

Received 
Washington State Supreme Court

OCT 13 2015

Ronald R. Carpenter 
Clerk

No. 91154-1

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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

Appellants.

PETITIONERS
BRIEF OF APPELLANTS
DAVIS AND NORTHROP

John R. Connelly, Jr.
WSBA #12183
Micah R. LeBank
WSBA #38047
Connelly Law Offices
2301 North 30th Street
Tacoma, WA 98403
(253) 593-5100

Philip A. Talmadge
WSBA #6973
Talmadge/Fitzpatrick/Tribe
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661



ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

Timothy K. Ford
WSBA #5986
Tiffany Cartwright
WSBA #43564
MacDonald Hoague & Bayless
705 2nd Avenue Suite 1500
Seattle, WA 98104
(206) 622-1604

Ian Hale
(Admitted *Pro Hac Vice*)
Michael E. Farnell
WSBA #23735
Parsons Farnell & Grein, LLP
1030 SW Morrison Street
Portland, OR 97205
(503) 222-1812

Attorneys for Appellants Davis and Northrop

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A. INTRODUCTION

This case is the outgrowth of the wrongful arrest, conviction and nearly two decade imprisonment of Larry Davis ("Davis") and Alan Northrop ("Northrop") for kidnapping and rape, crimes they did not commit. Davis and Northrop were each unjustly incarcerated for more than 17 years due to the continuing improper actions and omissions of Clark County ("County") and its lead investigating deputy sheriff, Detective Donald Slagle ("Slagle").

The County/Slagle not only conducted an improper investigation of the crimes for which Davis/Northrop were unjustly convicted and incarcerated, they failed to turn over exculpatory evidence that could have been used to prove Davis and Northrop's innocence at any point during the more than 17 years post-conviction that they spent in prison. Davis and Northrop each filed numerous post-conviction motions protesting their innocence, seeking their release, and requesting the disclosure of this information, but, despite such repeated pleas, the County/Slagle failed to take any steps to disclose the exculpatory evidence, and actively fought DNA testing—even destroying evidence *after* a court ordered that it be tested—whose results led to Davis/Northrop's belated exoneration and release in 2010.

The present case is an insurance coverage dispute that arose after Davis/Northrop filed a civil action in federal court against the County/Slagle for their wrongful conduct, which was alleged to occur each and every year of their ordeal. Beyond the County's deductible, WCRP provided primary insurance coverage that was 100% re-insured by private commercial insurers. Lexington Insurance Company ("Lexington"), an AIG-owned company, provided excess coverage that follows the terms and conditions in WCRP's underlying primary policies.

WCRP separately insured the County and Slagle under a series of annual, primary insurance policies in effect from 2002 until at least 2010 that obligated it to defend them against any allegations of an "occurrence" during the policy period. The first three WCRP policies define "occurrence" broadly as any "event, including continuous or repeated exposure to substantially the same conditions," while all of the later of policies further include a "deemer" clause mandating that any "occurrence" be "deemed for all purposes to take place during *the last* policy period in which any part of the 'occurrence' took place."

All of the policies, as well as all of WCRP's governing documents, expressly require the application of Washington law to these policies. WCRP had always applied Washington's insurance common law to its policies prior to the County/Slagle tendering the Davis/Northrop claims to

WCRP. WCRP nonetheless refused to honor its obligation to defend the County/Slagle, arguing that some other, unstated law applied to preclude coverage.

WCRP/Lexington owed the County/Slagle a duty of good faith *both* under the common law and under Title 48 RCW ("Insurance Code"), subjecting them to Washington's insurance common law in their claims determinations and handling; WCRP/Lexington's violation of that duty of good faith to County/Slagle also made contractual and extracontractual remedies under both the common law and the Insurance Code available to the County/Slagle against WCRP/Lexington.

In the face of WCRP's abandonment of the County/Slagle by refusing to defend them against Davis/Northrop's federal court action, the County/Slagle undertook to protect themselves and entered into a covenant judgment settlement, assigning all of their claims against WCRP/Lexington to Davis/Northrop. WCRP invoked a contractual provision in its interlocal agreement (a non-insurance document) that it asserted banned such assignments.

In a series of orders, the trial court agreed with WCRP that it had no duty to defend the County/Slagle, and it prohibited any assignment by the County/Slagle of their claims against WCRP/Lexington to Davis/Northrop.

The trial court's adoption of WCRP's belief that some undefined set of contractual principles govern the interpretation of what are liability insurance policies issued by WCRP (whose terms and conditions were then followed by Lexington as the excess insurer) was simply wrong, particularly where WCRP's risk above the County's deductible was 100% reinsured by private commercial insurers. This Court should reaffirm that a risk pool like WCRP and a commercial insurer like Lexington are subject to Washington's insurance common law. When it does so, this Court must overturn the trial court's erroneous orders on the duty to defend and the assignment of the County/Slagle claims against WCRP/Lexington to Davis/Northrop.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in ruling on November 13, 2014 that WCRP and Lexington are not subject to Washington's insurance common law for the interpretation of their primary and excess policies respectively.

2. The trial court erred in entering its December 12, 2014 order denying Davis/Northrop's and the County/Slagle's motions for partial summary judgment and granting summary judgment to WCRP on its duty to defend the County/Slagle in the Davis/Northrop's federal court action.

3. The trial court erred in entering its December 12, 2014 order denying Davis/Northrop's and the County/Slagle's motions and granting summary judgment to WCRP/Lexington barring the assignment of the County/Slagle claims to Davis/Northrop.

(2) Issues Pertaining to Assignments of Error

1. Where a risk pool issues primary liability insurance policies to its members, particularly where such policies are fully reinsured by private commercial liability insurers, must the courts apply Washington's insurance common law to the interpretation of the risk pool policies, and the policies of the risk pool's excess carrier that follow the terms and conditions set forth in the risk pool's policies, and the claims both contractual and extracontractual arising out of them? (Assignment of Error Number 1).

2. Where wrongfully convicted and incarcerated individuals brought claims against a county and its deputy sheriff under theories involving express allegations of both discrete and continuous actions and injuries during the risk pool's policy coverage, did the risk pool owe them a defense? (Assignment of Error Number 2).

3. Where a risk pool and its excess carrier breached their contractual duties to a county and its deputy sheriff, were the county and that deputy sheriff entitled to take whatever steps necessary to protect their interests including entering into a covenant judgment settlement with wrongfully convicted and incarcerated individuals and assigning to them their contractual and extracontractual claims against the risk and its excess carrier, notwithstanding an anti-assignment provision in the interlocal agreement creating the risk pool, given Washington law permitting such assignments generally and allowing such assignments specifically in the insurance context? (Assignment of Error Number 3).

C. STATEMENT OF THE CASE

(1) Davis and Northrop Are Convicted and Imprisoned for a Crime They Did Not Commit

This case arises out of the prosecution, conviction, and 17-plus year imprisonment of Davis and Northrop for a crime they did not commit, and of which they were exonerated by DNA evidence in 2010.¹

On January 11, 1993, Kari Morrison reported that she was raped by two unknown assailants in La Center, Washington. CP 160, 570. According to Morrison, the attackers tied her up and put tape over her eyes, and then one man raped her as the other held her down. *Id.* She only caught a glimpse of the two men. *Id.* After the perpetrators left, Morrison called 911, providing few details about the two men. *Id.*

Clark County Sheriff Detective Donald Slagle was the lead Sheriff's Office investigator in the case. *Id.* Morrison did not get a good view of her attackers and when deputies met with Morrison, she could not provide sufficient details about her blonde assailant to allow an artist's sketch of that assailant to be prepared. *Id.* Three days after the attack, a photo montage or "laydown" was prepared that contained a picture of Alan Northrop. CP 160-61. Morrison stated her attacker was not one of

¹ A careful and detailed recitation of the allegations from Davis/Northrop's federal district court complaint is appropriate because an insurer's duty to defend is ordinarily addressed from the four corners of that complaint. *See infra.*

the individuals pictured. CP 161.² Slagle did not include his meeting with Morrison, that Morrison had failed to identify Northrop, and that Morrison had looked at another photo laydown from which she identified no one in any report and this information to defense counsel for Davis or Northrop. *Id.*

Even though Morrison had excluded Northrop as a suspect, Slagle continued to pursue Davis and Northrop, but his investigation turned to Davis. CP 162. Slagle pulled an old booking photograph of Davis and had a Sheriff's Office records clerk assemble a highly suggestive photomontage with Davis's photo included. *Id.* From the montage, Morrison identified Davis through a process of elimination after initially indicating she could not identify her assailant. *Id.* Slagle then arrested Davis and Northrop. CP 162-63.

On March 11, 1993, Davis was placed in a live lineup at a police station that unfairly singled him out because Morrison had previously seen his photograph. CP 163.³ After over thirty minutes, Morrison identified Davis, rating her degree of certainty as a 7 or 8 out of 10. *Id.*

² In other words, approximately three days after the alleged rape, Morrison could not identify Northrop's photograph.

³ Morrison knew Davis and Northrop were suspects; she later revealed that upon viewing the lineup, she "figured [that] if the blond [sic] is still here than the blond [sic] is Larry Davis and the short haired one that they're looking for is Alan." CP 163.

On April 5, 1993, Morrison attended a lineup which included Northrop and, just as occurred with Davis, Northrop was unfairly singled out. CP 164.⁴ Knowing that an arrest of Northrop depended on her identification of him, she identified him. CP 163-64. Davis and Northrop were both charged with Morrison's rape and kidnapping. CP 163-64.

During Slagle's investigation of Davis and Northrop, he received tips and other leads identifying several other possible suspects. CP 164.⁵ These leads were not followed up and were not disclosed to prosecutors or, later, to defense counsel. CP 164-65. Slagle also withheld exculpatory information from the Davis and Northrop defense counsel. CP 165-66.⁶

On May 13, 1993, unaware of the concealed exculpatory evidence, a jury convicted Davis of burglary, kidnapping, and rape, based only on Morrison's suggestive eyewitness identification. CP 166. On July 8, 1993, unaware of the concealed exculpatory evidence, a jury convicted Northrop of burglary, kidnapping, and rape, again based only on Morrison's eyewitness identification. *Id.*

⁴ Morrison knew that the police believed Northrop to be a suspect, that he had been in the initial photo laydown, and that he would also be in the live lineup. CP 163.

⁵ The County/Slagle continued to withhold this exculpatory evidence of alternative suspects, which was not disclosed until the spring of 2013 when it was finally produced in discovery in this case. CP 164-65.

⁶ The County Prosecuting Attorney's Office learned of the this evidence after Northrop's trial. CP 166. Its exculpatory significance was obvious to that office because it promptly disclosed the information to Northrop's appellate counsel. *Id.*

Despite its knowledge of Slagle's history of misconduct, and his multiple misrepresentations and failures to disclose exculpatory evidence,⁷ the County continued to defend the Davis/Northrop convictions, and to resist their requests for DNA testing.

In 2004, after spending eleven years in prison, Davis and Northrop sought access to previously unavailable DNA testing through the Innocence Project. CP 167-68. The County refused to agree to the testing. CP 168. In late January 2006, only after the Legislature amended the law to allow for a judicial determination of whether DNA testing could be ordered, Clark County Superior Court Judge Robert L. Harris ordered the DNA testing that the County had refused to perform. CP 169. In July 2006, the Clark County Superior Court entered an agreed order to transfer certain evidence for DNA testing. *Id.* The County was notified by the Washington State Laboratory that Morrison's pants and shirt, containing possible exculpatory DNA evidence that would have been further evidence of Davis/Northrop's innocence, were missing. CP 8853. An

⁷ There were issues regarding Slagle's conduct as a deputy sheriff over the years both before and after the Davis/Northrop convictions. During his 26 years with the Sheriff's Office, he was disciplined sixteen times and was the subject of more than 36 internal affairs investigations, both before their convictions and during their continued imprisonment. CP 158. The County was on notice of Slagle's substandard police work and the high probability that Slagle had violated his ongoing legal and constitutional duties owed to Davis/Northrop. CP 158-59.

investigation revealed that the County destroyed the clothing in November 2006, *after* the order was entered. *Id.*

DNA testing on 27 separate pieces of evidence completely exonerated Davis and Northrop from the crime that they had been accused of committing seventeen years earlier. *Id.*⁸

Despite the DNA evidence exonerating them, and the other exculpatory evidence which the County possessed but still did not disclose, the County insisted on additional testing to exclude additional possible donors. CP 169. In fact, Davis, who had been released in January 2010 after serving his sentence, was forced to register as a sex offender. CP 8862. The County initially opposed the Davis/Northrop efforts to vacate their convictions and it was only after the DNA testing was done, and those allegedly possible donors were excluded, that the County finally recognized that the Davis/Northrop convictions should be set aside. CP 169.

On June 30, 2010, the Honorable Diane M. Woolard set aside the verdicts against Davis and Northrop based on the conclusive results of the DNA evidence and complete lack of evidence linking them to this crime. CP 8848-64. Northrop was then released from incarceration.

⁸ Morrison's pants and shirt, which had been improperly destroyed by the County obviously could not be tested for additional exculpatory DNA evidence.

Subsequently, on July 14, 2010, Clark County dismissed the charges against Davis and Northrop. CP 169.

(2) Davis/Northrop's Underlying Action Against the County/Slagle

Upon their release, Davis/Northrop sued the County/Slagle in the United States District Court for the Western District of Washington at Tacoma in August 2012. CP 133-51. In that complaint, Davis/Northrop alleged a federal civil rights claim under 42 U.S.C. § 1983, and state common law tort theories including negligence, negligent training/supervision/retention of Detective Slagle, and negligent and intentional infliction of emotional distress. CP 147-49. After additional discovery occurred an amended complaint was filed on June 7, 2013. CP 153-76, 570-93. The amended complaint also expressly pleaded both continuous and discrete events and misconduct by the County/Slagle during the policy periods of the WCRP policies. CP 167-70. In fact, the amended complaint devoted an entire section to “Ongoing Unlawful and Unconstitutional Conduct.” *Id.* In addition to the dignitary claims relating to their wrongful conviction, lengthy imprisonment, and false labeling as sex offenders, both Davis and Northrop suffered physical injuries and illnesses; Davis contract Hepatitis C, PTSD, and Willis-Ekbom disease, a neurological disorder, for example, during his imprisonment. CP 174.

Likewise, Northrop was subject to assaults while he was incarcerated and suffered multiple injuries over the course of his long seventeen year incarceration. *Id.*

(3) WCRP's and Lexington's Liability Policies Covering the County/Slagle

The County joined WCRP in 2002. CP 5322. The County had a deductible on its liability coverage of \$500,000 and thereafter it was covered in layers with WCRP's coverage being the first. *See* Appendix (chart). WCRP insured the County and Slagle separately as insureds, CP 362, 371, under a series of consecutive, annual, primary insurance policies in effect from July 2002 to at least October 2010. CP 359, 361-450. Those policies all contained identical or substantially identical insuring agreements that grant coverage as follows:

INSURING AGREEMENT: The Washington Counties Risk Pool ("Pool") shall pay on behalf of the **named insured** and other **insureds** identified in Section 2 below, subject to the terms and conditions of the policies, 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 damage, errors and omissions, and advertising injury** caused by an occurrence during the policy period...The Pool may at its discretion investigate any **occurrence** during the policy period and settle any claim or **suit** that may result and shall have the right and duty to defend any **suit** against the **insured** seeking monetary damages on account of any of the five coverages identified above, or any combination thereof.

E.g., CP 362 (bold in original). For personal and advertising injuries, the policies define an "occurrence" as "an event, including continuous or repeated exposure to substantially the same conditions." CP 369. They define "personal injury" to include false arrest, false imprisonment, wrongful detention, malicious prosecution, humiliation, and civil rights violations. *Id.* The only question in dispute under the policies is whether there was an "occurrence" during the policy period of one or more of the policies.⁹

The first three policies at issue (those effective from July 2002 to October 2002; from October 2002 to October 2003; and from October 2003 to October 2004) do not contain any terms or provisions that purport to reduce similar, related, continuing or progressive occurrences to a single point in time. CP 361-94. The other policies in effect from October 2004 on contain a so-called "deemer" clause¹⁰ that reduces continuing or

⁹ WCRP acknowledged that a "personal injury" occurred here. *E.g.*, CP 454 ("As an initial matter, Davis' and Northrop's claims arguably fall within the JSLIP's personal injury [coverage]"). Even without this concession, Davis/Northrop's complaint contained allegations of a "personal injury" within the meaning of the WCRP policy's definition of a "personal injury." CP 168-69.

¹⁰ As the federal district court in *In Re: Feature Realty*, 468 F. Supp.2d 1287 (E.D. Wash. 2006) noted, such so-called "deemer clauses" address the question of when coverage under a liability policy is triggered, "providing that a simple wrongful act shall be deemed to have taken place on the date [specified by the deemer clause]." *Id.* at 1301. "It is not uncommon for the proper resolution of a coverage issue in any given case to turn on the number of triggers and their timing." *Id.* The court noted there could be a single wrongful act; a single continuous wrongful act; or a series of wrongful acts. *Id.* In that case, there was no deemer clause and the court followed Washington's well-established continuous trigger principle to conclude that coverage was triggered by a

progressive occurrences to a single point in time, but that point in time is the *last policy period* in which any part of the occurrence took place:

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.

E.g., CP 397 (bold in original).

Lexington's policies, CP 4229-4495, follow the terms and conditions of WCRP's underlying coverage, *e.g.*, CP 4235, and provide coverage in excess of WCRP's first layer of coverage for its members. CP 5008-10. However, these policies recognize continuous triggering of coverage in defining an occurrence in a fashion somewhat different than the WCRP policies:

Occurrence - The word occurrence means an event, including continuous or repeated exposures to conditions, neither expected nor intended from the standpoint of the Insured. All such exposure to substantially the same general conditions shall be deemed one occurrence.

E.g., CP 4234. The Lexington policy is ambiguous in not prescribing whether that one occurrence is measured from the first or last triggering of coverage.

(4) The County/Slagle Tender the Davis/Northrop Federal Lawsuit to WCRP/Lexington Who Deny Coverage

2005 settlement based on wrongful acts committed over a span of years and occurring after coverage commenced. *Id.* at 1303.

The County/Slagle tendered the federal case to WCRP and requested that WCRP defend them in accordance with the policies' insuring agreements. CP 359. On at least *six different occasions* by letter or by decision, WCRP claimed its policies did not cover the County or Slagle and it refused to defend them. CP 359, 451-82. On each occasion, WCRP took the position that the "occurrence" alleged in the Davis/Northrop complaints must be deemed to have happened only at the single point in time when any allegations of related or continuous events first began or became manifest, in 1993. *E.g.*, CP 454, 459, 469, 480.¹¹

Although Washington law expressly governs the interpretation of WCRP's liability insurance policies,¹² WCRP did not cite a single Washington case in any of its denials of a defense to the County or Slagle to support its position on the timing of an "occurrence." CP 451-82. In denying coverage, WCRP addressed the "deemer clauses" in its later policies, asserting they were inapplicable because the single triggering

¹¹ WCRP even went so far as to attempt at a WCRP meeting in March 2014 to browbeat Mark Wilsdon, the County's risk manager, unrepresented by counsel, into agreeing that the County breached the interlocal agreement. CP 2104-06. Ultimately, WCRP terminated Clark County's membership in WCRP. CP 4968-69.

¹² Pursuant to its bylaws, WCRP was required to undertake all of its coverage determinations in a manner "not inconsistent with Washington state law." CP 359. Furthermore, each of the WCRP policies expressly state that they shall be governed by and construed in accordance with Washington law: "This Policy shall be governed by and construed in accordance with the laws of the state of Washington." CP 373.

event took place before the County joined WCRP, effectively ignoring the continuous and later acts of the County and Slagle. CP 479.

WCRP/Lexington claimed below that Washington's insurance common law did not apply to their policies; instead, they selectively argued that the insurance common law of certain other jurisdictions, notably that of jurisdictions that had adopted a "manifestation" trigger of coverage, a theory specifically rejected by this Court, applied instead. CP 474-81.

(5) The County/Slagle Defend and Settle the Davis/Northrop Case

Prior to trial on August 26, 2013, Davis/Northrop made a policy limits demand upon WCRP, to no avail. CP 730-33. A demand letter to Lexington dated December 27, 2013 met with an equal lack of success. CP 5079-85, 7168-80.

Abandoned by WCRP, the County/Slagle defended the action brought by Davis/Northrop, incurring \$685,952.34 in defense fees, costs and expenses in its vigorous defense of the case brought by Davis/Northrop. CP 359-60. County/Slagle litigated the case through summary judgment, engaging in extensive discovery. CP 594-617. In a lengthy published opinion, the federal district court, the Honorable Robert Bryan, ruled on summary judgment that Davis/Northrop's claims could

proceed to trial, including some claims based solely and only upon post-conviction events caused by the County/Slagle, including the County/Slagle's failure to turn over exculpatory evidence in and after 2009. *Davis v. Clark County, Wash.*, 966 F. Supp.2d 1106 (W.D. Wash. 2013).

The federal court trial before Judge Bryan began on September 17, 2013. CP 606-07. On September 27, 2013, ten days into trial, and the day after Slagle testified in his own defense, the County/Slagle, in consultation with their defense counsel, concluded that a settlement was necessary to protect their interests and avoid a potentially catastrophic judgment against them. CP 360. Written notice of this intent to settle the underlying case was also given to WCRP. CP 360, 5523.

Davis/Northrop and the County/Slagle subsequently entered into a covenant judgment settlement agreement whereby the County/Slagle agreed in a stipulated judgment of \$35 million to pay \$10,500,000 to Davis/Northrop in partial satisfaction of that judgment, and to assign to Davis/Northrop their contractual and extracontractual claims against WCRP and other insurers. CP 360, 497-549.¹³

(6) Proceedings Below

¹³ The federal district court declined to conduct a hearing on the reasonableness of the settlement in accordance with RCW 4.22.060. CP 737-45.

WCRP/Lexington filed the present action for declaratory relief and breach of contract in the Cowlitz County Superior Court on November 4, 2013,¹⁴ but filed their extensive amended complaint at issue here on November 23, 2013. CP 1-239. Davis/Northrop filed an answer and counterclaims asserting claims for breach of contract, as well as separate extracontractual claims for both common law and statutory bad faith and violations of Washington's Insurance Fair Conduct Act ("IFCA") and Consumer Protection Act ("CPA"). CP 301-29.¹⁵

In April 2014, Davis/Northrop filed a motion for summary judgment on WCRP's breach of the duty to defend, and the County/Slagle joined in the motion. CP 330-65. That motion addressed three interrelated issues: (1) whether the claims and policies at issue are governed by Washington common law insurance principles or some other law; (2) whether there was an "occurrence" during the period of any one of the WCRP primary policies so that WCRP/Lexington owed the County/Slagle a defense in the Davis/Northrop action; and (3) whether the

¹⁴ WCRP, Lexington, and American Insurance Company ("ACE"), WCRP's reinsurer, entered into a joint prosecution/defense agreement after the filing of the initial complaint. CP 5934-38.

¹⁵ Davis/Northrop also filed a motion for change of venue in the WCRP action to King or Pierce County; CP 801-08, but that motion was denied. CP 1284-93. Davis/Northrop filed their own declaratory judgment action in the King County Superior Court on November 13, 2013 against WCRP, CP 775-90, but that action was transferred to Cowlitz County by stipulation after the denial of the motion to change venue. CP 820-22.

assignments of claims by the County/Slagle to Davis/Northrop was valid.
Id.

After granting WCRP a lengthy CR 56(f) continuance, CP 1294-97; RP 33-34, and pre-assigning the case, CP 1298-1300; RP 9, and extensive, prolonged wrangling over discovery, RP 158-238,¹⁶ WCRP filed a motion for declaratory judgment seeking a determination that the assignments by the County/Slagle were invalid, CP 4503-35, and Davis/Northrop filed a motion seeking partial summary judgment that the assignments were valid with respect to the claims against WCRP/Lexington. CP 4107-18.

On October 10, 2014, the trial court, the Honorable Marilyn K. Haan, heard argument on the motions and subsequently issued its ruling on November 13, 2014. CP 8041-54. The court focused in that ruling exclusively on the Insurance Code, ignoring any common law good faith duties WCRP might owe to the County/Slagle. CP 8046-47. It reasoned that because WCRP was exempted from the definition of an insurer under the Code, RCW 48.01.050, and because its policies stated they provided

¹⁶ The court largely granted Davis/Northrop's and the County/Slagle's motions to compel. *E.g.*, RP 172, 192, 202, 222-23, 233-34. Disputes over discovery involve literally thousands of pages of the Clerk's Papers, ironically in large part over the duty to defend issue, a question to be resolved from the "eight corners" of the Davis/Northrop federal court complaint. WCRP/Lexington compelled Davis/Northrop to incur hundreds of thousands of dollars in fees on the discovery issues. CP 6730.

“joint self-insurance,” this Court’s common law insurance law principles did not apply. *Id.* The court determined that its rulings as to the County bound Slagle because, as a County employee, Slagle did not have any rights independent of the County. CP 8047. The court also extended this ruling to Lexington on the ground that the Lexington excess policies “follow form” to WCRP’s primary policies. CP 8052-54.¹⁷

In its ruling, the court further addressed the County/Slagle assignment of claims to Davis/Northrop. CP 8047-49. Its decision focused entirely on the terms of the interlocal agreement that created the WCRP in which the County was a participant. CP 8041-43. Based on the purported prohibition against a county’s assignment of rights, claims, or interests arising under that interlocal agreement, it concluded that the assignment by the County/Slagle of their claims against WCRP to Davis/Northrop was invalid, ignoring the fact that none of the assigned claims arose under that interlocal agreement, general Washington law on assignments of claims, and the law on covenant judgment settlements. CP 8049-50. The court entered its formal order on the assignment-related summary judgment motions on December 12, 2014. CP 9836-58.

¹⁷ The trial court never explained precisely what principles would apply to interpret WCRP’s policies and conducted no analysis under those unstated principles, nor did it even articulate what precise remedies, contractual or extracontractual, might be available to risk pool insureds when a risk pool breaches its contractual and other legal duties to its insureds. CP 8041-54.

On November 21, 2014, the trial court heard argument on the duty to defend and summarily concluded that no duty to defend existed because the singular point in time at which the claims against the County/Slagle occurred "was at the time of the arrest, conviction, and incarceration in 1993." RP 299. The court then filed a ruling on November 26 denying motions by the County/Slagle and Davis/Northrop on the duty to defend determining that WCRP had no duty to defend the County or Slagle as a matter of law. CP 9505-08. The trial court again based its conclusion on its determination that Washington's insurance common law did not apply to the policies at issue or the claims made under those policies. CP 9505. While the court determined that the duty to defend must be based on the language of the WCRP "policy and the complaint," it rejected Washington law that a continuous trigger of coverage applied when determining the timing of an occurrence; instead, ignoring the policy language and the deemer clauses in the later WCRP policies, it applied a manifestation trigger of coverage to reduce the occurrence to the single point in 1993 when Davis/Northrop were first arrested, prior to the inception of insurance policies at issue in this case. CP 9507-08. The trial court entered its formal orders on the duty to defend on December 12, 2014. CP 9825-31.

On December 12, 2014, the trial court certified the issues referenced above pursuant to RAP 2.3(b)(4), and stayed further proceedings in the case. CP 9859-61. Davis/Northrop then timely filed their notice of discretionary review, CP 9904-43; Commissioner Narda Pierce granted review by this Court.

D. SUMMARY OF ARGUMENT

Either under the common law or the Insurance Code, properly interpreted, WCRP owed a duty of good faith to the County/Slagle. Washington's well-developed insurance common law principles for interpreting policies and the contractual and extracontractual remedies for WCRP's breach of its duty of good faith to the County/Slagle applied here. That interpretation is entirely consistent with this Court's application of Washington insurance common law principles to risk pool policies in its prior decisions. Moreover, WCRP itself has previously believed it was subject to, and has always applied, that common law for its activities prior to receiving the claims now at issue. The existence of a duty of good faith also comports with sound public policy principles dictating that risk pools are subject to the Code's overarching good faith directives and Washington's insurance common law in order to fully protect governments and non-profit organizations and the hundreds of thousands of their employees and their families insured by such pools.

When Washington's insurance common law is applied in this case, it is clear that WCRP had a duty to defend the County and Slagle. The federal district court complaint filed by Davis/Northrop against them articulated claims falling unambiguously within the policies' insuring agreements. Given this Court's expansive and protective conception of the duty to defend, WCRP breached that duty here.

Once abandoned by WCRP, the County/Slagle had the right to take such steps as were necessary to protect themselves, including the negotiation of a covenant judgment settlement with Davis/Northrop, one feature of which was the assignments of the contractual or extracontractual claims they had against WCRP/Lexington to Davis/Northrop. Such covenant judgment settlements are now a well-recognized feature of Washington's insurance common law. Any prohibitions in WCRP's interlocal agreement on the assignment of rights under that agreement would violate this public policy. Moreover, under long-established Washington assignment law principles, any anti-assignment provision in WCRP's interlocal agreement was either inapplicable or was void as against public policy.

E. ARGUMENT¹⁸

¹⁸ The trial court resolved the issues below on a series of summary judgment motions. This Court reviews orders on summary judgment de novo. *Dowler v. Clover Park School District No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). In so doing,

(1) The Trial Court Erred in Concluding That Washington Insurance Common Law Did Not Apply to Risk Pools

This Court has developed an extensive body of law on the interpretation of insurance policies and on the remedies afforded insureds for the breach of the duty of good faith owed by liability insurers to those insureds. That good faith duty emanates *both* from decisions of this Court *and* from legislative direction. The trial court here erred when it focused *exclusively* on RCW 48.01.050 and held that it exempts risk pools from the independent common law good faith duty imposed on insurers in Washington. RP 8046-47.¹⁹

Washington insurance common law, both as to the interpretation of insurance policies and the contractual and extracontractual remedies of an insured against an insurer, apply here. This is true as to WCRP and

this Court considers the facts and all reasonable inferences from those facts in a light most favorable to Davis/Northrop as the non-moving parties. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The scope of insurance coverage and the construction of language in a policy are pure legal issues that are also reviewed de novo. *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 802, 329 P.3d 59 (2014).

¹⁹ WCRP/Lexington have not been completely candid as to what they believe the ultimate result of their assertion that “contract principles” control the interpretation of risk pool insurance policies will be, much less what specific standard they believe does apply or how the application of that standard results in no duty to defend. At a minimum, they claim that this Court’s common law on the duty to defend, which protects insureds, does not apply. They believe covenant judgment settlements, and even mere assignments of claims, are not available to risk pool insureds because such pools can (and WCRP’s interlocal agreement does) prevent assignments of rights, a core feature of covenant judgment settlements. Seemingly, they will argue that this Court’s law on extracontractual remedies, like coverage by estoppel and other common law bad faith remedies, do not apply to risk pools. The unfairness of such an analysis, particularly to public employees also insured by pools who have no involvement in developing the coverage of risk pool or excess insurer policies, is manifest.

Lexington,²⁰ regardless of whether the basis for the relief is the common law or the Insurance Code. The common law imposed a good faith duty on WCRP/Lexington toward the County/Slagle. Properly interpreted, the Insurance Code did so as well. These are separate duties, arising from discrete sources. The imposition of such duties on WCRP is entirely consistent with the fact that WCRP's policies utilize the terminology of insurance, its governing documents and policies expressly require application of Washington law, it has historically applied Washington's insurance common law in interpreting them, this Court's decisions have applied Washington's insurance common law to risk pools, and there are manifest public policy reasons that support doing so. Each will be discussed in turn.

(a) Washington's Insurance Common Law

When discussing the insurance common law in Washington, its development by this Court has its roots both in a common law good faith duty owed by insurers to their insureds *and* in a general statutory obligation of good faith owed by entities involved in the business of

²⁰ Davis/Northrop referenced WCRP/Lexington together hereafter in this section of their brief, but it is important to note that even though the Lexington excess policies at issue here follow the terms and conditions of WCRP's underlying coverage, there is no doubt that, as a private commercial insurer, Lexington is subject to the overarching common law and Code-based good faith duties to its insureds, the County/Slagle, and Washington's insurance common law for the interpretation of its policies and the remedies afforded such insureds, as this Court has expressly ruled. *See infra*. It enjoys no exemption from RCW 48.01.050's definition of an "insurer" under the Code, for example.

insurance. Washington courts as early as *Burnham v. Commercial Casualty Ins. Co. of Newark, N.J.*, 10 Wn.2d 624, 117 P.2d 644 (1941) recognized that an insurer owed an actionable duty of good faith to an insured. That duty was not based on statute but was rooted in a common law obligation on the insurer's part to settle claims brought against its insured within policy limits. *Id.* at 627-28. The insurer's duty included the duty to properly investigate the facts of the claim against its insured. *Id.* at 631.²¹ Indeed, in *Van Noy v. State Farm Mut. Ins. Co.*, 142 Wn.2d 784, 793, 16 P.3d 374 (2001), this Court firmly established that a liability insurer has common law duties of a quasi-fiduciary nature to an insured.²² An insurer may not put its interests ahead of those of its insured. *Truck Ins. Exch. v. Van Port Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002).

Insurers and those in the business of insurance also owe a separate duty of good faith imposed by the Legislature because the business of

²¹ *Accord, Evans v. Continental Cas. Co.*, 40 Wn.2d 614, 245 P.2d 470 (1952) (recognizing bad faith tort claim); *Murray v. Mossman*, 56 Wn.2d 909, 355 P.2d 985 (1960) (bad faith claim for failure to properly defend claim); *Tyler v. Grange Ins. Ass'n*, 3 Wn. App. 167, 473 P.2d 193 (1970).

²² It is not clear from the trial court's decision or the argument below by WCRP/Lexington if they believe that risk pools have such a quasi-fiduciary duty to their insureds.

insurance is so infused with public interest concerns. RCW 48.01.030 states:²³

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

That both the common law *and* the Insurance Code create an insurer's duty of good faith²⁴ to an insured has been specifically recognized by this Court in *Tank v. State Farm Fire & Cas. Ins. Co.*, 105 Wn.2d 381, 385-87, 715 P.2d 1133 (1986).

Washington's insurance common law applies both to the interpretation of insurance policies and to the contractual and extracontractual remedies available to insureds. The interpretative principles are extensive and are plainly a product of common law and not the Insurance Code. *See, e.g., Tyrrell v. Farmers Ins. Co. of Wash.*, 140

²³ RCW 48.01.030 was enacted as part of the 1947 Insurance Code, but there were earlier versions of that Code. The 1911 Code similarly imposed a duty of good faith on insurers when it defined insurance in Laws of 1911, ch. 49, § 1 and stated that with respect to insurance, the business of apportioning and distributing loss, it "is public in character and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto; shall abstain from deceptive or misleading practices, and shall keep, observe, and practice the principles of law and equity in all matters pertaining to such business."

²⁴ The *Tank* court phrased the good faith duty as follows: "... an insurance company's duty of good faith rises to an even higher level than that of honesty and lawfulness of purpose toward its policyholders: an insurer must deal fairly with an insured, giving equal consideration *in all matters* to the insured's interests." *Id.* at 386 (Court's emphasis).

Wn.2d 129, 133, 994 P.2d 833 (2000).²⁵ Regarding the duty to defend, this Court has developed *extensive* interpretive principles, about which more intensive discussion will be provided *infra*.

When that duty to defend is breached by an insurer, insureds may protect themselves not only by filing breach of contract actions against their insurers, but also by seeking various extracontractual remedies. For example, an insured may file a tort claim for bad faith against its insurer that breaches its duty of good faith. *Murray, supra; Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 485, 78 P.3d 1274 (2003). If an insured is successful in such a claim, the insurer is estopped to deny coverage for claims brought by tort claimants against that insured. *Safeco Ins. Co. of America v. Butler*, 118 Wn.2d 383, 392-94, 823 P.2d 499 (1992); *Truck Ins. Exch.*,

²⁵ Under those interpretive principles, Washington courts evaluate policy language as a question of law. This Court has directed that in construing the language of an insurance policy, the policy should be given a fair, reasonable, and sensible construction as would be given to the contract by the average person purchasing insurance. The policy must be considered as a whole so as to give effect to every clause in it. Where terms are undefined, they must be given their "plain, ordinary, and popular" meaning. In determining this meaning, standard English dictionaries may be used. *Tyrrell*, 140 Wn.2d at 133.

The purpose of insurance is to insure, and courts favor policy construction that results in coverage rather than defeats it. *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68, 659 P.2d 509 (1983). Exclusions in policies are narrowly interpreted, and strictly construed against the insurer. *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 413, 229 P.3d 693 (2010). Any ambiguities in the policy language must be resolved by a court and, if it cannot do so, any ambiguity results in a construction of the policy language favorable to the insured and against the insurer. *Queen City Farms, Inc. v. Central Nat'l Ins. Co.*, 126 Wn.2d 50, 68, 882 P.2d 703 (1994). *See generally*, Thomas V. Harris, *Wash. Insurance Law* (3rd ed. 2010), chap. 6.

147 Wn.2d at 759-60. An insured may file an action under the Consumer Protection Act, RCW 19.86 ("CPA") against the insurer. *Salois v. Mutual of Omaha*, 90 Wn.2d 355, 581 P.2d 1349 (1978); *Indus. Indemnity Co. of the NW v. Kallevig*, 14 Wn.2d 907, 792 P.2d 520 (1990) (single violation of Insurance Commissioner claims handling regulations may constitute CPA violation). More recently, an insured may sue an insurer for claims practices under the Insurance Fair Claims Act. RCW 48.30.015 ("IFCA").²⁶

Further, an insured abandoned by its insurer may also enter into a covenant judgment settlement without any risk that it has violated insurance policy provisions requiring the insured to work with the insurer. Davis/Northrop address covenant judgments specifically *infra*.

In the context of any litigation involving contractual or extracontractual issues between insurers and insureds, Washington's insurance common law also affords insureds special discovery rights against insurers.²⁷ Both WCRP and Lexington have aggressively resisted

²⁶ Under WCRP's/Lexington's argument to the trial court, it appears that no extracontractual remedies of any sort may be afforded insureds like the County/Slagle. The trial court did not clarify this point.

²⁷ In *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, 295 P.3d 239 (2013), for example, this Court stated that courts must "start from the presumption that there is no attorney-client privilege relevant between the insured and the insurer in the claims adjusting process, and that the attorney-client and work product privileges are generally not relevant." *Id.* at 698-99. Thus, even communications involving an attorney

the application of *Cedell* to discovery below. *E.g.*, CP 6821-22, 6894-6907.²⁸

Finally, Washington's insurance common law recognizes a special equitable exception to the American Rule on attorney fees where insureds are compelled to litigate to compel their insurers to fulfill their coverage obligation. *Olympic Steamship Co. v. Centennial Ins. Co.*, 117 Wn.2d 37, 811 P.2d 673 (1991); *McGreevy v. Ore Mut. Ins. Co.*, 128 Wn.2d 26, 904 P.2d 731 (1995). This issue will also be raised by *Davis/Northrop infra*, but it is not clear whether, under the trial court's narrow conception of WCRP/Lexington's duties to their insureds, this critical facet of Washington's insurance common law, designed to compel insurers to fulfill their coverage obligations, applies to risk pools.

This recitation of components of Washington's rich insurance common law was not meant to be exhaustive, but only to highlight the many issues left unaddressed by the trial court's skimpy analysis of WCRP/Lexington's good faith duties to the County/Slagle, Washington's insurance common law, and WCRP/Lexington's less than forthright articulation of what law *does* apply to risk pools and their insureds.

are not privileged or work-product protected when an attorney "engage[s] in the quasi-fiduciary tasks of investigating and evaluating or processing [a] claim." *Id.* at 699.

²⁸ In granting *Davis/Northrop's* motion to compel against WCRP/Lexington, the trial court did not indicate if *Cedell* controls as to a risk pool. CP 9792-9824.

(b) Washington's Insurance Common Law Applies to Risk Pools

(i) The Trial Court Erred in Failing to Discern that WCRP/Lexington Owed a Good Faith Duty to the County/Slagle Arising Out of the Common Law

The trial court's gateway decision on the applicable law erred by focusing solely on statutory duties owed by WCRP/Lexington to the County/Slagle. CP 8046-47. As noted *supra*, WCRP/Lexington owed a common law duty of good faith to the County/Slagle that is entirely unaffected by RCW 48.01.050's putative exclusion of WCRP from the definition of an "insurer" in the Insurance Code.

Insurers in Washington have owed a common law duty of good faith to insureds, apart from the Insurance Code, since at least this Court's decisions in cases like *Burnham*, *Evans*, and *Murray*. In allocating risk and placing insurance coverage, risk pools like WCRP are subject to this common law duty. That duty is a predicate to the application of Washington's insurance common law, both the principles for policy interpretation and the remedies afforded insureds for the breach of that good faith duty. This duty arises out of the quasi-fiduciary relationship of the insurer to the insured, according to *Murray*, *Van Noy*, and *Tyler* that is no different for a risk pool than a commercial insurance company. WCRP had a clear obligation not to elevate its own interests above those of the

County/Slagle when the latter were faced with the Davis/Northrop litigation.²⁹

The Legislature did not choose to override the common law duty of good faith anywhere in the 1911 or 1947 Insurance Code. *See infra*. The Legislature is presumed to be aware of the common law in enacting statutes. *City of Federal Way v. Koenig*, 167 Wn.2d 341, 351, 217 P.3d 1172 (2009). In the absence of preemptive language or a contrary legislative intent expressed in a statute, common law and statutory remedies may co-exist. As this Court stated in *Potter v. Wash. State Patrol*, 165 Wn.2d 67, 76-77, 196 P.3d 691 (2008), while the Legislature may supersede or modify the common law, courts "are hesitant to recognize an abrogation or derogation from the common law absent clear evidence of the legislature's intent to deviate from the common law." In *Potter*, the Court found that the statutory process for redeeming an impounded vehicle was not exclusive in the absence of any legislative exclusivity intent, and permitted a common law conversion action against the impounding authority. *Accord, State v. Kurtz*, 178 Wn.2d 466, 309 P.3d 472 (2013) (medical marijuana statute did not abrogate common law medical necessity defense). Specifically, *nowhere* in RCW 48.62 did the

²⁹ WCRP's detailed bylaws and claims handling protocol recognize a duty to its county members in the handling of claims against those members and in the decisions pertaining to coverage. CP 5820-21, 5744-60.

Legislature exempt risk pools from the general good faith duty owed by those in the business of insurance. Thus, the common law and Code-based good faith duties apply here, as this Court plainly recognized in *Tank* and the other cases discussed above.

The trial court erred in failing to recognize the common law good faith duty owed by WCRP/Lexington to the County/Slagle.

(ii) Under a Proper Interpretation of the Insurance Code, WCRP/Lexington Owed a Duty of Good Faith to the County/Slagle, Notwithstanding RCW 48.01.050

The trial court erred in concluding that RCW 48.01.050 excluded WCRP from the entirety of the Code, CP 8046-47, 8048, particularly the good faith duty of RCW 48.01.030. The trial court misconstrued the scope of RCW 48.01.050 because although WCRP is not an "insurer" within the meaning of the Code's general provisions, it is, nevertheless, in the business of insurance and subject to the general good faith duty required of entities in such business under RCW 48.01.030.

WCRP asserted below that it is not an "insurer" within the meaning of RCW 48.01.050 (*see Appendix*),³⁰ but rather it offered "self-

³⁰ This Court is confronted here initially with a question of statutory interpretation. This Court's principles for statutory interpretation have been articulated in a series of cases. The primary goal of statutory interpretation is to carry out legislative intent. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807, 16 P.3d 583 (2001). In Washington, this analysis begins by looking at the words of the statute. "If a statute is plain and unambiguous, its meaning must be primarily derived from the language itself."

insurance" to its members, CP 7470-78, and the trial court adopted that view. CP 8046-47. But WCRP's assertion ignores its actual relationship to its county members and their employees; WCRP is in the business of insurance.

First, the trial court mischaracterized WCRP as a "self-insurer." WCRP's representation below that its primary policies constitute "self-insurance," is simply false. "Insurance" and "self-insurance" are defined terms under both the common law and the Insurance Code in Washington. RCW 48.01.040 ("insurance" means "a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies"); RCW 48.62.021(6) ("self-insurance" means a "formal

Id. Courts look to the statute as a whole, giving effect to all of its language. *Dot Foods, Inc. v. Wash. Dep't of Revenue*, 166 Wn.2d 912, 919, 215 P.3d 185 (2009). Courts must look to what the Legislature said in the statute and related statutes to determine if the Legislature's intent is plain. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If the language of the statute is plain, that ends the courts' role. *Cerillo v. Esparza*, 158 Wn.2d 194, 205-06, 142 P.3d 155 (2006).

If, however, the language of the statute is ambiguous, courts must then construe the statutory language. A statute is ambiguous if it is subject to two or more reasonable interpretations. *State v. McGee*, 122 Wn.2d 783, 864 P.2d 912 (1993). Merely because two interpretations of a statute are conceivable, that does not render a statute ambiguous. *Tesoro Refining & Marketing Co. v. State, Dep't of Revenue*, 164 Wn.2d 310, 318, 190 P.3d 28 (2008).

Courts do not read language into a statute even if they believe the Legislature *might* have intended it. *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

As required by this Court's direction in *Campbell & Gwinn*, 146 Wn.2d at 9, the trial court should have analyzed "related statutes or other provisions of the same act in which the provision is found," i.e. the context of the Insurance Code, before launching into its construction of RCW 48.01.050. It did not do so.

program of advance funding and management of entity financial exposure to a risk of loss that is not transferred through the purchase of an insurance policy or contract."); *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 696-97, 186 P.3d 1188 (2008), *review denied*, 165 Wn.2d 1035 (2009) ("insurance involves risk shifting, while self-insurance involves risk retention").

Here, the County had a deductible of \$500,000.³¹ It then transferred the risk of loss to WCRP through the purchase of its insurance policies. 100% of WCRP's risk for County/Slagle, above the County's deductible, was then transferred by re-insurance and excess insurance policies to AIG, the AIG-owned Lexington, and other commercial insurers. CP 5941. To be precise, WCRP is not "self-insured" *for a single dollar* of the loss at issue in this case. It was transferring risk, just as any insurer would do.

WCRP generally provides insurance to its members, as it effectively *conceded* when it noted below that RCW 48.62, a part of the Insurance Code, allows it to "jointly self-insure risks, jointly purchase insurance or re-insurance, and jointly contract for risk management,

³¹ It is easy to confuse a deductible with self-insurance. A deductible indicates the amount of risk retained by the insured, and the insurance policy shifts the remaining risk of any loss above the deductible to the insuring entity. *Averill v. Farmers Ins. Co. of Wash.*, 155 Wn. App. 106, 114, 229 P.3d 830, *review denied*, 169 Wn.2d 1017 (2010).

claims and administrative services.” CP 20, 7459.³² WCRP, in fact, solicits insurance from both counties and commercial insurers, negotiates commercial insurance policies, and executes and binds insurance contracts with these commercial insurers on behalf of its members; its staff then engages in claims handling including making coverage decisions, working with re-insurers and excess insurers, attending mediations, and deciding on settlement and trial of cases. CP 5420-49, 5844-60. WCRP itself believed that it was providing insurance to its member counties. Its annual reports to its members described its "Liability Insurance Program," CP 5427, 5432, 5438, 5444, 5449, and it described its policies issued to members as late as 2010 as "liability insuring agreements." CP 5498. In fact, when it sought State Risk Manager approval for its creation in 1988, WCRP described itself as "a joint insurance program." CP 7528.

This lengthy recitation of WCRP's activities makes clear that WCRP was in the business of insurance as discussed in RCW 48.01.030 — allocating risk, buying coverage, handling claims, just to name a few. In doing so, it was subject to the good faith imperative of RCW 48.01.030.

³² Here, the County purchased insurance through WCRP's "third party liability insurance program" and WCRP, in turn, purchased liability insurance coverage for the County, as it did for its other member counties. CP 5451-52, 5505-07; *see generally*, CP 5420-49 (WCRP annual reports).

Moreover, missed by the trial court is the fact that the Legislature never intended to exempt risk pools from RCW 48.01.030. The statutory authority to create pools like WCRP is found in the Insurance Code itself.³³ *Nothing* in RCW 48.01.050 or RCW 48.62 expressed a legislative intent to exempt risk pools from the overarching good faith policy of RCW 48.01.030 or Washington's insurance common law.³⁴ The Legislature is presumed to be aware of the "existing legal framework" when it enacts a new statute. *Maziar v. Wash. State Dep't of Corrections*, 183 Wn.2d 84, 89, 349 P.3d 826 (2015). Thus, in enacting RCW 48.62,

³³ The Legislature stated:

This chapter is 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.

The 2004 Legislature enacted RCW 48.62.036, which authorizes nonprofit corporations to create risk pools. In so doing, the Legislature expressed its intent regarding such pools, mirroring the language of RCW 48.01.030, and once again recognizing that risk pools are in the business of insurance:

The legislature finds that in order to sustain the financial viability of nonprofit organizations, they should be provided with *alternative options for insuring against risks*. The legislature further finds that *local government entities and nonprofit organizations share the common goal of providing services beneficial to the public interest*.

(emphasis added). Laws of 2004, ch. 255, § 1.

³⁴ RCW 48.62.031 was enacted in 2005. Nowhere in the legislative history materials is there even a hint of legislative intent to provide such an exemption. *See, e.g.*, Final Bill Report HB 1356 (2005).

the Legislature was aware of RCW 48.01.030 and expressly chose not to exempt risk pools from its direction.³⁵

Davis/Northrop anticipate that WCRP will argue the language of RCW 48.01.050 exempting local governments that jointly self-insure or self-fund from the definition of an "insurer" under the Code also exempts it from RCW 48.01.030. WCRP is wrong.

An "insurer" is specifically defined in RCW 48.01.050 itself as "every person engaged in the business of making contracts of insurance..." The status of an "insurer" under Title 48 RCW is largely financial in nature. An insurer must obtain a certificate to do business in Washington, meeting solvency requirements. RCW 48.50.030. An insurer is subject to Washington's premium tax. RCW 48.14.020. Moreover, the Insurance Commissioner has the authority to examine the records and assure the financial solvency of insurers. RCW 48.03.010. WCRP, regulated under RCW 48.62, is appropriately exempted from those financial requirements.

³⁵ Davis/Northrop anticipate that WCRP may contend its authority derives from its interlocal agreement, but that argument makes little sense. RCW 48.62, not RCW 39.34 pertaining to the interlocal agreements, is the source of WCRP's authority. Otherwise, RCW 48.62 would be *unnecessary*; risk pools could exist simply by contract without any obligation to meet the regulatory requirements set out in RCW 48.62. Obviously, that is not the case.

But while WCRP is not an insurer for purposes of the Code's extensive certification, financial solvency requirements, policy marketing standards, or taxation,³⁶ it is still engaged in the business of insurance and is subject to RCW 48.01.030. WCRP's activities actively affect the *public* interest.³⁷

RCW 48.01.030 applies broadly. Indeed, the Code itself makes clear that its application goes beyond "insurers" to any *person* involved in the business of insurance:³⁸ "All insurance and insurance transactions in this state, or affecting subjects located wholly or in party or to be performed in this state, and all persons having to do therewith are

³⁶ In practical application, regulation of WCRP by the Department of Enterprise Services ("DES") is largely financial in nature, as the statutory provisions governing plan approval document. *See, e.g.*, RCW 48.62.071, RCW 48.62.091, RCW 48.62.111, RCW 48.62.141. Indeed, in a key provision, RCW 48.62.151 exempts pools from the State's insurance premium and B&O taxes. WCRP annual reports to the Risk Manager confirm that DES regulation of pools is financially-focused. CP 8865-8968. The fact that DES's Risk Manager only assesses WCRP's financial viability lends credence to Davis/Northrop's argument that RCW 48.01.050 is confined solely to exempting risk pools from the financial responsibilities of commercial insurers found in the Insurance Code. This is also entirely consistent with the specific regulatory authority of the Risk Manager over risk pools set forth in WAC 200-100 and WAC 200-110.

³⁷ WCRP is regulated by DES through the state risk manager (RCW 48.62.071; RCW 48.62.091), and is subject to audit by the State Auditor. RCW 48.62.091. Every year, WCRP reports extensively to the Auditor on its financial affairs. CP 8865-8968. WCRP is answerable to County elected officials. WCRP reports annually to its members, the Risk Manager, and the Insurance Commissioner. CP 5451. WCRP is "in the business of insurance" under RCW 48.01.030 as its activities include obtaining or purchasing insurance and insurance claims handling. It is created and regulated under RCW 48.62, *a part of the Insurance Code*.

³⁸ RCW 48.01.030 even applies to independent adjusters, allowing a bad faith action to be brought by an insured against such an adjuster acting as a *representative* of the insurer. *Lease Crutcher Lewis LLC v. National Union Fire Ins. Co. of Pittsburg, PA*, 2009 WL 3444762 (W.D. Wash. 2009) at *2.

governed by this code.” RCW 48.01.020.³⁹ RCW 48.01.060 defines multiple insurance transactions in which WCRP engaged.⁴⁰

In sum, RCW 48.01.050 does not exempt WCRP from the interpretative principles or remedies afforded insureds under Washington’s insurance common law, and the trial court erred in so holding.

(iii) This Court Has Applied Washington’s Insurance Common Law to Risk Pools Like WCRP

The trial court here acknowledged that this Court has applied Washington insurance common law interpretive principles to risk pools or their excess insurers, but it did not effectively explain why this Court’s decisions on this issue do not control; it did not even address similar Court of Appeals precedents. CP 8048.

Whether arising under a risk pool’s common law duty of good faith or its Insurance Code-based good faith duty, this Court has applied Washington’s insurance common law to risk pools like the WCRP. For example, in *Wash. Public Utility Districts’ Utilities System v. Public*

³⁹ WCRP is a “person” within the broad statutory definition of that term. RCW 48.01.070. As the term includes “insurer,” a person under RCW 48.01.020 is intended by the Legislature to capture a broader array of individuals and organizations.

⁴⁰ WCRP also provides claims handling services including making coverage decisions that ultimately apply to the commercial insurance carriers who provide the actual coverage at issue in this case.

Utility District No. 1 of Clallam County, 112 Wn.2d 1, 771 P.2d 701 (1989), this Court determined that a risk pool could be created by PUDs under a predecessor statute to RCW 48.62.031. The pool there had a large deductible and purchased excess liability coverage. *Id.* at 4 n.1. This Court upheld the authority of the districts to enter into the risk pool agreement and upheld coverage for a PUD treasurer sued by the PUD.

WCRP has attempted to distinguish the PUD case by contending that this Court was actually only interpreting the PUDs' commercial excess insurance when the Court cited to insurance cases, referred to insurance treatises, and relied on the longstanding insurance law principle that any ambiguities in an insurance policy must be construed in favor of coverage. *Id.* at 10-11, 16-17. This is simply a misreading of this Court's decision. A fair reading of the case indicates that this Court was addressing both the underlying pooling agreement of the PUDs, as well as the excess insurance coverage when it discussed "Coverage under the Agreement" in the decision at 10-18.⁴¹

⁴¹ There is little doubt that the Court has applied Washington's insurance common law to excess carriers who insure Washington risk pools. *E.g.*, *Transcontinental Ins. Co. v. Wash. Pub. Utils. Dist. Util. Sys.*, 111 Wn.2d 452, 467-70, 760 P.2d 337 (1988); *Public Utility Dist. No. 1 of Klickitat County v. Int'l Ins. Co.*, 124 Wn.2d 789, 800-01, 881 P.2d 1020 (1994). As excess policies ordinarily "follow the form" of the underlying policies, the Court was, in effect, applying Washington insurance common law principles to the underlying risk pool policies. It is difficult to understand how Lexington can argue that it is exempted from the whole of Washington's insurance law merely because it provides coverage to a risk pool like WCRP.

The Court of Appeals has similarly common law insurance principles to insurance policies issued by risk pools, *including the very policies issued by WCRP. Colby v. Yakima County*, 133 Wn. App. 386, 391-93, 136 P.3d 131 (2006) and those issued by the Washington cities risk pool. *City of Okanogan v. Cities Ins. Ass'n of Washington*, 72 Wn. App. 697, 865 P.2d 576 (1994). The courts in those cases had no trouble interpreting risk pool policies as courts would interpret insurance policies.

Thus, Washington courts have routinely construed risk pool policies or policies issued by risk pool-associated commercial insurers in accordance with Washington's insurance common law. WCRP has not been able to identify a single published Washington case holding otherwise. This Court should not hesitate to again apply Washington's insurance common law to a risk pool liability policy.

(iv) WCRP's Own Policies Utilize Insurance Terminology and WCRP Has Interpreted Them in Accordance with Washington's Insurance Common Law

The contention of the County/Slagle and Davis/Northrop that Washington's insurance common law applies to WCRP because it owed a duty of good faith to the County/Slagle, whether based on common law *or* the Code, is supported by the language of WCRP's policies at issue here, as well as WCRP's own past practices, utilizing Washington insurance

common law principles to interpret its policies. WCRP's policies use *traditional liability insurance terminology*. In fact, WCRP issued what it described as certificates of liability insurance to its members like the County and their employees, who it described as "named insureds." CP 5497. Those WCRP policies have a "declarations" page, an "insuring agreement" for a "policy period," "limits," "coverages," "exclusions," and "deductibles," all well-known terms in the liability insurance setting; they have a standard duty to defend provision and a standard definition of "occurrence" found in occurrence-based insurance policies. CP 364-73.

WCRP's own coverage counsel analyzed its policies under Washington insurance common law principles. CP 10538-56.⁴² For example, WCRP's senior claims manager, Susan Looker, specifically testified in her deposition that for 25 years prior to the present case WCRP coverage decisions applied interpretive principles derived from Washington's insurance common law. CP 8314-83. Moreover, *numerous* communications by WCRP and its key staff applied Washington insurance common law principles in analyzing coverage questions.⁴³

⁴² In a prior dispute involving a claim that WCRP had denied, the County argued that WCRP's policies are interpreted under Washington insurance law principles. CP 8415-25. WCRP also set forth these insurance principles in a newsletter to its membership. CP 8526-31.

⁴³ WCRP's Annual reports reference its "Liability Insurance Program." CP 8230-60. In fact, next to the charts pertaining to the layers of coverage afforded its members, WCRP states: "The Washington Counties Risk Pool provided its member

WCRP's position on the application of Washington's insurance common law is disingenuous in light of the foregoing; it should be estopped to deny the applicability of Washington's insurance common law here on equitable grounds. *Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 887, 154 P.3d 891 (2007) (Court found elements of equitable estoppel present and barred agency from arguing its post-bid interpretation of public works contract that contradicted its pre-bid interpretation).

(v) Public Policy Supports the Application of Washington's Insurance Common Law to Risk Pools

Finally, unaddressed by the trial court, important public policy principles further reinforce the argument that WCRP owed a good faith duty, both common law and Code-based, to the County/Slagle as its insureds, entitling them to the protection of Washington's insurance

counties with *liability insurance limits* of \$20 (option of \$25) million per occurrence." *E.g.*, CP 5432 (emphasis added). WCRP sent out an annual memorandum to members that stated that its policy was "an 'occurrence' policy, and the document gives your county valuable contract rights for many years in the future. It should be filed in a safe place with the rest of your Risk Pool and insurance policies." CP 8286-95. The County was directed to place the policy under the "Insurance Policies" tab of the WCRP Board of Directors Reference Manual. *Id.* WCRP maintained a web-site where members could locate their insurance documents including liability policies. CP 8296. WCRP issued certificates of liability insurance. CP 8301. WCRP referred to itself as an insurance program and a third party liability insurance program in its marketing materials. CP 8302-13. Specifically, with regard to representations made to member counties, WCRP referenced itself as an insurer and indicated that a third party claim was contractually transferred to WCRP (insurer). CP 8312. WCRP never represented to its members that the policies they were purchasing and for which they were paying premiums would be subject to other than Washington insurance law principles. CP 8365-66.

common law in interpreting WCRP's liability insurance policies and the remedies Washington's insurance common law provides insureds.

Initially, it would be inequitable to deny insureds like the County/Slagle the protection of Washington's insurance common law where the WCRP itself never risked a cent on coverage. 100% of WCRP's risk, beyond the County's deductible, was either reinsured or the subject of excess insurance from private commercial insurers like Lexington, owned by insurance conglomerate AIG. *See* Appendix (chart). There is simply no reason to craft vague new principles governing the relationship between WCRP and its insureds here when, in reality, private commercial insurers subject to Washington's insurance common law fully covered the risk; WCRP was essentially nothing more than a front for private insurers that are plainly subject to Washington's insurance common law.⁴⁴

From a public policy standpoint, Washington's insurance common law should apply to the relationship between risk pools and their government and public employee insureds.⁴⁵ Risk pools cover a variety

⁴⁴ In fact, WCRP's re-insurance policies are described as insurance policies, CP 3867, are governed by Washington law, CP 3874, and even cover it for extracontractual claims such as common law bad faith. CP 3871-72. These policies themselves, negotiated by WCRP, are evidence that WCRP was fully aware that it was subject to Washington insurance common law, including its extracontractual remedies.

⁴⁵ Risk pools authorized by RCW 48.62.031 are common, providing liability coverage to most local governments in Washington, including cities, counties, public

of governments and non-profit organizations in Washington and *hundreds of thousands* of their employees and their families for conduct in furtherance of that public employment. Those governments and non-profits should not endure the fiscal uncertainty occasioned by the vague contract principles WCRP/Lexington persuaded the trial court to employ for interpreting their insuring relationship.⁴⁶ More critically, public employees and non-profit employees and their families should be fully protected by Washington insurance common law principles when providing vital public services.

The trial court here erred in concluding that Washington's traditional insurance common law principles did not apply to WCRP. That decision infected its later decision on WCRP/Lexington's duty to defend the County/Slagle and their right to enter into a covenant judgment settlement, assigning their contractual and extracontractual claims against WCRP/Lexington to Davis/Northrop.

(2) The Trial Court Erred in Concluding That the WCRP Did Not Owe a Duty to Defend the County/Slagle

utility districts, and school districts, to name only a few, along with thousands of their employees. There are presently 14 municipal risk pools in Washington, according to the Insurance Commissioner. The school district pool, for example, is the subject of AGO No. 1991 No. 19. RCW 48.62.036 also allows non-profit groups to pool for self-insurance and to jointly obtain liability insurance coverage. There is even authority under RCW 48.64 for certain housing entities to establish a risk pool.

⁴⁶ Even under general contract law, Washington courts have recognized an implied covenant of good faith that may be actionable. *Rekhter v. State, Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 323 P.3d 1036 (2014).

One of the key aspects of Washington's insurance common law is the body of interpretive principles this Court has developed to fully implement a broad insurer duty to provide a defense to their insureds when they are sued. The trial court erroneously determined that WCRP did not owe the County/Slagle a defense of the Davis/Northrop federal court claims. CP 9507-08. As noted *supra*, WCRP repeatedly denied the County or Slagle a defense from the Davis/Northrop federal court litigation, exposing those insureds to extraordinarily serious risk. The trial court erred.

(a) The Duty to Defend Under Washington Law

This Court's body of law on an insurer's duty to defend is well-developed in numerous decisions and powerfully favors insureds. The duty to defend is a primary benefit of an insurance contract in Washington that is often "of greater benefit to the insured than indemnity." Critically, the duty to defend is far broader than the insurer's duty to indemnify. *Truck Ins. Exch.*, 147 Wn.2d at 765; *American Best Food*, 168 Wn.2d at 404.⁴⁷ An insurer must act in a "prompt and timely" manner to defend its insured. *Truck Ins. Exch.*, 147 Wn.2d at 765.

⁴⁷ In *American Best Food*, for example, despite Washington authority indicating the insured had no coverage, the fact of a single Texas federal court decision to the contrary was sufficient to trigger the duty to defend. *Id.* at 403, 408. Here, WCRP acknowledged in its letter denying coverage that the law was unsettled when it stated that

As this Court reaffirmed in *Expedia*, 180 Wn.2d at 802, "the duty to defend is triggered if the insurance policy *conceivably* covers allegations in the complaint." (emphasis added). An insurer must give the insured the "benefit of the doubt" on a defense and must defend the insured until it is *clear* that a claim is not covered under the policy. *Id.* at 803. An insurer may not rely on its own interpretation of the law to justify the denial of a defense to an insured. *Woo v. Fireman's Fund Insurance Co.*, 161 Wn.2d 43, 60, 164 P.3d 454 (2007); *American Best Food*, 168 Wn.2d at 412. Simply stated from a practical standpoint, an insured that purchases insurance coverage, including an insurer's duty to defend it, should not be put in the unenviable (and potentially prejudicial) position of being forced to prove the case against it in order to secure from the insurer the defense it was contractually obligated to provide it.⁴⁸

Rather than abandoning an insured, the usual course now for an insurer like WCRP is to defend an insured under a reservation of rights:

[i]f the insurer is unsure of its obligation to defend in a given instance, it may defend under a reservation of rights while seeking a declaratory judgment that it has no duty to

it is "not necessarily subject to the rules governing insurance policy interpretation which are deliberately slanted in favor of finding coverage." CP 474. However, it ignored its obligation under *American Best Food*, gave itself the benefit of the doubt, and denied coverage by simply applying insurance law from other jurisdictions that has already been rejected in Washington. *Id.*

⁴⁸ WCRP's senior claims manager, Susan Looker, testified that she applied all of these principles when making claims decision under WCRP policies. CP 8366-71.

defend. A reservation of rights is a means by which the insurer avoids breaching its duty to defend while seeking to avoid waiver and estoppel. “When that course of action is taken, the insured receives the defense promised and, if coverage is found not to exist, the insurer will not be obligated to pay.”

Truck Ins. Exch., 147 Wn.2d at 761 (citation omitted) (quoting *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 563 n.3, 951 P.2d 1124 (1998)).⁴⁹

The breach of the duty to defend may be deemed unreasonable and constitute bad faith *as a matter of law*. *American Best Food*, 168 Wn.2d at 413.

Here, the Davis/Northrop claims against the County/Slagle triggered a duty to defend them under the WCRP/Lexington policies, and WCRP breached this duty and did so in bad faith as a matter of law.

(b) Washington Law Recognizes a Continuous Trigger of Coverage

Because the duty to defend is determined from the allegations in the complaint, liberally construed, *Woo*, 161 Wn.2d at 53,⁵⁰ the central question in this case that must first be analyzed in addressing WCRP’s

⁴⁹ WCRP/Lexington did not defend the County or Slagle under a reservation of rights here, putting their interests ahead of their insureds in violation of a “cornerstone of insurance law.” *Expedia*, 180 Wn.2d at 803.

⁵⁰ There are only two exceptions to the rule that the complaint’s allegations control the duty to defend and both favor the insured – if the coverage is not clear from the complaint, but coverage might exist, the insurer must investigate and give the insured the benefit of any doubts; facts outside the complaint may be considered if allegations in the complaint conflict with facts known to the insurer or are ambiguous and then such facts may be used to trigger coverage, but not deny it. *Expedia*, 180 Wn.2d at 803-04.

duty to defend the County/Slagle is whether the claims Davis/Northrop brought against the County/Slagle in the federal action triggered coverage under the WCRP policies. They did, and WCRP did not argue to the contrary below.

As noted *supra*, the plain language of the allegations in the Davis/Northrop federal court complaint asserted both continuous events that happened post-conviction and during the periods of all the policies, as well as discrete events that occurred post-conviction and during the periods of several of the policies. For example, Davis/Northrop pleaded that the County and Slagle continuously breached their ongoing legal and constitutional duties and obligations by failing to disclose or otherwise come forward with certain exculpatory evidence and information in every year of Davis/Northrop's nearly two-decade ordeal, including in "2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010." CP 155-56, 168-69. As noted *supra*, there is even a section of the pleading entitled "Ongoing Unlawful and Unconstitutional Conduct" in bold and capitalized letters. CP 167-69. Moreover, Davis/Northrop asserted a claim for negligent training, supervision and retention, and a claim for negligence, seeking to hold the County/Slagle liable for these allegations of post-conviction events. CP 171-73.

The Davis/Northrop federal court complaint also provided very specific allegations recounting a series of events by the County or Slagle that extended through Davis/Northrop's numerous post-conviction efforts to prove their innocence. In fact, the very first allegation made is that the County/Slagle failed "to provide exculpatory evidence during the course of the investigation, trial, seventeen-year imprisonment, including their various post-conviction efforts to secure their release, and even after their release..." CP 153-54. With respect to separate and discrete events, the complaint specifically alleged breach of legal and constitutional duties and obligations and other misconduct by the County or Slagle at various times between 2002 and 2010, including:

- The destruction of exculpatory DNA evidence in 2006 or 2007 by the County, which the Court had ordered tested only months before, and which would have proved Davis and Northrop's innocence. CP 168;
- The 2004 request by Davis and Northrop for previously unavailable DNA testing, which the County opposed and refused to agree to, thus "ratifying the unconstitutional conduct of Detective Slagle [and his] continued failure to provide exculpatory evidence." CP 167-68;
- The numerous complaints, investigations and reprimands against Slagle in the years following Davis and Northrop's imprisonment, including those on "September 4, 2004; March 26, 2005; May 10, 2005; and March 8, 2006" as well as a "November 19, 2004 [] psychological evaluation" unfit for duty, all of which are alleged to have put the County on notice of the high

probability that undisclosed exculpatory evidence existed and that constitutional and other violations of Davis and Northrop's rights was occurring. CP 159.

The trial court accepted WCRP's contention that all Davis/Northrop allegations in their complaint must be deemed to have occurred in 1993 when they were wrongfully convicted. CP 9507-08; RP 299.⁵¹ But this position flies in the face of the fact that under Washington law there was no single triggering event and the deemer clauses in the later WCRP policies recognized the last date of any wrongful conduct by the County/Slagle as key.

There is no Washington authority supporting WCRP/Lexington's argument confining claims like those of Davis/Northrop to a single triggering event.⁵² Rather, because their tort claims included discrete and

⁵¹ Lexington argued to the trial court that it had no duty to defend the County or Slagle because its coverage was a "following-form policy," following the terms of WCRP's policies. RP 110.

⁵² Indeed, even under WCRP/Lexington's analysis of the triggering of coverage that seemingly equates the accrual of a cause of action with the triggering of coverage, the trial court erred. A claim in Washington accrues generally only when the claimant has the ability to apply to the courts for relief. *1000 Virginia Ltd. P'ship v. Vertreco Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006). In some instances, the harshness of this rule is ameliorated by applying the discovery rule. See, e.g., medical negligence, *Ruth v. Dight*, 75 Wn.2d 660, 453 P.2d 631 (1969); exposure to harmful pharmaceuticals, *Green v. A.P.C.*, 136 Wn.2d 87, 95, 960 P.2d 912 (1998); product liability claims, *North Coast Air Services Ltd. v. Grumman Corp.*, 111 Wn.2d 315, 759 P.2d 405 (1988); or exposure to toxic substances like asbestos with a long latency period, *White v. Johns Manville Corp.*, 103 Wn.2d 344, 693 P.2d 687 (1985); that prevent the claimant from appreciating the existence of harm or its casual connection to the defendant's wrongful act. In *1000 Virginia*, this Court applied the discovery rule to breach of a construction contract where latent defects were alleged.

specific allegations of misconduct as well as continuing misconduct during the 2002-2010 policy periods, their policies were *continuously* triggered. Washington law has long held that every policy in effect during any alleged ongoing events or injuries is ordinarily triggered regardless of when these events or injuries first began.⁵³ In the specific context of a

Thus, the trial court plainly erred under the WCRP/Lexington analysis in its treatment of Davis/Northrop's federal claim. Any claim under 42 U.S.C. § 1983 for wrongful conviction or incarceration accrues *only* upon the vacation of the conviction. *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L.Ed.2d 383 (1994). *See also*, *American Safety Cas. Ins. Co. v. City of Waukegan, Ill.*, 678 F.3d 475, 478-80 (7th Cir. 2012) (state wrongful conviction theories); *Bradford v. Scherschligt*, ___ F.3d ___, 2015 WL 5637534 (9th Cir. 2015) (reverses district court determination that § 1983 claim by wrongfully convicted/incarcerated man was time-barred; claim accrued up vacatur of conviction, not acquittal on retrial). Thus, the claim brought by Davis/Northrop under 42 U.S.C. § 1983 was *clearly triggered within the policy period of WCRP's 2010 policy issued to the County/Slagle as they were exonerated and released in 2010.*

Further, as to Davis/Northrop's various state court claims, again it is apparent the trial court plainly erred. The federal district court here ruled that most of Davis/Northrop's state law post-conviction claims against the County/Slagle *were not time-barred*, *Davis*, 966 F. Supp.2d at 1139, and WCRP/Lexington are bound by that decision where WCRP failed to defend the County/Slagle. An insurer is not only estopped to deny coverage when it wrongfully denies the insured a defense, "the insurer is bound by the decision of the trier of fact regarding issues necessarily decided in the litigation." 147 Wn.2d at 759. While this ordinarily means the amount of the reasonable settlement, the principle applied with equal force to a decision like when a claim accrues.

Davis/Northrop stated viable claims against the County/Slagle and WCRP/Lexington were obligated to provide the County/Slagle a defense against them, as well as indemnification for any sums they might be obligated to pay for them.

⁵³ *See Gruol Construction Co. v. Insurance Co. of North America*, 11 Wn. App. 632, 636, 524 P.2d 427, *review denied*, 84 Wn.2d 1014 (1974) ("... the resulting damage was continuous; coverage was properly imposed under [all the policies in effect during the entire process] even though the initial negligent act (the defective backfilling) took place within the period of Safeco's policy coverage."). *See also*, *American Nat'l Fire Ins. Co. v. B & L Trucking & Constr. Co.*, 134 Wn.2d 413, 951 P.2d 250 (1998) ("All insurers providing coverage during any portion of the total time period of the continuing damage were held liable for the total amount of the continuing property damage."); *Certain Underwriters at Lloyd's v. Valiant Ins. Co.*, 155 Wn. App. 469, 475, 229 P.3d 930 (2010) (noting that under Washington law "an 'occurrence' can be a continuing condition or

risk pool, this Court in *Transcontinental Ins. Co.*, 111 Wn.2d at 469, *rejected* the "trigger of coverage theory" actually applied here by the trial court. ("[The insurer's] argument that coverage is triggered at the time injuries are first manifested was expressly rejected by the court ... as unpersuasive and inconsistent with Washington case law.").⁵⁴

As further error, the trial court did not seriously address the deemer clauses in the later WCRP policies that treated continuous wrongful acts "to have taken place during the last policy period in which any part" of such continuous acts occurred. CP 397. Where the County/Slagle's continuing conduct resulted in the ongoing, unconstitutional incarceration and humiliation of Davis/Northrop until 2010, there can be little question but that WCRP's denial of a duty to defend the County/Slagle and WCRP/Lexington's refusal to indemnify them was plain error.

In sum, WCRP breached its duty to defend the County or Slagle. The trial court erred in applying a first manifestation concept regarding the

process; it need not be a single, isolated event"); *In re Feature Realty Litigation, supra* (City was sued for failing to take any action over a period of years with respect to a proposed plat amendment needed for the development of a subdivision; court rejected insurer's argument that all related acts should be deemed to occur at the time that the first such related act occurred). In *City of Okanogan, supra*, a case involving the cities risk pool, Division III noted that the continuous trigger of coverage principle applies in Washington. 72 Wn. App. at 702-03.

⁵⁴ WCRP's own coverage counsel recognized and argued for such a continuous trigger position in various coverage letters for WCRP in other cases. CP 10538-56, indicating forcefully that WCRP crafted its present position situationally for this case.

triggering of coverage, unsupported by Washington law or WCRP's own policies.

(3) The Trial Court Erred in Concluding That the County/Slagle Were Barred from Assigning Their Claims to Davis/Northrop

The trial court improperly concluded that the WCRP interlocal agreement barred any assignment of claims against WCRP by the County to Davis/Northrop. CP 8047. In so concluding, the trial court misunderstood Washington law on covenant judgment settlements and on assignments generally.

(a) Washington Law on Covenant Judgment Settlements

Where an insurer has breached the duty to defend, this Court's insurance common law provides that an insured may, in light of the insurer's bad faith abandonment of its duties toward the insured, protect itself. Such protection from liability includes the negotiation of a covenant judgment settlement with the tort claimant, including an assignment of the insured's claims, both contractual and extracontractual, against the insurer to the tort claimant. Stated another way, once the insurer abandons the insured, the insurer *forfeits* any ability to complain about the fact of such a settlement or its amount unless its amount is the product of fraud or collusion:

An insurer refusing to defend exposes its insured to business failure and bankruptcy. An insurer faced with claims exceeding its policy limits should not be permitted to do nothing in the hope that they insured will go out of business and the claims simply go away. To limit an insurer's liability to its indemnity limits would only reward the insurer for failing to act in good faith toward its insured. We therefore hold that when an insurer wrongfully refuses to defend, it has voluntarily forfeited its ability to protect itself against an unfavorable settlement, unless the settlement is the product of fraud or collusion. To hold otherwise would provide an incentive to an insurer to breach its policy.

Truck Ins. Exch., 147 Wn.2d at 765-66 (citation omitted).

In a covenant judgment settlement, the claimant and the insured agree on a reasonable settlement established in a stipulated or consent judgment, the insured then receives a covenant not to sue or execute protecting it from liability, and the insured assigns its contractual and extracontractual claims against the insurer to the claimant. *Bird v. Best Plumbing*, 175 Wn.2d 756, 754-65, 287 P.2d 551 (2012); Thomas V. Harris, *Wash. Insurance Law* § 10.02 at 10-3 (3d ed. 2010). See generally, *Besel v. Viking Ins. Co. of Wisc.*, 146 Wn.2d 730, 49 P.3d 887 (2002); *Mutual of Enumclaw Ins. Co. v. Dan Paulson Constr. Inc.*, 161 Wn.2d 903, 169 P.3d 1 (2007); *Miller v. Kenny*, 180 Wn. App. 772, 325 P.3d 278 (2014).

Such a settlement does not preclude a determination that an insured established the harm element of the tort of bad faith, subject to rebuttal by

the insured. *Butler*, 118 Wn.2d at 399. Moreover, if the settlement is deemed reasonable by a court, it becomes the presumptive measure of the insured's bad faith claim damages, *Besel*, 146 Wn.2d at 738, although an insured can recover damages beyond the amount of the covenant judgment settlement. *Miller*, 180 Wn. App. at 797-803.

This type of settlement is common in Washington law and "does not release a tortfeasor from liability; it is simply 'an agreement to seek recovery only from a specific asset -- the proceeds of the insurance policy and the rights owed by the insurer to the insured.'" *Besel*, 146 Wn.2d at 737 (quoting *Butler*, 118 Wn.2d at 399).

An assignment by the insured of its rights against the insurer to the tort claimant is a vital element of such a covenant judgment settlement; Washington law has long recognized that such assignments are valid even where there is a policy provision that forbids assignment. *Kiecker v. Pacific Indemnity Co.*, 5 Wn. App. 871, 877, 491 P.2d 244 (1971) ("After a loss has occurred and rights under the policy have accrued, an assignment may be made without the consent of the insurer, even though the policy prohibits assignments."); *Butler*, 118 Wn.2d at 397 (the proposition that a claim by an insured against the insurer may be assigned to the injured party is "well established."). In fact, in the absence of an assignment, the third-party claimant may lack standing to assert bad faith

claims against an insurer, obviating a central facet of the covenant judgment settlement. *See Trinity Universal Ins. Co. of Kan. v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 199-205, 312 P.3d 976 (2013), *review denied*, 179 Wn.2d 1010 (2014).

What occurred in this case is no different from what insureds do all the time when their insurers refuse to honor their contractual obligation to defend, settle, or indemnify. They enter into a deal with the tort claimant, one aspect of which is the assignment of the insured's rights against the insurer to the tort claimant. Any provision barring an insured from assigning its rights in a covenant judgment settlement must be *void as against this overarching public policy* expressed in Washington's insurance common law.

(b) Washington Law on Assignments

The trial court here erred in concluding that the County/Slagle could not assign their claims against WCRP/Lexington because it also failed to properly analyze Washington law on assignments in its ruling, CP 8048-49.

Washington law generally *upholds* the assignment of claims.⁵⁵ In *Berschauer/Phillips Constr. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d

⁵⁵ For example, tort claims against the State may be assigned to the same extent as claims against private parties. RCW 4.92.120.

816, 881 P.2d 986 (1994), this Court established the general principles on assignment in holding that an anti-assignment provision in the contract between the school district and the architect it hired to design an elementary school did not prevent the district from assigning any claims it had against the architect to the general contractor as part of a settlement. This Court recognized that contracts are assignable unless the assignment is barred by statute, specific contract provision, or public policy. *Id.* at 829. Citing *Portland Elec. & Plumbing Co. v. City of Vancouver*, 29 Wn. App. 292, 627 P.2d 1350 (1981), this Court drew a distinction between assignments of performance and assignments of rights to recover damages and concluded that a prohibition on the assignment of performance does not prohibit the assignment of damage claims. *Id.* at 830.⁵⁶

⁵⁶ This distinction recognized in *Berschauer/Phillips* also applies in the insurance context. The general rule is articulated in the treatise *Couch on Insurance* (3d ed.) § 35:8:

...the great majority of courts adhere to the rule that general stipulations in policies prohibiting assignments of the policy, except with the consent of the insurer, apply only to assignments before loss, and do not prevent an assignment after loss, for the obvious reason that the clause by its own terms ordinarily prohibits merely the assignment of the policy, as distinguished from a claim arising under the policy, and the assignment before loss involves a transfer of a contractual relationship while the assignment after loss is the transfer of a right to a money claim. The purpose of a no assignment clause is to protect the insurer from increased liability, and after events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity.

Specifically, in the risk pool setting, consistent with the foregoing principles, this Court has held that an anti-assignment provision in a risk pool liability policy is ineffective to bar an assignment of the right to collect damages. A risk pool's anti-assignment provision will not bar an assignment that occurs *after the events giving rise to a claim already happened*:

The plaintiffs argue, however, that even though a policy specifically prohibits assignments, an assignment of a claim, a cause of action, or proceeds may nonetheless be valid if made after the events giving rise to a liability have already occurred when the assignment is made. We agree and affirm the trial court's summary judgment on the validity of the assignments.

The purpose of a no assignment clause in an insurance contract is to protect the insurer from increased liability. After the events giving rise to the insurer's liability have occurred, the insurer's risk cannot be increased by a change in the insured's identity. The assignments in this case occurred long after the activities giving rise to liability.

Public Utility Dist. No. 1 of Klickitat County, 124 Wn.2d at 800-01. The very same contract law rationale would apply to the WCRP interlocal agreement's prohibition on assignments.

- (c) The County/Slagle's Assignment of Their Contractual and Extracontractual Claims Against WCRP/Lexington Was Not Prohibited by WCRP's Interlocal Agreement

The interlocal agreement did not bar the assignments at issue in this case. The anti-assignment provision in the interlocal agreement creating the WCRP states:

No county may assign any right, claim, or interest it may have under this Agreement. No creditor, 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 26.⁵⁷

First, it is apparent that nothing in the interlocal agreement bars an assignment by an individual insured like Slagle.⁵⁸ By its plain language, this provision: (1) only applies to claims arising “under this [Interlocal] Agreement”; it does not apply to assignments of claims arising under the primary and excess insurance policies that actually grant the insurance rights; (2) only applies to a member “county”; it does not apply to individuals like Slagle; (3) only applies to assignments of claims against

⁵⁷ While each WCRP policy also contains its own anti-assignment provision: “No insured shall assign any right, claim or interest it may have under this policy,” *e.g.*, CP 372, the trial court, however, relied on the interlocal agreements in its ruling. CP 8047. Lexington's policies did not contain a specific anti-assignment provision of their own, CP 4229-4495, but, had they done so, they would have been inapplicable. *Public Utility Dist. No. 1, supra*.

⁵⁸ Under the WCRP policies insuring agreement, Slagle is an “insured” under the policies, *e.g.*, CP 362, and that agreement gives each insured certain rights and impose corresponding duties to each insured on WCRP. *Id.* Moreover, these rights are both separate from and independent of any rights the policy provides to the County or any other insured, as expressly stated in the policy under the terms of the section denominated “Separation of Insureds.” *E.g.*, CP 371.

WCRP; it does not apply to assignments of claims against Lexington or any of the other private insurance companies that sell insurance to WCRP and its members.

Second, the anti-assignment provisions at issue do not foreclose the County from assigning its claims against WCRP/Lexington to Davis/Northrop. The interlocal agreement is not an insurance coverage document. Instead, it is the governance document for the WCRP, stating its purpose (Article 2), its membership (Article 5), its powers (Article 7), its governance structure (Article 8). CP 20-28. Davis/Northrop are not claiming a right to become members of WCRP, nor a right to designate the representative to the WCRP's board. Davis/Northrop have never asserted a claim for any right that arises "under the [Interlocal] Agreement."⁵⁹

Third, under the assignment principles articulated by this Court in *Berschauer/Phillips* and *Public Utility Dist. No. 1 of Klickitat County*, the assignments here were post-loss assignments and therefore fully enforceable even where an anti-assignment provision was in place.

Finally, given the public policy in Washington's insurance common law regarding the ability of insureds to protect themselves when

⁵⁹ The interlocal agreement and the policies do not incorporate each other. The agreement contains a provision stating it "constitutes the full and complete agreement of the parties." CP 27. Similarly, the policies contain a provision that specifically states that the policy embodies all agreements existing between itself and the WCRP or any of its agents relating to this insurance. CP 371.

abandoned by insurers, even if the anti-assignment provision in the interlocal agreement was conceivably enforceable as to the County/Slagle assignment to Davis/Northrop here, that anti-assignment provision was void as against public policy. This Court has concluded that efforts by insurers to limit coverage in insurance contracts that are contrary to public policy or statute are not enforceable. *Mutual of Enumclaw Ins. Co. v. Wiscomb*, 97 Wn.2d 203, 207-13, 643 P.2d 441 (1982) (family exclusion in automobile liability policy void as against public policy). Limitations on coverage that bear no relation to any risk faced by the insurer or that result in the denial of coverage to innocent victims may violate public policy. *Eurick v. Pemco Ins. Co.*, 108 Wn.2d 338, 343-44, 738 P.2d 251 (1987). Here, WCRP's putative prohibition on assignment fails because there is no added risk to WCRP where the claims have already arisen and where the County/Slagle had the right recognized in this Court's covenant judgment jurisprudence, as innocent victims of WCRP's wrongful denial of the duty to defend them, to take whatever steps necessary to protect themselves from the Davis/Northrop lawsuit.⁶⁰

In sum, the trial court erred in finding that the assignment by the County/Slagle to Davis/Northrop of their contractual and extracontractual

⁶⁰ Again, Slagle is clearly a bystander as to any assignment prohibition derived from WCRP's interlocal agreement with the County.

claims against WCRP/Lexington, a cornerstone of a covenant judgment settlement, was prohibited here.

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

As noted *supra*, Washington's insurance common law recognizes an equitable exception to the American Rule on attorney fees when an insured is compelled to litigate to secure rights to coverage. As simply stated by the *Olympic Steamship* court, an insured does not buy insurance only to be forced to litigate coverage with an insurer. 117 Wn.2d at 52. Davis/Northrop qualify for a fee award under *Olympic Steamship/McGreevy* on remand once they are successful in invoking the contractual rights under the WCRP/Lexington policies, rights assigned to them by the County/Slagle.

Moreover, as the assignees of the claims of the County/Slagle, they are also entitled to fees under RCW 4.84.330. WCRP sought more than a million dollars in fees and costs under the terms of a contract, the interlocal agreement, pursuant to its article 22. CP 9048-9504, 9944-10475.⁶¹ That provision in the interlocal agreement purports to allow the prevailing party in an "enforcement" action regarding that agreement to

⁶¹ The trial court initially agreed that WCRP was entitled to a fee award, CP 9854, but later stayed the proceedings on fees.

recover fees. This Court should allow the County/Slagle, and consequently Davis/Northrop, to recover bilaterally under its terms.

Under RAP 18.1(a), Davis/Northrop are also entitled to an award of their reasonable fees on appeal.

F. CONCLUSION

The trial court erroneously concluded that the liability policies issued by WCRP are not subject to Washington's insurance common law. Washington's insurance common law relating to the interpretation of insurance policies and the remedies afforded insureds, both contractual and extracontractual, is derived from a good faith duty owed by insurers to insureds that has its source both in the common law and the Insurance Code. The trial court erred in focusing solely on the Code, leading it to the erroneous determination that vague contract principles control the relationship between risk pools and their insureds, and leaving hundreds of thousands of Washington public employees and their public employers to the vagaries of those ill-defined principles. Moreover, the trial court misread the scope of RCW 48.01.050 in any event.

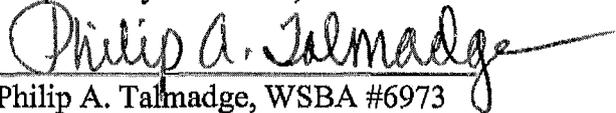
When this Court applies the well-defined contours of Washington's insurance common law to risk pool liability policies for their interpretation and the rights, both contractual and extracontractual, that flow from them, the Court will readily discern that the trial court erred in its decision on the

duty to defend and in barring an assignment of the County/Slagle's contractual and extracontractual claims against WCRP/Lexington to Davis/Northrop.

This Court should reverse the trial court's orders at issue here and rule that WCRP/Lexington breached their duty to defend the County/Slagle and that the County/Slagle were allowed to assign their contractual and extracontractual claims against WCRP/Lexington to Davis/Northrop. Costs on appeal, including reasonable attorney fees, should be awarded to Davis/Northrop.

DATED this 13th day of October, 2015.

Respectfully submitted,



Philip A. Talmadge, WSBA #6973

Talmadge/Fitzpatrick/Tribe

2775 Harbor Avenue SW

Third Floor, Suite C

Seattle, WA 98126

(206) 574-6661

Attorneys for Appellants

Davis and Northrop

John R. Connelly, Jr., WSBA #12183

Micah R. LeBank, WSBA #38047

Connelly Law Offices

2301 North 30th Street

Tacoma, WA 98403

(253) 593-5100

Attorneys for Appellant Davis

Ian Hale
(Admitted *Pro Hac Vice*)
Michael E. Farnell, WSBA #23735
Parsons Farnell & Grein, LLP
1030 SW Morrison Street
Portland, OR 97205
(503) 222-1812
Attorneys for Appellants
Davis and Northrop

Timothy K. Ford, WSBA #5986
Tiffany Cartwright, WSBA #43564
MacDonald Hoague & Bayless
705 2nd Avenue Suite 1500
Seattle, WA 98104
(206) 622-1604
Attorneys for Appellant Northrop

APPENDIX

RCW 48.01.030:

The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.

RCW 48.01.050:

“Insurer” as used in this code includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society. A reciprocal or interinsurance exchange is an “insurer” as used in this code. Two or more hospitals that join and organize as a mutual corporation pursuant to chapter 24.06 RCW for the purpose of insuring or self-insuring against liability claims, including medical liability, through a contributing trust fund are not an “insurer” under this code. 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. Two or more affordable housing entities that join together and organize to form an organization for the purpose of jointly self-insuring or self-funding under chapter 48.64 RCW are not an “insurer” under this code. Two or more persons engaged in the business of commercial fishing who enter into an arrangement with other such persons for the pooling of funds to pay claims or losses arising out of loss or damage to a vessel or machinery used in the business of commercial fishing and owned by a member of the pool are not an “insurer” under this code.



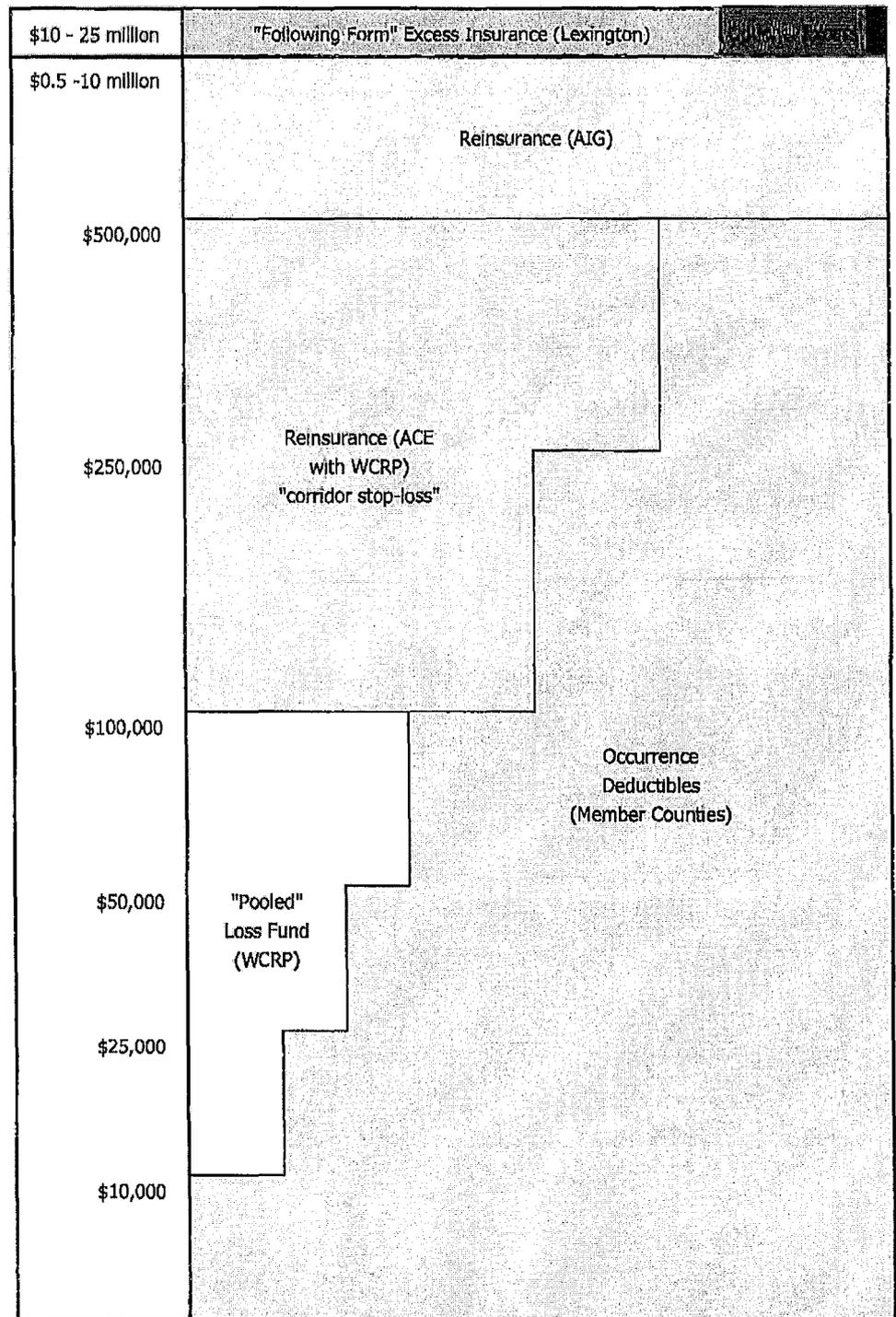
Washington Counties Risk Pool

SUMMARY OF 2007-08 LIABILITY INSURANCE PROGRAM

The Washington Counties Risk Pool provided its member counties with liability insurance limits of \$20 (option of \$25) million per occurrence. Subject to the county-selected deductible, included was \$10 million in joint self-insured coverage plus \$10 (or \$15) million in "following form" excess coverage.

Member counties selected a "per occurrence" deductible of either \$10,000, \$25,000, \$50,000, \$100,000, \$250,000 or \$500,000. There were no annual aggregate limits to the payments the Pool might make for any one member county or all member counties combined.

The insuring document for the Pool's joint self-insurance liability policy covers bodily injury, personal injury, property damage, errors and omissions, and advertising injury.



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COWLITZ COUNTY
BEVERLY R LITTLE CLERK
BY _____

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

**WASHINGTON COUNTIES RISK POOL;
LEXINGTON INSURANCE COMPANY;
AMERICAN INTERNATIONAL GROUP,
INC; VYRLE HILL, Executive Director of
the Washington Counties Risk Pool, in
both his individual capacity and official
capacity; J. WILLIAM ASHBAUGH,
Individually; and ACE AMERICAN
INSURANCE COMPANY,**

Plaintiffs,

vs.

**CLARK COUNTY, WASHINGTON, a
municipal corporation; DONALD
SLAGLE, an individual; LARRY DAVIS,
Individually and as assignee of Clark
County and Donald Slagle.**

No. 13-2-01398-4

**COURT'S RULING on
OCTOBER 10, 2014 HEARING**

This Court, based on the files, record, legal briefs, affidavits and exhibits thereto, and argument of counsel, hereby makes the following findings and rulings:

1. In 1967 the Washington State Legislature enacted the Interlocal Cooperation Act as set forth in Chapter 39.34 RCW.

- 1 2. In 1979 the Legislature added a section to Title 48 RCW to allow local
2 governmental entities to join together to jointly self-insure risks, jointly purchase
3 insurance or reinsurance with other entities.
- 4 3. In 1986 the Washington State Association of Counties started looking at whether
5 to form a pooling arrangement for liability protection for Washington State counties
6 under the authority granted by the Legislature in Chapters 39.34 and 48.62 RCW.
- 7 4. On November 11, 1987 the first Washington Counties Risk Pool meeting was held,
8 which was attended by the then Risk Manager of Clark County. At the meeting the
9 members approved the name "Washington Counties Risk Pool" (the "Pool").
- 10 5. In 1987 the Pool drafted an Interlocal Agreement pursuant to Chapter 39.34 RCW.
- 11 6. In 1987 the Pool then submitted to the then state risk manager Gary Alexander for
12 approval, pursuant to Chapters 48.62 and 39.34 RCW, the draft Interlocal
13 Agreement, the Pool's Bylaws, Liability Form, Claim manual, cost sheet and other
14 documents from participating counties. The draft Interlocal Agreement was
15 ultimately approved by the state risk manager and then signed by each member
16 county.
- 17 7. The first Interlocal Agreement is almost identical to the current Interlocal
18 Agreement and includes the same thirty articles.
- 19 8. In the current Interlocal Agreement Article 21 contains a prohibition on assignment,
20 as follows: "Article 21 Prohibition Against Assignment: No county may assign any
21 right, claim or interest it may have under this Agreement. No creditor assignee or
22 third-party beneficiary of any county shall have any right, claim or title to any part,
23 share, interest, fund premium or asset of the Pool."
- 24 9. The current Interlocal Agreement also contains an enforcement clause: "The Pool
25 may enforce the terms of this Agreement. In the event action is instituted to
26 enforce any term of this Agreement or any term of the Bylaws against a present or
27 previous member county, the prevailing party shall receive such sums as the court
28 may fix as reasonable attorneys' fees and costs in the action."
- 29 10. In 2002 Clark County joined the Pool. The Clark County Board of Commissioners
30 passed a resolution on August 12, 2002, joining the Pool. In that resolution it
31 states: "The Board hereby approves the terms of the Agreement and authorizes

1 and directs the member of the Board to execute the Agreement on behalf of the
2 County and deliver the Agreement to the offices of the pool." The resolution also
3 provided: "The County's representatives are hereby authorized to exercise the
4 County's voting rights in the Pool pursuant to the terms of the Agreement and
5 Bylaws and to act on behalf of the County with respect to all matters pertaining to
6 the Pool."

7 11. Clark County then signed the current Interlocal Agreement on August 20, 2002.
8 That version of the Interlocal Agreement contained the prohibitions against
9 assignment and enforcement provisions.

10 12. Under this scenario Clark County had \$25,000,000 in coverage by including
11 \$500,000 as a deductible by Clark County, then \$9,500,000 in coverage under
12 coverage by the Pool and reinsured by a private insurance company, and
13 \$15,000,000 in excess/umbrella coverage issued by private insurance companies.

14 13. Mark Wilsdon took over for Mr. Pavone and became the Risk Manager for Clark
15 County in March 22, 2007. Per the resolution, Mark Wilsdon was authorized to act
16 on behalf of the County on all matters related to the Pool. On July 2, 2013 Clark
17 County requested Mark Wilsdon remain Clark County's Director Representative to
18 the Pool and Bernard Veljacic (then a deputy prosecutor for Clark County) as the
19 Alternate Director.

20 14. On July 3, 2013, Clark County's Board of County Commissioners approved
21 another resolution, which stated Mark Wilsdon would serve as the County's
22 primary representative to the Pool.

23 15. Criminal Case:

24 a. On January 11, 1993, Karl Morrison was raped while cleaning a home in La
25 Center, Washington. On or about January 19, 1993, Clark County Sheriff's
26 Office Detective Donald Slagle ("Slagle") was assigned to the investigation.
27 As a result of the investigation, Alan Northrop ("Northrop") and Larry Davis
28 ("Davis") were arrested for burglary, rape and the kidnapping of Ms.
Morrison.

- 1 b. Davis was tried before a jury in Clark County Superior Court beginning on
2 May 10, 1993, and convicted of first degree burglary, rape and kidnapping.
3 Davis was sentenced on July 9, 1993.
- 4 c. Northrop was tried before a jury in Clark County Superior Court for first
5 degree burglary, rape, and kidnapping starting on July 6, 1993. He was
6 convicted on all counts and sentenced on September 14, 1993.
- 7 d. On June 30, 2010, the Clark County Superior Court granted Davis and
8 Northrop new trials based on newly discovered evidence. In particular,
9 DNA sampling taken from the crime scene was not consistent with either
10 Davis or Northrop's DNA. On July 13, 2010, Clark County dismissed all
11 charges against them without prejudice.

12 16. On August 8, 2012 Defendants Northrop and Davis filed a lawsuit in the United
13 States District Court for the Western District of Washington ("USDC") against
14 Slagle, the lead investigator involved in Northrop and Davis' convictions and Clark
15 County, Slagle's previous employer. They asserted claims for violation of their
16 rights protected by the United States Constitution, negligence and
17 negligent/intentional infliction of emotional distress.

18 17. On July 3, 2013 Davis and Northrop's attorney sent a letter to Susan Looker,
19 Claims Manager for the Pool, advising counsel there was coverage for the lawsuit.

20 18. On July 9, 2013, Vyrle Hill, Executive Director of the Pool, sent a letter regarding a
21 purported assignment to Mark Wilsdon and Bernard Veljacic, reminding them an
22 assignment was expressly prohibited under Article 21 of the Interlocal Agreement
23 and Section 7.0 of the Joint Self Insurance Liability Policy.

24 19. The case of Davis and Northrop in the USDC went to trial on September 17, 2013.
25 After ten days of trial, on September 27, 2013, the parties settled their case and
26 entered into a CR 2A agreement. As part of the CR 2A agreement, Clark County
27 agreed to pay Davis and Northrop \$10.5 million, and also agreed to a stipulated
28 judgment for \$34.5 million. Included in the CR 2A the parties agreed to the
29 following: "Whereas in addition to the cash settlement Defendants also agree to
30 enter into a stipulated judgment and assignment of rights against all Defendants
31 Insurer, including, without limitation, the Washington Counties Risk Pool, in the

1 amount of \$17.25 million to each plaintiff. Plaintiffs in turn will agree and covenant
2 not to execute against the County or Slagle or other County agents or employees
3 (excluding insurer and risk pools) above the \$5.25 million payments."

4 20. The Pool had denied coverage of the claims.

5 21. Upon receipt of the CR 2A agreement by Vyrle Hill of the Pool, Hill advised Clark
6 County by letter of September 27, 2013, that the assignment was in violation of
7 Article 21 of the Interlocal Agreement that was approved by the Board of Clark
8 County Commissioners in 2002.

9 22. On October 1, 2013 Vyrle Hill of the Pool wrote a letter to the Clark County
10 Commissioner's again advising of a breach of Article 21 of the Interlocal
11 Agreement by the assignment under the CR 2A agreement.

12 23. On October 3, 2013, Mark Wilsdon for Clark County confirmed with the Pool the
13 assignment.

14 24. On October 23, 2013, Davis and Northrop and Slagle and Clark County entered an
15 Agreement, Assignment and Covenant Not to Execute. Clark County and Slagle
16 agreed to pay Davis and Northrop \$10.5 million, and enter into a stipulated
17 judgment for \$34.5 million. Clark County and Slagle also agreed to assign their
18 rights to Davis and Northrop: "Defendants assign, transfer and set over to
19 Plaintiffs any and all contractual extra-contractual, tort, equitable, legal and
20 statutory rights, claims, rights, interests, causes of action, and choses in action, of
21 every kind and nature, including with limitation for breach of contract, breach of
22 duty to defend, breach of duty to settle, breach of duty to indemnify, breach of duty
23 to act in good faith, violation of the Washington Insurance Fair Conduct Act,
24 whether known or unknown, against all insurers without reservation including but
25 not limited to the Washington Counties Risk Pool..." Also included was a
26 provision: "7. In the event that the assignment is for any reason found invalid,
27 ineffective or otherwise fails to effect the intent of the Parties, the Parties agree
28 they will take any and all such actions that may be necessary to effect a valid
assignment or otherwise provide documentation necessary for the Plaintiffs'
prosecution of the above-referenced rights, claims interests, and causes of action
for Plaintiffs' exclusive benefit."

1 25. On October 29, 2013, Clark County, Slagle, Davis and Northrop filed the stipulated
2 judgment in the federal court cases.

3 26. On November 4, 2013 the Pool filed this lawsuit in Cowlitz County Superior Court.

4 27. The only claims in this case are for damages.

5 28. In November 2013 Davis and Northrop filed a motion in the USDC case to have
6 that court find that their settlement was reasonable. The Pool intervened in that
7 action. That court declined to hear the motion.

8 **A. MOTION FOR DECLARATORY JUDGMENT ON CLARK COUNTY AND**
9 **DONALD SLAGLE'S PURPORTED ASSIGNMENT:**

10 1. Is the Pool an insurer?

- 11 a. A reference was made to the Defendants requesting a continuance if the
12 Court was going to address this issue. The Court does not find any basis
13 for a continuance under CR 56(f) and therefore, denies same.
- 14 b. Under RCW 48.62.031 (1) it states, "The governing body of a local
15 government entity may individually self-insure, may join or form a self-
16 insurance program together with other entities, and may jointly purchase
17 insurance or reinsurance with other entities for property and liability risks
18 and health and welfare benefits only as permitted under this chapter..."
- 19 c. Under RCW 48.62.031(2) it states, "The agreement to form a joint self-
20 insurance program shall be made under Chapter 39.34 RCW and may
21 create a separate legal or administrative entity with powers delegated
22 thereto. Such entity may include or create a non-profit corporation
23 organized under Chapter 24.03, or 24.06 RCW or a partnership organized
24 under Chapter 25.04 RCW."
- 25 d. Under RCW 48.01.050 it states, "...Two or more local governmental
26 entities, under a provision of law, that join together and organize to form an
27 organization for the purpose of jointly self-insuring or self-funding are not an
28 "insurer" under this code..."
- e. The Pool Joint Self-Insurance Liability Policy ("JSILP") states the following:
"NOTICE, THE FOLLOWING LIABILITY COVERAGE IS PROVIDED BY
THE WASHINGTON COUNTIES RISK POOL, A JOINT SELF-INSURANCE

1 PROGRAM AUTHORIZED BY RCW 48.62.031. THE WASHINGTON
2 COUNTIES RISK POOL IS NOT AN INSURANCE COMPANY AND THIS
3 LIABILITY COVERAGE IS NOT TRADITIONAL INSURANCE."

4 f. Thus, based on the statutes the Pool is not an insurer. That determination
5 is furthered by the language in the JSILP.

6 2. Is the language of the Interlocal Agreement valid against Clark County and Slagle?

7 a. RCW 39.34.030 allows two or more public agencies to enter into
8 agreements with one another for joint or cooperative action. RCW
9 48.62.031 provides governing bodies of a local government entity may
10 individually self-insure, may join or form a self-insurance program with other
11 entities and to do so is to be made under Chapter 39.34 RCW. The Pool
12 and Clark County entered into such Interlocal Agreement and it specifies all
13 the requirements required by statute, was properly ratified and is a binding
14 contract on the Pool and Clark County.

15 b. Under Article 21 of the Interlocal Agreement there is a prohibition against
16 assignment.

17 c. The prohibition is an expressed, unambiguous prohibition on assignment of
18 any rights under the Interlocal Agreement.

19 d. Slagle was an employee of Clark County. All rights acquired by Slagle were
20 solely through that employment. Slagle does not have any independent
21 rights different from those rights as an employee. Therefore, if the County
22 is bound by the Interlocal Agreement so too is Slagle bound by the
23 Agreement.

24 e. Thus, based on statute and the validity of the Interlocal Agreement, the
25 Interlocal Agreement is valid against Clark County and Slagle.

26 3. Should the extrinsic evidence from the March 14, 2014 meeting be considered by
27 the Court or be stricken?

28 a. This Court finds no need for the extrinsic evidence offered by the Plaintiff
under exhibits 20,25,28, 35, 39 and portions of Exhibit 11 (exhibits to
Declaration of William Leedom filed in support of Plaintiff Pool's Motion) to
interpret the Interlocal Agreement as the language is not vague or

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ambiguous and thus, such evidence is irrelevant. Clark County ratified and signed the Agreement without any question as to the validity of the Agreement until this action.

- b. Even if the Court did find the need to consider such evidence there are concerns as to how the statements were acquired. The Court will consider that issue in more detail below.
4. Even though the Interlocal Agreement is valid against Clark County and Slagle, does case law allow for an assignment as provided in the CR 2A agreement even when expressly prohibited by the contract?
- a. This Court has already determined the Pool is not an insurer.
 - b. The Court is not swayed by the case law put forth by the Defendants. In particular the key case referenced is *Public Utility Dist. No. 1 of Klickitat County v. International Ins. Co.*, 124 Wash.2d 789, 881 P.2d 1020 (1994). That case interprets a commercial insurance policy. In doing so, that court applied traditional insurance law. That is not a like issue before this Court and fails as precedent in this matter. The defense further argued *Washington Public Utility Districts' Utilities System et al vs. Public Utility District No. 1 of Clallam County, et al*, 112 Wash.2d 1, 771 P.2d 701 (1989) applied here as well, and specifically pointing out FN2 which includes language, "...municipal corporations should not be distinguished from their private cousins." However, one has to review that small phrase with the entirety of the footnote and case to recognize it was not by that statement saying something such as the issue here with the Pool should be interpreted under insurance law.
 - c. As stated, the Pool is not an insurer. The Pool is specifically excepted by statute as being an insurer. This Court does not believe the Legislature went to the lengths they did to remove that of the Pool from being included in the insurance statutes. That removal is further evidenced by the requirement that the state risk pool manager is to review for approval the Interlocal Agreement, the Pool's Bylaws, Liability Form, Claim manual, cost

1 sheet and other documents – the risk pool manager, not the insurance
2 commissioner.

3 d. One has to go back to the session laws from 1979 1st Extraordinary session
4 to understand the actions of the Legislature. Specifically the Legislature
5 found that “local governmental entities in this state are experiencing a trend
6 of vastly increased insurance premiums for the renewal of identical
7 insurance policies, that fewer insurance carriers are willing to provide local
8 governmental entities with insurance coverage, and that some local
9 governmental entities are unable to obtain insurance coverage.”
10 Washington Laws, 1979 1st Extraordinary Session, Chapter 256. How is the
11 very basis of creating the ability to have a Pool to continue if the courts are
12 then going to apply insurance law. If that was the intent of the Legislature
13 then it is this Court's belief the Legislature would have set the entire process
14 up very differently and not excepted such as the Pool as being an insurer.

14 5. Should this Court grant the relief requested by the Plaintiff?

- 15 a. A summary judgment is appropriate under CR 56 because the only dispute
16 relates to the legal effect of contractual language.
- 17 b. A declaratory judgment is appropriate under RCW 7.24.020 and CR 57
18 because there is an actual present and existing dispute, the Pool and Clark
19 County and Davis/Northrop have genuine and opposing interests, the
20 interests are direct and substantial and if the Court rules the assignment
21 was invalid that will be conclusive of the majority of the Defendants'
22 counterclaims, as well as the Pool's claim for breach of contract.
- 23 c. The Interlocal Agreement was agreed to and ratified by Clark County and
24 through that is binding on Slagle. The Agreement contained an expressed,
25 unambiguous prohibition on assignment of “any right, claim or interest it
26 may have under this Agreement. No creditor assignee or third-party
27 beneficiary of any county shall have any right, claim or title to any part,
28 share, interest, fund premium or asset of the Pool.” When a contract
prohibits assignment in very specific and unmistakable terms the

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assignment will be void against the obligor. This was an Agreement reached by parties on an equal playing field.

- d. Pursuant to the prohibition on assignment Clark County, and through the County, Slagle, had no authority to assign any interest they may have under the Agreement with the Pool.
- e. Based on the files, records argument of counsel and the foregoing, this Court grants the declaratory judgment that Clark County and Donald Slagle's assignment of rights to Davis and Northrop under the Pool's Interlocal Agreement is invalid and the purported assignment is null and void.
- f. This Court further grants through Article 22 of the Interlocal Agreement, to the Pool the right to receive such sums as this Court may fix as reasonable attorneys' fees and costs as result of this breach of the Interlocal Agreement. The amount is reserved for further determination by this Court.

B. DEFENDANTS' MOTION TO STRIKE CERTAIN EXHIBITS TO WCRP'S MOTION FOR DECLARATORY JUDGMENT, AND FOR AN ORDER TO SHOW CAUSE

- 1. Should the exhibits 20, 25, 28, 35, 39 and portions of 11 to the Declaration of William Leedom filed in support of Plaintiff WCRP's Motion for Declaratory Judgment on Clark County & Donald Slagle's Purported Assignment be stricken? This Court has already determined the exhibits being requested to be stricken are irrelevant to the issue before the Court and thus, the Motion to Strike is moot.
- 2. Should additional sanctions be imposed for the Pool's counsels' violation of RPC 4.2?
 - a. Mark Wilsdon was President and a member of the Executive Committee of the Pool at the time Clark County and Slagle assigned their rights to Northrop and Davis under the CR 2A agreement in the USDC case. Wilsdon served in that role through the end of September 2013, and then continued to serve on the Pool Executive Committee as secretary/treasurer until he resigned on November 1, 2013.

- 1 b. Defendants allege Wilsdon was being pressured by Vyrle Hill of the Pool to
2 "fix" the assignment of rights. This Court cannot find that conversations
3 between a person from the Pool and Wilsdon were inappropriate or
4 somehow furthered by the request of counsel for the Pool. In the email in
5 the exhibits Wilsdon was either still serving as an officer of the Pool or
6 writing in his capacity as the former Pool President.
- 7 c. On March 14, 2014 Vyrle Hill asked the Clark County Commissioners to
8 attend a Pool Board of Directors Meeting scheduled for March 27-28 at
9 Suncadia Resort in Cle Elum, Washington. The purpose of the attendance
10 was for Clark County to explain why they should not be terminated from the
11 Pool. This would seem a reasonable question given the breach of the
12 Interlocal Agreement by Clark County.
- 13 d. Wilsdon and Commissioner Steve Stuart of Clark County attended the
14 meeting in Suncadia in March 2014 and specifically did not have their
15 attorney attend the meeting. However, the Pool's attorneys were present at
16 the meeting. Given this was a Board meeting and there was pending
17 litigation, it would only be reasonable for the Pool to have their counsel
18 present at the meeting. At the meeting Commissioner Stuart and Wilsdon
19 were asked to leave the room while the Pool Board met in an executive
20 session with the Pool's attorneys Ashbaugh and Leedom to discuss the
21 pending litigation. This appears to be a reasonable exclusion of
22 Commissioner Stuart and Wilsdon given the pending litigation.
- 23 e. At the March 2014 meeting Defendants are claiming Ashbaugh and Leedom
24 had *ex parte* contact with Wilsdon and Commissioner Stuart by Ashbaugh
25 specifically asking Wilsdon and Commissioner to admit a violation of the
26 Interlocal Agreement. Leedom's contact was allegedly through Ashbaugh.
27 Those allegations, directly or indirectly, are denied.
- 28 f. Likewise at the March 2014 meeting Plaintiffs are claiming Wilsdon and
 Commissioner Stuart allegedly both admitted to the Board in open session
 that Clark County had breached the Interlocal Agreement. That admission
 is denied.

1 g. Allegations of violations of Rules of Professional Conduct are serious. At
2 this point we have both sides pointing fingers on issues with a resulting
3 denial by the other side. There is no doubt too there were questions of
4 whether the Pool was going to continue the Interlocal Agreement with Clark
5 County because of the issues at the heart of this case.

6 h. Based upon the files and record herein this Court finds there is insufficient
7 evidence to find a violation, directly or indirectly, of the Rules of Professional
8 Conduct. That said, the allegations are very concerning to this Court and
9 this Court cautions all counsel to abide by the Rules of Professional
10 Conduct and be alert to even the appearance of a violation.

11 **C. MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST LEXINGTON RE
12 ASSIGNMENT**

- 13 1. The Pool issued Joint Self-Insurance Liability Policies ("JSILP") to Clark County
14 on a yearly basis for the combined period of October 1, 2003 to October 1, 2010.
15 2. The counties were able to negotiate and discuss the terms of the JSILP, including
16 the prohibition of assignment; all being on equal ground for negotiation of such
17 terms.

- 18 3. The JSILP contained the provision:

19 **"7. CONDITIONS AND RESPONSIBILITY:**

20 **N. Assignment: No insured shall assign any right, claim or interest it may have**
21 **under this policy. No creditor, assignee or third-party beneficiary of any insured**
22 **shall have any right, claim or title to any part, share, interest, fund, premium or**
23 **asset of the Pool. If, however, an insured shall die, such insurance as afforded by**
24 **this policy shall apply (1) to the insured's legal representative, as the insured, but**
25 **only while acting within the scope of his duties as such, and (2) with respect to the**
26 **property of the insured, to the person having proper temporary custody thereof, as**
27 **insured, but only until the appointment and qualification of the legal**
28 **representative."**

1. Lexington issued Follow Form Excess Liability Policies on an annual basis for the
combined period of October 1, 2003 to October 2, 2010 that contained the
provision:

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"INSURING AGREEMENTS

I. COVERAGE

A. We will pay on behalf of the Insured that portion of the loss which the Insured will become legally obligated to pay as compensatory damages (excluding all fines, penalties, punitive or exemplary damages) by reason of exhaustion of all applicable underlying limits, whether collectible or not, as specified in Section II of the Declarations, subject to:

- 1. the terms and condition of the underlying policy listed in Section IIA of the Declarations, and
- 2. our Limit of Liability as stated in Section IC of the Declarations.

B. Except as regards: (1) the premium; (2) the obligation to investigate and defend, including costs and expenses thereto; (3) the limit of liability; (4) the renewal agreement, if any; (5) the notice of occurrence, claim, or suit provision; (6) any other provision therein inconsistent with this policy; the provision of the underlying policy are hereby incorporated as part of this policy

CONDITIONS

- 1. Following Form – It is agreed that this policy, except as herein stated is subject to all conditions, agreements and limitations of and shall follow the underlying policy/ies in all respects, including changes by endorsement, and the Insured shall furnish the Company with copies of such changes. It is further agreed, should any alternation be made in the premium for the policy/ies of the Primary Insurers during the period of this policy, then the premium hereon, other than the minimum premiums as stated in the Declarations, shall be adjusted accordingly."
- 5. The JSILP specifically precludes Clark County, and consequently through them, Slagle, from assigning any rights, claims or interest under that policy. The prohibition is clear, unambiguous and does not contain language limiting its effect to pre-loss assignment.
- 6. As previously ruled above the Pool is not an insurer. Based on that same reasoning as above, the JSILP also follows it is not traditional insurance.

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Consequently, the Pool and JSILP do not fall under case law that might otherwise interpret a prohibition of assignment as assignable. It is instead a contract between the counties to pool resources to cover losses as provided by statute and the Interlocal Agreement.

7. The Follow Form Excess Policy unambiguously incorporates the provisions of the underlying policy, the JSILP, as part of that policy. For the reasons this Court finds the Interlocal Agreement and the JSILP as non-assignable, it then follows the Follow Form Excess Policy is non-assignable. Thereby Clark County is precluded, and thus also Slagle, from assigning any rights they may have against Lexington to Davis and Northrop. Again, this Court is not swayed to find otherwise by the stated case law put forth by the Defendants.
8. A summary judgment is appropriate under CR 56 because the only dispute relates to the legal effect of contractual language. Further both parties are claiming the issue is subject to summary judgment and so there is no dispute as to that issue.
9. The Defendants claim Lexington failed to respond to communications regarding the underlying criminal and USDC case. Lexington denies the allegation. This Court finds that allegation is irrelevant to the issue before this Court.
10. Therefore, based on the files, records, argument of counsel and the foregoing, this Court finds as a matter of law, in favor of Lexington, that Clark County and Slagle's assignment to Davis and Northrop is null and void. Defendants' Motion for Partial Summary Judgment is denied.

Dated: 11/13/2014



Judge Marilyn K. Haan

FILED
SUPERIOR COURT

2014 DEC 12 PM 12 12

GOWLITZ COUNTY
BEVERLY R LITTLE CLERK
BY _____

Hon. Marilyn Haan

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

WASHINGTON COUNTIES RISK POOL;
AMERICAN INTERNATIONAL GROUP,
INC.; LEXINGTON INSURANCE
COMPANY; VYRLE HILL, Executive
Director of the Washington Counties Risk
Pool, in both his individual capacity and
official capacity; J. WILLIAM ASHBAUGH,
individually; and ACE AMERICAN
INSURANCE COMPANY,

Plaintiffs,

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,

Defendants.

No. 13-2-01398-4

ORDER DENYING DEFENDANTS'
MOTIONS FOR PARTIAL
SUMMARY JUDGMENT ON
WCRP'S BREACH OF THE DUTY
TO DEFEND AND FINDING WCRP
HAD NO DUTY TO DEFEND
CLARK COUNTY OR DONALD
SLAGLE AS A MATTER OF LAW

THIS MATTER, having come before the Court on Defendants Larry Davis and Alan Northrop's Motion for Partial Summary Judgment on WCRP's Breach of the Duty to Defend and Defendants Clark County and Donald Slagle's Motion for Partial Summary Judgment on WCRP's Breach of Duty to Defend, and the Court having reviewed the records and files herein, and specifically:

1. Defendants' Larry Davis and Alan Northrop's Motion for Partial Summary Judgment on WCRP's Breach of the Duty to Defend;

ORDER DENYING DEFENDANTS' MOTIONS FOR
PARTIAL SUMMARY JUDGMENT ON WCRP'S
BREACH OF THE DUTY TO DEFEND - Page 1

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
601 Union Street, Suite 1500
Seattle, Washington 98101-1363
T: (206) 622-5511 F: (206) 622-8986

- 1 2. Declaration of Ian Hale in Support of Defendants' Larry Davis and Alan
2 Northrop's Motion for Partial Summary Judgment on WCRP's Breach of the Duty to Defend,
3 with attached exhibits;
- 4 3. Declaration of Mark Wilsdon, with attached exhibits;
- 5 4. Plaintiff Washington Counties Risk Pool's Motion for Continuance of
6 Defendants Larry Davis and Alan Northrop's Motion for Partial Summary Judgment on
7 WCRP's Breach of the Duty to Defend;
- 8 5. Declaration of William J. Leedom in Support of Plaintiff Washington Counties
9 Risk Pool's Motion for Continuance of Defendants Larry Davis and Alan Northrop's Motion
10 for Partial Summary Judgment on WCRP's Breach of the Duty to Defend, with attached
11 exhibits;
- 12 6. Defendants Larry Davis and Alan Northrop's Response to Plaintiff WCRP's
13 Motion to Stay and Permit Discovery on the Duty to Defend;
- 14 7. Declaration of Ian Hale in Support of Defendants Larry Davis and Alan
15 Northrop's Response to Plaintiff WCRP's Motion to Stay and Permit Discovery on the Duty
16 to Defend, with attached exhibits;
- 17 8. Plaintiff Washington Counties Risk Pool's Reply re: Motion for Continuance
18 on Defendants' Motion for Partial Summary Judgment;
- 19 9. Declaration of David M. Norman in Support of Plaintiff Washington Counties
20 Risk Pool's Reply re: Motion for Continuance on Defendants' Motion for Partial Summary
21 Judgment, with attached exhibits;
- 22 10. Plaintiff Washington Counties Risk Pool's Supplemental Brief in Support of
23 Request for Discovery re: Duty to Defend;
- 24 11. Declaration of Amy M. Magnano in Support of Plaintiff Washington Counties
25 Risk Pool's Supplemental Brief in Support of Request for Discovery re: Duty to Defend, with
26 attached exhibits;

- 1 12. Defendants Davis and Northrop's Response to Washington Counties Risk
- 2 Pool's Supplemental Brief in Support of Discovery re: Duty to Defend;
- 3 13. Plaintiff Washington Counties Risk Pool's Reply re: Supplemental Brief in
- 4 Support of Discovery;
- 5 14. Defendants Clark County and Donald Slagle's Motion for Partial Summary
- 6 Judgment on WCRP's Breach of the Duty to Defend;
- 7 15. Plaintiff Washington Counties Risk Pool's Opposition to Defendants' Motion
- 8 for Partial Summary Judgment on WCRP's "Breach of the Duty to Defend";
- 9 16. Declaration of Amy M. Magnano in Support of Plaintiff Washington Counties
- 10 Risk Pool's Opposition to Defendants' Motion for Partial Summary Judgment on WCRP's
- 11 "Breach of the Duty to Defend," with attached exhibits;
- 12 17. All Defendants' Reply in Support of their Motions for Summary Judgment on
- 13 WCRP's Breach of the Duty to Defend;
- 14 18. Declaration of Taylor Hallvik in Support of All Defendants' Reply in Support
- 15 of their Motions for Summary Judgment on WCRP's Breach of the Duty to Defend, with
- 16 attached exhibits;
- 17 19. Defendants Davis and Northrop's Second Amended Answer and
- 18 Counterclaims and exhibits thereto;
- 19 20. Clark County's Answer and Counterclaims;
- 20 21. *All Defendants' briefing, and the declarations and exhibits*
- 21 *is support thereof, that were filed in connection with*
- 22 *the motions decided in the Court's November 13, 2014 ruling.*
- 23 and the Court being fully advised in the premises, now, therefore, it is HEREBY ORDERED
- 24 that Defendants Larry Davis and Alan Northrop's Motion for Partial Summary Judgment on
- 25 WCRP's Breach of the Duty to Defend, and Defendants Clark County and Donald Slagle's
- 26

1 Motion for Partial Summary Judgment on WCRP's Breach of the Duty to Defend are
2 DENIED.

3 IT IS FURTHER ORDERED that the Court, having issued the "COURT RULING on
4 the NOVEMBER 21, 2014 HEARING" on November 26, 2014, which Ruling is attached and
5 incorporated into this Order, now, therefore, it is HEREBY ORDERED, ADJUDGED, AND
6 DECLARED that as a matter of law, Washington Counties Risk Pool did not have a duty to
7 defend Clark County and Donald Slagle in the lawsuit brought against Clark County by Larry
8 Davis and Alan Northrop.

9 DONE IN OPEN COURT this 10th day of December, 2014.

10

11


Judge Marilyn Hahn

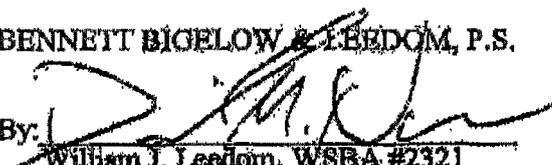
12

Presented by:

13

BENNETT BIGELOW & LEEDOM, P.S.

14

By: 

15

William J. Leedom, WSBA #2321
Amy M. Magnano, WSBA #38484
David M. Norman, WSBA #40564
Attorneys for Plaintiff Washington
Counties Risk Pool

16

17

18

Approved as to form:

19

CONNELLY LAW OFFICES

20

21

By John R. Connelly, Jr., WSBA No. 12183
Micah R. LeBank, WSBA No. 38047
Attorneys for Defendant Larry Davis

22

23

24

PARSONS FARNELL & GREIN, LLP

25

By 

26

Ian Hale
Attorney for Defendant Larry Davis

ORDER DENYING DEFENDANTS' MOTIONS FOR
PARTIAL SUMMARY JUDGMENT ON WCRP'S
BREACH OF THE DUTY TO DEFEND - Page 4

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
601 Union Street, Suite 1500
Seattle, Washington 98101-1363
T: (206) 622-5511 F: (206) 622-4986

1 TALMADGE / FITZPATRICK

2
3 By Philip A. Talmadge, WSBA #6973
4 Associate Counsel for Larry Davis and Alan Northrop

5 MACDONALD HOAGUE & BAYLESS

6 By Timothy K. Ford, WSBA #5986
7 David J. Whedbee, WSBA #35977
8 Attorneys for Defendant Alan Northrop

9 CLARK COUNTY PROSECUTING ATTORNEY: CIVIL DIVISION

10 By ~~Christopher H. Herring, WSBA #12357~~ Taylor Henthorn, WSBA #44963
11 Attorney for Defendants Clark County and Donald Slagle

12 SMITH GOODFRIEND, P.S.

13
14 By Howard M. Goodfriend, WSBA #14355
15 Associate Counsel for Plaintiff Washington Counties Risk Pool and Vyrle Hill

16 GORDON & REES, LLP

17 By Troy A. Biddle, WSBA No. 39165
18 Attorneys for Lexington Insurance Company

19 BYRNES KELLER CROMWELL LLP

20 By Bradley S. Keller, WSBA #10665
21 Devon S. Richards, WSBA #4602
22 Attorneys for J. William Ashbaugh

23 COZEN O'CONNOR

24
25 By Thomas M. Jones, WSBA #13141
26 Brendan Winslow-Nason, WSBA #39328
Attorneys for ACE American Insurance Company

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that she is now, and at all times material hereto, a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to, nor interested in the above entitled action, and competent to be a witness herein.

I caused to be served this date the foregoing in the manner indicated to the parties listed below:

Timothy K. Ford, WSBA #5986 Legal Messenger
David J. Whedbee, WSBA #35977 Facsimile
MacDonald Hoague & Bayless Email per Agreement
705 2nd Ave Ste 1500 1st Class Mail
Seattle, WA 98104-1796 Federal Express
TimF@mhb.com
davidw@mhb.com
tiffanyo@mhb.com
patrickr@mhb.com
lindant@mhb.com

Attorneys for Defendant Alan Northrop

John R. Connelly, WSBA #12183 Legal Messenger
Micah R. LeBank, WSBA #38047 Facsimile
Connelly Law Offices Email per Agreement
2301 N 30th St 1st Class Mail
Tacoma, WA 98403 Federal Express
JConnelly@connelly-law.com
mlebank@connelly-law.com
bmervin@connelly-law.com

Ian Hale Legal Messenger
Parsons Farnell & Grein, LLP Facsimile
1030 SW Morrison Street Email per Agreement
Portland, OR 97205 1st Class Mail
IHale@pfglaw.com Federal Express
mfarnell@pfglaw.com
kkaran@pfglaw.com

Attorneys for Defendant Larry Davis

Christopher Horne, WSBA #12557 Legal Messenger
Chief Civil Deputy Prosecuting Attorney Facsimile
Clark County Prosecuting Attorney, Civil Division Email per Agreement
1300 Franklin, Suite 380 1st Class Mail
PO Box 5000 Federal Express
Vancouver, WA 98666
Chris.horne@clark.wa.gov
taylor.hallvik@clark.wa.gov
thelma.kremer@clark.wa.gov

Attorney for Defendants Clark County and Slagle

1 Troy A. Biddle, WSBA No. 39165
2 Donald J. Verfurth, WSBA No. 15554
3 Gordon & Rees LLP
4 701 5th Avenue, Suite 2100
5 Seattle, WA 98104
6 tbiddle@gordonrees.com
7 dverfurth@gordonrees.com
8 mche@gordonrees.com

9 *Attorneys for Lexington Insurance Company*

6 Bradley S. Keller, WSBA #10665
7 Devon S. Richards, WSBA #4602
8 1000 Second Avenue, 38th Floor
9 Seattle, WA 98104
10 bkeller@byrneskeller.com
11 drichards@byrneskeller.com

12 *Attorneys for J. William Ashbaugh*

10 Thomas M. Jones, WSBA #13141
11 Brendan Winslow-Nason, WSBA #39328
12 Cozen O'Conner
13 1201 Third Avenue, Suite 5200
14 Seattle, WA 98101
15 tjones@cozen.com
16 bwinslow-nason@cozen.com
17 DFinafrock@cozen.com

18 *Attorneys for ACE American Insurance Company*

15 Howard M. Goodfriend, WSBA #14355
16 Smith Goodfriend, P.S.
17 1619 8th Avenue North
18 Seattle, WA 98109
19 howard@washingtonappeals.com
20 victoria@washingtonappeals.com

21 *Associate Counsel for WCRP and Vyrle Hill*

20 Philip A. Talmadge, WSBA #6973
21 Talmadge/Fitzpatrick
22 2775 Harbor Avenue SW
23 Third Floor, Suite C
24 Seattle, WA 98126
25 Phil@tal-fitzlaw.com
26 roya@tal-fitzlaw.com

Associate Counsel for Davis and Northrop

24 Dated in Seattle, Washington, on this 9th day of December, 2014.


Heather K. Poltz
Legal Assistant

Legal Messenger
 Facsimile
 Email per Agreement
 1st Class Mail
 Federal Express

Legal Messenger
 Facsimile
 Email per Agreement
 1st Class Mail
 Federal Express

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 Facsimile
 Email per Agreement
 1st Class Mail
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**FILED
SUPERIOR COURT**

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**COWLITZ COUNTY
BEVERLY R LITTLE CLERK
BY _____**

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

**WASHINGTON COUNTIES RISK POOL;
LEXINGTON INSURANCE COMPANY;
AMERICAN INTERNATIONAL GROUP,
INC; VYRLE HILL, Executive Director of
the Washington Counties Risk Pool, in
both his individual capacity and official
capacity; J. WILLIAM ASHBAUGH,
individually; and ACE AMERICAN
INSURANCE COMPANY,**

Plaintiffs,

vs.

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

No. 13-2-01398-4

**COURT'S RULING on
NOVEMBER 21, 2014 HEARING**

**This Court, based on the files, record, legal briefs, affidavits and exhibits thereto, and
argument of counsel, hereby makes the following findings and rulings:**

- 1. This Court has previously ruled in the ruling from the October 10, 2014 hearing
that the Washington Counties Risk Pool ("the Pool") is not an insurer and that this
case is a matter of contract law.**

- 1 2. Clark County was a member of the Pool from 2002 to 2010. During that time the
2 Pool issued on a yearly basis a Joint Self-Insurance Liability Policy ("JSILP"). The
3 counties were able to negotiate and discuss the terms of the JSILP. As previously
4 ruled from the October 10, 2014 hearing, the JSILP is not traditional insurance.
- 5 3. Criminal Case:
- 6 a. On January 11, 1993, Kari Morrison was raped while cleaning a home in La
7 Center, Washington. On or about January 18, 1993, Clark County Sheriff's
8 Office Detective Donald Slagle ("Slagle") was assigned to the investigation.
9 As a result of the investigation, Alan Northrop ("Northrop") and Larry Davis
10 ("Davis") were arrested for burglary, rape and the kidnapping of Ms.
11 Morrison.
- 12 b. Davis was tried before a jury in Clark County Superior Court beginning on
13 May 10, 1993, and convicted of first degree burglary, rape and kidnapping.
14 Davis was sentenced on July 9, 1993.
- 15 c. Northrop was tried before a jury in Clark County Superior Court for first
16 degree burglary, rape, and kidnapping starting on July 6, 1993. He was
17 convicted on all counts and sentenced on September 14, 1993.
- 18 d. On June 30, 2010, the Clark County Superior Court granted Davis and
19 Northrop new trials based on newly discovered evidence. In particular,
20 DNA sampling taken from the crime scene was not consistent with either
21 Davis or Northrop's DNA. On July 13, 2010, Clark County dismissed all
22 charges against them without prejudice.
- 23 4. On August 25, 2012 Defendants Northrop and Davis filed a civil rights lawsuit in
24 the United States District Court for the Western District of Washington ("USDC")
25 against Slagle, the lead investigator involved in Northrop and Davis' convictions
26 and Clark County, Slagle's previous employer. They asserted claims for violation
27 of their rights protected by the United States Constitution, negligence and
28 negligent/intentional infliction of emotional distress.
5. Clark County tendered defense and indemnity to the Pool after receiving the
Complaint. The Pool determined there was no duty to defend or indemnify Clark
County or Slagle pursuant to the JSILP.

- 1 6. In June 2013 Davis and Northrop moved to amend their Complaint and Clark
2 County did not challenge the motion. The Amended Complaint was identical
3 except it included allegations specific to "Ongoing Unlawful and Unconstitutional
4 Conduct."
5 7. On July 15, 2013, Clark County tendered the defense and indemnity of the
6 allegations in the Amended Complaint. The Pool again determined there was no
7 duty to defend or indemnify Clark County or Slagle pursuant to the JSILP.
8 8. As stated, the JSILP is not traditional insurance and thus the duty under such
9 policy should be based on the language of that policy and the complaint.
10 9. The JSILP contains the provision:

11 1. JOINT SELF-INSURING AGREEMENT: the Washington Counties Risk
12 Pool ("Pool") shall pay on behalf of the named insured and other insureds
13 identified in Section 2 below, subject to the terms and conditions of this
14 Joint Self-Insurance Policy ("policy"), all sums of monetary damages which
15 an insured shall become obligated to pay by reason of liability imposed by
16 law or by reason of liability assumed under and insured contract for bodily
17 injury, personal injury, property damage, errors and omissions, and
18 advertising injury caused by an occurrence during the policy period and
19 occurring anywhere in the world, but only if a suit that may result and shall
20 have the right and duty to defend any suit against the insured seeking
21 monetary damages on account of any of the five coverages above, or any
22 combination thereof.....

23 D. An Occurrence that takes place during more than one policy period will
24 be deemed for all purposes to have taken place during the last policy period
25 in which any part of the occurrence took place, and shall be treated as a
26 single occurrence during such policy period. No occurrence will be deemed
27 to have taken place after the insured has knowledge of the alleged bodily
28 injury, property damage, personal injury, errors and omissions or advertising
injury that gave rise to the occurrence.....

6. DEFINITIONS: When used in this policy, including endorsements
forming a part hereof:

"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.

10. Based on the JSILP and what this court finds to be the applicable law, all of the
conduct that formed the basis for the Complaint and Amended Complaint occurred

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at the singular point of time of the investigation, arrest, conviction and incarceration of Davis and Northrop; that occurrence, or event, occurred in 1993.

11. Given the occurrence, or event, was in 1993, it pre-dated Clark County joining the Pool in 2002. Therefore, given coverage did not apply in 1993 the Pool did not have a duty to defend Clark County, or through them, Slagle.

12. The Court does not find any other basis of coverage argued by Defendants to be applicable.

13. A summary judgment is appropriate under CR 56 because the only dispute relates to the legal effect of contractual language.

14. Therefore, based on the files, records, argument of counsel and the foregoing, this Court finds as a matter of law, in favor of Washington Counties Risk Pool, that it did not breach its duty to defend Clark County and Donald Slagle. Defendants' Motion for Partial Summary Judgment is denied.

Dated: 11/25/2014



Judge Marilyn K. Haan

FILED
SUPERIOR COURT

2014 DEC 12 PM 12 12

COWLITZ COUNTY
BEVERLY R. LITTLE CLERK
BY _____

Honorable Marilyn Haan

SUPERIOR COURT OF WASHINGTON FOR COWLITZ COUNTY

WASHINGTON COUNTIES RISK POOL;
AMERICAN INTERNATIONAL GROUP,
INC.; LEXINGTON INSURANCE
COMPANY; VYRLE HILL, Executive
Director of the Washington Counties Risk
Pool, in both his individual capacity and
official capacity; J. WILLIAM ASHBAUGH,
individually; and ACE AMERICAN
INSURANCE COMPANY,

Plaintiffs,

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,

Defendants.

No. 13-2-01398-4

ORDER GRANTING PLAINTIFF
WASHINGTON COUNTIES RISK
POOL'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON THE
ASSIGNMENT TO DAVIS AND
NORTHROP AND GRANTING
LEXINGTON INSURANCE
COMPANY AND WCRP'S CROSS
MOTION FOR PARTIAL
SUMMARY JUDGMENT RE:
ASSIGNMENT

THIS MATTER, having come before the Court on Plaintiff Washington Counties Risk Pool's Motion for Partial Summary Judgment on the Assignment to Davis and Northrop and on all Defendants Motion for Partial Summary Judgment RE: Assignment, and the Court having reviewed the records and files as set forth herein and hearing argument of the parties:

ORDER GRANTING PLAINTIFF WASHINGTON
COUNTIES RISK POOL'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON ASSIGNMENT TO
DAVIS AND NORTHROP AND GRANTING
PLAINTIFF LEXINGTON AND WCRP'S CROSS
MOTION FOR SUMMARY JUDGMENT RE:
ASSIGNMENT - Page 1

LAW OFFICES
BENNETT BIGELOW & LREEDOM, P.S.
601 Union Street, Suite 1500
Seattle, Washington 98101-1363
T: (206) 622-5511 F: (206) 622-8986

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1. All Defendants Motion for Partial Summary Judgment Against Lexington Insurance Company RE: The Assignment;
2. Declaration of Mark Wildon in Support of All Defendants Motion for Partial Summary Judgment Against Lexington Insurance Company RE: The Assignment and exhibits thereto;
3. Declaration of Ian Hale in Support of All Defendants Motion for Partial Summary Judgment Against Lexington Insurance Company RE: The Assignment and exhibits thereto;
4. Plaintiff Lexington Insurance Company's Opposition to All Defendants Motion for Partial Summary Judgment Against Lexington Insurance Company RE: The Assignment and Cross Motion for Partial Summary Judgment;
5. Declaration of Troy A. Biddle in Support of Plaintiff Lexington Insurance Company's Opposition to All Defendants Motion for Partial Summary Judgment Against Lexington Insurance Company RE: The Assignment and exhibits thereto;
6. Declaration of Alan M. Levine in Support of Plaintiff Lexington Insurance Company's Opposition to All Defendants Motion for Partial Summary Judgment Against Lexington Insurance Company RE: The Assignment and exhibits thereto;
7. WCRP's Opposition to All Defendants Motion for Partial Summary Judgment Against Lexington Insurance Company RE: The Assignment and Cross Motion for Summary Judgment;
8. All Defendants Reply in Support of All Defendants Motion for Partial Summary Judgment Against Lexington Insurance Company RE: The Assignment and appendix thereto;

ORDER GRANTING PLAINTIFF WASHINGTON COUNTIES RISK POOL'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON ASSIGNMENT TO DAVIS AND NORTHPROP AND GRANTING PLAINTIFF LEXINGTON AND WCRP'S CROSS MOTION FOR SUMMARY JUDGMENT RE: ASSIGNMENT - Page 2

LAW OFFICES
 BENNETT BIGELOW & LEEDOM, P.S.
 601 Union Street, Suite 1500
 Seattle, Washington 98101-1363
 T: (206) 622-5511 F: (206) 622-8946

WCRP MDJ *

- 1 9. Plaintiff Washington Counties Risk Pool's Motion for Declaratory Judgment
- 2 on Clark County and Donald Slagle's Purported Assignment;
- 3 10. Declaration of William J. Leedom in Support of Plaintiff Washington Counties
- 4 Risk Pool's Motion for Declaratory Judgment on Clark County and Donald
- 5 Slagle's Purported Assignment, with attached exhibits;
- 6 11. Defendants Clark County and Donald Slagle's Response to Plaintiff's Motion
- 7 for Declaratory Judgment;
- 8 12. Declaration of Taylor Hallvik in Support of Defendants Clark County and
- 9 Donald Slagle's Response to Plaintiff's Motion for Declaratory Judgment, with
- 10 attached exhibits;
- 11 13. Defendants Larry Davis and Alan Northrop's Response to WCRP's "Motion
- 12 for Declaratory Judgment";
- 13 14. Declaration of Ian Hale in Opposition to WCRP's "Motion for Declaratory
- 14 Judgment," with attached exhibits;
- 15 15. Declaration of Bernard Veljacic with attached exhibits;
- 16 16. All Defendants' Motion to Strike Certain Exhibits to WCRP's Motion for
- 17 Declaratory Judgment, And For An Order to Show Cause;
- 18 17. Declaration of Timothy Ford and exhibits attached thereto;
- 19 18. Washington Counties Risk Pool's Reply Re: Motion for Declaratory Judgment
- 20 on Clark County and Donald Slagle's Purported Assignment;
- 21 19. Declaration of William J. Leedom in Support of Washington Counties Risk
- 22 Pool's Reply Re: Motion for Declaratory Judgment on Clark County and
- 23 Donald Slagle's Purported Assignment, with attached exhibits;

Motion to Strike

26 ORDER GRANTING PLAINTIFF WASHINGTON
COUNTIES RISK POOL'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON ASSIGNMENT TO
DAVIS AND NORTHERP AND GRANTING
PLAINTIFF LEXINGTON AND WCRP'S CROSS
MOTION FOR SUMMARY JUDGMENT RE:
ASSIGNMENT - Page 3

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
601 Union Street, Suite 1300
Seattle, Washington 98101-1363
T: (206) 622-5511 F: (206) 622-8986

- 1 20. Plaintiff Washington Counties Risk Pool's Response to All Defendants'
2 Motion to Strike Certain Exhibits to WCRP's Motion for Declaratory
3 Judgment and for an Order to Show Cause;
- 4 21. Declaration of Vyrle Hill in Support of Plaintiff Washington Counties Risk
5 Pool's Response to All Defendants' Motion to Strike Summary Judgment
6 Exhibits and exhibits attached thereto;
- 7 22. Declaration of Tammy Devlin in Support of Plaintiff Washington Counties
8 Risk Pool's Response to All Defendants' Motion to Strike Summary Judgment
9 Exhibits and exhibits attached thereto;
- 10 23. Declaration of William J. Leedom in Support of Plaintiff Washington
11 Counties Risk Pool's Response to All Defendants' Motion to Strike Summary
12 Judgment Exhibits and exhibits attached thereto;
- 13 24. All Defendants Reply to Motion to Strike and for an Order to Show Cause;
- 14 25. Declaration of Tiffany M. Cartwright Supporting Reply Brief In Support of
15 Defendants' Motion to Strike;
- 16 26. Washington Counties Risk Pool's Supplemental Opposition to Defendants'
17 Motion to Strike and For Order to Show Cause;
- 18 27. Declaration of William J. Leedom in Support of Washington Counties Risk
19 Pool's Supplemental Opposition to Defendants' Motion to Strike and For
20 Order to Show Cause, with attached exhibits;
- 21 28. Declaration of Thad Duvall in Support of Washington Counties Risk Pool's
22 Supplemental Opposition to Defendants' Motion to Strike and For Order to
23 Show Cause, with attached exhibits;
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- 1 29. Declaration of Clyde Carpenter in Support of Washington Counties Risk
- 2 Pool's Supplemental Opposition to Defendants' Motion to Strike and For
- 3 Order to Show Cause, with attached exhibits;
- 4 30. Declaration of Lisa Young in Support of Washington Counties Risk Pool's
- 5 Supplemental Opposition to Defendants' Motion to Strike and For Order to
- 6 Show Cause, with attached exhibits;
- 7 31. Declaration of Keith Goehner in Support of Washington Counties Risk Pool's
- 8 Supplemental Opposition to Defendants' Motion to Strike and For Order to
- 9 Show Cause, with attached exhibits;
- 10 32. Declaration of Tammy Devlin in Support of Washington Counties Risk Pool's
- 11 Supplemental Opposition to Defendants' Motion to Strike and For Order to
- 12 Show Cause, with attached exhibits;
- 13 33. Declaration of Stephen R. Bartel in Support of Washington Counties Risk
- 14 Pool's Supplemental Opposition to Defendants' Motion to Strike and For
- 15 Order to Show Cause, with attached exhibits;
- 16 34. Declaration of Stephen Bozarth in Support of Washington Counties Risk
- 17 Pool's Supplemental Opposition to Defendants' Motion to Strike and For
- 18 Order to Show Cause, with attached exhibits;
- 19 35. Declaration of Timothy Dickerson in Support of Washington Counties Risk
- 20 Pool's Supplemental Opposition to Defendants' Motion to Strike and For
- 21 Order to Show Cause, with attached exhibits;
- 22 36. Declaration of Shawn Sant in Support of Washington Counties Risk Pool's
- 23 Supplemental Opposition to Defendants' Motion to Strike and For Order to
- 24 Show Cause, with attached exhibits;
- 25

26 ORDER GRANTING PLAINTIFF WASHINGTON
COUNTIES RISK POOL'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON ASSIGNMENT TO
DAVIS AND NORTROP AND GRANTING
PLAINTIFF LEXINGTON AND WCRP'S CROSS
MOTION FOR SUMMARY JUDGMENT RE:
ASSIGNMENT - Page 5

LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
601 Union Street, Suite 1500
Seattle, Washington 98101-1363
T: (206) 622-5511 F: (206) 622-8986

- 1 37. Declaration of Steve Clem in Support of Washington Counties Risk Pool's
- 2 Supplemental Opposition to Defendants' Motion to Strike and For Order to
- 3 Show Cause, with attached exhibits;
- 4 38. Declaration of William Andrew Woods in Support of Washington Counties
- 5 Risk Pool's Supplemental Opposition to Defendants' Motion to Strike and For
- 6 Order to Show Cause, with attached exhibits;
- 7 39. Declaration of J. William Ashbaugh in Support of Washington Counties Risk
- 8 Pool's Supplemental Opposition to Defendants' Motion to Strike and For
- 9 Order to Show Cause, with attached exhibits;
- 10 40. Declaration of Jill Johnson in Support of Washington Counties Risk Pool's
- 11 Supplemental Opposition to Defendants' Motion to Strike and For Order to
- 12 Show Cause, with attached exhibits;
- 13 41. Declaration of Jon Tunheim in Support of Washington Counties Risk Pool's
- 14 Supplemental Opposition to Defendants' Motion to Strike and For Order to
- 15 Show Cause, with attached exhibits;
- 16 42. Declaration of James Hagerty in Support of Washington Counties Risk Pool's
- 17 Supplemental Opposition to Defendants' Motion to Strike and For Order to
- 18 Show Cause, with attached exhibits;
- 19 43. Defendants Response ^{opposition} to WCRP's Unauthorized Supplemental Response;
- 20 44. Declaration of Tiffany M. Cartwright in Support of Defendants' Response to
- 21 WCRP's Unauthorized Supplemental Response ^{Opposition} and exhibits thereto;
- 22 45. Washington Counties Risk Pool's Reply re: Supplemental Opposition to
- 23 Defendants' Motion to Strike and for Order to Show Cause;
- 24 46. Washington Counties Risk Pool's Supplemental Brief re: *WPUDUS v. Clallam*
- 25 *PUD*;

* WJ
 WJ
 WJ
 MSJ
 MDJ

ORDER GRANTING PLAINTIFF WASHINGTON
 COUNTIES RISK POOL'S MOTION FOR PARTIAL
 SUMMARY JUDGMENT ON ASSIGNMENT TO
 DAVIS AND NORTHROP AND GRANTING
 PLAINTIFF LEXINGTON AND WCRP'S CROSS
 MOTION FOR SUMMARY JUDGMENT RE:
 ASSIGNMENT - Page 6

LAW OFFICES
 BENNETT BIGELOW & LEBDOM, P.S.
 601 Union Street, Suite 1500
 Seattle, Washington 98101-1563
 T: (206) 622-5511 F: (206) 622-8986

- 1 47. All Defendants' Objections & Opposition to Washington Counties Risk Pool's
- 2 Supplemental Brief re: *WPUDUS v. Clallam County*, with attached
- 3 Appendices;
- 4 48. Plaintiff Washington Counties Risk Pool's Response to All Defendants'
- 5 Objections and Opposition to Washington Counties Risk Pool's Supplemental
- 6 Brief re: *WPUDUS v. Clallam County*, with attached Appendix;
- 7 49. _____;
- 8 50. _____;
- 9 51. _____;
- 10 52. _____; and

11 the Court having heard argument of the parties and issued the "Court's Ruling on October 10,
 12 2014 hearing" on November 13, 2014, which Ruling is attached and incorporated into this
 13 Order, and the Court being fully advised in the premises, now, therefore, it is **HEREBY**
 14 **ORDERED, ADJUDGED, AND DECREED** that Plaintiff Washington Counties Risk Pool's
 15 Motion for Declaratory Judgment on Clark County and Donald Slagle's Purported
 16 Assignments is **GRANTED** as set forth in the attached written ruling.

17 **IT IS FURTHER ORDERED** that All Defendants Motion for Partial Summary
 18 Judgment RE: Assignment is hereby **DENIED** as set forth in the attached written ruling.

19 **IT IS FURTHER ORDERED** that Lexington Insurance Company and Washington
 20 County's Risk Pool's Cross Motion for Partial Summary Judgment RE: Assignment is hereby
 21 **GRANTED** as set forth in the attached written ruling.

22 **IT IS FURTHER ORDERED** that All Defendants Motion to Strike Certain Exhibits to
 23 WCRP's Motion for Declaratory Judgment is **DENIED** as **MOOT** as set forth in the attached
 24 written ruling.

25

26 **ORDER GRANTING PLAINTIFF WASHINGTON
 COUNTIES RISK POOL'S MOTION FOR PARTIAL
 SUMMARY JUDGMENT ON ASSIGNMENT TO
 DAVIS AND NORTHROP AND GRANTING
 PLAINTIFF LEXINGTON AND WCRP'S CROSS
 MOTION FOR SUMMARY JUDGMENT RE:
 ASSIGNMENT - Page 7**

**LAW OFFICES
 BENNETT BIGELOW & LEEDOM, P.S.
 601 Union Street, Suite 1300
 Seattle, Washington 98101-1363
 T: (206) 622-5511 F: (206) 622-8986**

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DONE IN OPEN COURT this 10th day of December, 2014.



Judge Marilyn Haan

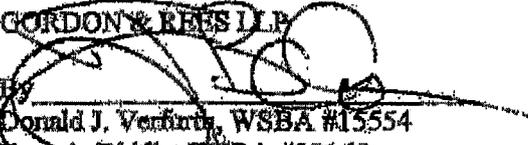
Presented by:

BENNETT BIGELOW & LEEDOM, P.S.

By: 

William J. Leedom, WSBA #2321
Amy M. Magnano, WSBA #38484
David M. Norman, WSBA #40564
Attorneys for Plaintiff Washington
Counties Risk Pool

~~GORDON & REES LLP~~

By: 

Donald J. Venturis, WSBA #15554
Perry A. Biddle, WSBA #39165
Attorneys for Plaintiff Lexington Insurance Company

Approved as to form:

CONNELLY LAW OFFICES, PLLC

By: _____
John R. Connelly, Jr., WSBA No. 12183
Micah R. LaBank, WSBA No. 38047
Attorneys for Defendant Larry Davis

PARSONS FARNELL & GREIN, LLP

By: 

Michael B. Farnell, WSBA No. 23735

ORDER GRANTING PLAINTIFF WASHINGTON
COUNTIES RISK POOL'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON ASSIGNMENT TO
DAVIS AND NORTHPROP AND GRANTING
PLAINTIFF LEXINGTON AND WCRP'S CROSS
MOTION FOR SUMMARY JUDGMENT RE:
ASSIGNMENT - Page 8

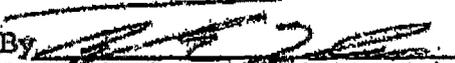
LAW OFFICES
BENNETT BIGELOW & LEEDOM, P.S.
601 Union Street, Suite 1500
Seattle, Washington 98101-1363
T: (206) 622-5311 F: (206) 622-8986

1 Ian Hale (Admitted *Pro Hac Vice*)
Attorneys for Larry Davis and Alan Northrop

2
3 MacDONALD HOAGUE & BAYLESS

4
5 By
6 Timothy K. Ford, WSBA #5986
David J. Whedbee, WSBA #35977
Attorneys for Alan Northrop

7 CLARK COUNTY PROSECUTING ATTORNEY'S OFFICE
8 CIVIL DIVISION

9 By 
10 Christopher Home, WSBA #12557
Taylor Hallvik, WSBA #44963
11 Attorneys for Clark County

12 BYRNES KELLER CROMWELL LLP

13
14 By
15 Bradley S. Keller, WSBA #10665
Devon S. Richards, WSBA #4602
Attorneys for J. William Ashbaugh

16
17 COZEN O'CONNOR

18
19 By
20 Thomas M. Jones, WSBA #13141
Brendan Winslow-Nason, WSBA #39328
Attorneys for ACE American Insurance Company

21
22
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24
25
26 ORDER GRANTING PLAINTIFF WASHINGTON
COUNTIES RISK POOL'S MOTION FOR PARTIAL
SUMMARY JUDGMENT ON ASSIGNMENT TO
DAVIS AND NORTHROP AND GRANTING
PLAINTIFF LEXINGTON AND WCRP'S CROSS
MOTION FOR SUMMARY JUDGMENT RE:
ASSIGNMENT - Page 9

LAW OFFICES
BENNETT BIGELOW & FREEDOM, P.S.
601 Union Street, Suite 1500
Seattle, Washington 98101-1363
T: (206) 622-5511 F: (206) 622-8986

DECLARATION OF SERVICE

On said day below I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Motion for Leave to File Over-Length Brief of Appellants and Brief of Appellants Davis and Northrop in Supreme Court Cause No. 91154-1 to the following parties:

Timothy K. Ford David J. Whedbee Tiffany Mae Cartwright MacDonald Hoague & Bayless 705 2 nd Avenue, Suite 1500 Seattle, WA 98104-1796	Howard M. Goodfriend Smith Goodfriend, P.S. 1619 8 th Avenue North Seattle, WA 98109-3007
Christopher Horne Taylor Hallvik Clark County Prosecuting Attorney, Civil Division 1300 Franklin, Suite 380 PO Box 5000 Vancouver, WA 98666	Troy A. Biddle Donald J. Verfurth Gordon & Rees LLP 701 5 th Avenue, Suite 2100 Seattle, WA 98104
Bradley S. Keller Devon S. Richards Byrnes Keller Cromwell LLP 1000 2 nd Avenue, Floor 38 Seattle, WA 98104-1094	Thomas M. Jones Brendan Winslow-Nason Cozen O'Connor 999 3 rd Avenue, Suite 1900 Seattle, WA 98104
John R. Connelly Micah R. LeBank Connelly Law Offices 2301 North 30 th Street Tacoma, WA 98403	Ian Hale Michael E. Farnell Parsons Farnell & Grein, LLP 1030 SW Morrison Street Portland, OR 97205
Patrick T. Jordan Jordan Legal LLC 1609 S Weller Street, Apt D Seattle, WA 98144-2157	William Leedom Amy M. Magnano David M. Norman Bennett Bigelow & Leedom, PS 601 Union Street, Suite 1500 Seattle, WA 98101-1363
Agelo L. Reppas Sedgwick LLP One North Wacker Drive, Suite 4200 Chicago, IL 60606	

Original efiled with:
Washington Supreme Court
Clerk's Office

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

DATED: October 13, 2015, at Seattle, Washington.



Kelley Carroll, Legal Assistant
Talmadge/Fitzpatrick/Tribe

OFFICE RECEPTIONIST, CLERK

To: Roya Kolahi
Cc: Phil Talmadge; jconnelly@connelly-law.com; mlebank@connelly-law.com; bmarvin@connelly-law.com; TimF@mhb.com; davidw@mhb.com; tiffanyc@mhb.com; patrickf@mhb.com; lindamt@mhb.com; IHale@pfglaw.com; mfarnell@pfglaw.com; kkaran@pfglaw.com; wleedom@bllaw.com; AMagnano@bllaw.com; dnorman@bllaw.com; vhager@bllaw.com; jgoldfarb@bllaw.com; hpoltz@bllaw.com; lyniguez@bllaw.com; howard@washingtonappeals.com; victoria@washingtonappeals.com; chris.horne@clark.wa.gov; taylor.hallvik@clark.wa.gov; thelma.kremer@clark.wa.gov; nicole.davis@clark.wa.gov; tbiddle@gordonrees.com; dverfurth@gordonrees.com; mche@gordonrees.com; pjordan@jordan-legal.com; agelo.reppas@sedgwicklaw.com; bkeller@byrneskeller.com; drichards@byrneskeller.com; kwolf@byrneskeller.com; ccoleman@byrneskeller.com; tjones@cozen.com; bwinslow-nason@cozen.com; DFinafrock@cozen.com
Subject: RE: WCRP, et al. v. Clark County, et al. Supreme Court Case No. 91154-1

Received on 10-13-2015

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Cc: Phil Talmadge <phil@tal-fitzlaw.com>; jconnelly@connelly-law.com; mlebank@connelly-law.com; bmarvin@connelly-law.com; TimF@mhb.com; davidw@mhb.com; tiffanyc@mhb.com; patrickf@mhb.com; lindamt@mhb.com; IHale@pfglaw.com; mfarnell@pfglaw.com; kkaran@pfglaw.com; wleedom@bllaw.com; AMagnano@bllaw.com; dnorman@bllaw.com; vhager@bllaw.com; jgoldfarb@bllaw.com; hpoltz@bllaw.com; lyniguez@bllaw.com; howard@washingtonappeals.com; victoria@washingtonappeals.com; chris.horne@clark.wa.gov; taylor.hallvik@clark.wa.gov; thelma.kremer@clark.wa.gov; nicole.davis@clark.wa.gov; tbiddle@gordonrees.com; dverfurth@gordonrees.com; mche@gordonrees.com; pjordan@jordan-legal.com; agelo.reppas@sedgwicklaw.com; bkeller@byrneskeller.com; drichards@byrneskeller.com; kwolf@byrneskeller.com; ccoleman@byrneskeller.com; tjones@cozen.com; bwinslow-nason@cozen.com; DFinafrock@cozen.com
Subject: WCRP, et al. v. Clark County, et al. Supreme Court Case No. 91154-1

Good afternoon:

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

Documents to be filed: (1) Motion for Leave to File Over-length Supplemental Brief of Appellants, (2) Brief of Appellants Davis and Northrop, and (3) Declaration of Service.

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

Case Cause Number: 91154-1

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

Contact information: Kelley Carroll, (206) 574-6661, roya@tal-fitzlaw.com

Hard copies to the parties will follow by U.S. Mail. Thank you.

Kelley Carroll
Legal Assistant
Talmadge/Fitzpatrick/Tribe
206-574-6661 (w)
206-575-1397 (f)
roya@tal-fitzlaw.com