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SUPREME COURT  
OF THE STATE OF WASHINGTON

WASHINGTON COUNTIES RISK POOL; AMERICAN  
INTERNATIONAL GROUP, INC.;  
LEXINGTON INSURANCE COMPANY, INC.; VYRLE HILL; J.  
WILLIAM ASHBAUGH; and ACE AMERICAN INSURANCE  
COMPANY,

Plaintiff-Respondents,

v.

CLARK COUNTY, a municipal corporation; DONALD SLAGLE, an  
individual; LARRY DAVIS, an individual; and ALAN NORTHROP, an  
individual,

Defendant-Appellants.

BRIEF OF *AMICUS CURIAE* SERVICE EMPLOYEES  
INTERNATIONAL UNION, LOCAL 925

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## I. INTRODUCTION & INTERESTS OF AMICUS

This appeal ostensibly presents a discrete insurance question of whether the Washington Counties Risk Pool (“WCRP”) and Lexington Insurance Company (“Lexington”) owed a duty to defend Clark County, Washington (“the County”), and its former individual police officer employee, Detective Donald Slagle (“Det. Slagle”), against the allegations of negligence and civil rights violations brought against them in federal court by Larry Davis (“Davis”) and Alan Northrop (“Northrop”) under their liability insurance policies.

However, this discrete question has been postured for resolution in a way that threatens to drastically and immediately reduce the insurance benefits and protections currently afforded to individual public employees insured by or through risk pools. Notably, these are the same basic benefits and protections that are afforded to every other insured person or entity under Washington law, including but not limited to:

- having individually enforceable rights as an “insured” under their policies;
- being owed a basic duty of good faith and fair dealing that is attendant upon all Washington contracts, and having recourse to remedies for breach of this duty; and
- having the ability to effectively assign their claims for damages if deprived of the insurance benefits and protections owed to them under their policies.

Service Employees International Union, Local 925 (“SEIU”), is a labor organization representing public employees, and shares an interest in preserving intact the benefits afforded to their members, and the thousands of other individual public employees, that serve in their communities throughout Washington. This interest obviously extends to preserving the basic insurance benefits and protections currently enjoyed by public employees under Washington’s common law, which are a practical necessity to the hazards of the service roles filled by public employees.

Individual public employees—educational employees, teachers, firefighters and law enforcement officers, road workers and utility operators, even prosecutors and our judges—are called upon daily to interact with, and protect, the public in the performance of their jobs, often under adverse and chaotic circumstances, and often in the face of immediate danger to themselves and others. These are the men and women on the front lines of providing the basic government health and safety services to their communities. And with these service professions comes the very real risk of catastrophic personal liability, liability that we often ask these individual public employees to relegate to a secondary consideration when performing their job-related activities for the benefit of the public.

The insurance benefits and protections that are provided to public employees to help shield them and their families from exposure to such personal liability are thus of paramount importance, not only to the individual employees, but also to the general public. Furthermore, it

cannot be overemphasized that these benefits and protections are *not* special rights that are being afforded to public employees alone. To the contrary, these are merely the same basic insurance benefits and protections that are enjoyed by every other insured person in Washington. These are the same basic benefits and protections that public entities, public employees, and the insurers of both, have been relying on and applying, and that this Court has defined through rules articulated within countless insurance decisions, over the last fifty-plus years.

SEIU offers this amicus brief to apprise the Court of the broad, negative impact that would be caused by abrogating any of the benefits and protections that currently exist for public employees as insureds in Washington, as well as to address the public policy rationales that have been advanced to support depriving public employees of basic benefits and protections provided to every other Washington insured.

## **II. ISSUES TO BE ADDRESSED BY AMICUS**

First, this brief notes the importance of public employees' status as "insureds" under their policies such that they possess the right to personally enforce the insurance benefits and protections that the policies promise. It also offers a counterpoint to the suggestion that these rights are somehow rendered redundant, and hence disposable, by the separate statutory right to an employer-provided defense and indemnification for claims arising out of the good faith performance of their job duties pursuant to RCW 4.96.

Second, this brief also discusses the basic benefits and protections afforded to all insureds under Washington's common law that have been developed over the course of decades in measured decisions by this Court in response to the practical realities presented in the coverage context. These benefits and protections have been portrayed in this case as onerous and wholly unnecessary burdens imposed upon risk pools. Yet at their core, these benefits and protections are merely the embodiment of the duty of good faith and fair dealing that are inherent in every contract. It is concerning that no coherent analysis is offered to justify stripping public employees of the basic insurance benefits and protections at issue. Equally concerning is the lack of any clear, uniform and objective standard to address these issues offered by either WCRP or Lexington.

### **III. ARGUMENT**

All of the parties to this case appear to acknowledge the frequency with which public employees are personally exposed to third-party claims arising out of the performance of their duties relative to other insureds in this state. In fact, WCRP spends large portions of its brief citing various legislative and academic sources that recount the increase in claims against government entities and their individual employees in Washington, and the corresponding increase in premiums for insurance coverage for these claims, which coincided with the broad waiver of sovereign immunity for state and municipal entities by the Washington Legislature. One need look no further than the underlying claims asserted in the instant case against Det. Slagle for an example of the sheer magnitude of liability

faced by individual public employees—numerous jurisdictions have held that \$1 million for each year of incarceration is an objectively reasonable measure of damages for such claims. *E.g., Limone v. United States*, 497 F.Supp. 2d 143, 243-44 (D. Mass. 2007)<sup>1</sup>; *Restivo v. Nassau County*, No. 06 Civ. 6720, 2015 WL 5796966 (E.D.N.Y. Sept, 30, 2015); *Newton v. City of New York*, No. 07 CIV 6211, slip op. at 44-45 (S.D.N.Y. March 4, 2016).

It is therefore startling to see WCRP and Lexington advocate, and the trial court adopt, a judicial re-writing of the liability policies to deprive public employees like Slagle of his status as insured, and with it the right of an insured to personally enforce the benefits and protections promised to him by the WCRP liability policy. SEIU and WSCFF understand the strategic importance of this position to the coverage defenses mounted by WCRP and Lexington. This position, however, is not based upon or limited to the interpretation of the specific language of the particular policies at issue in this case.<sup>2</sup> Rather, WCRP and Lexington appear to advocate for a public policy exception that would apply globally to every public employee insured by a policy issued by or through a risk pool.

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<sup>1</sup> The *Limone* court also canvassed other innocence awarding \$18 million for ten months' incarceration, \$1,095,000 per year of incarceration in addition to emotional damages; \$1 million per year of incarceration; \$711,000 per month of incarceration; and \$100,000 for six days of incarceration. 497 F. Supp. 2d at 243-44.

<sup>2</sup> It is clear from the language of the WCRP policies that the coverages provided are promised to any insured; that each insured has rights separate from and independent of the rights of any other insured; and that each past or former employee of a member county qualifies as an insured.

Specifically, WCRP and Lexington argue that the designation of public employees as an insured under their policies should be viewed as a mere technical designation, one not intended to afford the employees any substantive rights. Instead, and as the trial court here held, any rights of a public employee under these policies are purely derivative of the rights of the member county or entity, and that the public employee therefore has no direct means of personally enforcing the policy. The sole support for this argument is the bald assertion that any rights provided by the policies are wholly redundant of those provided in the statutory defense and indemnification mechanism for public employees under RCW 4.96.

First, it is not credible to suggest that the availability or unavailability of insurance coverage will have no impact on the government entity's decision on whether to provide a statutory defense or indemnity to its public employees. This would be especially true in situations where the employee is facing particularly large-loss claims. Where the indemnity and defense decision is a close call or presents a politically-charged issue, where an early but still significant settlement opportunity is presented, or in a host of other common circumstances, the availability of coverage will impact the government entity's decision. To this end, adding the prospect of incurring the additional expense of litigating a coverage case on behalf of the employee concurrently with

providing that public employee a defense in the liability action will further impact the decision made by the employer.<sup>3</sup>

The simple fact is that there is often a divergence of interest between the governmental entity employer and the public employee on the performance of duties, confirming the need for a broad duty to defend. This fact is born out in even the limited number of Washington decisions involving risk pools. For instance, in *Colby v. Yakima County*, 133 Wn. App. 386, 391-93, 136 P.3d 131 (2006), the WCRP member entity and the employee, a county judge, were at odds over whether coverage under the policies was triggered. Similarly, in *e.g., Public Utility Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 793-95, 881 P.2d 1020 (1994), the public employee insureds, after being denied coverage under their policies, assigned their rights to plaintiffs as part of a covenant judgment.

The interpretation of liability policies by WCRP and Lexington eliminates any predictability about a defense or coverage afforded by these policies – it will leave public employees guessing about whether their personal assets are at risk because risk pools and their commercial insurer allies will be afforded the sole discretion of interpreting liability policies

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<sup>3</sup> It is important to note that a governmental entity may, within its discretion, deny a defense to an employee under RCW 4.96.041 if it deems the employee's conduct not to have been undertaken in good faith within the course of his/her duties. That is a far cry from the broad duty to defend in insurance common law. Such a governmental entity will also be sorely tempted to throw an employee under the bus if that employee is a union activist, a whistleblower, or is simply outspoken.

as they see fit. Realistically, they will abandon public employees in the face of large claims, as WCRP and Lexington did in Det. Slagle's case here. This runs completely against the public policy developed by this Court in Washington's insurance common law.

Second, the argument advanced by WCRP and Lexington is tautological in that it is premised upon and proceeds from the very conclusion that they urge this Court to adopt—that the rights and remedies that individual public employees have under their insurance policies are identical to and coterminous with their rights to statutory indemnification under RCW 4.96. Under the current state of Washington law, however, it is clear that the rights and remedies available to an insured to recover the insurance benefits owed are far broader and stronger than those available to challenge an indemnification determination under RCW 4.96. These are, again, the same rights and remedies that WCRP and Lexington argue should not apply to public employee insureds, the most important of which are the duty of good faith and fair dealing implicit in every contract, and the corresponding remedy for the breach of this duty that allows insureds to protect themselves from personal liability by entering into a covenant judgment settlement binding upon the insurer (but subject to a reasonableness determination on damages) when incorrectly denied a defense to third-party claims under his or her policies.

According to WCRP and Lexington, the Legislature has exempted them from *all* duties to their public employee insureds, including the baseline duty of good faith and fair dealing imposed by the common law

on every contract. However, the exemption in RCW 48.01.050 relied upon by both WCRP and Lexington is exceedingly narrow: by its express terms this exemption only applies to certain provisions of Title 48 RCW, the Insurance Code, and even then only applies to a risk pool entity that actually self-insures the losses of its members and their employees.

Both WCRP and Lexington fail to acknowledge that in Washington, the duty of good faith and fair dealing is imposed by *both* the common law and the Code, and that each of these sources impose upon them separate and independent duties. As early as the 1940s, Washington courts recognized that an actionable duty of good faith and fair dealing was owed to insureds under the common law. *Burnham v. Commercial Casualty Ins. Co. of Newark, N.J.*, 10 Wn.2d 624, 117 P.2d 644 (1941). That duty, rooted in a common law, gives rise to the obligation to settle claims brought against an insured within policy limits once liability has become reasonably clear, and the obligation to properly investigate the facts of the claim and allegations made against an insured. *Id.* at 627-28, 631.<sup>4</sup> Indeed, as recently as 2001, this Court firmly established that insureds are owed common law duties of a fiduciary nature. *Van Noy v. State Farm Mut. Ins. Co.*, 142 Wn.2d 784, 793, 16 P.3d 374 (2001). The insured's interests cannot be made to take a back seat to any other interest

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<sup>4</sup> *Accord, Evans v. Continental Cas. Co.*, 40 Wn.2d 614, 245 P.2d 470 (1952) (recognizing bad faith tort claim); *Murray v. Mossman*, 56 Wn.2d 909, 355 P.2d 985 (1960) (bad faith claim for failure to properly defend claim); *Tyler v. Grange Ins. Ass'n*, 3 Wn. App. 167, 473 P.2d 193 (1970).

that the coverage provided deems relevant. *Truck Ins. Exch. v. Van Port Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002).

While this Court has repeatedly affirmed that it will not read new exceptions into statutes based on policy grounds, public policy also does not support reading into RCW 48.01.050 the universal exemption from all legal duties being advanced by WCRP and Lexington. This Court has spent decades crafting remedies to compel full compliance with the good faith obligations owed to insureds, which were and still are often routinely ignored. Without these specifically tailored remedies, the duty of good faith and fair dealing exists only in name.

To this end, the Court has long recognized the covenant judgment settlement mechanism as a keystone to ensuring that the duty of good faith owed to an insured is observed. In a covenant judgment settlement, the plaintiff and the insured agree on a reasonable settlement for the liability at issue in a stipulated or consent judgment, the insured receives a covenant not to sue or execute, protecting the insured's personal assets, and the insured's claims against the insurer are assigned to the plaintiff. *Bird v. Best Plumbing*, 175 Wn.2d 756, 754-65, 287 P.2d 551 (2012); *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr. Inc.*, 161 Wn.2d 903, 169 P.3d 1 (2007); *Besel v. Viking Ins. Co. of Wisc.*, 146 Wn.2d 730, 49 P.3d 887 (2002); *Miller v. Kenny*, 180 Wn. App. 772, 325 P.3d 278 (2014).

In other words, once an insured is abandoned without a defense, the fact of such a settlement or its amount is no longer an issue except to the extent that it is the product of fraud or collusion:

An insurer refusing to defend exposes its insured to business failure and bankruptcy. An insurer faced with claims exceeding its policy limits should not be permitted to do nothing in the hope that the insured will go out of business and the claims simply go away. To limit an insurer's liability to its indemnity limits would only reward the insurer for failing to act in good faith toward its insured. We therefore hold that when an insurer wrongfully refuses to defend, it has voluntarily forfeited its ability to protect itself against an unfavorable settlement, unless the settlement is the product of fraud or collusion. To hold otherwise would provide an incentive to an insurer to breach its policy.

*Truck Ins. Exch.*, 147 Wn.2d at 765-66 (citation omitted).

Without this covenant judgment mechanism, individual public employee insureds would have no ability to protect themselves from exposure to the liability claims they routinely face—they cannot end the liability case by assigning their rights to plaintiff, nor are they likely to be able to defend the liability case with their personal assets (much less concurrently prosecute an equally expensive coverage action). The suggestion that public employees would still be able to later sue to recover the defense costs under the policy thus presents a hollow remedy, and one unavailable to most public employees from a practical standpoint.

At its most basic level, WCRP and Lexington have asked this Court to change the status quo by exempting individual public employees from all of the benefits and protections provided to every other insured,

including even a duty of good faith and fair dealing when the determination of whether or not to provide the benefits and protections promised by their policies is being made. In effect, this Court is asked to not only treat hundreds of thousands of public employees as having received something less than insurance, with less benefits and protections than insurance, but to render them powerless to both protect themselves from liabilities claims asserted against them, and to prosecute claims to receive any benefits and protections owed under their policies.

WCRP and Lexington's assurances aside, this is not a scenario that is workable or tolerable to the public, the Legislature or the courts in this state when applied to insureds generally. It is every bit as unworkable and intolerable for public employees, who as part of their service occupations are personally exposed to liability for third-party claims with far more frequency, and of much greater magnitude, than other categories of insureds in Washington.

#### IV. CONCLUSION

This Court should apply the principles of law and remedies from Washington's insurance common law to the circumstances of individual public employees and risk pools in Washington.

DATED this 28<sup>th</sup> day of March, 2016.

Respectfully submitted,

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Motion for Leave to File Amicus Brief,  
Brief of Amicus Curiae Service Employees International Union, Local 925  
Declaration of Service.

Please feel free to contact me if you any questions,  
Sincerely,  
Lee Gray

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

DATED: March 28, 2016, at Seattle, Washington.

s/Kathleen Phair Barnard  
Kathleen P. Barnard  
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Iglitzin & Lavitt LLP

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Lee Gray

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