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No. 68634-8-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

TERRIE LEWARK, assignee of PUBLIC STORAGE

Plaintiff/Appellant,

v.

AMERICAN STATES INSURANCE COMPANY,
a foreign insurer,

Defendant/Respondent

and

DAVIS DOOR SERVICES, INC.

Defendant.

BRIEF OF RESPONDENT AMERICAN STATES INSURANCE COMPANY

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I. INTRODUCTION

Terrie Lewark brought a personal injury action against Public Storage, Inc.; Shurgard Storage Centers, LLC (collectively "PS"); and Davis Door Service, Inc., ("Davis"). Ms. Lewark alleged she was injured while opening an overhead door at a Public Storage self-storage facility; and further alleged that Davis had negligently performed repairs on the door at some time prior to the date of her injury.

The Respondent, American States Insurance Company ("ASIC"), issued liability insurance to Davis as its policyholder. Davis tendered the Lewark claim to ASIC. ASIC promptly agreed to defend and indemnify Davis.

Davis had a contract with PS – a form contract that PS drafted and directed Davis to sign before Davis performed any work for PS. The contract included an indemnity provision, as well as a provision that required Davis to maintain primary liability insurance and to make PS an additional insured *while Davis was performing its work.* The contract did not require Davis to make PS an additional insured for Davis's "completed operations." That made good sense in this context – Davis had no control over the PS storage facility once its work was done. Only PS, as the owner and lessor, invited the public into its facility and controlled all aspects of the use and maintenance of the facility when Davis was not on the premises performing its work.

Pursuant to the contract, PS demanded and received certificates of insurance that reflected its status as an additional insured under Davis's liability insurance.

Nevertheless, PS – a sophisticated, publicly traded S&P 500 corporation, which touts itself as "the world's largest owner and operator of self-storage facilities"[1] – did not tender the Lewark personal injury claim to Davis under the contractual indemnity provision. It did not tender the Lewark personal injury claim to Davis's insurer, ASIC, as an additional insured.

Instead, PS selected and retained its own counsel; and retained sole control over its own defense and its own destiny in the *Lewark v. PS and Davis* lawsuit. Not long before trial, and without prior notice to Davis or to ASIC, PS settled with Ms. Lewark for a payment of $299,000. Around the same time, PS belatedly demanded indemnity from Davis and liability insurance coverage as an additional insured under the policies ASIC issued to Davis as its named insured. Davis later settled with Ms. Lewark and paid her an additional $225,000 for a release.

PS assigned its putative rights against Davis and ASIC to Ms. Lewark. After she had obtained over half a million dollars from Davis and PS in her tort action, Ms. Lewark commenced this suit, as PS's assignee, against Davis and ASIC. The contract –drafted by PS - did not require Davis to make PS an additional insured under any excess policies. It did not require Davis to make PS an additional insured for Davis's completed operations.

[1] CP 388.

Nevertheless, Lewark claimed that PS was an additional insured and entitled to completed operations coverage under Davis's ASIC umbrella/excess policy, despite policy wording that made PS an additional insured only to the extent required by Davis's contract with PS. Lewark also claimed that the umbrella/excess policy was required to "drop down" to provide primary coverage, despite policy wording which unambiguously states the policy will not "drop down" until PS has exhausted its own insurance coverage and any self-insured retentions under its own insurance coverage. Conceding that PS did not tender a claim for contractual indemnity to Davis or a claim for insurance to ASIC until PS had already settled Lewark's claim, Lewark claimed that ASIC acted in "bad faith" because it did not provide PS with a coverage evaluation and volunteer to defend PS – *before* PS ever asked ASIC to defend and indemnify.

To provide relief for Lewark's claims for insurance coverage, as assignee of PS, the trial court would have been required to ignore not only the wording of the ASIC insurance policy, but the contract wording that PS itself wrote and required Davis to sign.

To provide relief for Lewark's assigned bad faith claims, the trial court also would have been required to ignore controlling Washington law and to make new and ill-advised law – to impose an obligation on every Washington insurer to respond to a possible claim for insurance, before the putative insured has tendered the claim to the insurer.

On cross-motions for summary judgment, the trial court properly applied the wording of the contract PS itself drafted and declined to relieve PS from the consequences of its own conduct. Under the contract, Davis was never required to procure excess coverage or "completed operations" coverage for PS as an additional insured; and thus ASIC did not provide such coverage to PS under the PS/Davis contract and the wording of the ASIC insurance policy. PS never tendered a claim for indemnity to Davis or a claim for insurance to ASIC before it settled Lewark's personal injury claim; and thus ASIC never had an obligation to provide PS with an unsolicited evaluation of its right to indemnity from Davis under the contract or of possible insurance coverage under Davis's insurance policies, much less to defend and indemnify PS as a volunteer.

As a result, the trial court dismissed the assigned claims for additional insurance coverage and for "bad faith."

Boiled down to its essentials, this is a very simple case. PS did not tender a claim for insurance to ASIC. Since there was no claim for insurance from PS, ASIC did not respond to the non-existent claim – and under Washington law, ASIC had no duty to anticipate and respond to a claim that PS did not make. Furthermore, even if ASIC did have such a duty, there was never coverage for PS's claim as an additional insured, as a matter of law. No matter what, PS has no cause of action against ASIC and, as PS's assignee, neither does Ms. Lewark.

Nevertheless, this appeal followed the trial court's dismissal of Lewark's assigned claims. The trial court did not err; and this Court should affirm.

II. LEWARK'S ASSIGNMENTS OF ERROR

Lewark has assigned error to the following trial court rulings:

A. The trial court's conclusion that PS was not an additional insured under the ASIC umbrella/excess insurance policy issued to Davis (i.e., the trial court's dismissal of Lewark's breach of contract claims based upon the umbrella policy), as a matter of law;

B. The trial court's dismissal of Lewark's extra-contractual claims against ASIC, as a matter of law; and

C. The trial court's exercise of its discretion to deny Lewark's motion to compel ASIC to produce privileged documents contained in ASIC's file for the underlying *Lewark v. Davis* personal injury claim.

III. ASIC's STATEMENT OF ISSUES PERTAINING TO LEWARK'S ASSIGNMENTS OF ERROR

A. Did the trial court properly conclude that Lewark's assigned contractual claims against ASIC should be dismissed because: (1) Davis did not agree to provide completed operations liability coverage or umbrella/excess liability coverage to PS, and thus PS is not an additional insured under the ASIC umbrella policy, which extends coverage to PS only to the extent required by its contract with Davis; and (2) even if PS were an additional insured under the umbrella/excess policy, the policy plainly states

that it applies in excess of all other coverage, deductibles and self-insured retentions?

B. Did the trial court properly dismiss Lewark's assigned extra-contractual claims against ASIC because: (1) PS is not an additional insured under the umbrella policy and, therefore, has no right to assert extra-contractual claims against ASIC; and (2) even if PS were an additional insured, PS settled Lewark's claims before PS tendered the matter to ASIC, and clear and controlling Washington authority holds ASIC cannot be found to have acted in bad faith in the absence of a tender?

C. Did the trial court properly exercise its discretion to deny Lewark's motion to compel the production of privileged documents from ASIC's claims file for the *Lewark v. PS and Davis* lawsuit because: (1) the information sought was shielded by *Davis's* right to attorney-client and work product protection of matters related to its defenses in this action; (2) there is no applicable exception to the attorney-client and work product privileges applicable to the documents; and (3) this issue is moot, because PS was not an additional insured and, even if it had been an additional insured, there was no coverage and no "bad faith" as a matter of law?

IV. STATEMENT OF THE CASE

A. Terrie Lewark sued PS and Davis for personal injuries allegedly arising out of Davis's completed work on an overhead door at a storage facility owned and operated by PS.

This action follows an underlying personal injury lawsuit that Terrie Lewark brought against PS and Davis on December 3, 2007. (CP 516 – 519) She filed an Amended Complaint on November 3, 2009 (CP 521 – 524) and a Second Amended Complaint on March 1, 2010 (CP 526 – 529), both of which included PS (a company related to Shurgard) and Davis as defendants.

Ms. Lewark alleged she was injured on December 4, 2006, when a rolling overhead door she was attempting to lift at PS's facility became stuck, causing her to wrench her back. (CP 528) She alleged Davis had previously repaired the door, but the repairs were not done correctly. (*Id.*) She also alleged that "Defendants failed to properly instruct or warn plaintiff regarding the dangers presented by the door or the safe operation of the door." (CP 527)

B. Davis tendered the Lewark personal injury claim to ASIC and ASIC defended Davis; but PS never tendered the claim to Davis or to ASIC before settling with Lewark.

ASIC issued a primary Commercial General Liability ("CGL") insurance policy to Davis for the period December 31, 2005, to December 31, 2006. Under an endorsement to that policy, PS was made an additional insured for bodily injury occurring while Davis was performing its operations for PS. Ms. Lewark plainly alleged that she was injured after Davis had

completed its repair of the door at PS's storage facility. As PS's assignee, Lewark concedes there is no additional insurance coverage under the primary CGL policy.[2]

When Ms. Lewark filed her tort claims against Davis and PS, Davis promptly tendered the claim to ASIC. In response to the tender, ASIC provided a defense to Davis under the CGL policy through attorney George Mix. (CP 414) ASIC had also issued an umbrella/excess liability policy to Davis for the same time period. (CP 417 – 443) Contrary to PS's assertion at page 6 of its opening brief, there is nothing in the record indicating that ASIC provided a defense to Davis under the umbrella policy.[3] Indeed, there was never any reason for Davis or ASIC to look to the umbrella/excess policy for coverage. The primary policy has liability limits of $1 million – which appeared more than adequate to cover Ms. Lewark's injuries.

Davis and PS had executed a Master Agreement in 2003. (CP 445 – 452) Under that Agreement, Davis was required to defend and indemnify PS and to maintain a CGL policy "during the entire progress of the Work," with at least $1,000,000 in coverage. Davis also was required to provide certificates of insurance "naming the Indemnified Parties as additional insureds." (CP 448)

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[2] Brief of Appellant at 6.

[3] Lewark cites ASIC's Answer as support for that proposition, but in the answer, ASIC admitted it issued an umbrella policy to Davis and admitted that provided a defense to Davis, but did not state it provided that defense under the umbrella policy. (CP 337)

Davis and PS executed a second "Master Agreement" in September 2006, before Ms. Lewark was injured. (CP 504 – 511) Under the terms of that second Agreement, "during the entire progress of the Work," Davis was required to maintain a CGL policy with at least $1,000,000 in coverage and to name "Public Storage, Inc., and each of its affiliates, subsidiaries, partners, owners, officers, directors and employees" as additional insureds on the policy. (CP 507).

PS cannot possibly deny it was aware of these Agreements – PS drafted them and required Davis to sign them before it performed work for PS. PS has never denied that it held certificates of insurance identifying PS as an additional insured under one or more policies of insurance that ASIC issued to Davis. Nevertheless, PS did not tender Ms. Lewark's lawsuit to Davis under the contractual indemnity provision and did not tender the suit to ASIC seeking additional insured coverage until *after* it had paid to settle Ms. Lewark's claims. Rather than turn to Davis or to ASIC, PS retained its own counsel and controlled its own defense.

In November 2009, ASIC learned that PS had asked Davis to enter into a joint defense agreement. (CP 414) This was the first time ASIC learned of the 2003 Master Agreement. (*Id.*) The 2006 Master Agreement was first disclosed to ASIC after Lewark filed this lawsuit. (CP 415)

C. <u>After settling the Lewark personal injury suit, PS raised the issued of insurance as an "additional insured" for the very first time</u>.

In February 2010, PS settled with Ms. Lewark for $299,000. (CP 534 – 538) As part of the settlement, PS assigned to Ms. Lewark any claims it had against Davis under the indemnification provisions included in the Master Agreement. (CP 534 – 536) Although Ms. Lewark's counsel informed Davis's counsel of the settlement, he refused to provide a copy of the settlement agreement to Davis. The trial court in the underlying tort action also denied Davis's motion to compel production of the settlement agreement. (CP 531 – 532)

The first time PS even mentioned a possible claim for additional insurance coverage from ASIC was in March 2010 – the month *after* it settled the Lewark suit. In a letter to PS's counsel dated February 23, 2010, Davis's attorney noted that PS had never tendered the matter to Davis under the Master Agreement. (CP 454) In a response dated March 8, 2010, PS's counsel stated "you and I had a number of communications regarding the fact that Public Storage/Shurgard was not sending you a written tender because doing so might prejudice Public Storage's and Davis's common interests in defending against Ms. Lewark's claims." (CP 456)

In the same March 8 letter, PS counsel also asserted, for the first time, that the contract required Davis to obtain "primary liability insurance" and

asserted that ASIC was obligated to "provide a defense and coverage for Public Storage in this case":

> In addition, Safeco [ASIC] has been on notice of the claim. ***The contract has provisions for both indemnity and primary liability insurance.*** WAC 284–30 articulates a clear obligation on the part of the insurer to fully explain all of the rights and benefits under the policy to the insured. Those obligations would clearly include providing a defense and coverage for Public Storage in this case. Safeco has never told us what it would do either to defend or indemnify my clients even though indemnity obligations are routinely covered as "insured contracts". We presume they are under your policy as well.

(CP 456; emphasis added). This letter was the first indication ASIC received that PS contended it was entitled to coverage for Lewark's claim. By that point, PS had already settled the suit ASIC was supposedly obligated to defend.

On May 18, 2010, attorney William Smart, who represented Ms. Lewark in the tort action, sent a notice to ASIC under the Washington Insurance Fair Conduct Act ("IFCA"). (CP 459 – 511) Mr. Smart alleged ASIC had acted wrongfully in not providing a defense to PS. (CP 460). He did not claim that PS had tendered the claim to ASIC – because there never had been a tender.

Mr. Smart's IFCA Notice included a copy of the 2003 Master Agreement (CP 463 – 470), but not the 2006 Master Agreement. It also included a copy of the Settlement Agreement between Ms. Lewark and PS – the very Agreement he had previously refused to provide to Davis. (CP 489 –

494) The Settlement Agreement was signed only by Ms. Lewark and did not include an assignment of any rights PS might have against ASIC. Thus, at the time Mr. Smart sent the IFCA Notice to ASIC, Ms. Lewark had no standing to make an IFCA claim.

In May 2010, Davis and Ms. Lewark engaged in a mediation of Lewark's personal injury claim. In a May 24, 2010, letter to the mediator, Mr. Smart confirmed that PS had never tendered the matter to ASIC, instead taking the position that "[t]here does not have to be a tender of defense. All there needs to be is notice to the insurance company to trigger the insurer's obligations under the WAC Regulations." (CP 501)

In June, 2010, Lewark and PS executed an "addendum" to their original agreement to settle Ms. Lewark's tort claims. In the addendum, PS purported to assign to Lewark its putative rights against Davis for indemnity under the applicable "Master Agreement" and against ASIC as an additional insured under the Davis insurance policies. (CP 540-542)

In July 2010, Ms. Lewark agreed to settle with Davis for $225,000. Lewark and Davis executed a Release and Hold-Harmless Agreement on September 9, 2010. (CP 544) ASIC paid the settlement to Ms. Lewark on behalf of Davis and Ms. Lewark dismissed her claims against Davis. (CP 546 – 547)

D. Ms. Lewark filed this suit, as assignee of PS, seeking more money from Davis and ASIC - in addition to the $524,000 she had already obtained in settlement of her personal injury claim.

Having already received $524,000 in full and final settlement of her claims against the alleged tortfeasors PS and Davis, Ms. Lewark filed the present lawsuit against Davis and ASIC, as assignee of PS. (CP 875 – 886)[4] The allegations in the Complaint confirm that PS did not tender the *Lewark v. PS* suit to ASIC until after PS had already settled with Ms. Lewark. As PS's assignee, Lewark contends that, even though PS did not present a claim to ASIC, ASIC was obligated to (1) provide a written evaluation of coverage to PS and (2) voluntarily step in to defend and indemnify PS:

> 3.13 Public Storage was an additional insured under the policy, as was each of Public Storage's affiliates, subsidiaries, partners, owners, officers, directors, and employees. By virtue of the claims against Davis Door, American States Insurance Company knew that Ms. Lewark had sued its additional insured Public Storage in a case arising from Davis Door's work.
>
> 3.14 American States Insurance Company failed to give a full and fair explanation of the coverages available to Public Storage.
>
> 3.15 American States Insurance Company failed to defend Public Storage or fund Public Storage's defense.

(CP 879) The Complaint quotes extensively from the 2003 Master Agreement (CP 876 – 878), but does not specifically refer to the 2006 Master

[4] As it did when Ms. Lewark sued Davis the first time, ASIC provided a defense to Davis under the primary liability policy.

Agreement, which was the operative document at the time of Ms. Lewark's injury.

E. Ms. Lewark's original counsel in this action withdrew after Davis filed a motion to disqualify him and Lewark's "insurance expert" for misuse of inadvertently produced, privileged documents.

During discovery in the present lawsuit, ASIC's counsel inadvertently produced to PS a compact disc of the entire *Lewark v. PS and Davis* claim file, including documents it had clearly identified as protected by the attorney-client and work product privileges. (CP 1833 – 1834) ASIC also provided a privilege log with those documents, clearly indicating which documents ASIC contended were protected. (CP 1847 – 1859) Nonetheless, Lewark's attorney Will Smart proceeded to review the entire claim file and did not notify ASIC's counsel of the inadvertent production.

Instead, without disclosing that he had already reviewed all of the privileged documents, Mr. Smart contacted ASIC's counsel several times to dispute the inclusion of documents in the privilege log. (CP 1834) In a letter to ASIC's counsel dated March 21, 2011, Mr. Smart stated "I have read the documents you produced over the past several weeks. In trying to get a better sense of Safeco's position, I then reviewed your privilege log." (CP 1866)

Counsel for ASIC and Davis became aware of the inadvertent production at a deposition held a month later, when Mr. Smart repeatedly presented the witness with privileged documents from ASIC's claim file. (CP 1834-1835) When asked why he had not notified ASIC's counsel of the

mistaken production and returned the documents, Mr. Smart claimed not to have reviewed the privilege log, despite the fact that he had expressly stated in a letter one month earlier that he had, in fact, reviewed the log. (*Id.*) ASIC asked Mr. Smart to return the privileged documents, but he refused to do so. (*Id.*)

The inadvertently produced privileged documents related primarily to the defense of *Davis* – a party Ms. Lewark sued in her tort action, and whom she again sued as PS's assignee in this action. Those documents reflect Davis's substantive defenses to liability and were directly relevant to Lewark's assigned claims against Davis for indemnity and failure to procure insurance. Therefore, on April 28, 2011, Davis filed a motion seeking Mr. Smart's disqualification. (CP 1867 – 1886) ASIC joined in that motion. (CP 1928 – 1935) At the same time, Public Storage filed a "Motion for Resolution of Privilege Claims." (CP 887 – 900) In that motion, Mr. Smart bluntly admitted, "Counsel for Ms. Lewark carefully reviewed all of the documents produced by ASIC and incorporated them into our analysis of the case." (CP 892, ll. 3 – 4) Mr. Smart also admitted he had provided the privileged documents to Lewark's "insurance expert," J. Kay Thorne, for his review. (CP 901, ¶ 2)

On May 2, 2011, before the trial court decided the Motion to Disqualify, Mr. Smart withdrew. (CP 1936 – 1937)

This was the procedural history when Lewark filed a Motion to Compel in January 2012. (CP 1 – 13) Lewark sought three documents ASIC had withheld on the basis of attorney-client privilege. (CP 5, li. 8) She sought an additional 159 documents ASIC had withheld as protected work product. (CP 9, li. 16) Lewark failed to acknowledge that the documents withheld were protected because they related to the defense of *Davis* in her personal injury action, which directly related to the defense of *Davis* in this, her follow-on suit against ASIC and Davis as PS's assignee. The documents withheld from the ASIC claim file production directly related to Lewark's assigned claims against *Davis* for indemnity and for purported failure to procure insurance.

As explained in the following section, the trial court dismissed all claims against ASIC on summary judgment. Lewark never claimed she could not respond to ASIC's summary judgment motion without the production of the documents that were the subject of the motion to compel and, in fact, had brought her own dispositive motion for consideration on the same date and time as ASIC's motion. Therefore, because the court properly dismissed all claims against ASIC, the trial court's denial of the motion to compel is moot and need not be considered by this Court.

F. **On cross-motions for summary judgment, the trial court concluded PS was not an additional insured under the ASIC umbrella/excess insurance policy and dismissed all claims against ASIC.**

In February 2012, Davis, ASIC, and Lewark filed various motions for summary judgment. Lewark's motion asked the trial court to rule, as a matter of law, that ASIC had committed bad faith; and sought an order "forbidding American States from denying coverage to Public Storage for the Lewark claim." (CP 293 – 304)

ASIC's motion sought dismissal of Lewark's assigned extra-contractual claims, because PS was not an additional insured under the umbrella/excess policy, because that policy did not drop down to provide coverage and because ASIC did not have a duty to respond to a claim that PS had never tendered to it. (CP 384 – 407)

Davis's motion sought dismissal of all of Lewark's assigned claims for contractual indemnification. (CP 1177 – 1193) In its response to Davis's motion, PS claimed it was also asserting a breach of contract claim against Davis for alleged failure to procure the insurance required under the Master Agreement. (CP 1471 – 1472)

The trial court granted ASIC's motion for partial summary judgment (CP 803 – 805) and denied Lewark's concurrent motion for partial summary judgment. (CP 806 – 808) Because the issue was fully briefed and argued to the court on the cross-motions between Lewark and ASIC, ASIC also moved for entry of an order declaring that PS was not an additional insured under the

umbrella/excess policy. (CP 809 – 811) In response, Lewark urged the court to find that PS was an additional insured. (CP 812 – 815) The court granted ASIC's motion and dismissed all claims against ASIC. (CP 824 – 827) The court also denied Lewark's Motion for Reconsideration. (CP 822 – 823)

The trial court granted Davis's motion as to the claim for contractual indemnity, but "reserved with regard to whether Plaintiff pleaded a breach of contract for failure to procure insurance claim." (CP 1829) Davis then filed a Motion to Dismiss Plaintiff's Breach of Contract for Failure to Procure Claim. (CP 1938 – 1951) Before the trial court could consider that motion, Lewark and Davis entered into a Stipulation and Order of Dismissal as to all of the claims against Davis. (CP 2026 – 2027).

Thus, although Lewark's assigned claims against Davis are no longer in the case, the evidence and arguments presented on Davis's dispositive motions, as well as in opposition to the production of privileged documents from ASIC's claim file for the *Lewark v. PS and Davis* personal injury suit, were before the trial court when it made the rulings Lewark has brought up on appeal.

VI. ARGUMENT

A. Standard of Review

The trial court's dismissal of the claims against ASIC on summary

judgment is subject to *de novo* review.[5] This Court may affirm summary judgment on any grounds supported by the record.[6]

The trial court's denial of PS's motion to compel privileged documents is reviewed for abuse of discretion.[7]

B. The trial court properly concluded PS is not an additional insured under the umbrella/excess insurance policy ASIC issued to Davis.

To assert a bad faith claim as PS's assignee, Lewark had to show that PS was an additional insured, to whom ASIC owed duties as an insurer, under the umbrella/excess insurance policy that ASIC issued to Davis. As a matter of law, the wording of the "Master Agreement" between PS and Davis and the wording of the umbrella/excess policy did not make PS an additional insured. The contract did not require Davis to make PS an additional insured under an umbrella/excess insurance policy – and, in fact, in his own communications with Davis, counsel for PS specifically referred to *primary* insurance coverage. More importantly, the contract that PS drafted specifically required additional insurance coverage only "during the progress of the work" – *i.e.,* the "ongoing operations" coverage that was extended to PS as an additional insured under the primary CGL policy ASIC issued to Davis.

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[5] *Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881 (2011) (citing *Simpson Tacoma Kraft Co. v. Dep't of Ecology,* 119 Wn.2d 640, 646, 835 P.2d 1030 (1992); *Michak v. Transnation Title Ins. Co.,* 148 Wn.2d 788, 794, 64 P.3d 22 (2003)).
[6] *Id.* (citing *Allstot v. Edwards,* 116 Wn. App. 424, 430, 65 P.3d 696 (2003)).
[7] *Cedell v. Farmers Ins. Co. of Washington*, 157 Wn. App. 267, 237 P.3d 309 (2010) (citing *Barry v. USAA*, 98 Wn. App. 199, 204, 989 P.2d 1172 (1999).

There was no contractual requirement that Davis obtain completed operations coverage for PS's benefit as an additional insured and no contractual requirement that Davis obtain umbrella/excess liability insurance for PS as an additional insured. Because PS's status as an additional insured goes no further than the requirements of the "Master Agreement" between PS and Davis, PS was an additional insured for ongoing operations under the primary CGL policy – and no more.

The trial court's decision granting ASIC's motion or summary judgment may be affirmed on any basis supported in the record.[8] The undisputed facts establish that PS did not satisfy the requirements to qualify as an additional insured under the ASIC umbrella/excess policy, because Davis did not agree to provide completed operations additional insured coverage to PS *or* to provide umbrella/excess additional insured coverage to PS. Thus, PS's theory that the umbrella/excess policy is required to "drop down" to provide such coverage to PS fails as a matter of law.

The 2006 Master Agreement, which Davis signed before Ms. Lewark was injured, provided:

> 10. Insurance. 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. . . . commercial general liability insurance insuring against claim for

[8] *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984) (citing *Gross v. Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978)).

> personal injury . . . occurring upon, in or about the Property in limits of 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. . . .

(CP 1221; emphasis added)[9]

By contract, Davis agreed to obtain commercial general liability insurance coverage with $1 million per occurrence limits, and to make PS an additional insured *during the progress of Davis's work.* The primary CGL policy that ASIC issued to Davis provided precisely the additional insured coverage that the contract, drafted by PS, required Davis to obtain – "ongoing operations" coverage. Lewark has never disputed that, pursuant to the terms of the primary CGL policy, PS was entitled only to additional insured coverage for injuries that occurred while Davis was performing its work – and there is no dispute that Ms. Lewark's injury occurred after Davis had completed its repair work and when Davis was no longer at the PS storage facility where she was injured.

Because the primary CGL additional insured coverage for "ongoing operations" unquestionably did not apply to Ms. Lewark's claims against PS, Lewark now contends that PS was entitled to coverage as an additional

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[9] The 2006 Master Agreement is included in multiple places in the record, but copying has rendered a previously highlighted portion barely legible. CP 1221 presents the most legible copy. The parties do not dispute what that provision says. Brief of Appellant at 7.

insured under Davis's umbrella/excess insurance policy. The umbrella/excess policy extends coverage to insureds other than Davis only to the extent required by a contract between Davis and a third party:

> 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.

(CP 428; emphasis added)

Lewark claims the phrase "kind of insurance afforded by this policy," as it is used in this provision is ambiguous, but it never offers the Court an interpretation of that provision – much less two reasonable and competing interpretations such that the provision could be deemed "ambiguous."[10] A provision in an insurance policy will be considered ambiguous only if it is susceptible to two reasonable interpretations.[11]

Here, there is only one reasonable and relevant interpretation. The "kind of insurance" afforded by the umbrella/excess policy is determined by reviewing the terms of the policy *and* the requirements of the contract between the named insured and the putative "additional insured." In its own

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[10] Brief of Appellant at 10 – 12.

[11] *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 666, 15 P.3d 115 (2000).

communications with Davis and ASIC, PS made it clear that the "kind of insurance" that was required by its contract is *primary* coverage. (CP 456) Lewark nevertheless argues that, because the CGL policy provides additional insured coverage only for "ongoing operations," the umbrella/excess policy should "drop down" to provide "completed operations" coverage to PS – as would be required if PS is going to qualify as an additional insured for her completed operations claim.

Thus, the "kind of insurance" that must be required by the Master Agreement between Davis and PS is (1) coverage for completed operations and (2) umbrella/excess insurance. If PS – who wrote the Master Agreement – wanted to require Davis to obtain umbrella/excess liability insurance for completed operations, PS had the ability to write a clear provision that required that kind of insurance. The onus was on PS – as the drafter and the party requiring Davis to obtain insurance – to provide a plain and unambiguous description of the insurance Davis needed to obtain. Neither PS nor its assignee, Lewark, should be permitted to try to expand the Master Agreement's insurance requirement, *post hoc,* when it turns out the insurance required by the contract does not extend far enough to cover a particular type of claim.[12]

Davis agreed to provide additional insured coverage during the course of its work. Davis did provide PS with ongoing operations additional insured

[12] *See* Davis Door's motion seeking dismissal of Lewark's "failure to obtain insurance claim." (CP 1938-1951)

coverage via the CGL policy. Because PS did not require Davis to obtain completed operations additional insured coverage, nor did it require Davis to obtain umbrella/excess additional insured coverage for PS, PS never qualified as an additional insured under that policy at all.

This Court addressed the meaning of "ongoing operations" in the context of insurance coverage in *Hartford Insurance Co. v. Ohio Casualty Insurance Co.*[13] That case addressed the question whether an additional insured endorsement that provided coverage only with respect to the named insured's "ongoing operations for that insured" applied to property damage occurring after the named insured's work is complete. The Court concluded that "ongoing operations" coverage does not extend to injury that occurs after completion of the named insured's work.[14]

The same reasoning applies to the Master Agreement's insurance provision. Davis agreed to provide additional insured coverage to PS *during the progress of Davis's work.* (CP 1221) Ms. Lewark's injuries unquestionably occurred after Davis's work was completed. Like the "ongoing operations" limitation in the policy in *Hartford*, the limitation in the Master Agreement's insurance requirement means Davis did not contract to provide additional insured coverage for PS arising out of Davis's "completed operations." As a result, PS never qualified as an "additional insured" under the umbrella/excess policy. It is, instead, a stranger to that contract. PS never

[13] 145 Wn. App. 765, 189 P.3d 195 (2008).
[14] 145 Wn. App. at 778.

applied for coverage from ASIC; PS never paid a premium for coverage from ASIC; and PS is entitled to coverage only to the extent the Master Agreement that it wrote required Davis to make PS an additional insured under an insurance policy that Davis purchased from ASIC.

The trial court properly concluded that PS did not qualify as an insured under the umbrella/excess policy as a matter of law; and properly dismissed Lewark's assigned breach of contract claim against ASIC under the umbrella/excess policy.

C. Even if PS were an additional insured under the umbrella/excess policy, its settlement with Ms. Lewark did not trigger coverage under that policy.

The umbrella/excess policy include the following provision, which specifically makes the policy excess over any other insurance *and the self-insured retention or deductibles under any other insurance:*

> **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 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**.

(CP 433; emphasis added) Even if PS is treated as an additional insured under the umbrella/excess policy, ASIC would not "drop down" to provide coverage to PS until the self-insured retention under PS's other coverage has been exhausted.

PS did indeed have other coverage. National Union Fire Insurance Company of Pittsburgh, P.A. ("NUFIC"), issued a primary CGL policy to Public Storage, Inc., for the period April 1, 2006, to April 1, 2007. (CP 568 – 647) The policy includes a $1,500,000 per occurrence limit. (CP 647) It also includes a Self-Insured Retention ("SIR") Endorsement, which provides that NUFIC will pay on behalf of Public Storage "those sums in excess of the 'Retained Limit' that the insured becomes legally obligated to pay because of 'bodily injury'." (CP 638) The "Retained Limit" is ***$500,000 per occurrence***. (CP 639)

Neither PS nor Lewark as PS's assignee has ever alleged, much less offered evidence to show, that PS has satisfied the $500,000 retained limit under PS's NUFIC insurance policy.

Lewark's only argument against application of the Other Insurance clause in the umbrella/excess policy is that the $500,000 Self-Insured

Retention is not "other insurance."[15] That question is not even relevant here, because the umbrella/excess policy specifically states that it is excess above deductibles and self-insured retentions in other available insurance. Furthermore, the case law does not support Lewark's argument.

Lewark relies entirely on *Bordeaux, Inc. v. American Safety Insurance Co.*[16] in support of its claim that the Other Insurance clause does not apply. *Bordeaux* never addressed the issue presented here. In *Bordeaux*, the question was whether a self-insured retention ("SIR") operates as "insurance for the purpose of subrogation."[17] Specifically, the Court analyzed whether, in a subrogation action, an insured is entitled to be reimbursed for any SIR it may have paid, before its insurer is entitled to reimbursement. The Court concluded the insured is entitled to receive reimbursement for an SIR it has paid (*i.e.*, to be "made whole") before the insurer is entitled to any recovery in subrogation.

This case does not involve subrogation or the "make whole" doctrine.; and the relevant question is not, as Lewark would have it, whether an SIR is "insurance." Here, the express language of the Other Insurance clause in the umbrella/excess policy requires exhaustion of the SIR of the NUFIC policy before the umbrella/excess policy is triggered – and Lewark has not offered any reason why the plain wording should not be enforced.

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[15] Brief of Appellant at 15 – 16.
[16] 145 Wn. App. 687, 186 P.3d 1188 (2008).
[17] 145 Wn. App. at 696.

Odessa School District No. 105 v. Insurance Co. of America involved a similar fact pattern.[18] *Odessa* involved two policies, one of which had an SIR and both of which had clauses which purported to make them excess over other insurance. This Court concluded that the SIR applied first, then both policies were treated as excess and would both contribute.

The same reasoning governs here. The ASIC umbrella/excess policy expressly states that it is "excess over, and shall not contribute with any other insurance[.]" It is also excess over "the total of all deductible and self-insured amounts under all such other insurance." The NUFIC policy is other insurance, meaning the Other Insurance provision is triggered. The NUFIC policy is subject to a $500,000 SIR and, under the plain wording of the ASIC umbrella/excess policy, that policy is also excess of that SIR and any other applicable SIR or deductible.

The final step is to examine the NUFIC policy to determine whether sufficient payment was made under that policy to trigger the ASIC umbrella/excess policy under this following provision:

> **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**.

[18] 57 Wn. App. 893, 791 P.2d 237 (1990).

(CP 433; emphasis added) This provision result in the following formula:

> Payments by PS – ($1,500,000 NUFIC limit + $500,000 NUFIC SIR)
> = Amount due under ASIC umbrella/excess policy

PS paid $299,000 to settle the Lewark claim and asserts (without documentation) that it paid $150,028 in defense costs. (CP 500) Therefore, when the numbers are inserted into the formula, the calculation looks like this:

> $449,028 – ($2,000,000) = – $1,550,972

In other words, the amount due from ASIC is *zero* – or, to be more exact, it is *minus* $1.55 million dollars.

As a result, the trial court properly dismissed Lewark's breach of contract claim on summary judgment.

D. <u>Even if PS had been an additional insured, the trial court properly dismissed Lewark's assigned extra-contractual claims because PS did not tender the Lewark suit to ASIC until after it settled with Lewark.</u>

Although her Complaint includes broad extra-contractual allegations against ASIC (CP 875 – 886), on summary judgment, Lewark made it clear those claims were based entirely upon her theory that ASIC had a "duty to disclose" to PS that coverage was allegedly available under the umbrella/excess policy and to step in and defend, all in the absence of a tender of a claim from PS. That is the only argument Lewark put forward in response to ASIC's motion for partial summary judgment (CP 655 – 659) and it was the only argument Lewark advanced in her own summary judgment pleadings (CP 295 – 304). In addition, Lewark confirms in her opening brief

on appeal that her "extra-contractual claims grow out of American States failure to disclose coverage and benefits available to PS under the Davis umbrella policy."[19] Thus, it is clear that, because PS does not qualify as an insured under the umbrella/excess policy, Lewark's extra-contractual claims were properly dismissed as a matter of law. Those were based entirely upon PS's alleged status as an insured; absent that status, PS had no standing to bring a "bad faith" claim, and Lewark similarly has no standing as PS's assignee.[20]

Furthermore, even if PS were an additional insured under the umbrella/excess policy, its failure to tender the Lewark suit to ASIC before settling the suit precludes all extra-contractual claims against ASIC. Lewark's "bad faith" claims fail, on their face, because our Courts have consistently held that an insurer has no obligation to anticipate whether a party will make a claim for insurance or ask to be defended against a third party claim.

The Washington Supreme Court has held, "an insurer cannot be expected to anticipate when or if an insured will make a claim for coverage; the insured must affirmatively inform the insurer that its participation is desired."[21] It logically follows that "[t]he duties to defend and indemnify do

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[19] Brief of Appellant at 16.

[20] *Tank v. State Farm Fire & Cas. Co.*, 105 Wn.2d 381, 393, 715 P.2d 1133 (1986).

[21] *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d 411, 420 – 21, 191 P.3d 866 (2008) (quoting *Griffin v. Allstate Ins. Co.*, 108 Wn. App. 133, 140, 36 P.3d 552 (2011)); *National Sur. Corp. v. Immunex Corp.*, 162 Wn.2d 762, 779, 256 P.3d 439 (2011) (citing *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d at 420 – 21)).

not become *legal obligations* until a claim for defense or indemnity is tendered."[22] As a result, the Supreme Court has expressly held that "breach of the duty to defend cannot occur before tender."[23] Here, there was no tender until after PS had already settled the Lewark suit. Thus, it was a legal impossibility for ASIC to have breached its duty to defend.

Lewark attempts to avoid this binding authority by claiming that notice of the suit was sufficient to trigger ASIC's duties under the policy. This theory finds no support in the law. Lewark argues that ASIC should have known PS was an additional insured and, therefore, should have prompted PS to make a claim. However, no Washington authority stands for the proposition that an insurer should solicit a tender from an insured when the insurer simply has knowledge of a suit against that insured.[24] Washington law actually dictates the precise opposite – an insurer with notice of a suit against its insured has no duty to defend its insured unless and until that insured expressly requests that the insurer do so.

This very issue was squarely addressed in *Unigard Insurance Co. v. Leven*.[25] In that case, both a corporate entity and an individual were entitled to coverage under a policy. However, only the corporate entity had tendered the suit to the insurer, so only that entity was being defended. The court held

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[22] *Id.*, 164 Wn.2d at 421 (emphasis in original).
[23] *Id.*
[24] For purposes of this argument only, ASIC will assume Public Storage qualified as an additional insured under the Umbrella policy. However, as previously addressed, Public Storage did not qualify as an additional insured.
[25] 97 Wn. App. 417, 983 P.2d 1155 (1999).

the insurance company had no duty to defend the individual until the individual had expressly tendered the matter to the insurer, thereby requesting a defense:

> Several courts have concluded that a tender of defense is sufficient if the insured puts the insurer on notice of the claim, while others have determined that an insurer's duty to defend does not arise unless the insured specifically asks the insurer to undertake the defense of the action. In *Time Oil Company v. Cigna Property & Casualty Insurance,* [743 F.Supp. 1400 (W.D. Wash. 1990] the United States District Court for the Western District of Washington adopted the latter theory. ***We agree with the federal court that an insurer cannot be expected to anticipate when or if an insured will make a claim for coverage; the insured must affirmatively inform the insurer that its participation is desired.***[26]

Thus, the fact that ASIC was aware PS had been sued did not require ASIC to gratuitously provide PS with an evaluation of potential coverage, much less to step in and defend PS.

Lewark attempts to create a new rule of law here by arguing that PS did not know it qualified as an insured under the ASIC umbrella/excess policy.[27] However, it is undisputed that PS drafted the 2006 Master Agreement that Lewark now contends required completed operations additional insured coverage.[28] It is also undisputed that, before the present suit was filed, ASIC had never been provided with the 2006 Master Agreement, a document extrinsic to the policy that is required to determine

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[26] 97 Wn. App. at 426 – 27 (emphasis added).
[27] Brief of Appellant at 17.
[28] As previously discussed, the Master Agreement nowhere states that completed operations coverage is required, and instead expressly requires Davis to maintain insurance only during the "progress of the work."

whether PS qualifies as an additional insured. Finally, it is undisputed that PS was aware that ASIC had obtained certificates of insurance identified the insurance coverages ASIC issued to Davis. PS was fully capable of tendering the Lewark lawsuit to ASIC, but rightly or wrongly, it made a conscious decision not to do so.[29] Lewark cannot now be heard to argue that ASIC should have unilaterally disregarded PS's own decision and undertaken the defense of PS in the absence of a tender.

Lewark's citation to *Van Noy v. State Farm*[30] is misplaced and misleading. In *Van Noy*, the insured unequivocally tendered a claim to his insurer for PIP benefits because of an auto accident. The insurer acknowledged the claim, but did not give the insured timely notice that it might not pay all the medical expenses incurred. In that context – where the insured had already tendered a claim to the insurer – the Court held the insurer had a "duty to disclose all facts that would aid its insureds in protecting their interests."[31]

There is not one word in *Van Noy* to support the conclusion that an insurer has an obligation to voluntarily provide a coverage evaluation in response to a claim that has not been tendered, or to solicit a tender from a party simply because it is aware the party has been sued. Moreover, the

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[29] Indeed, in Washington it entirely is up to the insured to determine whether it wants to invoke coverage under an insurance policy. An insured may decide not to tender a claim to a potentially applicable policy for any number of reasons and, unless the insured has exercised its right to "selectively tender" the claim to that policy, the insurer has no obligation to respond to a claim. *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d at 422.

[30] 142 Wn.2d 784, 16 P.3d 574 (2001).

[31] 142 Wn.2d at 790 – 91.

claims handling regulations support the opposite conclusion – *i.e.*, that a party does not qualify as a "claimant" to whom the insurer owes any obligations until that party makes a claim for coverage. WAC 284-30-350(1) addresses an insurer's obligation to disclose information:

> (1) No insurer shall fail to fully disclose to first party claimants all pertinent benefits, coverages or other provisions of an insurance policy or insurance contract under which a claim is presented.[32]

WAC 284-30-320(6) defines "first party claimant":

> (6) ***"First party claimant" means an individual, corporation, association, partnership or other legal entity asserting a right as a covered person*** to payment under an insurance policy or insurance contract arising out of the occurrence of the contingency or loss covered by a policy or contract.

(Emphasis added).

Thus, to trigger an insurer's duties under the insurance claims handling regulations, a party must first "assert a right as a covered person" under a policy issued by the insurer. Having argued below that WAC 284-30-350 applies because PS qualified as a first party claimant (CP 295 – 296; 298; 655; 775), Lewark has said not a word about the applicable insurance regulations in her opening brief on appeal. This is understandable. The case law directly contradicts Lewark's theory of the case, so she turned to the

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[32] The law review article to which Public Storage cites (Brief of Appellant at 18 – 19) is simply a lengthy discussion as to why a requirement such as this makes sense when you are dealing with unsophisticated insureds who have made a claim under a policy, but do not understand all the potential coverages that might be available to them. OBLIGATING INSURERS TO INFORM INSUREDS ABOUT THE EXISTENCE OF RIGHTS AND DUTIES REGARDING COVERAGE FOR LOSSES, 1 Conn Ins. L.J. 67 (1995).

insurance regulations for evidence of a "public policy" to support the "duty to volunteer information and solicit a tender" claim. But the insurance regulations themselves – in which the Insurance Commissioner effectuates the Legislature's intent to ensure fair insurance claims handling practices – specifically apply only to a party "asserting a right as a covered person." The case law says an insurer has no obligation to anticipate that a party will make a claim for insurance.[33] The case law says a party has the right to decide whether to invoke its rights as an insured or not and that an insurer has no obligation unless and until a party invokes those rights.[34] The claims regulations mirror and reinforce the case law.

Lewark is simply asking the Court to create a new rule of law, diametrically opposed to the existing case law and the controlling insurance regulations. Lewark's proposed "duty to advise in the absence of a tender" rule would require an insurer to continuously monitor its claim files and the court records to (1) determine whether there are any parties who might have an argument that they qualify as an insured under a *policy issued to a different party*, (2) determine whether the party who might have an argument that it qualifies as an insured might wish to tender claim under the *policy issued to a different party*, and then (3) actively solicit such a tender, or simply volunteer to defend. Nothing in the Washington insurance statutes,

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[33] *Leven*, 97 Wn. App. at 426 – 27.
[34] *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d at 422.

claims handling regulations or case law supports such an unworkable rule. Nor would it be "good public policy."

Lewark has not cited a single authority that supports her novel claim. As discussed above, in *Van Noy,* the insured had already tendered a claim to the insurer, and the question was whether the insurer had timely communicated with the insured concerning coverage for the claim. *Van Noy* is inapposite.

Salas v. Mountain States Mutual Casualty Co.,[35] a New Mexico case Lewark also cites, also involved an insured who tendered a claim to her insurer. The insured was a passenger who qualified as a "class two" (*i.e.*, not specifically named) insured under the policy covering the car in which she had been riding. She tendered and the insurer paid a claim under the medical benefits portion of the auto policy. However, the passenger did not know, until after she had settled her claim with the tortfeasor that she had a right to UIM benefits under the policy. The insurance company denied her UIM claim based on breach of a consent-to-settle clause. Under those facts, the court concluded that, because the insurance company had not put the insured on notice of the consent-to-settle provision, it could not rely on that provision to deny her claim. Here, ASIC has not denied PS's claim based on breach of a policy condition – there was never any coverage in the first place. Instead, we have Lewark, as PS's assignee, pursuing a "bad faith" claim based on an

[35] 202 P.3d 801 (N.M. 2009).

alleged duty to anticipate and respond to a claim for insurance coverage that PS never made. The reasoning of *Salas* simply does not apply.

Similarly, the reasoning and holding in the Illinois case of *Cincinnati Companies v. West American Insurance Co.*,[36] cited by Lewark, cannot apply here because that decision is directly contrary to the controlling Washington law. The Illinois Supreme Court held in *Cincinnati Companies* that notice of a suit against a party specifically listed on a policy as an additional insured is sufficient to trigger the insurer's duty to defend the additional insured. In contrast, the Washington Supreme Court has specifically held that the "duties to defend and indemnify do not become *legal obligations* until a claim for defense or indemnity is tendered."[37] Moreover, even *Cincinnati Companies* does not stretch its rule so far as to hold that an insurer must ascertain whether a third party, whose status as an additional insured depends on the interpretation of a contract external to the policy, must provide advice to or defend such a potential additional insured who *might* contend it is entitled to coverage, like PS.[38]

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[36] 701 N.E.2d 499 (Ill. 1998). The Illinois court also noted that in jurisdictions that require a tender to trigger the duty to defend, the insured also has the right to selectively tender to one of multiple insurers on the risk and bar the selected insurer from seeking contribution from other insurers. That, of course, is the rule in Washington.

[37] *Mutual of Enumclaw Ins. Co. v. USF Ins. Co.*, 164 Wn.2d at 421 (emphasis in original).

[38] *Cincinnati Companies* specifically rejected the ruling in *Hartford Accident v. Gulf Insurance,* 776 F.2d 1380 (7th Cir. 1985), which required the insured to affirmatively tender a claim. Tellingly, when this Court, in *Leven,* articulated the Washington rule requiring an affirmative tender of defense to trigger the insurer's obligations, the Court cited with approval and adopted the rule from the *Hartford Accident v. Gulf* decision. *Leven,* 97 Wn. App. at 427, n. 16.

Lewark's own motion papers in the trial court made it plain she was asking the court to reject existing Washington law. For example, Lewark asked the trial court to follow the Minnesota Supreme Court's decision in *Home Insurance Company v. National Union Fire Insurance,*[39] which held that an affirmative tender of defense is not required. That same Minnesota decision specifically declined to follow this Court's holding in *Unigard Insurance Company v. Leven,* which requires an insured to "affirmatively inform the insurer that its participation is desired" before the insurer is obligated to respond to a claim and provide a defense.[40]

ASIC does not seek to impose a forfeiture of coverage or other penalty on PS because PS failed to tender the Lewark personal injury lawsuit to ASIC before settling it. Rather, Lewark, as PS's assignee, now seeks to pursue a cause of action against ASIC because despite PS's failure to tender a claim, ASIC did not voluntarily provide a coverage evaluation, solicit a claim or voluntarily provide a defense to PS – something ASIC had no obligation to do under binding Washington authority. The trial court recognized that such extra-contractual claims were not only unsupported under Washington law but directly contrary to Washington law – and summarily dismissed them. The trial court's decision was correct and should be affirmed on appeal.

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[39] 658 N.W.2d 522, 532-533 (Minn. 2003).
[40] *Unigard v. Leven,* 97 Wn. App. at 427; *compare* Lewark's argument at CP 657 and *Home Insurance Co.,* 658 N.W.2d at 532 n. 5.

E. The trial court properly denied Lewark's request to compel production of privileged documents from the ASIC claim file for the defense of Davis in the *Lewark v. PS and Davis* personal injury lawsuit.

Lewark has never asserted that the privileged documents it sought to compel were necessary to allow it to respond to ASIC's summary judgment motion. Therefore, the proper dismissal of Lewark's claims for coverage and for "bad faith" rendered the discovery issue moot. However, even if this Court were to consider the discovery dispute, the record reflects that the trial court properly exercised its discretion not to compel ASIC to produce documents protected by the work-product and attorney-client privileges.

1. The trial court properly declined to compel production of work product protected documents.

In arguing that the trial court should have reviewed the work product documents *in camera*, Lewark relies on case law addressing discovery of an insurer's claim file when an insured is alleging bad faith based upon the insurer's handling of a claim.[41] PS quotes from the Arizona case of *Brown v. Superior Court*,[42] cited in *Escalante v. Sentry Insurance*.[43] In *Brown*, the Arizona court stated bad faith actions against an insurer "can only be proved by showing exactly how the company processed the claim, how thoroughly it

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[41] Lewark asks this Court to conclude the trial court erred in failing to review the protected documents in camera. However, Lewark never asked for such a review below. Rather, she asked that the trial court simply order production of the privileged documents. (CP 1 – 12) Lewark should not now be heard to argue, after the fact, that the trial court erred by failing to do something it was never asked to do.

[42] 670 P.2d 725 (Ariz. 1983).

[43] 49 Wn. App. 375, 743 P.2d 832 (1987).

was considered and why the company took the action it did."[44] The claim file includes important information regarding those issues. However, Lewark's assigned claim does not involve allegations of bad faith handling of PS's defense. Here, *there was no claim* made by PS during the time it asserts ASIC committed bad faith. As a result, there was no claim file for PS. Rather, the only claim file that exists relates to the defense of Davis – a party Lewark, as PS's assignee, also sued in this action. The claim file contains attorney communications and work product that reflect the strategy for Davis's liability defense – matters that were also directly relevant to Davis's defense against Lewark's assigned claims against Davis for contribution, indemnity and "failure to procure insurance" in this action.

Lewark's bad faith claims are premised upon the assertion that ASIC had a duty to notify PS that it might be entitled to additional insured coverage, to solicit a claim from PS or even step in to defend voluntarily. The documents in Davis's claim file have no bearing on that issue – they relate to Davis's strategy for defense of Lewark's personal injury claims and possible allocation of fault between Davis and PS. The reasoning of *Escalante*, therefore, has no application here.

Nonetheless, ASIC did produce the non-privileged documents from the Davis claim file. Beyond a bare statement that a claim file is necessary to assist with an insured with a bad faith claim, Lewark has provided no support for her claim that the trial court should have reviewed *in camera* the

[44] 670 P.2d at 336.

documents protected by the work product doctrine. Because the present case is not premised upon bad faith claims handling and because the work product documents were included in the claim file for another insured, there is no basis for requiring such a review. The trial court properly denied the motion to compel without reviewing the documents protected by the work product doctrine.

2. *The trial court properly declined to compel production of documents subject to the attorney-client privilege.*

Lewark asserts the trial court should have compelled production of the documents numbered ASIC 000174 – 175, 000183 – 185, 000195 – 196 (CP 60) and ASIC 00571 – 573 (CP 62), all protected by the attorney-client privilege. A review of the document log indicates the bulk of those documents relate to the defense of Davis in the underlying matter because George Mix, Davis's defense attorney, is either the author or the recipient. Lewark claims that the civil fraud exception to attorney-client privilege required the trial court to compel production of these documents.[45] However, there is not a scintilla of evidence of "civil fraud" in the record to support Lewark's claim.[46]

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[45] Brief of Appellant at 24 – 25.

[46] Indeed, the only malfeasance that is clearly documented in the record is the misconduct of Lewark's counsel, who knew that he had obtained privileged documents that ASIC had produced to him by mistake; secretly evaluated the documents in detail and provided them to Lewark's "insurance expert"; and later denied he knew ASIC had asserted work product and attorney client privilege over the documents – despite his own prior correspondence to ASIC counsel, in which he admitted he had reviewed the privilege log in detail and knew full well these documents had been produced by mistake. (CP 892, 1834, 1866, 1928-1934).

In *Cedell v. Farmers Insurance Co. of Washington*, this Court explained that, under the civil fraud exception, a party seeking discovery of documents protected by the attorney-client privilege "must show that (1) its opponent was engaged in or planning a fraud at the time the privileged communication was made, and (2) the communication was made in furtherance of that activity."[47] The trial court is to follow the following process:

> First, the trial court determines whether there is a factual showing adequate to show that wrongful conduct sufficient to evoke the fraud exception has occurred. *Escalante,* 49 Wn. App. at 394, 743 P.2d 832. Second, if so, the court conducts an *in-camera* inspection of the documents to determine whether there is a foundation in fact to overcome the privilege based on civil fraud. *Escalante,* 49 Wn. App. at 394, 743 P.2d 832. The *in-camera* inspection is a matter of trial court discretion. *Escalante,* 49 Wn. App. at 394, 743 P.2d 832. A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971).[48]

Moreover, to establish fraud, Lewark was required to show:

> (1) a representation of an existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity or ignorance of its truth, (5) [the speaker's] intent that [the fact] should be acted upon by the person to whom it is made, (6) ignorance of [the fact's] falsity on the part of the person to whom it is made, (7) the latter's reliance on the truth of the representation, (8) [the right of the person] to rely on it, and (9) [the person's] consequent damage.[49]

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[47] *Cedell*, 157 Wn. App. at 276.
[48] *Id.* at 277.
[49] *Id.* (quoting *Lambert v. State Farm Mut. Auto. Ins. Co.*, 2 Wn. App. 136, 141, 467 P.2d 214 (1970)).

Lewark did not allege fraud in her Complaint, nor did she even attempt to make any showing on her motion to compel of what fraud it ASIC allegedly planned to perpetrate. Instead, as with her substantive "bad faith" claim, the only "fraud" alleged was that ASIC knew or should have known that PS was an additional insured and that PS was entitled to coverage for Lewark's personal injury claim. Given the complete absence of factual support for Lewark's claim of "fraud," the trial court did not abuse its discretion by denying Lewark's motion to compel production of privileged documents based on the "civil fraud exception." There was no reason for the trial court to proceed to the second step of the *Cedell* procedure – *in camera* review of the documents – because Lewark utterly failed to get past step one.

Furthermore, the attorney-client privilege here ***belonged to ASIC's named insured, Davis***. Indeed, the most extensive opposition to production of these documents came from Davis, not from ASIC.[50] Lewark has never cited any authority that would have required Davis to forfeit its right to attorney-client and work product protection, even if the "civil fraud" exception were to apply to ASIC.

The trial court properly exercised its discretion not to grant extraordinary relief to Lewark by compelling ASIC to produce privileged documents from the *Davis* claim file.

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[50] CP 1031 – 1077; 1867 – 1927.

F. The trial court properly concluded Lewark was not entitled to an award of *Olympic Steamship* fees.

The trial court properly concluded PS does not qualify as an additional insured under the umbrella/excess policy. Therefore, *Olympic Steamship Co. v. Centennial Insurance Co.*[51] does not apply and neither PS, nor Lewark as PS's assignee, was entitled to recover its attorney fees below, nor is Lewark entitled to recover her attorney fees on appeal.

However, even if Lewark were able to prove that PS was an additional insured and that it was entitled to coverage for her completed operations personal injury claim, Lewark would not be able to recover *Olympic Steamship* fees. There is no dispute that PS failed to tender a claim to ASIC until it had defended and settled Lewark's personal injury lawsuit. While PS's late tender and failure to cooperate with ASIC in the investigation and defense of the claim would not forfeit coverage, in the absence of proof of actual and substantial prejudice, PS's breach of the policy does forfeit its right to an award of fees under *Olympic Steamship,* even if it were to be the prevailing party.[52]

VII. CONCLUSION

For the reasons set forth above, ASIC respectfully requests that the Court AFFIRM the trial court's dismissal of Lewark's claims against ASIC, which she has asserted as assignee of PS.

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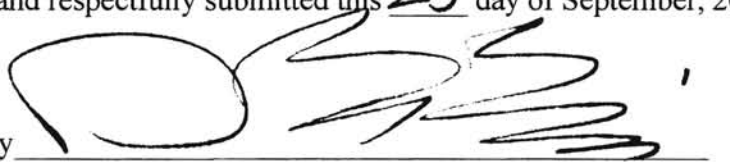
[51] 117 Wn.2d 37, 811 P.2d 673 (1991).
[52] *PUD No. 1 v. Int'l Ins. Co.*, 124 Wn.2d 789, 815, 881 P.2d 1020 (1994).

DATED and respectfully submitted this 28th day of September, 2012.

By 

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CERTIFICATE OF SERVICE

I certify that I delivered, or caused to be delivered, a copy of the foregoing document on the 28th day of September, 2012 to the following counsel of record at the following address:

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DATED at Seattle, Washington this 28th day September, 2012.

Betty Dobbins