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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 LEXINGTON INSURANCE COMPANY

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## A. INTRODUCTION

Lexington Insurance Company ("Lexington") is one of the commercial liability reinsurers and excess insurance carriers that fully covered the liability risk of Clark County and Detective Donald Slagle ("County/Slagle") in this case. As a private commercial insurer, Lexington is subject to Washington's insurance common law. To enable private insurers to avoid Washington's insurance common law, Lexington uses WCRP as a front to avoid the interpretive principles for liability policies and remedies long made available by this Court to Washington insureds; this is graphically demonstrated by the fact that Lexington retained the sole discretion to investigate, defend, and settle any claims bearing on its reinsurance of WCRP.

Lexington's brief contains misstatements of facts and disregards important facts in this case articulated by Davis/Northrop and the County/Slagle. More critically, on the law, despite admitting that as a commercial insurer it is fully subject to Washington's insurance common law, both as to its interpretive principles as well as its contractual and extracontractual remedies, Lexington tries to disguise its actual role in the outcomes below by arguing for WCRP's position on Washington's insurance common law. Lexington devotes well over half of its brief to the duty to defend argument when its duty to defend is yet to be addressed

below; no party has moved for summary judgment on this question, nor has the trial court ruled on it. Rather, Lexington simply seeks to lend credence to WCRP's contentions, further reinforcing the point that WCRP is a convenient front by which commercial insurers can attack the insurance common law in Washington that has vigorously defended insureds' rights. This point is further bolstered by Lexington's aggressive invitation to this Court to abandon the continuous coverage trigger concept, long applied in Washington, in favor of less protective principles applied in other jurisdictions.

This Court should reaffirm the principles in Washington's insurance common law developed over at least a half a century that require fair treatment of insureds. This Court should reject Lexington's effort to hide behind WCRP to deprive Washington insureds of the benefits and protections of Washington's insurance common law.

**B. RESPONSE TO LEXINGTON STATEMENT OF THE CASE**

Lexington's highly argumentative "Statement of Facts," Lexington br. at 1-22, is remarkable for the facts it argues and the facts in the Davis/Northrop Statement of the Case it does not choose to contest.

Among the facts not contested by Lexington are the following facts it has *now conceded* on appeal:<sup>1</sup>

- Davis and Northrop were wrongfully arrested, convicted, and incarcerated, and were ultimately exonerated. (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 subsequently destroyed DNA evidence in 2007, despite the court order (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 and discrete acts of misconduct by the County/Slagle under tort theories and 42 U.S.C. § 1983 (Davis/Northrop br. at 11-12);
- In the federal tort action, Judge Bryan entered a ruling denying the County/Slagle's motion for summary judgment because Davis/Northrop stated some claims against them in tort for post-conviction conduct, including the failure to turn over exculpatory evidence (Davis/Northrop br. at 16-17);<sup>2</sup>
- As the reinsurer of the WCRP and its excess insurer Lexington, a commercial liability insurer, provided every dollar of WCRP's coverage of the County/Slagle, above the County's deductible. (Davis/Northrop br. at 35).<sup>3</sup>

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<sup>1</sup> *Washburn v. Beatt Equip. Co.*, 120 Wn.2d 246, 270, 840 P.2d 860 (1992) (failure of respondents to contest facts related to plaintiff's injuries in fire concede them).

<sup>2</sup> The County engaged in both continuous and discrete acts of misconduct; Lexington's brief fails to seriously analyze, for example, the County's treatment and destruction of exonerating DNA evidence as to Davis and Northrop in 2006 and 2007. Contrary to Lexington's assertion to the contrary in its brief at 23, such conduct was not merely a "follow-on" Davis/Northrop's 1993 convictions, but rather constituted distinct wrongdoing by the County.

On a series of factual points, Lexington's contentions are without foundation in this record. For example, Lexington implies that it has no substantive association with AIG. Lexington br. at 1. Lexington is a wholly-owned subsidiary of AIG and is a part of the AIG group of companies.<sup>4</sup>

Lexington inconsistently interprets the provisions of its excess policies, cherry-picking the interpretation most advantageous to its current argument. While it argues on the one hand that its policies "followed the form" of the WCRP liability policies, Lexington br. at 9, it identifies numerous circumstances in which its excess policies are at odds with WCRP liability policy provisions and must be read differently. For example, it notes that a key provision, the definition of an "occurrence," is

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<sup>3</sup> Lexington quibbles with this assertion in its brief at 5-6. As to the County/Slagle, the fact that there was a \$100,000 retention for some WCRP members is irrelevant. The County's "deductible" was \$500,000. Davis/Northrop br. at 12, 45. See CP 112-19, 3865-79, 5420-61, 5464. Moreover, despite the argument at 5 n.2 of its brief, Lexington reinsured the WCRP risk for most of the years at issue here.

In light of the foregoing, there is real irony in Lexington's discussion in its brief at 2-4 that risk pools like WCRP were created as an alternative to commercial liability insurance. In fact, WCRP was nothing more than a front for commercial liability insurers, as scholarly treatment of their actual relationship documents. See Davis/Northrop reply to WCRP at 24 n.31. In particular, Lexington retained the *exclusive authority* to investigate, defend, and settle all claims, such as those made by Davis/Northrop here, affecting its reinsurance. CP 116.

<sup>4</sup> <http://www.lexingtoninsurance.com/press-center> ("Since its incorporation in 1965 in Boston, Massachusetts, Lexington Insurance Company, an AIG company, has grown to become one of the strongest and most stable surplus lines insurers in the market today...AIG is a world leading property-casualty and general insurance organization serving more than 70 million clients around the world.") (last visited March 3, 2016).

different in the WCRP and Lexington policies. *Id.* at 6-7, 10. It concedes its policies did not have a deemer clause or anti-assignment provisions. *Id.* at 9-10.<sup>5</sup> It further concedes that the duty to defend provisions in its policies are different than that in the WCRP liability policies. *Id.* at 10-11. In other words, Lexington asks this Court to adopt an interpretation of its excess policies that follows the form of the WCRP liability policies, when beneficial to it, or to not follow form, when beneficial to it.

Lexington even claims now that it did not contend below that Washington's insurance common law interpretive principles were inapplicable here. Lexington br. at 36. That argument is disingenuous given its position in its brief at 9-10 that its policies "follow form" as to WCRP's liability policies, and WCRP has denied application of those principles to its liability policies; Lexington argued below that its policies were subject to the same legal principles as WCRP's. CP 4970, 4978-80.

Perhaps Lexington's most misleading contention is that the case was never tendered to it by the County/Slagle, and Lexington thus never

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<sup>5</sup> Lexington muddies the waters about the policies in which the deemer clause appears. Lexington br. at 6-7. Lexington implies that the deemer clause language was in all the WCRP policies. The three earliest WCRP policies at issue here do not contain deemer clauses, as WCRP admits in its brief at 16. Lexington never asserted to the contrary below.

Lexington also cites to the "stamp" in the 2010 policy and states it is in all of the policies. *Id.* at 6. This stamp only appears in the 2006 and later policies. CP 359-450. WCRP admitted this in its brief. WCRP br. at 35.

denied them coverage, implying that it did not join in WCRP's wrongful denial of policy benefits to the County/Slagle. Lexington br. at 14. This argument is fallacious, given Lexington's knowledge of WCRP's conduct and its decisive role in addressing the claims against the County/Slagle.<sup>6</sup> The County/Slagle had no duty to tender a claim to Lexington; this was WCRP's obligation, CP 5468, and WCRP, in fact, tendered the claims to Lexington. CP 7153, 7155-58. WCRP's claim manager, Susan Looker, sent an email to AIG in August 2013 attaching the Davis/Northrop demand letter and telling them it was "notice" of the claims under the reinsurance and excess policies. CP 3144, 6351, 7153-58. This was the

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<sup>6</sup> Lexington covered 100% of the risk at issue here, beyond the County's deductible. It has exclusive control of the investigation, defense, and settlement of claims here, as noted *supra*. Lexington knew of WCRP's misconduct. *E.g.*, CP 1648-52 (AIG management and coverage team to meet in New York, get back to WCRP with a "plan of action"); CP 6251-52 (noting WCRP claim manager Susan Looker "Will be sending person to watch [trial], but there will be no reporting in writing. She will keep me [Lexington] in the loop;" Lexington knew the County was trying to settle case, and further acknowledged that "despite the new allegations of continuing conduct occurring up until the plaintiffs' release in 2010, the occurrence for purposes of this civil rights claim took place in 1993"); CP 6353-55 (showing that Lexington worked with WCRP and had knowledge of time-limited demand for policy limits to settle the case against its insureds, before the expiration of this demand); CP 6096-98 (Lexington chose not to set up excess file; noting interlocal agreement prohibited assignments shortly before WCRP began attempting to get Wilsdon to admit a breach of the interlocal agreement); CP 6360-64 (receipt of material from WCRP, including note that Wilsdon is "conflicted" and email from Wilsdon providing the County/Slagle's confidential and privileged information to WCRP).

This argument is likely advanced by Lexington to afford it a potential second bite at the apple on remand as to policy-related issues and to avoid attendant bad faith exposure. This Court should resolve these issues and deny Lexington its effort to manipulate the case to its advantage, particularly where it has chosen to weigh in on the issues on the merits of the duty to defend and assignment.

tender; no magic words were required.<sup>7</sup> Lexington then had an affirmative obligation to investigate and respond but it did not do so. Instead, it declined to even open a file, took no action to contact the County/Slagle, and worked with WCRP against the County/Slagle, finally suing them on November 13, 2013. CP 1-239, 1648-52, 6096-98, 6251-55, 6340-64. Such conduct was plainly a denial, if not in words, certainly in deeds.

Finally, Lexington spends a considerable portion of its statement of the case arguing that this Court should adopt WCRP's position on the anti-assignment provisions in the interlocal agreement and the WCRP liability policies because the County engaged in "misconduct" in assigning its claims against WCRP to Davis/Northrop and was properly expelled from WCRP. Lexington br. at 17-19. That assertion offers only a skewed version of the facts. WCRP and Lexington first failed to fulfill their obligations to the County/Slagle. Mark Wilsdon, who is quoted by Lexington, was conflicted, serving both as the County's risk manager and a WCRP executive committee member/board president. WCRP and its

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<sup>7</sup> Even if the tender to Lexington were somehow problematic, that proposition is belied by the fact that Lexington was well aware of the Davis/Northrop claims against its insureds as evidenced by its participation in settlement efforts by the County/Slagle as to the Davis/Northrop claims, its involvement in this litigation, and its rejection of any coverage under its policies in a letter to Davis/Northrop's counsel. CP 7168-80. Lexington was not prejudiced and its duty to defend commenced once it had notice of the Davis/Northrop claims, certainly no later than its receipt of the Davis/Northrop complaint. *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 889, 297 P.3d 688 (2013) (duty to defend arises not out of tender but upon the filing of the complaint).

counsel engaged in inexcusable bullying tactics against Wilsdon when he was unrepresented. Davis/Northrop reply to WCRP br. at 6-7.<sup>8</sup>

C. ARGUMENT<sup>9</sup>

(1) Washington's Insurance Common Law Governs the Interpretation of the WCRP Liability Policies and Lexington's Policies at Issue Here and the Remedies Afforded the County/Slagle and Davis/Northrop When WCRP/Lexington Breached Their Duties

Davis/Northrop will not repeat their arguments on the applicable interpretive principles for the policies at issue here or the remedies pertaining to them found in their opening brief at 25-30. Lexington has *no answer* in its brief to that discussion of Washington's insurance common

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<sup>8</sup> Any suggestion that Davis/Northrop "colluded" with the County/Slagle in arriving at the covenant judgment settlement here, is baseless, as demonstrated by the aggressive conduct of the federal court trial by Davis/Northrop against the County/Slagle and the arm's length negotiations that resulted in a settlement in which the County paid a significant monetary settlement, and did not merely assign its rights against WCRP/Lexington to Davis/Northrop. Moreover, based on Washington's law on covenant judgments, Davis/Northrop br. at 55-58, and from the experience of Chartis, another AIG excess insurer, *Chartis Specialty Ins. Co. v. Queen Anne HS, LLC*, 867 F. Supp. 2d 1111 (W.D. Wash. 2012), Lexington is well aware that merely agreeing to a covenant judgment settlement, a legitimate tool for insureds to protect themselves from insurer abandonment, as here, is not "collusive" conduct.

In any event, such an argument should await a reasonableness hearing under RCW 4.22.060. *Water's Edge Homeowners Ass'n v. Water's Edge Ass'n*, 152 Wn. App. 572, 594, 216 P.3d 1110 (2009), *review denied*, 168 Wn.2d 1019 (2010); *Bird v. Best Plumbing Group, LLC*, 161 Wn. App. 510, 526-28, 260 P.3d 209 (2011), *aff'd*, 175 Wn.2d 756, 287 P.3d 551 (2012).

<sup>9</sup> Lexington distorts the standard of review on summary judgment in its brief at 26-27 when it fails to note that this Court in its de novo review must treat all facts and all reasonable inferences from those facts, in light most favorable to Davis/Northrop and the County/Slagle. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 485, 258 P.3d 676 (2011).

law except its abbreviated “me too” argument in support of WCRP’s position. Lexington br. at 45-48. That argument should be rejected for the reasons Davis/Northrop have identified in their opening brief and in their reply to WCRP’s brief.<sup>10</sup>

(2) WCRP/Lexington Owed the County/Slagle a Defense of the Claims Brought by Davis/Slagle and Breached That Duty to Defend by Abandoning Them

Lexington contends in its brief at 27-42 that neither WCRP nor it owed the County/Slagle a defense when Davis/Northrop sued them in the federal court action. This Court should disregard Lexington’s arguments on WCRP’s duty to defend the County/Slagle because it lacks standing to assert WCRP’s position. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032 (1987), *appeal dismissed*, 488 U.S. 805 (1988) (“The doctrine of standing prohibits a litigant from raising another’s legal rights.”).<sup>11</sup> Additionally, to the extent Lexington is

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<sup>10</sup> One particular aspect of Lexington’s position on the application of Washington’s insurance common law to its excess policies merits comment. With regard to its contention that its excess policies “follow the form” of WCRP’s underlying liability policies, Davis/Northrop noted *supra* that Lexington overstates the meaning of such a concept here, particularly where its excess policies contain specific language contradicting the language in WCRP’s liability policies.

Lexington is a commercial insurer subject to the Insurance Code and Washington’s insurance common law. It does not get a free pass from the requirements of the Code and the common law merely because it is reinsuring a risk pool, as opposed to another primary liability insurer.

<sup>11</sup> Of course, the fact that Lexington has weighed in on WCRP’s behalf further documents the fact that WCRP is a stalking horse for commercial insurers.

claiming that it has no duty to defend the County/Slagle, that issue is not before this Court, as it was not before the trial court.<sup>12</sup>

While Davis/Northrop adhere to their discussion of WCRP's duty to defend the County/Slagle from their opening brief and their reply to WCRP's brief and will not repeat all of those arguments here, several points offered in the Lexington brief on the duty to defend do merit a response.

Lexington's discussion of the duty to defend actually begins at the wrong place when it states at 27 that the duty to indemnify is narrower than the duty to defend. Rather, the pertinent point for this Court's analysis is that the duty to defend, at issue here, is *broader* than the insurer's duty to indemnify its insured. In making this argument, Lexington cites Washington Court of Appeals authority applying Washington insurance common law interpretive principles to the analysis of the duty to defend. It ignores this Court's cases on the duty to defend and does not take issue with Davis/Northrop's articulation of the principles underlying the duty to defend set forth in their opening brief. Davis/Northrop br. at 47-49. Those insurance common law interpretive principles are a specialized subset of contract law interpretive principles

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<sup>12</sup> Lexington's premise that it has no duty as an excess carrier to defend the County/Slagle is flawed in any event. See, e.g., *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 692, 15 P.3d 115 (2000); *Chartis Specialty Co.*, 867 F. Supp.2d at 1117-19.

that protect insureds.<sup>13</sup> Apparently, Lexington concurs with Davis/Northrop that those principles apply, disagreeing with WCRP's position.

Lexington is simply wrong that the allegations contained in the Davis/Northrop complaints did not articulate facts/legal theories falling within the coverage provisions of the WCRP liability policies and its own policies.

*No Washington case* describes the precise contours of Washington common law negligence claims of the type at issue here. Because there is authority in other jurisdictions applying a continuous trigger principle to

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<sup>13</sup> In placing insurance, insureds are buying the duty to defend, a crucial aspect of the insurance relationship. *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 765, 58 P.3d 276 (2002) ("The defense may be of greater benefit to the insured than the indemnity."). Because the duty to defend is broader than the duty to indemnify, as Lexington *concedes*, Lexington br. at 27, an insurer must defend the insured against claims *conceivably covered* by the policy's insuring agreement. *Woo v. Firemen's Fund Ins. Co.*, 161 Wn.2d 43, 53-54, 164 P.3d 454 (2007). Thus, if there is *any* reasonable interpretation of the facts and law that could result in coverage, the insurer must defend. *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 405, 229 P.3d 693 (2010); *Nat'l Sur. Corp.*, 176 Wn.2d at 879; *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 802-03, 329 P.3d 59 (2014). Indeed, the insurer must even defend the insured against allegations that are groundless, false, or fraudulent. *State Farm Gen. Ins. Co. v. Emerson*, 102 Wn.2d 477, 485-86, 687 P.2d 1139 (1984), and the insurer must give the insured the benefit of *any* doubts. *Expedia*, 180 Wn.2d at 803. In *Expedia*, in analyzing the "eight corners" of the policy and the complaint, the trial court could conceive of one theory under which coverage might be possible among the many theories set forth in the complaint, thus implicating the insurer's duty to defend. *Id.* at 804.

Where there is no Washington authority, courts may resort to out-of-state authority to assess whether the claims are *conceivably covered* under the applicable policy. *Am. Best Food*, 168 Wn.2d at 407-08. As noted there, if the theory is supported by any authority, an uncertainty about whether there is coverage is created and a defense must be provided. *Id.* at 408.

such common law claims, Davis/Northrop reply to WCRP br. at 32 n.42,<sup>14</sup> it is not only *conceivable*, but clear, that Davis/Northrop asserted covered claims under these theories against the County/Slagle because the County and Slagle were involved in misconduct that was both continuing in nature and also involved discrete events.<sup>15</sup>

Moreover, Lexington ignores Davis/Northrop's § 1983 claim against the County/Slagle. That claim did not accrue until 2010 upon their exoneration of any criminal charges. *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). Under the WCRP insuring agreement, even if the conviction occurred in 1993, there was no “occurrence” as to the 42 U.S.C. § 1983 claim because the County/Slagle could not have a legal obligation to pay Davis/Northrop anything until 2010.

The central thrust of Lexington’s argument on the duty to defend, however, pertains to its misperception of the continuous trigger concept

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<sup>14</sup> Lexington's citation of cases as to when a claim of the type at issue here accrues, Lexington br. at 28-31, fully misses the point. The question is whether there is authority supporting the position advanced by Davis/Northrop. Even WCRP concedes that such authority exists when it discusses cases on "the majority rule," implying that there is a contrary minority rule. WCRP br. at 65-66. *See also*, Davis/Northrop reply to WCRP at 33-35.

<sup>15</sup> Lexington deliberately cites an unpublished Washington trial court decision as authority for its argument on the duty to defend. Lexington br. at 28. Unpublished trial court decisions are not precedent to be cited to this Court. *Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 470, 229 P.3d 735 (2010); *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 577 n.10, 964 P.2d 1173 (1996). Lexington should be sanctioned. RAP 10.7; RAP 18.9.

for an occurrence.<sup>16</sup> Lexington claims alternatively that Washington has applied the continuous trigger only to latent harms, and that the manifestation trigger principle should be applied instead. Lexington br. at 27-42. Lexington is wrong on both counts, and ignores the language in its own policies defining an occurrence as an event “including continuous or repeated exposures to conditions...” *E.g.*, CP 4234.

First, as noted in Davis/Northrop’s opening brief at 49-55, the continuous trigger theory is the rule in Washington for an occurrence and is not confined to property damage matters or latent harm. No Washington case has ever so stated because Lexington has not cited a case so holding.<sup>17</sup> Rather, this state has rejected the manifestation trigger of principle in favor of a continuous trigger. Further, this Court did not adopt this rule on a claim-by-claim basis, but adopted it globally, for example in negligence and employment claims like those asserted here. Davis/Northrop reply to WCRP at 33. Indeed, Lexington needed to go no further than *City of Okanogan v. Cities Ins. Ass’n of Wash.*, 72 Wn. App. 697, 702-03, 865 P.2d 576 (1994) to find a case where Davis/Northrop’s

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<sup>16</sup> There is a real irony in Lexington’s argument on this issue. After arguing at length that Washington’s insurance common law does not apply to the WCRP/Lexington policies, Lexington, like WCRP, does an about-face to argue that the Court should follow the insurance common law of other jurisdictions, jurisdictions that have adopted a manifestation trigger theory for an occurrence that Washington long ago rejected.

<sup>17</sup> The absence of a citation of authority allows this Court to infer that there is no authority for this proposition. *House v. Estate of McCamey*, 162 Wn. App. 483, 492, 264 P.3d 253, *review denied*, 173 Wn.2d 1005 (2011).

position on continuous trigger was applied to a claim not relating to property loss, arising under a risk pool liability policy. Again, Davis/Northrop's position was, at a minimum, conceivable in light of such authority because no Washington decision has ever confined the continuous trigger principle to latent harm claims only, despite Lexington's argument at 36-42.<sup>18</sup>

Lexington asserts in its brief at 38 that the concerns justifying a continuous trigger are not applicable here. That argument is baseless. The continuous trigger principle was adopted primarily from a reading of actual insurance policy language like Lexington's here – the definition of “occurrence” to include “continuous or repeated exposure to the same general harmful conditions,” not public policy concerns. This is the exact language used in all the WCRP policies, including those with a deemer clause. WCRP/Lexington have known since 1974 that *Gruol* adopted a continuous trigger, based on such language, and they have always applied

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<sup>18</sup> If WCRP and Lexington wanted to argue for manifestation trigger – an issue already decided against them repeatedly over the last 40 years, since the 1974 decision in *Gruol Constr. Co. v. Ins. Co. of N. Am.*, 11 Wn. App. 632, 524 P.2d 427 (1974), *review denied*, 84 Wn.2d 1014 (1974), their remedy here was to defend and file a declaratory judgment action, not to abandon the insureds and then sue them and argue for a change in the law to avoid coverage. *Truck Ins. Exch.*, 147 Wn.2d at 761.

it to claims under the WCRP liability policies. *See* Davis/Northrop reply to WCRP at 33 n.43.<sup>19</sup>

Further, as noted in Davis/Northrop's br. at 13-14, 52, Lexington's argument is also directly contrary to the deemer language in the 2004 and later WCRP liability policies. The wrongs and attendant harm suffered by Davis and Northrop were continuing and must, under the deemer provisions, be treated as occurring on the applicable time.<sup>20</sup>

Finally, Lexington makes an elaborate argument in which it seeks to draw a distinction between when an occurrence is present and when claims accrue. Lexington br. at 27-36, 41-42. In making this argument, Lexington conveniently forgets three key points. First, the insuring agreements in the WCRP policies, like its own policies, connect coverage to a legal obligation to pay arising out of an occurrence. *E.g.*, CP 57, 362. Second, the issue of when a common law civil rights claim for wrongful prosecution/conviction/incarceration arises has never been decided in Washington and there is authority for the view that such claims arise upon an insured's exoneration. Davis/Northrop reply to WCRP br. at 34 n.46. Third, claims under 42 U.S.C. § 1983 arise only upon exoneration. *Id.* at

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<sup>19</sup> WCRP applied the continuous trigger principle with regard to its own liability policies in disputes with Chartis, another AIG entity. CP 10543-556.

<sup>20</sup> As noted *supra*, there were also discrete wrongful acts by the County after 2002 as well.

33-34. From the eight corners, Davis/Northrop stated claims in their federal court complaints falling conceivably within WCRP's coverage, compelling WCRP to defend them.

In sum, the trial court erred in deciding that WCRP had no duty to defend the County/Slagle.<sup>21</sup>

(3) The County/Slagle Were Not Barred from Assigning Their Claims Against WCRP/Lexington to Davis/Northrop

Lexington makes a variety of arguments in its brief at 42-59 regarding the assignment of claims against it by the County/Slagle to Davis/Northrop. But it has no real answer to the arguments in Davis/Northrop's opening brief that such assignments are generally

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<sup>21</sup> For the first time in this case, Lexington surfaces what amounts to a known loss issue in this case that precludes its duty to defend. Lexington br. at 40. The Court should disregard such a belated argument. RAP 2.5(a). Known loss is treated as an exclusion under Washington law, *ALCOA v. Aetna Cas. & Surety Co.*, 140 Wn.2d 517, 556, 998 P.2d 856 (2000) and is an affirmative defense that has not been pleaded here and never argued below. Lexington cannot now raise such an issue. *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986). In any event, it is not a defense to the duty to defend, but rather a defense to coverage. To establish such a defense, which is ordinarily a question of fact, *Pub. Util. Dis. No. 1 of Klickitat Cty. v. Int'l Ins. Co.*, 124 Wn.2d 789, 805, 881 P.2d 1020 (1994), Lexington would have to prove that the County/Slagle knew that there was a substantial probability that they would be sued by Davis/Northrop when the WCRP/Lexington policies were issued. *Id.* at 806. The test is a subjective one. *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 67, 882 P.2d 703 (1994). That the County/Slagle knew they would be sued was certainly unlikely because Davis/Northrop were imprisoned, their sentences were in effect, they did not know Davis/Northrop would be exonerated from any criminal culpability. Moreover, the County/Slagle believed Davis/Northrop to be guilty and that their conviction and imprisonment was not violative of their rights.

enforceable under Washington law and specifically so in the covenant judgment settlement context. *Davis/Northrop* br. at 55-60.<sup>22</sup>

First, Lexington admits, albeit in the context of the attorney fee provision, that the WCRP interlocal agreement does not apply to it. *Lexington* br. at 45. Similarly, the anti-assignment provision in that WCRP agreement does not apply to it.

Nevertheless, Lexington then makes two arguments as to why the anti-assignment clauses incorporated into its policies from the WCRP liability policies are enforceable: (1) the so-called “follow form” policies somehow incorporate the legal standard, and (2) that even if that is not true, public policy should dictate that these provisions in its excess policies are enforceable. *Id.* at 50-59. Lexington is wrong as to both contentions.

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<sup>22</sup> Lexington asserts in its brief at 44-45 that *Davis/Northrop* waived any contentions that claims by the County/Slagle against were assigned to them because *Davis/Northrop* only addressed in their opening brief that portion of the judge’s decision relating to the WCRP interlocal agreement and not the policies’ prohibitions on assignment. This argument borders on the frivolous. Lexington argued that Washington’s insurance common law did not apply to its policies because they “follow the form” of the WCRP primary policies, and insurance law does not apply to the WCRP policies. In other words, its policies not only follow the “terms, provisions, and conditions” of the WCRP liability policies, which is what the Lexington excess policies actually state, but that they also somehow follow the applicable legal standard. It makes that same argument here, *Lexington* br. at 56-59 (section 3.4.2), despite denying that it made such an argument below. As noted in *Davis/Northrop*’s opening brief at 14, this argument is baseless. It defies common sense, and this Court’s decisions, for a commercial insurer to contend that it is not subject to Washington’s insurance common law when it actually provided first dollar coverage to the County above the County’s \$500,000 deductible.

With respect to the former, the policies do not even suggest they follow the legal standard applicable to the WCRP policies. This is particularly so where Lexington is a commercial insurer to which Washington's insurance common law decidedly applies. Moreover, there is no reason that this Court must apply the same standard to the primary and excess policies in any event. Washington's insurance common law simply applies to both sets of policies.

Critically, Lexington has no real answer to this Court's decisions in *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 881 P.2d 986 (1984) and *P.U.D. No. 1 of Klickitat County, supra*, that unambiguously held that claims for damages, as opposed to performance, are assignable, even where anti-assignment provisions were present. Lexington attempts to suggest that the claims here were somehow "integral to WCRP's existence," Lexington br. at 50, but it resorts to this baseless contention only in the face of the unambiguous contrary authority noted above. Its further contention that assignment of claims contravenes public policy, Lexington br. at 52, is equally baseless. Lexington seems to conveniently forget that it and WCRP abandoned the County/Slagle in a case of considerable risk to the County and Detective Slagle and his family. Lexington's protestations of upholding public policy ring hollow in light of its self-interested behavior.

Lexington also argues that Davis/Northrop ratified the anti-assignment provisions in the policies for 12 years, so they cannot be heard to complain about the enforcement now. Lexington br. at 8-9, 52-53. Even if this were true (and it is not), for that entire period Washington law on this issue was clear – anti-assignment provisions are not enforceable as to claims that have already accrued.

Finally, Lexington contends that the breach of the anti-assignment vitiates coverage. Lexington br. at 53. But it is important to note that Lexington first breached its duties to the County/Slagle, compelling them to seek protection in light of that abandonment. Moreover, there was no breach of the anti-assignment provisions in Lexington’s policies in any event. In *P.U.D. No. 1 of Klickitat County*, this Court held an anti-assignment provision in an insurance policy was inapplicable where the assignment post-dated the events giving rise to liability because such provisions exist to prevent increased liability to insurers, and the insurer’s liability could not be increased merely by a change in the insured’s identity. 124 Wn.2d at 800. This Court also rejected the contention Lexington now makes in the covenant judgment settlement context.<sup>23</sup>

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<sup>23</sup> An insurer cannot claim that such a settlement precludes coverage where the insurer has abandoned the insured. *Besel v. Viking Ins. Co. of Wisc.*, 146 Wn.2d 730, 736-37, 49 P.3d 887 (2002) (covenant judgment settlement did not constitute release of insurer); *Mutual of Enumclaw Ins. Co. v. T&G Constr., Inc.*, 165 Wn.2d 255, 268-69, 199 P.3d 376 (2008) (covenant judgment settlement does not breach policy’s cooperation

Here, the assignment had *no impact* on damages, just the identity of the parties to the claims.

In sum, the trial court erred in its decision prohibiting the County/Slagle's assignment of their claims against Lexington to Davis/Northrop.<sup>24</sup>

(4) Davis/Northrop Are Entitled to Their Fees at Trial and on Appeal Against Lexington

Lexington contends in its brief at 59 that Davis/Northrop are not entitled to what it phrases as a "common law attorney fee award" for their fees in the trial court and on appeal pursuant to the equitable exception to the American Rule on fees in civil litigation articulated by this Court in *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991) and *McGreevy v. Oregon Mutual Ins. Co.*, 128 Wn.2d 26, 904 P.2d 731 (1995). Davis/Northrop were properly assigned the contractual and extracontractual rights of the County/Slagle against WCRP/Lexington. The insureds under the WCRP policies were forced to litigate to obtain the benefit of those policies. In fact, WCRP/Lexington sued the

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clause). By breaching its duties to the County/Slagle, Lexington was estopped to assert any coverage defenses in any event. *Truck Ins. Exch.*, 147 Wn.2d at 775.

<sup>24</sup> Lexington repeats WCRP's misrepresentation of Detective Slagle's status as an insured under the WCRP liability policies, in the apparent hope that the anti-assignment provision in the WCRP interlocal agreement will extend to him. Lexington br. at 55-56. Lexington misreads WCRP's liability policies that expressly state that Slagle is an insured under those policies with separate rights. Davis/Northrop reply to WCRP at 38 n.48.

County/Slagle. The central requirement of the exception was met, allowing an award of fees.<sup>25</sup>

Lexington asserts that fees should not be awarded because the County/Slagle assigned their rights without its consent. For the reasons enumerated *supra*, the County/Slagle were fully entitled to assign their rights, both contractual and extracontractual, against Lexington once it abandoned them by failing to defend or indemnify them. This Court has so held in *numerous* cases. *P.U.D. No. 1 of Klickitat County*, cited by Lexington in its brief at 59, does not help it. There, this Court held that an insured that settled liability claims without insurer involvement violated the terms of the applicable policy, foreclosing the recovery of *Olympic Steamship* fees. 124 Wn.2d at 815. But that case has been expressly distinguished in the covenant judgment settlement context by this Court in *Mutual of Enumclaw Ins. Co.*, 165 Wn.2d at 268-69. Lexington was aware that settlement negotiations here were occurring, but took no steps

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<sup>25</sup> Even if this Court were to conclude that Washington's insurance common law does not apply to the WCRP's liability policies and Lexington's excess policies follow form, Davis/Northrop, nevertheless, may recover fees incurred to sustain the duty to defend owed by WCRP/Lexington to the County/Slagle on equitable grounds. The *Olympic Steamship* principle allows the recovery of fees in a non-insurance setting where an 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 intervene and fulfill its obligations to its insureds, nor did it even contact the County/Slagle when the claim was tendered to it by WCRP. The County/Slagle were entitled to protect their interests once abandoned by Lexington.

Davis/Northrop were entitled to an award of fees at trial and on appeal.

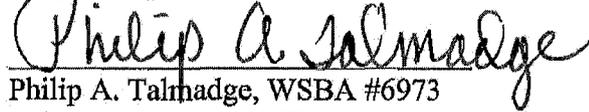
#### D. CONCLUSION

Nothing provided in Lexington's brief should dissuade 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 policies issued by Lexington, a commercial insurer.

This Court should reverse the trial court's orders at issue here and rule that Washington's insurance common law applies to liability policies issued by WCRP/Lexington, WCRP/Lexington breached their duty to defend the County/Slagle, and 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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DECLARATION OF SERVICE

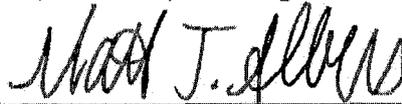
On said day below I electronically served a true and accurate copy of the Reply Brief of Appellants Davis/Northrop to Lexington Insurance Company in Supreme Court Cause No. 91154-1 to the following parties:

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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 with a horizontal line underneath it.

Matt J. Albers, Paralegal  
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**Subject:** RE: WCRP, et al. v. Clark County, et al. - Supreme Ct Cause #91154-1

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**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:

Document to be filed: Reply Brief of Appellants Davis/Northrop to Lexington Insurance Company

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

Case Cause Number: 91154-1

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

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

Very truly yours,

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