NO. 90184-8

SUPREME COURT
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 APR 24 PM 3:52

NO. 68634-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

TERRIE LEWARK, assignee of PUBLIC STORAGE,

Petitioner,

v.

AMERICAN STATES INSURANCE COMPANY,
a foreign insurer,

Respondent.

PETITION FOR REVIEW

James M. Beecher, WSBA #468
David R. Collins, WSBA #2158
HACKETT, BEECHER & HART
1601 Fifth Avenue, Suite 2200
Seattle, WA 98101-1651
Telephone: 206 624 2200
Attorneys for Petitioner

FILED
APR 23 2014
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

TABLE OF CONTENTS

CITATIONS

I. IDENTITY OF PETITIONER

Appellant Terrie Lewark, assignee of Public Storage.

II. CITATION TO COURT OF APPEALS

Petitioner seeks review of the Court of Appeals' Opinion filed February 10, 2014 and ordered to be published on March 25, 2014. (Attached as Appendix A)

Petitioner also seeks Review of one holding in the Unpublished Opinion filed August 5, 2013, which was subsequently reconsidered and withdrawn on February 10, 2014. (Attached as Appendix B)

III. ISSUES PRESENTED FOR REVIEW

1. Did the Published Opinion set a mistaken precedent when it ruled that the terms of a contractor's written agreement to purchase additional insured coverage for its customer eliminated coverage *actually purchased* for the additional insured customer that was broader than required by the agreement to purchase coverage?

2. Does the rule in *Bordeaux v. Am Safety Ins. Co.*, 145 Wash. App. 687,696, 186 P.3d 1188 (2008) that self-insured

retention is "not insurance" because "traditional insurance involves risk shifting while self-insurance involves risk retention" apply in a subrogation setting, but not to an "other insurance" policy provision?

IV. STATEMENT OF THE CASE

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)

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)

There is no dispute that there is no coverage under one of Davis Door's liability policies; it contains an exclusion that applies to Ms. Lewark's claim. The issue here is whether there is coverage under Davis Door's umbrella commercial general liability policy. That umbrella policy provides coverage for Public Storage so long as Davis Door was required by contract to name Public Storage as an additional insured for the "kind of coverage that is afforded by this [the umbrella liability] policy." Opinion at 4. As described below, the court of appeals, without citing any authority to support its position, artificially and impermissibly limited the scope of the umbrella policy. The published court of appeals Opinion is incorrect, contradicts established law, and should be reversed.

V. ARGUMENT

A. The Published Opinion Violated the Context Rule, as Applied by *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 993, 115 P.3d 292 (2005), by Misusing an Extrinsic Contract to Interpret the Insurance Policy.

The Court of Appeals interpreted the umbrella policy from which Ms. Lewark seeks coverage by interpreting, not the policy's own language, but rather by interpreting the language of an underlying contract, the Master Agreement, between Davis Door,

the insured, and Public Storage, which was not even a party to the purchase of the insurance policy. This violated a widely acknowledged rule of insurance policy interpretation, placed undue emphasis on the underlying contract which was extrinsic evidence of dubious relevance, and exposed the public to damaging uncertainty in the interpretation of one of the most extensively used types of standardized contracts.

Insurance policies are essential for virtually every family and every business. Disputes over the meaning of policies are common and crowd our courts. Interpreting the insurance policy by the language of the underlying contract is an improper use of extrinsic evidence under the Washington context rule for contract interpretation and directly contradicts the Washington Supreme Court case of *Hearst Communications, Inc. v. Seattle Times Co.,* 154 Wn.2d 493, 502-504 and 509, 115 P.3d 292 (2005). See, RAP13.4 (b)(1). Whether a policy should be interpreted by its own language or that of an extrinsic contract "is an issue of substantial public interest that should be determined by the Supreme Court." See RAP 13.4(b)(4). The ruling should be reviewed by the Supreme Court and reversed.

The interpretation of an insurance policy depends upon analyzing the words in the policy, not those of an underlying contract between the insured and another party. "The parties to whom an insurer owes policy benefits are set forth in the policy. An insurer's duties are defined by what *it* contracted to do, not by what *the insured* contracted to do." *Windt, Insurance Claims & Disputes: Representation of Insurance Companies & Insureds*, Sec. 11:30 Additional insured provisions, at note 16 (Westlaw Ed. 2013) (Emphasis in original). Even under the Washington context rule for interpreting contracts the language to be interpreted is that of the subject contract itself, if extrinsic documents are consulted it, is for the purpose of divining the intent of the parties to assist in the interpretation, not to directly impose an interpretation upon the subject contract itself. *Hearst Communications, Inc.*, 154 Wn.2d at 509. This kind of extrinsic evidence is useful to determine the mutual intent of the parties during the contract negotiations, but here the underlying contract was negotiated between Davis Door and Public Storage, not the insurer. There is no evidence the insurance policy terms were negotiated at all, and usually they are not. See, *Spratt v. Crusader Ins. Co.*, 109 Wash. App. 944, 949, 37 P.3d 1269 (2002).

In Ms. Lewark's case the Court of Appeals read the Master Agreement's requirement that Davis Door obtain for Public Storage "...commercial general liability insurance ... in limits not less than $1,000,000...." and, having noted the underlying CGL with $1,000,000 limits, ruled "[c]overage under the umbrella policy was not required by the master agreement" completely ignoring the issue of whether the umbrella's language, itself, provided coverage, as umbrella coverage sometimes will. Master Agreement, (CP 448, 9.a.) Published Opinion at p. 5. See, *Prudential Property and Cas. Ins. Co. v. Lawrence*, 45 Wn. App. 111, 117-120, 724 P.2d 418 1986) and *Jacob's Meadow Owners Ass'n. v. Plateau,* 139 Wn. App. 743, 768 footnote 13, 162 P.3d 1153 (2007) (umbrella coverage broader than that of the policy under it will drop down to fill primary coverage gaps). Importantly, the court of appeals' reasoning can be run equally well in reverse, to reach the *opposite* conclusion; that is to say, Davis Door complied with its contractual obligations by purchasing the *umbrella* general liability policy, and therefore had no separate contractual obligation to name Public Storage as an additional insured under the primary policy. At the very least, this Court has established that where there are two plausible interpretations of policy language, the interpretation that

favors coverage is the legally correct one. *Am. Nat. Fire Ins. Co. v. B & L Trucking & Const. Co., Inc.*, 134 Wn.2d 413, 427 (1998).

This device also allowed the Court to slip away from the issue of whether the "commercial general liability insurance" required by the Master Agreement includes the "commercial umbrella liability insurance" provided by the umbrella policy. Referring to the $1,000,000 CGL policy lying beneath the umbrella, the Court said: "It is undisputed that Davis Door purchased that kind of policy with the limits required by the master agreement. It was not required to do more." Published Opinion at page 4. Neither "commercial general liability insurance" nor "commercial umbrella liability insurance" is defined in either the umbrella policy or the Master Agreement. No analysis was undertaken whether the "commercial general liability insurance" required by the Master Agreement could be anything other than the underlying CGL policy even though the words "commercial general liability insurance" are not capitalized in the Master Agreement, suggesting commercial insurance generically, rather than a CGL policy specifically. Master Agreement, (CP 448, 9.a.) No analysis was undertaken to determine what these undefined terms mean in the policy when taking their ordinary meaning as required by case law, or whether

they created an ambiguity requiring an interpretation favorable to the insured. *Vision One, LLC v. Philadelphia Indem. Ins. Co.,*174 Wn.2d 501, 512, 276 P.3d 300 (2013) *(Ordinary meaning); Queen City Farms, Inc., v. Central Nat. Ins. Co. of Omaha*, 126 Wn.2d 50, 68 882 P.2d 703 (1994) (ambiguities in an insurance policy are interpreted to mean the most favorable reasonable interpretation for the insured). In addition, no attempt was made to interpret the underlying Master Agreement.

Basing an interpretation of an insurance policy upon an underlying contract has another negative impact. It dilutes the benefit of standardized contract forms. Both insurers and insureds rely on the stability produced by consistent interpretation of standard insurance forms. *Harris, Washington Insurance Law,* Sec. 6.2 p. 6-7 (3d Ed. 2010). The decision in Ms. Lewark's case threatens to upset this stability.

Very recently a West Virginia federal district court faced the issue confronting Ms. Lewark and provided a useful analysis. *Norfolk Southern Ry. Co., v. National Union Fire Ins. of Pittsburgh* 2014 WL 773517, United States District Court, S.D. West Virginia February 26, 2014__ F.Supp.2d __. Norfolk Southern leased railroad property to Cobra to use for a loadout. The lease required

"Tenant [Cobra] [to] procure and maintain, ... Commercial General Liability Insurance [with] a single limit of not less than $2,000,000." *Id.* at *3. Like Davis Door, Cobra obtained both an underlying CGL policy from National Union, with limits of $2,000,000, and an umbrella policy from Westchester, with limits of $10,000,000. After an accident subjected Norfolk Southern to significant liability Westchester denied coverage under the umbrella. The federal court coverage action resulted.

In addition to covering Cobra, Westchester's umbrella covered any entity "that has obligated you by written contract to provide the insurance that is afforded by this policy." *Id.* at *3. Westchester argued Norfolk Southern was not an additional insured under its umbrella policy because Cobra was only obligated to provide $2,000,000 in coverage, the amount provided by National Union's underlying CGL, similar to the argument American States brought against Ms. Lewark.

The Court disagreed. "The 2008 Lease Agreement does not establish a cap on the insurance Cobra is to obtain. Quite simply, Cobra was required to obtain insurance for the benefit of Cobra and Norfolk Southern, and that insurance could not have a limit of 'less than $2,000,000.' Cobra could, and did, obtain insurance in excess

of $2 million consistent with the terms of the 2008 Lease Agreement."[1]

B. IS SELF-INSURED RETENTION "INSURANCE"?

Upon remand, Ms. Lewark is concerned with the holding in the withdrawn Unpublished Opinion that a $500,000 self-insured retention below Public Storage's own policy is considered "insurance" in applying the American States' "other insurance" provision.

It appeared to be settled that self-insured retention is not insurance. *Bordeaux, Inc. v. American Safety Ins. Co.,* 145 Wash. App. 687, 696, 186 P.3d 1188 (2008). The reasoning that "traditional insurance involves risk shifting while self-insurance

---

[1] This most recent authority is consistent with the argument and cases at page 3 of Ms. Lewark's Reply Brief of Appellant. No contrary authority was presented by American States.

The *Norfolk Southern* court added a second basis for its holding saying, "Further, the 2009 Lease Agreement expressly contemplates limits grater than $2 million, as indicated by the parenthetical clause, '(or such greater amount over time so as to be commercially reasonable.)'" *Id* at *4. The clause providing for an increase in policy limits if it became commercially reasonable appears to allow the parties to negotiate a change within the standard of commercial reasonableness in the future. The standard might permit this renegotiation without offending the forbidden "agreement to agree" limitation on enforceability. See, Restatement (Second) Contracts, Sec. 33 (1981) (Westlaw Ed. 2014); Associated Indem. Corp. v. Dow Chemical Co., 935 F.2d 800 (1991). Since no change had apparently been made at the time of the lawsuit it had no direct impact on the case.

The court distinguished one case cited by Westchester in which the underlying contract obligated a party to obtain insurance with limits of "up to one million dollars," language rather obviously establishing a ceiling rather than the floor required by "not less than." *Id* at *4. Several other cases in which the operative language was "not less than" were dismissed by the court saying "[t]he other cases cited by Westchester employ Westchester's faulty reasoning that 'not less than' is a cap on Cobras obligation." *Id* at *4. The Court of Appeals in Ms. Lewark's case used the same faulty reasoning.

App. 687, 696, 186 P.3d 1188 (2008). The reasoning that "traditional insurance involves risk shifting while self-insurance involves risk retention" is persuasive. However, if the Court of Appeals continues in its stated belief that the rule in *Bordeaux* only applies in a subrogation setting, Public Storage's assigned indemnity rights (though not its defense rights) could be severely impacted.

Self-insured retention plays an increasingly important role in commercial insurance programs. Public interest would be served by removing the doubt that the *Bordeaux* rule may not apply outside of a subrogation setting.

VI. CONCLUSION

Petitioner asks the Supreme Court to accept review and to:

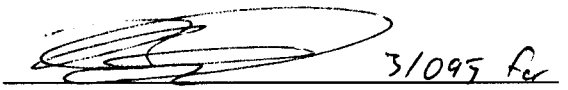
1. Rule that Public Storage had coverage for Ms. Lewark's claim as an additional insured under the American States umbrella policy as written.

2. Rule that self-insured retention is not insurance for the purpose of applying the "other insurance" provision in the American States policy.

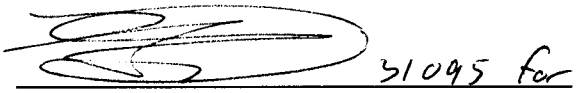
3. Remand to the trial court for further handling.

Respectfully submitted this 24th day of April 2014.

HACKETT, BEECHER & HART



James M. Beecher, WSBA #468
Attorney for Appellant



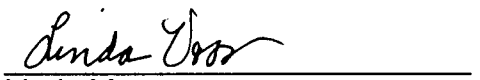
David R. Collins, WSBA #2158
Attorney for Appellant

DECLARATION OF SERVICE

Linda Voss declares, under penalty of perjury, on the date noted below she sent for delivery via ABC Legal Services, a copy of Petition for Review to:

David M. Jacobi & Alfred E. Donohue
WILSON SMITH COCHRAN DICKERSON
905 Fifth Avenue, Suite 1700
Seattle, WA 98161

Signed in Seattle, Washington this 24th day of April 2014.



Linda Voss
Hackett, Beecher & Hart

APPENDIX - A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

TERRIE LEWARK, assignee of PUBLIC STORAGE, INC. Appellant, v. DAVIS DOOR SERVICES, INC., a Washington corporation, Defendant, AMERICAN STATES INSURANCE COMPANY, a foreigner insurer, Respondent.	)	No. 68634-8-I ORDER GRANTING MOTION TO PUBLISH

The respondent, American States Insurance Company, having filed its motion to publish, and appellant, Terrie Lewark, having filed a response to the respondent's motion to publish herein, and a panel of the court having reconsidered its prior determination not to publish the opinion filed for the above entitled matter on February 10, 2014, and finding that it is of precedential value and should be published; now, therefore it is hereby

ORDERED that the written opinion filed February 10, 2014, shall be published and printed in the Washington Appellate Reports.

DATED this 25th day of March, 2014.

Judge

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 25 AM 9:11

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERRIE LEWARK, assignee of PUBLIC STORAGE, INC. Appellant, v. DAVIS DOOR SERVICES, INC., a Washington corporation, Defendant, AMERICAN STATES INSURANCE COMPANY, a foreigner insurer, Respondent.	)	No. 68634-8-I DIVISION ONE PUBLISHED OPINION FILED: February 10, 2014

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 FEB 10 AM 9:39

APPELWICK, J. — Lewark, as assignee of Public Storage, sued American States claiming coverage as an additional insured under an umbrella liability policy it issued to Davis Door. She claimed breach of contract for failure to defend and indemnify and asserted a variety of extra-contractual claims based on American States' alleged failure to notify Public Storage of coverage. The trial court dismissed her claims on summary judgment. The insurance policy did not provide coverage for the underlying claim. We affirm.

FACTS

Public Storage Inc. contracted with Davis Door Service Inc. to perform work at its facilities. They signed a master agreement in 2003, and again in 2006. The 2006

master agreement included a provision that required Davis Door to maintain a commercial general liability policy that insured Public Storage "during the entire progress of the work."

As required by the agreement, Davis Door took out a commercial general liability policy and an employer's liability policy with American Economy. It also took out an umbrella liability policy with American States.

In October 2006, Davis Door performed repair work on a door at a Public Storage facility in Renton. Then, in December 2006, Terrie Lewark attempted to open the door and injured her back. She sued Public Storage and Davis Door. Public Storage settled with Lewark for $299,000. It also paid $150,028 in defense costs, and assigned to Lewark its rights under the 2006 master agreement. Lewark settled with Davis Door in September 2010 for $225,000. Then, Lewark sued Davis Door and American States as assignee of Public Storage. Because she acted as assignee of Public Storage, we refer to her as simply Public Storage.

Public Storage alleged it was an additional insured under the umbrella liability policy and that American States breached the contract by failing to defend and indemnify it. It also pursued extra-contractual claims for negligence, bad faith, and violation of the Consumer Protection Act, ch. 19.86 RCW, and the Insurance Fair Conduct Act, ch. 48.30 RCW. The parties filed competing motions for summary judgment. The trial court dismissed all claims. It found that "Public Storage is not an additional insured under the American States Insurance Company umbrella policy issued to Davis Door."

DISCUSSION

Public Storage argues that it is an additional insured, that the umbrella insurance policy covered the loss in this case, and that American States violated its duty of good faith by failing to notify Public Storage of its policy benefits. It also claims that the trial court abused its discretion by denying Public Storage's motion to compel discovery of documents that American States alleges are protected by the work product doctrine and attorney-client privilege. American States argues that Public Storage is not an additional insured, that the policy was not triggered in this case, that it had no duty to notify Public Storage of potential benefits, and that the trial court correctly denied the motion to compel.

We review an order granting summary judgment de novo. Weden v. San Juan County, 135 Wn.2d 678, 689, 958 P.2d 273 (1998). We may affirm the order on any grounds supported by the record. Allstot v. Edwards, 116 Wn. App. 424, 430, 65 P.3d 696 (2003).

The threshold issue in this case is whether Public Storage is an additional insured under the umbrella liability policy. This question turns on the additional insured language in the umbrella liability policy and the insurance requirement in the 2006 master agreement. The master agreement described the type of insurance required:

> Contractor shall procure and maintain at its own expense during the entire progress of the Work, the following insurance coverage from an insurance company satisfactory to Owner:
>
> > 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.) The umbrella liability policy provided that insured persons or entities include:

> Any 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 added.) It also provided that the coverage was excess over other coverage:

> 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.

Public Storage claims that the language, "the kind of insurance that is afforded by this policy," is ambiguous. It argues that the policy does not specify whether it is referring to commercial general liability insurance or commercial umbrella liability insurance, and does not define either term. Thus, it urges the court to liberally construe the clause in favor of insurance coverage.

Whether both policies provide commercial liability coverage does not create ambiguity. The master agreement requires a commercial general liability policy that covers not less than $1,000,000 per occurrence. It is undisputed that Davis Door purchased that kind of policy with the limits required by the master agreement. It was not required to do more. The umbrella insurance policy was by its terms excess coverage, providing coverage in excess of the limits of the commercial general liability

policy and in excess of the amounts required by the master agreement. Coverage under the umbrella policy was not required by the master agreement.

The master agreement required Davis Door to maintain insurance "during the entire progress of the Work." Lewark's underlying claim is based on injury more than two months after the repairs to the door had been completed. Public Storage agrees that the commercial general liability did not provide coverage for the claim. However, it argues that the umbrella coverage should apply if it was the kind of insurance required by the master agreement. American States argues that the master agreement does not require coverage of completed operations, only coverage during ongoing operations. Public Storage counters that the scope of coverage is defined by the umbrella liability policy, not the master agreement.

The master agreement does not use either the phrase ongoing operations or completed operations. The meaning of these phrases has been discussed in Hartford Insurance Company v. Ohio Casualty Insurance Company, 145 Wn. App. 765, 777, 189 P.3d 195 (2008). The issue was whether "ongoing operations" language of an additional insured endorsement excluded coverage for "completed operations." Id. The court limited the coverage to damages arising out of the subcontractors' work in progress only. Id. at 778. Here, the master agreement required insurance "during the entire progress of the Work." Read in the context of the Hartford decision, that language does not require completed operations coverage.

The umbrella policy only insures what is "required by virtue of a written contract." Neither excess coverage nor completed operations coverage were required in the

master agreement. Public Storage is not covered under the umbrella policy as an additional insured. The remaining issues are moot.

We affirm.

WE CONCUR:

APPENDIX - B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

TERRIE LEWARK, assignee of PUBLIC STORAGE, INC. Appellant, v. DAVIS DOOR SERVICES, INC., a Washington corporation, Defendant, AMERICAN STATES INSURANCE COMPANY, a foreigner insurer, Respondent.	No. 68634-8-I ORDER GRANTING MOTION FOR RECONSIDERATION, WITHDRAWING OPINION, AND SUBSTITUTING OPINON

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 FEB 10 AM 9:39

The appellant, Terry Lewark, has filed a motion for reconsideration of the opinion filed on August 5, 2013. Respondent, American States Insurance Company, has filed a response. The court has determined that said motion should be granted and that the opinion filed on August 5, 2013 shall be withdrawn and a substitute unpublished opinion be filed. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is granted; it is further

ORDERED that the opinion filed on August 5, 2013, is withdrawn and a substitute unpublished opinion shall be filed.

DATED this 10th day of February, 2014.

Becker, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERRIE LEWARK, assignee of PUBLIC STORAGE, INC. Appellant, v. DAVIS DOOR SERVICES, INC., a Washington corporation, Defendant, AMERICAN STATES INSURANCE COMPANY, a foreigner insurer, Respondent.	)	No. 68634-8-I DIVISION ONE UNPUBLISHED OPINION FILED: August 5, 2013

COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 AUG -5 AM 8: 21

APPELWICK, J. — Lewark, as assignee of Public Storage, sued American States, claiming coverage as an additional insured under an umbrella liability policy it issued to Davis Door. She claimed breach of contract for failure to defend and indemnify and asserted a variety of extra-contractual claims based on American States' alleged failure to notify Public Storage of coverage. The trial court dismissed her claims on summary judgment. The insurance policy did not provide coverage for the underlying claim. We affirm.

FACTS

Public Storage Inc. contracted with Davis Door Service Inc. to perform work at its facilities. They signed a master agreement in 2003, and again in 2006. The 2006 master agreement included a provision that required Davis Door to maintain a

commercial general liability policy that insured Public Storage while it was performing work:

> Contractor shall procure and maintain at its own expense during the entire progress of the Work, the following insurance coverage from an insurance company satisfactory to Owner:
>
> 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 must be received by owner naming Public Storage, Inc. and each of its affiliates, subsidiaries, partners, owners, officers, directors and employees as additional insureds.

As required by the agreement, Davis Door took out a commercial general liability policy and an employer's liability policy with American Economy. It also took out an umbrella liability policy with American States. The umbrella liability policy provided that insured persons or entities include:

> Any 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.

In October 2006, Davis Door performed repair work on a door at a Public Storage facility in Renton. Then, in December 2006, Terrie Lewark attempted to open the door and injured her back. She sued Public Storage and Davis Door. Public Storage settled with Lewark for $299,000. It also paid $150,028 in defense costs, and assigned to Lewark its rights under the 2006 master agreement. Lewark settled with Davis Door in September 2010 for $225,000. Then, Lewark sued Davis Door and American States as

assignee of Public Storage. Because she acted as assignee of Public Storage, we refer to her as simply Public Storage.

Public Storage alleged breach of contract for failing to defend and indemnify. It also pursued extra-contractual claims for negligence, bad faith, and violation of the Consumer Protection Act, ch. 19.86 RCW and the Insurance Fair Conduct Act, ch. 48.30 RCW. Those claims arose with respect to the umbrella liability policy. Public Storage alleged that it was an additional insured under the umbrella liability policy, that American States failed to defend or indemnify, and that American States acted in bad faith by failing to inform Public Storage of available coverage and benefits. The parties filed competing motions for summary judgment. The trial court dismissed all claims. It found that "Public Storage is not an additional insured under the American States Insurance Company umbrella policy issued to Davis Door."

DISCUSSION

Public Storage argues that it is an additional insured, that the umbrella insurance policy covered the loss in this case, and that American States violated its duty of good faith by failing to notify Public Storage of its policy benefits. It also claims that the trial court abused its discretion by denying Public Storage's motion to compel discovery of documents that American States alleges are protected by the work product doctrine and attorney-client privilege. American States argues that Public Storage is not an additional insured, that the policy was not triggered in this case, that it had no duty to notify Public Storage of potential benefits, and that the trial court correctly denied the motion to compel.

We review an order granting summary judgment de novo. Weden v. San Juan County, 135 Wn.2d 678, 689, 958 P.2d 273 (1998). We may affirm the order on any grounds supported by the record. Allstot v. Edwards, 116 Wn. App. 424, 430, 65 P.3d 696 (2003).

Even if Public Storage is an additional insured, the umbrella insurance policy does not cover the loss in this case. In an "other insurance" provision, the umbrella policy explicitly stated that it only applies as excess over 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.
>
> 2. When this insurance is excess, we will have no duty to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit." If no other insurer defends, we will undertake to do so, but we will be entitled to your rights against all other insurers, and you shall execute and deliver instruments and papers, including assignments of rights, and do whatever else is necessary to secure such rights.
>
> 3. When this insurance is excess over other insurance, we will pay our share of the "ultimate net loss" that exceeds the sum of:
>
>   a. The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
>
>   b. The total of all deductible and self-insured amounts under all such other insurance.

Public Storage in fact carried its own insurance policy with a $1,500,000 per occurrence limit. That policy contained a $500,000 self-insured retention, such that the insurer would only make payments for damages that exceeded $500,000. There is no suggestion that the underlying claim in this case reached that threshold.

Public Storage argues that, despite the fact that its insurance was not exhausted, the umbrella coverage applies, because the self-insured retention is not "insurance." It claims that section 1 of the "other insurance" provision determines whether the umbrella policy applies. Only then, it argues, does subsection 3 and its explicit reference to self-insured retentions kick in. That interpretation is untenable.

Public Storage's argument is based on the premise that self-insurance provisions are not insurance, because "traditional insurance involves risk shifting, while self-insurance involves risk retention." Bordeaux, Inc. v. Am. Safety Ins. Co., 145 Wn. App. 687, 696, 186 P.3d 1188 (2008). It thus claims that its self-insured retention is not insurance and does not need to be exhausted before the umbrella policy kicks in. But, Bordeaux is a subrogation case that examined whether an insured is entitled to reimbursement for paying out its self-insured retention before its insurer is entitled to reimbursement. Id. at 694. We rejected the insurer's argument that the self-insurance was primary insurance and that the insurer only paid an excess amount over that primary insurance. Id. It was within that equitable context of subrogation that we explained that self-insured retentions are not really "insurance." Id. at 695-96.

This case presents an entirely different issue. It is immaterial whether the self-insured retention itself is "insurance," because it is undisputed that Public Storage owns a primary insurance policy that mandates the self-insured retention. The "other insurance" provision is triggered. It explicitly states that American States is only responsible for losses above both the amount paid by another insurer and the amount of any deductibles or self-insured retentions. It is unreasonable to interpret that provision as requiring coverage in this case. Coverage was not triggered, because

Public Storage's losses were not in excess of its primary insurance and self-insured retention.

Public Storage's extra-contractual claims stem from the alleged failure to disclose coverage and benefits available to Public Storage. Because there were no available benefits, we affirm summary dismissal of those claims. Likewise, we need not consider whether the trial court abused its discretion by denying Public Storage's motion to compel, because Public Storage only sought documents related to the extra-contractual claims. Specifically, American States' interpretation and investigation of coverage. There was no coverage and the extra-contractual claims were properly dismissed.

We affirm.

Appelwick, J.

WE CONCUR:

Schindler, J.

Becker, J.