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68634-8

NO. 68634-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TERRIE LEWARK, assignee of PUBLIC STORAGE,

Appellant,
v.

AMERICAN STATES INSURANCE COMPANY,
a foreign insurer,

Respondent.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FOREIGN CITATIONS

OTHER CITATIONS

I. INTRODUCTION

This case involves the scope of additional insured coverage under a commercial umbrella liability policy. American States issued the policy to the Davis Door Company. The principal question is whether Public Storage is an additional insured under that policy for an injury claim arising out of Davis Door's work for Public Storage.

Terrie Lewark suffered a serious back injury while attempting to lift a defective door to a rented storage unit in a Public Storage, Inc. facility. Ms. Lewark sued Public Storage. Ms. Lewark found in discovery that Davis Door had improperly repaired the door shortly before she was injured, so she added Davis Door as a party to that suit.

In February 2010, Public Storage separately settled its own liability to Ms. Lewark for $299,000 plus an assignment of Public Storage's indemnity and insurance rights under a Master Agreement covering Davis Door's maintenance work for Public Storage.

Ms. Lewark's injury claim against Davis Door was settled five months later during trial for an additional $225,000 paid by Davis Door's insurer American States.

This appeal deals with Public Storage's status and rights as an additional insured under Davis Door's American States policy. These rights were assigned to Ms. Lewark by Public Storage, and include extra-contractual claims resulting from bad faith claims handling.

II. ASSIGNMENTS OF ERROR

1. It was error to hold that Public Storage was not an additional insured under the American States' Commercial Umbrella Liability policy purchased by Davis Door.

Issue:

Davis Door contracted to add Public Storage as an additional insured in Davis Door's commercial general liability insurance coverage. Davis Door's Commercial Umbrella Liability policy issued by American States granted additional insured status to anyone that Davis Door had contracted to provide "the kind of insurance afforded by this policy." Is commercial general liability insurance the "kind of insurance" afforded by the Commercial Umbrella Liability policy in question?

Issue:

Public Storage was unaware it was an additional insured under the American States policy until after it settled Ms. Lewark's suit. Did Public Storage forfeit all its rights as an additional insured by failing to tender to American States until after it learned it was insured by American States?

Issue:

The American States policy states it "is excess over, and shall not contribute with any other insurance." Public Storage owned a policy with a self-insured retention of $500,000. Is the self-insured retention "other insurance" that relieves American States from coverage for the Lewark suit?

Issue:

Did Public Storage forfeit its additional insured's rights by settling its share of liability to Ms. Lewark without the prior approval of American States?

2. The trial court erred when it dismissed Public Storage's extra-contractual claims against American States.

Issue:

When American States became aware that Public Storage was its additional insured for the Lewark claim, did the insurer violate its duty of good faith by failing to reveal that coverage to Public Storage?

3. The trial court abused its discretion when it denied discovery of American States' records relating to its investigation and knowledge of Public Storage's rights under its policy.

Issue:

In the investigation of the of the extra-contractual claims, plaintiff requested production of American States' records relating to its investigation and knowledge of Public Storage's rights as its additional insured. Was it an abuse of discretion for the trial court to deny access to all 311 pages of records which American States withheld as "work product" without first conducting an *in camera* review?

Issue:

Should the Trial Court have conducted an *in camera* inspection of an additional nine pages of records withheld under a claim of attorney-client privilege?

III. STATEMENT OF THE CASE

A. The underlying Injury and suit.

Following multiple low back surgeries and permanent disability, Terrie Lewark brought suit against Public Storage, Inc. (formerly known as Shurgard) and Davis Door, Inc. (CP 858) Her suit alleged she sustained a back injury in 2006, while lifting a door negligently maintained by Davis Door at a Public Storage facility. (CP 858)

Public Storage settled its share of liability to Ms. Lewark in February 2010, for a payment of $299,000, plus an assignment of Public Storage's rights under a Master Agreement with its vendor Davis Door. (CP 534, 540)

American States later settled Davis Door's liability to Ms. Lewark for an additional payment of $225,000. (CP 544)

B. American States' liability coverage for Davis Door.

When Ms. Lewark's injury occurred, Davis Door owned two Safeco branded policies: an American Economy Commercial General Liability policy (CP 423) and an American States Commercial Umbrella Liability policy. (CP 427)

Only the American States' umbrella policy is at issue. American States defended Davis Door under its umbrella policy (CP 326 & 337) and Public Storage claims additional insured status only under the same umbrella policy. (CP 326)

American States accepted the Lewark claim against Davis Door (CP 414) and controlled the defense through a staff attorney of its parent, Liberty Mutual. (CP 454)

C. Public Storage's own policy did not apply.

A $500,000 self-insured retention (or "SIR") applied to a National Union liability policy owned by Public Storage. (CP 638,639) That policy insured Public Storage only for that part of any loss exceeding $500,000, including defense costs. (CP 639) Public Storage paid out $299,000 to Ms. Lewark (CP 534) plus $150,028 in defense costs (CP 500) so its total costs were short of the $500,000 threshold necessary to trigger its own policy.

D. Public Storage's unknown status as an additional insured under Davis Door's American States policy.

Davis Door's American States umbrella policy also insured "any person or organization" for which Davis Door was required by "written contract" to provide "the kind of insurance afforded by this policy." (CP 428)

Such a "written contract" was part of a Master Agreement between Public Storage and Davis Door which was renewed shortly before Ms. Lewark was injured. (CP 507) Unfortunately, the insurance section of the Master Agreement reproduced in the Clerk's Papers is partly illegible. (CP 507) However, American States' own motion pleadings accurately quote the insurance section of the Master Agreement which triggered additional insured coverage for Public Storage. (CP 724)

Davis Door was required to provide the following insurance:

> a. Employer's liability insurance of not less than $1,000,000, and **commercial general liability insurance insuring against claims for personal injury, death or property damage** occurring upon, in or about the Property in limits not less than $1,000,000 per occurrence. Prior to the start of any work a certificate of insurance must be received by Owner naming **Public Storage, Inc.** and each of its affiliates, subsidiaries, partners, owners, officers, directors and employees as **additional insureds**.
>
> Emphasis added. (CP 724)

Public Storage was not aware it had coverage under Davis Door's umbrella until after it had settled the Lewark claim. (CP 711)

E. Breach of contract and extra-contractual claims.

As assignee of the rights of Public Storage, Ms. Lewark sued both Davis Door and its insurer American States. (CP 322) Following agreed dismissal of Davis Door, this case deals only with American States' additional insured coverage and its violation of claims handling obligations. (CP 828) The Complaint alleges breach of contract claims for defense and indemnity benefits owed to Public Storage. (CP 330-331) Separately stated are extra-contractual claims for negligence, bad faith and violation of the Consumer Protection and Insurance Fair Conduct Acts. (CP 330-332)

American States denies that Public Storage is an additional insured because it claims that its Commercial Umbrella Liability policy is not "the kind of insurance" required by Davis Door's promise to secure "commercial general liability insurance" for Public Storage. (CP 723-724)

American States asserts that even if Public Storage is an additional insured, it has no indemnity obligation because the

American States policy is excess over the $500,000 self-insured retention in Public Storage's own insurance program. (CP 401) It further argues that it had no obligation to defend or indemnify because Public Storage did not tender the claim to American States before it settled its liability to Ms. Lewark. (CP 395)

IV. ARGUMENT

1. Public Storage was an additional insured under the American States policy purchased by Davis Door.

A. American States' coverage is triggered for Public Storage by the Master Agreement.

The policy provision at issue provides:

> Each of the following is an insured under this policy to the extent set forth below:
>
> G. An person or organization for which an insured is required by virtue of a written contract entered into prior to an "occurrence" to provide the kind of insurance that is afforded by this policy, but only with respect to operations by or on an insured's behalf, or to facilities an insured owns or uses, and only to the extent of the limits of insurance required by such contract, but not to exceed the applicable limits of insurance set forth in this policy. (Emphasis supplied) (CP 428)

As conceded by American States – "Thus the question is whether Davis Door contracted 'to provide the kind of insurance that is afforded by this policy.'" (CP 723)

The insurance provision in the Master Agreement required Davis Door to provide:

> a. Employer's liability insurance of not less than $1,000,000, and **commercial general liability insurance insuring against claims for personal injury, death or property damage** occurring upon, in or about the Property in limits not less than $1,000,000 per occurrence. Prior to the start of any work, a certificate of insurance must be received by Owner naming **Public Storage, Inc**. and each of its affiliates, subsidiaries, partners, owners, officers, directors and employees as **additional insureds**. [Emphasis supplied) (CP 507, 724)

American States' only argument against Public Storage's status as its insured is its claim that umbrella liability insurance is a different "kind of insurance" than the commercial general liability insurance contemplated by the Master Agreement. Without analysis or any authority, ASIC simply argued that: "Nothing in the Master Agreement refers to umbrella coverage." (CP 724)

Construction related businesses often are required to purchase insurance to directly protect the policyholder's customer from liability arising out of the policyholder's operations for that customer. The Master Agreement in this case is an example. It is agreed that Davis Door's basic policy excluded this claim, but that the umbrella policy insured Davis Door's customer if "the kind of

insurance afforded by this policy" is required by Davis Door's written agreement with its customer.

American States chose to use an imprecise phrase for extending additional insured coverage when "the kind of insurance that is afforded by this policy" is required. Neither "commercial general liability insurance" nor "commercial umbrella liability insurance" are defined terms. Each would be expected to be the "kind of insurance" protecting insureds from a broad range of risks related to commercial activity.

B. The interpretation of the policy phrase "kind of insurance."

Washington case law directs liberal interpretation of grants of coverage to accomplish the intended purpose of the parties.

> It must not be forgotten that the purpose of insurance is to insure, and that construction should be taken which will render the contract operative, rather than inoperative.
>
> *Phil Schroeder, Inc. v. Royal Globe Ins. Co.*, 99 Wn.2d 65, 68 (1983)

Inclusionary clauses are liberally construed in favor of coverage.

> In responding to the certified question, we observe, first, that because the pertinent clause provides for coverage to persons who are included in the definition of relative, it is an inclusionary clause. See, e.g. *Tokley v. State Farm Ins. Cos.*, 782 F. Supp. 1375, 1378 (1992) (holding that the

> definition of "relative" is a provision that defines the persons to whom coverage is extended, as opposed to defining persons excluded from coverage, and is therefore an inclusionary clause). As a general principle, courts must liberally construe inclusionary clauses in insurance policies in favor of coverage for those who can reasonably be embraced within the terms of the clause.
>
> *State Farm Mut. Auto. Ins. Co. v. Ruiz, 134 Wn.2d 713, 718 (1998)*

Insurance companies are not allowed to deny coverage based on unclear or ambiguous policy language.

> "The industry knows how to protect itself and it knows how to write exclusions and conditions." (Citation omitted.) If Allstate intends "hidden" to mean "unknown," it must say so. Further, to the extent the term is ambiguous, it must be construed against the insurer. "It is Hornbook law that where a clause in an insurance policy is ambiguous, the meaning and construction most favorable to the insured must be applied...."
>
> *Panorama Village Condominium Owners Ass'n. Bd. of Directors v. Allstate Ins. Co.,* 144 Wn.2d 130, 141 (2001)

The insurance protection called for in the Master Agreement falls well within the scope of the liability protection of the umbrella policy. Rules for interpretation of insurance policy language compel a finding that Public Storage was entitled to liability coverage for the Lewark suit.

2. Public Storage did not forfeit its insurance benefits by late tender.

A. The late tender rule.

Public Storage separately settled with Ms. Lewark in February 2010. (CP 534) It later tendered the Lewark claim to American States when it found out it had coverage under Davis Door's umbrella policy. (CP 711)

Late tender does not forfeit an insureds policy rights unless the insurer proves it was actually and substantially prejudiced by the late tender.

> Noncompliance with a policy provision does not deprive the insured of the benefits of the policy unless the insurer demonstrates actual prejudice resulting from the insured's noncompliance. The burden of proof is on the insurer; prejudice is ordinarily a question of fact.
>
> *Canon, Inc. v. Federal Ins. Co.*, 82 Wash. App. 480, 485 (1996)

Even in a case where coverage was not discovered until more than two years after the underlying suit had been settled, it was held in *Mutual of Enumclaw v. USF Insurance Co.*, 164 Wn.2d 411, 422 (2008) that:

> The "late tender" rule provides that an insured's breach of an insurance contract through failure to notify the insurer of a claim does not relieve the insurer of the obligation to perform under the

> insurance contract unless the insured can prove that the late notice caused it actual and substantial prejudice.

American States would be hard pressed to argue "actual and substantial" prejudice due to late tender in light of its investigation, defense and indemnity provided to Davis Door in the same underlying suit. American States has not even claimed it was prejudiced.

B. No Waiver.

Contrary to the assertion of American States staff counsel assigned to defend Davis Door, (CP 454) Public Storage did not waive its right to insurance coverage under the Master Agreement.

> Waiver requires "the intentional abandonment or relinquishment of a known right [and i]t must be shown by unequivocal acts or conduct showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive.
> *Gross v. Sunding*, 139 Wn. App. 54, 61 (2007)

Public Storage did not know it was insured by American States until after settling its liability to Ms. Lewark, (CP 711) so it could not have waived a known right.

C. The $500,000 self-insured retention is not "other insurance" available to Public Storage.

American States argues that its "other insurance" clause makes it excess over the self-insured retention in Public Storage's own insurance program. (CP 401)

The "other insurance" clause in the American States policy reads as follows:

> E. OTHER INSURANCE
>
> 1. This insurance is excess over, and shall not contribute with any other insurance, whether primary, excess, contingent or on any other basis. This condition will not apply to insurance written specifically as excess over this policy. (CP 433)

The $500,000 self-insured retention beneath Public Storage's own liability coverage was not "other insurance." (CP 638-639)

A self-insured retention is simply not insurance. This Court made that perfectly clear by the following holding in *Bordeau v. American Safety Ins. Co.*, 145 Wn. App. 687, 694 (2008) at ¶ 15:

> We agree with Bordeaux and Cameray that "self-insurance" provisions are not insurance.

The *Bordeaux* case analyzes and rejects American State's argument that self-insurance retentions should be considered "other insurance." It states at ¶ 18:

> The basic flaw in American Safety's argument is that it fails to recognize that traditional insurance involves risk shifting, while self-insurance involves risk retention.

Since there was no "other insurance" as defined in its policy, American States alone covered Public Storage for Ms. Lewark's claim.

3. Extra-contractual claims should not have been dismissed on summary judgment.

In addition to breach of contract, plaintiff alleges that American States violated its duty of good faith toward Public Storage as required by case law, statutes and insurance regulations. (CP 328) The extra-contractual claims grow out of American States failure to disclose coverage and benefits available to Public Storage under the Davis Door umbrella policy.

A. <u>American States knew Public Storage was in additional insured.</u>

Unlike the underlying policy (that only provided additional insured coverage during Davis Door's "on going" operations) the

umbrella provided additional insured status for Davis Door's "completed operations." (CP 297)

Though Public Storage was not aware it was covered for the Lewark claim by the umbrella, (CP 711) American States knew Public Storage was an additional insured (CP 549). More importantly it knew its umbrella granted completed operations coverage if Davis Door had contracted to provide "the kind of insurance" it provided. (CP 428) American States admits that it knew of the Master Agreement requiring this coverage no later than November 2009. (CP 414) It was not until 3½ - months later that Public Storage settled the Lewark claim (CP 534) while still in the dark about the coverage available from American States. (CP 711) American States gives no factual excuse for remaining silent about its obligation to Public Storage.

B. Good faith required American States to inform Public Storage of its policy benefits.

American States argued that it was not legally obligated to reveal its coverage to Public Storage because "an insurer has no duty to put an insured on notice that it might want to tender a claim to the insurer." (CP 398) This position falls far short of the high standard of good faith required of insurers.

In *Van Noy v. State Farm*, 142 Wn.2d 784 (2001) the court rejected a similar assertion when State Farm argued that it had no duty to "disclose all facts that would aid its insureds in protecting their interests." *Van Noy* (at p. 791) holds that "a fiduciary or quasi-fiduciary relationship exists between an insurer and its insured." At footnote 2 to the opinion, the majority reflects further on this relationship as follows:

> We note that Justice Talmadge asserts, in his concurring opinion, that an insurer does not owe a fiduciary duty to its insureds in the first-party insurance context, but rather, owes only a duty of "good faith." We are doubtful that there is any real difference between a "fiduciary" duty and a duty of "good faith" in the insurance context. We say that because we have long held that the duty of the insurer to act in good faith toward the insured is the same as the fiduciary relationship that the insurer has to the insured. See, *Tank v. State Farm Fire & Cas. Co.,* 105 Wash.2d 381, 385, 714 P.2d 1133 (1986) ("The duty to act in good faith or liability for acting in bad faith generally refers to the same obligation . . . . . the fiduciary relationship existing between the insurer and insured.")

Conceptional guidance on an insurers duty to disclose coverage is found in 1 Conn. Ins. L.J. 67, 93 (1995) in an article entitled *Obligating Insurers To Inform Insureds About The Existence Of Rights And Duties Regarding Coverage For Losses,* by Professor Alan I. Widiss:

> For several decades, one prominent insurer has repeatedly stressed the importance of acquiring coverage from a company that places the insured in "good hands." "Good hands" are, of course, helping hands. The image of "helping hands" provides an excellent approach to conceptualizing an appropriate scope for the obligation of insurers to inform insureds. Expressed very simply, I suggest that the scope can be assessed by answering a single question. Viewed prospectively, the question is:
>
> Is it possible that disclosing information will be helpful to an insured in securing benefits afforded by an insurance coverage the insurer has issued?
>
> If a disclosure might be helpful, an insurer should act. Phrased as a normative statement: An insurer is required to inform insureds about all rights and duties that relate to possible coverage for an occurrence that may warrant the payment of insurance benefits.
>
> Providing information does not entitle an insured to payment of claims that are excluded by the policy. It does not afford protection in excess of that which is provided for in the contract. And, it does not abrogate any of the limitations contained in the contract. When an insurance company is aware of something that may be helpful to an insured—including the existence of coverage, rights related to the coverage, or steps that need to be taken to preserve the right to recover—the insured should be obligated to inform the insured. If an insurer is in doubt about whether the insured is aware of such a matter, the insurer should act.

In an opinion citing the above article, the New Mexico Supreme Court found:

> The duty of disclosure is premised on the principle of fundamental fairness, which dictates an insurer must notify a known insured of the scope of available insurance coverage and the terms and conditions governing that coverage regardless of whether the insured is a party to the insurance contract or a third-party beneficiary thereof.
>
> *Salas v. Mountain States Mut. Cas. Co.,* 145 N.M. 542, 202 P.3d 801 (2009) at ¶ 16.

If an insurer is uncertain whether the insured is aware of its potential coverage, the insurer has an obligation to inquire whether the insured desires its participation – "a simple letter to the insured requesting clarification is hardly 'onerous.'" *Cincinnati Companies v. West American Ins. Co.*, 183 Ill.2d 317, 329 701 N.E. 2d 499 (1998).

4. Discovery of insurer's files in bad faith litigation.

Insurance regulations require that insurer's claim files "must contain all notes and work papers pertaining to the claim in enough detail that pertinent events and dates of the events can be reconstructed." WAC 284-30-340. Insurance bad faith cases are often won or lost on the contents of the insurer's claims files.

In response to a request to produce the 2,364 pages of its Lewark claim file, American States withheld or redacted 320 pages

of documents. (CP 139) The accompanying Privilege Log invoked the attorney-client privilege as to only nine of those pages. The remaining 311 pages were said to be "work product." The Privilege Log is remarkably unrevealing.[1]

American States refused to produce any of the withheld documents that were related to its consideration of coverage and benefits owing to Public Storage. A motion to compel was filed. (CP 1) The motion was denied without the *in camera* review requested. (CP 291)

A. The work product rule in insurance litigation.

The attorney-client privilege and the work product rule are separate and should not be confused. The attorney-client privilege codified in RCW 5.60.060(2) is limited to confidential communications between an attorney and client. The work product rule expressed in CR 26(b)(4) applies more broadly to materials "prepared in anticipation of litigation or for trial" whether an attorney is involved or not.

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[1] However, its does show an example of American States' expansive view of its right to withhold records. At CP 855 a message is redacted from the cover page of the insurance agents notice to the Safeco Claims Office of the Lewark suit against both Public Storage and Davis Door. The Privilege Log claims this message to be "Work Product – Defense of Claims." (CP 70)

The work product rule itself allows discovery of work product "only upon a showing that the party seeking discovery has substantial need for the materials in preparation of his case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Application of the work product rule in insurance litigation has long been guided by the court's opinion in *Escalante v. Sentry Ins.,* 49 Wn. App. 375 (1987).

Escalante makes a note of the obvious "substantial need" for access to the insurer's claim file in suits alleging bad faith.

> We note that, the nature of the issues in this type of action automatically establishes substantial need for discovery of certain materials in an insurer's claims files. *Maricopa Cy.,* 137 Ariz. 327, 670 P.3d 725, 734 (1983) (at footnote 11).

Even faced with the "substantial need" to reveal an insurer's work product, the rule provides that "the court shall protect against disclosure of mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." *Escalante* (at p. 397) deals with this concern as follows:

> Given the unique nature of bad faith actions, and considering the protection available in the form of *in camera* inspections, we hold that mental impressions etc are discoverable in a bad faith action if they are directly in issue, and if the discovering party makes a

> stronger showing of necessity and hardship than is normally required under CR 26. See *Upjohn Co. v. United States,* 449 U.S. 383, 101 S.Ct 677, 66 L.Ed.2d 584 (1981) (court declining to hold that such material is always protected by the work-product rule, and implying that a stronger showing of necessity and unavailability would be required for disclosure).

Escalante does not expand on the phrase "a stronger showing of necessity and hardship than normal" which it adopted from the U.S. Supreme Court decision it cites. However, *Brown v. Superior Court,* 137 Ariz. 327, 670 P.2d 725, 734 (1983) which is also cited in *Escalante* calls out the critical need for access to an insurer's claim file as follows:

> Further, bad-faith actions against an insurer, like actions by client against attorney, patient against doctor, can only be proved by showing exactly how the company processed the claim, how thoroughly it was considered and why the company took the action it did. The claims file is a unique, contemporaneously prepared history of the company's handling of the claim; in an action such as this the need for the information in the file is not only substantial, but overwhelming. The "substantial equivalent" of this material cannot be obtained through the other means of discovery. The claims file "diary" is not only likely to lead to evidence, but to be very important evidence on the issue of whether Continental acted reasonably.
>
> *Brown at 397.*

The trial court should have applied the directives in *Escalante* and undertaken the *in camera* review of the 311 pages of the claim file withheld as work product.

B. Documents subject to the attorney-client privilege.

Only nine pages of documents were withheld under the claim of attorney-client privilege.

Escalante also deals with the attorney-client privilege and confirms that, "the privilege may be overcome by a showing of a foundation in fact for the charge of civil fraud." *Esclante* at p. 394. However, because of the difficulty in acquiring proof of fraud when important portions of a claim file have been withheld, *Escalante* adopted a procedure from the Colorado court for testing the fraud exception to the attorney-client privilege:

> However, recognizing the proof of problems inherent in requiring a prima facie showing at the discovery stage, the Supreme Court of Colorado held in *Caldwell v. District Court in and For City and Cy. of Denver*, 644 P.2d 26 (Colo. 1982) that the privilege may be overcome by a showing of a foundation in fact for the charge of civil fraud. *Caldwell,* at 33. The *Caldwell* court also held that the "foundation in fact" showing could be accomplished after an *in camera* inspection of the relevant documents. However, the *in camera* inspection would itself be a matter of trail court discretion requiring a factual showing "adequate to support a good faith belief by

> a reasonable person that wrongful conduct sufficient to invoke the . . . fraud exception . . . has occurred." *Caldwell,* at 33. We find this procedure to be a reasonable solution to the discovery problems associated with the attorney-client privilege in bad faith litigation. Therefore, we adopt the reasoning of the *Caldwell* court and remand all interrogatories to which Sentry objected on the basis of the attorney-client privilege. On remand, the trial court, in its discretion, may conduct an *in camera* inspection of the requested documents. The court will then determine whether the attorney client privilege applies to particular discovery requests, and whether appellants have overcome that privilege by showing a foundation in fact for the charge of civil fraud.
>
> *Escalante* at 394.

Plaintiff requests that the trial court be directed to carry out the *in camera* review of the nine pages of document withheld under the claim of attorney-client privilege if warranted by the *in camera* review of the documents withheld under the work product rule.

The recent case of *Cedell v. Farmers Ins. Co.,* 157 Wn. App 267 (2010) Review Granted, 171 Wn.2d 1005 (2011) places a significant burden on an insured to establish the fraud exception to the attorney-client privilege. It is assumed that the Supreme Court opinion in *Cedell* will provide valuable guidance on this issue before the trial court is called upon to consider the proper ruling on the exception to the attorney-client privilege in this case.

5. Request for attorney fees and expenses on appeal.

Pursuant to RAP 18.1, appellant asks for an award of attorney fees and costs on appeal.

Olympic Steamship Co. v. Centennial Ins. Co., 117 Wn.2d 37, 53 (1991) holds that "an award of fees is required in any legal action where the insurer compels the insured to assume the burden of legal action to obtain the full benefit of his insurance contract." This rule also applies when a party litigates to establish its standing as an insured even though not a party to the insurance contract at issue. *State Farm v. Johnson*, 72 Wn. App. 580, 594 (1994).

V. CONCLUSION

Appellant asks the Court to:

1. Reverse the Orders dismissing plaintiff's claims against American States.

2. Find that Public Storage is an additional insured under Davis Door's American States Commercial Umbrella Liability policy and entitled to coverage for the Lewark suit.

3. Find that plaintiff is entitled to recover from American States expenses incurred by Public Storage to defend and settle

the Lewark suit, as well as attorney fees and cost of this action beyond those granted on appeal.

4. Remand for trial of the extra-contractual claims arising out of American States failure to reveal coverage and benefits available to Public Storage regarding the Lewark suit.

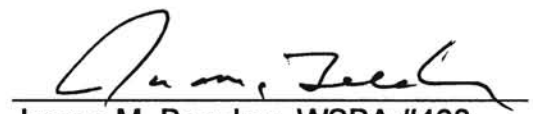
5. Direct the Trial Court to conduct an *in camera* review of work product documents withheld by American States consistent with the *Escalante* opinion.

6. Direct the Trial Court to conduct an *in camera* review of the attorney-client documents withheld by American States consistent with *Escalante* or the Supreme Court's pending decision in its review of the *Cedell* opinion.

7. Award appellant attorney fees and costs on appeal.

Respectfully submitted this 30th day of July 2012.

HACKETT, BEECHER & HART



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COURT OF APPEALS
DIVISION ONE
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Linda Voss declares that on the date noted below, she sent for delivery via ABC Legal Services, a copy of Appellant's Brief to:

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And the Original and one copy to:

The Court of Appeals
Division 1
600 Union Street
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I Declare Under Penalty Of Perjury Under The Laws Of The State Of Washington That The Foregoing Is True And Correct.

Signed in Seattle, Washington this 30th day of July 2012.

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