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SUPREME COURT  
OF THE STATE OF WASHINGTON

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

Petitioners.

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CLARK COUNTY / SLAGLE'S REPLY BRIEF IN SUPPORT OF  
MOTION FOR DISCRETIONARY REVIEW

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ORIGINAL

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## I. INTRODUCTION

The trial court, Petitioners and even Respondent Lexington/AIG are all in agreement that discretionary review of the trial court's threshold rulings in this case is warranted. Only WCRP and its executive director, Vyrle Hill, oppose immediate review of the trial court's ruling, which includes, among other things, that Washington common law insurance principles do not apply to insurance policies issued by WCRP/Lexington, or to the claims made under those policies.<sup>1 2</sup> In opposing discretionary review, WCRP/Hill continue to ignore not only their own prior treatment of these policies, but also decades of Washington appellate precedent as they struggle to both justify the trial court's ruling and at the same time diminish its wider implications. WCRP/Hill also ignore the existence of the trial court's express findings in its certification of these issues for appeal.

In an effort to delay appellate review of the trial court's threshold rulings, WCRP/Hill misstate and/or disregarded the numerous Washington appellate decisions uniformly applying well-considered common law insurance principles to policies issued by and through risk pools. After

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<sup>1</sup> To avoid the redundancy that would result from separately replying to the briefs filed by WCRP, Hill and Lexington, Clark County and Slagle submit this omnibus Reply in Support of its Motion for Discretionary Review.

<sup>2</sup> Clark County/Slagle also hereby incorporated by reference the arguments set forth in Davis/Northrop's reply.

dismissing this controlling Washington appellate authority without any meaningful discussion, WCRP attempts to argue that the trial court did not commit obvious or probable error in failing to apply Washington insurance common law because the “unambiguous” language of RCW 48.01.050 exempts risk pools from certain provisions of the insurance code relating to “insurers.”

Setting aside the fact that this novel interpretation flies in the face of numerous Washington appellate decisions (constituting obvious or probable error), it also fails upon even a cursory review of the plain language of this statute.<sup>3</sup> RCW 48.01.050 is expressly limited to the definition of an “insurer under this code” (Title 48) and does not remotely touch upon or nullify this Court’s rich body of common law protecting the rights of individual, commercial and municipal insureds alike.

The trial court’s acceptance of WCRP/Lexington’s interpretation of the discrete and self-limiting provisions of RCW 48.01.050 to relieve WCRP/Lexington of its duty to defend and invalidate the assignment of claims by Clark County and Slagle, constitutes obvious or probable error that will render further trial court proceedings not only useless but also prejudicial until appellate review occurs. This was recognized in explicit findings of the trial court, which found appellate guidance necessary to

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<sup>3</sup> WCRP/Lexington’s present interpretation of RCW 48.01.050 is contradicted by the manner in which WCRP/Lexington has always treated these policies in the past.

any continued litigation of these claims and therefore certified the issues pursuant to RAP 2.3:<sup>4</sup>

**“[...] the Court does find that the order involves a controlling issue of law -- question of law, and that is whether common law of insurance applies or not. And I keep looking at this. That is the fundamental underlying building block of this case that this Court finds is going to decide matters -- majority of the matters as we move forward.”**

Davis/Northrop App. 1052-1053. Although WCRP would prefer to ignore the trial court’s findings, and appears to deny their very existence, this Court should heavily weight the trial court’s acknowledgement that the question of whether common law of insurance applies to the insurance policies issued by risk pools is a controlling threshold question that is worthy of discretionary review.

In attempting to insulate themselves from Washington common law insurance principles, WCRP/Lexington seek a separate and discrete body of “risk pool” law where the duty to defend, the timing of an occurrence and the other rights and protections afforded to every other Washington insured have different second-rate meanings, and where the only option left to an abandoned insured is to face a catastrophic judgment. Fortunately, this parallel universe of “risk pool” law envisioned *ex post facto* by WCRP/Lexington does not exist in

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<sup>4</sup> Transcript of December 12, 2014 Hearing on Motion to Certify Issues for Appellate Review, Northrop/Davis Supplemental Appendix 01052 -01053

Washington, and risk pool insureds and their employees enjoy the same rights and protections as any other insureds in Washington—rights and protections that WCRP/Lexington recognized and acknowledged at all times prior to receiving notice of these claims.<sup>5</sup>

In this case, Clark County and Det. Donald Slagle were abandoned by WCRP/Lexington and left to face a potentially catastrophic verdict without the insurance benefits to which they were entitled. They were thus forced to protect their own interests by exercising the widely recognized right to assign a claim for damages to the plaintiffs in a covenant judgment settlement.<sup>6</sup> Contrary to WCRP's characterization, Clark County and Slagle did not assign their “interests in the pool,” or any other right or interest provided under the Interlocal Agreement, which is a governance document that controls membership and operation of the pool.<sup>7</sup> Rather, Clark County and Slagle assigned their claims for damages against WCRP/Lexington under the separate and wholly discrete insurance policies provided by WCRP/Lexington; which are the documents that

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<sup>5</sup> Excerpt of Deposition of Susan Looker, Northrop/Davis Appendix 00868,00870 – 00875; Excerpt of Deposition of Mark Wilsdon, County/Slagle Appendix 105; Deposition of Ed Pavone, County/Slagle Appendix 97.

<sup>6</sup> See Covenant Judgment Settlement/Assignment, County/Slagle Appendix 310- 317.

<sup>7</sup> *Id.*; See Interlocal Agreement DR 135 - 143.

provide their insurance coverage.<sup>8</sup> These are separate, stand-alone agreements, each of which contain “entire agreement” clauses and do not incorporate each other.<sup>9</sup> Unencumbered by these facts, WCRP continues to claim that Clark County and Slagle’s assignment somehow breached an anti-assignment provision in the Interlocal Agreement.

WCRP’s factual mischaracterization of the settlement/assignment should have been immaterial because this Court has repeatedly ruled that assignments of claims for damages after they have accrued are expressly permitted even when prohibited by a contractual provision.

Unfortunately, the trial court failed to apply this authority, and failed to recognize the distinction between the rights provided under the insurance policies and the separate and distinct rights provided under the Interlocal Agreement when it erroneously concluded that an assignment under the former constituted a breach of the later. The trial court also went so far as to hold that Slagle, an “insured” under the policies—policies that expressly afford each “insured” their own rights separate and independent from those of any other “insured,” including the “named insured”—had no actual rights of his own under the policies, and that any rights he had were purely “derivative” of the rights of Clark County. Each of these decisions

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<sup>8</sup> See Covenant Judgment Settlement/Assignment, County/Slagle Appendix 310- 317; WCRP/Lexington Insurance Policies as Exhibits 1-9 of Declaration of Mark Wilsdon, Northrop/Davis Appendix 00160 -00348

<sup>9</sup> *Id.*

constitutes obvious or probable error such that discretionary review pursuant to RAP 2.3(b) is now appropriate.

Discretionary review by this Court is appropriate because the trial court's rulings have cast into doubt the insurance rights of each and every risk pool member across the State of Washington, as well as those of their literally thousands of individual Washington employees. This includes not only the twenty-six remaining member counties of WCRP, but also dozens of cities, school districts, public utilities, and a broad range of other government and nonprofit entities and their employees.

Ironically, although WCRP/Lexington now attempt to diminish the implications and scope of the trial court's ruling, they relied heavily upon a prior similarly erroneous *commissioner* ruling in the *Spencer* case to justify their wrongful denial of coverage in this case.<sup>10</sup> Indeed, Lexington continues to cite and rely upon this commissioner's decision in briefing to this Court even as they attempt to argue that other Washington risk pools and their commercial insurance partners would be unable to use this trial court's decision to deny coverage to other insureds.<sup>11</sup> The disingenuousness of this argument is clear.

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<sup>10</sup> WCRP Opposition to Defendant's Motion for Partial Summary Judgment on WCRP's Breach of Duty to Defend, DR 349-351.

<sup>11</sup> Lexington Answer to Petitioner's Statement of Grounds for Direct Review, pp. 9-10.

Until this Court affirms that Washington common law insurance principles apply to policies of insurance purchased through risk pools, the trial court's rulings will affect every municipal entity in Washington that purchases its insurance coverage through a risk pool—and all of their individual employees. These rulings will have effect not only when claims are made under existing policies, or when a defense and indemnity in an existing liability case are denied, but even more fundamentally, when municipalities and other government entities are deciding whether to even purchase insurance from a risk pool rather than a commercial insurance company. Those decisions are being made daily and will be clouded with uncertainty until this issue is finally resolved. Moreover, insuring entities like WCRP/Lexington will continue to feel free to make arbitrary, wrongful coverage decisions and engage in other misconduct that disregards and flies in the face of Washington law.

This decision has implications well beyond this case and will impact every government entity and their employees that are provided insurance coverage through as risk pool in Washington.

II. ARGUMENT WHY DISCRETIONARY REVIEW  
SHOULD BE GRANTED

A. Clark County, Det. Donald Slagle, Alan Northrop, Larry Davis Lexington Insurance Company and the Trial Court All Agree That Discretionary Review is Appropriate under RAP 2.3(b)

The trial court, Petitioners and Respondent Lexington Insurance are all in agreement that immediate discretionary review of the trial court's threshold rulings is appropriate under RAP 2.3(b).<sup>12</sup> Only WCRP and its executive director, Vyrle Hill, oppose immediate review.<sup>13</sup>

The near consensus of the parties and the trial court combined with the trial court's dramatic departure from this Court's well-developed body of common law insurance principles, make discretionary review by this Court appropriate. This body of law has repeatedly affirmed: (1) the scope and standard of the contractual duty to defend, and (2) the ability of an insured to protect itself by executing a covenant judgment and assignment of claims when abandoned and left without a defense. This Court should grant review to vindicate this body of law and resolve any uncertainty created by the trial court that insurance purchased through risk

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<sup>12</sup> See Clark County Motion for Discretionary Review, See Northrop/Davis Motion for Discretionary Review; See Lexington Insurance Co. Response to Motion for Discretionary Review; See Trial Court's Order Certifying Issues for Appellate Review Pursuant to RAP 2.3, County/Slagle Appendix pp. 43-45; See Transcript of December 12, 2014 Hearing on Motion to Certify Issues for Appellate Review, Northrop/Davis Appendix 01052 -01053.

<sup>13</sup> See WCRP Response to Motion for Discretionary Review; See Hill Response to Motion for Discretionary Review.

pools is somehow exempt from these fundamental common law principles, and to allow for a just and speedy resolution of this case.

As the only remaining party in this case opposing discretionary review, WCRP/Hill fail to acknowledge that which all other parties to this case, as well as the trial court, have recognized – that immediate appellate review will allow the trial court to proceed efficiently through the remainder of the case under the appropriate body of law and with the appropriate parties, while dispelling any doubt as to the rights and protections provided to members of risk pools and their employees.<sup>14</sup> Contrary to WCRP's assertion, the trial court did make express findings in certifying its threshold rulings for appeal, clearly articulating its continuing concerns and questions regarding what law applied to WCRP/Lexington insurance policies in this case.<sup>15</sup> The trial court also considered the arguments advanced by Mr. Hill and found that the claims against him are inextricably tied to the issues presented for review.<sup>16</sup>

The trial court's certification pursuant to RAP 2.3 and its *express* finding that immediate appellate review in this case would materially advance the ultimate termination of the litigation deserves deference from

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<sup>14</sup> *Id.*

<sup>15</sup> Transcript of December 12, 2014 Hearing on Motion to Certify Issues for Appellate Review, Northrop/Davis Supplemental Appendix, Appendix 01052 -01053

<sup>16</sup> *Id* at 01024, 01052 - 01053.

this Court. The trial court is in the best position to evaluate whether immediate review of these threshold rulings will expedite the ultimate resolution of this case and provide the closure sought by all of the individual parties. The trial court and the majority of parties to this case have recognized that immediate appellate review will promote judicial economy because much, if not all, of the trial court's work will need to be re-done if this Court rules that Washington common law insurance principles do apply to policies of insurance issued by WCRP/Lexington.

Discretionary review is especially appropriate in this case because the trial court's ruling nullifying the assignment of claims for damages to Northrop and Davis creates uncertainty regarding which parties may prosecute claims as this case continues. In departing from Washington appellate authority that expressly authorizes covenant judgment and assignment settlements, the trial court has ruled that Petitioners Northrop and Davis do not own many of the remaining claims in this case. This ruling effectively forces Clark County and Det. Donald Slagle to litigate claims that they thought they had rightfully assigned in a manner consistent with decades of Washington law. *Public Utility Dist. No. 1 of Klickitat County, v. Int'l Ins. Co.*, 124 Wn.2d 789, 800-01, 881 P.2d 1020 (1994); *Bird v. Best Plumbing*, 175 Wn.2d 756, 754-65, 287 P.2d 551 (2012); Thomas V. Harris, *Washington Insurance Law* § 10.02 at 10-3 (3d

ed. 2010). This continuing litigation will include extensive discovery, motion practice, and potentially trial on claims that were assigned to Petitioners Northrop and Davis. If appellate review of this issue is delayed until after the case and the trial court's ruling with respect to the assignment is reversed, all of the trial court's work will need to be re-done as Petitioners Northrop and Davis re-litigate the assigned claims. Such an outcome would be an enormous waste of time and resources and would prolong the ultimate termination of this lawsuit.

B. Washington Appellate Courts have Repeatedly and Universally Applied Washington Common Law Insurance Principles to Insurance Policies Purchased through Risk Pools.

WCRP/Lexington continue to ignore or distort the implications of decades of Washington appellate decisions that apply Washington common law on insurance to insurance policies purchased through risk pools. As set forth in Petitioners' Motions for Discretionary Review at 10-12, this Court and other Washington appellate courts have repeatedly and uniformly applied these principles in coverage disputes that have arisen between risk pools and their insureds. *E.g. Wash. Pub. Util. Dists. Util. Sys. v. Public Utility Dist. No. 1 of Clallam Cy.*, 112 Wn.2d 1, 771 P.2d 701 (1989) (treating true "joint self-insurance" policies as subject to Washington common law on insurance); *Colby v. Yakima County*, 133

Wn.App. 386, 136 P.3d 131 (2006) (treating *WCRP's policies* as subject to Washington common law on insurance); *City of Okanogan v. Cities Ins. Ass'n of Wash.*, 72 Wn.App. 697, 865 P.2d 576 (1994) (treating risk pool policies as subject to Washington common law on insurance, including adoption of the “continuous trigger” to establish the timing of an “occurrence”). WCRP/Lexington either ignore or misconstrue this precedent. Not one of these decisions has ever followed the position advocated by WCRP/Lexington.

In opposing discretionary review, WCRP/Hill continue to seek refuge from this controlling precedent by claiming that RCW 48.01.050 somehow exempts risk pools and their commercial excess/reinsurers from these decisions.<sup>17</sup> As noted above, this expansive interpretation of RCW 48.01.050 cannot be supported by even a plain reading of the statute, which limits the definition of “insurer” only with respect to “the code” and not the common law. Additionally, even if this statute implicated the common law in some way, which it does not, any modification of the definition of “insurer” would apply only to the extent that a risk pool is jointly self-insured or self-funded.

Specifically, RCW 48.62.021(6) defines self-insurance as:

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<sup>17</sup> WCRP Response to Petitioner’s Motion for Discretionary Review, pp. 16-20.

“Self-insurance” means a formal 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.

In the present case, it is undisputed that WCRP transferred *all of the risk* associated with Clark County’s claims through the purchase of re-insurance and excess insurance policies from AIG, Lexington and ACE.<sup>18</sup> Put simply, even if RCW 48.01.050 could be read to provide an exemption from the common law, which it cannot, it would not apply here because it is undisputed that WCRP did not “self-fund” or “self-insure” any of Clark County’s claims.<sup>19</sup>

Moreover, the question here is not WCRP’s status as an “insurer,” but rather the scope of the contractual rights and protections provided by the *insurance policies* issued by WCRP/Lexington. And these policies constitute “insurance” under both the code and the common law definitions. RCW 48.01.040 (“insurance” means “a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies”); *Bordeaux, Inc. v. American Safety Ins. Co.*, 145 Wn. App. 687, 696-97, 186 P.3d 1188 (2008) (“insurance involves risk shifting, while self-insurance involves risk retention”).

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<sup>18</sup> WCRP Annual Reports Coverage Graphs, Northrop/Davis Appendix 00783, 00794, 00800.

<sup>19</sup> *Id.*

Simply put, RCW 48.01.050 in no way exempts WCRP from the common law. The common law and the Insurance code have long been recognized as separate and independent bodies of law that impose separate and independent duties. *E.g.*, *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 386, 715 P.2d 1133 (1986) (“Not only have the courts imposed on insurers a duty of good faith, the Legislature has imposed it as well”); *cf. Am. Best Food, Inc. v. Alea London*, 168 Wn.2d 398, 415, 229 P.3d 693 (2010) (“This court has long recognized that breach of an insurance contract and the tort of bad faith are separate claims that are analyzed independently. Breach of an insurance contract is neither necessary, nor sufficient, to establish the tort of bad faith.”). The question now before the Court is whether the common law of insurance applies to the interpretation of these policies. The claim that RCW 48.01.050 somehow exempts WCRP from the common law is not true. No such exemption exists.

The unanswerable question that arises from WCRP/Lexington’s flawed interpretation of RCW 48.01.050 is: “If Washington common law insurance principles do not apply to policies purchased through risk pools, what law does apply to interpret these insurance policies?” To date, WCRP/Lexington have left this question unanswered. Instead, they have merely cited to *the insurance common law from other states*, states that

have adopted a “manifestation” trigger of coverage theory rejected by this Court in *Transcontinental*, 111 Wn.2d at 464-70.

WCRP/Lexington then make vague references to contract law as if it were somehow different than insurance contract law. “In Washington insurance law is contract law.” 25 Wash. Prac., Contract Law and Practice § 5:8 (2d ed.) (“The interpretation of an insurance policy is an issue of law, according to the principles of contract law. Accordingly, appellate review of insurance contracts is de novo.”); *id.* at § 5:9 (“The basic rules of contract interpretation and construction apply to insurance contracts, though the Washington courts have specifically articulated the guiding principles as applied to insurance policies resulting in a prolific body of law that may be effectively relied on by the practicing attorney.”). (emphasis added).<sup>20</sup> There is no question but that WCRP/Lexington are in the business of insurance as defined under RCW 48.01.030. The insurance provided to municipalities and their employees is certainly a matter of great public importance. Unfortunately, the trial Court

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<sup>20</sup> See also, *Panorama Vill. Condo. Owners Ass'n Bd. of Directors v. Allstate Ins. Co.*, 144 Wn.2d 130, 136-37, 26 P.3d 910 (2001) (“We recognize we must be guarded in our interpretation of an insurance contract as it is elementary law, universally accepted, that the courts do not have the power, under the guise of interpretation, to rewrite contracts which the parties have deliberately made for themselves.”); *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665-66, 15 P.3d 115 (2000) (“In Washington, insurance policies are construed as contracts. . . . If the language is clear and unambiguous, the court must enforce it as written and may not modify it or create ambiguity where none exists. If the clause is ambiguous, however, extrinsic evidence of the intent of the parties may be relied upon to resolve the ambiguity.”);

erroneously accepted this deeply flawed position, giving rise to the present situation where there is no body of law to refer to and no guiding principles as the parties litigate and attempt to resolve the many remaining insurance claims in this case. The fact is, however, that prior to receiving notice of these claims, WCRP/Lexington always treated their policies and the claims made under these policies as being subject to Washington common law on insurance.<sup>21</sup>

As recognized by the trial court and Lexington, discretionary review of this threshold ruling is appropriate to provide guidance to all risk pool's and their insureds as to what body of law applies to these insurance policies and to expedite the ultimate resolution of this case.<sup>22</sup>

C. Clark County and Slagle Executed a Valid Assignment of a Claim for Damages Under its Insurance Policies, Not its "Interests in the Pool" Provided by the Interlocal Agreement.

WCRP falsely claims that Clark County and Slagle breached the Interlocal agreement when they assigned claims for damages to Northrop and Davis after being abandoned by WCRP/Lexington. WCRP's

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<sup>21</sup> Excerpt of Deposition of Susan Looker, Northrop/Davis Appendix 00868,00870 - 00875; Excerpt of Deposition of Mark Wilsdon, County/Slagle Appendix 105; Deposition of Ed Pavone, County/Slagle Appendix 97.

<sup>22</sup> Clark County/Slagle agree with Lexington's contention that three issues should be considered by this Court: (1) the legal principles governing the interpretation of policies issued by the WCRP; (2) the duty of WCRP/Lexington to defend the County/Slagle; (3) the validity of the County/Slagle's assignment of claims to Davis/Northrop. Lexington MDR resp. at 2-3.

demonstrably false claim represents a continuing effort to conflate the terms of the Interlocal Agreement (a membership/governance document) with the terms of WCRP/Lexington's insurance policies (coverage documents) in order to avoid addressing this coverage dispute in the insurance context.<sup>23</sup> Unfortunately, the trial court erroneously accepted this conflation and ignored clear Washington appellate authority that authorizes assignment of a claim for damages that had already accrued even when prohibited by contract. See *Public Utility Dist. No. 1 of Klickitat County v. International Ins. Co.*, 124 Wn.2d 789, 800–801, 881 P.2d 1020 (1994); *Portland Elec. & Plmb. Co. v. City of Vancouver*, 29 Wn. App. 292, 295, 627 P.2d 1350 (1981). The trial court's conflation of these agreements and disregard for this controlling authority constitutes obvious or probable error and is appropriate for discretionary review pursuant to RAP 2.3(b).

Even if Washington appellate courts had not repeatedly held that assignment of a claim for damages that has already accrued is always permitted, which they have, the assignment in the underlying case did not even implicate the Interlocal agreement.<sup>24</sup> The Interlocal agreement

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<sup>23</sup> See Interlocal Agreement, DR 135- 143; See WCRP/Lexington Insurance Policies, Northrop/Davis Appendix 00676 - 00775.

<sup>24</sup> See Covenant Judgment Settlement/Assignment, Northrop/Davis Appendix 00946-00953

contains no insurance coverage rights to be assigned.<sup>25</sup> Rather, it contains only terms and provisions that govern membership eligibility, organizational structure, voting rights, cancelation and withdrawal procedures, etc. – none of which were assigned to Petitioners Northrop and Davis in the underlying settlement.<sup>26</sup> Because Clark County and Slagle did not assign any “interests in the pool” under the Interlocal agreement, the Interlocal agreement anti-assignment language does not apply. By its own terms, the Interlocal agreement’s anti-assignment provisions only relate to the governance and membership rights provided therein:<sup>27</sup>

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

It is undisputed that the Interlocal agreement and the WCRP/Lexington insurance policies are separate agreements that do not incorporate each other.<sup>28</sup> Thus, Clark County and Slagle’s assignment of claims for damages under WCRP/Lexington’s insurance policies cannot, as a matter

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<sup>25</sup> See Interlocal Agreement, DR 135- 143.

<sup>26</sup> *Id.*; Covenant Judgment Settlement/Assignment, Northrop/Davis Appendix 00949.

<sup>27</sup> Article 21 of the WCRP Interlocal Agreement, DR 141;

<sup>28</sup> Article 30 of the WCRP Interlocal Agreement, DR 142; *See also* 2002-2010 WCRP/Lexington Insurance Policies Section 7, sub D. “Declarations”, Northrop/Davis Appendix 00676 – 00775.

of law, constitute a breach of an anti-assignment provision in a separate Interlocal agreement.

The trial court's failure to appreciate this distinction constitutes obvious or probable error that is ripe for discretionary review because it is now uncertain which parties have the right to litigate the remaining claims in this case. The trial court's ruling has created a situation where, unless reviewed, Clark County and Slagle will be forced to prosecute claims that it rightfully assigned to Northrop and Davis, claims which will need to be re-litigated if this Court finds that the assignment was valid at the end of the case. The prosecution of the remaining claims will be expensive, and burdensome for all parties as evidenced by the hundreds of hours that have been spent by counsel for all parties.<sup>29</sup>

Contrary to WCRP/Hill's presumptuous suggestion, this case is not almost over and will involve a great deal of discovery, motion practice and likely a trial. It would be a colossal waste of the court's and the parties' time and resources to litigate these claims to completion only to have to do it all over again in the event that Northrop and Davis are the proper parties to prosecute the claims. Under these circumstances, this Court should grant discretionary review to provide all parties with certainty that they will be litigating these claims once.

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<sup>29</sup> WCRP alone has claimed more than \$1Million in attorney fees to date to litigate the pure legal issues that have been decided by the trial court.

D. The Court Should Accept Review Because the Trial Court Erred in Holding that Washington Insurance Law on the Duty to Defend did not Apply to the Policies Issued by Risk Pools.

In holding that Washington's common law insurance principles do not apply to risk pool insureds the trial court held that the law regarding the contractual duty to defend does not apply to risk pool insureds such as the County/Slagle. The principles underlying the duty to defend are steadfast and "[i]t is a cornerstone of insurance law that an insurer may not put its own interests ahead of its insured's." *Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 803, 329 P.3d 59, 64 (2014), as corrected (Aug. 6, 2014). The duty to defend requires an insurer to give the insured the benefit of the doubt when determining whether the insurance policy covers the allegations in the complaint and any ambiguities are construed in favor of providing coverage. This is because the duty to defend is broad and is in effect litigation insurance that is sometimes more valuable than the duty to indemnify. This Court has repeatedly affirmed the significant public policy reasons behind the duty to defend and has been steadfast in affirming an insured's right to a defense. *See e.g., Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d (2007); *Am. Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010). Most recently this Court re-affirmed these principles in *Expedia* and held that an insured

does not have to prove liability against themselves in order to obtain a defense. These same principles apply with equal force to risk pool insureds. Risk pool insureds are entitled to a defense at the inception of the case based on the exact same principles that apply to every other insured in Washington. The trial court ignored these principles and refused to apply them to the County/Slagle. The same reasoning applies the application of the timing of an “occurrence” which has long been established in this state. *Transcontinental at supra*. This is an issue of broad public importance impacting each and every risk pool insured in Washington. Until this issue is addressed, risk pool’s throughout this state will be able to deny a defense under any arbitrary rules that they see fit.

E. Review Should be Granted Under RAP 2.3(b)(2) Because Risk Pool Insured Municipalities Throughout Washington and Their Employees Deserve to Know Whether they have the Same Rights as Any Other Insured.

Review is appropriate under RAP 2.3(b)(2) because the trial court’s order has broad implications for risk pools and their insureds throughout Washington.<sup>30</sup> Although WCRP/Hill diminish the broader implications of the trial Court’s ruling in this case, the trial court’s decision has created very real uncertainty for each and every risk pool insured municipality in the State of Washington. Specifically, these risk

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<sup>30</sup> Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 Wash. L. Rev., 1541, 1546 (1986).

pool insured municipalities and their tens of thousands of employees now do not know whether they have liability insurance that is even roughly equivalent to insurance purchased directly from commercial insurance carriers. They do not know whether they are owed a defense or indemnify under the standards set forth by this Court, whether they are allowed to enter into a covenant judgment to resolve a case where they have been abandoned by their insurer or whether they have any remedies, contractual and extra-contractual, at all available to them. Risk Pool's and commercial insurance carriers can now take advantage of this void and arbitrarily deny claims. Risk Pool insureds are left with uncertainty as to whether they can expect this Court's well considered body of insurance principles to apply to the claims that they tender under their policies each and every day. This is a reality occurring on a daily basis throughout Washington. The trial court's gateway decision that Washington's common law of insurance including the duty to defend does not apply to risk pool's will have enormous impact upon municipalities, school districts, public utility districts, non-profits and their thousands of individual employees. Ultimately, it is the local taxpayers who will be impacted by this decision; being forced to incur liability in situations where they are abandoned by their insurers instead of transferring that risk

to commercial insurers such as AIG, AIG owned Lexington, ACE America, and other commercial insurance companies.

Presently, there are at least fourteen risk pools operating in the State of Washington, many of which operate closely with commercial insurance partners such as AIG and AIG owned Lexington. These risk pools and their commercial partners insure school districts, counties, cities, and public utility districts, which employ teachers, police officers, firefighters and many other public employees that face extremely challenging and liability intensive circumstances on a daily basis. These municipalities and their employees deserve to know as soon as possible whether, as WCRP/Lexington and the trial court believe, they have something dramatically less than liability insurance and the rights traditionally afforded to insureds under Washington's common law.

Any undue delay in obtaining certainty on this issue will make it virtually impossible for local municipalities to make informed decisions regarding whether to remain insured through a risk pool or purchase insurance directly from a commercial carrier. Delay of review will also create an environment where risk pools and their commercial partners will seek to rely upon the trial court's ruling in making future coverage determinations, just as WCRP/Lexington did in this case when they relied upon a prior local commissioner's ruling to support their novel position

that Washington common law insurance principles do not apply to them.  
The requirements of RAP 2.3(b)(2) are met.

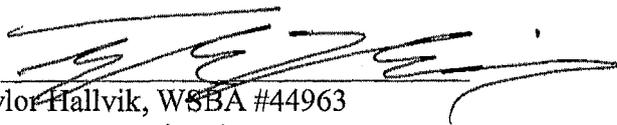
### III. CONCLUSION

The fundamental question as to whether municipal corporations and their employees are owed the same contractual and extra-contractual duties as all other insureds in Washington is a threshold issue that requires immediate review. The Court should grant review under RAP 2.3(b) to vindicate its decisions on insurance principles applying to risk pools including the duty to defend and covenant judgment settlements.

DATED this 12th day of February, 2015.

Respectfully submitted,

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