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No. 91154-1

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Appellants.

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DAVIS AND NORTHROP  
ANSWER TO AMICI BRIEFS

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## A. INTRODUCTION

This Court has received six amicus briefs on the issues in this case, including those from the Washington State Association for Justice Foundation (“WSAJF”), the Innocence Network (“IN”), SEIU Local 925 (“SEIU”), various Washington risk pools (“risk pools”), the Washington State Association of Counties (“WSAC”); and the Association of Government Risk Pools, the National League of Cities, and the California Association of Joint Powers Authorities (collectively, “AGRIP”). By its ruling dated April 8, 2016, this Court set a deadline of April 27, 2016 for the parties to answer those amici briefs. Davis/Northrop offer this single answer to all of the amici briefs. Davis/Northrop will focus in this brief on the particular points raised by the amici.

## B. STATEMENT OF THE CASE

Davis/Northrop believe the statements of the case set forth in their opening and reply briefs accurately articulate the facts and procedure in this case.

## C. ARGUMENT

Davis/Northrop adhere to their arguments on Washington’s insurance common law, WCRP/Lexington’s duty to defend, and the assignment of claims as set forth in their prior briefing. They will repeat

those arguments only as necessary to answer particular positions taken by various amici.

(1) Washington's Insurance Common Law Applies Here

Nothing presented in the various amicus briefs detracts from the point made by Davis/Northrop in their briefs that Washington's insurance common law governs both as to the principles to interpret and construe WCRP's liability policies at issue here (as well as Lexington's insurance obligations), and the remedies afforded insureds like the County/Slagle under those policies when WCRP/Lexington breach duties owed to them.

WCRP/Lexington's amici allies spend a considerable portion of their briefing arguing the merits of risk pools and discussing the law of other jurisdictions pertinent to risk pools. Davis/Northrop do not question the utility of risk pools, properly regulated and held to the vigorous obligations of good faith toward their governmental and public employee insureds. This case is *not* a referendum on risk pools; it *is* a case about how WCRP/Lexington breached duties of good faith to the County/Slagle.

Further, this is not a case about California or Colorado risk pools, risk pools operating in a legal environment different than Washington.<sup>1</sup> Rather, this is a case about risk pools under Washington law.<sup>2</sup>

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<sup>1</sup> The relevance of the decisions from courts in California and Colorado, with distinctive statutory provisions on risk pools, is insignificant, particularly given Washington statutes and decisional law on risk pools, and WCRP's own conduct in

(a) The Interpretive Principles of Washington's Insurance Common Law Apply to Risk Pool Liability Policies

It is notable that *none* of WCRP/Lexington's amici allies make any attempt to articulate the principles that should guide the interpretation and construction of risk pool liability policies. In fact, the risk pools and AGRIP seemingly imply that courts should blindly acquiesce in whatever interpretation risk pools give to their own liability policies even when such interpretation is contrary to the policy language, risk pool practices, and Washington case law. The failure of WCRP/Lexington's amici allies to describe the principles that ought to apply for the interpretation and construction of risk pool liability policies fails to confront a key issue in this case; they leave a void for both risk pools and their insureds in interpreting and construing risk pool liability policies that provide

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historically employing Washington's insurance common law with regard to its liability policies. Davis/Northrop reply to WCRP at 25-26; County/Slagle reply br. at 19-20.

<sup>2</sup> Omitted from any discussion by WCRP/Lexington amici allies is a serious discussion of the states that interpret their risk pools' liability policies in accordance with insurance law principles because such risk pool liability policies are no different than other liability policies. Davis/Northrop reply to WCRP at 26; County/Slagle reply br. at 18-19. *See generally*, Jason Doucette, *Wading in the Pool: Interlocal Cooperation in Municipal Insurance and the State Regulation of Public Entity Risk-Sharing Pools*, 8 Conn. Ins. L. J. 533, 556-58, 559-61 (2001-02). As the South Dakota Supreme Court succinctly stated in *South Dakota Public Entity Risk Pool for Liability v. Winger*, 566 N.W.2d 125, 128 n.5 (S.D. 1997): "Technically, the PEPL is not insurance, but a liability, self-insurance pool. However, coverage concepts are similar to insurance, so we apply the same general principles." (citations omitted).

coverage for tens of thousands of Washington public employees.<sup>3</sup> Those amici invite the need for future litigation to ascertain what principles control. The better approach is to apply Washington insurance common law to such policies, just as WCRP itself has done for decades.<sup>4</sup>

(i) Washington's Insurance Common Law Is a Specialized Subset of Contract Law

The principles governing the interpretation and construction of insurance policies,<sup>5</sup> referenced by Davis/Northrop as Washington's insurance common law, arise both out of the common law and statute. The brief of the Washington State Association for Justice ("WSAJF") only

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<sup>3</sup> See Appendix for the list of approved Washington risk pools. <http://des.wa.gov/SiteCollectionDocuments/RiskManagement/LGSIApprovedJointPrograms%203%20216.pdf>.

<sup>4</sup> There are also numerous suggestions by WCRP/Lexington's amici allies that subjecting risk pools to Washington insurance common law, both the interpretive principles and remedies, will somehow fundamentally change the status quo such that risk pools would become unable to secure reinsurance and excess insurance from commercial insurers. WSAC br. at 7; risk pools br. at 14-16; AGRIP br. at 1. That assertion does not square with the facts here.

WCRP and its reinsurers and excess carriers have always previously applied Washington insurance common law to these policies and the claims made under these policies. WCRP's commercial insurers made the decision to underwrite these policies (and to calculate the premiums for the policies) knowing full well that Washington insurance common law would apply. WCRP's reinsurance policies also expressly insure WCRP for any bad faith and other extra-contractual claims that arise from their claim handling duties, again demonstrating that WCRP and its insurers believed WCRP was subject to such claims; this risk was taken into account in issuing the policies and in setting the premium amounts that were annually charged by these commercial carriers, and that were paid by WCRP for such coverage.

<sup>5</sup> The interpretation and construction of contracts are conceptually distinct endeavors. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 502 n.9, 115 P.3d 262 (2005).

confirms this assertion. WSAJF br. at 13-19. None of the other amici briefs disputes this.

Washington's insurance common law is a specialized subset of Washington contract law, as Davis/Northrop have noted. Davis/Northrop reply to WCRP at 30. This is confirmed by Washington courts addressing risk pool liability policies:

an insurance policy is a contract whereby the insurer undertakes to indemnify the insured against loss, damage, or liability arising from a contingent or unknown event.

*City of Okanogan v. Cities Ins. Ass'n*, 72 Wn. App. 697, 701, 865 P.2d 576 (1994). *See also*, RCW 48.01.040. This legal basis for interpreting and construing liability policies is also recognized by scholars. "An insurance policy is a contract executed by an insurer and an insured." Thomas Harris, *Wash. Insur. Law* (3d ed.) at 1-1.

This Court should apply its long-established principles for interpreting and construing insurance contracts to risk pool liability policies, not only for the reasons articulated *supra* by the South Dakota court, but to do so better addresses the actual relationship between risk pools and their insureds, a relationship that mirrors the one between insurers and insureds, particularly where WCRP is but a front for its commercial reinsurers and excess insurers.

(ii) The Amici Fail to Honor the Key Principle that Risk Pools Owe Good Faith Obligations to their Insureds

A core principle of Washington contract law is that a covenant of good faith is implied with regard to parties' performance of their contractual undertakings. Breach of that covenant of good faith is actionable. *Rekther v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 111-20, 323 P.3d 1036 (2014). *Nothing* in RCW 48.01.050 purports to immunize risk pools from this general good faith contractually-based common law duty they owed to their insureds in carrying out their obligations under the terms of liability policies issued to their insureds. WCRP/Lexington and their amici allies cannot read these good faith obligations on the part of risk pools and their reinsurers/excess insurers out of Washington law, even if contract law is the basis for interpreting/construing risk pool liability policies.

Specifically, in the insurance setting, as noted previously, an insurer has long had good faith obligations to the insured derived from statute *and* common law. *See, e.g., Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 386, 715 P.2d 1133 (1986). Again, WCRP/Lexington

and their amici allies cannot read out of Washington law these particular good faith obligations to insureds like the County/Slagle.<sup>6</sup>

In seeking to read any good faith duty to the County/Slagle out of this case, the risk pool amici deliberately distort the impact of Washington statutory treatment of risk pools with regard to this core good faith obligation. For the reasons articulated in Davis/Northrop's opening brief at 33-40 and their reply to WCRP at 9-18, *nothing* in RCW 48.01.050, wherein risk pools are deleted from the definition of an insurer *under the Insurance Code*, purports to address risk pools' common law obligations of good faith to their insureds. To argue that the plain language of RCW 48.01.050, that *nowhere* addresses common law duties, eliminates such duties carefully crafted by this Court over the years, distorts legislative intent.<sup>7</sup> Those common law obligations are unaffected by RCW 48.01.050.<sup>8</sup>

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<sup>6</sup> Critical to the arguments of WSAC, the risk pools, and AGRIP is their willingness to completely read public employees insured by risk pools out of the analysis of risk pool liability policies. WSAC says those employees are not insureds, despite the contrary express WCRP liability policy language. WSAC br. at 6-8. The risk pools and AGRIP extol the sophistication and power of risk pools, risk pools br. at 6-9, AGRIP br. at 5-10, entirely *ignoring* the fact that the disproportionate relationship of individual public employees like Donald Slagle and risk pools like WCRP is not any different than the relationship of insureds and commercial insurers that was the genesis for the good faith duties developed in common law and statute.

<sup>7</sup> WSAC claims in its brief at 2 that the Legislature in RCW 48.01.050 exempted risk pools from the common law duty of good faith. That assertion is false and unsupported anywhere in RCW 48.01.050 or its legislative history.

Moreover, RCW 48.01.030's good faith directive continues to apply to entities "in the business of insurance" regardless of whether they are insurers under the Insurance Code. WCRP contended that risk pools are not in the business of insurance within the meaning of RCW 48.01.030 because such pools were never under the regulation of the Insurance Commissioner. WCRP br. at 34-37. *That assertion was untrue for the entire period at issue in this case up until 2010.* Indeed, as Davis/Northrop observed, the Insurance Commissioner was a key player on the committee that assisted the risk manager in the approval and regulation of risk pools. Davis/Northrop reply to WCRP at 13.<sup>9</sup> The Insurance Commissioner's involvement in the regulation of pools was characterized by outside scholars as *intensive*. Doucette, 8 Conn. Ins. L. J. at 556 ("the [Washington] state Insurance Department retains close control over the operation of the state's primary government risk pooling authority, the Local Government Self-Insurance Program (LGSI)").

Instead, AGRIP attempts in a footnote to minimize the role of the Insurance Commissioner in the regulation of risk pools until 2010,

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<sup>8</sup> This is precisely why the better reading of RCW 48.01.050 is that the Legislature intended by its enactment to exempt risk pools from those requirements of the Insurance Code like capitalization, taxation, etc. that are inconsistent with the nature of risk pools as the Legislature envisioned them. Davis/Northrop br. at 38-40; Davis/Northrop reply to WCRP at 12-18.

<sup>9</sup> The WSAC amicus brief simply *misrepresents* the law applicable to *this case* when it cites to RCW 48.62.061 on the role of the state risk manager, a statute effective largely *after* all the events in this case. WSAC br. at 4, 6.

asserting that the board in question merely “assisted” the Risk Manager in his/her duties. AGRIP br. at 5. That is a misrepresentation. Per former RCW 48.62.041, that board approved the creation of risk pools and promulgated regulations pertaining to them. This “close” regulatory control confirmed in the Doucette article cited above.

Second, that risk pools are in the business of insurance is additionally supported by the fact that risk pools like WCRP are merely a front for commercial reinsurers. This point was made in a law review article upon which WCRP and its amici allies have relied. Marcos Mendoza, *Reinsurance as Governance: Governmental Risk Management Pools as a Case Study in the Governance Role Played by Reinsurance Institutions*, 21 Conn. Ins. L. J. 53 (2014-15). WCRP br. at 32; risk pools br. at 3, 6, 9, 17; AGRIP br. at 3, 4, 5, 17.<sup>10</sup>

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<sup>10</sup> It is particularly telling that the Mendoza article *repeatedly* recounts in considerable detail how commercial reinsurers like Lexington actually dictate to risk pools on underwriting. 21 Conn. Ins. L. J. at 74-87. One AGRIP official was quoted as saying:

Pools absolutely have accepted input from the reinsurers to influence their practices, operations – even policies. This can be very subtle. For example, a reinsurer might ask, when underwriting a pool, if they have policies and procedures for cancelling or non-renewing a member that will not comply with loss control requirements. I have known pools without such formal procedures to develop them, not because their reinsurer “required” it, but because they recognized [the procedure] as a good proactive [policy], and they wanted to make themselves more attractive to reinsurers in the future. Other areas I have seen influenced by reinsurers include rating and pricing; building and holding adequate surplus; better claim management procedures; and coverage issues, to name a few.

Here, it is undisputed that Lexington, not WCRP, actually covered all of the County's risk exposure above its deductible. Davis/Northrop br. at 35; Davis/Northrop reply to WCRP at 4-5. More critically, despite the fondness of AGRIP and the risk pool amici for quoting the Mendoza article, that article severely undercuts the argument that risk pools are sui generis entities existing for the public good of their governmental members.<sup>11</sup> Risk pools are just as likely as their commercial insurer counterparts to abuse their position and deny their member governmental entities and public employees a defense or indemnification.

WCRP/Lexington's amici allies fail to address WCRP's claims management function. In addition to making coverage decisions regarding claims, WCRP also performs claims management services, retains and

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*Id.* at 83.

The influence on pool claims decisions from reinsurers was noted to be equally intensive and persuasive. *Id.* at 87-96. This is entirely consistent with the fact that Lexington here retained the right to control the defense of WCRP claims and payment of them. CP 116.

Indeed, the Mendoza article does not spare AGRIP. The article notes that commercial reinsurers attend AGRIP conferences and aggressively instruct AGRIP members on how to "partner" with their reinsurers; as Mendoza noted, these presentations are ... attempting on a broader scale to influence pools in general." *Id.* at 84.

<sup>11</sup> For example, the assertion in the AGRIP brief at 7 that there "is no body of disinterested players deciding what is right or wrong for the local government participants" and the pools are motivated by "a consistent public-minded decision making process" rings exceedingly hollow when all the dollars at risk here are Lexington's. As Mendoza points out, reinsurers really pull the strings on risk pools.

interacts with defense counsel, and makes settlement and trial-related decisions. These functions, paid for by the County members, constitute the business of insurance. WCRP's functions referenced above are no different than those performed by a commercial insurer. The same duty of good faith is inherent in the relationship between WCRP and its insureds, requiring WCRP to act in their best interest, placing the interests of those insureds ahead of its own. CP 8314-83.

In sum, just as the relationship between insurers is animated by principles of good faith derived from common law and statute, the same good faith principles animate the relationship between risk pools and their insureds.

(iii) The Amici Fail to Honor the Express Intent of the WCRP Liability Policies Manifested in the Policy Language

The risk pool amici allies similarly fail to heed a central tenet of contract law that requires courts to carry out the intent of the contracting parties. *Navlet v. Port of Seattle*, 164 Wn.2d 818, 842, 194 P.3d 221 (2008) ("The purpose of contract interpretation is to determine the intent of the parties."). That intent is discerned from the objective manifest language of the contract itself. *Hearst Commc'ns*, 154 Wn.2d at 503. WCRP's subjective intent regarding its liability policies is irrelevant; the

objective manifestation of the parties' intent is in the liability policies themselves. *Id.* at 503-04.

Here, the risk pool amici ignore, for example, the definitions of an occurrence and the duty to defend, express provisions in WCRP's and Lexington's liability policies, interpreted over the years by WCRP under Washington insurance common law principles. *See* Davis/Northrop br. at 12-14. Under the express WCRP liability policy and Lexington policy language, WCRP/Lexington owed the County/Slagle a defense because the Davis/Northrop federal court complaints articulated an occurrence against the County/Slagle within the meaning of the policy language, as will be noted *infra*.

Similarly, they ignore express WCRP liability policy language defining individual public employees as *insureds* under those policies. It is simply astonishing that WSAC asserts in its amicus brief at 6-8 that, despite the plain language in the WCRP liability policy defining individual public employees like Detective Slagle as insureds, Davis/Northrop reply to WCRP at 38 nn.4-8, individual public employees "do not have contractual rights in the self-insurance maintained by their employers." Apparently, WSAC has not read the express language in the WCRP liability policies defining individual employees as insureds, *e.g.*, CP 363, 369, the separation of insureds language in those policies, *e.g.*, CP 371, or

Article 14(a) of the WCRP interlocal agreement, CP 24, that expressly contradict such a position.

The plain language of WCRP's liability policies and Lexington's policies supports Davis/Northrop's position here.

- (iv) The Amici Fail to Honor the Principle that WCRP's Liability Policies Must Be Interpreted in Accordance with WCRP's Own Interpretation and Enforcement of Them

WCRP/Lexington's various risk pool amici allies are silent on another important contract interpretation principle – conduct with respect to the contract by the parties themselves. Such conduct can lend credence to the proper interpretation of a contract. *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973); *Greer v. Northwestern Nat'l Ins. Co.*, 109 Wn.2d 191, 200, 743 P.2d 1244 (1987). *Nowhere* do those amici acknowledge WCRP's employment of insurance terminology in its policies or WCRP's own conduct interpreting its liability policies in accordance with Washington insurance common law. Davis/Northrop br. at 12-13, 42-44. Similarly, they give short shrift to judicial employment of Washington's insurance common law to interpret risk pool liability policies.<sup>12</sup>

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<sup>12</sup> They fail to seriously address, if at all, *City of Okanogan, supra*, *Colby v. Yakima County*, 133 Wn. App. 386, 136 P.3d 131 (2006), or *Wash. Public Utility Districts' Utilities Systems v. Public Utility District No. 1 of Clallam County*, 112 Wn.2d

For the reasons set forth above, nothing provided by WCRP/Lexington's amici allies should deter this Court from applying Washington's insurance common law to WCRP's liability policies. Rather, as noted by WSAJF and SEIU the proper reading of those policies requires their interpretation and construction consistent with those principles developed by this Court.

(b) WCRP/Lexington's Breach of Good Faith and Other Duties Owed the County/Slagle Afforded Them Extracontractual Remedies Against WCRP/Lexington<sup>13</sup>

WCRP/Lexington's amici allies generally decry the application of extracontractual remedies developed over the years by this Court in Washington's insurance common law to protect insureds in the context of risk pool liability policies. It is important to note here that WCRP itself believed that persons aggrieved by its conduct in connection with its

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1, 771 P.2d 701 (1989). Those cases confirm that both WCRP and Washington appellate courts have applied insurance law principles to risk pools for decades. In *Colby*, the Court of Appeals applied insurance law principles to the very WCRP liability policies at issue in this case. In *City of Okanogan*, the Court of Appeals applied the continuous trigger principles to risk pool policies. In *Wash. Pub. Utilities Districts' Utilities Sys.*, this Court applied insurance law principles to a self-funded portion of a risk pool policy. There is simply no support under Washington law to depart from the precedent established by these cases or to treat risk pool liability policies any differently from any other contract of insurance.

<sup>13</sup> It is important for this Court to recall that WCRP/Lexington never revealed to the trial court the true importance of their argument on the application of Washington's insurance common law to risk pool liability policies as to insureds' extracontractual remedies. Their belief that *no* extracontractual remedies were available to risk pool insureds, unlike any other Washington insureds, was not revealed until their responsive briefs in this Court. *See Davis/Northrop br.* at 24 n.19.

liability policies had extracontractual remedies against it. WCRP sought and obtained coverage through Ace Insurance for its exposure to extracontractual claims, including common law bad faith, associated with its activities in the business of insurance dealing with defense, claims handling, and coverage decisions. CP 3871-72.<sup>14</sup> Plainly, WCRP's present contentions about the inapplicability of extracontractual remedies under Washington law, arguments also advanced by its allies, *are belied by WCRP's own actions in seeking insurance coverage for such claims.* Davis/Northrop br. at 45 n.44.

More critically, the reasons for this Court's creation of extracontractual remedies for insureds generally apply with equal vigor to insureds of risk pool liability policies.

For example, this Court determined that coverage by estoppel was appropriate where an insurer acted in bad faith in *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 393-94, 823 P.2d 499 (1992). Such a remedy arose out of an insurer's enhanced obligation of fairness toward its insured identified in *Tank, supra*, that exceeds the standard contractual good faith duty. As the *Butler* court observed, tort principles are implicated by the breach of the enhanced duty and anything short of coverage by estoppel incentivizes insurer bad faith:

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<sup>14</sup> WCRP allocates risk, handles claims, makes claims and coverage decisions, and hires defense counsel to defend its insureds. Davis/Northrop br. at 35-36.

If the only remedy available were the limits of the contract, then there would be no distinction between an action for an insurer's wrongful but good faith conduct, and an action for its bad faith conduct. An insurer could act in bad faith without risking any additional loss. This would render *Tank* meaningless. An estoppel remedy, however, gives the insurer a strong disincentive to act in bad faith. Therefore, an estoppel remedy better protects the insured against the insurer's bad faith conduct.

*Id.* at 394 (citations omitted). The same analysis applies to the relationship between risk pools and their insureds.

Similarly, covenant judgment settlements (including the ability of insureds to assign contractual and extracontractual claims) are also recognized remedies available to insureds impacted by an insurer's breach of duty including bad faith conduct. *Besel v. Viking Ins. Co. of Wisconsin*, 146 Wn.2d 730, 49 P.3d 887 (2002) (insured may independently settle with tortfeasor once the insurer engages in bad faith and insurer is liable to the extent the settlement is reasonable and paid in good faith). *See generally, Harris* at § 10.02. By breaching its duties to an insured or otherwise engaging in bad faith conduct, the insurer forfeits the right to object to the means by which its insured acts to protect itself:

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 will 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 towards 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. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 765-66, 58 P.3d 276 (2002). This rationale applies with no less force in the relationship between risk pools, their member insureds, and individual public employee named insureds under risk pool policies.

Finally, with regard to an insured's equitable right to recover fees in any coverage dispute, this Court articulated the basis for this equitable exception to the American Rule on attorney fees in civil litigation in *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 37, 904 P.3d 731 (1995) as arising out of the disproportionate bargaining power of the insurer/insured and the conduct of the insurer forcing the insured to incur litigation costs to compel the insurer to honor its policy commitments. The Court was even more blunt in *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991) as to the latter factor; insureds buy liability coverage to protect themselves from litigation expenses, not to incur vexatious, time-consuming, expensive litigation with their insurers. The same principles apply here to risk pool insureds. The County bought coverage from WCRP for itself and its employees like

Slagle; neither wanted nor expected to encounter instead WCRP/Lexington's vexatious refusal to defend or indemnify them.

In sum, the *very same reasons* that were the genesis for the development of extracontractual remedies for liability insureds apply with equal force to risk pool insureds. Nothing in the amici briefing supports a contrary view, as will be noted *infra* in particular with respect to Detective Slagle. This Court should apply Washington common law remedies to risk pool insureds.

(2) WCRP/Lexington Breached Their Duty to Defend the County/Slagle

The arguments advanced in the briefs of WCRP/Lexington's amici allies regarding the duty to defend are remarkable for their imprecise articulation of the principles for understanding that duty in the risk pool liability policy setting.<sup>15</sup> The WCRP policies specifically contain a contractual duty to defend insureds. *E.g.*, CP 362 (WCRP "shall have the right and duty to defend any suit against the Insured seeking monetary damages on account of any of the five coverages identified above, or any combination thereof." (emphasis added). If, as WSAJF believes, WCRP/Lexington and its allies are arguing for principles akin to those

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<sup>15</sup> This imprecision would leave a void as to the meaning of the duty to defend in risk pool liability policies, inviting years of litigation to discern precisely what principles do apply.

governing indemnification contracts, the WSAJF brief does an effective job of demonstrating why such an approach is unsupported and ultimately harmful to risk pool insureds; it is inconsistent with the good faith duty owed by WCRP/Lexington to their insureds. WSAJF br. at 21-22.

Rather, as Davis/Northrop believe, the better approach is for this Court to apply its well-developed principles for the duty to defend from Washington's insurance common law. *See, e.g., Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 802-04, 329 P.3d 59 (2014). Those principles, developed over more than a half century by this Court, are well-understood, and provide real protection to insureds.<sup>16</sup>

WCRP/Lexington's amici allies fail to address a key point in the duty to defend analysis – the implication of the deemer clauses in WCRP's policies – and aggressively address two other questions – the status of individual public employees like Detective Slagle as named insureds under WCRP's policies and the continuous trigger principle for an occurrence under a liability policy. Each issue merits attention here.

(a) The WCRP/Lexington Policy Provisions on Occurrences, Including the Deemer Clauses in the WCRP Liability Policies, Were Triggered Here

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<sup>16</sup> Washington law has long recognized the importance of the duty to defend as a key component of the insured's purchase. The *Butler* court flatly stated: "The insurer's duty to defend the insured is one of the main benefits of the insurance contract." 118 Wn.2d at 392. There is little question that the County bought a defense right when it purchased coverage through WCRP.

Washington law clearly delineates when an occurrence, and thus, the duty to defend and coverage,<sup>17</sup> is triggered. It is important that none of the amici deny that the 2006 destruction of evidence by the County or the claims of misconduct after 2009, noted by Judge Bryan in his decision on summary judgment, constituted discrete occurrences triggering coverage. Similarly, they do not join WCRP's baseless argument that such events were not occurrences under its liability policies because the County/Slagle were charged with knowledge of such claims from Davis/Northrop's appeal and post-conviction activities.

Additionally, the County/Slagle's continuing conduct constituted occurrences under those policies. Washington has long applied a continuous trigger principle. *See Gruol Constr. Co. v. Ins. Co. of North America*, 11 Wn. App. 632, 524 P.2d 427 (1974), *review denied*, 84 Wn.2d 1014 (1974). That principle is not confined to property losses.<sup>18</sup> Indeed, none of the WCRP/Lexington's amici allies address this Court's decision in *Transcontinental Ins. Co. v. Wash. Pub. Utils. Dist. Util. Sys.*,

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<sup>17</sup> An insurer's duty to defend an insured is far broader than its duty to indemnify the insured. Moreover, the insurer must defend the insured even if the allegations are groundless or false. Davis/Northrop reply to WCRP at 30 n.38; Davis/Northrop reply to Lexington at 10-11.

<sup>18</sup> Importantly, there is no Washington law definitively stating that the continuous trigger principle applies *only* to property losses. Under *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 413, 229 P.3d 693 (2010), WCRP/Lexington owed the County/Slagle a defense when the issue is unsettled under Washington law.

111 Wn.2d 452, 464-70, 881 P.2d 1020 (1994), a case that involved negligence claims arising out of the issuance of bonds and also involved excess policies that followed the form of the underlying risk pool liability policy. This Court's own jurisprudence establishes that the continuous trigger principle is not confined to first party property losses, and rejects a manifestation trigger for an occurrence. *Id.* at 469. Where the complaint alleges continuing harm, as here, WCRP's own policy specifically provides coverage for "continuous and repeated exposure to substantially the same conditions," *e.g.*, CP 369, and its later policies even make the *last* policy period of the continuous harm the triggering event under the deemer clauses in such liability policies. *E.g.*, CP 397.<sup>19</sup> WCRP/Lexington's amici allies have no real answer to these points, and instead seek to ignore Washington law in favor of that from other jurisdictions and ignore the deemer clauses.<sup>20</sup>

The amicus brief of the Innocence Network makes it precisely clear how the harm to Davis/Northrop continuously and discretely occurred in this case. That brief correctly notes that violations by

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<sup>19</sup> Lexington also defines an occurrence in its policies as an event that includes "continuous or repeated exposures to conditions." *E.g.*, CP 4234. Its policies treat such continuing exposure as one occurrence. *Id.*

<sup>20</sup> Those amici also have no answer to when civil rights claims actually accrue. Davis/Northrop br. at 52-53; Davis/Northrop reply to WCRP at 33-35; Davis/Northrop reply to Lexington at 12.

prosecuting authorities of their constitutional obligations under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) are often continuous and ongoing by their nature and take years to uncover. IN br. at 8-12. Moreover, to precisely pin down the point of the violation of a party's civil rights in a *Brady* situation is difficult when the prosecuting authority may have hidden such exculpatory evidence or, in this case, destroyed that evidence. *Id.* at 14-15. The Innocence Network also appropriately documents why the continuous trigger principle applies in *Brady* violation cases and innocence claims.<sup>21</sup>

This Court should reaffirm the application of the continuous trigger principle for an occurrence.

(b) Donald Slagle Was an Insured

As noted in Davis/Northrop's reply to WCRP at 37-38, and *supra*, Detective Slagle was a separate insured under the express language of WCRP's liability policy. It is again astonishing that WCRP/Lexington's amici allies contend that this Court should ignore that express language and conclude that any coverage under those policies derives indirectly from statute. Then, WSAC goes even farther when it proclaims that this lack of coverage will not have devastating effects on individual public

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<sup>21</sup> See Joe Delich, Note, *Ensuring Insurance: Adequate and Appropriate Coverage for Brady Claims in Illinois*, 110 Nw. U. L. Rev. 223, 224 (2015).

employees. WSAC br. at 7-8. That rosy sentiment is flawed. Public employees not provided a defense or indemnity by their public employers and abandoned by their risk pool insurers face the reality of many thousands of dollars of costs to defend the claims against them and millions of dollars of potential liability – quintessentially, financial ruin.

The SEIU amicus brief carefully explains precisely why an individual public employee is harmed by the position taken by WCRP/Lexington. SEIU br. at 6-7. If an individual public employee is a named insured, then, under Washington insurance common law, that employee enjoys specific rights to a defense and indemnification that do not rest upon the good will of their public employer; if, from the eight corners of the complaint, an occurrence within the policy's coverages is alleged, a defense is owed. Similarly, if a public employee documents that an occurrence within the policy's coverages is alleged, indemnification is owed the insured.

By contrast, RCW 4.96.041 permits a public employer to deny a public employee a defense or indemnification if that public employer believes the public employee is not performing his/her official duties. This leaves the question of defense/indemnification to the discretion of his/her public employer, a public employer that may be financially or politically affected by the defense/indemnification decision. The

temptation to a public employer in a high exposure, highly political case to abandon a public employee will be significant.<sup>22</sup> Similarly, that public employer may throw an employee active in union activities, an employee with opposing political views, a whistleblower, or a person who is simply difficult to deal with, under the bus. An employee who has no protection under Washington's insurance common law from such bad faith conduct by a public employer will have no recourse in tort or other remedies to deter such behavior.

(3) The County/Slagle's Contractual and Extracontractual Rights Were Assignable to Davis/Northrop

As noted *supra*, there is no question that under Washington insurance common law, insureds abandoned by their insurers have the right to protect themselves, including the negotiation of covenant judgment settlements in which assignments of rights both contractual and extracontractual play a central role. Moreover, Washington contract law generally allows for assignments of claims.<sup>23</sup> Indeed, Washington public policy *supports* assignment of claims: "Claims against the state arising

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<sup>22</sup> This is particularly true in cases involving claims under 42 U.S.C. § 1983 where conduct under color of state law, i.e. conduct within the public employee's official duties, is a key element of the constitutional tort and punitive damages may be recovered. RCW 4.96.041(4).

<sup>23</sup> That covenant judgment settlements sanction assignment of rights is again consistent with the view that Washington's insurance common law is a specialized subset of contract law.

out of tortious conduct may be assigned voluntarily, involuntarily, and by operation of law to the same extent as like claims against private persons may be so assigned.” RCW 4.92.120. But WCRP/Lexington’s amici allies would actually bar assignment of claims against risk pools by their named insureds *contrary to the general principles of contract law authorizing such assignments*. Risk pools br. at 10-11;<sup>24</sup> AGRIP br. at 18-20.

Those amici allies fail to distinguish general Washington contract law as expressed in *Berschauer/Phillips Constr. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1994) that permits assignments of claims, as opposed to contractual performance, or *Public Utility Dist. No. 1 of Klickitat Cty. v. Int’l Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994) that permits assignment in the insurance setting, despite anti-assignment provisions. Those amici allies simply cannot articulate a basis in statute, contract, or public policy for denying an assignment here where the County/Slagle’s claims against WCRP/Lexington had already arisen.

The trial court’s decision barring assignment was error.

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<sup>24</sup> The risk pools’ assertion that the issue regarding assignment here relates to the selection of the persons with whom WCRP wanted to deal, risk pools br. at 10, is simply false. The issue here is merely the identity of the claimant against WCRP/Lexington and nothing more. Davis/Northrop br. at 61-64; Davis/Northrop reply to WCRP at 35-39; Davis/Northrop reply to Lexington at 19-20.

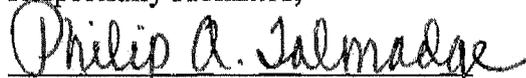
D. CONCLUSION

This Court should apply the interpretive principles and the remedies of Washington's insurance common law to the liability policies issued by WCRP to cover Clark County and Detective Slagle, and the claims made under those policies. WCRP owed a duty to defend the County/Slagle; when that duty was breached, the County/Slagle were entitled to protect themselves and to assign their various claims for damages against WCRP/Lexington to Davis/Northrop.

This Court should reverse the trial court's orders at issue here, ruling that Washington's insurance common law applies to liability policies issued by WCRP/Lexington, WCRP breached its duty to defend the County/Slagle, and that the County/Slagle are allowed to assign their contractual and extracontractual claims against WCRP/Lexington to Davis/Northrop. Costs on appeal, including reasonable attorney fees, should be awarded to Davis/Northrop.

DATED this ~~27th~~ day of April, 2016.

Respectfully submitted,



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# APPENDIX

RCW 4.96.041:

(1) Whenever an action or proceeding for damages is brought against any past or present officer, employee, or volunteer of a local governmental entity of this state, arising from acts or omissions while performing or in good faith purporting to perform his or her official duties, such officer, employee, or volunteer may request the local governmental entity to authorize the defense of the action or proceeding at the expense of the local governmental entity.

(2) If the legislative authority of the local governmental entity, or the local governmental entity using a procedure created by ordinance or resolution, finds that the acts or omissions of the officer, employee, or volunteer were, or in good faith purported to be, within the scope of his or her official duties, the request shall be granted. If the request is granted, the necessary expenses of defending the action or proceeding shall be paid by the local governmental entity. Any monetary judgment against the officer, employee, or volunteer shall be paid on approval of the legislative authority of the local governmental entity or by a procedure for approval created by ordinance or resolution.

...

(4) When an officer, employee, or volunteer of the local governmental entity has been represented at the expense of the local governmental entity under subsection (1) of this section and the court hearing the action has found that the officer, employee, or volunteer was acting within the scope of his or her official duties, and a judgment has been entered against the officer, employee, or volunteer under chapter 4.96 RCW or 42 U.S.C. Sec. 1981 et seq., thereafter the judgment creditor shall seek satisfaction for nonpunitive damages only from the local governmental entity, and judgment for nonpunitive damages shall not become a lien upon any property of such officer, employee, or volunteer. The legislative authority of a local governmental entity may, pursuant to a procedure created by ordinance or resolution, agree to pay an award for punitive damages.

Approved Property and Liability Joint Self-Insurance Programs	Contact Name	Address			E-mail contact	Telephons
Association of Washington Cities RMSA	Derek Bryan	1076 South Franklin Street	Olympia	98501	<a href="mailto:derekb@awcnet.org">derekb@awcnet.org</a>	(360) 753-4137
Cities Insurance Association of Washington	Jim Cherf	451 Diamond Drive	Ephrata	98823	<a href="mailto:jcherf@canfieldsolutions.com">jcherf@canfieldsolutions.com</a>	(509) 754-2027
Enduris	Mark Kammers	P.O. Box 19330	Spokane	99219-9330	<a href="mailto:mkammers@enduris.us">mkammers@enduris.us</a>	(509) 838-0910
Housing Authorities Risk Retention Pool	Bill Gregory	7111 NE 179th Street	Vancouver	98686	<a href="mailto:bill@harp.com">bill@harp.com</a>	(360)574-9035 ext. 102
Non Profit Insurance Program	Jim Cherf	451 Diamond Drive	Ephrata	98823	<a href="mailto:jcherf@choosedclear.com">jcherf@choosedclear.com</a>	(509) 754-2027
Public Utility Risk Management Services	Dick Rodruck	12611 Des Moines Way S, PO Box 68787	Seattle	98168	<a href="mailto:rodruck@pacificunderwriters.com">rodruck@pacificunderwriters.com</a>	(206) 248-2254
Schools Insurance Association of Washington	Jim Cherf	451 Diamond Drive	Ephrata	98823	<a href="mailto:jcherf@choosedclear.com">jcherf@choosedclear.com</a>	(509) 754-2027
SW Washington Risk Management Ins Coop	Loy Dale	2500 NE 65th Avenue	Vancouver	98661-6812	<a href="mailto:loy.dale@esd112.org">loy.dale@esd112.org</a>	(360) 750-7504
United Schools Insurance Program	Jim Cherf	451 Diamond Drive	Ephrata	98823	<a href="mailto:jcherf@choosedclear.com">jcherf@choosedclear.com</a>	(509) 754-2027
Washington Cities Insurance Authority	Ann Bennett	320 Andover Park East-P.O. Box 88030	Tukwila	98138	<a href="mailto:annb@wclapool.org">annb@wclapool.org</a>	(206) 575-6046
Washington Counties Risk Pool	Vyrle Hill	2558 RW Johnson Road SW, Suite 106	Tumwater	98512-6103	<a href="mailto:vyrle@wcrp.wa.gov">vyrle@wcrp.wa.gov</a>	(360) 292-4495
Washington Rural Counties Insurance Pool	Jim Cherf	451 Diamond Drive	Ephrata	98823	<a href="mailto:jcherf@choosedclear.com">jcherf@choosedclear.com</a>	(509) 754-2027
Washington Schools Risk Management Pool	Deborah Callahan	P.O. Box 88700	Tukwila	98138-2700	<a href="mailto:dcallahan@wsrmp.com">dcallahan@wsrmp.com</a>	(206) 394-9729
Washington State Transit Insurance Pool	Al Hatten	2629 12th Court SW	Olympia	98502	<a href="mailto:al@wstip.org">al@wstip.org</a>	(360) 586-1800
Water and Sewer Risk Management Pool	Ken Goodwin	1750 112th Avenue NE-Suite B-215	Bellevue	98004-3770	<a href="mailto:kenq@wsrmp.org">kenq@wsrmp.org</a>	(425) 452-9750

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On said day below I electronically served a true and accurate copy of the Davis and Northrop Answer to Amici Briefs in Supreme Court Cause No. 91154-1 to the following parties:

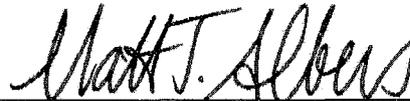
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 27, 2016, at Seattle, Washington.



\_\_\_\_\_  
Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe

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