

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 23, 2016, 11:48 am
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

NO. 91154-1

SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON COUNTIES RISK POOL; LEXINGTON
INSURANCE COMPANY; AMERICAN INTERNATIONAL
GROUP, INC.; and ACE AMERICAN INSURANCE COMPANY

Respondents,

v.

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

Petitioners.

WASHINGTON STATE ASSOCIATION OF COUNTIES
AMICUS CURIAE BRIEF IN SUPPORT OF
WASHINGTON COUNTIES RISK POOL

Josh Weiss, WSBA #27647
WASHINGTON STATE
ASSOCIATION OF COUNTIES
206 10th Avenue SE
Olympia, WA 98501-1311
(360) 489-3015

 ORIGINAL

FILED E
APR - 8 2016
WASHINGTON STATE
SUPREME COURT
by L

TABLE OF CONTENTS

1. INTRODUCTION.....1

2. IDENTITY AND INTEREST OF AMICUS.....1

3. STATEMENT OF THE CASE.....2

 3.1 Washington Counties’ ability to self-insure is governed
 by statute, not Washington insurance law.....3

 3.2 RCW 4.96.041 governs the duties a local governmental
 entity may have with respect to a claim for defense and
 indemnity by a current or former employee.....4

4. ARGUMENT.....5

 4.1 The Washington statutory scheme governing local
 governmental entity self-insurance necessarily excludes
 the application of Washington insurance law.....5

 4.2 Employees of local governmental entities do not
 have contractual rights in the self-insurance
 maintained by their employers.....6

5. CONCLUSION.....7

TABLE OF AUTHORITIES

STATUTES

RCW 4.96.041	1, 2, 4, 5, 6, 7, 8
RCW 48.01.040	6
RCW 48.01.050	4, 5
RCW 48.62	3, 4, 5, 6, 7, 8
RCW 48.62.011	3, 4, 6
RCW48.62.031	3
RCW 48.62.061	5, 6

1. INTRODUCTION

Petitioners seek to apply Washington's insurance code and common law of insurance to Washington counties that have chosen to jointly self-insure with other counties through a statutory joint self-insurance pool. Washington State Association of Counties ("WSAC") joins the Respondent, Washington Counties Risk Pool ("WCRP") in requesting that this Court reject this argument and affirm the summary judgment orders entered by the Cowlitz County Superior Court because: (1) counties that comprise a joint self-insurance pool should know that their rights and liabilities are based on their contractual obligations under an intergovernmental agreement, a pool's bylaws and the terms of joint self-insurance that the counties themselves approve from year to year, rather than the open ended tort liability imposed upon commercial insurers who put their own interests above those of their policy holders; and (2) all counties, whether individually or jointly self-insured, should be able to rely on the statutory obligations of defense and indemnity of current and former employees, officers and agents found in RCW 4.96.041 and the county's code, rather than the expansive common law insurance obligations and remedies applicable to commercial insurers.

2. IDENTITY AND INTEREST OF AMICUS

WSAC is a non-profit association whose membership includes elected county commissioners, council members and executives from each of Washington's 39 counties. WSAC provides a variety of services to its member counties including advocacy, training and workshops, and a forum in which to network and share best practices. Voting within WSAC is limited to county commissioners, council members and executives; however WSAC also serves as an umbrella organization for affiliate organizations representing county road engineers, local public health officials, county administrators, emergency managers, county human service administrators, clerks of county boards, and others.

WSAC's membership includes counties who individually self-insure, and counties who jointly self-insure, including the 26 member counties of Respondent WCRP and former WCRP member county, Petitioner Clark County. WSAC was instrumental in coordinating the efforts of Washington counties to establish the WCRP in 1988. (CP 4544).

3. STATEMENT OF THE CASE

WSAC adopts WCRP's Restatement of the Case, but writes further here to emphasize that: (1) the Legislature granted Washington counties the right to self-insure, either jointly with other counties or individually, while exempting them from the separate and distinct rights and remedies under both the Washington Insurance Code and the Washington common law of insurance; and (2) the rights of former or current county employees to a

defense and indemnity are governed exclusively by RCW 4.96.041 (and their particular county's ordinance implementing RCW 4.96.041).

3.1 Washington Counties' ability to self-insure is governed by statute, not Washington insurance law.

RCW 48.62 provides: "the exclusive source of local government entity authority to individually or jointly self-insure risks, jointly purchase insurance or reinsurance, and to contract for risk management, claims, and administrative services". RCW 48.62.011. Further, under RCW 48.62.031(1):

The governing body of a local government entity may individually self-insure, may join or form a self-insurance program together with other entities, and may jointly purchase insurance or reinsurance with other entities for property and liability risks, and health and welfare benefits *only as permitted under this chapter*.

(emphasis added).

Because RCW 48.62 is the exclusive source of local governmental authority to self-insure:

This chapter shall be *liberally construed* to grant local governmental entities *maximum flexibility* in *self-insuring* to the extent the *self-insurance* programs are operated in a safe and sound manner.

RCW 48.62.011 (emphasis added).

At the same time that RCW 48.62 was enacted, an amendment to the definition of "insurer" in RCW 48.01.050 was inserted:

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

RCW 48.01.050 (emphasis added); *see* Laws 1979, 1st Ext. Sess., Ch. 256, § 13.

Finally, by statute it is the State Risk Manager, not the State Insurance Commissioner, who is charged with establishing the rules governing the management and operation of self-insurance programs:

The state risk manager shall adopt rules governing the management and operation of both individual and joint local government self-insurance programs covering property or liability risks. . . . [R]ules shall include:

(1) Standards for the management, operation, and solvency of self-insurance programs. . . .

(2) Standard for claims management procedures. . . .

RCW 48.62.061.

3.2 RCW 4.96.041 governs the duties a local governmental entity may have with respect to a claim for defense and indemnity from a current or former employee.

When a claim for damages is brought against current or former employees of a local governmental entity, those employees "may request the local governmental entity to authorize the defense of the action or proceeding at the expense of the local governmental entity." RCW 4.96.041(1). If the legislative authority of that local governmental entity or

that local governmental entity utilizing its implementing ordinance “finds that the acts or omissions of that [current or former employee] were, or in good faith purported to be, within the scope of his or her official duties, the request shall be granted.” RCW 4.96.041(2). Any subsequent monetary judgment entered against that current or former employee shall be paid only after approval by the legislative authority of that local governmental entity or that local governmental entity utilizing its implementing ordinance. *Id.*

4. ARGUMENT

4.1 The Washington Statutory Scheme governing local governmental entity self-insurance necessarily excludes the application of Washington insurance law.

The Legislature specifically excluded local governmental entity joint self-insurance programs from the definition of “insurer” under Washington law:

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

RCW 48.01.050 (emphasis added). As to local governmental entities individually self-insuring, such a process by definition is not subject to insurance law since “Insurance” is defined as “a contract whereby *one undertakes to indemnify another* or pay a specified amount upon determinable contingencies. RCW 48.01.040. (emphasis added). The

Legislature further explained that RCW 48.62, not the Washington Insurance Code codified in the rest of RCW Ch. 48, was the “*exclusive*” source of local government entity authority to individually or jointly self-insure risks. RCW 48.62.011 (emphasis added).

Finally, under RCW 48.62.061, it is the state Risk Manager and not the state Insurance Commissioner who is responsible for establishing rules governing the operation and management of local governmental entity self-insurance programs, including claims management procedures. This comprehensive and exclusive statutory scheme governing local governmental entity self-insurance in Washington precludes any coextensive application of the Washington Insurance Code or the Washington common law of Insurance.

4.2 Employees of Counties do not have contractual rights in the self-Insurance maintained by their employers.

Petitioners’ contention that individual county employees may assert personal rights as an “insured” under the common law of insurance poses extraordinary risks to all Washington counties, whether members of joint self-insurance pools or self-insured. A county employee’s right to a defense and indemnity is derived from statute, not contract.

As described above, RCW 4.96.041 obligates counties to defend and indemnify current or former employees for acts or omissions while

performing or in good faith purporting to perform their official duties. RCW 4.96.041(2). Petitioner Slagle's contention that he is an "insured" under the joint self-insurance provided to member counties by the WCRP exposes those counties to risks and obligations that go far beyond the statutory obligations imposed by the Legislature. A Washington county's decision to fund the obligations imposed by RCW 4.96.041 by either jointly self-insuring or individually self-insuring through the authority granted by RCW 48.62 would impose an additional layer of insurance law tort duties and remedies to the procedure described in RCW 4.96.041.

Further, the statutory relationship governing the defense and indemnity rights of a county employee codified in RCW 4.96.041 should not be altered merely because Washington counties that self-insure or jointly self-insure purchase reinsurance for their self-insured risk as the WCRP does. Washington counties that self-insure do so to even out their exposure to risk and to protect their treasuries from the shock of paying large claims, just as the WCRP does. These prudent financial practices – expressly authorized by RCW 48.62 – do not in any way introduce common law insurance remedies to the operation of RCW 4.96.041.

Finally, not classifying a county employee as an "insured" under a county's self-insurance program will not have "devastating impacts" on

public employees in the state of Washington (County/Slagle Br. 25). Public employees retain their rights under RCW 4.96.041 and a judgment against an indemnified employee can only be collected from employer-local governmental entity, RCW 4.96.041(4). Slagle was afforded exactly this statutory protection in this case, CP 8625. He at no point faced the financial ruin faced by an individual who is insured by a commercial liability insurer that breached its duty to defend or indemnify a policyholder.

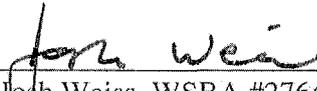
5. CONCLUSION

RCW 48.62 is the exclusive source of authority for the operation of local governmental entity self-insurance programs in the state of Washington. The Petitioners' attempt to apply the Washington Insurance Code and common law of insurance to local governmental self-insurance programs and impose the expansive tort duties developed for commercial insurance companies conflicts with the exclusive statutory scheme in RCW 48.62 and should be rejected. This Court should also reject Petitioners' attempt to import the Washington Insurance Code and common law of insurance to the application of RCW 4.96.041.

This Court should affirm the summary judgment rulings entered by
the Cowlitz County Superior Court.

Respectfully submitted this 23rd day of March 2016.

WASHINGTON STATE
ASSOCIATION OF COUNTIES



Josh Weiss, WSBA #27647

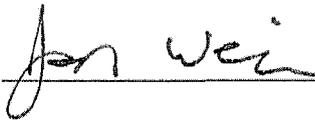
CERTIFICATE OF SERVICE

Josh Weiss, declares under penalty of perjury, that on date noted below, he caused the foregoing document to be served on the individuals named below in the specific manner indicated:

Office of Clerk Washington Supreme Court Temple of Justice P.O. Box 40929 Olympia, WA 98504-0929	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Howard M. Goodfriend Catherine Wright Smith Smith Goodfriend, PS 1619 8 th Avenue N. Seattle, WA 98109	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
William J. Leedom Amy M. Magnano David M. Norman Bennett Bigelow & Leedom PS 601 Union Street, Suite 1500 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Timothy K. Ford David J. Whedbee MacDonald Hoague & Bayless 705 2 nd Ave., Suite 1500 Seattle, WA 98104-1796	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
John R. Connelly Micah R. LeBank Connelly Law Offices 2301 N. 30 th St. Tacoma, WA 98403	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Ian Hale Michael E. Farnell Parsons Farnell & Grein, LLP 1030 SW Morrison Street Portland, OR 97205	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

Phillip A. Talmadge Talmadge Fitzpatrick 2775 Harbor Avenue SW Third Floor, Suite C Seattle, WA 98126	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Christopher Horne Taylor Hallvik Clark County Prosecuting Attorney, Civil Division P.O. Box 5000 Vancouver, WA 98666-5000	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Troy A. Biddle Donald J. Verfurth Gordon & Rees LLP 701 Fifth Ave., Suite 2100 Seattle, WA 98104	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Agelo L. Reppas Aaron F. Mandel Sedgwick LLP One North Wacker Drive, Suite 4200 Chicago, IL 60606	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Matthew J. Segal Pacifica Law Group LLP 1191 Second Ave., Suite 2000 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail
Thomas M. Jones Brendan Winslow-Nason Cozen O'Connor 999 Third Avenue, Suite 1900 Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> E-Mail

Signed in Olympia, WA this 23rd day of March 2016.



OFFICE RECEPTIONIST, CLERK

To: Josh Weiss
Subject: RE: Electronic Filing, Supreme Court Case No. 91154-1

Received 3-23-16

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Josh Weiss [mailto:JWeiss@wsac.org]
Sent: Wednesday, March 23, 2016 11:37 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Electronic Filing, Supreme Court Case No. 91154-1

Dear Clerk,

Attached please find the Washington State Association of Counties motion for leave to file amicus brief, and amicus brief in the following matter:

Washington Counties Risk Pool v. Clark County
Supreme Court Case Number No. 91154-1

Certification for service is included in both documents. Please let me know if you have any questions.

Sincerely,

Josh Weiss WSBA #27647
Washington State Association of Counties
Director of Policy and Legislative Relations / General Counsel
(360) 489-3015 office
(360) 561-3560 cell

"The Voice of Washington Counties"