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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

vs.

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

Petitioners.

BRIEF OF RESPONDENT
WASHINGTON COUNTIES RISK POOL

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 ORIGINAL

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I. INTRODUCTION

The Legislature authorized counties to self-insure through joint governmental risk programs as an alternative to, and not a form of, commercial insurance. Respondent Washington Counties Risk Pool ("the Pool") is the vehicle through which its member counties cooperatively self-insure under RCW ch. 48.62. The Pool is neither an insurer nor in the business of insurance and is not subject to the extra-contractual liability of insurers under Washington law.

In separate orders, the trial court held that the Pool had no obligation to defend or indemnify a member county or its former employee for civil rights claims alleging the wrongful conviction and incarceration of two men in 1993, nine years before the county first joined the Pool, and held that the member counties' Interlocal Agreement prohibiting any assignment to a third party of a county's rights or interest in the Pool was valid and enforceable. Its decisions adhered to clear statutory language, the Legislature's express intent, and the unambiguous agreement of the Pool's member counties. This Court should affirm.

II. RESTATEMENT OF ISSUES

1. The Washington Counties Risk Pool is "not an 'insurer,'" RCW 48.01.050, but a joint governmental self-insurance

program organized under RCW ch. 48.62 by member counties who are jointly responsible for all liabilities of the Pool, cooperatively determine the scope and terms of their joint liability coverage, decide whether risks should be reinsured or covered by excess insurance, and, through an Executive Committee, vote on whether a tendered claim is covered by the Pool's joint self-insurance. Is the Pool subject to the extra-contractual duties and liabilities of a commercial liability insurer?

2. Is the anti-assignment clause of the Pool's Interlocal Agreement, which prohibits any "assignee or third-party beneficiary of any county" from obtaining "any right, claim or title to any part, share, interest, fund, premium or asset of the Pool," valid and enforceable against a member county that purports to assign contract, tort and statutory claims against the Pool as an "insurer" to tort plaintiffs in settlement of damages claims against the county?

3. Does a former county employee, whose statutory right to a defense and indemnity for liability claims arising during employment under RCW 4.96.041 is enforceable only against the county, have any direct contractual or extra-contractual right to a defense and indemnity by the joint governmental self-insurance program in which the county is a member?

4. In 2012 Clark County tendered to the Pool a civil rights complaint alleging that in 1993 the County and its detective wrongfully arrested, tried, convicted and imprisoned two individuals who were exonerated in 2010. Did the complaint, or an amended complaint filed on the eve of trial, allege an “occurrence” after August 2002, when the County first joined the Pool?

5. Are the Pool and its county members entitled to enforce the benefit of their bargain, including the right to attorney fees incurred as a result of a member county’s breach of the Interlocal Agreement?

III. RESTATEMENT OF THE CASE

A. Restatement of Facts.

Although this Court views conflicting evidence in the light most favorable to the non-prevailing party, it is not free to disregard undisputed evidence considered by the court below. RAP 9.12; see *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998) (“An appellate court would not be properly accomplishing its charge if the appellate court did not examine *all* the evidence presented to the trial court . . .”) (emphasis in original). Petitioners’ factual recitations ignore the evidence before the trial court, selectively

citing self-serving allegations devoid of evidentiary support and without regard to historical accuracy.

For example, petitioners wholly ignore the legislative history, formation documents, and chronology that explain how the counties availed themselves of the statutory right to jointly self-insure, arguing that respondent Washington Counties Risk Pool (“the Pool”), a governmental joint self-insurance program established by Washington counties in 1988, is nothing more than a commercial liability insurer. As another example, petitioners repeatedly cite to Davis and Northrop’s *amended* complaint, to which Clark County stipulated, for the proposition that they alleged “continuing harm.” However, the injuries alleged in both the *original* complaint and an amended complaint filed on the eve of trial took place in 1993, nine years before Clark County joined the Pool. Moreover, the Pool did not finally reject the belated tender of defense and coverage of the amended complaint until *after* the County settled Davis’ and Northrop’s claims by consenting to entry of judgment and purporting to assign them the County’s rights as a member of the Pool. This restatement of the facts cites to the undisputed evidence relied upon by the trial court in granting summary judgment to the Pool:

- 1. The Legislature created joint governmental risk pools as “joint self-insurers,” exempted from the definition of “insurer” and overseen by the state office of risk management, not the Insurance Commissioner.**

Respondent Washington Counties Risk Pool was created pursuant to a legislative mandate that authorized local governments to jointly self-insure as an *alternative* to purchasing commercial liability insurance. The Legislature consistently distinguished joint governmental self-insurance programs from traditional insurance, exempting all aspects of joint self-insuring programs from oversight by the Insurance Commissioner. Petitioners’ contention that the Legislature intended to exempt only the financial reserves of joint governmental risk programs from regulation as “insurance” ignores that statutory scheme.

Joint governmental risk programs are creatures of statute. In the 1967 Interlocal Cooperation Act, the Legislature enabled local governments to cooperatively provide services in a manner most suited to the economic needs and development of their communities. *See* RCW 39.34.010, .900, .920. RCW 39.34.030(2) authorized “[a]ny two or more public agencies [to] enter into agreements with one another for joint or cooperative action pursuant to the provisions of this chapter[.]”

In 1979, the Legislature expressly authorized cities, counties and other governmental entities to “enter into agreements” to jointly and cooperatively self-insure pursuant to RCW 39.34.030, recognizing that “local governmental entities in this state are experiencing a trend of vastly increased insurance premiums for the renewal of identical insurance policies, that fewer insurance carriers are willing to provide local governmental entities with insurance coverage, and that some local governmental entities are unable to obtain desired insurance coverage.” Laws 1979, 1st Ext. Sess., Ch. 256, § 1.

RCW ch. 48.62 was “intended to provide the exclusive source of local government entity authority to individually or *jointly self-insure risks, jointly purchase insurance or reinsurance*, and to contract for risk management, claims, and administrative services.” RCW 48.62.011 (emphasis added). The Legislature repeatedly characterized these statutory risk programs as *self-insurance*, not “insurance”:

The governing body of a local government entity may individually self-insure, may join or form a self-insurance program together with other entities, and may jointly purchase insurance or reinsurance with other entities

RCW 48.62.031(1). RCW ch. 48.62 is to be liberally construed to provide local governments “maximum flexibility” in self-insuring:

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

RCW 48.62.011 (emphasis added).

When it enacted RCW ch. 48.62, the Legislature at the same time specifically exempted joint governmental self-insurance programs from the definition of an insurer under Title 48:

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

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

The state office of risk management, the agency created to facilitate loss prevention for the state, RCW 43.19.766, not the Insurance Commissioner, oversees joint governmental self-insurance programs. RCW 48.62.071. The Legislature charged the state Risk Manager, not the Insurance Commissioner, with establishing standards for all aspects of the management and operation of self-insurance programs, not just for their solvency:

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

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

(2) Standards for claims management procedures

RCW 48.62.061. See WAC ch. 200-100.

The state Risk Manager, not the Insurance Commissioner, is the exclusive agent to receive service of process issued against a joint governmental risk programs. RCW 48.62.031(6); compare RCW 4.28.080(6) (authorizing service on agent of domestic insurer); 48.05.200 (Insurance Commissioner is agent for service on foreign insurers). A joint governmental risk program's books are reviewed by the state Auditor, not the Insurance Commissioner. RCW 48.62.031(5).

2. Since 1988, member counties have established the Pool's defense and indemnity obligations and decided coverage disputes pursuant to an Interlocal Agreement that prohibits assignment of a member county's rights.

The Pool's organizational and financial structure mirrors its unique legal status as a "joint self-insurer" under RCW 48.62.031; the history of the Pool reflects its distinguishing characteristics of self-governance and joint self-insurance.

In June 1987, the Washington State Association of Counties Executive Committee considered a proposal from a committee of elected and appointed county officials to “form a pool independent of the insurance industry” (CP 4544), a “radical departure from the usual practice of each county individually buying insurance to protect the county’s tort exposure.” (CP 4555) Their intent was to create a pool “into which counties would contribute sufficient funding to create an actuarially sound program to cover predictable losses and costs.” (CP 4555-56) Among the perceived advantages of a self-insurance program was county “control over how claims are paid,” and “[e]limination of coverage questions by mutual agreement of participants.” (CP 4563)

In December 1987, over twenty small and medium-sized Washington counties funded a feasibility project that eventually led to the formation of the Washington Counties Risk Pool. (CP 4600-09) Pursuant to the Interlocal Cooperation Act, RCW ch. 39.34, 15 of those counties initially approved an Interlocal Agreement, Bylaws, coverage documents and claim management procedures, submitting them to the state Risk Manager for approval under RCW ch. 48.62 in July 1988. (CP 4611-4705) Petitioner Clark County was among the counties that studied the feasibility of a risk program in 1987, but

opted not to join the Pool upon its formation in 1988. (CP 4573, 7558) *See* §III.A.3, *infra*.

The Pool's Interlocal Agreement has remained unchanged since 1988. Now, as then, the Agreement recites the purpose of the Pool is "to provide to member counties programs of joint self-insurance, joint purchasing of insurance and joint contracting for or hiring of personnel to provide risk management, claims handling, and administrative services." (CP 4619, 7531) Membership in the Pool is limited to Washington state counties; individuals or entities other than a Washington state county cannot join or buy into the Pool. (CP 4620, 7531) *See* RCW 48.62.031; RCW 39.34.030(2). The Pool is governed by a Board of Directors made up of one representative from each member county. (CP 4621, 7532) Each member county must also appoint a risk manager and claims administrator to liaison with the Pool. (CP 4622, 7533)

The Pool provides "joint self-insurance coverage for liability claims arising from the negligent or other tortious conduct of the Pool and member counties, and their officers, employees or agents" (CP 4623, 7534) The Pool is also required to provide umbrella coverage for its member counties, reinsurance coverage for

self-insured claims, and to establish deductibles and limits of coverage for its member counties. (CP 4621, 7533)

Under the Pool's original and current Bylaws, the member counties themselves determine both the amount and scope of available coverage, reinsurance and excess insurance, and whether a tendered claim should be covered by the Pool. (Art. 8, CP 4640-41, 7548; *see* CP 8339, 8703, 8720) The definition of covered and excluded claims, defense and indemnity obligations, and a member county's correlative rights and obligations, are documented in a Joint Self Insurance Liability Policy ("JSLIP") that governs both defense and indemnity obligations for covered bodily injury and property damage, personal injury, or errors and omissions "caused by an occurrence during the policy period." (CP 4655; *see also* CP 361-450)

Petitioners rely on the JSLIP to argue that the Pool is the functional equivalent of a commercial insurer. (County/Slagle Br. 33) But they ignore the Interlocal Agreement and Bylaws, by which the member counties themselves decide the terms and conditions of their joint self-insurance. Each year, the Pool's underwriting committee and executive committee reviews the JSLIP and recommends changes to the Board. (CP 7572) The Board itself

determines the terms of the JSLIP for the following year. (CP 7572-73, 8329, 8613; see CP 4801)

Unlike a commercial liability insurer, where each policy holder's liability is limited to its premium obligations, each member county of the Pool is obligated to pay its premium, to pay "any readjusted amount" (CP 4622), and in addition "shall have contingent liability for the liabilities of the Pool in the event the assets of the Pool are not sufficient to cover its liabilities," with deficits "financed through fair and reasonable retroactive assessments levied against each member county as determined by the Board." (CP 4623) In the event of termination of the Pool, each member county is obligated to pay its fair share to cover final disposition of covered claims. (CP 4624-25) Similarly, a member county withdrawing from the Pool remains liable for all assessments or other liabilities of the Pool during the period of its membership. (CP 4624)

A member county's claim for coverage is decided in the first instance by the Pool's Claims Manager, who must provide a written explanation of any coverage decision. (CP 7548) Unlike an insured whose claim has been denied, by regulation a member county has the right to appeal an adverse coverage decision. WAC 200-100-050(3). Member counties may appeal first to the Pool's Executive Director

and then to its Board's 11-member Executive Committee, which conducts a hearing at which the aggrieved county may provide documentary evidence and argue that coverage was improperly denied. (CP 7549-50)

The Executive Committee's coverage decision is the final decision of the Pool. (CP 7550) Any aggrieved member county must exhaust its appellate remedies under the Pool's Bylaws as "a condition precedent to any subsequent legal action." (CP 7550) As a public entity, "[t]he Pool is subject to Washington State law regarding conflicts of interest and the appearance of fairness" in the coverage determination and appeal process. (CP 7551)

Consistent with the mutual rights and obligations of the member counties, the Interlocal Agreement contains a clear prohibition against assignment of any interest by a member county of any "right, claim or interest" in the Pool or any of its funds or assets to any third party:

Article 21
Prohibition Against Assignment

No county may assign any right, claim or interest it may have under this Agreement. No creditor, assignee or third-party beneficiary of any county shall have any right, claim or title to any part, share, interest, fund, premium or asset of the Pool.

(CP 4625)

3. Clark County joined the Pool in 2002.

Clark County had participated in the study and creation of the Pool in 1987 but was not among the Pool's 15 original members. Clark County instead elected to continue to self-insure, maintaining a liability fund that contained \$8 to \$9 million by the late 1990's. (CP 7557) In 2000, Clark County purchased excess liability insurance to cover \$10 million in exposures over \$2 million (to \$12 million), at a cost of \$70,000. (CP 7560) By 2002, however, its premium had increased to \$174,000, prompting the County to join the Pool as an alternative to obtaining liability insurance. (CP 7560-62, 7565-68)

Clark County's Board of Commissioners approved and signed the Interlocal Agreement on August 20, 2002. (CP 4726-27, 4730-38) In its 2013 Comprehensive Annual Financial Report, the Clark County Auditor reported that the County "self-insure[s]" both directly and through its membership in the Pool and that "[t]he initial \$10 million in coverage is jointly self-insured," under the terms of the JSLIP. (CP 7587) The County Auditor reported as "noteworthy" that "under Washington law the Pool is not an insurance company, and therefore not subject to the rules governing insurance policy interpretation." (CP 7586-87)

When it joined the Pool in 2002, Clark County acquired \$10 million in primary joint self-insurance coverage per occurrence through the Pool. (CP 363, 369, 1644) After 2005, Clark County had \$10 million in primary insurance and availed itself of the option of purchasing \$15 million in additional coverage through “following form” excess insurance provided by respondent Lexington Ins. Co., for total coverage of \$25 million. (CP 386, 1265, 1644, 5514, 8043) Clark County chose the maximum deductibles per claim authorized by the Pool’s Board — \$250,000 in 2002, then \$500,000 in subsequent years. (CP 7587, 8333-34) As authorized by RCW 48.62.031(4)(d) and the Interlocal Agreement (CP 4621), the Pool also obtained reinsurance to stabilize its membership’s loss exposure in each coverage year. (CP 1644)

Each JSLIP since the County joined the Pool in 2002 stated that the Pool would pay “all sums of monetary damages which an **insured** shall become obligated to pay by reason of liability imposed by law [] for **bodily injury, personal injury, property damages, errors and omissions . . .** caused by an **occurrence** during the policy period. . .” (CP 362, 396, 7612) (bold in original) The JSLIP defined an “occurrence” as an “accident” or “event,”

“including continuous or repeated exposure to substantially the same conditions”:

Occurrence means an **accident**, including continuous or repeated exposure to substantially the same conditions, which results in **bodily injury, property damage, or errors and omissions**. With respect to **personal injury** and **advertising injury**, “**occurrence**” means an event, including continuous or repeated exposure to substantially the same conditions.

(CP 369, 7614)

In 2004, the Pool’s Board approved a provision, known as a “deemer clause,” clarifying that an “occurrence” that takes place over multiple policy periods will be deemed one occurrence taking place in the last policy period during which any portion of the occurrence took place, but that in no event could an occurrence be deemed to take place once an insured has knowledge of the claim:

An **occurrence** that takes place during more than one policy period will be deemed for all purposes to have taken place during the last policy period in which any part of the **occurrence** took place, and shall be treated as a single occurrence during such policy period. *No **occurrence** will be deemed to have taken place after the insured has knowledge of the alleged **bodily injury . . . [or] **personal injury**, . . . that gave rise to the **occurrence**.***

(CP 397) (bold in original; italics added)

The JSLIP defines “bodily injury” as “physical trauma” and resulting “mental anguish and emotional injury,” and includes

within “personal injury” “[f]alse arrest, false imprisonment, . . . wrongful detention, malicious prosecution . . . defamation of character, humiliation . . . [and] violation of Civil Rights protected by 42 U.S.C. 1981, et seq., or state law.” (CP 368-69, 402-03, 7613).

From 2002 to 2007, Clark County’s risk manager Ed Pavone served on the Pool’s Board of Directors. (CP 4727) In 2007, Mark Wilsdon replaced Pavone as Clark County’s risk manager and the County’s representative to the Pool Board. (CP 2619, 4744) In 2010, Wilsdon was elected one of the 11 members of the Executive Committee and Secretary/Treasurer of the Pool. (CP 2620) In 2012, Wilsdon was elected Pool President and chaired the Board of Directors and its Executive Committee. (CP 2620)

4. In 2012, the Pool rejected coverage of Davis and Northrop’s complaint alleging that Clark County’s and Slagle’s misconduct caused their wrongful arrest, conviction and incarceration in 1993.

Petitioners Northrop and Davis were arrested, convicted of rape, and sentenced to prison in 1993. Petitioner Donald Slagle, a Clark County detective, was the lead investigator of these crimes. After unsuccessful appeals and habeas petitions alleging they were wrongly convicted due to Clark County’s failure to disclose exculpatory evidence and Slagle’s improper eye witness

identification procedures, Northrop and Davis were exonerated through exculpatory DNA evidence; in 2010 the Clark County Superior Court granted them new trials and the Clark County Prosecutor dismissed all charges against them without prejudice. (CP 8848-63; *see* CP 4765-77)

In August 2012, Northrop and Davis filed suit in U.S. District Court for the Western District of Washington against Slagle and Clark County. (CP 4759) In their complaint, Northrop and Davis alleged Slagle's "improper and highly suggestive identification practices, the failure to provide exculpatory evidence during the course of the investigation and trial," and Clark County's failure to disclose exculpatory evidence, as well as "Clark County's negligent training, supervision, and retention of former Det. Slagle" resulted in their wrongful convictions in 1993. (CP 4759-60) They alleged that despite "numerous and frequent" complaints against Slagle for misconduct between 1986 and 1993, Clark County failed to terminate Slagle and instead "promoted [him] to detective and put [him] in charge of the investigation that led directly to the wrongful conviction and imprisonment of Larry Davis and Alan Northrop." (CP 4764) The complaint alleged the County and Slagle breached a

common law duty of care, inflicted emotional distress, and violated Northrop's and Davis' constitutional rights. (CP 4773-75)

Clark County tendered the Davis/ Northrop complaint to the Pool. (CP 7611) Davis' and Northrop's complaint contained no allegations of "continuing harm." (CP 4759-77) All of the acts alleged in the complaint predated Clark County's membership in the Pool by at least nine years. On November 13, 2012, Claims Manager Susan Looker determined that the Pool had no duty to defend or indemnify Clark County or Slagle because the arrest, trial and incarceration of Davis and Northrop took place in 1993, long before Clark County joined the Pool. (CP 7611-14) Because "all of the alleged conduct that resulted in the arrest, trial conviction and imprisonment of Davis and Northrop took place in 1993, the **occurrence** giving rise to Davis and Northrop's claims took place in 1993," nine years before the County joined the Pool. (CP 7614) (bold in original)

The Pool's Executive Director Vyrle Hill affirmed that determination on January 3, 2013. (CP 7616-24) Because Davis and Northrop alleged only a single "occurrence" that took place in 1993, before the County joined the Pool, Hill also decided that the "deemer clause," under which an occurrence during multiple years is treated as a single occurrence taking place in the last applicable JSLIP

period, was inapplicable to the tendered claims. (CP 7623) Noting that the JSLIP is not an insurance policy, but a “contract drafted with the member counties jointly . . . based upon their own perceptions of the risk which they elect to pool,” Hill concluded that none of the allegations “assert a continuing course of conduct that requires the timing of the occurrence in 2010,” when the County finally dismissed the charges against Davis and Northrop. (CP 7619, 7622-24)

On March 18, 2013, after a hearing on Clark County's administrative appeal, the Executive Committee (with its President Clark County risk manager Wilsdon recused) affirmed Hill's decision. (CP 7626) Clark County did not seek judicial review of the Executive Committee's final decision,¹ and continued to defend itself and Slagle in federal court.

¹ Clark County's risk manager believed that the County would lose were it to seek judicial review of the Pool's denial of a defense and coverage because the County had recently lost a lawsuit challenging the Pool's refusal to defend or indemnify the County in a civil rights action filed by a different exoneree who had been charged, convicted and sentenced in 1985. (CP 2656, 7797-804)

5. **The County stipulated to an amendment of the complaint to allege “ongoing” conduct and settled with Davis and Northrop by paying \$10.5 million cash, consenting to a \$34.5 million judgment, and assigning its rights as a Pool member, in violation of the Interlocal Agreement.**

Instead, on June 7, 2013, Clark County stipulated to an amendment to Davis’ and Northrop’s complaint. (CP 7628) The amended complaint largely repeated the allegations in the original complaint, but for the first time alleged “ongoing unlawful and unconstitutional conduct” based on Clark County’s and Slagle’s opposition to DNA testing and the County’s failure to disclose exculpatory evidence or discipline Slagle “during every year after Davis and Northrop’s arrest and conviction.” (CP 7646-47)

On July 3, 2013, counsel for Davis and Northrop demanded that the Pool attend a mediation scheduled for July 12, 2013, asserting that the Pool was obligated to provide coverage because “an occurrence . . . did not occur until July 2010,” when Davis and Northrop were exonerated. (CP 4779-81) On July 9, the Pool’s Executive Director Hill declined this “invitation,” noting that the County had not tendered an amended complaint to the Pool for defense and indemnity. (CP 4783) Hill also reminded Clark County that any assignment by the County in settlement of the

Davis/Northrop claims was expressly prohibited by the Interlocal Agreement. (CP 4783-84, 8044)

In fact, Davis and Northrop had already demanded an assignment from the County against the Pool as part of any settlement by the time the County tendered the amended complaint to the Pool on July 15, 2013. (CP 7656, 8642) Moreover, the County had already stipulated to entry of judgment and agreed to assign its claims against the Pool to Davis and Northrop *before* the Pool's Executive Committee reached a final decision denying a defense and coverage of the amended complaint.

On July 29, 2013, the Pool's Claims Manager again decided that "all of the alleged conduct [in the amended complaint] that resulted in the arrest, trial, conviction and imprisonment of Davis and Northrop took place in 1993." (CP 7662) The Pool's Claims Manager also concluded there was no occurrence after 2002, when the County first joined the Pool, "because it is alleged that Clark County had knowledge of – and opposed – the plaintiffs' consistent and continued attempts to prove their innocence." (CP 7662)

The Pool's Executive Director upheld the coverage decision in the first level of Clark County's administrative appeal on September

12, 2013, five days before the start of trial. (CP 7669) The County then appealed that decision to the Pool's Executive Committee.

On September 27, 2013, after nine days of jury trial before U.S. District Court Judge Robert Bryan, and before appealing the Executive Director's denial of coverage of the amended complaint, Clark County settled with Davis and Northrop. (CP 7682) The County stipulated to entry of a \$34.5 million judgment and an assignment of rights against "all Defendants['] insurers, including without limitation the Washington Counties Risk Pool," in return for a covenant not to execute beyond the sum of \$10.5 million. (CP 4804)

When alerted to the settlement, the Pool's Executive Director on September 27, 2013, warned Clark County's Board of Commissioners again that an "unauthorized assignment" would be a breach of the County's obligations under the Interlocal Agreement. (CP 4810) Against the advice of Wilsdon,² its representative to the Pool (CP 4806), the Clark County Board of Commissioners on October 23 ratified the settlement agreement, including its

² Wilsdon believed that Clark County was "throwing the other 26 [counties] under the bus in an attempt to save us money." (CP 4806) He characterized the settlement as "the Plaintiff's Bar attempt to break up the Pools . . ." and told the Pool's Executive Director Hill that the assignment was "wrongful[]." (CP 4879, 4965)

assignment of rights “against all insurers without reservation including but not limited to the Washington Counties Risk Pool.” (CP 4835-36)

On November 1, 2013, eight days after Clark County’s commissioners approved the settlement, the Pool’s Executive Committee held a hearing on the County’s appeal and affirmed its Executive Director’s denial of coverage. (CP 7809) After Clark County refused to cure its admitted default under the Interlocal Agreement, the other Pool members voted to cancel Clark County’s membership in the Pool effective April 28, 2014. (CP 4888-89, 4948, 4936-39, 4954-55, 4969)

Davis and Northrop sought a determination in federal district court that their settlement with the County was reasonable under RCW 4.22.060. (CP 4908-20) Judge Bryan refused to exercise supplemental jurisdiction and dismissed without prejudice their request for a reasonableness determination. (CP 4930-31)

B. Procedural History.

On November 4, 2013, three days after the Executive Committee issued its final decision, the Pool filed this lawsuit in Cowlitz County Superior Court against Clark County, Slagle, Davis and Northrop, seeking a declaratory judgment that the purported

assignment of rights by Clark County and Slagle to Davis and Northrop was null and void, and that the Pool had no duty to defend or indemnify Clark County or Slagle in the federal litigation. (CP 10557-66) On November 22, 2013, respondent Lexington, a reinsurer and excess carrier for the Pool, sought similar relief as a plaintiff in an amended complaint. (CP 1-17)

Davis and Northrop added as counterclaim defendants Pool Executive Director Hill, the Pool's outside coverage counsel, William Ashbaugh, reinsurer Ace American Insurance Company, and Lexington's parent AIG, alleging twelve counterclaims for (1) breach of the duty to defend; (2) breach of the duty to settle; (3) breach of the duty to indemnify; (4) common law bad faith; (5) negligence; (6) violation of the Consumer Protection Act; (7) violation of the Insurance Fair Conduct Act; (8) Due Process violations; (9) Equal Protection violations; (10) declaratory judgment; and two claims for intentional interference with contractual relations. (CP 5951-6004) Petitioners Davis and Northrop voluntarily dismissed their counterclaims against Ashbaugh and Hill, but not until they had separately moved for dismissal. (CP 10509-12, Sub. Nos. 339, 441, Supp. CP ___)

Petitioners mischaracterize each of three discrete rulings made by Cowlitz County Superior Court Judge Marilyn Haan (“the trial court”). The trial court granted a declaratory judgment for the Pool that under RCW 48.62.031 and RCW 48.01.050, the Pool is not an insurer, and that Clark County’s purported assignment was null and void based on the express language of the anti-assignment provision in the Interlocal Agreement. (CP 8041-54) The trial court separately granted summary judgment to respondent Lexington, holding that Lexington’s “Follow Form Excess Policy” is also non-assignable. (CP 8054)

In a separate order, the trial court ruled on summary judgment that all of the conduct that formed the basis of both the Original and Amended Complaints occurred at the time of the investigation, arrest, conviction and incarceration of Davis and Northrop in 1993, and thus the only “occurrence” within the meaning of the JSILP took place nine years before Clark County joined the Pool in 2002. (CP 9507-08) The trial court ruled the Pool therefore had no duty to defend Clark County, or through the County, its former employee Slagle. (CP 9508)

The trial court entered summary judgment orders on December 12, 2014. (CP 9825-28, 9836-41) On the joint motions of

Clark County, Slagle, Northrop and Davis, the trial court also certified for discretionary review pursuant to RAP 2.3(b)(4) the question “whether Washington’s common law on insurance applies to the issues decided by the Court as set forth in [the court’s] orders.” (CP 9859-60)

IV. ARGUMENT

A. The Legislature authorized establishment of the Pool as a vehicle for counties to jointly self-insure. The Pool is not an insurer and its relationship with its members is not governed by the Insurance Code or the common law duties of insurance companies.

As the statutory vehicle through which its member counties jointly self-insure under RCW ch. 39.34 and ch. 48.62, the Pool is not subject to the statutory or common law duties of insurers. The Legislature has unambiguously excluded joint self-insurance risk programs such as the Pool from the definition of “insurer” and defined the relationship between the Pool and its member counties as “joint self-insurance,” not liability insurance under Title 48. The Pool’s unique statutory role in facilitating “joint self-insurance” is not negated by the fact that the Pool in its JSLIP and in its communications with member counties uses traditional insurance terms; the parties’ rights and obligations are “a matter of contract law.” (CP 9505)

1. In authorizing counties to jointly self-insure, the Legislature exempted the Pool from the definition of “insurer.”

A governmental self-insurance risk program does not fall within the statutory definition of an “insurer”:

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

RCW 48.01.050 (emphasis added). The Legislature further declared that RCW ch. 48.62 alone, and not the rest of Title 48, is the “exclusive source of local government entity authority to individually or jointly self-insure risks.” RCW 48.62.011. The trial court correctly interpreted this unambiguous statutory language to hold that the Pool is exempt from the requirements of Title 48 and not subject to the common law or statutory duties of insurers. (CP 8047)

RCW 48.01.050’s express statutory exemption, standing alone, disposes of petitioners’ argument that the Pool is exempt only from the “general provisions” or “financial requirements” of Title 48. (Davis/Northrop Br. 33, 38) “Washington statutorily excludes governmental risk-pooling organizations like WRCIP [Washington Rural Counties Insurance Program] from being considered

insurers.” *Jones v. St. Paul Fire & Marine Ins. Co.*, 2015 WL 4508884, at *4 (W.D. Wash. July 24, 2015) (citing RCW 48.01.050).

That the Pool “acts like an insurer” because it manages and shares risk among its county members is not a reason to ignore the statutory definition that exempts the Pool from the Insurance Code in its entirety. *In re F.D. Processing, Inc.*, 119 Wn.2d 452, 458, 832 P.2d 1303 (1992) (“A legislative definition prevails over a dictionary definition or common understanding of any given term.”); *Fisher v. State ex rel. Dep’t of Health*, 125 Wn. App. 869, 875, ¶11, 106 P.3d 836 (courts “will not ignore definitions included in the statute by the legislature.”), *rev. denied*, 155 Wn.2d 1013 (2005). This Court should affirm based on the clear and unambiguous language of RCW 48.01.050 alone. *See Jewels v. City of Bellingham*, 183 Wn.2d 388, 394, ¶8, 353 P.3d 204 (2015) (“If the language is unambiguous, our review is at an end.”).

2. The Pool does not become a commercial liability insurer by exercising its statutory right to reinsure risk and purchase excess insurance.

The trial court did not, however, “focus[] *exclusively*” on the statutory exemption, as petitioners contend. (Davis/Northrop Br. 24; emphasis in original) The trial court looked to the entire statutory scheme, in which the Legislature repeatedly characterized

governmental risk programs as joint *self-insurance*, not insurance. (See CP 8046-49) A self-insured entity is not subject to the statutory or common law duties of an insurer. See, e.g., *Kyrkos v. State Farm Mut. Auto Ins. Co.*, 121 Wn.2d 669, 674-75, 852 P.2d 1078 (1993) (self-insurance is not insurance under UIM statute); *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 694-95, ¶¶15-17, 186 P.3d 1188 (2008) (self-insured retention is not “insurance”), *rev. denied*, 165 Wn.2d 1035 (2009).

The Legislature authorized *joint* self-insurance as a form of self-insurance. Member counties jointly self-insure through the Pool as a cooperative of local governmental jurisdictions establishing a “*joint self-insurance program . . . under chapter 39.34 RCW . . .*” RCW 48.62.031(2). Designating RCW ch. 48.62 the “exclusive source” of authority to jointly self-insure, RCW 48.62.011, the Legislature authorized the creation of the Pool “[f]or the purpose of carrying out a *joint self-insurance program*,” RCW 48.62.034(1) (emphasis added), and to grant local governments “maximum flexibility in *self-insuring*.” RCW 48.62.011 (emphasis added). Under the Interlocal Agreement, member counties provide “*joint self-insurance* coverage for liability claims” against “member

counties, and their officers, employees or agents” through the Pool.
(Art. 14, CP 4623) (emphasis added)

Petitioners ignore the statutory qualifier “self” in attempting to bring the relationship between the Pool and its members within the statutory definition of “insurance” – “a contract whereby one undertakes to indemnify *another*.” RCW 48.01.040 (emphasis added). By statute and under the Interlocal Agreement, however, Pool members self-insure their own risks. The Pool members themselves remain liable for all losses. The Pool members themselves decide the scope of coverage, reviewing the terms of the JSLIP on an annual basis. And the Pool members themselves decide whether their pooled resources will be tapped to defend and pay for a claim against any member county.

That they do so jointly through the Pool does not bring this cooperative arrangement within the statutory definition of “insurance.” To the contrary, treating such joint self-insurance programs as insurers under Title 48 would defeat the legislative scheme to “grant local government entities maximum flexibility in self-insuring.” RCW 48.62.011.

Nor does the fact that the member counties protect themselves from risks through the Pool’s purchase of reinsurance

and excess insurance make the Pool an insurance company. By statute, “a joint self-insurance program may . . . [j]ointly purchase insurance and reinsurance coverage in such form and amount as the program’s participants agree by contract” RCW 48.62.031(4). As the state Risk Manager that oversees the Pool recognizes, the joint pooling of risk and the purchase of insurance by member counties through the Pool does not turn the Pool into an insurer:

Only members may participate in risk-sharing. Only members may participate in the self-insured retention layer, and only members may participate in the joint purchase of insurance or reinsurance.

WAC 200-100-02005.

In Washington, as elsewhere, the ability to reinsure is key to maintaining the solvency of a governmental risk pool as the vehicle for its members’ joint self-insurance. *See generally*, Marcos Mendoza, *Reinsurance as Governance: Governmental Risk Management Pools as a Case Study in the Governance Role Played by Reinsurance Institutions*, 21 Conn. Ins. L.J. 53, 55 (2014) (“governmental entity pools, which are self-funded cooperatives . . . are largely not subject to states’ regulation [T]hey are not considered insurance.”). As authorized by statute, regulation, and the Interlocal Agreement, the Pool purchases reinsurance to lessen the financial risks to the Pool in the first instance, and then to its

individual members who ultimately share all of the risks of the Pool – including insolvency of a reinsurer and the increased premiums that reinsurers would charge were the Pool’s exposure on claims not limited by the terms of its member counties’ agreement, but were instead co-extensive with the potential extra-contractual liability of a commercial insurer.

Nor can the Pool’s status as a joint self-insurance program turn on the *amount* of risk that the member counties jointly reinsure through the Pool. A governmental risk program, like an entity that self-insures its L&I risk, does not become an “insurer” simply because it has “reinsured’ the risk above a certain limit.” *Stamp v. Dep’t of Labor & Indus.*, 122 Wn.2d 536, 543, 859 P.2d 597 (1993) (quotation omitted); *Bordeaux*, 145 Wn. App. at 695, ¶17.³ The member counties jointly self-insuring decide for themselves the amount of their joint risk to reinsure, the form of the Pool’s reinsurance, as well as excess insurance. (CP 4620, 8339, 8703)

³ *In Stamp*, the Court considered the worker’s compensation statutes, which authorize self-insured employers to purchase reinsurance for the retained risk. Although RCW 51.14.020(5) limits re-insurance to 80% of an employer’s liability, the Legislature has placed no limit on the amount of risk a self-insured county or its self-insurance risk pool can reinsure.

3. The state office of risk management, not the Insurance Commissioner, regulates the Pool, which is not a person engaged in the business of insurance.

As a cooperative of counties formed for the purpose of providing joint self-insurance, the Pool is not an insurer, is not engaged in the business of insurance, and is not governed by the Washington Insurance Commissioner under the Insurance Code. Petitioners' argument that the Pool may be exempt from the definition of an "insurer" yet still be subject to the obligations of Title 48 finds no support in the statutory language governing governmental risk programs *or* insurance. RCW ch. 48.62 "is intended to provide the exclusive source of local government entity authority to . . . jointly self-insure." RCW 48.62.011. Neither the Pool nor any of its member counties is a "person" engaged in "[t]he business of insurance" within the meaning of RCW 48.01.030. RCW 48.01.070 ("Person" means any individual, company, insurer, association, organization, reciprocal or interinsurance exchange, partnership, business trust, or corporation."); *see also Washington Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969) (RCW 19.86.010 by its terms does not include state or public corporations as "persons" or "entities" who may be liable under the CPA).

Since at least 2006, the JSLIPs have prominently disclosed that the Pool is *not* an insurance company, and that the JSLIP does *not* provide “traditional insurance.” (CP 419, 431, 442, 1086, 1098, 4788, 8046-47) Petitioners nevertheless argue that because the JSLIP “use[s] traditional liability insurance terminology” like “coverage” and “insurance,” the Pool is engaged in the “*business of insurance*” under RCW 48.01.030. (Davis/Northrop Br. 39, 43) As it is commonly understood, however, the term “business” means an activity “that is regularly conducted, with prescribed methods, to make a profit.” *State v. Postema*, 46 Wn. App. 512, 516, 731 P.2d 13, *rev. denied*, 108 Wn.2d 1014 (1987). The Pool is a cooperative entity organized to serve its member counties, not to make a profit.⁴ “All income and assets of the Pool, including surplus funds, shall be at all times dedicated to the exclusive benefit of its members” (Art. 6, CP 4620) Conversely, county members remain liable “in the event the assets of the Pool are not sufficient to cover its liabilities.” (Art. 14, CP 4623) The Pool is exempt from B&O taxes. RCW 48.62.151.

That the Legislature designated the state office of risk management to oversee governmental joint self-insurance

⁴ By contrast, mutual non-profit corporations under RCW ch. 48.09 are considered insurers. *See also* RCW 48.44.309 (public interest in regulating non-profit health care contracts “as a form of insurance”).

programs, RCW 48.62.071, also undermines petitioners' contention that the Pool's obligations are defined by the "public interest" duties of good faith imposed upon commercial insurers by the Insurance Commissioner pursuant to RCW 48.01.030. (Davis/Northrop Br. 27) The state Risk Manager's oversight is not limited to financial issues, as petitioners contend (Davis/Northrop Br. 39 & n.36), but instead encompasses all aspects of a joint self-insurance program's management and operation, including the manner in which the program handles claims against its members. RCW 48.62.061.

"Washington's regulations governing pools appear to [be] among the lengthiest of any state not requiring pools to register as mutual insurance companies." 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. Ins. L.J. 533, 557 (2002). See WAC 200-100-02021 (rights of program members); WAC 200-100-02005(1) (requiring, unlike any insurance company, that program members "shall pay assessments and reassessments").⁵ To mandate compliance with Insurance

⁵ See Office of Financial Management, Risk Management Basics 32 (2010), <http://des.wa.gov/SiteCollectionDocuments/RiskManagement/riskManagementBasics.pdf>; Department of Enterprise Services, Local Government Self-Insurance Program, <http://des.wa.gov/services/risk/self-Insurance/Pages/localGovSelfInsure.aspx> (both last visited January 7, 2016).

Commissioner regulations regarding, for instance, claims handling, WAC ch. 284-30, in addition to the state Risk Manager's regulations, would require joint self-insurance programs to dramatically increase their staffing and would impose significant transaction costs in contravention of the very purpose expressly set out in the enabling legislation – to establish joint self-insurance at a substantially lower cost than commercial insurance. Doucette, 8 Conn. Ins. L.J. at 544 (“the added costs of compliance would undermine the cost-sharing purpose of the entire pooling arrangement”).

4. The Pool's obligations are based on contract, not the extra-contractual tort principles applicable to commercial insurers.

Relying on the “traditional” “terminology” of the JSLIP, petitioners seek to bind the Pool to the unique *extra-contractual* remedies insureds have against commercial insurers, in order to force the Pool and its county members to pay a \$34.5 million consent judgment under the doctrine of coverage by estoppel and the additional tort damages available under insurance bad faith law. (Davis/Northrop Br. 43) But the use of “insurance language” in the JSLIP and in the Pool's coverage determinations is entirely unremarkable given the member counties' joint self-insurance through the Pool. It is not a basis to ignore the statutory structure of

the Pool or to impose upon its members all extra-contractual duties and remedies that are applied to commercial liability insurers as a matter of public policy, to remedy the enormous disparity of bargaining power between commercial liability insurers and their policy holders.

a. The Interlocal Agreement, Bylaws and JSLIP are interpreted as a contract between the Pool's county members.

The County's joint self-insurance coverage under the JSLIP cannot be read in isolation. The member counties' mutual obligations must be determined from the language the parties used to express their intent in the Interlocal Agreement under RCW ch. 48.62, the Bylaws, as well as the JSLIP. *See Levinson v. Linderman*, 51 Wn.2d 855, 859, 322 P.2d 863 (1958) ("where several instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other"); *WPUDUS v. PUD No. 1 of Clallam County*, 112 Wn.2d 1, 10, 771 P.2d 701 (1989) ("The entire contract must be construed together in order to give force and effect to each clause.").

While the JSLIP contains terms and language common to insurance policies, it is not a standard form insurance policy; under the Interlocal Agreement and Bylaws, the members themselves

decided upon its terms. A contractual relationship is not subject to the laws of commercial insurance merely because the parties define their rights using the indemnity language common to insurance policies. *See George Sollitt Corp. v. Howard Chapman Plumbing & Heating, Inc.*, 67 Wn. App. 468, 472, 836 P.2d 851 (1992) (courts do not hold an indemnitor to the “strict test” applicable to an insurer’s duty to defend). Given the statutory exemption of the Pool from the definition of an insurer and the cooperative structure of the Pool, there is no principled basis to interpret the negotiated terms of the JSLIP any differently than any other contract. *See Orange County Water Dist. v. Ass’n of Cal. Water Authority*, 54 Cal. App. 4th 772, 63 Cal. Rptr. 2d 182, 187 (1997) (governmental self-insurance pool not estopped from denying that its coverage operates as “insurance” because it used that term in its joint pooling coverage document).⁶

Application of the common law of contracts to the unique joint self-insurance relationship among member counties would not allow

⁶ *See also Southgate Recreation and Park Dist. v. Cal. Ass’n for Park & Rec. Ins.*, 106 Cal. App. 4th 293, 130 Cal. Rptr. 2d 728, 730 (2003) (because “risk pools are ultimately member created and directed . . . questions of defense and coverage are answered by relying on rules of contract law that emphasize the parties’ intent”); *City of S. El Monte v. S. Cal. Joint Powers Ins. Auth.*, 38 Cal. App. 4th 1629, 45 Cal. Rptr. 2d 729, 735 (1995) (“It is this Agreement by the member cities that is the crux of the coverage determination,” rather than principles of insurance law).

the Pool to “trample” on its members’ rights in bad faith, as petitioners contend. To the contrary, “[t]here is in every contract an implied duty of good faith and fair dealing. This duty obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.” *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). That duty requires “that the parties perform in good faith the obligations imposed by their agreement,” but cannot be invoked to impose additional terms, ignore the terms the parties have agreed to, or (as petitioners argue here) grant contracting parties the right to receive anything more than the benefit of their bargain. *Badgett*, 116 Wn.2d at 569-70.

Petitioners in any event set up a false dichotomy in arguing that “Washington courts apply the common law of insurance,” in some sort of contrast to the “common law of contracts,” in reviewing coverage questions under joint self-insurance. While insurers are subject to extra-contractual duties and obligations, there are no special rules for interpreting the meaning of a term in an insurance contract. See *Int’l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 282, 313 P.3d 395 (2013) (“When interpreting insurance contracts, courts use the same interpretive techniques employed on other commercial contracts.”); *WPUDUS*, 112 Wn.2d at 10.

Moreover, “where there are actual negotiations, the context principle, as appropriately limited by its definition, permits admission, and examination of extrinsic evidence” to interpret insurance contracts based on the parties’ “objectively manifested mutual intent.” *Lynott v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 684-85, 871 P.2d 146 (1994) (emphasis in original).

The relationship between the Pool and its member counties is defined by their contract. (CP 8048-54, 9505)

b. The extra-contractual duties imposed on commercial insurers do not govern the relationship of the Pool and its members.

Because the program members themselves define their rights and obligations, Washington joint self-insurance programs “are not insurers under Washington law and owe[] . . . no duties as insurers” to members claiming coverage. *Jones v. St. Paul Fire & Marine Ins. Co.*, 2015 WL 4508884, at *4 (W.D. Wash. July 24, 2015) (citing RCW 48.01.050). The “extracontractual remedies available to insureds” (Davis/Northrop Br. 27) – tort liability for insurance bad faith, and coverage by estoppel irrespective of policy terms and limits – are imposed as a matter of public policy because liability policies issued by commercial insurers are contracts of adhesion; individual

insureds cannot negotiate the terms and conditions of coverage that, pursuant to statute, are “affected by the public interest.” RCW 48.01.030; *McGreevy v. Oregon Mut. Ins. Co.*, 128 Wn.2d 26, 35, 904 P.2d 731 (1995) (commercial insurers present policies as “nonnegotiable, ‘take-it-or-leave-it’”). There is no basis here to impose upon the Pool the duties of an insurer and to hold its member counties liable for Clark County’s \$34.5 million consent judgment, plus unspecified tort damages, under the common law and statutory remedies available to commercial insureds.⁷

The members of the Pool establish for themselves the scope of their joint self-insurance, and decide through its Board’s Executive Committee, whether the Pool will defend and indemnify a particular claim. A member county has significant due process rights in coverage and defense decisions that commercial insureds do not enjoy. A county member may appeal to the Executive Director – as Clark County did here – who must provide a written explanation of his or her decision. (CP 7549) The coverage decision is not final until it is

⁷ Petitioners have no viable statutory claims against the Pool under the CPA and IFCA. CPA liability under RCW 19.86.090 can never extend to a governmental entity like the Pool. *Washington Nat. Gas Co.*, 77 Wn.2d at 98. And IFCA allows recovery only by a “first party claimant . . . who is unreasonably denied a claim for coverage or payment of benefits *by an insurer . . .*” RCW 48.30.015 (emphasis added).

resolved after a hearing before the Executive Committee, made up of 11 county representatives whose interests in fairly interpreting the JSLIP's provisions for defense and coverage are substantially aligned with the petitioning county. (CP 7542, 7549-50) The Pool's records are subject to public scrutiny. RCW 48.62.101.

This Court's decisional law governing the extra-contractual duties of insurers cannot be imposed upon joint governmental self-insurance programs without ignoring the doctrinal basis for those remedies -- a disparity of bargaining power and the quasi-fiduciary relationship between insurer and insured. "[I]nsurance contracts are imbued with public policy concerns," *Nat'l Sur. Corp. v. Immunex Corp.*, 176 Wn.2d 872, 878, ¶9, 297 P.3d 688 (2013) (emphasis added), because "the *business* of insurance affects the public interest." *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 560, 951 P.2d 1124 (1998), citing RCW 48.01.030 (emphasis added). The Court imposes on *insurers* an "enhanced obligation of fairness . . . beyond that of the standard contractual duty of good faith." *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 393, 823 P.2d 499 (1992), citing *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 383-85, 715 P.2d 1133 (1986); see *Murray v. Mossman*, 56 Wn.2d 909, 912, 355 P.2d 985 (1960) ("the duty of the insurance company to use good

faith in the handling of a claim against the insured springs from a fiduciary relationship”). An *insurer* owes its insureds a quasi-fiduciary obligation because its interests in coverage decisions are adverse to its defense obligations to its insureds.

The tort of insurance bad faith, the remedies of a presumption of harm and coverage by estoppel, are unique to the relationship of insurer and insured. See *Kirk*, 134 Wn.2d at 562, 564 (extra-contractual remedies for “intentional abuse of fiduciary relationship” including “coverage by estoppel remedy” “protects the insured against the insurer’s bad faith conduct.”); *McGreevy*, 128 Wn.2d at 37 (equitable rule authorizing recovery of attorney fees by insured who succeeds in securing coverage is based on “a disproportionate bargaining position of an insurer vis-à-vis the typical insurance consumer”). An *insurer* that in bad faith refuses to defend its insured is liable for the full amount of a reasonable settlement between insured and claimant because “[a]n *insurer* refusing to defend exposes its insured to business failure and bankruptcy.”⁸ *Truck Ins.*

⁸ The consequences of a Pool’s determination not to defend a claim against a county member is not equivalent to the potential ruin faced by an individual or small business insured denied a defense by its liability insurer. Each of the Pool’s member counties have prosecuting attorneys and civil deputies, and many member counties handle their own claims management and defense of covered, as well as uncovered, claims. (CP 8323, 8353)

Exch. v. Vanport Homes, Inc., 147 Wn.2d 751, 765, 58 P.3d 276 (2002) (emphasis added).

Petitioners fail to explain how a joint self-insurance pool of 27 counties must give “equal consideration in all matters to the insured’s interests” if the “interests” are those of any one of the 27 county members. *Tank*, 105 Wn.2d at 386 (emphasis removed). As the County’s risk manager observed, “what was good for the Pool was good for Clark County” (CP 8581) The self-insured counties have “equal interests in enforcing the contracts protecting the pooling of their resources.” *Bd. of Cnty. Comm’rs of Delaware Cnty. v. Ass’n of Cnty. Comm’rs of Okla. Self-Insurance Grp.*, 339 P.3d 866, 868 (Ok. 2014).

Because self-insurance risk programs are not “insurers,” they are not estopped to deny coverage for a breach of an insurer’s good faith duty to defend or indemnify. It would “defeat the purpose and intent” of risk programs to put them “in the position of having the same duties and obligations as commercial insurers.” *City of El Monte*, 45 Cal. Rptr. 2d at 731, 735 (relationship between risk pools

and its members did not “incorporate principles governing insurance carriers and insurance law into coverage decisions”).⁹

Petitioners misrepresent Washington precedent, ignoring that this Court has never imposed upon a joint governmental self-insurance program the statutory or common law obligations of insurers. The WPPSS cases relied on by petitioners are particularly inapposite, as the WPUDUS Pool was an unincorporated association of public utility districts formed in 1953, 26 years before the Legislature first authorized joint governmental self-insurance programs under RCW ch. 48.62 in 1979. *See* Laws 1979, ch. 256. Indeed, this Court “construed as [a] contract[,]” the 1976 WPUDUS joint self-insurance agreement, which simply “incorporate[d] certain parts of the nonrenewed [commercial] liability policy” in providing the “first layer liability coverage for the participating districts and their officers and employees.” *WPUDUS*, 112 Wn.2d at 3-4.

⁹ Accord, *Pub. Entity Pool for Liability v. Score*, 658 N.W.2d 64, 69 (S.D. 2003) (“we have never held the PEPL fund accountable under our insurance code”); *City of Arvada v. Colo. Intergovernmental Risk Sharing Agency*, 19 P.3d 10, 11 (Colo. 2001) (municipal risk pool not bound by notice requirements applicable to commercial insurers when modifying terms of coverage); *Bd. of Cty. Comm’rs of Delaware Cty.*, 339 P.3d at 869 (county risk pool “is not subject to the general rules of liability imposed on all insurers”).

The other WPPSS cases do not address a risk pool's liability to its members, but the liability of a commercial excess insurer. See *PUD No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 881 P.2d 1020 (1994) (assignments of rights under excess policies); *Transcontinental Ins. Co v. WPUDUS*, 111 Wn.2d 452, 760 P.2d 337 (1988) (considering insured's rights under special excess liability policies). In short, none of the cases cited by petitioners supports their attempt to shift to the other 26 member counties of the Pool extra-contractual liability for Clark County's \$34.5 consent judgment by applying the "common law of insurance."¹⁰ (Davis/Northrop Br. 40-42; County/Slagle Br. 25-32)

Imposing upon member counties the extra-contractual liability of commercial insurers would undermine the statutory mandate to give self-insuring governmental program members "maximum flexibility," RCW 48.62.011, defeating the Legislature's purpose to reduce the costs of governmental risk management. Laws 1979, 1st Ext. Sess., Ch. 256, § 1. Those costs, not included in any

¹⁰ In seeking to bind the Pool to their \$34.5 million consent judgment, petitioners also ignore that no court has ever determined the reasonableness of their settlement, or whether it was the result of fraud or collusion among the petitioners. Judge Bryan declined petitioners' request for a reasonableness hearing (CP 4930-31), and petitioners did not seek a reasonableness determination in this action.

county's loss history, will ultimately be borne by the member counties and their taxpayers, who are responsible for the Pool's liabilities, including premiums for reinsurance and excess insurance. (Arg. §IV.A.2, *supra*) In this critical respect, the JSLIP is "distinguishable from commercial policies," because the "risks and costs of civil liability are completely internalized" and spread among its county members. *Antiporek v. Village of Hillside*, 114 Ill.2d 246, 251, 499 N.E.2d 1307 (1986) (coverage through risk pool does not waive sovereign immunity that is unavailable to municipalities purchasing commercial insurance).¹¹

The policies that underlie the extra-contractual duties of insurers and correlative remedies of insureds are conspicuously absent in the relationship between the Pool and its member counties. The trial court properly held that the Pool is not liable under the common law of insurance.

¹¹ Accord, *Milner v. City of Leander*, 64 S.W.3d 33, 39-40 (Tex. App. 2000) (municipal risk pool entitled to governmental immunity for bad faith claim); *Morgan v. City of Ruleville*, 627 So.2d 275, 280-81 (Miss. 1993) (municipal risk pool's purpose is to provide self-insurance to cities; members of pool do not waive sovereign immunity under state law to extent of "liability insurance coverage").

B. The Interlocal Agreement's prohibition against assignment is enforceable against Clark County. Neither the County nor Slagle had any extra-contractual claims to assign to Davis and Northrop.

Article 21 of the Interlocal Agreement prohibits a member county from assigning to a third party any "right, claim or interest" in the Pool. (CP 4625) Slagle, whose right to a defense and indemnity from the County derives from RCW 4.96.041, has no contractual rights to enforce or to assign as an "insured" under the JSLIP. Because the Pool is not an insurer, neither the County nor Slagle have any extra-contractual tort or statutory claims to assign as an "insured that has been denied coverage by their insurer." (County/Slagle Br. 47)

"The assignor can assign no greater interest than he has, and the assignee gets no greater right than the assignor had." *Kendrick v. Davis*, 75 Wn.2d 456, 463, 452 P.2d 222 (1969), quoting *Stansbery v. Medo-Land Dairy, Inc.*, 5 Wn.2d 328, 337, 105 P.2d 86 (1940); *Estate of Jordan v. Hartford Acc. & Indem. Co.*, 120 Wn.2d 490, 495, 844 P.2d 403 (1993) ("An assignee steps into the shoes of the assignor, and has all the rights of the assignor."). The trial court correctly held that as the County's and Slagle's assignees, Davis and Northrop had no enforceable rights against the Pool, whether

contractual rights under the JSLIP or extra-contractual rights under Washington statutory and tort insurance bad faith law.

1. The Interlocal Agreement prohibits Clark County's assignment of its contract rights as a member of the Pool.

The trial court correctly held that Clark County's purported assignment of its contractual rights to Davis and Northrop constituted a prohibited assignment of its "part, share, interest, fund . . . or asset of the Pool" under the plain language of the Interlocal Agreement. (CP 8047)¹² Contracts are not assignable where prohibited by statute or by the plain terms of the agreement. *See Levinson*, 51 Wn.2d at 860-61 (enforcing prohibition of assignment by contractor of rights under public works contract). Further, as a local governmental entity, the County has only those rights in the Pool that are conferred or necessarily implied by statute. *See Chemical Bank v. WPPSS*, 99 Wn.2d 772, 792, 666 P.2d 329 (1983). The County's purported assignment is prohibited both by contract and by statute.

¹² "No county may assign any right, claim or interest it may have under this Agreement. No creditor, assignee or third-party beneficiary of any county shall have any right, claim or title to any part, share, interest, fund, premium or asset of the Pool." (Art. 21, CP 4625) Each version of the JSLIP contains similar language. (CP 382, 394, 406, 416-17, 427, 439, 450)

Petitioners' argument that the County is not assigning any rights under the Interlocal Agreement, but only its right as an insured under the JSLIP, is without merit. The County's rights to coverage under the JSLIP are based on its membership in the Pool, which is defined by the Interlocal Agreement. (Arg. §IV.A.4.a, *supra*) "When a contract prohibits assignment in very specific and unmistakable terms the assignment will be void against the obligor." *Portland Elec. & Plumbing Co. v. City of Vancouver*, 29 Wn. App. 292, 295, 627 P.2d 1350 (1981) (quotation omitted).

The prohibition against assignment of a county member's rights in the Pool is also compelled by the statutes and regulations establishing the cooperative structure of the Pool. Only a "local government entity" may assert rights in a joint governmental self-insurance program under the Interlocal Cooperation Act. RCW 48.62.031(1); RCW 39.34.030; WAC 200-100-02005; see Art. 6 (CP 4620). Since the assets of the Pool are those of the members themselves, each of whom is ultimately responsible for the obligations of the Pool, an assignment of one member county's purported right to indemnity by the Pool defeats the very purpose of statutory joint self-insurance.

Petitioners emphasize that this Court has approved assignments of the rights of *insureds* to claims against their *insurers*. But they have cited no authority that would allow a member to assign its interests in the coverage provided by a statutory joint governmental self-insurance program. The WPPPS coverage cases cited by petitioners, *PUD No. 01 of Klickitat County*, 124 Wn.2d 789, and *Transcontinental*, 111 Wn.2d 452, both addressed assignments of rights to coverage under commercial excess liability policies, and not to coverage by a statutory joint self-insurance program organized under RCW ch. 48.62. (Arg. §IV.A.4.b, *supra*)

Nor has this Court ever authorized an assignment prohibited by an Interlocal Agreement, such as the County's assignment here, which purported to give its assignees Northrop and Davis a "right, claim or title to [the County's] part, share, interest, fund, premium or asset of the Pool" within the clear language of Article 21. (CP 4625) The trial court correctly held that the County's assignment of rights "is invalid and the purported assignment is null and void." (CP 8050)

2. **Slagle's individual assignment is also void, as he had no contractual rights in the Pool, only a statutory right to a defense and indemnity by his former employer Clark County.**

Only the County has rights and obligations under the Interlocal Agreement, the Bylaws and the JSLIP. Slagle, who was not a signator or party to the Interlocal Agreement, has no rights in or against the Pool to assign. Slagle's contention that he is an "insured" under the JSLIP ignores that his right to a defense and indemnity arises from the statutory obligation imposed on Clark County by RCW 4.96.041. The JSLIP's reference to member counties' "past or present employees" (CP 4656) as "insureds" is subject to this statutory scheme, and does not give Slagle any independent rights to assign.

Public employees derive their right to defense and indemnity from statute, not contract. Counties have a statutory obligation to defend and indemnify present or past employees, officials and agents for acts or omissions while performing or in good faith purporting to perform their official duties under RCW 4.96.041(2).

The JSLIP's extension of the joint self-insurance of a member county to include its officers, employees and agents is subject to the statutory conditions for defense and indemnity under RCW 4.96.041, Clark County Code 2.95.090(A), 2.97.025(1), and the

County's obligations under the Interlocal Agreement. (CP 4623, 4720, 4795) Once a member county grants a request for defense and indemnity (and the Pool determines that coverage exists), the Pool pays defense costs and any damages that the Pool member would otherwise be statutorily obligated to pay on behalf of a member county under RCW 4.96.041(2). (CP 4795; see CP 8359) See *Colby v. Yakima Cnty.*, 133 Wn. App. 386, 393, ¶14, 136 P.3d 131 (2006) (Pool's obligation to defend and indemnify county judge in disciplinary proceedings is "subject to and conditioned upon the provisions of RCW 4.96.041").

Petitioners again misrepresent this Court's decision in *WPUDUS*, which does not support their contention that Slagle, as a former county employee, has independent rights in the JSLIP under "Washington's common law insurance principles." (County/Slagle Br. 26) The *WPUDUS* policy at issue in that case provided direct coverage to PUD employees, whose right to defense and indemnity did not derive from RCW 4.96.041. Clallam County PUD chose to indemnify its officers under a permissive statutory scheme, initially purchasing commercial "liability insurance." *WPUDUS*, 112 Wn.2d at 4, 7 (discussing RCW 54.16.095. and .097). *WPUDUS* then provided "first layer liability coverage for the participating districts

and their officers and employees” in a policy that adopted “certain parts” of the commercial liability policy that it chose not to renew. *WPUDUS*, 112 Wn.2d at 4. Here, to the contrary, Slagle’s right to defense and indemnity was statutorily mandated under RCW 4.96.041. When the County chose to join the Pool, it obtained self-insurance that included coverage for its employees under the Interlocal Agreement, the Pool’s Bylaws, and the JSLIP, which did not grant Slagle direct rights in the Pool as an “insured.”

Recognizing that Slagle is not an “insured” would not have “devastating impacts” on public employees (County/Slagle Br. 25), who retain their statutory rights to a defense and indemnity by their public employer under RCW 4.96.041 whether or not the Pool (or any joint self-insurance program) provides it. Only the County is liable to a judgment creditor for the acts of an indemnified employee. RCW 4.96.041(4) (“[T]he judgment creditor shall seek satisfaction for nonpunitive damages only from the local governmental entity, and judgment for nonpunitive damages shall not become a lien upon any property of such officer, employee, or volunteer.”). The Interlocal Agreement conforms to this statutory indemnity scheme, because only a county can join the Pool, and only the member county,

not its employee or any assignee, has rights and obligations in the Pool. (Art. 5, 21; CP 4731, 4736)

As a public employee, Slagle received his statutory right to a defense and indemnity from Clark County pursuant to RCW 4.96.041 and the Clark County Code. (CP 8625) He is not an "insured" and has no enforceable rights against the Pool. Petitioners' argument that only Clark County, and not Slagle, could be bound by the contractual prohibition against assignment in the Interlocal Agreement is similarly without merit. (County/Slagle Br. 47; Davis/Northrop Br. 61) Rather than establishing the validity of his purported assignment of claims to coverage by the Pool, the fact that Slagle did not sign the Interlocal Agreement only underscores the fact that he had no direct rights in the Pool that were assignable to Davis, to Northrop, or to anyone else.

3. Neither the County nor Slagle have any extra-contractual remedies against the Pool to assign.

The assignment, by its terms, is based on petitioners' assumption that the County and Slagle could have brought claims against the Pool as an "insurer," including claims for "negligence, bad faith, breach of contract, and breach of other duties" and statutory claims for "violations of the Insurance Fair Conduct Act." (CP 4836)

Petitioners' contention that the Court must honor the County's and Slagle's assignment of "claims for damages that have already accrued" (County/Slagle Br. 47) falters on its threshold premise that the County and Slagle had *any* extra-contractual claims against the Pool for damages that could be assigned. The Pool is not an insurer, it is not subject to the liability of an insurer, and it is not "estopped" as an insurer would be when a Pool member has been denied a defense or coverage. (Arg. §IV.A.4.b, *supra*) Because the Pool is not liable as an insurer under the Washington law of insurance, the County and Slagle had no extra-contractual claims to assign to Davis and Northrop.

C. The Pool had no duty to defend the Northrop/Davis complaints, which alleged an "occurrence" that took place upon their arrest, conviction and incarceration in 1993, and that was known to Clark County before it joined the Pool in 2002.

The Pool had no duty to defend or indemnify the Davis/Northrop claims asserted in either the original or the amended complaint because the "investigation, arrest, conviction and incarceration of Davis and Northrop . . . occurred in 1993," predating by nine years "Clark County joining the Pool in 2002." (CP 9507-08) By then, Davis and Northrop's allegations were known to Clark County, and therefore were, by definition, not an "occurrence"

within any period of Pool membership under the JSLIP. The Pool in any event could have no contractual obligation to defend Clark County from claims that the County settled by entry of a consent judgment *before* the Pool's Executive Committee rejected the County's tender of the amended complaint. This Court should affirm for each, or any, of these reasons.

1. Neither the original nor amended complaint alleged an "occurrence" after 1993.

The Pool did not breach any duty to defend because neither Davis/Northrop's original nor their amended complaint alleged an "occurrence" – injury caused by an accident or event – while Clark County was a member of the Pool. Even a commercial liability insurer has no duty to defend where the claims alleged against an insured in a complaint fall outside the policy period. *White v. Allstate Ins. Co.*, 124 Wn. App. 60, 64-65, ¶7, 98 P.3d 496 (2004) ("Because the loss in this case occurred before the policy went into effect, we hold that the [occurrence] is not covered under the insurance policy as a matter of law"), *rev. denied*, 154 Wn.2d 1009 (2005). All of the injury-causing conduct alleged in Davis' and Northrop's two complaints took place in 1993, nine years before Clark County joined the Pool.

a. The original complaint did not allege any occurrence after 1993.

Petitioners never address the claims or allegations of Davis and Northrop's *original* complaint filed in 2012 in claiming the Pool breached a duty to defend. (CP 4759-77) But that complaint clearly alleged only an "occurrence" in 1993, long before Clark County joined the Pool.

Davis' and Northrop's 2012 complaint alleged Slagle's "improper and highly suggestive identification practices, the failure to provide exculpatory evidence during the course of the investigation and trial," and Clark County's failure to disclose exculpatory evidence, as well as "Clark County's negligent training, supervision, and retention of former Det. Slagle" resulted in their wrongful convictions in 1993. (CP 4759-60) They alleged that the County should have terminated Slagle for misconduct based on "numerous and frequent" complaints of misconduct beginning in 1986 and continuing into 1993, when the County instead "put [him] in charge of the investigation that led directly to the wrongful conviction and imprisonment of Larry Davis and Alan Northrop" in 1993. (CP 4764)

The County did not join the Pool until 2002, nine years after these events. Clark County chose to use its own liability fund to defend and indemnify the County and its officers, employees and

agents from any liability claims arising when Davis and Northrop were arrested, charged, and (wrongfully) convicted in 1993.¹³ When the County decided to join the Pool and signed the Interlocal Agreement on August 20, 2002, its commissioners understood that it was not buying claims-made coverage, but that it would become eligible for joint self-insurance, under which the Pool would “defend any **suit**” seeking “monetary damages,” and pay any sums that the County was “obligated to pay by reasons of liability imposed by law for **bodily injury, personal injury, property damages, errors and omissions . . .** caused by an **occurrence** *during the policy period. . .*” (CP 362, 396, 7612) (bold in original, italics added) (See CP 4726-27, 4730-38)

Petitioners seize on the Pool’s acknowledgement that the claims alleged in the original complaint for wrongful arrest, prosecution, conviction and imprisonment could be considered “bodily injury,” “personal injury,” or “errors and omissions” as those terms were defined in the JSLIP. But the Pool never “conceded” that Northrop and Davis’ allegations established “misconduct on the part of the County & Slagle between 2002 and 2010 when they were

¹³ The County did not purchase any excess liability insurance until 2000, and then only to cover exposures in excess of \$2 million. (CP 7560)

insured by WCRP” (County/Slagle Br. 41), or that their allegations “arguably” established more than one occurrence. (County/Slagle Br. 43) Instead, the Pool concluded that “the **occurrence** for purposes of this claim took place in 1993, before Clark County joined the Pool, and therefore, the Pool has no duty to defend or indemnify Clark County or Donald Slagle in connection with this claim.” (CP 7624) (bold in original)

The final coverage decision, made by ten other county members’ representatives elected to the Pool’s Executive Committee (CP 7626), was properly based on the JSLIP’s definition of an occurrence as an “accident” or “event” that results in injury, whether that injury constitutes “bodily injury” or “personal injury.” This is true regardless whether the “accident” or “event” entails “continuous or repeated exposure to substantially the same conditions,” such as the continuing incarceration and consequences of a wrongful conviction alleged by Northrop and Davis. (CP 369, 7614)

b. The amended complaint, filed with Clark County’s consent, did not allege continuous or worsening injury.

The amended complaint, filed with the County’s consent after it knew that no settlement could be reached without an assignment of the County’s claims, alleged no new occurrence or event. Davis

and Northrop merely alleged the four claims in their original complaint, but added a section entitled “Ongoing Unlawful and Unconstitutional Conduct” to assert additional facts unrelated to their wrongful conviction and incarceration. (CP 7646-48) This amended complaint did not manufacture coverage or create a duty to defend.

For instance, Davis and Northrop alleged that since their conviction and incarceration, the County received additional complaints that further put the County on notice that Slagle was unfit for service, and that, in 2004, Clark County failed to document Slagle’s use of force. (CP 7646, ¶4.35-36). They alleged that Clark County and Slagle “continued to withhold exculpatory evidence,” (CP 7647, ¶4.41), and that the County “continued to defend” the convictions of Davis and Northrop despite knowing of Slagle’s propensities and prior history. (CP 7646, ¶4.38) They alleged that Clark County resisted or interfered with attempts by Davis and Northrop to obtain DNA testing, opposed their requests in court in 2004, and destroyed evidence before it could be tested for DNA in 2006 or 2007. (CP 7646-47, ¶¶4.38-40) Davis’ and Northrop’s amended civil rights and negligence claims thus did not allege any new or distinct harm, only that the injury they suffered upon their wrongful arrest, conviction and incarceration was “continuing.”

c. The “continuous trigger” theory is inapplicable to claims for wrongful conviction and incarceration, which do not entail latent and progressive damage.

Ignoring that the JSLIP defines “occurrence” as an “accident” or “event,” petitioners erroneously contend that this Court has adopted a “continuous trigger of coverage” theory (County/Slagle 30; Davis/Northrop 49) that obliged the Pool to treat the relevant “occurrence” as the entire course of Davis’ and Northrop’s incarceration. The cases cited to support that argument are clearly inapposite, as they involve latent and progressive damage to real property,¹⁴ or wrongful conduct that by its nature does not take place at a single point in time, such as maintaining a hostile work

¹⁴ *E.g.*, *Gruol Const. Co., Inc. v. Insurance Co. of North America*, 11 Wn. App. 632, 636, 524 P.2d 427 (1974) (property coverage for dry rot and defective backfilling; “damage was continuous”), *rev. denied*, 84 Wn.2d 1014 (1974) (County/Slagle Br. 29-30); *City of Okanogan v. Cities Ins. Ass’n of Washington*, 72 Wn. App. 697, 702, 865 P.2d 576 (1994) (no coverage because damages from City’s negligent construction of culvert and failure to maintain irrigation channel were foreseeable and therefore not “occurrences”; distinguishing *Gruol*, where “dry rot is an invisible, slow process of decay”); *Am. Nat. Fire Ins. Co. v. B & L Trucking & Const. Co., Inc.*, 134 Wn.2d 413, 418, 424, 951 P.2d 250 (1998) (“when the pollution occurred over many years” during which insured operated landfill, “all insurers on the risk during the time of ongoing damage have a joint and several obligation to provide full coverage for all damages”); *Certain Underwriters at Lloyd’s London v. Valiant Ins. Co., Inc.*, 155 Wn. App. 469, 475, ¶13, 229 P.3d 930 (2010) (Because “the injury and damage [in *Gruol*] was a continuing process until its discovery, . . . it was covered by all three insurers who had issued policies to Gruol during the period from construction until the discovery of the damage.”). (See County/Slagle Br. 30, 44; Davis/Northrop Br. 53-54)

environment.¹⁵ By contrast, where the wrongful conduct is neither latent nor progressive, “the time of an occurrence for insurance coverage purposes is determined by when damages or injuries took place.” *Transcontinental*, 111 Wn.2d at 465; see also *Castle & Cook, Inc. v. Great American Ins. Co.*, 42 Wn. App. 508, 517, 711 P.2d 1108 (an “occurrence” takes place “when the injury giving rise to the claim occurred”), *rev. denied*, 105 Wn.2d 1021 (1986).¹⁶

Petitioners’ reliance on *Transcontinental* is particularly misplaced, as it fails to recognize that this Court distinguished between the injury-causing event(s) and its effects in that case. “[T]he number of triggering events depends on the number of *causes* underlying the alleged damage and resulting liability.” *Transcontinental*, 111 Wn.2d at 467 (emphasis added). See also

¹⁵ See *Broyles v. Thurston Cnty.*, 147 Wn. App. 409, 434, ¶52, 195 P.3d 985 (2008) (“hostile work environment claims ‘are different in kind from discrete acts’ and ‘[t]heir very nature involves repeated conduct’”) quoting *Antonius v. King County*, 153 Wn.2d 256, 264, 103 P.3d 729 (2004) (County/Slagle Br. 35-36). See also, *In re Feature Realty Litigation*, 468 F. Supp. 2d 1287, 1302 (E.D. Wash. 2006) (City’s alleged wrongful “acts of delay in the processing of the plat amendment application were ongoing and continued unabated”).

¹⁶ The trial court clearly did not adopt a “manifestation trigger” theory in holding that there was no covered occurrence. (Davis/Northrop Br. 16, 21, 54) Under that theory, “coverage d[oes] not begin until the defect show[s] itself,” as “no injury or damage of *any kind* took place until [that] manifestation.” *Villella v. Pub. Employees Mut. Ins. Co.*, 106 Wn.2d 806, 813-14, 725 P.2d 957 (1986) (emphasis in original).

Certain Underwriters, 155 Wn. App. at 476, ¶15 (“[T]he number of occurrences equals the number of causes of liability.”). Unlike here, the WPPSS bondholders in *Transcontinental* alleged a series of “multiple, distinct events” that caused their losses, including “the PUDs’ entrance into the Participants’ Agreement . . . , reliance on bond counsels’ opinions that accompanied each bond issue stating that the Agreement was enforceable, or participants’ failure to file a declaratory action to determine the enforceability of their agreement prior to the sale of the bonds.” 111 Wn.2d at 466.

While this Court has not addressed what triggers coverage in a civil rights claim, “[u]nder the majority rule, civil rights claims such as malicious prosecution, false imprisonment, and wrongful conviction trigger insurance policies in effect when the injury first occurs, i.e., when the underlying charges are filed, or when the plaintiff is wrongfully arrested or first incarcerated.” *Northfield Ins. Co. v. City of Waukegan*, 761 F. Supp. 2d 766, 773 (N.D. Ill. 2010),

aff'd 701 F.3d 1124 (7th Cir. 2012).¹⁷ See *N. River Ins. Co. v. Broward Cty. Sheriff's Office*, 428 F. Supp. 2d 1284, 1290 (S.D. Fla. 2006) (“Years before the Policy was a glimmer in the Defendants' collective eye, Messrs. Lee and Townsend were allegedly wrongfully deprived of their liberty and falsely imprisoned-and any alleged malicious prosecution resulted in their imprisonment at that time”).¹⁸ Petitioners' argument that a claim for wrongful imprisonment does not “accrue” for statute of limitations purposes until the wrongful

¹⁷ The district court in *Northfield* adopted the minority position – that an “occurrence” takes place “when the underlying proceeding is terminated in the plaintiff's favor,” based on the Seventh Circuit's prediction of Illinois law. 761 F. Supp. 2d at 773. See *American Safety Cas. Ins. Co. v. City of Waukegan, Ill.*, 678 F.3d 475, 479 (7th Cir. 2012); *Northfield*, 701 F.3d at 1132 (expressing reluctance to “singlehandedly modify the Illinois rule without some new direction from the state.”). That prediction proved incorrect, however; the Illinois courts recently declined to follow the minority position and adopted the majority position advocated by the Pool here. See *St. Paul Fire and Marine Ins. Co. v. City of Zion*, 385 Ill. Dec. 193, 18 N.E.3d 193 (App. Ct. 2014), *rev. denied*, 388 Ill. Dec. 9, 23 N.E.3d 1207 (2015). Only one state (Louisiana) “has held that exoneration marks the ‘occurrence’ for insurance coverage of malicious-prosecution claims.” *American Safety*, 678 F.3d at 479; see also *Sauviac v. Dobbins*, 949 So.2d 513, 519 (La. Ct. App. 2006), *writ denied*, 952 So.2d 701 (2007).

¹⁸ Accord, *City of Erie, Pa. v. Guar. Nat'l Ins. Co.*, 109 F.3d 156 (3d Cir. 1997); *Sarsfield v. Great Am. Ins. Co. of New York*, 833 F. Supp. 2d 125 (D. Mass. 2008), *aff'd* 335 F. App'x 63 (1st Cir. 2009); *City of Lee's Summit v. Missouri Public Entity Risk Management*, 390 S.W.3d 214 (Mo. Ct. App. 2012); *Idaho Cnty's. Risk Mgmt. Program Underwriters v. Northland Ins. Companies*, 147 Idaho 84, 205 P.3d 1220 (2009); *Zurich Ins. Co. v. Peterson*, 188 Cal. App. 3d 438, 232 Cal. Rptr. 807 (1986); *S. Maryland Agric. Ass'n, Inc. v. Bituminous Cas. Corp.*, 539 F. Supp. 1295 (D. Md. 1982); *S. Freedman & Sons, Inc. v. Hartford Fire Ins. Co.*, 396 A.2d 195 (D.C. 1978); *Paterson Tallow Co., Inc. v. Royal Globe Ins. Companies*, 89 N.J. 24, 444 A.2d 579 (1982).

imprisonment ends (Davis/Northrop Br. 53 n. 52) has nothing to do with the time of the “occurrence” under the Pool’s JSLIP, and is supported by neither Washington law, the majority rule, nor any sound public policy. *See N. River*, 428 F. Supp. 2d at 1290 (“imposing on Plaintiff a risk based on the fortuitous occasion of the date of exoneration as opposed to the date when the damage first manifests itself, *i.e.*, the date of incarceration” would “strain logic . . . [and] public policy”).

Here, the injury took place in 1993, nine years before the County joined the Pool. Davis and Northrop alleged that Slagle used “unduly suggestive witness identification procedures” during his investigation, withheld exculpatory evidence that should have been turned over to their defense counsel before their trial, and that Clark County was responsible for their wrongful convictions because it failed to properly train and supervise Slagle and retained him after being “placed on notice regarding his dangerous propensities and substandard police work.” (CP 4759-4777, 7649-52)

Moreover, the amended complaint’s attempt to allege continuing harm by concealment or destruction of exculpatory evidence alleged no latent “defect” – the “occurrence” was the *wrongful* arrest, prosecution, or conviction of an innocent person,

and the injury is the incarceration of an innocent individual. *See Sarsfield*, 833 F. Supp. 2d at 130 (“even if the concealment could be said to cause a distinct injury . . . the concealment first occurred prior to the policy period” when assignee under stipulated judgment was convicted and imprisoned). Petitioners’ allegation that their injury “spann[ed] the entire period” of their “ongoing unconstitutional incarceration” (County/Slagle Br. 15, 42; Davis/Northrop Br. 54) fails to distinguish between the *effects* of an injury and the injury itself – a distinction recognized by even those courts adopting the minority position regarding the “trigger” for wrongful imprisonment claims. *See Northfield*, 761 F. Supp. 2d at 773 (“reject[ing] the argument that the continuing consequences of a wrongful conviction trigger policies in effect whenever those consequences are felt.”), *aff’d* 701 F.3d at 1133 (“[a] continuing violation or tort is occasioned by continuing unlawful acts and conduct, not by continual ill effects from an initial violation.”) (quoted case omitted).

Because there was only one “occurrence” – wrongful arrest, conviction, and incarceration – there is no merit to Davis’ and Northrop’s argument that the multiple wrongful acts are “deemed” to occur in the last policy period under the 2010 JSLIP’s “deemer clause.” Whether Davis and Northrop were imprisoned for five years

or 20, the length of the imprisonment and the events that occurred while they were incarcerated have no bearing on the one and only occurrence that caused them to be wrongfully convicted and imprisoned in the first place. That is when the harm occurred. The trial court correctly held that the wrongful acts in 1993 constituted the one and only occurrence that gives rise to all of Davis' and Northrop's alleged injuries and claims against Clark County and Slagle.

2. No occurrence took place after Clark County joined the Pool because the County knew of Davis' and Northrop's claims of innocence long before 2002.

The claims at issue here are not "occurrences" for another reason: Clark County knew of Davis' and Northrop's allegations of wrongdoing in opposing their post-conviction attempts to establish their innocence long before it joined the Pool. Under the JSLIP, "[n]o occurrence will be deemed to have taken place *after the insured has knowledge* of the alleged bodily injury, property damage, personal injury, errors and omissions, or advertising injury that gave rise to the occurrence." (CP 397) (emphasis added) Here, Clark County "ha[d] knowledge of the alleged . . . injury" long before it joined the Pool in 2002. See *Overton v. Consol. Ins. Co.*, 145 Wn.2d

417, 431, 38 P.3d 322 (2002) (insured's "knowledge [of alleged property damage] predated its purchase of the policies").

Northrop argued in his 1993 post-trial motion the failure to preserve or disclose material evidence in violation of his due process right to a fair trial, and that the victim did not identify Northrop as the person who raped her in the photo montage shown by Slagle. (CP 7811-20) In his 1994 appeal, Northrop argued that Clark County's suggestive pre-trial identification procedures "irreparably" created a substantial likelihood of misidentification. (CP 7822, 7854-57)

In his 1993 direct appeal, Davis also challenged both the sufficiency of the evidence admitted against him at trial and the identification procedure used by Slagle, calling the lineup and photo lay-downs "suspicious," and "troublesome." (CP 7910; *see also* CP 7940-43; Davis' 1996 petition for review arguing that identification procedures were tainted and led to a false identification) Davis filed a petition for habeas corpus under 28 U.S.C. § 2254 in December 1997, arguing that Clark County's suggestive pretrial identification procedures "irreparably created a substantial likelihood of misidentification in violation of due process under the Fifth and Fourteenth Amendments of the United States Constitution." (CP 7949) Davis argued that Clark County's identification process was

highly prejudicial and tainted, citing serious inconsistencies in Slagle's reports. (CP 7950)

Further, Clark County argued in defending their federal lawsuit that Davis and Northrop should be collaterally estopped from re-litigating their Sixth and Fourteenth Amendment claims, because the previous final judgments in their criminal and post-conviction cases raised the identical issues they alleged in their civil rights action. (CP 7990-91) Clark County cited Davis' and Northrop's appellate briefs and habeas pleadings to argue that the issues raised in their civil case were the very issues they had previously litigated. (CP 7990-91)

Clark County thus had knowledge of Davis' and Northrop's alleged injuries well before it joined the Pool in 2002, and actively opposed Davis' and Northrop's attempts to exonerate themselves on the same grounds that Davis and Northrop alleged in the civil rights suit. As the JSLIP expressly provides that "[n]o occurrence will be deemed to have taken place after the insured has knowledge of the alleged bodily injury," Clark County's knowledge of Davis' and Northrop's allegations beginning in 1993 establishes that no "occurrence" took place after the County first joined the Pool in 2002.

3. The Pool had no duty to defend because Clark County settled by stipulating to entry of judgment before the Pool's Executive Committee decided there was no coverage for the claims in the amended complaint.

Finally, petitioners' contention that the Pool breached a duty to defend the amended complaint ignores that Clark County consented to entry of judgment in September 2013, before the Pool made a final decision denying coverage. By the time the Pool's Executive Committee denied Clark County's tender of that amended complaint following its hearing on November 1, 2013, there were no claims for the Pool to defend. (CP 7809)

Petitioners rely on the Pool's Claims Manager's July 29 denial of coverage, but it was the Executive Committee's decision that was the final decision of the Pool. (CP 7550: member county must exhaust its appellate remedies under the Pool's Bylaws as "a condition precedent to any subsequent legal action.") *See Galvis v. State, Dep't of Transp.*, 140 Wn. App. 693, 709, ¶39, 167 P.3d 584 (2007) (court reviews final, not initial, decision), *rev. denied*, 163 Wn.2d 1041 (2008); *City of Olympia v. Thurston Cnty. Bd. of Comm'rs*, 131 Wn. App. 85, 96, ¶26, 125 P.3d 997 (2005) (same), *rev. denied*, 158 Wn.2d 1003 (2006). Petitioners argue that this Court has imposed upon an *insurer* an extra-contractual duty to defend

from the moment of tender, but the member counties of a joint governmental self-insurance program may, as they did here, establish a process to jointly make a final coverage and defense decisions while a member county provides its own defense of tendered claims. The Pool had no duty to defend claims asserted in an amended complaint to which the County stipulated, tendered to the Pool on the eve of trial, then settled by entry of a consent judgment before the Pool's Executive Committee had made its decision.

D. Any damages awarded to either the Pool for breach of the Interlocal Agreement or to the County, if there was a breach of the JSLIP, are a matter of contract law, to fulfill the benefit of their bargain.

Because the relationship between the County and the Pool is defined by contract and not tort principles applicable only to insurers, their respective rights and liabilities, including for attorney fees, are defined by the law of contracts. (CP 9505: parties' rights and duties are based on "contract law.") In a decision unchallenged on appeal, the trial court held that Clark County breached the Interlocal Agreement by assigning its rights in the Pool, resulting in its expulsion. The County is therefore liable for the Pool's damages caused by the breach, including, as the trial court held, the Pool's attorney fees and costs. (CP 4736, 9854)

Damages for breach of contract are intended to protect the parties' expected benefit of the bargain:

Contract damages are ordinarily based on the injured party's expectation interest and are intended to give that party the benefit of the bargain by awarding him or her a sum of money that will, to the extent possible, put the injured party in as good a position as that party would have been in had the contract been performed.

Mason v. Mortgage America, Inc., 114 Wn.2d 842, 849, 792 P.2d 142 (1990). If the Pool breached the JSLIP by failing to defend the County against the amended complaint, therefore, the County would be entitled to the benefit of its bargain – the reasonable fees the County incurred in defending itself from the date the Pool denied the County's tender of defense – but no more.

“The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds. . . .” *Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155, 43 P.3d 1223 (2002), quoting *Restatement (Second) of Contracts* § 356 cmt. a (1981). See also *Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 140, ¶79, 323 P.3d 1036 (2014) (“application of an implied duty of good faith was not required to ensure the providers received the benefit of their bargain”). If this Court allows the County to recover any breach of contract damages, they must be

offset by the Pool's "attorneys' fees and costs as a result of this breach of the Interlocal Agreement" (CP 8050), including the fees the Pool incurred in intervening to object to the petitioners' attempt to establish the reasonableness of their settlement in federal district court.

E. The Pool is entitled to its attorney fees on appeal.

Under Article 22 of the Interlocal Agreement, in any action "to enforce any term of this Agreement or any term of the Bylaws against any present or previous member county, the prevailing party shall receive such sums as the court may fix as reasonable attorneys' fees and costs in the action." (CP 4736) The County is liable on appeal, as in the trial court (CP 8050), for the Pool's attorney fees in this action. RAP 18.1. *See Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 525, ¶28, 210 P.3d 318 (2009); *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 717-18, ¶28, 334 P.3d 116 (2014).

F. The Pool adopts any arguments necessary for affirmance.

The Pool adopts by reference any arguments advanced by respondent Lexington that may be necessary for affirmance of the trial court's orders. RAP 10.1(g).

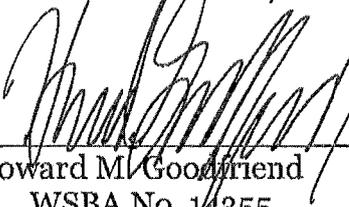
V. CONCLUSION

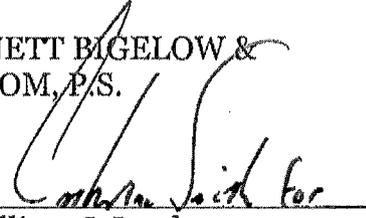
The trial court correctly held that the parties' relationship is defined by statute and contract and not by the statutory and common law duties applicable to insurers. This Court should affirm its holding that the Pool is not liable for breach of a duty to defend, that neither the County nor Slagle could validly assign any claims against the Pool, and award the Pool its fees on appeal.

Dated this 15th day of January, 2016.

SMITH GOODFRIEND, P.S.

BENNETT BIGELOW &
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By: 

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DECLARATION OF SERVICE

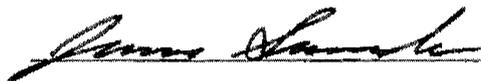
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on January 15th, 2016, I arranged for service of the foregoing Brief of Respondent, to the Court and to the parties to this action as follows:

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DATED at Seattle, Washington this 15th day of January,
2016.



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Attached for filing in searchable .pdf format is the Brief of Respondents Washington Counties Risk Pool and Respondent Washington Counties Risk Pool's Motion for Leave to File Overlength Brief.

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