No. 90184-8

SUPREME COURT
OF THE STATE OF WASHINGTON

TERRIE LEWARK, assignee of PUBLIC STORAGE

Petitioner,

v.

AMERICAN STATES INSURANCE COMPANY,
a foreign insurer,

Respondent

AMERICAN STATES INSURANCE COMPANY'S ANSWER TO PETITION FOR REVIEW of the decision of the Court of Appeals, Division I, No. 68634-8-I

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1. *Identity of Answering Party*

The defendant below and respondent on appeal, American States Insurance Company ("ASIC"), seeks the relief stated in section 2, below.

2. *Statement of Relief Sought*

ASIC asks the Court to deny review of the decision of Division I of the Court of Appeals, dated February 10, 2014 and published on March 25, 2014, in which the Division I Panel affirmed the trial court's summary judgment order dismissing Terrie Lewark's claims, which she asserted as the assignee of Public Storage ("PS").[1]

3. *Issues Presented for Review*

Ms. Lewark has asked the Court to accept review of two issues. She has misstated the first issue; and the second issue is not properly before this Court under RAP 13.4 or any other governing Rule of Appellate Procedure.

Issue 1: ASIC's named insured, Davis Door ("Davis"), purchased an umbrella/excess liability insurance policy. The policy specifically stated that a third party and stranger to the policy, like Public Storage , would also be treated

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[1] Ms. Lewark sued PS and Davis Door ("Davis"), alleging she injured her back while operating an overhead door at a PS facility. (CP 521-529). She settled with PS for $299,000 and later settled with Davis for an additional $225,000. Lewark then obtained an assignment of PS's putative rights against ASIC and Davis and sued both – ASIC for insurance coverage and alleged "bad faith," Davis to recover as an indemnitee under the contract between PS and Davis. Slip opinion at 2. Lewark also asserted a claim against Davis for failure to procure insurance coverage. With Davis's motion for summary judgment on that claim pending, Ms. Lewark voluntarily dismissed all claims against Davis. (CP 1177-93; 1471-72; 1829; 1938-51; 2026-27). She then commenced her appeal against ASIC.

as an insured *only* if Davis was required, by a separate written contract with that third party, to provide the insurance afforded under the excess/umbrella policy. Did both the trial court and the Court of Appeals properly rule that PS was not an insured under Davis's umbrella/excess policy, because the contract between PS and Davis – which PS drafted – specifically required Davis to make PS an additional insured under a *primary liability insurance policy,* which Davis did, in fact, do?

Issue 2: The Court of Appeals *withdrew* its original opinion in this case, in which the Court construed and applied the "excess and other insurance" provisions of the umbrella/excess insurance policy that ASIC issued to Davis. Should this Court deny review of the Court of Appeals' withdrawn opinion because that opinion is not a decision terminating review that is subject to this Court's discretionary review under RAP 13.4; and because the question whether a self-insured retention is "insurance" is irrelevant to the application of the ASIC umbrella/excess policy, which specifically states that it is *excess of all deductibles and self-insurance*?

4. ***Reasons Why Review Should Be Denied***

a. ***The umbrella/excess insurance policy that Davis Door purchased from ASIC does not grant insured status to Public Storage unless a contract between Davis Door and Public Storage requires Davis Door to obtain that policy and to make Public Storage an "additional insured" under that policy.***

Public Storage did not enter into an insurance contract with ASIC – Davis Door did. PS did not pay premiums to obtain coverage from ASIC –

Davis Door did. The unambiguous provisions of the umbrella/excess insurance policy that Davis purchased from ASIC point the reader directly to the provisions of Davis's contract with a third party, like PS, to determine whether that third party will be granted status as an additional insured under the policy:

> ***Each of the following is an insured under this policy to the extent set forth below: ...***
>
> G. ***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.[2]

Under this provision, PS is only an additional insured under the umbrella/excess policy *if the contract between PS and Davis required Davis "to provide the kind of insurance afforded by" that policy.*

There is only one place to look to determine whether Davis was "required by contract" to obtain umbrella/excess insurance coverage and to make PS an additional insured under that umbrella/excess insurance coverage – the "Master Agreement" between Davis and PS.

As a result, Lewark's argument that Judges Applewick, Schindler and Becker somehow "violated the context rule" by "misusing an extrinsic contract to interpret the insurance policy" is both illogical and meritless. The

[2] CP 420 (emphasis added).

members of the Division I Panel were not required to "interpret" the insurance policy at all. The policy is crystal clear about how a stranger to the policy, like PS, may qualify as an insured: by entering into a contract with the named insured that requires the named insured to obtain the type of coverage afforded under the policy.

The trial court and the Court of Appeals were not called upon to "interpret" the insurance policy – only to apply its unambiguous wording.[3] Under the unambiguous wording of the insurance policy, both of the courts below were required to determine what the words contained in the contract between Davis and PS – the so-called "Master Agreement" -- required Davis to do. Neither ASIC nor Davis drafted that Master Agreement – PS did. As PS's assignee, Lewark must live with the Agreement that PS wrote.[4]

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[3] Under *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171-72, 110 P.3d 733 (2005), Washington courts apply the unambiguous provisions of an insurance policy as written; and a policy provision is only "ambiguous" if it is susceptible to two different interpretations, both of which are reasonable. Lewark has not shown that the grant of additional insured status contained in the umbrella/excess policy could have two different and reasonable meanings, in the abstract or in the context of this case. Similarly, the contract that PS drafted says PS must be made an additional insured under a *primary liability insurance policy*; there is nothing ambiguous about that requirement. PS used the very same words to describe the required insurance in correspondence before this lawsuit commenced (CP 456); and Ms. Lewark did the same in her Complaint and motion papers in this litigation. (CP 1471).

[4] Any ambiguity in the Master Agreement concerning the "additional insured" coverage that Davis was required to procure for PS should be construed against PS. As the drafter, PS was required to provide Davis with a clear description of the "additional insured" coverage Davis would have to obtain to comply with the contract, and cannot rely on an ambiguity to impose broader duties on Davis or Davis's insurer. *See, e.g., Emter v. Columbia Health Servs.*, 63 Wn. App. 378, 384, 819 P.2d 390 (1991) (drafter cannot

[Footnote continues on next page...]

b. ***Public Storage is not an additional insured under Davis Door's umbrella/excess insurance policy because the Master Agreement between Public Storage and Davis Door did not require Davis to obtain or to make Public Storage an additional insured under an umbrella/excess insurance policy.***

Because Public Storage's status as an additional insured under the ASIC umbrella/excess policy hinges on what "additional insured" coverage Davis Door was contractually bound to obtain for PS, this insurance coverage dispute properly begins -- and ends -- with a contract of adhesion that was drafted by PS, the world's largest landlord, and the owner and operator of thousands of self-storage facilities around the globe. Before PS would permit Davis to perform any repair work on overhead doors at Public's facilities in the Seattle area, it required Davis to sign a form contract called a "Master Agreement." In Paragraph 10, that Master Agreement described, in some detail, the insurance Davis was required to obtain before Public would do business with Davis.[5]

Lewark's Petition selectively cites a small portion of the relevant wording of the Master Agreement, in which PS directed Davis to obtain:

> [C]ommercial general liability insurance insuring against claims for personal injury, death or property damage occurring upon,

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take advantage of ambiguities it could have prevented with greater diligence); *Cont'l Ins. Co. v. PACCAR, Inc.*, 96 Wn.2d 160, 167, 634 P.2d 291 (1981) (party who created the contract is in a better position to prevent ambiguous language or mistakes).

[5] CP 507-08.

> in or about the Property in limits not less than $1,000,000 per occurrence.[6]

But the Master Agreement said much more about the "additional insurance" coverage Davis was required to procure for Public's benefit – all of which Lewark conveniently glosses over in her Petition, just as she did in making the same illogical, and by now tired arguments in the trial court and in the Court of Appeals. The Master Agreement did not say "you must make Public Storage an additional insured under any and all insurance policies you may have in force during and after the time you perform your work" at a PS facility – although that is how Lewark would like to convince a court to construe the Master Agreement. Instead, the Agreement set out very specific criteria for the insurance that Davis was required to procure to comply with PS's requirements.

First, Paragraph 10 of the Agreement specifically required Davis to obtain and make PS an additional insured under *primary insurance coverage* that would not be excess over PS's own insurance:

> ***All liability insurance coverage required under this Paragraph 10 shall provide that the insurance provided to each additional insured shall be primary insurance, and any other insurance carried by an additional insured shall be treated as excess or contingent coverage***, and the amount of Contractor's Insurance Carrier's liability shall not be reduced by the existence of such other insurance.[7]

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[6] Petition for Review at 2, citing CP 724.

[7] CP 507-08. The Master Agreement also gave PS the right to obtain insurance and charge Davis for the premiums in the event that PS found the insurance Davis procured unacceptable. CP 508. PS never exercised that option.

To comply with the requirements of the Master Agreement, Davis did, in fact, obtain primary liability insurance coverage from ASIC that made PS an additional insured. The primary liability policy had limits of $1 million; contained an endorsement that made PS an additional insured; and made Public's own insurance excess or contingent – all exactly as Paragraph 10 of the Master Agreement required.[8] However, the additional insurance coverage only applied to Davis's "ongoing operations" for the additional insured – there was no coverage for "completed operations." In other words, if an injury occurred after Davis had finished its door repair work at PS's premises, the additional insurance coverage would not apply.

Because the primary coverage did not extend to "completed operations," the primary coverage did not extend to Ms. Lewark's underlying complaint, which alleged that she was injured *after* Davis had finished its repair work on a door at a PS facility -- long after Davis had left the building in the exclusive care and control of PS.

Second, Paragraph 10 stated that the primary insurance that Davis must provide, and in which PS must be made an additional insured, must remain in force "*during the entire progress of the Work.*"[9] The Master Agreement *does not* state that PS must be made an additional insured for injury that occurs after Davis has completed its work and is no longer on the

[8] CP 798-99.

[9] CP 507.

job. While the Master Agreement is quite specific about the limits of coverage and provisions that must be included in the insurance that Davis is required to procure, the Agreement makes no mention of "completed operations" coverage at all – and does not require Davis to procure additional insured coverage for PS that covers Davis's completed operations.[10]

Looking at the Master Agreement, and at the umbrella/excess insurance policy as a whole, it is clear that the umbrella/excess policy is *not* the insurance coverage Davis was required to obtain, or that it did obtain, under Paragraph 10 of the contract. It is not the primary insurance that paragraph 10 called for at all.

Instead, the umbrella/excess policy specifically states that it is *excess over any and all other insurance and any and all other self-insured retentions*:

> **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.
>
> 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

[10] *See Hartford Insurance Co. v. Ohio Casualty Insurance Co.*, 145 Wn. App. 765, 189 P.3d 195 (2008), for a thorough discussion of the distinction between additional insurance coverage that extends to "completed operations" of the named insured, in contrast with such coverage that applies only to "ongoing operations" of the named insured.

> 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.***[11]

In short, the umbrella/excess policy that Davis purchased from ASIC was in no way required by the Paragraph 10 of the Master Agreement, and it is in no way tailored to comply with the insurance requirements of the Master Agreement. It is not primary insurance coverage. Instead, in direct contravention of the insurance specifications contained in Paragraph 10 of the Master Agreement, the umbrella/excess policy states that it is excess over all other insurance, and specifically states that it is also excess of all other deductibles and self-insured retentions. Indeed, by its very nature, the ASIC "umbrella/excess insurance policy" is *not* the "primary liability insurance" called out in the provisions of the Master Agreement.

Furthermore, the record on appeal makes it abundantly clear that PS fully understood what was required under the Master Agreement that PS itself drafted and demanded that Davis sign. Ms. Lewark herself told the trial court: "*the actual contract language require[s] primary general liability*

[11] CP 433 (emphasis added).

insurance;" and emphasized that *"Ms. Lewark's complaint alleges and the Master Agreement shows Davis Door was required to obtain primary commercial general liability insurance to protect Public Storage."*[12] The trial court and the Court of Appeals were both entitled to consider this "context evidence," because it did not in any way alter or contradict the plain meaning of the words PS chose to use in the Master Agreement -- the evidence merely confirmed that the words mean exactly what they say.

Lewark, on the other hand, was urging the courts below to ignore both the plain meaning of the Master Agreement *and* other writings from PS and Lewark herself which confirmed that when the Master Agreement said Davis was required to obtain *primary* insurance, it *meant* primary insurance. If and to the extent the courts below considered evidence outside the Master Agreement as an aid to construction, both of the courts below properly applied the *Hearst Communications*[13] "context rule" by looking to evidence that merely confirmed the plain meaning of the words used in the Agreement and did not modify or supplement the Agreement's text.

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[12] CP 1471 (emphasis added). What if Davis had only purchased a primary liability insurance policy with limits of $1 million, that made PS an additional insured – but had never purchased an umbrella/excess insurance policy? Based on the wording of the "Master Agreement," no one could reasonably claim that Davis failed to procure the insurance coverage required under the Master Agreement. (CP 1938-1951). Davis's decision to obtain and pay for additional, umbrella/excess liability coverage for its own benefit had nothing whatsoever to do with the Master Agreement. To extend additional insured coverage to PS under that umbrella/excess policy would be a mere gratuity that PS did not bargain for, and for which PS did not pay any consideration to Davis or to ASIC.

[13] 154 Wn.2d 493, 502-04, 509, 115 P.3d 292 (2005).

Lewark, on the other hand, urged the courts below, and now urges this Court, to *violate* the basic principle stated in *Hearst Communications* – that extrinsic "context evidence" may not be used to modify or contradict the actual words of the contract between PS and Davis. That contract unequivocally required Davis to obtain *primary* liability insurance that made PS an additional insured, and to provide such coverage "*during the entire progress of the Work.*" Lewark would have the courts ignore these provisions of the Agreement and find that the Agreement was intended, instead, to require Davis to make PS an additional insured under any and all liability insurance policies that Davis might purchase – regardless whether those policies might be primary, excess or contingent, and regardless of the limits of that coverage. The Agreement quite simply does not say that – and to construe the contract that way now would do violence to the contract wording and give PS – and Lewark as its assignee – a pure windfall.

Davis did obtain a $1 million primary insurance policy and did make PS an additional insured under that policy.[14] In so doing, Davis fully satisfied the Master Agreement's plainly worded requirement that Davis make PS an additional insured under a *primary liability insurance policy,* with limits of at least $1 million, that made PS's own insurance "excess or contingent coverage." The contract never required Davis to do more.

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[14] (CP 798-99).

The only reason Lewark has argued, *post hoc,* that PS is an additional insured under the umbrella/excess policy is simple – no one disputes that the "additional insured" coverage for "ongoing operations" that is provided under the $1 million primary insurance policy *did not cover Ms. Lewark's personal injury claim and did not require ASIC to defend or indemnify PS, whether PS tendered a claim to ASIC or not.*

Davis was not required to obtain additional insured coverage for PS that would cover every conceivable claim – it was required only to obtain the additional insurance coverage described in the Master Agreement. The insurance described in the Master Agreement did not include coverage for PS, as an additional insured, for Davis Door's "completed operations," and it did not include coverage of any kind under an umbrella/excess policy, and under no circumstances was Davis required to insure PS against claims arising out of PS's own allegedly negligent maintenance and operation of its storage facilities when Davis's work was done and it was no longer on the premises.[15]

Nor did the Master Agreement – the controlling contract that PS wrote and presented to Davis on a take it or leave it basis – require Davis to make PS an additional insured under each and every insurance policy that Davis might purchase, primary or excess. The Agreement states with specificity what insurance Davis was required to obtain *for PS's benefit as*

[15] *See* RCW 4.24.115 (invalidating such indemnification provisions in contracts for improvements to real property).

an additional insured – and that is what Davis obtained when it purchased the $1 million primary liability policy from American Economy.

The umbrella/excess insurance directly benefits only Davis – which applied and paid for the coverage. It does not benefit PS – which did not bargain with Davis or ASIC to obtain umbrella/excess coverage, and never paid any consideration to obtain such coverage, whether in its contract with Davis or through payment of premiums to ASIC.

Public Storage is not the policyholder. If it does not qualify as an additional insured, it is a stranger to the umbrella/excess policy, with no more rights under the policy than any other stranger – *i.e.*, no rights whatsoever. The trial court properly dismissed all of Lewark's contract and extracontractual claims on this basis alone, because as PS's assignee, she has no more right to assert a claim against ASIC than PS did. The Court of Appeals did not err when it affirmed; and there is no conflict with existing law and no question of public importance that calls for this Court's review under RAP 13.4.

c. The Federal District Court's decision in Norfolk Southern, applying West Virginia law, does not provide a basis for Supreme Court review under RAP 13.4.

Ms. Lewark has chosen to make the decision of the District Court for the Southern District of West Virginia in *Norfolk Southern Railway v. National*

Fire[16] the linchpin of her Petition for Review, arguing that her Petition "confronts the same issue" that was before that Federal trial court. In truth, a careful reading of the *Norfolk Southern* decision reveals that the question of West Virginia law that was before the District Court is thoroughly distinguishable from the "the issue confronting Ms. Lewark," the King County Superior Court, Division I of the Court of Appeals, and this Court in the instant case.[17]

In the *Norfolk Southern* case, the named insured Norfolk contracted with Cobra. The contract required Cobra to obtain liability insurance with limits "of not less than $2 million" making Norfolk an additional insured. Cobra obtained a primary policy with limits of $2 million; and also obtained an umbrella/excess policy with limits of $10 million. The excess policy granted additional insured status to any entity "that has obligated you by written contract to provide the insurance that is afforded by this policy." Westchester argued that because the contract called for coverage with limits of "not less than $2 million," Cobra was not "obligated" to procure coverage *over* $2 million – and thus its excess policy did not apply.

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[16] 2014 U.S. Dist. LEXIS 24092 (S.D. W. Va., Feb. 26, 2014).

[17] Even if the Court of Appeals' decision *were* in conflict with the decision of the Federal District Court, applying West Virginia law, that would scarcely provide a basis for Supreme Court review under RAP 13.4. The criteria that may justify this Court's exercise of its discretion to accept or deny review whether there is a conflict with decisions from another Division of the Washington Court of Appeals or the Washington Supreme Court – a trial court decision under West Virginia law does not provide an applicable benchmark under the Rule.

However, ASIC has never argued that the umbrella policy does not apply because it provides coverage limits of more than the $1 million limit set forth in the Master Agreement. Indeed, if the American Economy primary policy issued to Davis had limits of $2 million, the limits would apply to PS as an additional insured, subject to all other terms and conditions of the coverage (including the limitation of additional insured coverage to "ongoing operations" of the named insured).

The Master Agreement in *this* case, unlike the contract between Norfolk and Cobra in the *Norfolk Southern* case, *specifically directed Davis to make PS an additional insured under a primary liability insurance policy with limits of at least $1 million per occurrence.* The umbrella/excess policy that Davis obtained from American States is *not* the coverage that the Master Agreement called for.

Furthermore, the *Norfolk Southern* decision itself shows that the District Court's holding represents a minority view, citing numerous decisions which have held a contract provision that generally refers to a party's obligation to obtain "liability insurance" with limits of "up to" or "not less than" a specified amount, does not also require the insured to procure additional umbrella/excess insurance; and therefore does not require an umbrella/excess insurer to treat a third party as an "additional insured" under an umbrella/excess policy provision like the one at issue here.[18]

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[18] The *Norfolk Southern* decision itself cites, and rejects, without any cogent reasons of its own, the rulings in *Musgrove v. Southland Corp.*, 898 F.2d

[Footnote continues on next page...]

Indeed, Lewark's citation to the recent District Court decision in *Norfolk Southern* in her Petition for Review represents the very first time she has ever been able to point to *any* authority that holds an excess insurer is required to grant additional insured status under wording the same or similar to the wording of the ASIC umbrella/excess policy. But even the *Norfolk Southern* ruling fails her, because the *contract* in our case – which must be the source of PS's status as an insured – is unlike the contract in *Norfolk Southern.* The contract that PS wrote, and demanded that Davis sign, specifically directs Davis to obtain *primary liability insurance,* and states that insurance that is by its terms excess of PS's own insurance does *not* conform to the contract's requirements. The contract in *Norfolk Southern* contained no such wording.

The ASIC umbrella/excess policy that Davis bought and paid for is specifically written to be excess of all other insurance, *as well as all other deductibles and self-insured retentions.* It is not the insurance called for in the Master Agreement; and even if the Court were to follow *Norfolk Southern* – a trial court decision, from another jurisdiction, which appears to run counter to

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1041, 1043-44 (5th Cir. 1990); *Forest Oil Corp. v. Strata Energy, Inc.*, 929 F.2d 1039, 1045 (5th Cir. 1991); and *Allied Corp. v. Frola,* Civ. No. 87-462, 1992 U.S. Dist. LEXIS 15778, all of which held that a contract that does not specifically require an insured to procure and make another party an "additional insured" under an excess insurance policy does not qualify that party for insured status under an additional insured provision like the one in the ASIC policy. Also holding that a contract to procure, and make an entity an additional insured under, liability insurance coverage with "limits of at least" a specified dollar amount does not confer additional insured status under an excess/umbrella liability policy, are *Certain London Mkt. Ins. Cos. v. Pa. Nat'l Mut. Cas. Ins. Co.*, 269 F. Supp. 2d 722 (N.D.Miss. 2003); and *Ryder Integrated Logistics, Inc. v. BellSouth Telecoms, Inc.*, 277 Ga. App. 679 (2006); *reversed on other grounds,* 281 Ga. 736 (2007).

all other reported case law -- PS *still* would fail to qualify as an additional insured under the umbrella/excess policy that ASIC issued to Davis.

d. ***The ASIC umbrella/excess insurance policy specifically states that it is excess of all other insurance, deductibles and self-insured retentions; and thus, whether or not a self-insured retention constitutes "insurance" is utterly irrelevant in this case.***

The policy could not be clearer. It does not merely state that it shall be excess of all "other insurance" – it also states that the policy will only make payment *in excess of "all deductible and self-insurance amounts under all such other insurance"*:

> **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.***[19]

Lewark nevertheless argues that the Court should accept review of the question whether self-insurance is "insurance" because the Court of Appeals – in its withdrawn opinion of August 5, 2013, supposedly held that self-insurance *is* insurance, and therefore ran afoul of the holding in *Bordeaux, Inc. v. American Safety Ins. Co.*[20]

There is a one word response to that argument: nonsense.

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[19] CP 433 (emphasis added).

[20] 145 Wn.App. 687, 696, 186 P.3d 1188 (2008).

To begin with, the policy wording above moots the question whether self-insurance is "insurance." *It does not matter,* because the ASIC umbrella/excess policy is not only excess of "insurance" – it is also excess of *deductibles and self-insured retentions.*[21]

Furthermore, if one goes back to Division I's withdrawn opinion, the Court of Appeals specifically acknowledged that Ms. Lewark's appeal does not present the question addressed in *Bordeaux,* because the ASIC policy is expressly made excess of self-insured retentions.[22]

Finally, there is no basis for Supreme Court review of a decision that has been withdrawn – much less any "public interest that would be served" by reviewing a decision that has been rendered a nullity. RAP 13.4 provides for "discretionary review by the Supreme Court of a Court of Appeals decision terminating review" – and decision of the Court of Appeals that has been withdrawn and replaced with an entirely new decision cannot possibly be a "decision terminating review."

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[21] *Missouri Pacific R.R. Co. v. International Insurance Co.*, 288 Ill.App.3d 69, 679 N.E.2d 801 (1997); *see also* Seaman & Schulze, *Allocation of Losses in Complex Insurance Coverage Claims,* § 5.5 (Self-insurance as "other insurance") (2012) ("Where a contract contains a clause stating that its coverage is excess of 'other insurance *or self-insurance*,' imposition of liability on the self-insurer plainly is proper"); *Nabisco, Inc. v. Transport Indem. Co.*, 143 Cal.App.3d 831, 192 Cal.Rptr. 207 (4th.Dist.1983) (an additional insured had no right to defense or indemnity under an umbrella/excess policy that stated, as the ASIC policy does, that it was excess of all other insurance *and self-insurance*).

[22] Appendix B, August 5, 2013 slip opinion at 5-6.

Indeed, it is no longer a "decision" amenable to further appellate review at all; and, contrary to Ms. Lewark's assertion, no "public interest would be served" by this Court's review of an unpublished opinion that the Court of Appeals has withdrawn and replaced with a very different, published decision.

5. Conclusion

The trial court and the Court of Appeals both correctly applied the plain wording of the ASIC umbrella/excess policy and the Master Agreement – drafted by PS – to find that PS was never an "additional insured" under the umbrella/excess policy, and thus had no right to claim the benefit of that insurance or to assert any claims under or outside of the contract as an "insured" entity. As PS's assignee, Ms. Lewark had no rights against ASIC either.

Neither the trial court nor the Court of Appeals erred in any manner; and there is nothing for this Court to review further under RAP 13.4.

ASIC therefore asks the Court to deny Lewark's Petition for Review; and to issue a Mandate bringing an end to Ms. Lewark's relentless pursuit of her meritless, assigned claims against ASIC.

DATED and respectfully submitted this 23 day of May, 2014.

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CERTIFICATE OF SERVICE

The undersigned certifies that under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be served and filed the attached document as follows:

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DATED at Seattle, Washington this 23 day of May, 2014.

Natasha Johnston