

No. 72116-0-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

POST-CONFIRMATION COMMITTEE OF IN RE PIERCE COUNTY
HOUSING AUTHORITY,

Appellant,

vs.

PIERCE COUNTY,
A political subdivision of the State of Washington,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Appellant Post-Confirmation Committee of In re Pierce County Housing Authority, (hereinafter “Committee”), by and through its attorneys Darrell L. Cochran, Loren A. Cochran, Christopher E. Love and Pfau Cochran Vertetis and Amala, PLLC, respectfully requests reversal of the trial court’s summary judgment order dismissing Appellant’s declaratory judgment action.

Appellant’s action was one seeking indemnification from Pierce County’s self-insurance fund for liability incurred by a board of commissioners providing volunteer services for the county. The claims originally asserted in an underlying personal injury action and eventually assigned following bankruptcy protection were brought against the board members acting in their official capacity for the benefit of Pierce County, acting as the Pierce County Housing Authority (“PCHA”). PCHA Board members—who were appointed by the Pierce County Executive and confirmed by the County Council—agreed to provide a service for Pierce County by accepting an appointment to the Board, thus fulfilling Pierce County’s legal obligations to create a housing authority under RCW 35.82.040. Coverage of volunteer commissioners providing a benefit to the county, like those on the PCHA Board, is clearly evidenced by the Pierce County Code’s language, the intent of the Code’s creators, and extrinsic evidence from Pierce County’s past practices and procedures. Thus, the PCHA Board members were entitled to coverage under the County’s self-insurance fund.

This interpretation of the Pierce County Code was confirmed by the sworn statements of Michael A. Panagiotu. Panagiotu was Pierce County's Director of Risk Management for more than thirty-two (32) years.¹ Panagiotu was also the County's top risk manager at the time the underlying action against PCHA was being litigated in Pierce County Superior Court and when PCHA filed for bankruptcy on October 13, 2008.² Panagiotu was also a member of the original committee responsible for creating Pierce County's self-insurance fund in 1977, as codified in Pierce County Code 2.120, *et seq.*³ According to Panagiotu, ". . . Pierce County established its self-insurance fund to establish coverage for claims against employees and individuals who agreed to perform a service for Pierce County by accepting an appointment by the Pierce County Executive, the Pierce County Council, and approved by the County Council, regardless of the individual's status as an employee under the direct control of Pierce County, a member of a board independent of Pierce County, and/or the individuals' lack of compensation by Pierce County."⁴

Additionally Panagiotu stated, "The purpose and intent of the self-insurance fund was also to provide coverage in catastrophic situations in

¹ CP at 385.

² CP at 386-388.

³ CP at 386.

⁴ *Id.*

which boards and commissions acting for the benefit of Pierce County did not have sufficient or appropriate insurance in place. This was true regardless of whether the board or commission contributed to Pierce County's self-insurance fund.”⁵

In his sworn declaration Panagiotu added, “Members of the Pierce County Housing Authority (PCHA) Board of Commissioners who were appointed by the Executive and/or Pierce County Council, despite operating independently from Pierce County itself, agree to provide a service for Pierce County by accepting an uncompensated appointment to the Board. As such, these volunteers were providing a service to Pierce County and are potentially entitled to coverage under the County's self-insurance fund, as was fully intended by the County when creating the fund.”⁶

Two (2) vastly different opinions exist in this statutory coverage action. One opinion, favoring coverage, comes from Pierce County's Risk Manager for more than three decades, Panagiotu, who was in charge at the time of the relevant facts of this case, and who says that the County's self-insurance fund was designed and maintained to provide coverage in cases just like the one at bar. The other, rejecting coverage, comes from Mark Maenhout, a member of Panagiotu's staff and now the County's current risk manager. Because summary judgment is not appropriate where different competing conclusions exist, the trial court's order granting

⁵ CP at 386-87.

⁶ CP at 387.

summary judgment and dismissing Appellant's action must be reversed.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: The trial court erred in granting Pierce County's Motion for Summary Judgment.

Issues Pertaining to Assignments of Error

No. 1: Did the trial court improperly conclude that Pierce County's ordinances required direct or vicarious liability in order for a duty to indemnify to be triggered? (Assignment of Error No. 1).

No. 2: Did the services of PCHA's volunteer board members convey a benefit to Pierce County such that the PCHA board members were entitled to coverage under the County's self-insurance fund?

No. 3: Did the trial court impermissibly conclude as a matter of law that the services provided by PCHA's Board of Commissioners did not require that the Commissioners be treated as volunteers of the County according to the Pierce County Code? (*Assignment of Error No. 1*).

No. 4: Did the trial court impermissibly dismiss the appellants' action when two competing conclusions were offered from Pierce County risk managers responsible for determining coverage? (*Assignment of Error No. 1*).

No. 5: Was the Pierce County self-insurance fund also created to provide for situations, like the one encountered by PCHA, where boards and commissions acting for the benefit of Pierce County did not have sufficient or appropriate insurance in place? (*Assignment of Error No. 1*).

III. STATEMENT OF CASE

The appellant Committee is the creation of the Bankruptcy Court for the Western District of Washington arising out of PCHA's bankruptcy filing, *In re Pierce County Housing Authority*, cause number 08-45227.⁷ The Committee is comprised of seven (7) representative individuals from an underlying negligence lawsuit filed in Pierce County Superior Court, cause number 08-2-12411-3, which was stayed by PCHA's Chapter 9 bankruptcy filing on October 13, 2008.⁸

The Underlying Lawsuit⁹

In the underlying litigation from which this current coverage action arose, individuals rented and/or resided at an apartment unit at the Eagle's Watch apartment complex.¹⁰ These individuals are hereinafter referred to as the "Underlying Resident Plaintiffs."

PCHA (doing business as Eagle's Watch) was the owner/manager

⁷ CP at 229-230; CP at 300.

⁸ *Id.*

⁹ *See, generally*, CP at 232-254.

¹⁰ CP at 236.

and/or lessor of each Underlying Resident Plaintiffs' apartment.¹¹ After moving into their apartments, many of the Underlying Resident Plaintiffs noticed that their apartments felt damp and smelled of mildew.¹² They also noticed that mold was appearing on walls, throughout their bathrooms, and in other rooms.¹³ They further observed that their apartments became unusually humid during the summer months, and that the apartments "sweated" and accumulated excessive moisture.¹⁴ When they attempted to clean the mold, it quickly returned.¹⁵

On multiple occasions, many of the Underlying Resident Plaintiffs complained to the apartment management and maintenance personnel about the mold and excessive moisture in their apartments.¹⁶ Many were routinely told that no mold problem or excessive moisture problem existed at Eagle's Watch and that they were responsible for cleaning the mold and managing the excessive moisture.¹⁷

PCHA, its commissioners, managers, agents, and/or its employees were also aware of the mold and excessive moisture and its dangerousness.¹⁸ On the occasions when maintenance personnel entered the Underlying Resident Plaintiffs' apartments to remove the mold, or the

¹¹ CP at 235-236.

¹² CP at 236-237.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ CP at 237.

¹⁷ *Id.*

¹⁸ *Id.*

excessive moisture, the Underlying Resident Plaintiffs were often charged for the maintenance, despite PCHA's knowledge of the long-standing problems.¹⁹ Managers and maintenance personnel at Eagle's Watch received multiple reports from other residents about their struggle with mold and excessive moisture at Eagle's Watch.²⁰

Despite knowing for many years that Eagle's Watch was infested with mold and suffered from structural problems that caused excessive moisture and mold growth, PCHA, including but not limited to its Board of Commissioners ("Board"), negligently failed to inform the Underlying Resident Plaintiffs or their invited guests of the mold problem and excessive moisture problem, or the dangers created by the toxic mold growing on the premises and/or in their apartments.²¹

Some of the Underlying Resident Plaintiffs developed allergic, asthmatic and pneumonia-type symptoms as a result of their continuous exposure to the mold in their apartments.²² Because of this constant mold exposure, some of the Underlying Resident Plaintiffs have required medical attention and hospitalization.²³ Furthermore, given that certain health problems related to mold exposure will not materialize until a later date, it is more probable than not that some or all of the Underlying Plaintiffs will be diagnosed in the future with health problems that were

¹⁹ *Id.*

²⁰ *Id.*

²¹ CP at 237-238.

²² CP at 238.

²³ *Id.*

caused or exacerbated by their exposure to mold at Eagle's Watch.²⁴ Furthermore, all Underlying Plaintiffs experienced excessive moisture problems at Eagle's Watch and were forced to take measures to try to prevent and clean the excessive moisture.²⁵ This nuisance interfered with their quiet enjoyment of their home.²⁶ Despite its knowledge of these excessive moisture problems, PCHA did nothing to repair them.²⁷

On September 12, 2008, Underlying Plaintiffs filed a complaint in Pierce County Superior Court for damages and equitable relief against the PCHA, including but not limited to its Board of Commissioners.²⁸

At or about that same time, Lyle Quasim, Pierce County Deputy Executive, approached then-Director of Pierce County's Risk Management and Insurance Department Michael A. Panagiotu and informed Panagiotu that, in addition to being the Pierce County Deputy Executive, Quasim was a PCHA Board member and that, due to the underlying lawsuit, PCHA was likely going to declare bankruptcy.²⁹ This was the first time Panagiotu recalled being informed of the PCHA litigation.³⁰ He was surprised to learn of the issue at such a late stage, given the severity and amount of the claims against PCHA.³¹ Previously,

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ CP at 232.

²⁹ CP at 388.

³⁰ *Id.*

³¹ *Id.*

Panagiotu was consulted by various boards for potential catastrophic cases and scenarios such as the PCHA litigation, as this was one of the reasons the Pierce County Risk Management Department and the self-insurance fund were created.³² At or about that same time, Quasim expressed his concern to Panagiotu that, after PCHA declared bankruptcy, the underlying plaintiffs may pursue claims against the Board and/or Pierce County itself.³³

Shortly thereafter, Quasim again approached Panagiotu about the PCHA litigation.³⁴ Lyle Quasim specifically asked Panagiotu whether he, Quasim, had any coverage from the County for any boards or commissions he served on.³⁵ Panagiotu assured Quasim that Pierce County would come to his aid in the event of any claims asserted against him provided he was acting within his official duties as an appointee of the Executive and/or Pierce County Council.³⁶ Panagiotu based his assurance to Quasim on two reasons.³⁷ First, because Quasim was serving on the Board in his official capacity as the Deputy Executive for Pierce County, he was clearly covered by Pierce County's self-insurance fund as an employee and/or volunteer.³⁸ Second, Quasim, as a Board member approved by the Pierce County Council, was covered under the self-

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

insurance fund as a volunteer providing services to Pierce County by accepting appointment to the PCHA Board.³⁹ According to Panagiotu, had Quasim, as a PCHA Board Member appointed by the Executive and approved by the Pierce County Council as Deputy Executive of Pierce County, officially presented this claim to him in a timely matter, Panagiotu would have recommended to the Pierce County Executive that the self-insurance fund provide coverage subject to a “reservation of rights” for a full investigation into the facts involving potential liability of Pierce County and Quasim as a PCHA Board member.⁴⁰ None of the PCHA Board presented the claim to Pierce County at that time.

On October 13, 2008, the PCHA, through its Board of Commissioners, filed for bankruptcy protection from the underlying lawsuit.⁴¹

Claims Transferred via PCHA’s Bankruptcy

On December 17, 2009, the Bankruptcy Court entered an Order Confirming Third Amended Plan for Adjustment of Debts of Pierce County Housing Authority (“Third Amended Plan”).⁴² The Third Amended Plan defines “Insurance Claim(s)” as “Without limitation, any rights, claims, or causes of action owned by, or accruing to the Debtor

³⁹ *Id.*

⁴⁰ CP at 389.

⁴¹ CP at 178, 259.

⁴² CP at 283.

[PCHA] under any policies of insurance issued to or on behalf of the Debtor or under which the Debtor may otherwise be a beneficiary pursuant to any contract, statute, regulation or legal theory.”⁴³

The Third Amended Plan also defines “Rights of Action” as “Any rights, claims, or causes of action owned by, accruing to, or assigned to the Debtor [PCHA] pursuant to the Bankruptcy Code or pursuant to any contract, statute, regulation, or legal theory, including without limitation any rights to, claims, or causes of action for recovery under any policies of insurance issued to or on behalf of the Debtor.”⁴⁴ The Third Amended Plan further provides that the Unsecured Creditors Committee would continue on as the Post-Confirmation Committee.⁴⁵ Article VII, Section G of the Third Amended Plan provides in part:

“In addition to Insurance Claims, to the extent based on events or conduct that occurred prior to the Petition Date, the following rights, claims and causes of action of the Debtor (collectively, “Causes of Action”) are reserved for, and shall be administered by, the Post-Confirmation Committee:

...

(ii) alleged Causes of Action against Pierce County, Washington, and/or its insurance policies or self-insurance fund for coverage of claims asserted against the Debtor, and consistent therewith all extensions of time in 11 U.S.C. 108 shall apply; (iii) any claims or causes of action that the Post-Confirmation Committee determines must be filed in order to trigger insurance that would give rise to an

⁴³ CP at 289.

⁴⁴ CP at 290.

⁴⁵ CP at 290.

Insurance Claim.

Following the Effective Date [of the plan confirmation order], the Post-Confirmation Committee may investigate, prosecute and/or settle all such Causes of Action as the Post-Confirmation Committee in its judgment deems appropriate, and may commence adversary proceedings against persons or entities to realize upon such Causes of Action retained.⁴⁶

On October 19, 2012, the Bankruptcy Court entered an Order (1) Allowing Claims, (2) Transferring Remaining Plan Assets to Committee, (3) Confirming Remaining Duties Under Confirmed Plan, and (4) Limiting Notice (“Order Allowing Claims”).⁴⁷ The Bankruptcy Court’s Order Allowing Claims reduced each of the claims of the unsecured creditors, including those of the plaintiffs in the underlying lawsuit stayed in Pierce County, to a specific, allowed monetary amount.⁴⁸ The Order Allowing Claims also provided, “The Debtor shall transfer to the Post-Confirmation Committee . . . Insurance Claims and Causes of Action (both as defined in the Plan) that were reserved under Sections VII. F and G of the Plan.”⁴⁹ The Order Allowing Claims further provided, “The [Post-Confirmation] Committee may, in its discretion, administer, pursue, or abandon any or all Insurance Claims and Causes of Action as it deems appropriate.”⁵⁰ Also on October 19, 2012, the Bankruptcy Court entered

⁴⁶ CP at 301-302.

⁴⁷ CP at 310.

⁴⁸ CP at 312.

⁴⁹ *Id.*

⁵⁰ *Id.*

an Order Granting Discharge to Debtor discharging PCHA from bankruptcy proceedings.⁵¹

Following the bankruptcy discharge, on November 9, 2012, the Pierce County Superior Court entered a stipulated Order of Dismissal with Prejudice dismissing the negligence case underlying the Committee's claims.⁵² On February 14, 2013, pursuant to the Bankruptcy Court's transfer of insurance claims and causes of action to the Committee and pursuant also to the stipulated dismissal of the action in Pierce County, PCHA tendered the claims against it to Pierce County.⁵³ On or about February 25, 2013, Pierce County rejected PCHA's tender of claims.^{54, 55} On September 30, 2013, this suit was filed to determine the scope of coverage at issue and the validity of Pierce County's rejection of the tendered claim.⁵⁶

Pierce County's Self-Insurance Fund

Pierce County's self-insurance fund was first created in 1977 by

⁵¹ CP at 325.

⁵² CP at 328-329.

⁵³ CP at 331, 356, 360.

⁵⁴ *Id.*

⁵⁵ Pursuant to PCC 2.120.050, "The determination of whether said officer, employees or volunteers were acting or making a good faith attempt to act within the scope and course of their duties of employment by the County, shall be made by the **Executive**, or in the case of any elected official of the County other than the Prosecuting Attorney, by the Prosecuting Attorney." It is unclear if the Executive made the determination in this case. Only the names of Risk Manager Mark Maenhout and Deputy Prosecuting Attorney Donna Matsumoto appear on the one-page denial letter, with no accompanying information.

⁵⁶ CP at 1, 11-12.

the Board of Pierce County Commissioners.⁵⁷ As the Director of Pierce County's Risk Management and Insurance Department in 1977, Michael A. Panagiotu was a member of the original committee responsible for creating Pierce County's self-insurance fund.⁵⁸ The underlying intention for creating Pierce County's self-insurance fund was to insure individuals employed by or providing services for the benefit of Pierce County, including members of its governing body or any other committees, trustees, boards, commissions, or volunteers acting for or on behalf of Pierce County.⁵⁹ It was particularly important that the self-insurance fund cover appointed, volunteer board members.⁶⁰ Volunteer board members were concerned with potential exposure to legal liability inherent in agreeing to perform a service for Pierce County by accepting appointment to such boards, especially without the incentive of compensation.⁶¹ As a common sense matter, Pierce County would experience great difficulty in finding anyone to accept appointment to such boards without assurances that, in the event he/she were subject to a lawsuit while in his/her official capacity, Pierce County would defend against and indemnify for any such claims.⁶²

To that end, Pierce County established its self-insurance fund to

⁵⁷ CP at 381, 386.

⁵⁸ CP at 385-386.

⁵⁹ CP at 386.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

establish coverage for claims against employees and individuals who agreed to perform a service for Pierce County by accepting an appointment by the Pierce County Executive, the Pierce County Council, and approved by the County Council, regardless of the individual's status as an employee under the direct control of Pierce County, a member of a board independent of Pierce County, and/or the individuals lack of compensation by Pierce County.⁶³

The purpose and intent of the self-insurance fund was also to provide coverage in catastrophic situations in which boards and commissions acting for the benefit of Pierce County did not have sufficient or appropriate insurance in place.⁶⁴ This was true regardless of whether the board or commission contributed to Pierce County's self-insurance fund.⁶⁵ Similarly, the county's Loss and Expense fund was also established as another mechanism by which Pierce County could provide coverage where insurance did not otherwise exist to insure losses.⁶⁶

IV. ARGUMENT

A. PCHA Board Members Are Entitled to Coverage Under Pierce County's Self-Insurance Fund

1. Legal Standards

This Court reviews summary judgment rulings de novo, engaging in the same inquiry as the trial court. *Ellis v. City of Seattle*, 142 Wn.2d

⁶³ *Id.*

⁶⁴ CP at 386-387.

⁶⁵ *Id.*

⁶⁶ CP at 387.

450, 458, 13 P.3d 1065 (2000). Summary judgment is appropriate only when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” CR 56(c). “After the moving party submits adequate affidavits [demonstrating the absence of issues of material fact], the nonmoving party must set forth specific facts which sufficiently rebut the moving party’s contentions and disclose the existence of a genuine issue of material fact.” *Meyer v. Univ. of Wash.*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986). In determining whether a genuine issue of material fact exists, “[t]he facts and inferences therefrom are viewed in the light most favorable to the nonmoving party.” *Gosset v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 963, 948 P.2d 1264 (1997). Summary judgment should be granted “only if reasonable persons could reach only one conclusion from all of the evidence.” *Hanson v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 483 (1992). “Where different competing inferences may be drawn from the evidence, the issue must be resolved by the trier of fact.” *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 457-58, 309 P.3d 528 (2013).

Resolution of the coverage issue in this action requires interpretation of the PCC. Washington courts interpret local ordinances and codes as they interpret statutes, employing the general rules of statutory construction. *Washington Shell Fish, Inc. v. Pierce County*, 132 Wn. App. 239, 253, 131 P.3d 326 (2006); *Neighbors of Black Nugget Rd. v. King County*, 88 Wn. App. 773, 778, 946 P.2d 1188 (1997). The Court’s fundamental objective in statutory interpretation is to give effect

to the drafting body's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, then this court gives effect to that plain meaning as an expression of legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004). "Where statutory language is 'plain, free from ambiguity and devoid of uncertainty, there is no room for construction because the legislative intention derives solely from the language of the statute.'" *LRS Electric Controls, Inc. v. Hamre Const., Inc.*, 153 Wn.2d 731, 738, 107 P.3d 721 (2005) (internal quotation marks omitted) (quoting *Bravo v. Dolsen Cos.*, 125 Wn.2d 745, 752, 888 P.2d 147 (1995)). The Court discerns plain meaning not only from the provision in question but also from closely related statutes and the underlying legislative purposes. *Murphy*, 151 Wn.2d at 242. The Court gives effect to all statutory language, considering statutory provisions in relation to each other and harmonizing them to ensure proper construction. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000). If a statute is susceptible to more than one reasonable interpretation after this inquiry, then the statute is ambiguous and this court may resort to additional canons of statutory construction or legislative history. *Campbell & Gwinn*, 146 Wn.2d at 12.

2. Pierce County's ordinances do not require direct or vicarious liability in order for a duty to indemnify to be triggered.

In its written order, the trial court wrote that the language of Pierce County ordinances is clear and unambiguous and does not impose a duty

to indemnify where there is no direct or vicarious liability on the part of the County.⁶⁷ Respectfully, however, Appellant submits that the trial court confused the issues of the underlying lawsuit with those in the declaratory action. Appellant's action is an assignment of claims procured through the bankruptcy proceeding, and exists as a product of the relationship between PCHA, its volunteer board members and the county for which the board members serve. Appellant's action does not claim that Pierce County directly owed PCHA and its board members—or underlying plaintiffs, as PCHA's assignees—a duty that existed beyond the coverage under the county's self-insurance program which it owed PCHA and its board members pursuant to the Pierce County Code. Moreover, as discussed below, there is nothing in the code that requires a finding of direct or vicarious liability against the Pierce County in order for a duty to provide coverage for a board member to be triggered.

3. The Pierce County Code's Plain Language Unambiguously Provides Coverage under the Self-Insurance Fund for PCHA Board Members

The trial court found that the services provided by the PCHA Board of Commissioners did not require that the Commissioners be treated as volunteers of the County according to the Pierce County Code. But the trial court's order appeared to rely on PCHA's status under Washington law as an entity independent from Pierce County—as well as the PCHA Board members' status as uncompensated non-employees of Pierce

⁶⁷ CP at 422.

County—as its basis for contesting coverage for their negligent acts under Pierce County’s self-insurance fund. However, the Pierce County Code (PCC) provisions controlling the coverage issue extend coverage to far more individuals than Pierce County’s paid employees. When properly construed, the Code clearly and unambiguously provides coverage to volunteers whose services Pierce County accepts, such as individuals who agree to help Pierce County fulfill its statutory obligations by accepting an uncompensated appointment from the Pierce County Executive to serve on the Board.

RCW 35.82.040 provides:

When the governing body of a county adopts a resolution declaring that there is a need for a housing authority, it shall appoint five persons as commissioners of the authority created for the county. The commissioners who are first appointed shall be designated to serve for terms of one, two, three, four and five years, respectively, from the date of their appointment, but thereafter commissioners shall be appointed for a term of office of five years except that all vacancies shall be filled for the unexpired term.

In other words, Washington law requires that counties creating a housing authority must also create and fill, through appointment, a board of commissioners for the housing authority. Pierce County codified this statutory obligation in Pierce County Charter, Section 3.30, wherein it required the County Executive to appoint and the County Council to confirm Board members.

In turn, PCC 2.120.010(A) provides:

Pierce County agrees, as a condition of employment **or acceptance of services** to defend upon proper request, all civil claims or civil actions for damages brought or maintained against its officers, employees, **and/or volunteers,**” provided those officers, employees, or volunteers were acting within their official duties.

Emphasis added. PCC 2.120.030(B) further provides:

If the County agrees to defend said action, the officer, employee **or volunteer** shall not be required to make any payment, assume any legal obligation or incur any expense arising out of the defense or in settlement of the claim or action.

Thus, the Code conditions defense and indemnification of individuals not only employed by the County, but also on the far broader concept of the County’s “acceptance of services” from an individual. Likewise, the Code does not limit coverage solely to paid county employees or offices, instead extending coverage to volunteers.

Accordingly, the Code unambiguously requires Pierce County to defend and indemnify—i.e., provide coverage under Pierce County’s self-insurance fund—PCHA for claims asserted against its Board members in their official capacity. Members of the PCHA Board who were appointed by the Pierce County Executive and confirmed by the County Council, despite operating independently from Pierce County itself, agree to provide a service for Pierce County by accepting an appointment to the Board, thus fulfilling Pierce County’s legal obligations under RCW 35.82.040. Likewise, even though Board members received no compensation from Pierce County, coverage of such non-compensated

individuals is clearly evidenced by the Code’s repeated usage of the term “volunteer.” As such, these volunteers were providing a service to Pierce County and are entitled to coverage under the County’s self-insurance fund.

Furthermore, Lyle Quasim served on the Board in his capacity as Pierce County Deputy Executive during the relevant time periods.⁶⁸ Even if the Court concludes that individuals who were solely Board members are not entitled to coverage under the Code’s plain language, Quasim was unquestionably employed by Pierce County and acting as a Pierce County employee—i.e., in his official capacity as Pierce County’s Deputy Executive—while serving on the Board. Accordingly, Quasim’s dual role as both the Deputy Executive and a PCHA Board member created coverage under the Code for the claims asserted against PCHA in the underlying lawsuit.

4. The Code’s Legislative History Confirms Volunteer Board Members Are Covered Under Pierce County’s Self-Insurance Fund

Even if the Court concludes that the Code’s plain language does not unquestionably provide a defense and indemnification to volunteer members of independent boards appointed by Pierce County to fulfill the County’s statutory obligations, the Code can reasonably be interpreted to provide coverage to such individuals as a “condition of . . . acceptance of services” and to “volunteers,” instead of only as a condition of

⁶⁸ CP at 387.

employment or only to employees. Thus, the Code is ambiguous on the issue, and the Court may consider legislative history as an interpretive aid.

The Code's legislative history confirms that PCHA Board members are covered under the self-insurance fund. Michael Panagiotu, Director of Pierce County's Department of Risk Management and Insurance for nearly 32 years, served on the committee responsible for creating Pierce County's self-insurance fund, as currently codified in PCC 2.120 *et seq.*⁶⁹ According to Panagiotu, the underlying intent in creating the self-insurance fund was to insure not only Pierce County employees, but also individuals providing services for Pierce County's benefit.⁷⁰ Common sense and experience explained this intention; as Panagiotu stated,

It was particularly important that the self-insurance fund cover appointed, volunteer board members. In my experience as Director, such board members were concerned with potential exposure to legal liability inherent in agreeing to perform a service for Pierce County by accepting appointment to such boards, especially without the incentive of compensation. As a common sense matter, Pierce County would experience great difficulty in finding anyone to accept appointment to such boards without assurances that, in the event he/she were subject to a lawsuit while in his/her official capacity, Pierce County would defend against and indemnify for any such claims.⁷¹

Thus,

⁶⁹ CP at 385-386. In contrast, Pierce County's declarant, Mark Maenhout, did not participate in the self-insurance fund's creation. CP at 386.

⁷⁰ CP at 386.

⁷¹ *Id.*

Pierce County established its self-insurance fund to establish coverage for claims against employees and individuals who agreed to perform a service for Pierce County by accepting an appointment by the Pierce County Executive, the Pierce County Council, and approved by the County Council, **regardless of the individual's status as an employee under the direct control of Pierce County, a member of a board independent of Pierce County, and/or the individuals lack of compensation by Pierce County.**⁷²

Such coverage is currently reflected in PCC 2.120.010(A) and PCC 2.120.030(B) and, according to Panagiotu, coverage of PCHA Board members falls within both those Code provisions' plain language and underlying intent.⁷³ Accordingly, the Court should interpret the Code as providing coverage to the PCHA members under Pierce County's self-insurance fund and deny Pierce County's motion for summary judgment.

5. Any Ambiguities, Especially Where Two Competing Interpretations of Coverage exist, Must Be Construed in Favor of Providing Insurance

At a minimum, the applicable coverage of Pierce County's volunteer board members is susceptible to more than one reasonable interpretation, and therefore, the limitations as alleged by the County in its denial of coverage are ambiguous. There are two different interpretations from two different men who have held the same role for Pierce County, Director of Risk Management, both charged with overseeing the county's self-insurance pool. Michael Panagiotu was a member of the committee created the self-insurance fund in 1977.⁷⁴ He was the County's Risk

⁷² CP at 386.

⁷³ CP at 387.

⁷⁴ CP at 385-386.

Manager for more than 33 years and was the risk manager at the time of the underlying lawsuit.⁷⁵ He believes the Pierce County self-insurance fund was created for just these sorts of emergent situations, where a board full of volunteers, operating for the benefit of Pierce County, was at substantial risk of liability.⁷⁶ Panagiotu's subordinate, Mark Maenhout, has submitted a declaration on behalf of his current employer, Pierce County, which submits that Pierce County is not obligated to provide coverage. As a matter of law, these two interpretations preclude summary judgment.

Furthermore, in the insurance context, ambiguities are resolved against the drafter-insurer and in favor of the insured. *American Nat. Fire Ins. Co. v. B&L Trucking and Const. Co.*, 134 Wn.2d 413, 428, 951 P.2d 250 (1998) (holding that the language of the policy was, at a minimum, fairly susceptible to different, reasonable interpretations and therefore ambiguous). This rule of interpretation controls despite the insurer's intention to the contrary. *See, e.g., State Farm Insurance v. Emerson*, 102 Wn.2d 477, 687 P.2d 1139 (1984) (“[w]here a clause in an insurance policy is ambiguous, it will be construed in a manner most favorable to the insured regardless of the insurer’s intention”).

6. Pierce County’s Self-Insurance Program Was Created In Part For Catastrophic Situations like the PCHA Bankruptcy

In addition to covering the individual volunteer board members of

⁷⁵ *Id.*

⁷⁶ CP at 386-387.

an agency providing a benefit to Pierce County, the county's risk manager for over three decades, Mike Panagiotu, also testified in his sworn declaration that Pierce County's self-insurance program was created, in part, for situations precisely like the bankruptcy protection sought by the PCHA as a result of the underlying suit. "The purpose and intent of the self-insurance fund was also to provide coverage in catastrophic situations in which boards and commissions acting for the benefit of Pierce County did not have sufficient or appropriate insurance in place. This was true regardless of whether the board or commission contributed to Pierce County's self-insurance fund."⁷⁷ Further, Panagiotu stated, "[T]he county's Loss and Expense fund was also established as another mechanism by which Pierce County could provide coverage where insurance did not otherwise exist to insure losses."⁷⁸ The common sense, practicality behind providing coverage exists in the county's self-interest to have boards and commissions that operate capably enough to provide a benefit to the county and its residents.

B. The County's Other Challenges are not Applicable to Coverage Claims

Appellant anticipates that Pierce County will urge this Court to affirm the trial court's ruling on other grounds argued by it in its summary judgment motion. But these other grounds neither factually nor legally support affirmance of the trial court's summary judgment order.

⁷⁷ CP at 386-87.

⁷⁸ CP at 387.

1. Exhaustion of Remedies Occurred When the County Denied the PCHA Claim

On February 14, 2013, pursuant to the conditions established in the bankruptcy discharge and the stipulated dismissal of the underlying action, PCHA, through its counsel, Barbara Kastama, tendered the Committee's claims against it to Pierce County.⁷⁹

Just eleven (11) days later, on February 25, 2013, Pierce County rejected PCHA's tender of claims in a letter from Deputy Prosecuting Attorney Donna Masumoto on behalf of Mark Maenhout.⁸⁰ Then on September 30, 2013, 217 days after the County rejected PCHA's tender of claims, this suit was filed seeking to establish coverage.

The Bankruptcy Court's Third Amended Plan clearly transferred to the Post-Confirmation Committee all of **PCHA's insurance claims and causes of action** against Pierce County and its insurance policies and self-insurance fund for coverage of claims asserted by underlying Eagles Watch plaintiffs against PCHA, as well as any claims or causes of action that the Post-Confirmation Committee determines must be filed in order to trigger insurance that would give rise to an Insurance Claim.

In the County's summary judgment motion, it mischaracterized the nature of the claims transferred to the Committee by the bankruptcy action as "damages" and "mold claims", when in fact, PCHA's claims are for coverage regarding the underlying action. The nature of these claims was specifically outlined by the Bankruptcy Court in its Third Amended Plan

⁷⁹ CP at 331, 356, 360.

⁸⁰ CP at 331.

and in the October 19, 2012 order Allowing Claims and Transferring Remaining Plan Assets to Committee.

Aside from the obvious fact that the claim transferred from PCHA to the Committee is not a damages action per se, but rather for coverage, the County was wrong when it asserted that the Committee and its seven former tenants failed to file tort claim forms. Each and every one of the underlying plaintiffs, including the members of the Committee, filed RCW 4.96.020 tort claim forms with PCHA in the underlying action.⁸¹ By tendering the action to Pierce County as directed by the bankruptcy court, providing proof of claims regarding all of the underlying plaintiffs, and by the fact that RCW 4.96.020 tort claim forms were, in fact, filed with PCHA, PCHA and the Committee, as well as the underlying plaintiffs, exhausted all administrative remedies, and the County's argument otherwise must fail.

2. The Statute of Limitations Was Tolled Until Bankruptcy Closed in October 2012

Similar to its exhaustion of remedies argument, the County's assertion in its summary judgment motion that the statute of limitations is barred by a three-year negligence statute of limitations is equally flawed. First, the coverage action did not accrue until the County rejected PCHA's tender of coverage on February 25, 2013. Second, pursuant to 11 U.S.C. §362(a)(1), the Bankruptcy Court ordered a stay of all proceedings when PCHA filed its bankruptcy petition. Any and all causes of action were

⁸¹ CP at 223.

tolled from the moment of PCHA's Chapter 9 bankruptcy filing on October 13, 2008, until October 19, 2012, when the Bankruptcy Court entered an Order Granting Discharge to Debtor discharging PCHA from bankruptcy proceedings. Whether viewed as a coverage action or an action for damages, no statute of limitations has passed.

V. CONCLUSION

For the foregoing reasons, Appellants respectfully ask this Court to reverse the trial court's order granting summary judgment dismissal of the Appellant's declaratory action.

RESPECTFULLY SUBMITTED this 1st day of December 2014.

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By:  _____

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CERTIFICATE OF SERVICE

Laura Neal, being first duly sworn upon oath, deposes and says:

I am a citizen of the United States of America and of the State of Washington, over the age of twenty-one years, not a party to the above-entitled matter and competent to be a witness therein.

That on December 1, 2014, sent via ABC Legal Messengers, a true and correct copy of the above document, directed to:

Donna Masumoto
Pierce County Prosecutor
955 Tacoma Ave. South, Ste. 301
Tacoma, WA 98402-2160

Attorney for: Pierce County

DATED this 1st day of December 2014.



Laura Neal
Legal Assistant to Darrell Cochran

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