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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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REPLY BRIEF OF APPELLANTS  
DAVIS AND NORTHROP  
TO WCRP

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## A. INTRODUCTION

The brief submitted by the Washington Counties Risk Pool (“WCRP”) is remarkable for its misstatements of basic facts in this case and its disregard of the facts articulated to this Court by appellants Larry Davis and Alan Northrop (and appellants Clark County and Detective Slagle), thereby effectively conceding them. For example, WCRP wholly ignores its own consistent application of Washington’s insurance common law to interpret its liability policies, and the claims made under these policies, including both before and after its denial of the claims now before the Court.

Similarly, WCRP is indifferent to the rights, benefits and protections afforded insureds under Washington’s insurance common law, including its duty to defend the County/Slagle; WCRP misinterprets RCW 48.01.050 in an attempt to exonerate itself from the duty of good faith, and any other duties, toward its county members and their employees, duties present both under the common law and statutorily under RCW 48.01.030. WCRP asks this Court to treat RCW 48.01.050 as a grant of total immunity from any good faith and other duties without any demonstration that the Legislature intended such a radical consequence.

WCRP now openly asks this Court to re-write the substance of the duty to defend owed by risk pool insurers, limiting any damages from the

breach of that duty to so-called “contract remedies” derived from the law of other jurisdictions, ignoring Washington law and the language of its own policies. It espouses the position that risk pool insureds do not even have the same rights in contract, tort, and equity as every other insured in Washington: no coverage by estoppel if such pools wrongfully refuse to defend and abandon their insureds; no claim in tort for their bad faith misconduct, no matter how egregious their misconduct; no statutory rights under the Consumer Protection Act, RCW 19.86 (“CPA”); and no right to recover *Olympic Steamship* attorney fees.

WCRP even goes so far as to ask this Court to deny “insured” status to the individual employees of its members, like Slagle, despite the express language of its liability policies to the contrary, thereby conferring second-class citizen status upon hundreds of thousands of Washington public employees and their families.

WCRP’s position in this case is unfair to risk pool insureds and is contrary to Washington law, as well as its own prior practices. WCRP asks this Court to turn its back on over half a century of Washington common law developed to provide fairness to parties dealing with entities like WCRP and its allied private commercial insurers, all who are in the “business of insurance.” This Court should reject WCRP’s invitation to turn back the clock.

B. RESPONSE TO WCRP STATEMENT OF THE CASE<sup>1</sup>

WCRP nowhere contests or denies the following basic facts from the Davis/Northrop opening brief:<sup>2</sup>

- The facts of Davis/Northrop's wrongful arrest, conviction, and incarceration and their ultimate exoneration (Davis/Northrop br. at 6-11);
- The County refused to conduct DNA testing in 2004 and was compelled to conduct such testing by court order in 2006; the County destroyed DNA evidence in 2006, despite the court order,

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<sup>1</sup> In "restating" the facts below, WCRP seeks to alter the standard by which this Court reviews summary judgment decisions. WCRP br. at 3-5. As noted in Davis/Northrop's opening brief at 23 n.18, this Court reviews such decisions de novo and the facts and reasonable inferences from those facts adduced below are assessed in a light most favorable to Davis/Northrop as the non-moving parties. WCRP seemingly wants this Court to consider the facts in a light most favorable to it, despite the fact that it was the *moving party* on summary judgment.

WCRP contends that whether the facts and/or legal theories pleaded by Davis/Northrop against the County/Slagle were in the complaint or amended complaint is legally significant. WCRP br. at 4. It makes no difference. The duty to defend encompasses allegations *in either*. This Court has recognized that allegations in an amended complaint must be considered by the insurer in connection with its duty to defend. *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 403, 229 P.3d 693 (2010). The operative complaint upon which the duty to defend is determined here is Davis/Northrop's amended complaint. *Goodstein v. Continental Cas. Co.*, 509 F.3d 1042, 1048 (9th Cir. 2007) (described amended complaint as the "operative pleading"). This is not a case where a party's amended complaint offers factual assertions so contradictory to the initial complaint as to judicially estop the party from making them. *Hartford Fire Ins. Co. v. Leahy*, 774 F. Supp. 2d 1104 (W.D. Wash. 2011). Rather, Davis/Northrop's amended complaint was filed after the conclusion of discovery in the federal case. The district court addressed certain claims based solely on post-conviction misconduct, which were allowed to proceed to trial. *Davis v. Clark County, Wash.*, 966 F. Supp. 2d 1106 (W.D. Wash. 2013). The Davis/Northrop amended complaint thus simply clarified with greater specificity the facts and theories they were and had been advancing against the County/Slagle and those that developed in discovery.

<sup>2</sup> WCRP has *conceded* various facts asserted in Davis/Northrop's brief. *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 270, 840 P.2d 860 (1992) (failure of respondent to contest facts related to plaintiff's injuries in fire concede them).

continuing to conceal exculpatory evidence until after the dismissal of charges (Davis/Northrop br. at 9-10);

- All charges against Davis/Northrop were not dismissed until July 14, 2010 (Davis/Northrop br. at 11);
- The Davis/Northrop amended complaint against the County/Slagle pleaded continuous events and misconduct by the County/Slagle, and continuous injuries by Davis/Northrop, under numerous state law tort claims, as well as violations of 42 U.S.C. § 1983 (Davis/Northrop br. at 11-12);
- In the federal tort action, Judge Bryan denied the County/Slagle's motion for summary judgment because Davis/Northrop stated claims against them in tort for post-conviction conduct, including but not limited to the failure to turn over exculpatory evidence and the 2006 destruction of DNA evidence after testing was ordered by the court (Davis/Northrop br. at 16-17);
- WCRP has uniformly applied Washington insurance common law principles to interpret its policies, and the claims made under these policies, including both before and after its denial of the claims now at issue, as evidenced by the letters from its own coverage counsel to AIG and Lexington (Davis/Northrop br. at 43-44);
- WCRP's liability policies used traditional liability insurance policy terminology (Davis/Northrop br. at 12-13, 42-43);
- WCRP describes its activities to its members as a "liability insurance program," and has always represented and treated the policies that it issues as "insurance" (Davis/Northrop br. at 35-36, 43 n.43);
- WCRP's policies expressly state they are to be governed by and construed in accordance with Washington law, and its governing documents expressly mandate that its conduct in making all claim determinations shall be not inconsistent with Washington law (Davis/Northrop br. at 15 n.12); and
- Every dollar of WCRP's coverage of the County/Slagle was 100% insured/reinsured by private commercial liability insurers; these

commercial insurers have the exclusive right to determine whether to pay claims made under the WCRP primary policies (Davis/Northrop br. at 35).<sup>3</sup>

Additionally, WCRP is simply mistaken in a number of its factual assertions. For example, WCRP asserts that Davis/Northrop and the County/Slagle entered into their settlement *before* the WCRP executive committee's final determination on whether there was coverage due to the County/Slagle for the allegations made in the Davis/Northrop amended complaint. WCRP br. at 22, 23, 72.<sup>4</sup> That assertion is flatly wrong.<sup>5</sup>

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<sup>3</sup> CP 116 ("The Company in its full discretion shall investigate, defend, and resolve claims or proceedings affecting this reinsurance.").

<sup>4</sup> This argument seemingly bears on whether the County/Slagle exhausted all of their administrative remedies under the WCRP bylaws, but WCRP never pleaded exhaustion as an affirmative defense, nor did it ever raise this issue in the trial court. The argument is not properly before this Court for the first time on appeal. RAP 2.5(a); *State v. Paumier*, 176 Wn.2d 29, 52-53, 288 P.3d 1126 (2012) (rooted in fairness and judicial economy values, it is a "fundamental principle of appellate litigation" that parties may not assert arguments not first presented below).

<sup>5</sup> The settlement agreement between the County/Slagle and Davis/Northrop expressly states that the assignment does not become effective unless and until after the final, executive committee denial of the claims by WCRP. CP 5527, 5542.

Moreover, WCRP cites to an earlier version of its bylaws, CP 7549-50, for the exhaustion requirement, but these were *not* the bylaws in effect at the time the final executive committee coverage determination was made on November 1, 2013; rather, it was the July 2012 version of the bylaws that was in effect at this time. Notably, the incorrect 2013 version of the bylaws cited by WCRP also omits the requirement, found in the 2012 version, that claim determinations must be made "not inconsistent with Washington law." CP 491. Article 8 of the correct, 2012 bylaws contains no language requiring exhaustion, or even suggesting that exhaustion is required, beyond the initial decision of the claims manager: per Article 8.A.6, "All written determinations of coverage shall be final and binding . . ."; per Article 8.B.1, a party aggrieved by the decision of the claim manager "may" appeal to the executive director; and per Article 8.B.2, the decision of WCRP's executive director "may" be appealed to the executive committee. CP 491-94.

WCRP also asserts that its member counties “ratify” the WCRP liability policies such that they are not contracts of adhesion. WCRP br. at 11, 41-44. That is not true. In reality, WCRP’s interlocal agreement states that upon joining WCRP, a member county obligates itself to purchase coverage for 5 years, whether it likes it or not. That is not negotiated. It is a contract of adhesion. CP 490. Here, the County joined WCRP during the 2001-02 policy period, so the first opportunity it had to allegedly ratify any language was the 2007-08 policy, and nothing material in that policy or any later policy implicated in this case was changed from the 2006-07 policy. Further, as Ed Pavone, the County’s risk manager, testified, ratifying those policies merely meant agreeing to purchase the policy, nothing more, which was already a mandate for the first 5 years. CP 5457-58. Obviously, neither Slagle nor any other individual employee insured for the County ever had even this limited involvement with the policies.

Finally, WCRP seeks to impute to the County several statements made by Mark Wilsdon, as well as a statement made in a County audit report. WCRP br. at 14, 20 n.1. This Court should be highly skeptical of

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Finally, the WCRP executive committee ultimately denied coverage for the final time on the same grounds as did the executive director, and on the same grounds as its numerous other denials of these claims. CP 465-69. Clearly, there was no prejudice from an allegedly early settlement.

WCRP's loose treatment of Wilsdon's involvement in this case, especially as it relates to WCRP's attempts to use his manufactured statements to persuade the Court to ignore the critical fact that WCRP itself always previously applied Washington insurance common law to its liability policies.<sup>6</sup>

### C. ARGUMENT

As with its recitation of the facts, WCRP ignores the central legal arguments advanced by Davis/Northrop in their opening brief, thereby *conceding* them. *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (State's failure to respond to legal argument concedes it).<sup>7</sup> For example, WCRP does not anywhere dispute in its brief Davis/Northrop's characterization of Washington's insurance common law, or the fact that

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<sup>6</sup> First, Wilsdon was conflicted. He served as both the County risk manager and as president of the WCRP at the time of the settlement in this case and the time the statements were made that WCRP now seeks to exploit. Second, as noted in the Davis/Northrop motion to strike below, the uncontroverted facts show that WCRP acted *illegally* to coerce Wilsdon to secretly provide the County/Slagle's confidential and attorney-client privileged communications during the underlying federal court case, CP 5286-93, 5545 (blind copying WCRP Executive Director Hill on emails with the County board and the County and Slagle's counsel), 5548-49 (secret email to Hill with privileged information); 5544 (email with privileged information); 5547 (same), and to respond to questions, while unrepresented and under threat, from WCRP's counsel in this case and while this case was ongoing. CP 5286-93, 5462-77, 5550-52, 5553-61, 5564-70, 5577-78. Finally, with respect to the statement in the County audit report quoted by WCRP in its brief, this statement was actually written by WCRP's Executive Director, Vyrle Hill, and then sent to Wilsdon while this case was pending for inclusion in the County's audit report. CP 8534-45.

<sup>7</sup> A respondent has an affirmative obligation to offer arguments on the points of error raised by an appellant. RAP 10.3(a)(6), 10.3(b). Unargued errors are deemed abandoned by this Court. *Fosbre v. State*, 70 Wn.2d 578, 583, 424 P.2d 901 (1967).

the common law imposes separate and independent duties from those imposed under the Insurance Code, Title 48 RCW. Davis/Northrop br. at 25-31. Rather, WCRP seeks to distract this Court from the core legal issues by focusing on irrelevant or inapplicable legal arguments, just as it did below.

(1) The Trial Court Erred in Concluding that Washington's Insurance Common Law Did Not Apply to WCRP's Liability Policies and the Claims Made Under Them

*Nowhere* in its brief does WCRP dispute the central point in Davis/Northrop's opening brief at 24-33 that the duty of good faith owed to an insured derives separately from both common law and statutory sources. That duty is an essential building block for the relationship between insurers and insureds, and the remedies both contractual and extracontractual available to insureds that are deprived of their insurance benefits under Washington law.

WCRP then asserts that because the Legislature enacted RCW 48.62 and exempted two or more local government entities that are jointly self-insuring or self-funding from the definition of an "insurer under this code [Title 48 RCW]" in RCW 48.01.050 that WCRP is thereby exempted from both the common law and statutory duty of good faith owed to its insureds.

Then, for the first time in this case, WCRP *admits* that it is arguing that a risk pool insured is deprived of the common law principles governing not only the interpretation of insurance policies in Washington, but also any extracontractual, tort or statutory remedies, and any equitable protections.<sup>8</sup> In making this elaborate argument, WCRP tortures the language of the statutes at issue and simply ignores fundamental principles of statutory interpretation, at great disservice to its members and individual public employee insureds.

(a) RCW 48.01.050 Nowhere Purports to Override Common Law Principles

WCRP contends in its brief for the first time in this case<sup>9</sup> that RCW 48.01.050 not only overrode any statutory obligations it might have had to act in good faith toward the County/Slagle under RCW 48.01.030, but that RCW 48.01.050, construed in conjunction with RCW 48.62.011, also preempted its common law duty to do so as well. WCRP br. at 28.<sup>10</sup> Nothing in the language of either RCW 48.01.050 or RCW 48.62.011

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<sup>8</sup> WCRP veiled this position from the trial court. Davis/Northrop br. at 24 n.19. This is the *first time* WCRP has admitted that this is, in fact, its true position.

<sup>9</sup> This Court should reject an argument raised for the first time on appeal. See n.2, *supra*.

<sup>10</sup> As noted *supra*, WCRP *nowhere* disputes that an insurer's duty of good faith toward an insured has arisen separately in Washington law under the common law and by statute. Davis/Northrop br. at 25-27.

supports this interpretation. Indeed, by its specific language, to whatever extent it applies to WCRP,<sup>11</sup> RCW 48.01.050 is limited to insurers under the Insurance Code.

WCRP's argument neglects to address clear-cut principles established by this Court for the construction of statutes that are in derogation of the common law.<sup>12</sup> First, the Legislature is presumed to know the area in which it is legislating, and to have the prior decisions of this Court in mind when it does so. *Miller v. Paul Revere Life Ins. Co.*, 81 Wn.2d 302, 308-09, 501 P.2d 1063 (1972) (Legislature presumed aware of Insurance Code and insurance decisional law).<sup>13</sup>

Statutes are not construed in derogation of the common law unless the Legislature clearly expresses an intent to change the law. *Price v.*

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<sup>11</sup> To jointly self-insure, multiple entities agree to alone accept all risk. A pool may be jointly self-funded, but a pool is not self-insured where risk is *allocated* among its members. Thus, WCRP overstates the scope of RCW 48.62 in its brief at 30.

<sup>12</sup> RCW 4.04.010 expressly states:

The common law, so far as it is not inconsistent with the Constitution and laws of the United States, or of the state of Washington nor incompatible with the institutions and condition of society in this state, shall be the rule of decision in all the courts of this state.

<sup>13</sup> *See also, In re Tyler Estate*, 140 Wash. 679, 689, 250 Pac. 456 (1926) (citing with approval the statement of the Missouri Supreme Court that knowledge of the Legislature of the statutory and common law contest in enacting a statute is essential: "Whether the statute affirms the rule of the common law upon the same subject, or whether it supplements it, supersedes it, or displaces it, the Legislature enactment must be construed with reference to the common law...").

*Kitsap Transit*, 125 Wn.2d 456, 463, 866 P.2d 556 (1994); *Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008). In fact, absent an *express* indication from the Legislature that it intends to overrule the common law, new legislation is presumed to be consistent with prior judicial decisions. *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982). *See also*, *State v. Calderon*, 102 Wn.2d 348, 351, 684 P.2d 1293 (1984) (“We will not assume that the Legislature would effect a significant change in legislative policy by mere implication.”). The fact is that Washington courts have often recognized that separate and distinct common law and statutory duties and remedies can stand side-by-side, unless and until the Legislature expressly overrides those common law principles.<sup>14</sup>

Thus, because the Legislature nowhere in RCW 48.01.050 or in RCW 48.62 purported to specifically override the interpretive principles, duties, and remedies separately imposed by the common law, and expressly limited the exemption to Insurance Code requirements, WCRP’s new, contrary contention must fail.

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<sup>14</sup> *E.g.*, *Landis & Landis Construction, LLC v. Nation*, 171 Wn. App. 157, 286 P.3d 979 (2012), *review denied*, 177 Wn.2d 1003 (2013) (court recognizes that tenants have remedies for a landlord's treatment of the rental premises under the Residential Landlord-Tenant Act *and* the common law); *Berger v. Sonneland*, 144 Wn.2d 91, 26 P.3d 257 (2001) (Uniform Health Care Privacy Act and common law remedies for improper disclosure of private health information).

(b) WCRP Misreads the Scope of RCW 48.62 and RCW 48.01.050

As part of its highly argumentative “Restatement of the Case,” WCRP argues that the legislative history of risk pools in RCW 48.62 and the enactment of RCW 48.01.050 compel the conclusion that the Legislature not only intended to override the good faith duty of those in the business of insurance in RCW 48.01.030, but also that it intended to override the application of Washington’s insurance common law generally as to risk pools. WCRP br. at 5-8, 27-34. In making this argument, WCRP misreads the operative language of the statutes at issue, vastly overstating the Legislature’s intent in authorizing risk pools and exempting them, in certain situations, from certain portions of the Insurance Code. *See* Davis/Northrop br. at 31-40.

First, statutory authorization for risk pools has been in place in Washington since at least 1979. Laws of 1979, ex. sess., chap. 256. However, RCW 48.62.011 and RCW 48.62.031, on which WCRP rests its argument here, were not enacted until 1991. *Nothing* in the language of RCW 48.62.011 or RCW 48.62.031 evidences the express intent of the Legislature to foreclose the application of RCW 48.01.030, much less Washington's insurance common law generally, to the liability policies issued by WCRP. This Court has very recently reiterated that it has no

authority to read language into a statute that does not appear in its text. *Saucedo v. John Hancock Life & Health Ins. Co.*, \_\_\_ Wn.2d \_\_\_, \_\_\_ P.3d \_\_\_, 2016 WL 852459 (2016) at \*3.

The Legislature intended to regulate the organization of local government self-insurance, and joint insurance programs under RCW 48.62.<sup>15</sup> But in doing so, for most of the period at issue here, and contrary to WCRP's argument at 34-37, the Legislature did not exempt risk pools from supervision by the Insurance Commissioner. WCRP misleads this Court when it claims that the State's risk manager alone regulated it. Until the 2010 legislative session, pools were regulated by a special board, one of whose members was the Insurance Commissioner. That board addressed regulations governing risk pool creation and operations. Clearly, up until 2010 the Legislature believed that risk pools were in the business of insurance, meriting close OIC supervision.<sup>16</sup>

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<sup>15</sup> Again, WCRP never provided self-insurance to the County here, or self-funded the County's risks in any sense. No risk of loss was transferred by contract or agreement by WCRP. Rather, WCRP was purchasing insurance and reinsurance for 100% of the risk above the County's deductible from private commercial insurers like Lexington, including for all related bad faith and attorney fee claims.

WCRP has *no answer* to the Legislature's own description of pools in 2004 (in this instance for private, non-profit groups) as "alternative options for *insuring against risks*." RCW 48.62.036 (emphasis added). The Legislature repealed this statute in 2015. Laws of 2015, ch. 109, § 18.

<sup>16</sup> The former RCW 48.62.041 is provided in the Appendix. See Jason Doucette, *Wading in the Pool: Interlocal Cooperation in Municipal Insurance and the State Regulation of Public Entity Risk Sharing Pools – a Survey*, 8 Conn. L.J. 533, 556

RCW 48.01.050 exempts local governments that jointly self-insure or self-fund from the definition of an insurer with respect to those provisions regulating an insurer under the Insurance Code. But *nowhere* in RCW 48.01.050 has the Legislature ever expressly exempted risk pools from the good faith duties in RCW 48.01.030, much less from the entirety of Washington's insurance common law.

RCW 48.01.030 articulates a broad direction that the business of insurance is affected by the public interest, and "all persons" associated with that business must be "actuated by good faith."<sup>17</sup> This good faith duty is not imposed only upon insurers. It extends to providers and even representatives of insurers, insureds, and providers. Moreover, WCRP itself essentially acknowledges that it is in the business of insurance. It addresses risk more generally where it purchases and issues insurance and reinsurance policies; it collects premiums and deductibles; it handles claims; it appoints and supervises defense counsel. WCRP br. at 10-11.

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(2001-02) (noting Washington's "Insurance Department retains close control over the operation of the state's primary governmental risk pooling authority, the Local Government Self-Insurance Program (LGSIP).").

<sup>17</sup> WCRP contends in its brief at 35 that it is not the business of insurance because it is a non-profit entity. "Business" is not confined to for-profit entities. For example, non-profit entities pay B&O taxes. RCW 82.04.030; *Yakima Fruit Growers Ass'n v. Henneford*, 187 Wash. 252, 258, 60 P.2d 62 (1936). In any event, "business" has a more generic dictionary meaning entailing dealings, transactions, or matters more generally, even of a non-commercial nature. Bryan Garner, *Black's Law Dictionary* (10th Ed.) at 239.

Because nothing in RCW 48.62 or RCW 48.01.050 expressly overrode the application of Washington's insurance common law or its requirement of good faith, and nothing in either statute purported to exempt risk pools from the separate good faith duty inherent in the business of insurance under RCW 48.01.030, WCRP owes a good faith duty to participating member insureds and their individual public employees.

WCRP tries to read far too much into the Legislature's silence on whether the common law or statutory good faith and other duties apply. As noted in Davis/Northrop's opening brief at 33, 38, the term insurer is one of art in the Insurance Code. Risk pools are appropriately exempt from provisions in the code relating to insurers, such as organizational mandates, anti-kickback prohibitions, taxation, and other areas applicable to commercial insurers that are inconsistent with the practices of self-insuring or self-funding entities. Similarly, the provisions of RCW 48.62 address local governments' authority to individually or jointly self-insure risks. RCW 48.62.011. For WCRP to assert in its brief at 28 that this language "unambiguously" evidenced a legislative intent to reject the application of the principles in RCW 48.01.030 to risk pools, or to exempt risk pools from all of the separate and discrete common law duties and their corollary contractual and extracontractual remedies in tort and equity

is plainly wrong. The Legislature should not be assumed to have made such a drastic and profound change for the hundreds of thousands of public employees in Washington without expressly saying so.

WCRP claims broadly that self-insurers are exempt from any statutory or common law duties, citing *Kyrkos v. State Mutual Auto Ins. Co.*, 121 Wn.2d 669, 852 P.2d 1078 (1993) and *Bordeaux v. American Safety Ins. Co.*, 145 Wn. App. 687, 186 P.3d 1188 (2008), *review denied*, 165 Wn.2d 1035 (2009). WCRP br. at 30. Of course, WCRP is not truly a self-insurer as to the County or Slagle.<sup>18</sup> Moreover, WCRP vastly

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<sup>18</sup> As a pool, WCRP in theory may one day decide to jointly self-insure or self-fund risk for its members, but it has not done so here. Insurance shifts risk to a third party; self-insurance does not. 121 Wn.2d at 674. *See also, Bordeaux*, 145 Wn. App. at 695-96. In fact, WCRP was neither self-insuring nor self-funding liability as to the County here. WCRP *admits* that it insured through reinsurance or excess liability insurance every dollar of coverage for the County through private commercial liability insurers who were fully subject to the Insurance Code and Washington's insurance common law. *Stamp v. Dep't of Labor & Indus.*, 122 Wn.2d 536, 859 P.2d 597 (1993) (self-insured employer was not an insurer under Oregon Insurance Guaranty Fund), cited by WCRP in its brief at 33, does not help it on this point because of its unique facts based in Title 51 RCW and the law of insurance guaranty funds. Reinsurance certainly is a fact of life in liability insurance but when the pool is really only a front for commercial insurers that fully undercuts any rationale that a pool is not in "the business of insurance." Indeed, where a reinsurer reinsures 100% of an insured's risk, and involves itself significantly in claims handling situations, the intermixture of the roles of primary insurer and reinsurer has been held significant, even permitting suits directly against the reinsurer. *Venetsanos v. Zucker, Facher & Zucker*, 638 A.2d 1333 (N.J. App. Div. 1994), *cert. denied*, 137 N.J. 166 (1994); *Koken v. Legion Ins. Co.*, 831 A.2d 1196 (Pa. Commw. 2003), *aff'd*, 878 A.2d 51 (2005).

Moreover, WCRP contends in its brief at 12, 31, 35 that every WCRP member is obligated under the interlocal agreement for all losses because every member is liable for retroactive assessments (commonly referred to as retroactive premium policies), and thus it has not transferred all of the risk to commercial insurers. It makes this unsupported argument ostensibly to claim it does not actually shift risk in its activities. WCRP's liability policies are not retroactive premium policies, nor have any retroactive

overstates the holdings in the two cases cited.<sup>19</sup> Similarly, *Jones v. St. Paul Fire & Marine Ins. Co.*, 2015 WL 4508884 (W.D. Wash. 2015), cited by WCRP br. at 28-29 in support of its argument that it is not subject to Washington's insurance common law, does not help it.<sup>20</sup>

Essentially, WCRP tries to argue that its activities do not place it squarely within the *business of insurance* by asserting that this Court should ignore the reality that it allocates risk, buys insurance and reinsurance, handles claims, assigns defense counsel to its insureds, manages the defense of cases against its insureds, and settles claims. WCRP br. at 29-32. Merely because an insured chooses a large deductible or has a self-insured retention does not exempt its insurer from RCW

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premium agreements ever been alleged to actually exist, much less been produced, by WCRP. So while WCRP may have authority to purchase such retroactive premium policies, it has never done so. It is uncontroverted that WCRP generally does shift 100% of the risk of its policies to the pool, reinsurers, and excess insurers. CP 5420-49.

<sup>19</sup> Both cases address the peculiar situations of how to treat deductibles or self-insured retentions for purposes of subrogation in the specific context of UIM coverage. Neither case purported to generally exempt parties like WCRP from the Insurance Code or Washington's insurance common law.

<sup>20</sup> There, the plaintiffs sued an independent contractor attorney providing public defense services in Grant County and the County for legal malpractice. The Washington Rural Counties Insurance Program ("WRCIP") purchased liability coverage from Travelers. The Travelers policy specifically excluded independent contractors, although it covered appointed officials. The district court agreed with Travelers that the attorney was an independent contractor and not a covered appointed County official. Unnecessary to its holding, as pure dictum, the court recited WRCIP's statement that it was not an insurer under Washington law, citing RCW 48.01.050. The court apparently ignored WRCIP's common law duties to the County in arriving at its conclusion. In any event, the district court decision, which was decided after the decisions rendered in the instant case, has been appealed to the Ninth Circuit.

48.01.030, nor does it exempt its policies or the claims made under those policies from the common law good faith duty, any more than WCRP, an entity in the business of insurance, is exempt from RCW 48.01.030.<sup>21</sup>

Properly interpreted, RCW 48.62.011 and RCW 48.01.050 appropriately exempt true self-insuring and self-funding risk pools from the Insurance Code regulations applicable to insurers that conflict with the nature of the work the Legislature authorized risk pools to perform. Because those statutes do not *expressly* state override Washington's insurance common law, or RCW 48.01.030 on the good faith obligations inherent in the business of insurance (particularly where OIC supervision of risk pools under RCW 48.62.041 took place through 2010), this Court should apply its traditional interpretive principles to WCRP's liability policies, as well as its remedies, both contractual and extracontractual, for violations of its good faith duties.

(c) WCRP Has No Answer to Davis/Northrop's Contentions That This Court Has Applied to Washington Insurance Common Law Interpretive Principles to Risk Pool Policies, WCRP Itself Has Done So, and Public Policy Favors Such an Approach

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<sup>21</sup> As noted *supra*, the County here had a self-insured retention of \$500,000. It was self-insured for any claims within that amount. This is akin to a deductible from any coverage afforded it by WCRP. *Averill v. Farmers Ins. Co. of Wash.*, 155 Wn.2d 106, 114, 229 P.3d 830, *review denied*, 169 Wn.2d 1017 (2010) ("A deductible indicates the amount of risk retained by the insured... The insurance policy shifts the remaining risk of any damages above the deductible to the insurance company.").

Davis/Northrop discussed in their brief at 40-46 a number of other reasons for concluding that Washington's insurance common law, particularly its interpretive principles, apply to risk pools like WCRP: Washington courts have repeatedly held such principles applicable to the interpretation of risk pool liability policies, including the very WCRP liability policies now at issue; WCRP itself has always applied such principles to its own policies; and strong public policy reasons dictate that Washington common law interpretive principles and remedies should apply to the WCRP liability policies and the claims made under those policies.

WCRP's response to the first point is a diatribe against Davis/Northrop in which it claims they "misrepresent Washington precedent." WCRP br. at 46. WCRP obviously misleads this Court as to Davis/Northrop's basic contention by focusing on the remedies afforded under Washington's insurance common law, something WCRP studiously refused to address below and on which it has now, for the first time in this case, revealed as its actual position.

In fact, Washington's insurance common law consists of interpretive principles governing the construction of liability policies, *and* remedies for breach of good faith duties to insureds like the

County/Slagle, both contractual and extracontractual. As Davis/Northrop noted in their brief at 40-42, this Court has routinely applied the former to risk pool liability policies, as well as the excess policies issued by private insurance companies that “follow form” to these policies.

Indeed, in *Colby v. Yakima County*, 133 Wn. App. 386, 391-93, 136 P.3d 131 (2006), a case not even cited by WCRP in its brief, the Court of Appeals applied *Washington insurance common law interpretive principles to the very WCRP’s liability insurance policies at issue in this case*. WCRP’s silence on this case is deafening.<sup>22</sup>

WCRP is silent on the fact that its own legal counsel and other staff have always previously applied these interpretive principles to WCRP’s own liability policies, and the claims made under these policies, including both before and after the it refused to apply these same principles to the current claims.<sup>23</sup> Moreover, the language of WCRP’s

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<sup>22</sup> Even Lexington admits that this Court has applied Washington insurance common law interpretive principles to risk pool liability policies in *Wash. Pub. Util. Dists. Util. Sys v. P.U.D. No. 1 of Clallam County*, 112 Wn.2d 1, 10-17, 771 P.2d 701 (1989), and the *Colby* court applied the same interpretive principles to WCRP’s own policy. Lexington br. at 47-48. *See also, Okanogan v. Cities Ins. Ass’n of Wash.*, 72 Wn. App. 697, 700-02, 865 P.2d 576 (1994) (applying Washington’s continuous trigger to risk pool policies).

<sup>23</sup> On January 22, 2009, WCRP wrote a letter to one of its reinsurers regarding a claim made under these same primary policies in the *Broyles* case. CP 10538-541. In that letter, WCRP relied exclusively on Washington insurance common law, including the very cases now relied upon by Davis/Northrop and County/Slagle. *Id.* WCRP asserted that principle applied Washington’s continuous trigger to numerous tort claims,

own liability policies at issue here is that used commonly in liability insurance policies.<sup>24</sup> WCRP should be estopped to deny the application of insurance interpretive principles to its policies covering the County/Slagle.

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the exact same principle that the County/Slagle relied upon when they tendered the Davis/Northrop claims to WCRP for coverage, and the exact same principle that WCRP and Lexington now contend does not apply to these same policies. Similarly, on January 26, 2012, WCRP wrote a letter to its reinsurer AIG (at that time known as Chartis) justifying WCRP's decision in the *Case* lawsuit, again relying exclusively on Washington's insurance common law to interpret its liability policies. CP 10543-554.

There may well be many other instances of this sort, as both WCRP and Lexington have yet to produce other claim files, despite an order to do so from the trial court.

<sup>24</sup> WCRP also does not deny the point made in Davis/Northrop's opening brief at 42-43 and n.43 that it always represented and treated its policies as insurance, and at 43-44 that its policies used the traditional terminology of liability insurance such as "named insured," "insured," "premium," "deductible," "occurrence," *etc.* See WCRP br. at 11, 15-16. Indeed, even in the contractual setting, where a contract uses commonly understood terminology, such terms should be given their "ordinary, usual, and popular" meaning. *Kelly v. Ammex Tax and Duty Free Shops West, Inc.*, 162 Wn. App. 825, 831, 256 P.3d 1255 (2011), *review denied*, 173 Wn.2d 1014 (2012). Moreover, the words, if ambiguous, are construed against WCRP as their drafter. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 705, 952 P.2d 590 (1998). *Orange County Water Dist. v. Ass'n of Calif. Water Agencies Joint Powers Ins. Authority*, 63 Cal. Rptr. 2d 182 (Cal. App. 1997), cited by WCRP in its brief at 39 for the proposition that the mention of insurance in an organization's creation documents does not estop it to deny that it is an insurer, is distinguishable. WCRP did not just mention insurance in its interlocal agreement (where the very first page defines its primary policies as "Insurance"), it issued detailed liability insurance policies using extensive liability insurance terminology, which it uniformly represented and marketed as insurance, and then its claims staff and coverage counsel interpreted such policies in accordance with Washington's insurance common law. Again, Davis/Northrop are not contending WCRP is an insurer, but rather that it is in the business of insurance under RCW 48.01.030 and is also subject to insurance common law and thus owes good faith and other duties to its insureds.

There is a real irony in the argument WCRP advances in its brief at 35 that this Court should disregard the fact that its policies employ all the terminology of traditional liability insurance policies because, *since 2006*, it has mentioned to members that it is not an insurance company and is not providing traditional insurance. This is not true, Davis/Northrop br. at n.43, and, even if it were, it means that from 2001 to 2006, WCRP never disclaimed the point that it *was* offering what amounted to liability insurance to its insureds.

*Silverstreak v. Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 887, 154 P.3d 891 (2007).

WCRP largely misses the compelling public policy reasons why Washington's insurance common law should apply to risk pool member insureds and their employees. Davis/Northrop br. at 44-46. Instead, WCRP is content to claim that only some vague contract principles should govern, WCRP br. at 37-48, principles that will require years of litigation to fully develop, and that will not benefit the employees of risk pool members.<sup>25</sup>

This Court should also reject WCRP's argument on extracontractual remedies, particularly where that argument is offered for the first time on appeal. RAP 2.5(a). As to WCRP's now finally open assertion that its insureds, unlike anyone else similarly situated in Washington, have no remedies in tort for its conduct, or even statutory remedies under the CPA or IFCA,<sup>26</sup> and no *Olympic Steamship* equitable remedy for attorney fees, WCRP br. at 41-48, that newfound argument

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<sup>25</sup> WCRP asks this Court to analyze its liability policies utilizing the language of its interlocal agreement, its bylaws, and the liability policies. WCRP br. at 37-41. This Court should reject such an approach where the policies themselves contain provisions stating what constitutes the policy governing the relationship between the pool and the insureds. *E.g.*, CP 361 ("This policy consists of this Declarations page, the Coverage Form, and applicable endorsements.").

<sup>26</sup> WCRP gives the CPA and IFCA short shrift in a footnote. WCRP br. at 42 n.7.

should be rejected. Insureds' damages should not be, and have never been, confined to the mere benefit of the bargain. WCRP br. at 73-74.<sup>27</sup>

This Court crafted the remedies for bad faith, the Legislature enacted the CPA, and the people adopted IFCA for strong public policy reasons to compel those in the business of insurance to live up to their good faith obligations to insureds, which are often routinely ignored. WCRP's "trust me" promise to this Court is not enough to satisfy that obligation of good faith as to a defense, coverage, and indemnification, and claims handling responsibilities.<sup>28</sup>

At its core, WCRP asks this Court to backtrack on years of decisions in which this Court painstakingly developed principles for interpreting insurance policies and created remedies for insureds, both

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<sup>27</sup> Even under purely contractual damages, it was reasonably foreseeable that WCRP's wrongful denial of a defense in a massive liability case would lead the County and Slagle to take steps necessary to protect their interests, including a covenant judgment settlement. By breaching its duty to defend the County/Slagle, WCRP breached its contract with them, thereby excusing the County/Slagle from any further performance under the contract in any event. *City of Woodinville v. Northshore United Church of Christ*, 166 Wn.2d 633, 647, 211 P.3d 406 (2009). WCRP and Lexington should thus be responsible for the judgment, even under a pure contract damages theory.

<sup>28</sup> Merely because WCRP members have a procedural right to an internal WCRP claim appeal, WCRP br. at 42-43, is nowhere near the protection afforded by Washington law to insureds through the remedies this Court has crafted. Moreover, no such internal appeal rights appear to apply to individual employee insureds like Slagle. This Court would hardly sit still for a commercial liability insurer's argument that it is immune from bad faith or CPA/IFCA remedies or *Olympic Steamship* fees because it afforded insureds insurer-crafted procedural rights under their policies. This Court should not buy WCRP's analogous argument.

contractual and extracontractual, when an insurer breached good faith duties owed to insureds. In effect, WCRP invites this Court to treat hundreds of thousands of public employees of local governments and their families, as having received something less than insurance, with less rights and protections than insurance.<sup>29</sup> This relegates them to the status of second-class citizens, not deserving of those carefully-established protections developed for every other insured in Washington.<sup>30</sup> This Court should not tolerate such a radical proposition, particularly where the WCRP policies are nothing more than a front for private commercial insurers that insure 100% of the risk through reinsurance and excess coverage.<sup>31</sup>

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<sup>29</sup> WCRP's self-serving and factually unsupported assertion in its brief at 44 n.2 that its claim determinations will not compel insureds to face financial catastrophe or ruin is simply untrue, especially for individual public employees like Slagle. That employees and their families are left unprotected by WCRP's analysis, without the rights, benefits, and protections of Washington's insurance common law, is fully illustrated by WCRP's treatment of Donald Slagle in its brief, now denying that he is even an insured under its policies in order to advance its position on these claims, despite the express provisions to the contrary in its liability policies. WCRP br. at 53-57.

<sup>30</sup> WCRP effectively seeks immunity from all liability for its conduct, no matter how egregious, and no matter the consequences of such conduct upon its insureds. The Legislature, however, expressed the exact opposite intent when it eliminated sovereign immunity in RCW 4.96.010, stating that local governments must be liable in tort like any other person or corporation in Washington.

<sup>31</sup> Cited by WCRP in its brief at 32, a recent law review article surveyed risk pool officials and documented how reinsurers influence their claim decisions. Marco Antonio 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). The central tenet of that article is that "not only does a form of reinsurance influence or 'governance' clearly exist in the largely unregulated world of

Further, WCRP's contention that only contract law should control in interpreting its liability policies, WCRP br. at 37-41, is baseless. For this proposition, it cites a single, entirely distinguishable Washington case, WCRP br. at 39,<sup>32</sup> and (despite the undisputed fact that the WCRP policies state they must be construed under Washington law) decisions from other

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self-insured pools, whether characterized as direct, indirect, or regulatory in nature, but also that the governance effect is an open and recognized influence that is accepted by the pools." *Id.* Washington risk pool officials are quoted in the article. *Id.* at 88, 111, 113-14.

Commercial reinsurers, subject to Washington's insurance common law, significantly impact pool underwriting and claims decisions. Lexington reserved exclusive authority to investigate, defend, and settle all claims within its reinsurance. This reality *fundamentally undercuts* WCRP's contention that it is not part of the business of insurance or subject to the common law, and that it should be allowed to proceed without its insureds enjoying the usual protections, from bad faith conduct, both contractual and extracontractual, that are present for all others in our state.

<sup>32</sup> *George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc.*, 67 Wn. App. 468, 836 P.2d 851 (1992) is an indemnification agreement case. It addresses a contract in which a subcontractor purported to indemnify and hold harmless a general contract. Division II observed that for a duty to indemnify arising out of such an agreement, subject to the express provisions of RCW 4.24.115, courts look not to the allegations in a complaint, as in the insurance setting where there is a duty to defend at the outset of the case, but to all the pleadings at the time of tender. It is simply inappropriate from this specialized contractual setting to establish a universal rule permitting risk pools who are in the business of insurance to subtract protections for insureds under their liability policies, and would create a scenario where an insured, in order to obtain a defense to liability claims, must prove some or all of the very allegations from which they are seeking a defense. The WCRP policies are not hold harmless provisions, but rather contain an *express* duty to defend that must be provided at the outset of the liability case. That is a telling difference where the defense is provided at the outset of the liability case, the thus mandating that the court look only at the allegations in the complaint to determine the duty to defend. Even Lexington acknowledges in its brief at 10 that "WCRP has an immediate duty to defend under the policies."

If it were true that the allegations in the Davis/Northrop complaint do not control, but all the pleadings, WCRP was still obligated to defend the County/Slagle as to their continuing and later post-conviction misconduct.

jurisdictions. However, the cases cited by WCRP are easily distinguishable.<sup>33</sup> Those cases arise under a common law and statutory regime distinct from that present in Washington with its long traditions of common law and statutory good faith and other obligations on the part of those in the business of insurance designed to protect Washington insureds.<sup>34</sup>

WCRP's assertion that its members themselves delineate the scope of the insurance, and that it will never be adverse to its insureds' interests or trample on their rights, WCRP br. at 40, is oblivious not only to the misconduct WCRP engaged in during the claim handling process and

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<sup>33</sup> In the primary case relied upon by WCRP, *City of South El Monte v. Southern California Joint Powers Insurance Authority*, 45 Cal.Rptr.2d 729 (Cal. App. 1995), there was an express written agreement between that pool and its members stating that the duty to defend principle did not apply. No such agreement ever existed between WCRP and its members anywhere in the WCRP interlocal agreement, bylaws, or liability policies.

In *City of Arvada v. Colo. Intergovernmental Risk Sharing Agency*, 19 P.3d 10, 11 (Colo. 2001), the Colorado statute authorizing the pool, and the total exemption it contained, "was modeled after a similar statute in California." *Id.* at 14. The California and Colorado statutes authorizing risk pools more broadly exempt risk pools from the totality of law regulating both insurance companies and insurance in those states. *Id.* at 13. RCW 48.01.050, by contrast, is far narrower.

<sup>34</sup> In any event, not all states treat risk pools as do California courts. Many states have concluded that risk pool liability policies must be interpreted in accordance with insurance common law interpretive principles, e.g., *Public Entity Pool for Liability v. Winger*, 566 N.W.2d 125, 128 n.5 (S.D. 1997) (because pool concept is similar to insurance, applies insurance law interpretive principles), or that various extracontractual remedies such as the tort of bad faith apply in favor of risk pool insureds. E.g., *Miller v. Ga. Interlocal Risk Mgmt. Agency*, 501 S.E.2d 589 (Ga. App. 1998). See generally, Doucette, 8 Conn. Ins. L.J. 533, 559-62 (2001-02) (discussing history of pools and noting a number of states that treat pools as mutual insurers).

thereafter here, but also to the implications of its adverse coverage decisions on insureds like the County and Donald Slagle.

Even under WCRP's conception that it is a collective and its decisions are collective in nature, it is obvious that the County and Slagle did not get to decide whether there was coverage for these claims. WCRP did, while working hand-in-hand with private commercial insurers. Such a relationship is fraught with adversity, as is true for claims handling generally when WCRP denies a claim and exposes its insureds to liability.<sup>35</sup>

In sum, WCRP's liability policies implicate the public interest just as traditional insurance policies do, and this Court should interpret them in accordance with principles developed over the decades to protect insureds and to ensure that they receive the benefits and protections that they are due from those in the business of insurance. Similarly, the remedies for breach of good faith-based duties should be those developed over the

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<sup>35</sup> The duties of the common law arise because of such a claim-handling relationship where someone other than the insured has all the decision making power and that entity's interests are not aligned with those of the insured. That is precisely why a fiduciary relationship arises in Washington when "one party occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for," *Liebergessel v. Evans*, 93 Wn.2d 881, 889-90, 613 P.2d 1170 (1980) (citation omitted), and a quasi-fiduciary relationship applies in the insurance setting, *VanNoy v. State Farm Ins. Co. of Wash.*, 142 Wn.2d 784, 16 P.3d 374 (2001). The *VanNoy* court noted that this quasi-fiduciary duty was indistinguishable from a duty of good faith arising out of the insurer-insured relationship. *Id.* at 793 n.2.

years in the insurance setting. Public employee insureds and their families deserve at the very least the same benefits and protections afforded to every other Washington insured.

(2) WCRP Breached Its Duty to Defend the County/Slagle from the Claims Made Against Them by Davis/Northrop

WCRP asserts that it had no duty to defend the County/Slagle because the sole occurrence here allegedly took place at but a single point in time in 1993, WCRP br. at 57-73, notwithstanding Washington law on trigger of coverage, the County/Slagle's alleged continuous wrongful conduct toward Davis/Northrop, the deemer clauses in the 2004 and later WCRP policies, and the instances of post-conviction misconduct discerned by Judge Bryan on summary judgment in the federal action.

First, WCRP does not deny the articulation of the usual principles of Washington's insurance common law on the duty to defend set forth in the Davis/Northrop opening brief at 25-30.<sup>36</sup> Despite its previous argument that vague contract principles apply to interpret its liability policies, WCRP's brief is silent on the specific principles to be employed to interpret its duty to defend insureds under those policies. WCRP br. at

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<sup>36</sup> Again, WCRP itself at all other times applied these specific principles in making defense decisions, including both before and after denying the current claims. CP 8366-71.

57-73.<sup>37</sup> Indeed, after spending the majority of its briefing arguing that insurance principles do not apply to its policies, WCRP makes an about-face and relies exclusively on insurance principles, just those from jurisdictions other than Washington, and specifically jurisdictions adopting a manifestation trigger of coverage repeatedly rejected by Washington.

WCRP had a duty to defend any claims brought against the County/Slagle for damages because of bodily injury, personal injury, property damage, errors and omissions and/or advertising injury, caused by an occurrence during the policy period. *E.g.*, CP 362. The policies define an occurrence in the personal injury coverage as “an event, including continuous or repeated exposure to substantially the same conditions.” CP 369. The personal injury coverage, which WCRP previously acknowledged, includes not only false arrest, but also

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<sup>37</sup> WCRP itself *concedes* that even under contract law in Washington, a covenant of good faith attends performance of contracts. WCRP br. at 40. *See, e.g., City of Woodinville*, 166 Wn.2d at 647. The breach of that covenant is actionable. *Rekhter v. State, Dep’t of Soc. & Health Servs.*, 180 Wn.2d 102, 323 P.3d 1036 (2014). WCRP seems to concede by its silence that its liability policies required it defend its insureds against claims made against them. Its concession is appropriate as the insuring agreement in its liability policies expressly references its “right and duty to defend” suits brought against its insureds. *E.g.*, CP 362. Arguably, that fact alone means that even under “contract principles,” the trial court erred in dismissing the County/Slagle bad faith claims against WCRP in the duty to defend context. Thus, it had a duty of good faith to the County/Slagle to properly analyze its duty to defend them.

imprisonment, wrongful detention, civil rights violations and humiliation.

*Id.*

This Court has made clear that insurance policies generally, and certainly WCRP's liability policies here, are contracts. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 480, 687 P.2d 1139 (1984). Thus, the interpretive principles of Washington's insurance common law are a specialized subset of the rules for interpreting contracts. In the absence of any other similar authority, and consistent with the practices of WCRP's own claims staff and coverage counsel, this Court's well-developed case law on the duty to defend should control.<sup>38</sup>

Davis/Northrop pleaded a continuing course of events and misconduct (and resulting injuries) by the County/Slagle in both their original *and* amended complaints. This renders the argument advanced by WCRP that the Court should perceive some distinction in its duty to defend based on the allegations in those respective forms of the complaint

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<sup>38</sup> If a complaint articulates *any* reasonable or law facts triggering coverage, the insurer must defend. *American Best Food*, 168 Wn.2d at 405. That duty is present even if the allegations are groundless, false, or fraudulent. *Emerson*, 102 Wn.2d at 485-86. Only if the complaint alleges facts and law *clearly* outside the policy's coverage can the insurer refuse to defend. *Greer v. Northwestern Nat'l Ins. Co.*, 109 Wn.2d 191, 197, 743 P.2d 1244 (1987). Extrinsic evidence is admissible only to support, and not to deny, a duty to defend. All factual and legal inferences must be construed in favor of a defense, and if there is any question of whether a duty to defend is owed, the remedy is to provide a defense and file a declaratory judgment action. *E.g.*, *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 60, 164 P.3d 454 (2007); *Truck Ins. Exch. v. Van Port Homes, Inc.*, 147 Wn.2d 751, 761, 58 P.3d 276 (2002).

meaningless. As noted *supra*, the operative allegations of the insured in the most recent complaint control. Moreover, it is noteworthy that Judge Bryan's summary judgment decision allowed certain claims to go forward as to the County's post-conviction misconduct during WCRP's policy periods.<sup>39</sup>

Far from lacking new and distinct harms, as WCRP contended, WCRP br. at 19, 59-62, the County/Slagle engaged in a continuing course of misconduct with corresponding harm. The destruction of DNA evidence in 2006 or 2007 could be viewed as discrete wrongful acts. Further, this issue has been judicially resolved because Judge Bryan's ruling that post-2002 acts of the County/Slagle were actionable precludes WCRP's contrary claim here.

WCRP also completely misses the significance of its own deemer clauses. WCRP br. at 22, 57, 69-71.<sup>40</sup> If the harm was continuing, then WCRP's own liability policies deem the applicable occurrence to have occurred at a single point in time, "during the last policy period in which any part of the occurrence took place," and not the first point in time as

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<sup>39</sup> Lexington admits that the allegations in Davis/Northrop's amended complaint flow from the same misconduct in their original complaint. Lexington br. at 12.

<sup>40</sup> As noted *supra*, there are no deemer clauses in the early WCRP primary policies, only in those issued in 2004-05 and thereafter.

argued by WCRP and Lexington. *E.g.*, CP 397. Thus, WCRP's stubborn insistence on 1993 as the occurrence date for the claims against the County/Slagle is not only contrary to Washington law on the timing of an occurrence, but fails common sense where Davis/Northrop were continuously incarcerated for more than 17 years. The last date for any such *continuing* wrongful conduct or injuries was well into 2010.<sup>41</sup>

WCRP misstates Washington law on when an occurrence is triggered. WCRP br. at 63 n.17, 69 n.18. It contends, contrary to decisions in numerous Washington cases, that a manifestation trigger of coverage applies. *Id.* Ironically, WCRP seeks to apply the insurance common law of other jurisdictions,<sup>42</sup> despite the fact that it has argued

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<sup>41</sup> WCRP appears to contend that the County (but not Slagle) knew about these allegations as soon as Davis/Northrop were incarcerated in 1993, and thus coverage is precluded under those policies containing the deemer provision. WCRP br. at 69-71. However, the allegations upon which WCRP relies for this position actually state that the County "knew *or should have known*." CP 7650. Under the duty to defend, the County/Slagle are entitled to the benefit of the doubt regarding these allegations, and indeed, such allegations are wholly irrelevant to that duty where, as here, actual knowledge was not a necessary element of the claims against them. To the extent that WCRP refers to matters outside the pleadings, that is not permissible in denying a duty to defend under current Washington law, and even if relevant, which they are not, such allegations would merely create a factual issue on which Davis/Northrop and the County/Slagle are entitled to conduct discovery.

<sup>42</sup> WCRP attempts to avoid coverage here by arguing in its brief at 65-66 that the continuous trigger theory is inapplicable. Washington, however, has expressly rejected a manifestation trigger of coverage, as Davis/Northrop have noted. Numerous jurisdictions employing triggers of coverage other than either a manifestation or a continuous trigger have found coverage in "innocence" cases. *E.g.*, *National Cas. Inc. Co. v. City of Mount Vernon*, 515 N.Y.S.2d 267 (N.Y. App. Div. 1987); *American Safety Cas. Ins. Co. v. City of Waukegan, Ill.*, 678 F.3d 475 (7th Cir. 2012) (adopting accrual

insurance common law is inapplicable here, and despite the fact that its own liability policies and bylaws expressly require the application of Washington law, as noted *supra*.

This Court has never confined the continuous trigger principle only to property damage cases, as WCRP suggests.<sup>43</sup> See Davis/Northrop br. at 53 n.53. Specifically, the continuous trigger principle was applied by this Court in *Transcontinental Ins. Co. v. Wash. Pub. Utils. Dist. Util. Sys.*, 111 Wn.2d 452, 464-70, 881 P.2d 1020 (1994), a case that was not merely a first-party property insurance case, but involved pure negligence claims surrounding the issuance of bonds.<sup>44</sup>

Finally, WCRP offers an argument on the accrual of civil rights claims, WCRP br. at 65-69, that is truly inconsistent with duty to defend principles. The insuring agreements in the WCRP policies only purport to

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theory to find coverage under policies incepting post-conviction); *Waters v. Western World Ins. Co.*, 982 N.E.2d 1224 (Mass. App. 2013).

<sup>43</sup> The continuous trigger has been the prevailing Washington rule since 1974. *Gruol Construction Co. v. Insurance Co. of North America*, 11 Wn. App. 632, 524 P.2d 427 (1974), review denied, 84 Wn.2d 1014 (1974). See also, *Certain Underwriters at Lloyd's London v. Valiant Ins. Co.*, 155 Wn. App. 469, 474-75, 229 P.3d 930, 932 (2010) (holding an occurrence to include any “continuing condition or process; it need not be a single, isolated event”); *American National Fire Insurance Co. v. B & L Trucking & Construction Co.*, 134 Wn.2d 413, 951 P.2d 250 (1998) (same).

<sup>44</sup> In *In Re Feature Realty Litigation*, 468 F. Supp. 2d 1287 (E.D. Wash. 2006), the plaintiff developer asserted that the City of Spokane was liable for its continuous wrongful conduct in refusing to issue land use permits and in delaying a project. The court there applied the continuous trigger principle in a case not involving latent harm. *Id.* at 1299-1303.

provide coverage for claims that an insured becomes legally obligated to pay. *E.g.*, CP 362. As noted in Davis/Northrop's opening br. at 52 n.52, the County/Slagle could not become legally obligated to pay the federal 42 U.S.C. § 1983 claims against them until after Davis/Northrop were exonerated and the claims accrued, in 2010. *See, e.g., Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994); *Bradford v. Scherschligt*, 803 F.3d 382 (9th Cir. 2015).<sup>45</sup>

Further, as noted in Davis/Northrop's opening brief at 53, not only has at least one court has determined that the accrual date, rather than any particular trigger of coverage theory, determines the timing of an occurrence in this setting, WCRP admits that "this Court has not addressed what triggers coverage in a civil rights claim..." WCRP br. at 65, and that *there is at least a minority rule* under which such common law civil rights claims accrue when the claimant's harm is manifested. *Id.*<sup>46</sup> That

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<sup>45</sup> This means, with respect to the deemer clause contained in the later policies, that the County/Slagle could not have known of any allegations of liability against them for injuries caused by an occurrence prior to the completion of the occurrence, the injuries and the accrual of the claims, which at the earliest was in 2010.

<sup>46</sup> In fact, in citing the district court decision in *Northfield Ins. Co. v. City of Waukegan*, 761 F. Supp. 2d 766 (N.D. Ill. 2010), *aff'd*, 701 F.3d 1124 (7th Cir. 2012), in its brief at 65, WCRP misstates that case's actual holding. The Seventh Circuit in *American Safety*, *supra*, acknowledged the majority rule as to accrual of common law wrongful prosecution/conviction/incarceration claims, but held Illinois follows a contrary minority view that such claims accrue upon exoneration of the offender for purposes of an occurrence. 678 F.3d at 479-80. The Seventh Circuit upheld the determination that insured breached its duty to defend. In *Northfield*, the Seventh Circuit re-affirmed that result. 701 F.3d at 1132.

admission alone is sufficient to resolve the duty to defend the issue in this case. Pursuant to *American Best Food* and its progeny, WCRP had a duty to defend the County/Slagle and file a declaratory judgment action to resolve any coverage issues that it believed existed with respect to these claims.

In sum, WCRP breached its duty to defend the County/Slagle under well-understood principles of Washington's insurance common law, or straightforward Washington contract principles.

(3) The County/Slagle Were Entitled to Assign Their Contractual and Extracontractual Claims Against WCRP to Davis/Northrop

WCRP's contention that its interlocal agreement prohibits the assignment of contractual and extracontractual rights flowing from its liability policies is contrary to the terms of that agreement, this Court's law on assignments (whether under insurance common law or general contract law), and fundamentally misrepresents Donald Slagle's status as an insured under the WCRP policies. WCRP br. at 49-57.

WCRP again has no answer to the law in the insurance context on covenant judgment settlements and the routine assignment of rights that occur in connection with such settlements. Davis/Northrop br. at 55-58. Similarly, it has no answer to the cases cited by Davis/Northrop on Washington's law on assignment in the contract context that allows a

party to assign claims for damages, but not for performance, even where an anti-assignment provision is in place. *Id.* at 58-60.

WCRP asserts that its interlocal agreement's anti-assignment provision also pertains to rights under its liability policies. WCRP br. at 51-52. To make this argument, WCRP misreads the express language of its own interlocal agreement. Article 21 of that agreement only bars the assignment of any right, claim, or interest "under this Agreement." CP 26. It says nothing about the assignment of any claims under the WCRP policies. It further only prohibits an assignee from receiving a "right, claim, or title to any part, share, interest, fund, or asset of the Pool." *Id.* Davis/Northrop have not claimed any right under the interlocal agreement or an interest in WCRP as such. Thus, whether under insurance law or contract law, the interlocal agreement does not prohibit these assignments.

WCRP has no good answer to this Court's decision in *Pub. Util. Dist. No. 1 of Klickitat Cty. v. Int'l Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994). WCRP br. at 52. That case involved a risk pool whose insurance policies had anti-assignment provisions. Nevertheless, this Court permitted assignments of claims, causes of action, and proceeds, applying the general rule on assignments previously articulated by Davis/Northrop. 124 Wn.2d at 800-02. WCRP offers no cogent reason why that general policy on assignments under Washington law is

inapplicable, even assuming the anti-assignment provision of its interlocal agreement applies here. The County/Slagle assigned claims for damages based on events that have already occurred, not claims for performance.

Because the interlocal agreement only applies to assignments by a county, WCRP asserts that Slagle's individual assignment is also void because he is not actually an insured under the WCRP liability policies. In fact, WCRP contends that any responsibility it has to provide coverage to Slagle (or its other members' individual employees) derives from a statute, and that no individual employees are insureds or under its liability policies. WCRP br. at 53-57. WCRP attempts to conflate a local government's statutory obligation to defend and insure its employees with its duty to defend and indemnify employees under its liability policies. The two obligations are complementary, but distinct matters. RCW 4.96.041 addresses the obligation of local governments to defend and indemnify their employees when they were sued.<sup>47</sup> This is distinct from the duties under the WCRP liability policies, as Division III recognized in *Colby* by analyzing these questions *separately*. 133 Wn. App. at 133-35.

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<sup>47</sup> RCW 4.96.041, like its counterpart for state employees, RCW 4.92.060, was enacted to remove any uncertainty as to whether a public employee would be defended and indemnified for actions in the course of their public employment. Prior to their enactment, public employees could be denied a defense/indemnification at the discretion of the attorney representing the government. See, e.g., *State v. Hermann*, 89 Wn.2d 349, 572 P.2d 713 (1977). See also, *Sanders v. State*, 166 Wn.2d 164, 207 P.3d 1245 (2009). By creating uncertainty as to whether a public employee is to be defended or indemnified, WCRP's argument undercuts the very rationale for RCW 4.96.041.

In fact, Slagle is an insured, separate and distinct from the County, under WCRP's liability policies.<sup>48</sup>

WCRP's claim that its position on whether individual county employees (or even risk pool employees) are policy insureds would not have a serious impact on thousands of public employees, WCRP br. at 55, is either naïve or incredibly cynical. The issue here is *risk*. The provisions of RCW 4.96.041 and WCRP's liability policies are meant to eliminate a public employee's perception that their personal assets may be at risk for liability allegedly incurred while he or she performs public duties; no local police officer, correctional officer, or other employee performing duties that may result in lawsuits against them wants to believe their personal assets are at risk merely because of their public employment.<sup>49</sup> WCRP's position puts those individual public employees at real risk.

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<sup>48</sup> An insured is defined in WCRP's policies to include the named insured (the County), as well as all its former and current employees (Slagle). *E.g.*, CP 363, 369. The separation of insureds provision in the WCRP liability policies make clear that the rights of individual employee insureds like Slagle are separate and independent. *E.g.*, CP 371. Even WCRP's interlocal agreement, in Article 14(a), *mandates* coverage for member county employees under the WCRP policies. CP 24.

<sup>49</sup> WCRP's position is severely undercut by this Court's jurisprudence on risk pools. The genesis for the various public utility district risk pool cases was the liability of PUD officers or commissioners for their poor decisions on the WPPSS nuclear power plants. Those PUD officers or commissioners perceived more than a modicum of personal risk when faced with lawsuits involving billions of dollars.

The trial court erred in concluding that the County/Slagle could not assign their claims against WCRP/Lexington to Davis/Northrop.

(4) Davis/Northrop Are Entitled to Their Fees at Trial and on Appeal<sup>50</sup>

WCRP has, yet again, *no answer* to the legal argument set forth in the brief of Davis/Northrop at 30, 64-65, that they are entitled to an award of their fees at trial and on appeal pursuant to the equitable exception to the American Rule articulated by this Court in *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) and *McGreevy v. Ore. Mutual Ins. Co.*, 128 Wn.2d 26, 904 P.2d 731 (1995). The insureds under the WCRP policies were forced to litigate (indeed, WCRP initiated the lawsuit) to obtain the benefit owed them under those policies. The central requirement of the exception is thus met.<sup>51</sup>

D. CONCLUSION

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<sup>50</sup> Davis/Northrop reject the argument that WCRP is entitled to a fee award under article 22 of the interlocal agreement against the County, WCRP br. at 75, where WCRP has not prevailed in this action.

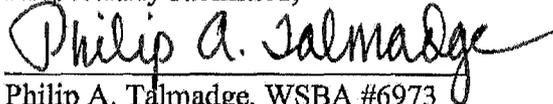
<sup>51</sup> Were this Court to conclude that Washington's insurance common law does not apply to the WCRP's liability policies, Davis/Northrop still must recover fees incurred to sustain the duty to defend owed by WCRP to the County/Slagle on equitable grounds. The *Olympic Steamship* principle allows the recovery of fees in a non-insurance setting where the obligor akin to an insurer engages in conduct that compels an obligee to sue to secure the benefits of the parties' contract, particularly if there is disparity in bargaining and enforcement power of the contracting parties. *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 597-606, 167 P.3d 1125 (2007) (construction performance bonds); *King County v. Vinci Construction Grands Projets*, 191 Wn. App. 142, 364 P.3d 784 (2015) (same). The equitable considerations announced by this Court in *Colorado Structures* apply to the relationship between WCRP and its insureds.

Nothing provided in WCRP's brief should deter this Court from concluding that the trial court erred in failing to apply the interpretive principles and the remedies of Washington's insurance common law to the liability policies issued by WCRP and the claims made under those policies. In particular, the trial court erred in its decision on WCRP's duty to defend the County/Slagle, and in barring an assignment of the County/Slagle's claims for damages against WCRP/Lexington to Davis/Northrop.

This Court should reverse the trial court's orders at issue here and rule that Washington's insurance common law applies to 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 16<sup>th</sup> day of March, 2016.

Respectfully submitted,



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# APPENDIX

RCW 48.62.041:

(1) The property and liability advisory board is created, consisting of the insurance commissioner and the state risk manager, or their designees, as ex officio members and five members appointed by the governor on the basis of their experience and knowledge in matters pertaining to local government risk management, self-insurance, and management of joint self-insurance programs. The board shall include at least two representatives from individual property or liability self-insurance programs and at least two representatives from joint property or liability self-insurance programs.

(2) The board shall assist the state risk manager in:

(a) Adopting rules governing the operation and management of both individual and joint self-insurance programs covering liability and property risks;

(b) Reviewing and approving the creation of joint self-insurance programs covering property or liability risks;

(c) Reviewing annual reports filed by joint self-insurance programs covering property and liability risks and recommending that corrective action be taken by the programs when necessary; and

(d) Responding to concerns of the state auditor related to the management and operation of both individual and joint self-insurance programs covering liability or property risks.

(3) The board shall annually elect a chair and a vice-chair from its members. The board shall meet at least quarterly at such times as the state risk manager may fix. The board members who are appointed shall serve without compensation from the state but shall suffer no loss because of absence from their regular employment. Members of the board who are not public employees shall be compensated in accordance with RCW 43.03.240.

(4) A majority of the board constitutes a quorum for the transaction of business.

(5) The board shall keep public records of its proceedings.

DECLARATION OF SERVICE

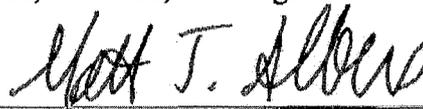
On said day below I electronically served a true and accurate copy of the Reply Brief of Appellants Davis/Northrop to WCRP in Supreme Court Cause No. 91154-1 to the following parties:

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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: March 16, 2016, at Seattle, Washington.

A handwritten signature in black ink that reads "Matt J. Albers". The signature is written in a cursive style and is positioned above a horizontal line.

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Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe

DECLARATION

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**Sent:** Wednesday, March 16, 2016 9:10 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** Jack Connelly (jconnelly@connelly-law.com) <jconnelly@connelly-law.com>; Micah LeBank <mlebank@connelly-law.com>; bmarvin@connelly-law.com; TimF@mhb.com; davidw@mhb.com; tiffanyc@mhb.com; lindamt@mhb.com; lan Hale <IHale@pfglaw.com>; mfarnell@pfglaw.com; Kathleen A. Karan <KKaran@pfglaw.com>; wleedom@bblaw.com; AMagnano@bblaw.com; dnorman@bblaw.com; vhager@bblaw.com; jgoldfarb@bblaw.com; hpoltz@bblaw.com; lyniguez@bblaw.com; howard@washingtonappeals.com; Victoria Vigoren <victoria@washingtonappeals.com>; chris.horne@clark.wa.gov; taylor.hallvik@clark.wa.gov; thelma.kremer@clark.wa.gov; nicole.davis@clark.wa.gov; matthew.segal@pacificallawgroup.com; katie.dillon@pacificallawgroup.com; tbiddle@gordonrees.com; dverfurth@gordonrees.com; mche@gordonrees.com; pjordan@jordan-legal.com; agelo.reppas@sedgwicklaw.com; tjones@cozen.com; bwinslow-nason@cozen.com; DFinafrock@cozen.com; Phil Talmadge <phil@tal-fitzlaw.com>  
**Subject:** WCRP, et al. v. Clark County, et al. - Supreme Ct Cause #91154-1

Good morning:

Attached please find the following document for filing with the Supreme Court:

Documents to be filed: (1) Motion for Leave to File Over-Length Reply Brief of Appellants Davis/Northrop to WCRP; and (2) Reply Brief of Appellants Davis/Northrop to WCRP

Case Name: WCRP, et al. v. Clark County, et al.

Case Cause Number: 91154-1

Attorney Name and WSBA#: Philip A. Talmadge, WSBA #6973

Contact information: Matt J. Albers, (206) 574-6661, [matt@tal-fitzlaw.com](mailto:matt@tal-fitzlaw.com)

Please let me know if you have any questions. Thank you.

Very truly yours,

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