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I. COUNTERSTATEMENT OF ISSUES

1. Does the Office of the Insurance Commissioner owe a duty to the individual Appellants arising from RCW 48.88 and WAC 284-78?

2. Did the trial court abuse its discretion when it denied the Appellants' Motion to Compel Discovery of records on the basis that such records were not in the possession, custody, or control of the Office of the Insurance Commissioner, the only State agency that was facing allegations in the complaint?

3. Did the trial court abuse its discretion in granting a protective order that stayed discovery for 30 days and required the Respondent to provide within that time a proposal for alternatives to the depositions of current and former high level government officials of the Office of the Insurance Commissioner?

4. Did the trial court abuse its discretion in denying motions to continue hearings on defendant's motion for summary judgment when Appellants failed to show what evidence they would obtain that would defeat summary judgment on a dispositive legal issue?

5. Did the trial court abuse its discretion in denying a class certification motion without prejudice on the basis that there was

insufficient evidence in support of certification prior to a pending motion for summary judgment on a dispositive legal issue?

II. COUNTERSTATEMENT OF THE CASE

The record on appeal contains the following background facts pertaining to this appeal.¹

A. **Prior Litigation: Murray I**

This case traces its origins to a lawsuit filed by Appellants Michael Murray and Iesha Hall, individually and on behalf of their minor son D.H. (collectively referred to hereinafter as “Murray”). CP at 233-41. D.H. was allegedly raped by the son of Birgitt Burnett, a licensed family day care operator. CP at 235. That suit (Murray I) was brought against Burnett and the State of Washington and the state Department of Social and Health Services (DSHS). CP at 233. The suit included a claim asserted under RCW 48.88, part of the insurance code authorizing a day care insurance Joint Underwriting Association (JUA).² CP at 236.

In Murray I, this court denied a motion for discretionary review regarding a discovery order adverse to Murray pertaining to discovery

¹ Appellants’ Statement of the Case in their opening brief violates RAP 10.3(a)(4) in that it contains argument and fails to cite to the record on appeal for many factual statements.

² The text of several statutes and regulations discussed in this brief are provided in the appendix. RAP 10.4(c).

directed to non-party state agencies and employees, including the Office of the Insurance Commissioner (OIC). CP at 256-64. Murray later nonsuited their action. CP at 465.

B. Parallel Litigation: Murray II

Murray then filed another suit (Murray II), which is ongoing, against Burnett and the State of Washington, without naming DSHS or any other State agency as a party defendant. CP at 266-270. Murray II alleges mainly negligent day care licensing. CP at 268.

C. This Suit: Murray And Linville

Murray and additional plaintiffs Terry and Julie Linville, individually and on behalf of their minor child J.L., Timothy and Tammi Ryan, individually and on behalf of their minor child T.H.R., and Yvonne Poplawski, individually and on behalf of her minor child H.K. (collectively referred to hereinafter as “Murray and Linville”), then filed the action from which this appeal is taken. CP at 79-87, 988-96.

The allegations in this case involve the lack of insurance coverage for two licensed family day care facilities located in Pierce County, where the minor plaintiffs were allegedly abused by the teenage sons of the two day care licensees. CP at 81-82, 990-91. Murray’s child was allegedly abused at the family day care operated by Burnett. CP at 81-82, 991. The

other children were allegedly abused at a family day care operated by licensee Julie Bertolucci. CP at 81, 990-91. The licensees were not named as defendants in this lawsuit.

Burnett had a day care liability coverage endorsement on her homeowner's policy; however, another endorsement excluded coverage for claims arising out of acts of sex abuse.³ CP at 213, 220-21. Bertolucci had similar insurance coverage. CP at 81, 990-91.

The Murray and Linville action names as defendant the State of Washington without also naming any particular state agencies. CP at 988, 990, 992-93. The complaint alleges mainly negligent failure of unidentified state actors and "the Insurance Commissioner" (OIC) to act in compliance with RCW 48.88. CP at 922-93. In essence, Murray and Linville alleged OIC failed to make available insurance coverage that would have included sex abuse committed at day cares. CP at 992-93.

D. Discovery

Murray and Linville propounded written discovery that sought, among other things, the identity of homeowners' insurers who cover day care activities without sex abuse exclusions, statistics as to day care sex abuse cases, and contact information for former legislators. CP at 93-101.

³ In Murray I and II, Burnett has been defended by her insurer. CP at 444-46.

OIC responded with answers, objections, and production of discoverable documents. CP at 299-331.

Murray and Linville also sought informally to depose the current Insurance Commissioner, two of his predecessors, and certain former legislators regarding RCW 48.88 and related topics. CP at 107, 109. OIC opposed such depositions. CP at 111, 113-14.

Murray and Linville subsequently filed a Motion to Compel Discovery, CP at 4-16, and OIC moved for a protective order. CP at 51-73. The trial court denied Murray and Linville's motion to compel non-OIC records, reasoning thus:

I do agree with the state that the defendant in this case is the Office of the Insurance Commissioner. It is not the entire breadth of the state of Washington. The purpose of discovery, simply put, is to allow a party access to information not privileged that is under the exclusive control of another party in the case, and the way in which the state of Washington is structured is by agency, and those agencies do not have control over information of other agencies.

There is a reason why there are separate sections of the government, and it's because to try to combine them all together would be impossible to manage and impossible to understand.

In this case, I agree the gravamen of the case is against the Office of the Insurance Commissioner, and they are the appropriate agency defendant. Therefore, I will not compel the Office of the Insurance Commissioner to search through databases or documents of other agencies in order to supplement the answers that they have already filed.

To the extent they have adequately answered based upon information within the exclusive control of that agency, they have satisfied the requirements of the Civil Rules.

RP (Feb. 10, 2006) at 27-28.⁴

The court further refused to compel depositions of high level officials and granted OIC's motion for a protective order:

With regard to public officials, I agree that there is a policy to protect them from the discovery process, and I agree that the defendant in this case, the Office of the Insurance Commissioner, should be given an opportunity to provide alternative means of discovery for information that would otherwise be within the bounds of discovery and I will give them 30 days to do that.

RP (Feb. 10, 2006) at 28.

The court made the same ruling with respect to former high level officials, stating:

If they are entitled to AG representation, then I assume they are arguably within the scope of [defense counsel's] representation, and the same policy it seems to me should apply to them, although at a lesser level. I think the day-to-day demands of the office certainly don't exist for them, but I think they are still entitled to some deference, if you will, so that they are not dragged into every lawsuit following their leaving office. I think it's a lesser burden that the plaintiff needs to show as to those individuals, but I will give the state an opportunity to provide alternate means for them, as well.

RP (Feb. 10, 2006) at 29.

⁴ The Verbatim Report of Proceedings is organized into three separately paginated volumes corresponding to the dates of the concerned hearings. Accordingly, the report of proceedings is cited as "RP (date) at page(s)."

The court also denied the motion to compel with regard to legislative materials, reasoning thus:

[Y]ou are really talking about legislative history here, and I am aware of no requirement on the part of any defendant to provide legislative history for another defendant. It is readily available to the extent it is available through documents kept in the state archives. We are all attorneys. We have all seen it. We all know how to get it, but to require the defendant in this case to pull it together to my mind requires the defendant to do legal research for the plaintiff, which is well beyond the scope of discovery.

RP (Feb. 10, 2006) at 29-30.

On March 9, 2006, OIC filed its discovery proposal pursuant to the trial court's discovery order. CP at 1036-37. The proposal provided a list of potential deponents who could testify with regard to OIC activities in the 20 years since RCW 48.88 was enacted. CP at 1036-37.

E. Motion For Summary Judgment

OIC filed its motion for summary judgment, asserting mainly the lack of any actionable tort duty arising from RCW 48.88. CP at 363-82. With their response, Murray and Linville supplied numerous OIC documents obtained by public disclosure requests submitted during Murray I. CP at 563-987.

Murray and Linville moved for a CR 56(f) continuance. CP at 480-84. The trial court orally denied the motion, reasoning there was no

need for further discovery before the court resolved the legal issue of duty. RP (Mar. 3, 2006) at 8-10.

Later, Murray and Linville moved again for a CR 56(f) continuance, CP at 1034-1035, arguing on the same day as the summary judgment motion that they needed more time to conduct discovery. RP (Mar. 17, 2006) at 4-9. The trial court responded, "The motion that is before the Court this morning is a legal issue, and it is still unclear to me what type of facts that you would be developing through discovery that might be necessary for you to oppose this motion." RP (Mar. 17, 2006) at 7. "Since when has there ever been discovery in terms of the people who developed WACs and when is that relevant on a Motion for Summary Judgment on a legal issue?" RP (Mar. 17, 2006) at 7. "Are we going to have a trial on the intent of the people who wrote the WAC?" RP (Mar. 17, 2006) at 8. "Could there ever be such a trial? I have never heard of such a thing." RP (Mar. 17, 2006) at 8.

In conclusion, the trial court denied the renewed motion for continuance, stating:

Well, it seems to me that one of the real issues in this case is whether defendant owes a duty to plaintiff, and I don't see that any of the discovery that you're proposing would get to that issue.

To me, that is the central issue of this case, and the intent of the people who wrote the WACs really doesn't help me or anybody else with that issue, I don't think.

So, I'm still persuaded that the real thrust of discovery here is, A, to either try to develop a theory or, B, develop a class, and under either of those theories, I don't see that it's necessary for plaintiff to engage in further discovery in order to have the opportunity to fairly meet the motion that defendant has brought this morning.

I think defendant is entitled to have this motion heard, because this case has already gone on for some time, and I think it is unfair to parties to allow cases to continue indefinitely with open-ended discovery just to see if something happens. So I'm going to deny the Motion to Continue, and we will go ahead with the motion on the merits this morning.

RP (Mar. 17, 2006) at 9-10.

F. Motion To Certify Class

While OIC's Motion for Summary Judgment was pending, Murray and Linville moved for class certification. CP at 501-10. The trial court denied the motion without prejudice, reasoning the motion was premature in light of the pending summary judgment motion and the lack of evidence at that time to support the numerosity and typicality requirements of CR 23(b). RP (Mar. 3, 2006) at 10-16. The trial court said, "I don't want to preclude plaintiffs from bringing this issue up after they have had additional discovery, so I don't want to deny it with prejudice, but I think this morning it is premature." RP (Mar. 3, 2006) at 16. *See* CP at 1021-25 (written order denying class certification).

G. Summary Judgment Order

After hearing oral argument, the trial court granted OIC's summary judgment motion. RP (Mar. 17, 2006) at 39-41. An order granting summary judgment and dismissing Murray and Linville's action with prejudice was entered on March 17, 2006. CP at 1246-49.

H. Notice Of Appeal

Murray and Linville filed a timely notice of appeal assigning error to the trial court's six orders culminating in the order granting summary judgment. CP at 1253-54.

III. SUMMARY OF ARGUMENT

Murray and Linville's appeal fails because OIC did not owe them individually a duty actionable in tort arising from RCW 48.88. Even if there was a duty, under the Public Duty Doctrine it was owed to the public at large, not these plaintiffs individually. Murray and Linville's lack of a cognizable negligence claim moots their other assignments of error relating to discovery and class certification. In any event, the trial court did not abuse its discretion in denying Murray and Linville's motion to compel, in entering a protective order, in denying a continuance of the summary judgment hearing to conduct further discovery, and in denying

class certification without prejudice. This Court should affirm the trial court's order on summary judgment.

IV. ARGUMENT

A. Summary Judgment Of Dismissal Was Appropriate Because (1) Murray And Linville's Negligence Claim Fails For Lack Of A Duty Enforceable In Tort, And (2) Even If There Was A Duty, It Was Owed To The Public At Large, And Not The Appellants Individually

The trial court had no difficulty granting OIC's motion for summary judgment. The OIC was under no duty arising from RCW 48.88 that was enforceable in a tort action. And even if RCW 48.88 created a duty on the part of OIC, it was a duty owed to the public as a whole, rather than the individual Appellants.

The standard of review for summary judgment is well-settled. "Summary judgment is proper when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Harvey v. County of Snohomish*, 157 Wn.2d 33, 38, 134 P.3d 216 (2006) (citing *Babcock v. Mason Cy. Fire Dist. No. 6*, 144 Wn.2d 774, 784, 30 P.3d 1261 (2001)). "The moving party bears the burden of demonstrating there is no genuine dispute as to any material fact." "The appellate court engages in the same inquiry as the trial court when

reviewing an order on summary judgment.” *Id.* “In addition, all facts and reasonable inferences are considered in a light most favorable to the nonmoving party.” *Id.* The court should grant summary judgment if reasonable persons could reach but one conclusion. *Reynolds v. Hicks*, 134 Wn.2d 491, 495, 951 P.2d 761 (1998). And the court may affirm the summary judgment ruling on any grounds supported by the record even if the trial court did not consider those grounds. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

Because Murray and Linville’s claims are grounded entirely on RCW 48.88 and its related regulations, WAC 284-78, this case can be resolved through statutory interpretation as an issue of law. *See Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). The appellate court decides issues of law de novo. *Sheehan v. Central Puget Sound Regional Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005). For reasons set forth below, Murray and Linville cannot, as a matter of law, state a cause of action arising under either RCW 48.88 or WAC 284-78.

1. Neither RCW 48.88 Nor WAC 284-78 Give Rise To A Duty Enforceable In Tort

A plaintiff alleging negligence must establish the existence of a duty, a breach thereof, a resulting injury, and proximate causation between the breach and the resulting injury. *Schooley v. Pinch’s Deli*

Mkt., 134 Wn.2d 468, 474, 951 P.2d 749 (1998). The threshold question in a negligence action is whether the defendant owes a duty of care to the plaintiff. *Minahan v. W. Wash. Fair Ass'n*, 117 Wn. App. 881, 890, 73 P.3d 1019 (2003), *review denied*, 151 Wn.2d 1007 (2004). Existence of a duty for purposes of a negligence action is a question of law, not fact. *Sheikh v. Choe*, 156 Wn.2d 441, 448, 128 P.3d 574 (2006); *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 124 P.3d 283 (2005); *Schooley*, 134 Wn.2d at 475 n.3. If there is no duty, there is no need for the Court to consider the remaining elements of negligence; breach, causation, and damages. *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998); *Minahan*, 117 Wn. App. 881 at 890. There is no actionable duty here as a matter of law; consequently, the trial court correctly granted summary judgment in favor of OIC.⁵

Murray and Linville's opening brief generally ignores the issue of duty, and improperly relies on references to briefs submitted to the trial court, which similarly fail to address the issue. *See Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial

⁵ Murray and Linville's complaint vaguely alleges an intentional failure to implement RCW 48.88 (CP at 992-93), but that fleeting allegation does not convert a claim of negligence into an intentional tort. *See, e.g., Williams v. Michigan*, 376 N.W.2d 117, 118-19 (Mich. Ct. App. 1985) (holding that a mere allegation of intentional conduct on part of state insufficient to convert negligence claim into intentional tort). In any event, Appellants have not argued intentional misconduct in this appeal.

consideration on appeal; trial court briefs cannot be incorporated into appellate briefs by reference). Their briefing is so deficient with regard to the issue of duty underlying the trial court's summary judgment ruling that this Court should deem that assignment of error waived. *Id.*

In any event, tort duties can arise from common law principles or from statutes or regulations. *Minahan*, 117 Wn. App. at 890; *Murphy v. State*, 115 Wn. App. 297, 305, 62 P.3d 533, *review denied*, 149 Wn.2d 1035 (2003), *cert. denied, sub. nom. Murphy v. Washington*, 124 S. Ct. 2812, 159 L. Ed. 2d 249 (2004). There is no common law principle supporting Murray and Linville's proposition that OIC owes them a duty enforceable in tort to require insurance companies to cover acts of sex abuse in day care facilities. Therefore, their cause of action, if any, relies solely on RCW 48.88 and its companion regulations under WAC 284-78.

Here, RCW 48.88 does not create an obligation on the part of OIC to Murray and Linville or any particular individuals. An examination of RCW 48.88 and the regulations promulgated thereunder, WAC 284-78, demonstrate why this is so.

Statutory interpretation is a question of law reviewed de novo. *Sheehan v. Central Puget Sound Regional Transit Auth.*, 155 Wn.2d 790, 797, 123 P.3d 88 (2005). "The aim of statutory interpretation is to 'discern and implement the intent of the legislature.'" *Id.* (quoting *State v.*

J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). “Where the meaning of a provision is ‘plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.’” *Sheehan*, 155 Wn.2d at 797 (quoting *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002)). “A provision’s plain meaning may be ascertained by an ‘examination of the statute in which the provision at issue is found, as well as related statutes or other provisions of the same act in which the provision is found.’” *Id.* If the statute’s meaning is plain on its face, the court will give effect to that plain meaning. *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004). These rules of statutory interpretation also apply when interpreting agency regulations. *See, e.g., State v. Reier*, 127 Wn. App. 753, 761, 112 P.3d 566 (2005), *review denied*, 156 Wn.2d 1019 (2006) (appellate court interprets a regulation as if it were a statute). Here, neither RCW 48.88 nor WAC 284-78 is susceptible to an interpretation that gives rise to a duty owed to individual plaintiffs such as Murray and Linville.

a. RCW 48.88 Does Not Create A Duty Enforceable In Tort

The Legislature enacted RCW 48.88 “to remedy the problem of unavailable liability insurance for day care services.” RCW 48.88.010. This purpose was founded on the Legislature’s broader societal concern

that “unavailability of adequate liability insurance threatens to decrease the availability of day care services.” *Id.* General policy statements such as these do not give rise to rights and obligations that are enforceable in tort. *Melville v. State*, 115 Wn.2d 34, 38, 793 P.2d 952 (1990). Accordingly, Murray and Linville cannot establish a tort duty by merely relying on the general intent language of the statute.

Looking beyond the general policy language of the statute, no enforceable obligation is expressly stated in the statute, and no tort duty based on RCW 48.88 can be implied under the three-part test set forth in *Bennett v. Hardy*, 113 Wn.2d 912, 920, 784 P.2d 1258 (1990). Here, Murray and Linville would have to establish (1) that they fall within the “class for whose ‘especial’ benefit” RCW 48.88 was enacted, (2) that the legislative intent underlying RCW 48.88 “explicitly or implicitly, supports creating or denying a remedy,” and (3) that the damages they seek are “consistent with the underlying purpose of the legislation.” *Id.* at 920-21 (quoted with approval in *Sheikh v. Choe*, 156 Wn.2d 441, 457, 128 P.3d 574 (2006)). But Murray and Linville fail “to even discuss the *Bennett* test.” *Sheikh*, 156 Wn.2d at 457.

None of the three *Bennett* factors are satisfied here. To the extent RCW 48.88 was enacted for the “especial” benefit of a class of individuals, that class would be day care providers seeking insurance and

the general public seeking day care services, not alleged victims of sex abuse at day care facilities. RCW 48.88.010. Moreover, there is no language within the statute that mandates day care insurance coverage for sex abuse. Nor are there any statutory mandates prohibiting sex abuse exclusions in insurance policies. *Cf.* RCW 48.88.070 (vesting the Insurance Commissioner with discretion to promulgate rules “requiring or limiting certain policy provisions”).

To the contrary, the statute defines “[d]ay care insurance” to mean “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.” RCW 48.88.020(2) (emphasis added). Sexual assault is not an act of negligence or malpractice: it is an intentional tort. *See* 16 Wash. Practice § 13.6 (2000) (discussing the intentional tort of childhood sexual abuse). Consequently, the “day care insurance” contemplated in RCW 48.88 is intended to cover acts of negligence or malpractice, not intentional torts like sexual assault. RCW 48.88.020(2).

To fulfill the legislative purpose of addressing the availability of insurance coverage for day care providers, the Legislature authorized OIC to create a Joint Underwriting Association (JUA) “to provide liability

insurance for day care services.” RCW 48.88.010. A licensed day care provider “may apply” to the JUA for coverage, but the statute contains no language requiring day care providers to obtain insurance through the JUA, or to obtain any insurance at all. RCW 48.88.050.

Moreover, RCW 48.88 does not explicitly or implicitly reflect a legislative intent to create a remedy for sex abuse victims. *Bennett*, 113 Wn.2d at 920-21. The Legislature merely sought to have the Insurance Commissioner “approve . . . 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 48.88.030.

Further, the Legislature granted the Insurance Commissioner discretion to “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.” RCW 48.88.070. This rulemaking discretion falls within the statutory authority accorded the Insurance Commissioner under RCW 48.02.060(3)(a). The Insurance Commissioner complied with RCW 48.88 with promulgation of the rules codified in WAC 284-78. This statutory framework does not create an implied remedy in tort for potential insurance claimants.

Most importantly, the implied remedy Murray and Linville seek, monetary damages in tort for coverage excluded from day care insurance,

is not even remotely consistent with the legislative purpose of RCW 48.88, which is to address general concerns over the availability of day care insurance. RCW 48.88.010; *Bennett*, 113 Wn.2d at 921. Money damages here would not advance the primary goal of RCW 48.88 to improve day care insurance availability. *See Crisman v. Pierce Cy. Fire Protection District No. 21*, 115 Wn. App. 16, 24, 60 P.3d 652 (2002) (holding that an implied tort action based on the Public Disclosure Act is not possible because “it would provide no greater public accountability and is not consistent with the statute’s goal of public disclosure”). Because Murray and Linville failed “to succeed under any part of the *Bennett* test,” the trial court’s summary judgment order in favor of OIC was proper. *Sheikh*, 156 Wn.2d at 458.

b. WAC 284-78 Does Not Create A Duty Enforceable In Tort

As noted above, the courts interpret regulations the same way they interpret statutes. *Roller v. Dep’t of Labor & Indus.*, 128 Wn. App. 922, 117 P.3d 385 (2005); *State v. Reier*, 127 Wn. App. 753, 761, 112 P.3d 566 (2005), *review denied*, 156 Wn.2d 1019 (2006). The Court reviews the regulation’s plain language to ascertain legislative intent, *Roller*, 128 Wn. App. at 927, and strives to avoid an interpretation that will lead to an absurd result. *Id.*

Moreover, because OIC has particular expertise in the area of insurance regulation, its interpretation of the insurance code, including RCW 48.88, is accorded substantial deference so long as its interpretation “reflects a plausible construction of the statute’s language and is not contrary to legislative intent.” *Blueshield v. State Office of Ins. Com’r*, 131 Wn. App. 639, 648, 128 P.3d 640 (2006) (citing *Seatoma Convalescent Ctr. v. Dep’t of Soc. & Health Servs.*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996)). OIC’s interpretation of RCW 48.88 is set forth in WAC 284-78, which creates no cause of action, expressly or implicitly, for Linville and Murray.

The rules set forth under WAC 284-78 establish the JUA and define its purpose. WAC 284-78-030(1). But, “[t]he association shall remain inactive . . . until it is activated by the commissioner as provided in WAC 284-78-040.” WAC 284-78-030(2). The commissioner has discretion to activate the JUA if “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.” WAC 284-78-040. The JUA’s inactive status is thus not inconsistent with the Legislature’s mandate to formulate a “reasonable plan” for establishment of a JUA under RCW 48.88.030 to ensure coverage is available.

Furthermore, WAC 284-78 has been on the books for nearly 20 years. The Legislature has not amended RCW 48.88, or otherwise indicated any dissatisfaction with the JUA plan under WAC 284-78-030. A court should give great weight to the contemporaneous interpretation of the statute by the agency charged with the statute's implementation, "particularly where that construction has been accompanied by silent acquiescence of the legislative body over a long period of time." *Newschwander v. Bd of Trustees of Wash. State Teachers Retirement Sys.*, 94 Wn.2d 701, 711, 620 P.2d 88 (1980) (citing *Ball v. Smith*, 87 Wn.2d 717, 723, 556 P.2d 936 (1976); *Morin v. Johnson*, 49 Wn.2d 275, 300 P.2d 569 (1956)). Here, two decades of silence are mute testimony to the Legislature's acquiescence in OIC's interpretation of RCW 48.88 and its rules adopted thereunder. *See, e.g., Bowles v. Wash. Dep't of Retirement Sys.*, 121 Wn.2d 52, 63-64, 847 P.2d 440 (1993); *Newschwander*, 94 Wn.2d 701 at 710-11; *Holbrook, Inc. v. Clark County*, 112 Wn. App. 354, 362-63, 49 P.3d 142 (2002). The JUA regulations reflect a plausible interpretation of RCW 48.88 that is consistent with the statute's legislative purpose.

Even if the JUA were activated, a licensee would not be eligible for a policy issued by the JUA unless "unable to obtain day care insurance . . . from the voluntary insurance market." WAC 284-78-090.

Here, it is undisputed that the day care providers concerned had liability insurance for their day care activities at the times of the alleged sex abuse. CP at 81, 213, 220-21, 990-91.

Further, Murray and Linville's contention that WAC 284-78-100(3) makes sex abuse coverage compulsory for all day care providers is devoid of merit in light of the plain language of the rule and related provisions. The JUA would offer "[a] policy . . . which provides liability coverage with respect to child abuse, whether a sexual nature or not." WAC 284-78-100(3). But because the indefinite article "a" precedes "policy" in WAC 284-78-100(3), the rule does not impose a standard that *all* JUA issued policies cover sex abuse. *See, e.g., State v. Douglas*, 50 Wn. App. 776, 778-79, 751 P.2d 311 (1988) (noting that the indefinite article "a" refers to a single item, in contrast with "the," which connotes a previously noted or recognized noun); *see also Estate of Garwood*, 109 Wn. App. 811, 816, 38 P.3d 362 (2002) (comparing use of definite and indefinite articles).

In contrast, "all" JUA day care insurance policies would have offered a minimum liability limit of \$100,000 per occurrence. WAC 284-78-100(1). This standard policy requirement does not mandate sex abuse coverage. *Id.* If there was intent to require all JUA policies to cover sex abuse, that would have been made part of the standard for "all" policies.

Id. Accordingly, there is no requirement that all JUA policies cover sex abuse.

More critically in this case, WAC 284-78-100(3) does not mandate sex abuse coverage for policies issued in the voluntary market. To the contrary, WAC 284-78-100(3) expressly authorizes the JUA to issue policies with “a broader exclusion with respect to coverage for child abuse.” Murray and Linville’s interpretation of WAC 284-78-100(3) is untenable and inconsistent with the rules because mandatory sex abuse policies would negate the provision allowing abuse exclusions. *See In Re Estate of Garwood*, 109 Wn. App. 811, 816, 38 P.3d 362 (2002) (noting that a court will not construe a statute so as to render any provisions superfluous). Properly interpreted in accordance with its plain language, WAC 284-78-100(3) merely authorizes the JUA to provide a range of options in insurance coverage and exclusions, to include “a” policy with abuse coverage.

Neither RCW 48.88 nor WAC 284-78 create an explicit actionable obligation, or an implied cause of action in tort, on the part of OIC or any other State agency, to guarantee that day care providers carry insurance coverage for sex abuse. By their plain language, RCW 48.88 and WAC 284-78 were intended to address the availability of day care insurance for day care providers, not to provide a tort remedy to victims of day care

abuse. Because Murray and Linville's claims based on these insurance statutes and regulations are devoid of merit, the trial court did not err in granting OIC's motion for summary judgment.⁶

2. Murray And Linville Cannot State A Claim Because OIC Owes Them No Duty Individually Under The Public Duty Doctrine

In essence, Murray and Linville contend OIC is obligated to guarantee they would receive proceeds of insurance policies for acts of sex abuse in day cares. This contention is without merit because there is no recognized actionable obligation to the individual plaintiffs. In any event, even if there is an obligation on the part of OIC arising from RCW 48.88, under the Public Duty Doctrine that obligation, or duty, is owed to the public, not to the Appellants individually.

⁶ Murray and Linville incorrectly assert that the Department of Social and Health Services (DSHS) "was required to inform licensees of the need for insurance to cover sexual abuse." Appellant's Brief at 17. There has never been a statute or regulation that set forth such a requirement. Murray and Linville appear to be relying on a new day care licensing statute, RCW 43.215.535 (formerly codified as RCW 74.15.340). Effective January 1, 2006, day care insurance coverage or self insurance is mandatory for licensed day care "centers," (larger facilities operated outside of the provider's home). RCW 43.215.535(1). However, licensed "family" day care providers (providers operating out of their own homes, as in this case) may opt out of having insurance, provided there is written notice to their clients. RCW 43.215.535(2)(a)(ii). This new statute does not require sex abuse coverage, it is not retroactive, it does not pertain to this lawsuit, and it does not fall within the administrative authority of OIC. In any event, there is no dispute that the family day care providers concerned had liability insurance for daycare services through endorsements on their homeowner's policies.

Further, Murray and Linville incorrectly allege that OIC was required to "notify the licensees where the policies could be obtained." Appellant's Brief at 17. There are no provisions in either the Insurance Code or its related regulations that require OIC to "notify" consumers where they can purchase day care insurance coverage.

“[U]nder the public duty doctrine, the State is not liable for its negligent conduct even where a duty does exist unless the duty was owed to the injured person not merely the public in general.” *Sheikh*, ¶ 12, 156 Wn.2d at 448. “The traditional rule is that a regulatory statute imposes a duty on public officials which is owed to the public as a whole, and that such a statute does not impose any duties owed to a particular individual which can be the basis for a tort claim.” *Baerlein v. State*, 92 Wn.2d 229, 231, 595 P.2d 930 (1979). “The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability.” *Taylor v. Stevens Cy.*, 111 Wn.2d 159, 170, 759 P.2d 447 (1988) (citing *Rogers v. City of Toppenish*, 23 Wn. App. 554, 559, 596 P.2d 1096 (1979)). Whether a duty actionable in tort exists is a question of law. *Johnson v. State*, 77 Wn. App. 934, 937, 894 P.2d 1366 (1995).

Here, the intent of RCW 48.88 to address the issue of day care insurance availability does not support Appellants’ claims in light of the public duty doctrine. *See, e.g., Hartley v. State*, 103 Wn.2d 768, 698 P.2d 77 (1985) (where statute is intended “[t]o provide maximum safety for all persons who travel or otherwise use the public highways of this state” there is no individual claim as against the public duty doctrine) (quoting RCW 46.65.010(1)); *Taylor*, 111 Wn.2d at 164-65 (Building Code Act’s

broad purpose to promote the welfare of building occupants insufficient to overcome the public duty doctrine). Even though Murray and Linville do not provide any reasoned argument in support of any exceptions to the Public Duty Doctrine, none of the recognized exceptions to the doctrine apply in this case anyway. *See Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987) (listing legislative intent, failure to enforce, special relationship, duty to rescue, and proprietary function exceptions to public duty doctrine).

RCW 48.88 does not evidence a “clear intent to identify and protect a particular and circumscribed class of persons” to which Murray and Linville belong. *Taylor*, 111 Wn.2d at 164 (citations omitted). There was no “failure to enforce” a violation of a known condition dangerous to the plaintiff children that had to be corrected by OIC. *Taylor*, 111 Wn.2d at 171-72; *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987); *see also Forest v. State*, 62 Wn. App. 363, 369, 814 P.2d 1181 (1991) (if statute gives official broad discretion, failure to enforce exception does not apply).

Further, Murray and Linville fail to establish a relationship between themselves and OIC, or between a third person and OIC, sufficient to give rise to the “special relationship” exception to the Public Duty Doctrine. *See Taylor*, 111 Wn.2d at 166; *Honcoop v. State*, 111

Wn.2d 182, 193, 759 P.2d 1188 (1988). Finally, Murray and Linville allege no facts that would indicate a duty to rescue the plaintiffs, or that OIC's regulation of the insurance industry constituted a proprietary function. *See Bailey*, 108 Wn.2d at 268.

Murray and Linville's tort claims predicated on RCW 48.88 and WAC 284-78 do not overcome the public duty doctrine. The trial court did not err in granting OIC's motion for summary judgment.

B. The Trial Court Did Not Abuse Its Discretion With Respect To Any Of Its Discovery Orders

Murray and Linville assign error to trial court rulings that (1) denied their motion to compel discovery and (2) granted OIC's motion for a protective order. These issues are moot given the correctness of the trial court's summary judgment order. Murray and Linville's briefing is so inadequate as to waive the issues. Even if these discovery issues were properly before this Court, the trial court did not abuse its discretion, and should be affirmed.

1. The Summary Judgment Order Rendered Discovery Issues Moot

A proper summary judgment order dismissing claims on the merits renders any remaining discovery issues moot. An issue is moot if

the reviewing court can offer no effective relief. As explained above, the trial court correctly dismissed Murray and Linville's suit for lack of any actionable duty. An appellate opinion affirming that order renders any remaining discovery issues moot. *See, e.g., Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 331, 111 P.3d 866 (2005); *Urena v. Theta Products, Inc.*, 899 A.2d 449, 454 (RI 2006).

2. Murray And Linville Should Not Raise Constitutional Issues For The First Time On Appeal Absent A Showing Of Manifest Error

Murray and Linville's assertion of constitutional error should be rejected as it is raised here for the first time on appeal. RAP 2.5(a). Generally, an appellate court will not entertain arguments that were not presented to the trial court. *Wise v. City of Chelan*, 133 Wn. App. 167, 173, 135 P.3d 951 (2006). And the mere assertion of constitutional error is insufficient to merit appellate review absent a plausible showing of manifest error affecting a constitutional right. RAP 2.5(a)(3); *State v. Lynn*, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). Manifest in this sense means "unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed." *Lynn*, 67 Wn. App. at 345 (citing *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974)). Here, Murray and Linville cannot demonstrate manifest error because they fail to show that any of

the trial court's discretionary rulings "had practical and identifiable consequences" in the case. *Lynn*, 67 Wn. App. at 345. In other words, they do not show that the trial court's adverse discretionary rulings prevented them from defeating OIC's summary judgment motion.

Further, Murray and Linville's unreasoned due process and equal protection assertions amount to nothing more than "naked castings into the constitutional sea" that are unworthy of judicial consideration. *In re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986); *Garibay v. State*, 131 Wn. App. 454, 460, 128 P.3d 617 (2005). In an admonition that is most appropriate in light of Murray and Linville's briefing here, the Ninth Circuit has stated:

The art of advocacy is not one of mystery. Our adversarial system relies on the advocates to inform the discussion and raise the issues to the court. Particularly on appeal, we have held firm against considering arguments that are not briefed. But the term "brief" in the appellate context does not mean opaque nor is it an exercise in issue spotting. However much we may importune lawyers to be brief and to get to the point, we have never suggested that they skip the substance of their arguments in order to do so. It is no accident that the Federal Rules of Appellate Procedure require the opening brief to contain the "appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellate relies." Fed. R. App. P. 28(a)(9)(A). We require contentions to be accompanied by reasons.

Independent Towers of Washington v. Washington, 350 F.3d 925, 929-30 (9th Cir. 2003). Here, the Court can properly disregard Murray and Linville's fleeting and unreasoned constitutional assertions.

In any event Murray and Linville cannot show lack of due process; the record demonstrates they had a full and fair opportunity to argue their discovery motions. They have been treated as equally as any other claimant suing a state agency, RCW 4.92.100-110, and nothing in the record indicates that they were precluded from utilizing non-party subpoenas, depositions, and the public disclosure process. CR 30; CR 34(c); CR 45; RCW 42.56 (formerly RCW 42.17).

3. Murray And Linville’s Briefing Is So Deficient As To Waive The Discovery Issues On Appeal

Murray and Linville’s motion to compel pertained to specific interrogatories and requests for production, none of which they address in any meaningful way in their opening brief. Appellants’ Brief at 11-12. The utter lack of argument addressing the specific discovery requests at issue is tantamount to abandonment of those issues on appeal. *Hollis v. Garwall, Inc.*, 137 Wn.2d 683, 689 n. 4, 974 P.2d 836 (1999); RAP 10.3(a)(5).

In the absence of any reasoned argument, Murray and Linville merely quote from a “laundry list” of cases, primarily federal, “leaving the court to piece together the argument” for them. *Independent Towers of Washington*, 350 F.3d at 929. They provide “little if any analysis to

assist the court in evaluating its legal challenge.” *Id.* It is as if they have “heaved the entire contents of a pot against the wall in the hopes that something would stick.” *Id.*

In any event, none of the cases quoted by Murray and Linville are controlling, and all are factually and procedurally distinguishable. Only two of those cases warrant any discussion here.

First, *Allen v. Veterans Admin.*, 749 F.2d 1386, 1388 (9th Cir. 1984), which ostensibly supports the proposition that a plaintiff cannot sue an individual governmental agency, *see* Appellants’ Brief at 8, is legally distinguishable because the Federal Tort Claims Act expressly precludes naming individual federal agencies as defendants to a lawsuit. 28 U.S.C. §§ 1346(b), 2679(a); *Allen*, 749 F.2d at 1388. There is no such restrictive language within RCW 4.92. *Allen* is also distinguishable in that the plaintiff first named a specific federal agency as defendant and then was barred by the statute of limitations from amending her complaint. *Id.* at 1388-89.

Second, *United States v. Rewald*, 889 F.2d 836 (9th Cir. 1989), which ostensibly supports the proposition that discovery can be sought from any agency, *see* Appellants’ Brief at 10, is also distinguishable and Appellants’ reliance on that case is based on inapposite dicta describing a trial court ruling in a criminal case with respect to applicability of *Brady*

v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and Fed. R. Crim., p. 16. *Rewald*, 889 F.2d at 848. Consequently, Murray and Linville’s reliance on *Allen* and *Rewald* is misplaced.

In any event, Murray and Linville do not provide any meaningful analysis with regard to those two cases, or any other authorities they cite. In *Independent Towers of Washington*, the Ninth Circuit declined “to sort through the noodles in search of [the appellant’s] claims” and concluded the appellant had waived a number of issues. *Id.* at 929-30. “As the Seventh Circuit observed in its now familiar maxim, ‘[j]udges are not like pigs, hunting for truffles buried in briefs.’” *Id.* at 929 (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)). Here too, Murray and Linville’s briefing is so lacking in legal analysis that this Court should consider the issues waived.

4. The Trial Court Did Not Abuse Its Discretion With Respect To Discovery

Even if the discovery issues are not moot, the trial court did not err in disposing of those matters, and should be affirmed.

A trial court’s discovery rulings are reviewed for a manifest abuse of discretion. *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 348, 16 P.3d 45 (2000). “A trial court abuses its discretion if it bases its decision on untenable or unreasonable grounds.” *Alaska Nat. Ins. Co. v. Bryan*,

125 Wn. App. 24, 40, 104 P.3d 1 (2004) (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). “[T]he central idea of discretion is choice: the court has discretion in the sense that there are no ‘officially wrong’ answers to the questions posed.” *Coggle v. Snow*, 56 Wn. App. 499, 505, 784 P.2d 554 (1990).

Here, Murray and Linville’s discovery contentions rely on their sweeping assertion that the real defendant was not OIC, but rather the State of Washington in the broadest sense of the word. Appellants’ Brief at 7. But the entire State of Washington is not the defendant in this action. State government is comprised of numerous and diverse agencies; OIC is the only proper state agency defendant in this action.⁷ State government is also comprised of the Legislature, Const. Art. II, and the Supreme Court, as well as this reviewing Court. Const. Art. IV, §§ 1-2, 30. Nothing in Murray and Linville’s complaint alleges tortious conduct

⁷ A few of these other state agencies include Office of the Code Reviser, Board of Accountancy, Office of Administrative Hearings, Committee on Advanced Tuition Payment, Department of Agriculture, Apple Advertising Commission, Arts Commission, Commission on Asian Pacific American Affairs, Attorney General’s Office, Washington Beef Commission, Department of Services for the Blind, Central Washington University, Office of the Family and Children’s Ombudsman, Dairy Products Commission, Department of Information Services, Washington State School for the Deaf, Human Rights Commission, Forensic Investigations Council, Fruit Commission, Freight Mobility Strategic Investment Board, Gambling Commission, Office of the Governor, Horse Racing Commission, Interagency Committee for Outdoor Recreation, Judicial Conduct Commission, Secretary of State, Board of Tax Appeals, Tobacco Settlement Authority, and the Advisory Committee on Transportation of Dangerous Cargoes. Numerous other agencies can be found in the WAC.

by the Legislature, the courts of this State, or any other governmental units.⁸

The State's multi-faceted nature is recognized in the tort claim statutes, RCW 4.92 and RCW 4.96. With regard to claims against state agencies, such as OIC, the Risk Management Division of the Office of Financial Management performs a gate-keeping and oversight function with respect to initial claim filing, investigation, payment of claims and judgments, and agency payments of liability premiums.⁹ RCW 4.92.130. Local governmental entities, such as counties and municipalities, are subject to the claim filing procedures set forth under RCW 4.96. In such cases, the local governmental agencies are responsible for paying their own claims. RCW 4.96.041.

In sum, the tort claim process at the state, county, and municipal levels contemplate that such claims and lawsuits are directed to specific

⁸ On a more localized level, the State of Washington is also made up of 39 counties. *See* Const. Art. XXII (listing counties and their legislative apportionment). Each county has superior and lower courts that are also part of the judicial branch of state government. Const. Art. IV, §§ 1, 5. Nothing in Murray and Linville's complaint alleges tortious conduct by any political subdivisions of the State.

Finally, the State of Washington is also made up of its citizens. The citizens of Washington Territory established the State pursuant to the Enabling Act of 1889. 25 U.S. Stat. at Large, ch. 180. The people also have initiative and referendum rights. Const. Art. I, § 1(a), (b).

⁹ State agencies are assessed annual liability account premiums "based on sound actuarial principles, and shall be for liability coverage in excess of agency-budgeted self-retention levels." RCW 4.92.130(4). All settlements must be "approved by the responsible agencies, or their designees, prior to settlement." RCW 4.92.210(7). And agency heads or agency representatives must certify settlements to the Risk Management Division. RCW 4.92.160(1).

state departments, agencies, officers, and employees, or local governmental entities. With respect to claims against state agencies, the targeted agencies are responsible for the consequences of settlements and judgments, partly through the payment of liability premiums. RCW 4.92.130(4).

Therefore, merely naming the State of Washington as defendant in the caption of a lawsuit does not implicate as defendants all the agencies, subagencies, departments, local governmental entities, and individuals that comprise the State. Murray and Linville ignore that nuance, reasoning in essence that any and all agencies and entities of the State are necessarily parties to their lawsuit. Taking their impractical world view to its illogical conclusion, the trial court, and by extension this reviewing Court, are parties to this litigation by virtue of being agencies state of government. *See* Appellant's Brief at 15 (stating that the trial court acted "as an agent of the State").

However, the allegations in Murray and Linville's complaint implicate only OIC as a party defendant. The complaint alleges that unnamed individuals and "the Insurance Commissioner" were negligent in failing to implement RCW 48.88. CP at 992-93. RCW 48.88 is part of the Insurance Code, which falls within the regulatory authority of the Insurance Commissioner and the agency through which he or she

performs his or her public duties, the Office of the Insurance Commissioner. WAC 284-02-020 (“The insurance commissioner is the head of an agency generally referred to as the insurance commissioner’s office, and as such is its chief administrative officer”); *see also Premera v. Kreidler*, 133 Wn. App. 23, 42, 131 P.3d 930 (2006) (noting that the legislature created OIC and conferred upon it the task of enforcing the insurance code). Responsibility for the alleged failure to implement a part of the Insurance Code cannot be laid at the feet of DSHS, the Washington State Patrol (WSP), the Legislature, this Court, the Fruit Commission, Thurston County, or any other agency, section, department, entity, or person outside of OIC, acting on behalf of the State. Consequently, OIC is the proper state agency defendant for purposes of this action.

Applying the foregoing principles to discovery in accordance with the Civil Rules, the basis for the trial court’s order in favor of OIC and denying Murray and Linville’s motion to compel is reasonable and tenable. RP (Feb. 10, 2006) at 27-30. For purposes of interrogatories and requests for production of documents and other tangible things, OIC does not maintain control over the records of other agencies and departments, such as DSHS, WSP, and the Legislature. CR 34(a). Accordingly, the

trial court correctly ruled that OIC could not be compelled to go forth and obtain and produce records in the custody and control of other agencies.

Contrary to Murray and Linville's assertions, the order denying their motion to compel did not bar them from obtaining discovery from non-parties by other means. Nothing in the trial court's order prevents them from serving non-party agencies with CR 45 subpoenas and CR 30 notices of deposition. *See also* CR 34(c) ("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."). Additionally, Murray and Linville did resort to the public disclosure process prior to initiating this suit, which yielded extensive OIC records, CP at 563-987, and they can continue to direct that process toward other agencies. RCW 42.56.

Further, Murray and Linville fail to show the sought-after evidence would have defeated the OIC's motion for summary judgment. Absent some showing of prejudice, the trial court did not err in denying their motion to compel. *Clarke v. State Attorney General's Office*, ___ Wn. App. ___, at ¶¶ 52-55, 138 P.3d 144 (2006).

Consequently, the trial court did not abuse its discretion.

5. The Trial Court Did Not Err In Granting A Protective Order

The trial court also did not abuse its discretion in denying Murray and Linville's motion to compel deposition testimony of the current and former insurance commissioners, and in turn granting a protective order that allowed OIC an additional 30 days in which to propose deponents or other means of meeting plaintiffs' discovery requests. The trial court recognized that deposing the Insurance Commissioner and his predecessors would be unduly burdensome, particularly over the history and meaning of a statute and the deliberative processes connected with it. *See, e.g., Kyle Engineering Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) (stating that heads of government agencies generally not subject to deposition).

Murray and Linville also failed to show that the Insurance Commissioner and his two immediate predecessors had first-hand knowledge that was unavailable from different sources. *See ABC, Inc. v. United States Info. Agency*, 599 F.Supp. 765, 769 (D.D.C. 1984); *Community Federal Savings & Loan Ass'n v. Federal Home Loan Bank Bd.*, 96 F.R.D. 619, 621 (D.D.C. 1983) (cases disapproving of depositions of high level government officials). The trial court was clearly troubled by the spectre of former high-level OIC officials being deposed on their

deliberative acts undertaken as long as two decades prior to this action. RP (Feb. 10, 2006) at 29. Such depositions are analogous to impermissible public disclosure requests for drafts and internal communications containing policy recommendations and opinions that reflect agency deliberative process. See *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 256-57, 884 P.2d 592 (1994) (explaining purpose and scope of “deliberative process exemption” to public disclosure). Moreover, this Court very recently held that depositions of high-level government officials are inappropriate when other available witnesses can provide the same information. *Clarke*, ___ Wn. App. ___, at ¶¶ 45-47, 138 P.3d 144.

It was reasonable for the trial court to allow OIC to designate other deponents in lieu of current and former high level officials, as less burdensome alternatives to the depositions proposed by Murray and Linville. The trial court’s orders should be affirmed.

C. The Court Did Not Abuse Its Discretion In Twice Denying A Continuance Of The Summary Judgment Hearing

Murray and Linville’s contention that the trial court erred in twice denying their CR 56(f) motion for a continuance is devoid of merit. This issue is also moot given the validity of the trial court’s summary judgment order. *Taft v. Vines*, 83 F.3d 681, 684 (4th Cir. 1996); see also

Versuslaw, Inc. v. Stoel Rives, LLP, 127 Wn. App. 309, 331, 111 P.3d 866 (2005) (holding trial court did not err in declining to rule on pending discovery motion rendered moot by summary judgment ruling).

In any event, the trial court's decision whether to grant or deny a CR 56(f) motion is reviewed for an abuse of discretion. *Alaska National Ins. Co. v. Bryan*, 125 Wn. App. 24, 40, 104 P.3d 1 (2004). As discussed earlier, "[a] trial court abuses its discretion if it bases its decision on untenable or unreasonable grounds." *Id.* (citing *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). Here, too, the trial court had tenable reasons for denying a continuance.

"A trial court may continue a summary judgment hearing if the nonmoving party shows a need for additional time to obtain additional affidavits, take depositions, or conduct discovery." *Winston v. State Dep't of Corrections*, 130 Wn. App. 61, 64-65, 121 P.3d 1201 (2005) (citing CR 56(f)). "The trial court may deny a motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of material fact." *Winston*, 130 Wn. App. at 64-65 (quoting *Butler v. Joy*, 116 Wn. App. 291, 299, 65 P.3d 671 (2003)). The second and third reasons provided ample

justification for the trial court's denial of Murray and Linville's two continuance motions.

OIC's summary judgment motion was anchored on the dispositive legal argument that there was no duty to support Murray and Linville's negligence claim. In both attempts to obtain a continuance, Murray and Linville offered nothing more than speculation as to what evidence they might obtain if given more time, and they were never able to articulate how the evidence obtained would have established a genuine issue of material fact sufficient to defeat summary judgment. CP at 480-484, 1034-1035; RP (Mar. 3, 2006) at 8-9; RP (Mar. 17, 2006) at 4-9. It is not an abuse of discretion for a trial court to deny a motion for a continuance if the moving party fails to indicate what evidence would be established through additional discovery. *Olson v. City of Bellevue*, 93 Wn. App. 154, 165, 968 P.2d 894 (1998).

Moreover, to overturn the trial court's CR 56(f) ruling, Murray and Linville must demonstrate prejudice. *State ex rel Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 237 n. 4, 88 P.3d 375 (2004). There was no prejudice here because additional discovery would not have prevented summary judgment in favor of OIC where there was no actionable duty. The trial court need not permit Murray and Linville to waste more client and judicial resources before making a ruling on an

issue of law on summary judgment. “A trial court has the authority to administer its affairs to achieve the orderly and expeditious disposition of its docket.” *Winston*, 130 Wn. App. at 66 (citing *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 129, 896 P.2d 66 (1995)). Hence, the trial court did not abuse its discretion.

D. The Trial Court Did Not Err In Denying Murray And Linville’s Class Certification Motion Without Prejudice

There was no error also in denying without prejudice Murray and Linville’s class certification motion. With the entry of summary judgment, this issue is moot as well. And even if the issue was not moot, the trial court had a tenable basis for denying the motion without prejudice, a ruling tantamount to continuation of the motion pending outcome of the summary judgment motion.

1. The Correct Summary Judgment Ruling Rendered The Class Certification Issue Moot

There is no point in certifying a class if the underlying cause of action does not exist. The trial court’s summary judgment was proper because there was no actionable duty upon which Murray and Linville could rest their claims, as argued above. This dispositive ruling rendered the issue of class certification moot. *See, e.g., Sickles v. Campbell County, Kentucky*, ___ F.Supp. 2d ___, 2006 WL 2035726, at *6-7 (E.D.

Ky 2006); *Gillespie v. Trans Union, LLC*, ___ F. Supp. 2d ___, 2006 WL 1430213, at *2 (N.D. Ill. 2006) (courts ruling grant of summary judgment rendered pending class certification motions moot). Consequently, this Court should affirm the trial court's disposition of the class certification issue.

2. The Trial Court Did Not Abuse Its Discretion In Denying Class Certification Without Prejudice

Even if the class certification issue was not moot, the trial court did not err in denying the motion without prejudice. "A trial court's class certification decision is discretionary and will not be overturned absent a manifest abuse of discretion." *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790, 807, 123 P.3d 88 (2005) (citing *Lacey Nursing Ctr., Inc. v. Dep't of Revenue*, 128 Wn.2d 40, 47, 905 P.2d 338 (1995)). Here, the trial court had a tenable basis for denying the class certification motion without prejudice.

OIC filed its summary judgment motion before Murray and Linville filed their certification motion. CP at 363-64, 501-10. "[A] trial court retains discretion, for purposes of judicial economy, to delay ruling on a motion for class certification until after hearing dispositive motions." *Sheehan*, 155 Wn.2d at 807 (citing, *inter alia*, *Wash. Educ. Ass'n v. Shelton Sch. Dist. No. 309*, 93 Wn.2d 783, 789, 613 P.2d 769 (1980)).

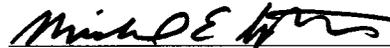
Here, the trial court recognized that if OIC prevailed on summary judgment, the question of class certification would become moot. *See Sheehan*, 155 Wn.2d at 807. The interests of judicial economy under these circumstances justified denying the certification motion without prejudice. *Id.* Denying the motion without prejudice was tantamount to delaying a final ruling on class certification until the summary judgment motion was decided. *See id.* The trial court did not abuse its discretion, and should be affirmed.

V. CONCLUSION

The order granting summary judgment to OIC was correct because Murray and Linville's negligence claim lacked the essential element of duty. And the trial court did not abuse its discretion in issuing the orders preceding the order of summary judgment. Consequently, OIC respectfully asks the Court to affirm the trial court in all respects.

DATED this 4th day of August, 2006.

ROB MCKENNA
Attorney General


MICHAEL E. JOHNSTON
WSBA #28797
Assistant Attorney General
Attorneys for Defendant

APPENDIX

STATUTES

RCW 48.88.010

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

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

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

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

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.

RCW 43.215.535 (formerly RCW 74.15.340)

(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.

(a) Every licensed child day-care center shall comply with the following requirements:

(i) Notify the department when coverage has been terminated;

(ii) Post at the day-care center, in a manner likely to be observed by patrons, notice that coverage has lapsed or been terminated;

(iii) Provide written notice to parents that coverage has lapsed or terminated within thirty days of lapse or termination.

(b) Liability limits under this subsection shall be the same as set forth in RCW 48.88.050.

(c) The department may take action as provided in RCW 74.15.130 if the licensee fails to maintain in full force and effect the insurance required by this subsection.

(d) This subsection applies to child day-care centers holding licenses, initial licenses, and probationary licenses under this chapter.

(e) A child day-care center holding a license under this chapter on July 24, 2005, is not required to be in compliance with this subsection until the time of renewal of the license or until January 1, 2006, whichever is sooner.

(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.

(b) Any licensed family day-care provider that provides to the department proof that the licensee has insurance as provided under (a)(i) of this subsection shall comply with the following requirements:

(i) Notify the department when coverage has been terminated;

(ii) Post at the day-care home, in a manner likely to be observed by patrons, notice that coverage has lapsed or been terminated;

(iii) Provide written notice to parents that coverage has lapsed or terminated within thirty days of lapse or termination.

(c) Liability limits under (a)(i) of this subsection shall be the same as

set forth in RCW 48.88.050.

(d) The department may take action as provided in RCW 74.15.130 if the licensee fails to notify the department when coverage has been terminated as required under (b) of this subsection.

(e) A family day-care provider holding a license under this chapter on July 24, 2005, is not required to be in compliance with this subsection until the time of renewal of the license or until January 1, 2006, whichever is sooner.

(3) Noncompliance or compliance with the provisions of this section shall not constitute evidence of liability or nonliability in any injury litigation.

REGULATIONS

WAC 284-78-030

(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

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 284-78-090

Any licensee that 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 from any market assistance plan organized pursuant to section 906, chapter 305, Laws of 1986, is eligible to apply for coverage through the association. The association's service insurer shall promptly process such application and, if the licensee is judged to be an acceptable insurable risk, offer coverage to the licensee. In view of the purpose of chapter 141, Laws of 1986, every licensee will be presumed to be an acceptable insurable risk for the association. To refuse coverage to any licensee meeting the other eligibility requirements of this section, the association must have the prior written approval of the commissioner. The commissioner will grant such approval only if the association demonstrates that extraordinary circumstances justify refusing coverage to such individual licensee.

WAC 284-78-100

(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.

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COURT OF APPEALS
BY _____

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STATE OF WASHINGTON

NO. 34654-1-II BY _____
DEPUTY

**COURT OF APPEALS FOR DIVISION II
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 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,

Appellants,

v.

STATE OF WASHINGTON,

Respondent.

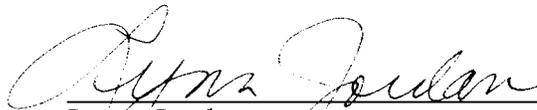
**AFFIDAVIT OF
SERVICE**

STATE OF WASHINGTON)
) ss.
County of Thurston)

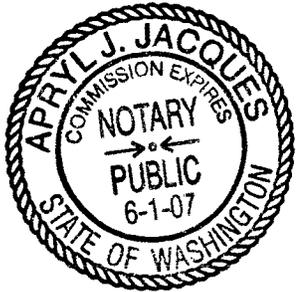
I, Lynn Jordan, being first duly sworn on oath, depose and say: That at all times mentioned herein I was over 18 years of age; that on August 4, 2006, I served the Brief of Respondent and this Affidavit of Service upon the appellants herein, by mailing a

true and correct copy, postage prepaid, to their attorney as follows:

JAMES F. LEGGETT
ATTORNEY FOR APPELLANT
1901 SOUTH I STREET
TACOMA, WA 98405


Lynn Jordan

SUBSCRIBED AND SWORN TO Before me this 4th
day of August, 2006.




Notary Public in and for the
State of Washington
Residing at Olympia
My Commission Expires: 6-1-07