, D.S.H.S., the State Attorney General's Office, the State Patrol (statistics of sexual assault), and The Governor's Office. Although the Plaintiffs have obtained some documents from Public Records Act requests, some of which are attached hereto (CP 4), there is no assurance that they are complete or that the Defendant does not have additional documentation stored in locations unknown to the Plaintiffs. As this Court is aware, a Public Records Act request must be directed to a specific records custodian while a Request for Production or Interrogatory need only be directed to the Defendant and the Defendant is

required to respond as to information within its possession or control and certify that the disclosure is complete (CR 26, 33, 34, & 37, A - 17).

The State of Washington has taken the position that the discovery rules should not encompass a requirement for it to disclose information held in any location other than the Office of the Insurance Commissioner (CP 166). The Judge agreed with the State and precluded discovery from other than the files of the Insurance Commissioner currently in possession of the Insurance Commissioner's Office (CP 357, 359). The problem with this logic is that older documents are moved to State Archives (CP 4 A-12); workers who have transferred from the Office of the Insurance Commissioner may have taken documents with them to other agencies of the State, i.e. Office of Financial Institutions and Mr. Jarvis; Computer files are backed up and stored on central storage; D.S.H.S. has information regarding Insurance needs (74.15.340. Day-care insurance A - 9), and D.S.H.S., the Attorney General and the State Patrol have the statistics on the number of sexual assault cases and those which have resulted in loss of in-home daycare licenses in this State (information needed to determine the members of the Plaintiff Class).

(C) Summary of Argument

The Trial Court allowed this case to "languish" for only 123 days from filing to dismissal. This case was not dismissed on a CR 12 Motion or for lack of jurisdiction, but was dismissed on the merits without the opportunity for the Plaintiff to engage in or complete meaningful discovery. Fundamental fairness and Due Process demand reversal.

(D) Argument

Issues 1, 2, 4, & 6:

Standard of review of discovery rulings of a Trial Court is usually abuse of discretion (Matter of Firestorm 1991 129 Wash.2d 130, *152, 916 P.2d 411, **422 (Wash.,1996)), however that discretion is not without limits.

"But neither should the courts stand by and permit what might be plainly relevant, and potentially extremely significant, evidence to be lost or hidden through intricate investigative plans, and a hypertechnical reading of discovery rules. The purpose of the discovery rules is to ensure trials are fair and the truth is not lost. We must continually affirm these principles, until litigation counsel get the unmistakable message we will apply these principles in discovery and we will sanction lawyers who do not take us at our word." Matter of Firestorm 1991 129 Wash.2d 130, *152, 916 P.2d 411, **422 (Wash.,1996).

Further, when the conduct of the Trial Court in denying discovery reaches the level infringing upon Civil Due Process and Equal Protection rights of litigants under the United States' (A - 5) and Washington State Constitutions, the standard of review is a legal issue and, as it affects a fundamental right of equal treatment of litigants in the Courts and determines the propriety of the grant of Summary Judgment Dismissing the case, this Court should review the action of the Trial Court de novo or at least under the compelling State interest standard.

"In reviewing an order of summary judgment, this court engages in the same inquiry as the trial court. *E.g., Reid v. Pierce County* 136 Wash.2d 195, 201, 961 P.2d 333 (1998). Summary judgment is upheld if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *E.g., Green v. A.P.C. (American Pharm. Co.)*, 136 Wash.2d 87, 94, 960 P.2d 912 (1998) (citing, inter alia, CR 56(c)). Because this case is reviewed on stipulated facts, the issues are solely questions of law and *210 are reviewed de novo. *See Di Blasi v. City of Seattle*, 136 Wash.2d 865, 873, 969 P.2d 10 (1998) (citing case)." Tunstall ex rel. Tunstall v. Bergeson 141 Wash.2d 201, *209-210, 5 P.3d 691, **696 (Wash.,2000)

"Whether a statute is constitutional is a question of law, which we review de novo. *State v. Shultz*, 138 Wash.2d 638, 643, 980 P.2d 1265 (1999)." City of Bremerton v. Tucker 126 Wash.App. 26, *30, 103 P.3d 1285, **1286 (Wash.App. Div. 2,2005)

"The first step in conducting any equal protection analysis is determining the appropriate standard of review. *Foley v. Department of Fisheries*, 119 Wash.2d 783, 789, 837 P.2d 14 (1992) (citing case). Contrary to the dissent's assertions, to apply strict scrutiny, we

must first find that a fundamental right is being infringed or a suspect class is involved. *See O'Day v. King County*, 109 Wash.2d 796, 814, 749 P.2d 142 (1988); *City of Seattle v. State*, 103 Wash.2d 663, 670-71, 694 P.2d 641 (1985)." Tunstall ex rel. Tunstall v. Bergeson 141 Wash.2d 201, *225, 5 P.3d 691, **704 (Wash.,2000)

"It is clear from both these cases that infringement of a *226 fundamental right is a legal requirement to applying strict scrutiny review. On the other hand, *impermissible* infringement--infringement of a fundamental right by an overly broad law unsupported by a compelling state interest--is an ultimate legal conclusion in an equal protection analysis. *See O'Day*, 109 Wash.2d at 814, 749 P.2d 142; *City of Seattle*, 103 Wash.2d at 670-71, 694 P.2d 641." Tunstall ex rel. Tunstall v. Bergeson 141 Wash.2d 201, *226, 5 P.3d 691, **704 (Wash.,2000)

"Fourteenth Amendment Fourteenth Amendment equal protection jurisprudence has generally utilized two separate standards of review.[FN1] One, utilizing **886 the normal presumptions of constitutionality, requires only that the classification adopted bear a rational relationship to a legitimate public purpose.[FN2] The other standard of review, requiring a 'very heavy burden of justification,' [FN3] (i.e., the showing of a compelling state interest) is imposed either when a 'suspect' classification such as race is utilized[FN4] or when the interest protected is as fundamental to the democratic*433 process as voting or interstate travel.[FN5] In either case, all members of the class must be similarly treated." Thurston v. Greco 78 Wash.2d 424, *432-433, 474 P.2d 881, **885 - 886 (WASH 1970) Justice Finley Concurring.

"The standard of review for an alleged substantive due process violation also employs a three-part test: "(1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner." *Id.* at 330, 787 P.2d 907. As inspection shows, all of these tests can be reduced to the central inquiry--does the regulation "go too far.?" Sintra, Inc. v. City of Seattle 131 Wash.2d 640, *691, 935 P.2d 555, **581 (Wash.,1997)

Here, also, the question is "whether the Trial Judge went too far?".

The central issue of this Appeal is whether the State of Washington is the party defendant or whether an individual State Agency, the Office of Insurance Commissioner, is the party Defendant for the purpose of the Discovery Rules. There are no cases directly in point in the Courts of the State of Washington. However, the Federal Rules of Civil Procedure, upon which the State of Washington Civil Rules were patterned, are instructive and determine that the United States of America is the Defendant in a Federal

Tort Claim litigation and the Rules of Discovery apply to it rather than limited to one of its Agencies.

"The Federal Tort Claims Act provides that the United States is the sole party which may be sued for personal injuries arising out of the negligence of its employees. 28 U.S.C. §§ 1346(b), 2679(a) (1982). Individual agencies of the United States may not be sued." Allen v. Veterans Admin. 749 F.2d 1386, *1388 (C.A.Cal.,1984).

"The Government as a litigant is, of course, subject to the rules of discovery." U. S. v. Procter & Gamble Co. 356 U.S. 677, *681, 78 S.Ct. 983, **986 (U.S. 1958).

"Modern instruments of discovery serve a useful purpose, as we noted in Hickman v. Taylor, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451. They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable**987 extent. Id., 329 U.S. at page 501, 67 S.Ct. at page 388." U. S. v. Procter & Gamble Co. 356 U.S. 677, *682, 78 S.Ct. 983, **986 - 987 (U.S. 1958)

"Thus, in the absence of a claim that disclosure would jeopardize state secrets, see United States v. Reynolds, 345 U.S. 1, 73 S.Ct. 528, 97 L.Ed. 727 (1953), memoranda consisting only of compiled factual material *88 or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government. " Environmental Protection Agency v. Mink 410 U.S. 73, *87-88, 93 S.Ct. 827, **836 (U.S. Dist. Col. 1973)

"It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, common-sense approach that has long governed private parties' discovery of such documents involved in litigation with Government agencies. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents." Environmental Protection Agency v. Mink 410 U.S. 73, *91, 93 S.Ct. 827, **838 (U.S. Dist. Col. 1973)

Two of our most well respected Jurists, Mr. Justice Frankfurter and Mr. Justice Douglas, instruct that the Due Process Clause of the United States Constitution extends to procedural conduct of litigation in which the United States is a party.

"The Attorney General is certainly not immune from the historic requirements of fairness merely because he acts, however conscientiously, in the name of security. Nor does he obtain immunity on the ground that designation is not an 'adjudication' or a 'regulation' in the conventional use of those terms. Due process is not confined in its scope to the particular forms in which rights have heretofore been *174 found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our

whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice, it is also a living principle not confined to past instances." Joint Anti-Fascist Refugee Committee v. McGrath 341 U.S. 123, *173-174, 71 S.Ct. 624,**650 (U.S.1951) Mr. Justice Frankfurter Concurring.

"When the **652 Government becomes the moving party and levels its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the Government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path.
FN2. Rule 8(a), Federal Rules of Civil Procedure.

FN3. As Mr. Justice FRANKFURTER points out, due process requires no less. But apart from due process in the constitutional sense is the power of the Court to prescribe standards of conduct and procedure for inferior federal courts and agencies. See McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819." Joint Anti-Fascist Refugee Committee v. McGrath 341 U.S. 123, *177, 71 S.Ct. 624, **652 (U.S.1951) Mr. Justice Douglas Concurring

"It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." Joint Anti-Fascist Refugee Committee v. McGrath 341 U.S. 123, *179, 71 S.Ct. 624, **652 (U.S.1951) Mr. Justice Douglas Concurring. (emphasis added)

"We find nothing in the nature of the rights and obligations of joint tort-feasors to require such a procedural distinction, nor does the Act state such a requirement. On the contrary, the Act expressly makes the Federal Rules of Civil Procedure applicable,^{FN9} and Rule 14 provides for third-party practice.^{FN10}" U.S. v. Yellow Cab Co. 340 U.S. 543, *553, 71 S.Ct. 399, **406 (U.S. 1951).

The logic behind the implementation of the Federal Tort Claims Act A - 5) and application of procedural rules equally to the government as they do to other litigants also applies to State Tort Claim Statutes as explained by another highly regarded Jurist, Judge Cardozo.

"In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo's statement in Anderson v. John L. Hayes Construction Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30: 'The exemption of the sovereign from suit involves hardship enough, where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been

announced. “””” U.S. v. Yellow Cab Co. 340 U.S. 543, *554, 71 S.Ct. 399, **406 (U.S. 1951)

"As applied to the State of New York, Judge Cardozo said in language which is apt here: 'No sensible reason can be imagined why the state, having consented to be sued, should thus paralyze the remedy.'**407 Anderson v. John L. Hayes Const. Co., 243 N.Y. at page 147, 153 N.E. at page 29. 'A sense of justice has brought *555 a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen. * * * When authority is given, it is liberally construed.' United States v. Shaw, 309 U.S. 495, 501, 60 S.Ct. 659, 661, 84 L.Ed. 888." U.S. v. Yellow Cab Co. 340 U.S. 543, *554-555, 71 S.Ct. 399, **406 - 407 (U.S. 1951) (emphasis added)

The scope of discovery from the United States is not limited to the agency directly involved in the litigation, but extends to wherever the information may lie.

"The court reaffirmed that Rewald "is entitled to discover information related to whether CIA officials directed him to engage in any of the activities charged in the indictment." U.S. v. Rewald 889 F.2d 836, *848 (C.A.9 (Hawaii),1989). (The Court did not limit discovery to information in the hands of the U.S. Prosecutor).

The discovery denied directly impacts the ability of the Plaintiff Class to present admissible evidence on the Legislative Intent, the knowledge of the State, the intent of the State's agents, the actions of insurers and lobbyists which may have affected the failure to implement the mandate of the Statute, and the membership of the Class itself, so that Plaintiffs and Class are denied due process and equal protection of the law by the failure of the Trial Court to even allow the discovery offered by the State.

"...nor shall any State deprive any person of life, liberty, or property, without due process of law;" U.S.C.A. Const. Amend. XIV, § 1-Due Proc.

"...nor deny to any person within its jurisdiction the equal protection of the laws."
U.S.C.A. Const. Amend. XIV, § 1-Equal Protect

"No person shall be deprived of life, liberty, or property, without due process of law."
West's RCWA Const. Art. 1, § 3 (A - 5)

"Procedural fairness is provided for in civil due process. Notice, open testimony, time to prepare and respond to charges, and a meaningful hearing before a competent tribunal in

an orderly proceeding are all elements of civil due process." In re Moseley 34 Wash.App. 179, *184, 660 P.2d 315, **318 (Wash.App.,1983)

"CR 26 has been labeled as the 'General Provisions Governing Discovery.' Subsection (b) states as follows:

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

[3] [4] CR 33(b) states that '(i)nterrogatories may relate to any matters which can be inquired into under Rule *434 26(b), . . .' The Washington rules were patterned after the Federal Rules of Civil Procedure which were established to permit broad discovery. **1081 Harris v. Nelson, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969). The only limitation is relevancy to the subject matter involved in the action, not to the precise issues framed by the pleadings, and inquiry as to any matter which is or may become relevant to the subject matter of the action should be allowed, subject only to the objection of privilege. Felix A. Thillet, Inc. v. Kelly-Springfield Tire Co., 41 F.R.D. 55 (D.P.R.1966). The test in determining relevancy of interrogatories is whether the testimony sought may reasonably be expected to lead to the discovery of admissible evidence. Provisional Government of French Republic v. Tower's Warehouse, Inc., 11 F.R.D. 291 (D.N.Y.1951); Diel v. Beekman, 7 Wash.App. 139, 499 P.2d 37 (1972). As stated in the landmark case of Hickman v. Taylor, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947):

(T)he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise." Bushman v. New Holland Division of Sperry Rand Corp. 83 Wash.2d 429, *433-434, 518 P.2d 1078, **1080 - 1081 (WASH 1974).

Absent the Constitutional Issues, the Trial Judge clearly abused his discretion in denying the requested discovery. The specific Interrogatories and Requests for Production at issue are found at CP 45 - 50, 154 - 160. The following are provided by way of example:

Interrogatory No. 3: Of how many instances are you aware wherein a teenage boy, who was a resident of a home in which a daycare operated, molested one or more children in the care of the daycare between the enactment of RCW 48.88 and the present?

Answer: See objections to Interrogatories Nos. 1 and 2. Further, Defendant Office of the Insurance Commissioner does not receive or compile or maintain information concerning children being molested in daycares. This Interrogatory exceeds the scope of allowable discovery in that it is not reasonably calculated to lead to the discovery of admissible evidence regarding Plaintiff's claim that Defendant acted tortiously with regard to chapter 48.88 RCW. CR 26(b)(1).

Interrogatory No. 8: At any time since 1986, did the State of Washington have a policy, regulation, or statute which required in-home day care operators to have liability insurance coverage, either through a private insurer, a Joint Underwriting Association or a self-insurance pool? If so, please provide a copy of all such policies, regulations and/or statutes.

Answer: Objections. This request further demonstrates that Defendant's representation that there is no stand alone "State of Washington" for purposes of discovery in this lawsuit. Rather, each agency may or may not have policies, regulations, or legislative enactments thereby giving the agency authority to act. Further, Defendant Office of Insurance Commissioner does not license or regulate the day care industry. Interrogatory 8 also calls for a legal conclusion. Without waiving the foregoing objections, Defendant Office of Insurance Commissioner did not require, at any time since 1986, that day care operators have liability insurance coverage. CP 46, 47.

During a previous deposition of Mr. Jarvis during which he did not have the benefits of his notes and records, it was discovered that documents which could lead to the discovery of relevant and admissible evidence were within the control of the State, but not within the Insurance Commissioner's Office (CP 533, 535, 536, 539, 541, 543, 544, 547, 549 and attachments thereto). Some of those documents were obtained through a Public Records Request and are attached to CP 533).

Issue 3. Did the Trial Court abuse its discretion in Denying the Certification of the Plaintiff Class without allowing discovery as to the number in the Class and failing to make a rigorous analysis of the propriety of the Class? (Assignment of Error 4)

This Court reviews the Trial Court decision to Certify a Class for abuse of discretion. (Schweneman v. USAA Cas. Ins. Co. 2003 WL 103456, *4 (Wash.App. Div. 1) (Wash.App. Div. 1,2003). However, CR 23 (A - 15) requires the Trial Court to make

a rigorous analysis of the Class requirement, which was not possible in this case because the Court denied discovery from the Defendant State as to the number of the members of the Class and refused to take judicial notice of the number of instances of reports of acts to members of the Class. The proposed Class of Plaintiffs is described as:

"parents of minor children and minor children sexually molested while in the care of State of Washington Licensed in-home daycares wherein the perpetrator was convicted of sexual assault or a "founded" finding was made by D.S.H.S. after July, 1986 and for whose claims against the licensee were denied by licensee's homeowners insurance based upon an exclusion of coverage inconsistent with the provision of WAC 284-78-100 '... such policy may exclude from coverage an individual who directly commits or participates in the actual abuse, but it may not exclude from coverage other persons who may be liable only vicariously for such abuse.'" CP 501.

The Order of the Trial Court denying the Motion to Certify, CP 1021, does not set forth the required findings. In the oral hearing, the Court indicated that the grounds for its denial was that there was no evidence as to the number of potential members of the Class (Defendant has ordered the transcript of all hearings, but has not shared it with Plaintiff as of the date required for this Brief to be filed). The Trial Court rejected Plaintiffs' suggestion that it use common sense and judicial notice of the number of potential members of the Plaintiff Class. (Ali v. Ashcroft, 213 F.R.D. 390, 408 (W. D. Wash. 2003)). The actual members of the purported Plaintiff Class would be readily identifiable from the statistical data gathered by the Washington State Patrol and D.S.H.S. Without such required findings and evidence of "rigorous" analysis of the governing factors of CR 23, the ruling of the Trial Court is an abuse of discretion.

"The Supreme Court in *WEA* held that the trial court abused its discretion in refusing to certify a class "without appropriate consideration and articulate reference to the criteria of CR 23". *WEA*, 93 Wash.2d at 793, 613 P.2d 769. *WEA* does not hold that a certification decision must be upheld if the trial court explicitly considers the CR 23 factors. As is true in all types of cases, a court abuses its discretion when its decision is based on untenable

grounds or is manifestly unreasonable or arbitrary. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wash.2d 654, 683, 15 P.3d 115 (2000). " *Oda v. State* 111 Wash.App. 79, *91, 44 P.3d 8, **14 (Wash.App. Div. 1,2002)

"Class Certification

*4 A plaintiff seeking class certification must satisfy the requirements of CR 23. CR23(a) enumerates four prerequisites to a class action:

(1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. [FN17]

FN17. CR 23(a).

In addition, one of the three requirements of CR 23(b) must be met . [FN18] Although CR 23 should be liberally interpreted in favor of class actions, [FN19] class actions must strictly conform to the requirements of CR 23. [FN20] 'Class actions are specialized types of suits, and as a general rule must be brought and maintained in strict conformity with the requirements of CR 23.' [FN21] Accordingly, before granting class certification, the trial court must engage in a 'rigorous analysis' to ensure that the prerequisites of the rule have been met. [FN22]

FN18. These three requirements are:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only the individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. " *Schweneman v. USAA Cas. Ins. Co.* L 103456, *3 -4 (Wash.App. Div. 1,2003).

In considering whether to certify a class, the Court must take the substantive allegations of the complaint as true "with no consideration of the merits of the plaintiffs' claims" (*Washington Education Ass'n v. Shelton Sch. Dist.* 93 Wn.2d 790, 613 P.2d 769

(1980)) and interpret the requirements of CR 23 liberally to support the certification.

Here, common questions do not just predominate over individual questions, but the only relevant legal and factual issue is common to the proposed class. Even the damage issue is common wherein the limitation of the statutory claim is \$100,000 and a survey of the judgments for the conduct exceeds that amount (CP 504). If damage issues are not uniform, the Court could bifurcate the action. The potential members of the Class are the most vulnerable citizens of our State and not likely to be able to bring an action independently. (Class actions also serve the important purpose of educating individuals about their rights. Ergonomic Solutions, LLC v. United Artists, 50 P.3d 844, 848 (Ariz.App. 2002)). The economics of a "war" with the State of Washington and all of its resources makes uneconomic an individual action wherein there is only the potential for a \$100,000 recovery. The costs of the litigation could exceed that.

Issue 5. Was there an issue of fact which precluded grant of Summary Judgment?

As indicated above, the standard for review of a grant of Summary Judgment is de novo (Tunstall ex rel. Tunstall v. Bergeson 141 Wash.2d 201, *209-210, 5 P.3d 691,**696 (Wash.,2000)). In this case, the Trial Court, as an agent of the State, has taken away by denial of discovery a right given to the Plaintiffs by the State Tort Claim Statute contrary to the policy set-forth by Judge Cardozo (U.S. v. Yellow Cab Co. 340 U.S. 543, *554-555, 71 S.Ct. 399,**406 - 407 (U.S. 1951) RCW 4.92.090).

The thrust of the State's Motion for Summary Judgment was that it did not owe a duty to the Plaintiffs under any theory of the facts. This position is reliant upon only the office of the Insurance Commissioner being the Defendant (CP 365). Defendants strive

to turn mixed questions of law and fact into ones of duty to try and remove the restrictions from Trial Court's in leaving factual issues to the jury.

The existence of a legal duty is a question of law and " 'depends on mixed considerations of "logic, common sense, justice, policy, and precedent." Christensen v. Royal School Dist. No. 160 156 Wash.2d 62, *67, 124 P.3d 283, **285 (Wash.,2005).

"...question of whether a child between the ages of 6 and 17 has the capacity necessary to be assessed contributory fault is generally a question of fact for the jury. *Id.*

¶ 28 The majority errs in concluding that *no* fault may be assessed against the student because she had no duty to protect herself. RCW 4.22.015 includes multiple theories of fault, and a plaintiff's duty is not corresponding under all theories. Under the theory of contributory fault that a plaintiff unreasonably failed to avoid injury or to mitigate damages, a defendant must establish that a plaintiff did not use reasonable means under the circumstances to avoid or minimize damages. Thus, facts indicating that the student did not tell school officials or her parents about the sexual relationship when asked prior to the last sexual encounter with the teacher should be submitted to the jury for its *77 determination whether the student used reasonable means under the circumstances to avoid or minimize damages." Christensen v. Royal School Dist. No. 160 156 Wash.2d 62, *76-77, 124 P.3d 283, **290 (Wash.,2005) Justice Madsen Concurring and Dissenting.

"A jury should not be precluded from inquiring whether, through her conduct, the student failed to avoid injury caused by the alleged negligence of the school in hiring or supervising Diaz. There is a question of fact whether the student lied to her parents and school officials about her relationship with Steven Diaz. Specifically, the defendants argue that school officials questioned the student prior to the final sexual encounter between her and Diaz, and the student denied that she was in a sexual relationship with him. Under the majority's analysis, the question of whether these actions hindered the school district and the principal from fulfilling their duty to *79 protect the student and contributed to her injury cannot be considered by the jury in assessing fault. In effect, the student and her parents will be able to recover monetary damages from the district and the principal for negligent hiring and negligent supervision for failing to fulfill a duty the student may have obstructed them from fulfilling. I respectfully dissent." Christensen v. Royal School Dist. No. 160 156 Wash.2d 62, *78-79, 124 P.3d 283, **291 (Wash.,2005) Justice Madsen Concurring and Dissenting.

There are three separate actions of the State of Washington upon which Plaintiffs assert liability (CP 511). First, the act of the Insurance Commissioner's Office injecting discretion into activation of the Joint Underwriting Association into its regulations implementing RCW 48.88, where none had been provided in the statute and was

specifically rejected according to the legislative record (CP 517, 552, 554). Thus it was not a discretionary act providing immunity to the Commissioner as it was directly in opposition to the mandate of the Statute (U.S. v. Gaubert 499 U.S. 315, 322, 111 S. Ct. 1267, 1273 (U.S. Tex., 1991) and discussions at CP 518). Even if the individual Insurance Commissioner had immunity for this incorrect exercise of discretion, the State does not have such immunity (CP 512. *Savage v. State*, 127 Wash.2d 434, 899 P.2d 1270 (Wash. 1995)).

Second, the action of the Insurance Commissioner's Office in determining that the Insurance Industry had "filled the void" intended to be satisfied by the Joint Underwriting Association in 1986, was at the least negligent and perhaps more, where there is no evidence that any insurer "admitted" in Washington provided coverage for sexual abuse of a client of in-home daycare by other than the licensee (WAC 284-78-100(3) A - 13). The testimony of Scott Jarvis and the evidence submitted herein disclose an issue of fact as to the knowledge, motive, and actions of the staff of the Insurance Commissioner's Office, lobbyists and insurance industry members.

Third, since 1986, each staff and each Insurance Commissioner has made the same finding: "policies filling the void", were available. Further, D.S.H.S., in compliance with its own regulations, was required to inform licensees of the need for insurance to cover sexual abuse, which was recently mandated along with a warning to parents when it was not in place (CP 521 RCW 74.15.7(2) A - 9) and the Insurance Commissioner's Office was provide to notify licensees where the policies could be obtained (CP 515). The evidence is that no such policies have been available in

Washington State since before 1986, so there is an issue of fact as to the compliance of Washington State staff with the mandate of the Statute.

Assuming all the foregoing is true, what is the vehicle which transmits the duty of the State to Plaintiffs rather than having it stop at the licensee? There is no question that a licensee would have an action for the complained of conduct. Were the Plaintiffs within the class of intended beneficiaries of RCW 48.88 so as to give rise to standing to sue the State for the alleged misconduct? (CP 519, Halleran v. Nu West, Inc. 123 Wash.App. 701, 98 P.3d 52; Smith v. State, 59 Wash. App. 808, 802 P.2d 133). The ultimate facts to be obtained upon reversal and remand for discovery from the State on these issues will make a through analysis of the duty issue more possible.

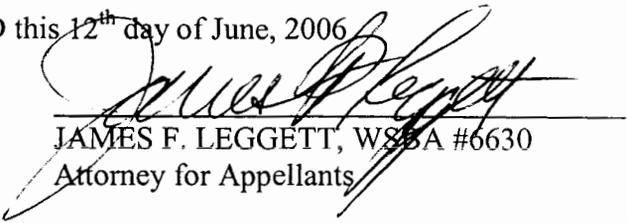
The "Special Relationship" between the Plaintiffs and the State is explored in CP 1228. The victim need not be named in the Statute to be an intended beneficiary, but merely be the foreseeable object of damage from the failure of the State to monitor and adequately supervise insurers and daycare licensees (Taggart v. State, 118 Wash.2d 195, 822 P.2d 243 (1992); Sterling v. Bloom, 111 Idaho 211, 723 P.2d 755; Bishop v. Miche, 137 Wash.2d 518, 973 P.2d 465 (1999), and Babcock v. State, 116 Wash.2d 596, 809 P.2d 143 (1991)).

(E) Conclusion

Plaintiffs respectfully request that this Court REVERSE the Trial Court's Dismissal of this action on Summary Judgment and remand to the Trial Court with instructions to allow the Discovery sought by the Plaintiffs, to include the discovery proposed by the State, not limited to documents and information contained within the

Insurance Commissioner's Office, and to reconsider the Certification of the Class after conclusion of discovery.

RESPECTFULLY SUBMITTED this 12th day of June, 2006



JAMES F. LEGGETT, W&BA #6630
Attorney for Appellants

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EXPEDITE
 Hearing is Set
 Date:
 Time:
 The Honorable Christopher Wickham

STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

TERRY LINVILLE and JULIE
 LINVILLE, husband and wife,
 individually and on behalf of J.L., a
 minor; et al.,

NO. 05-2-02268-7

DEFENDANT'S PROPOSAL
 RE: DISCOVERY

Plaintiffs,

v.

STATE OF WASHINGTON,

Defendant.

TO: CLERK OF THE SUPERIOR COURT

TO: JAMES F. LEGGETT, Attorney for Plaintiffs

Pursuant to the court's order of February 10, 2006 in the above-entitled action, and
 without waiving previously entered objections, the Defendant State of Washington, by and
 through the Office of the Insurance Commissioner, proposes making the following individuals
 available for purposes of discovery depositions subject to proper service and notice under the
 applicable discovery rules.

Mike Kreidler Administration

- John Hamje, Deputy Commissioner for Consumer Advocacy
- Scott Jarvis, former OIC Deputy Commissioner for Consumer Advocacy
- Jim Odiorne, Deputy Commissioner for Company Supervision.

LEGGETT & KRAM

DEFENDANT'S PROPOSAL
 RE: DISCOVERY
 #05-2-02268-7

COPY

ATTORNEY GENERAL OF WASHINGTON
 Trial Division
 629 Woodland Square Loop SE
 PO Box 40126
 Olympia, WA 98504-0126
 (360) 459-6600

MAR 10 2006
 FILED

1037

Deborah Senn Administration

Scott Jarvis

Melodie Bankers, OIC's Senior Policy Advisor and Rules Coordinator.

Dick Marquardt Administration

Scott Jarvis

Melodie Bankers

H. Eugene Davis, former Deputy Commissioner for Consumer Advocacy/Protection.

DATED this 9th day of March, 2006.

ROB MCKENNA
Attorney General


PETER J. HELMBERGER, WSB#23041
MICHAEL E. JOHNSTON, WSB#28797
Assistant Attorney General
Attorneys for State of Washington

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by _____

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9 day of March, 2006, at Lacey, WA.



DEFENDANT'S PROPOSAL
RE: DISCOVERY
#05-2-02268-7

ATTORNEY GENERAL OF WASHINGTON
Torts Division
629 Woodland Square Loop SE
PO Box 40126
Olympia, WA 98504-0126
(360) 459-6600

U.S.C.A. Const.Amend XIV, § 1-Due Process

U.S.C.A. Const.Amend XIV, § 1-Equal Protect

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Washington State Constitutional. Art. 1, § 3. Personal Rights

No persons shall be deprived of life, liberty, or property, without due process of law.

28 U.S.C.A. § 1346

(b)(1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury.

28 USC§ 2679. Exclusiveness of remedy

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

Federal Rules of Civil Procedure

Rule 8. General Rules of Pleading

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief,

and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Rule 14. Third-Party Practice

(a) **When Defendant May Bring in Third Party.** At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(6)(b)(i) in the property arrested.

(b) **When Plaintiff May Bring in Third Party.** When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

(c) **Admiralty and Maritime Claims.** When a plaintiff asserts an admiralty or maritime claim within the meaning of Rule 9(h), the defendant or person who asserts a right under Supplemental Rule C(6)(b)(i), as a third-party plaintiff, may bring in a third-party defendant who may be wholly or partly liable, either to the plaintiff or to the third-party plaintiff, by way of remedy over, contribution, or otherwise on account of the same transaction, occurrence, or series of transactions or occurrences. In such a case the third-party plaintiff may also demand judgment against the third-party defendant in favor of the plaintiff, in which event the third-party defendant shall make any defenses to the claim of the plaintiff as well as to that of the third-party plaintiff in the manner provided

in Rule 12 and the action shall proceed as if the plaintiff had commenced it against the third-party defendant as well as the third-party plaintiff.

Washington State Statutes

RCW 4.22.015. "Fault" defined

"Fault" includes acts or omissions, including misuse of a product, that are in any measure negligent or reckless toward the person or property of the actor or others, or that subject a person to strict tort liability or liability on a product liability claim. The term also includes breach of warranty, unreasonable assumption of risk, and unreasonable failure to avoid an injury or to mitigate damages. Legal requirements of causal relation apply both to fault as the basis for liability and to contributory fault.

A comparison of fault for any purpose under RCW 4.22.005 through 4.22.060 shall involve consideration of both the nature of the conduct of the parties to the action and the extent of the causal relation between such conduct and the damages.

RCW 4.92.090. Tortious conduct of state--Liability for damages

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation.

RCW 48.02.060. General powers and duties

- (1) The commissioner shall have the authority expressly conferred upon him by or reasonably implied from the provisions of this code.
- (2) The commissioner shall execute his duties and shall enforce the provisions of this code.
- (3) The commissioner may:
 - (a) Make reasonable rules and regulations for effectuating any provision of this code, except those relating to his election, qualifications, or compensation. No such rules and regulations shall be effective prior to their being filed for public inspection in the commissioner's office.
 - (b) Conduct investigations to determine whether any person has violated any provision of this code.
 - (c) Conduct examinations, investigations, hearings, in addition to those specifically provided for, useful and proper for the efficient administration of any provision of this code.

RCW 48.30.010. Unfair practices in general--Remedies and penalties

- (1) No person engaged in the business of insurance shall engage in unfair methods of competition or in unfair or deceptive acts or practices in the conduct of such business as

such methods, acts, or practices are defined pursuant to subsection (2) of this section.

(2) In addition to such unfair methods and unfair or deceptive acts or practices as are expressly defined and prohibited by this code, the commissioner may from time to time by regulation promulgated pursuant to chapter 34.05 RCW, define other methods of competition and other acts and practices in the conduct of such business reasonably found by the commissioner to be unfair or deceptive after a review of all comments received during the notice and comment rule-making period.

(3)(a) In defining other methods of competition and other acts and practices in the conduct of such business to be unfair or deceptive, and after reviewing all comments and documents received during the notice and comment rule-making period, the commissioner shall identify his or her reasons for defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive and shall include a statement outlining these reasons as part of the adopted rule.

(b) The commissioner shall include a detailed description of facts upon which he or she relied and of facts upon which he or she failed to rely, in defining the method of competition or other act or practice in the conduct of insurance to be unfair or deceptive, in the concise explanatory statement prepared under RCW 34.05.325(6).

(c) Upon appeal the superior court shall review the findings of fact upon which the regulation is based de novo on the record.

(4) No such regulation shall be made effective prior to the expiration of thirty days after the date of the order by which it is promulgated.

(5) If the commissioner has cause to believe that any person is violating any such regulation, the commissioner may order such person to cease and desist therefrom. The commissioner shall deliver such order to such person direct or mail it to the person by registered mail with return receipt requested. If the person violates the order after expiration of ten days after the cease and desist order has been received by him or her, he or she may be fined by the commissioner a sum not to exceed two hundred and fifty dollars for each violation committed thereafter.

(6) If any such regulation is violated, the commissioner may take such other or additional action as is permitted under the insurance code for violation of a regulation.

RCW 48.88.010. Intent

Day care service providers have experienced major problems in both the availability and affordability of liability insurance. Premiums for such insurance policies have recently grown as much as five hundred percent and the availability of such insurance in Washington markets has greatly diminished.

The availability of quality day care is essential to achieving such goals as increased work force productivity, family self-sufficiency, and protection for children at risk due to poverty and abuse. The unavailability of adequate liability insurance threatens to decrease the availability of day care services.

This chapter is intended to remedy the problem of unavailable liability insurance for day care services by requiring all insurers authorized to write commercial or professional liability insurance to be members of a joint underwriting association created to provide

liability insurance for day care services.

RCW 48.88.020. Definitions

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Association" means the joint underwriting association established pursuant to the provisions of this chapter.

(2) "Day care insurance" means insurance coverage against the legal liability of the insured and against loss, damage, or expense incident to a claim arising out of the death or injury of any person as the result of negligence or malpractice in rendering professional service by any licensee.

(3) "Licensee" means any person or facility licensed to provide day care services pursuant to chapter 74.15 RCW.

RCW 48.88.030. Plan for joint underwriting association

The commissioner shall approve by July 1, 1986, a reasonable plan for the establishment of a nonprofit, joint underwriting association for day care insurance, subject to the conditions and limitations contained in this chapter.

RCW 48.88.050. Policies--Liability limits--Rating plan

Any licensee may apply to the association to purchase day care insurance, and the association shall offer a policy with liability limits of at least one hundred thousand dollars per occurrence. The commissioner shall require the use of a rating plan for day care insurance that permits rates to be modified for individual licensees according to the type, size and past loss experience of the licensee including any other difference among licensees that can be demonstrated to have a probable effect upon losses.

RCW 48.88.070. Rules

The commissioner may adopt all rules necessary to ensure the efficient, equitable operation of the association, including but not limited to, rules requiring or limiting certain policy provisions.

The repealed § 48.88.060, which required a report to the legislature detailing the operations, finances, claims, and marketing experiences of the association, was derived from Laws 1986, ch. 141, § 6.

RCW 74.15.340. Day-care insurance (1) Every licensed child day-care center shall, at the time of licensure or renewal and at any inspection, provide to the department proof that the licensee has day-care insurance as defined in RCW 48.88.020, or is self-insured pursuant to chapter 48.90 RCW

Chapter 473 § 7 Laws 2005, Amendment to RCW 74.15 Sec. 7(2):

Sec. 1. "...The legislature further recognizes that parents, as consumers, have an interest in obtaining access to information that is relevant to making informed decisions about the persons with whom they entrust the care of their children. The purpose of this act is to establish a system, consistent throughout the state, through which parents,

guardians, and other persons *in loco parentis* can obtain certain information about child care providers."

Sec. 7. (2)(a) Every licensed family day-care provider shall, at the time of licensure or renewal either:

(i) Provide to the department proof that the licensee has day-care insurance as defined in RCW 48.88.020, or other applicable insurance; or

(ii) Provide written notice of their insurance status to parents with a child enrolled in family day care. Family day-care providers may choose to opt out of the requirement to have day care or other applicable insurance but must provide written notice of their insurance status to parents with a child enrolled and shall not be subject to the requirements of (b), (c), or (d) of this subsection...

(c) Liability limits under (a)(i) of this subsection shall be the same as set forth in RCW 48.88.050."

Washington Administrative Code

WAC 284-30-700.

Restrictions as to denial and termination of homeowners insurance affected by day-care operations.

(1) Beginning August 1, 1985, pursuant to RCW 48.30.010, it shall be an unfair practice for any insurer transacting homeowners insurance to deny homeowners insurance to an applicant therefor, or to terminate any homeowners insurance policy covering a dwelling located in this state, whether by cancellation or nonrenewal, for the principal reason that an insured under such policy is engaged in the operation of a day care facility, pursuant to chapter 74.15 RCW, at the insured location.

(2) This rule does not prevent an insurer from excluding or limiting coverage with respect to liability or property losses arising out of business pursuits of an insured, specifically including those related to the operation of day care facilities.

WAC 284-78-030. The association.

(1) A nonprofit joint underwriting association for day care insurance is hereby established. Membership in the association shall be mandatory for all insurers that on or after July 1, 1986, possess a certificate of authority to write property and casualty insurance within this state on a direct basis. Every such insurer shall be and remain a member of the association and fulfill all its membership obligations as a condition of its authority to continue to transact property and casualty insurance business in this state.

(2) The association shall remain inactive, except for the actions of the board enumerated in WAC 284-78-050 through 284-78-080, until it is activated by the commissioner as provided in WAC 284-78-040.

WAC 284-78-040. Activation of association

(2) The association shall remain inactive, except for the actions of the board enumerated in WAC 284-78-050 through 284-78-080, until it is activated by the commissioner as provided in WAC 284-78-040.

If the commissioner finds that any licensee is unable to obtain day care insurance with liability limits of at least one hundred thousand dollars per occurrence from the voluntary insurance market, or through any market assistance plan organized pursuant to section 906, chapter 305, Laws of 1986, the commissioner may notify the board in writing of such finding and may direct the board to activate the association and commence writing day care insurance within thirty days of receipt of the notice in accordance with the provisions of these regulations.

WAC 284-78-050. Administration.

(1) The association shall be administered by a governing board, subject to the supervision of the commissioner, and operated by a manager appointed by the board.

(2) The board shall consist of nine members. Five board members shall be insurers, one of which shall be appointed by the commissioner from each of the following: American Insurance Association, Alliance of American Insurers, National Association of Independent Insurers, all other stock insurers, and all other nonstock insurers. A sixth board member shall be the insurer designated as the service insurer for the association (or, if there is more than one service insurer, the sixth board member shall be such service insurer as the commissioner designates as the board member). The other three board members shall be licensees who are appointed by the commissioner to so serve, none of whom shall be interested, directly or indirectly, in any insurer except as a policyholder. Board members shall serve for a period of one year or until their successors are appointed. Not more than one insurer in a group under the same management or ownership shall serve on the board at the same time. At least one of the six insurers on the board shall be a domestic insurer. All members of the board shall serve at the pleasure of the commissioner.

(3) Each person serving on the board or any subcommittee thereof, each member insurer of the association, and each officer and employee of the association shall be indemnified by the association against all costs and expenses actually and necessarily incurred by him, her, or it in connection with the defense of any action, suit, or proceeding in which he, she, or it is made a party by reason of his, her, or its being or having been a member of the board, or a member or officer or employee of the association, except in relation to matters as to which he, she, or it has been judged in such action, suit, or proceeding to be liable by reason of wilful misconduct in the performance of his, her, or its duties as a member of such board, or member, officer, or employee of the association. This indemnification shall not be exclusive of other rights as to which such member, or officer, or employee may be entitled as a matter of law.

WAC 284-78-060. General powers and duties of the board.

(1) Within thirty days after the appointment of its members by the commissioner, the board shall prepare and adopt articles of association consistent with this chapter, subject to approval by the commissioner. In a timely manner thereafter, the board shall take all actions necessary to prepare the association to receive applications and issue policies, when and if the commissioner activates the association as provided in WAC 284-78-040. These actions shall include the preparation of all necessary policy forms and rating

information to be filed with the commissioner for approval and all necessary operating manuals and procedures to be followed.

(2) The board shall meet as often as may be required to perform the general duties of the administration of the association or on the call of the commissioner. Three insurer members of the board shall constitute a quorum.

(3) The board may appoint a manager, who shall serve at the pleasure of the board, to perform any duties necessary or incidental to the proper administration of the association, including the hiring of necessary staff.

(4) The board shall annually furnish to all insurer members of the association and to the commissioner a written report of operations.

WAC 284-78-070. Assessments.

(1) The board may calculate, levy, and collect assessments from member insurers whenever necessary for the orderly operation of the association.

(2) After its formation, the board may calculate, levy, and collect from member insurers a start up assessment to pay initial expenses of the association and to establish any necessary reserves. The start up assessment shall not exceed one million dollars. For ease of administration, the share of the start up assessment levied upon and collected from each member insurer shall be the same for each member insurer, regardless of size and regardless of whether it is actively writing business in this state.

(3) Any assessment subsequent to the initial start up assessment shall be used to offset losses and/or expenses in excess of income received by the association. These assessments may be made as often as the board determines is necessary. To the extent such an assessment exceeds one million dollars, each member insurer shall be assessed a proportionate share relating to premium volume. The first one million dollars of such an assessment shall be levied and collected in equal amounts from each member insurer.

(4) Any member insurer failing to remit its assessment when due is subject to revocation of its certificate of authority to write property and casualty insurance in this state.

WAC 284-78-080. Statistics, records, and reports.

(1) The association shall maintain separate statistics on business written and shall make the following quarterly report to the commissioner:

(a) Number of applications received by the association;

(b) Number of applications accepted by the association and the total and average premiums charged, including the high and low premiums;

(c) Number of risks declined;

(d) Number of risks conditionally declined and the number ultimately accepted after having been conditionally declined; and

(e) Number of risks cancelled.

(2) In addition to statistics, the association shall maintain complete and separate records of all business transactions, including copies of all policies and endorsements issued by the association, and records of reasons provided for each declination of coverage or cancellation of coverage, including the results of any on-site inspections, or investigations of applicants or insureds or their employees.

(3) Regular reports of the association's operations shall be submitted to all members of the board, such reports to include, but not necessarily to be limited to, premiums written

and earned, losses, including loss adjustment expense, paid and incurred, all other expenses incurred, outstanding liabilities, and, at least once a year, the proposed annual budget of the association for the next fiscal year.

(4) The books of account, records, reports, and other documents of the associations shall be open to the commissioner for examination at all reasonable times.

(5) The books of account, records, reports, and other documents of the association shall be open to inspection by members only at such times and under such conditions as the board shall determine.

(6) The books of account of any and all servicing insurers may be audited by a firm of independent auditors designated by the board.

WAC 284-78-100.

Standard policy coverage--Premiums.

(1) All policies issued by the association shall have liability limits of at least one hundred thousand dollars per occurrence and shall be issued for a term of one year.

(2) Premiums shall be based on the association's rate filings approved by the commissioner in accordance with chapter 48.19 RCW. Such rate filings shall provide for modification of rates for licensees according to the type, size, and past loss experience of each licensee, and any other differences among licensees that can be demonstrated to have a probable effect upon losses.

(3) A policy shall be offered which provides liability coverage with respect to child abuse, whether a sexual nature or not. In the discretion of the association, such policy may exclude from coverage an individual who directly commits or participates in the actual abuse, but it may not exclude from coverage other persons who may be liable only vicariously for such abuse. In addition, the association may offer coverage with a broader exclusion with respect to coverage for child abuse. (emphasis added)

Washington State Civil Rules

CIVIL RULE 12. DEFENSES AND OBJECTIONS

(a) When Presented. A defendant shall serve his answer within the following periods:

(1) Within 20 days, exclusive of the day of service, after the service of the summons and complaint upon him pursuant to rule 4;

(2) Within 60 days from the date of the first publication of the summons if the summons is served by publication in accordance with rule 4(d)(3);

(3) Within 60 days after the service of the summons upon him if the summons is served upon him personally out of the state in accordance with RCW 4.28.180 and 4.28.185 or on the Secretary of State as provided by RCW 46.64.040.

(4) Within the period fixed by any other applicable statutes or rules.

A party served with a pleading stating a cross claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise

directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court.

(A) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action.

(B) If the court grants a motion for a more definite statement, the responsive pleading shall be served within 10 days after the service of the more definite statement.

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.

(d) Preliminary Hearings. The defenses specifically enumerated (1)-(7) in section (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in section (c) of this rule shall be heard and determined before trial on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial.

(e) Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, or if more particularity in that pleading will further the efficient economical disposition of the action, he may move for a more definite statement before interposing his responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after the notice of the order or within such other time as the court may fix,

the court may strike the pleading to which the motion was directed or make such order as it deems just.

(f) Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subsection (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(i) Nonparty at Fault. Whenever a defendant or a third party defendant intends to claim for purposes of RCW 4.22.070(1) that a nonparty is at fault, such claim is an affirmative defense which shall be affirmatively pleaded by the party making the claim. The identity of any nonparty claimed to be at fault, if known to the party making the claim, shall also be affirmatively pleaded.

CIVIL RULE 23. CLASS ACTIONS

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interest; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to Be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subsection (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subsection (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subsection (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subsection (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate, (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and

applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Disposition of Residual Funds.

(1) "Residual Funds" are funds that remain after the payment of all approved class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement that does not create residual funds.

(2) Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents of Washington State. The court may disburse the balance of any residual funds beyond the minimum percentage to the Legal Foundation of Washington or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class.

CIVIL RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General*. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(2) *Insurance Agreements*. A party may obtain discovery and production of: (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Structured Settlements and Awards*. In a case where a settlement or final award provides for all or part of the recovery to be paid in the future, a party entitled to such payments may obtain disclosure of the actual cost to the defendant of making such payments. This disclosure may be obtained during settlement negotiations upon written demand by a party entitled to such payments. If disclosure of cost is demanded, the defendant may withdraw the offer of a structured settlement at any time before the offer is accepted.

(4) *Trial Preparation: Materials*. Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that

the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this section, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.

(B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained under subsection (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subsection (b)(5)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) *Discovery From Treating Health Care Providers.* The party seeking discovery from a treating health care provider shall pay a reasonable fee for the reasonable time spent in responding to the discovery. If no agreement for the amount of the fee is reached in advance, absent an order to the contrary under section (c), the discovery shall occur and

the health care provider or any party may later seek an order setting the amount of the fee to be paid by the party who sought the discovery. This subsection shall not apply to the provision of records under RCW 70.02 or any similar statute, nor to discovery authorized under any rules for criminal matters.

(7) *Treaties or Conventions.* If the methods of discovery provided by applicable treaty or convention are inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the discovery methods described in these rules to supplement the discovery method provided by such treaty or convention.

(c) *Protective Orders.* Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that the contents of a deposition not be disclosed or be disclosed only in a designated way; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) *Sequence and Timing of Discovery.* Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) *Supplementation of Responses.* A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the

substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

(f) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

- (1) A statement of the issues as they then appear;
- (2) A proposed plan and schedule of discovery;
- (3) Any limitations proposed to be placed on discovery;
- (4) Any other proposed orders with respect to discovery; and
- (5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request,

response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) *Use of Discovery Materials.* A party filing discovery materials on order of the court or for use in a proceeding or trial shall file only those portions upon which the party relies and may file a copy in lieu of the original.

(i) *Motions; Conference of Counsel Required.* The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.

(j) *Access to Discovery Materials Under RCW 4.24.*

(1) *In General.* For purposes of this rule, "discovery materials" means depositions, answers to interrogatories, documents or electronic data produced and physically exchanged in response to requests for production, and admissions pursuant to rules 26-37.

(2) *Motion.* The motion for access to discovery materials under the provisions of RCW 4.24 shall be filed in the court that heard the action in which the discovery took place. The person seeking access shall serve a copy of the motion on every party to the action, and on nonparties if ordered by the court.

(3) *Decision.* The provisions of RCW 4.24 shall determine whether the motion for access to discovery materials should be granted.

CIVIL RULE 33. INTERROGATORIES TO PARTIES

(a) Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party.

Interrogatories shall be so arranged that after each separate question there shall appear a blank space reasonably calculated to enable the answering party to place the written response. In the event the responding party either chooses to place the response on a separate page or pages or must do so in order to complete the response, the responding party shall clearly denote the number of the question to which the response relates, including the subpart thereof if applicable. Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or any party may move for an order under rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(b) Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under rule 26(b), and the answers may be used to the extent permitted by the Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

An interrogatory otherwise proper is not objectionable merely because the propounding party may have other access to the requested information or has the burden of proof on the subject matter of the interrogatory at trial.

(c) Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, or from a compilation, abstract or summary based thereon, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is sufficient answer to such

interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

CIVIL RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of rule 26(b).

(b) Procedure. The request may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 40 days after service of the summons and complaint upon that defendant. The parties may stipulate or the court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified and inspection permitted of the remaining parts. The party submitting the request may move for an order under rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(c) **Persons Not Parties.** This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

CIVIL RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) **Motion for Order Compelling Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, and upon a showing of compliance with rule 26(i), may apply to the court in the county where the deposition was taken, or in the county where the action is pending, for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or on matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under rules 30 or 31, or a corporation or other entity fails to make a designation under rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under rule 33, or if a party, in response to a request for inspection submitted under rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, any party may move for an order compelling an answer or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this section an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) *Sanctions by Court in County Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

- (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
- (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;
- (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;
- (E) Where a party has failed to comply with an order under rule 35(a) requiring him to produce another for examination such orders as are listed in sections (A), (B), and (C) of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on Failure to Admit.* If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable

pursuant to rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe the fact was not true or the document was not genuine, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production or Inspection. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c). For purposes of this section, an evasive or misleading answer is to be treated as a failure to answer.

(e) Failure to Participate in the Framing of a Discovery Plan. If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

Civil Rule 56 SUMMARY JUDGMENT

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings. The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda

of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) Case Not Fully Adjudicated on Motion. If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or

solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

(h) Form of Order. The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

James F. Leggett
 Leggett & Kram, Attorneys at Law
 1901 South I Street
 Tacoma WA 98405-3810
 Telephone: (253) 272-7929

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 COURT OF APPEALS

06 JUL 13 PM 1:45

STATE OF WASHINGTON

BY: 

WASHINGTON STATE COURT OF APPEALS

DIVISION TWO

Terry Linville and Julie Linville,)
 Husband and wife, individually and)
 on behalf of J.L., a minor; Timothy)
 Ryan and Tammi Ryan, husband and)
 wife, individually and on behalf of)
 T.H.R., a minor; Michael Murray)
 Iesha L. Hall, individually and on)
 behalf of D.H., a minor, Yvonne)
 Poplawski, individually and on)
 behalf of H.K., a minor, and on)
 behalf of a class of similarly situated)
 Plaintiffs,)
 Plaintiffs,)
 vs.)
 State of Washington,)
 Defendant.)

NO. 34654-1-II

DECLARATION OF SERVICE BY MAIL

KNOW ALL PERSONS BY THESE PRESENTS: That I, Connie DeChaux, the undersigned, of Tacoma, in the County of Pierce and State of Washington, have declared and do hereby declare:

That I am not a party to the above-entitled action, I am over the age required and competent to be a witness;

That on the 13th day of June, 2006, I placed in the United States Mail with first class

postage prepaid an envelope containing the following documents:

1. Brief of Appellant
2. This Declaration of Service by Mail

properly addressed to the following person:

Michael E. Johnston
Atty Generals Office Torts Div
629 Woodland Square Loop SE
PO Box 40126
Olympia WA 98504

Original and one copy to: *VIA ABC Legal Messenger*

Court of Appeals Division II
950 Broadway, Suite 300
Tacoma, WA 98402

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

Signed at Tacoma, Pierce County, Washington this 13th day of June, 2006.



Connie DeChaux

Leggett & Kram, Attorneys at Law
1901 South I Street
Tacoma WA 98405
(253) 272-7929