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NO. 69569-0-1  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

GULL INDUSTRIES, INC.,

Appellant/Cross-Respondent,

vs.

ALLIANZ UNDERWRITERS INSURANCE COMPANY; AMERICAN  
ECONOMY INSURANCE COMPANY; AMERICAN STATES INSURANCE  
COMPANY (successor to WESTERN CASUALTY and SURETY COMPANY;  
CHICAGO INSURANCE COMPANY; COLUMBIA CASUALTY COMPANY;  
FEDERAL INSURANCE COMPANY; FIREMAN'S FUND INSURANCE  
COMPANY; GENERAL INSURANCE COMPANY OF AMERICA; GRANITE  
STATE INSURANCE COMPANY; INDIANA INSURANCE COMPANY;  
NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA;  
OHIO CASUALTY INSURANCE COMPANY; PACIFIC INDEMNITY  
COMPANY; SAFECO INSURANCE COMPANY OF AMERICA,

Defendants,

and

STATE FARM FIRE AND CASUALTY COMPANY,

Respondent/Cross-Appellant,

and

TIG INSURANCE COMPANY,

Respondent,

and

UNITED STATES FIDELITY & GUARANTY COMPANY; WESTPORT  
INSURANCE CORPORATION; and ZURICH-AMERICAN INSURANCE  
COMPANY,

Defendants.

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APPEAL FROM KING COUNTY SUPERIOR COURT  
Honorable Michael Trickey, Judge

BRIEF OF RESPONDENT/CROSS-APPELLANT

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## I. INTRODUCTION

Plaintiff Gull Industries, Inc. (“Gull”) asserts that words in an insurance policy are not to be given a “lawyerly reading.” However, it is Gull that gives the word “suit” a definition originating solely in the minds of its lawyers. Washington courts use English dictionaries to determine the plain, ordinary meaning of undefined insurance policy terms. Doing so reveals that “suit” does not include a voluntary remediation with no lawsuit or administrative proceeding.

Moreover, Gull has not “defended” anything. Gull is attempting to require insurers to pay more than their policy limits to investigate and clean up pollution at gasoline service stations. The Model Toxics Control Act is not an insurance statute, and creates no duty to “defend” not created by contract language. Contrary to Gull’s argument, the holding in *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, limited to the duty to indemnify, was based on insurance policy construction, not public policy.

Regarding State Farm’s cross-appeal, Gull cannot create a genuine issue of material fact regarding the existence of a State Farm policy based on inadmissible hearsay in a handwritten note allegedly made by an unidentified person to a Gull employee who did not create the note. The ancient document hearsay exception does not make admissible hearsay

within hearsay in an ancient document that does not fall within its own hearsay exception.

## **II. ASSIGNMENT OF ERROR FOR CROSS-APPEAL**

The trial court erred in denying State Farm Fire and Casualty Company's motion for partial summary judgment, in part, on September 28, 2012, and finding a factual issue whether State Farm's cancelled policy was "renewed" effective July 28, 1978, based solely on hearsay within hearsay in a handwritten note created by a Gull employee.

### **Issues Pertaining to Assignment of Error**

1. Does ER 805 require that each layer of hearsay within hearsay in an "ancient document" fall within its own hearsay exception to be admissible?

2. Was the handwritten note properly authenticated as an ancient document pursuant to ER 901(b)(8) where persons making statements in the note were not identified, where the note did not refer to the subject matter at issue, and where an attorney without personal knowledge purported to testify to the place where the note was found?

## **III. STATEMENT OF THE CASE**

### **A. STATEMENT OF PROCEDURE.**

Gull sued State Farm Fire and Casualty Company ("State Farm") and other insurers in Skagit County superior court, *Gull Industries, Inc. v.*

*Safeco Ins. Co. of America, et. al.*, No. 10-2-01537-2. CP 64. The court granted a motion to transfer venue to King County, No. 12-2-14992-5 SEA, and the action was then consolidated with a King County action, No. 11-2-44427-9 SEA. CP 968-73. In the King County action, Gull had sued its own liability and excess insurers in connection with over 200 allegedly contaminated sites. *See* CP 838-899. However, State Farm was only sued in connection with a gas station in Sedro-Woolley.<sup>1</sup> CP 65-66.

On July 17, 2012, State Farm filed Defendant State Farm's Motion for Partial Summary Judgment to Establish Insurance Policies and Declare not Duty to Defend. State Farm asked the court to grant summary judgment:

- 1) Declaring that State Farm issued two policies which could be applicable to claims against plaintiff Gull Industries, Inc. ("Gull") relating to the gas station site located at on Highway 20 in Sedro-Woolley, Washington:
  - a) General liability policy no. 98-59-3477 issued to Johnson, Hayes R. and Mary L., DBA Gull-U-Serve & Johnson Mini-Mart, effective 7/28/77 to 7/28/78, with bodily injury and property damage combined single limit of \$300,000 each occurrence, \$300,000 aggregate; and
  - b) general liability policy no. 98-60-0439 issued to Johnson,

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<sup>1</sup> Gull misleads the court when it states it sued State Farm in December, 2011, for damages in connection with over 200 contaminated sites. (Gull's Opening Brief at 9-10) At the time the court decided State Farm's motion for partial summary judgment on September 28, 2012, State Farm was not a defendant in the King County action, No. 11-2-44427-9 SEA. (CP 793-95) On October 25, 2012, Gull amended its complaint in that case to sue State Farm as an additional insured, but only in connection with three additional sites. CP 817, 905.

Hayes R. and Mary L., DBA Gull-U-Serve & Johnson Mini-Mart, effective 7/28/78 to 8/21/78, with bodily injury and property damage combined single limit of \$300,000 each occurrence, \$300,000 aggregate;

2) Declaring that the policy forms and terms are as set forth in Exhibit A to [the] motion; and

3) Declaring that State Farm owes no duty to defend Gull with respect to any claims brought against Gull relating to contamination at or near the gas station site on Highway 20 in Sedro-Woolley.

CP 26.

In response to State Farm's motion, Gull submitted a one sentence handwritten note from 1978, authored by former Gull employee Dale Nebeker, stating: "Note to Tom re: cancellation of insurance Tom advises they are renewing with present agent and binder s/b coming in." CP 429, 431. State Farm moved to strike the note as hearsay. CP 974-75. Plaintiff then sought to have the note admitted as an ancient document. CP 983-87. State Farm responded that the note had not been properly authenticated as an ancient document, and that hearsay within hearsay in the note was inadmissible. CP 994-97.

On September 28, 2012, the court granted State Farm's motion in part. CP 793-95. The court ruled: "State Farm owes no duty to defend Gull Industries, Inc. with respect to any claims brought against Gull relating to contamination at or near the gas station site on Highway 20 in

Sedro-Woolley. State Farm’s motion is otherwise denied based on a genuine issue of fact.” CP 795.<sup>2</sup>

The court denied State Farm’s motion to strike the 1978 Nebeker note. The court ruled that the note was an ancient document, and “barely” created a genuine issue of material fact precluding summary judgment on “what policies are there.” RP 44-45, 47.

**B. STATEMENT OF FACTS.**

**1. Complaint Allegations.**

In its Second Amended Complaint, Gull alleged it is a Washington corporation<sup>3</sup> that owned a gas station site on Highway 20 in Sedro-Woolley. CP 65, 67, 69. Gull leased the site from 1972 to September, 1982 to Hayes Johnson and Mary McGunnigle f/k/a Mary Johnson (“the Johnsons”), who operated the gas station. CP 70. The Johnsons purchased liability insurance policies from State Farm covering part of the time they leased the premises, with policy limits of \$300,000. CP 71

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<sup>2</sup> On September 24, 2012, only four days before the summary judgment hearing, Gull submitted a declaration signed by James Pendowski. CP 674, 676-719. State Farm objected to consideration of this declaration because it was untimely, and for other reasons. CP 791-92.

<sup>3</sup> Gull’s attempt to spin itself as a “family-owned business” (Gull’s Opening Brief at 2) is based on its lawyers’ statement in a brief, not on admissible evidence. Gull’s Brief at 2; CP 818. In reality, Gull is a corporation that owned over 200 gas stations. Appellant’s Brief at 9-10; CP 838-99.

Gull alleged that in May 1984, it contracted with Norton Corrosion to “perform analysis of leakage of USTs” at a number of Gull’s stations. CP 76. A report prepared by Norton Corrosion dated March 1985 provided “conclusive evidence that hydrocarbons were present in the soil at the Highway 20 site in December 1984.” *Id.* Gull alleged it undertook voluntary remediation of hazardous substances released at the site. *Id.* Gull alleged it “tendered its claims as additional insured under the Johnsons’ State Farm Policies by letter on March 15, 2010,” and State Farm has not accepted the tender. CP 77. <sup>4</sup>

Gull alleged it is liable under the Model Toxics Control Act, RCW ch. 70.105D (“MTCA”), and that this liability triggers coverage under the Johnsons’ policies with State Farm. CP 81. Gull pleaded claims against State Farm for declaratory judgment and breach of contract. CP 80-81.

## **2. Tender by Gull and Reconstruction of Policy.**

In 2010, Gull’s attorney tendered to State Farm claims on behalf of Gull “for indemnity and defense of potential third-party liability claims.” CP 86. Gull asserted it had incurred over \$365,000 in costs for investigation and remediation. CP 87.

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<sup>4</sup> State Farm and the other insurers have raised the extreme late notice provided by Gull as a defense. That defense is not at issue in this appeal.

Gull sent with the tender two certificates of insurance listing as named insureds Johnson, Hayes R and Mary L DBA Gull-U-Serve & Johnson Mini-Mart. The certificates purported to be for the periods 7/28/77 to 7/28/78, and 7/28/78 to 7/28/81. The certificates listed an address on Highway 20 in Sedro-Woolley. CP 98, 99.

In May 2010, Gull's attorney sent some additional documents, including an Acknowledgment of Cancellation Request listing a date processed of August 4, 1978. This document stated cancellation was effective on the date of issuance of the policy, July 28, 1978. CP 101.

More than 30 years had passed since these policies expired. State Farm had no record of them. State Farm could not with any certainty determine what policy forms were included, or even if it still retained copies of the forms. CP 94.

Due to the absence of any record of these policies, State Farm was forced to rely solely on the documents provided by Gull to attempt to confirm the existence of these policies. First, State Farm concluded it likely issued a general liability policy to Johnson, Hayes R. and Mary L., DBA Gull-U-Serve and Johnson Mini-Mart for operations located at 1945 Highway 20, Sedro-Woolley, Washington, no. 98-59-3477, for policy period 7/28/77 to 7/28/78, with bodily injury and property damage limits of \$300,000 each occurrence and \$300,000 aggregate. CP 94. State Farm

decided to treat Gull as an additional insured under policy 98-59-3477. CP 95. However, the holder of a certificate of insurance is not necessarily an additional insured, and State Farm could not determine this with any certainty. *Id.*

Second, State Farm concluded it likely issued a general liability policy to Johnson, Hayes R. and Mary L., DBA Gull-U-Serve and Johnson Mini-Mart for operations located at 1945 Highway 20, Sedro-Woolley, Washington, no. 98-60-0439, effective beginning 7/28/78, with bodily injury and property damage limits of \$300,000 each occurrence, \$300,000 aggregate. CP 95. However, the policy was cancelled at the policyholders' request effective on its issuance date, July 28, 1978. CP 101.

The Acknowledgement of Cancellation Request listed "Gull Ind Inc" as "MORTGAGEE," and contained the following message: "TO MORTGAGEE: Your interest is protected for 17 days from the 'Date Processed' shown above." The "Date Processed" was 08/04/78. CP 101. State Farm concluded that it may have directed such a message to an additional insured. CP 95. Therefore, State Farm concluded that the second policy, no. 98-60-0439, could be treated as having been in force as to claims against Gull until 17 days after August 4, 1978, *i.e.* until August

21, 1978. Such coverage would have bodily injury and property damage limits of \$300,000 each occurrence, \$300,000 aggregate. CP 95-96.

Having reached these conclusions, State Farm attempted to determine what policy forms and provisions would make up the subject policies. The documents provided by Gull did not list any policy forms. State Farm was not certain it retained policy forms for similar policies issued from that era. However, the claims department located forms for a “Service Station Policy” issued in that time frame. State Farm decided to use those forms to attempt to reconstruct the policy. CP 96, 112-25.

### 3. Insurance Policy Language.

As reconstructed, the policies provided the following Coverage C—Liability:

This Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage, arising out of service station operations; and this Company **shall have the right and duty to defend any suit** against the Insured seeking damages payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but this Company **may make such investigation and settlement of any claim or suit** as it deems expedient.

CP 119 (emphasis added)<sup>5</sup>.

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<sup>5</sup> The policies also contained the following General Conditions (CP 114):

#### 4. “Potential Third-Party Liability Claims” Against Gull.

As noted above, Gull tendered “potential third-party liability claims” to State Farm. Nobody has ever sued Gull for contamination at the Sedro-Woolley site. The Department of Ecology (“DOE”) never sued Gull. DOE has never determined that Gull is a Potentially Liable Person (“PLP”) under MTCA. CP 131-32, 140, 142. Gull has not even submitted this remediation under DOE’s Voluntary Cleanup Program. CP 132-33, *see* CP 143. Instead, Gull has chosen to perform a voluntary “independent cleanup.” CP 133, 141. DOE has never reviewed or approved the remediation system installed at the Sedro-Woolley site. CP 132, 141.

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#### 3. Section II – Insured’s Duties in the Event of Accident or Occurrence

- (a) In the event of an accident or occurrence, written notice containing particulars sufficient to identify the Insured and also reasonably obtainable information respecting time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or on behalf of the Insured to this Company or any of its authorized agents as soon as practicable.
- (b) If claim is made or suit is brought against the Insured, the Insured shall immediately forward to this Company every demand, notice, summons, or other process received by him or his representative.
- (c) . . . The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

## **5. Gull's Admissions.**

Gull made important admissions. “It matters not to Gull” whether the investigation costs are characterized as “damages” within the indemnity coverage, or as defense costs. CP 410. The investigation costs claimed by Gull as defense costs “are within the policies’ indemnity coverage.” *Id.* These costs are “not for the purpose of ‘defending’ anything,” but rather “part . . . of the remedy.” CP 419.

Gull admitted: “Gull has incurred no traditional ‘defense’ costs at the Sedro-Woolley Site and claims no attorneys fees related to ‘defense.’” CP 420. Gull “has not had to defend.” CP 421. “The only costs that Gull has tendered to State Farm . . . are those incurred to characterize the contamination, evaluate remediation options, and implement and run a cleanup operation. These costs fall within the indemnity coverage of the State Farm policies.” *Id.* “[T]he investigation costs incurred by Gull . . . are most appropriately characterized as indemnity.” *Id.*

## **IV. ARGUMENT**

### **A. STANDARD OF REVIEW.**

Review of summary judgment rulings is *de novo*. The reviewing court engages in the same inquiry as the trial court. Summary judgment is properly granted where “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.”

Where the moving party brings forth admissible evidence supporting the absence of any issue of material fact, the “adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, *must set forth specific facts* showing that there is a genuine issue for trial.” *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003) (*quoting* CR 56; emphasis in original).

**B. NATURE OF LIABILITY COVERAGE.**

Gull seeks coverage under a third party liability coverage, not a first party property coverage. Liability coverages do not cover the insured’s own claim for property damage; they cover the insured’s liability to a third party.

Third party insurance involves protection for the policyholder for liability it incurs to someone else, while first party insurance involves protection for losses to the policyholder’s own property.

*Olds-Olympic, Inc. v. Commercial Union Ins. Co.*, 129 Wn.2d 464, 479, 918 P.2d 923 (1996).

The State Farm policies, like many liability policies, create two obligations. First, they provide that State Farm will pay all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage, arising out of service station operations.

This “duty to indemnify” could include payment for voluntary cleanup costs, if covered. *See Olds-Olympic*, 129 Wn.2d at 473.

Second, the State Farm policies provide “this Company shall have the right and duty to defend any suit against the Insured seeking damages payable under the terms of this policy.” CP 119. This “duty to defend” requires a “suit” against the insured.

Significantly, the policies treat the terms “suit” and “claim” as separate and distinct. The policies provide that State Farm has the right and duty to defend any “suit” against any insured. They also provide that State Farm may make investigation and settlement of any “claim or suit” as it deems expedient. While State Farm has discretion to investigate and settle any claim or suit, only a suit triggers the duty to defend.

The duty to defend and the duty to indemnify must be examined independently. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 902, 874 P.2d 142 (1994). The “duty to defend” is the subject of Gull’s appeal. Gull alleges that it is State Farm’s insured, and seeks coverage for its liability to third parties. However, there has been no “suit” to trigger the duty to defend.

**C. A PROPER ANALYSIS DETERMINES THAT “SUIT” MEANS A COURT PROCEEDING.**

The insurance policy provides that State Farm “shall have the right and duty to defend any suit against the Insured seeking damages payable under the terms of this policy.” CP 119 (emphasis added). In its 34-page brief, Gull never properly analyzes the meaning of the term “suit.” Washington courts interpret insurance policy language using dictionaries. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990). Gull never cited a dictionary, either to the trial court or to this court. Instead, Gull seems to assert that the average purchaser of insurance would not “expect” the term “suit” to be in the policy at all. (See Gull’s Opening Brief at 29) Gull may not eliminate a term from the policy to obtain coverage. *Transcontinental Ins. Co. v. Washington Public Utilities Dists.’ Util. Sys.*, 111 Wn.2d 452, 456, 760 P.2d 337 (1988).

The court construes insurance policies as contracts. If policy language is unambiguous, the court must enforce it as written. Language is ambiguous only when, on its face, it is fairly susceptible to two different interpretations, both of which are reasonable. *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005).

An insurance policy must be given a practical and reasonable interpretation, rather than a strained or forced construction that leads to an

absurd conclusion, or one that renders the policy nonsensical or ineffective. *Transcontinental Ins. Co. v. Washington Public Utilities Dists. ' Util. Sys.*, 111 Wn.2d 452, 456-57, 760 P.2d 337 (1988).

Undefined terms in an insurance policy are given their plain, ordinary meaning. To determine the plain, ordinary meaning of an undefined term, the courts will look to English dictionaries. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869, 877, 784 P.2d 507 (1990).

Gull's assertion that insurance policy terms are never given a legal meaning is not accurate. Where the common person would understand that a term has legal significance, the court will give the term its legal meaning. *State Farm Mut. Auto. Ins. Co. v. Ruiz*, 134 Wn.2d 713, 720, 952 P.2d 157 (1998) (giving the term "residing with" its legal meaning).

A proper analysis reveals that a suit is a court proceeding. "Suit" means: "A court proceeding to recover a right or claim." AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1796 (3<sup>rd</sup> ed. 1992). "Suit" means: "b. : the attempt to gain an end by legal process : prosecution of right before any tribunal : LITIGATION . . . c. : an action or process in a court for the recovery of a right or claim : a legal application to a court for justice." WEBSTER'S THIRD NEW INTERN'L DICTIONARY 2286 (1993). "Suit" means: "Any proceeding by a party or parties against another in a court of law." BLACK'S LAW DICTIONARY

1572 (9<sup>th</sup> ed. 2009). The common person would have no difficulty comprehending that a suit is a court proceeding.

Notably, although the policies limit the duty to defend to a “suit,” the duty to indemnify may encompass a “claim or suit.” The policies provide that State Farm may investigate and settle any “claim or suit.” A policy is considered as a whole so that the court can give effect to every clause in the policy. *Kitsap County v. Allstate Ins. Co.*, 136 Wn.2d 567, 575, 964 P.2d 1173 (1998); *see also* RCW 48.18.520. “Claim” and “suit” must have different meanings. The court therefore should analyze the meaning of “claim.”

“Claim” means: “A demand for something as rightful or due.” AMERICAN HERITAGE DICTIONARY at 350. “Claim” means: 1. a (2) : a demand of a right or supposed right . . . (3) : a calling on another for something due or supposed to be due . . . b : a demand for compensation, benefits, or payment.” WEBSTER’S THIRD NEW INTERN’L DICTIONARY at 414. “Claim” means: “2. The assertion of an existing right; any right to payment or to an equitable remedy, even if contingent or provisional. . . . 3. A demand for money, property, or a legal remedy to which one asserts a right.” BLACK’S LAW DICTIONARY at 281-82.

Clearly, a claim is much broader than a suit. While a claim may ripen into a suit, “suit” and “claim” are not synonymous. The policy gives

State Farm discretion to investigate and settle any claim or suit, but requires State Farm to defend only a “suit.” This evinces a clear intent that State Farm is only required to defend a court proceeding. See *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 77 Cal. Rptr. 2d 107, 959 P.2d 265, 280-82 (1998); *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 166 Ill. 2d 520, 655 N.E.2d 842 (1995).

Construing the term “suit” to require a court proceeding is consistent with Washington law. The parameters of the duty to defend are defined by the allegations in a complaint against the insured. The duty to defend is triggered when a complaint is filed against the insured that alleges facts which could, if proven, impose liability within the policy’s coverage. *American Best Food, Inc. v. Alea London, Ltd.*, 168 Wn.2d 398, 404, 229 P.3d 693 (2010)<sup>6</sup>. Complaints are filed to commence court proceedings. *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 77 Cal. Rptr. 2d 107, 959 P.2d 265, 280 (1998).

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<sup>6</sup> Gull argued below that if there is a duty to indemnify, there should also be a duty to defend because the duty to defend is broader than the duty to indemnify. This is usually true, but only because ordinarily the duty to defend is determined from the allegations in a complaint, which are construed liberally. “The duty to defend is triggered if the insurance policy conceivably covers allegations in the complaint”. *American Best Food*, 168 Wn.2d at 404 (emphasis omitted). Without a suit, there is no complaint to construe broadly. Moreover, not every liability policy includes a duty to defend. The State Farm policy creates no duty to defend at all if there is no suit against the insured.

This court has held that “suit” in this context means a lawsuit, not a claim. In *Unigard Ins. Co. v. Leven*, 97 Wn. App. 417, 983 P.2d 1155 (1999), a MTCA contribution suit named Bayside as a defendant, but the suit did not name Leven, who was Bayside’s owner, president, and sole shareholder. Nevertheless, Leven retained his own counsel to handle his personal interests in the litigation, and later tendered the “defense” to Unigard. The Unigard policy, like State Farm’s, obligated Unigard to defend “any suit against the Insured seeking damages . . . .” This court held that Unigard owed Leven no duty to defend because he was not named as a defendant in the suit. *Leven*, 97 Wn. App. at 425-26 (emphasis omitted).

As in *Leven*, nobody has brought a court proceeding against Gull to recover for damage caused by contamination at the Sedro-Woolley site. Nobody has filed a complaint against Gull. There are no complaint allegations. Therefore, the duty to defend is not triggered. *Compare Ameron Intern. Corp. v. Insurance Co. of Pennsylvania*, 118 Cal. Rptr. 3d 95, 242 P.3d 1020 (2010) (administrative proceeding not a suit unless it involves filing a complaint and quasi-judicial proceeding before administrative law judge).

Despite the plain meaning of the word “suit,” a Washington federal court has concluded that an administrative action may be considered a

“suit” for purposes of the duty to defend an environmental claim. In *Time Oil Co. v. Cigna Prop. & Cas. Ins. Co.*, 743 F. Supp. 1400, 1404, 1420 (W.D. Wash. 1990) a federal court applying Washington law held there was no “suit.” for purposes of the duty to defend, until the Environmental Protection Agency (“EPA”) issued an administrative order under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) directing the insured to take remedial action, two years after the EPA issued a “PRP” (potentially responsible person) letter.

Notably, the court in *Time Oil* did not find that the issuance of the PRP letter triggered the duty to defend. Other courts have held that the issuance of a PRP letter is not a suit. *Foster-Gardner, Inc. v. National Union Fire Ins. Co.*, 77 Cal. Rpt. 2d 107, 959 P.2d 265 (1998); *Employers Ins. of Wausau v. Ehlco Liquidating Trust*, 186 Ill. 2d 127, 708 N.E.2d 1122, 1130 (1999); *Technicon Electronics Corp. v. American Home Assur. Co.*, 533 N.Y.S.2d 91, 141 A.D.2d 124 (1988), *aff’d on other grounds*, 542 N.E.2d 1048 (1989); *Professional Rental, Inc. v. Shelby Ins. Co.*, 599 N.E.2d 423 (Ohio App. 1991); *Simon Wrecking Co. v. AIU Ins. Co.*, 350 F. Supp. 2d 624 (E.D. Pa. 2004) (Pa. law). *But see Unigard Ins. Co. v. Leven*, 97 Wn. App. at 426-31 (finding no duty to defend after assuming in dicta that issuance of PLP letter could trigger duty to defend).

Gull relies on *Governmental Interinsurance Exchange v. City of Angola*, 8 F. Supp. 2d 1120 (N.D. Ind. 1998). In that case, the insured received directions from the Indiana Department of Environmental Management (“IDEM”) on precisely how to proceed in cleaning up the site. The insured was required to comply with IDEM procedures. IDEM notified the insured that it could be subject to a fine of up to \$25,000 per day until the contamination was removed, plus cost recovery by the state. 8 F. Supp. 2d 1131. We have no such facts here.

The MTCA has administrative procedures similar to CERCLA. The DOE can commence an administrative proceeding by issuing a “PLP” (potentially liable person) letter. WAC 173-340-500.

In *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, the Washington Supreme Court addressed coverage for liability under MTCA. The court referred to caselaw holding that where a CGL policy requires a “suit” in order to trigger the duty to defend, “there must be more than an invitation to initiate cleanup in order to animate the insured’s duty to defend.” *Weyerhaeuser*, 123 Wn.2d at 902 (citing *Ryan v. Royal Ins. Co.*, 916 F.2d 731, 741 (1<sup>st</sup> Cir. 1990)).

Unlike in *Time Oil*, here the DOE never issued a ruling of any sort finding Gull liable or directing Gull to take action. DOE never even issued a PLP letter. DOE has never taken any action against Gull at all.

Gull's remediation has been purely voluntary<sup>7</sup>. Even if the broader *Time Oil* definition for "suit" is used, there has been no "suit" against Gull. *Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co.*, 166 Ill. 2d 520, 655 N.E.2d 842 (1995).

Gull claims it engaged in an "independent remedial action." "An independent remedial action is a remedial action conducted without department oversight or approval and not under an order, agreed order or consent decree." WAC 173-340-515(1). An independent remedial action is not a suit.<sup>8</sup>

Gull would simply remove the requirement of a "suit" from the policy altogether. Washington law does not permit this. The court must enforce the policy as written. *Transcontinental Ins.*, 111 Wn.2d at 456.

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<sup>7</sup> Gull asserts that the word "voluntary" is a "term of art" under MTCA's implementing regulations, WAC Chapter 173-340, and refers to a cleanup without DOE bringing a formal enforcement action. (Gull's Opening Brief at 6-7) Gull apparently has not read the chapter. The word "voluntary" is used in only one place in that chapter, WAC 173-340-500(5): "Voluntary waiver. Persons may accept status as a potentially liable person at any time through a voluntary waiver of their right to notice and comment." WAC ch. 173-340 does not mention "voluntary" cleanups at all.

<sup>8</sup> Persons performing cleanups may request assistance under DOE's Voluntary Cleanup Program if "an independent remedial action is undertaken and a formal review of the independent report or consultation during any phase of [the] independent investigation or cleanup is desired." CP 143. Participants in the program pay a fee. DOE assigns a site manager to the project who can provide technical assistance. Upon successful completion, DOE will issue a No Further Action opinion. See <http://www.ecy.wa.gov/programs/tcp/vcp/vcpmain.htm>. However, Gull has chosen not to participate in the Voluntary Cleanup Program. CP 132-33. Even if it had, participating in this voluntary program would not be a suit against the insured.

The court must give force and effect to each word and clause in the policy. *Id.*; see also *State Farm General Ins. Co. v. Emerson*, 102 Wn.2d 477, 481, 687 P.2d 1139 (1984) (courts will not invoke public policy to limit or avoid express contract terms absent legislative action). The court may not modify or revise policy language under the theory of construing it *Britton v. Safeco Ins. Co. of Am.*, 104 Wn.2d 518, 528, 707 P.2d 125 (1985).

There has been no claim against Gull, much less a suit. There has been no court proceeding. The DOE has not commenced an administrative proceeding against Gull. The DOE has not even determined Gull is a potentially liable person. CP 142. Instead, Gull decided to clean up its property on its own.

A voluntary remediation is not a “suit” against the insured. Therefore, this court should affirm the trial court’s entry of summary judgment declaring State Farm owes no duty to defend, and bears no liability for “defense costs” claimed by Gull.

**D. GULL’S ADMISSIONS DEMONSTRATE THAT IT INCURRED NO “DEFENSE” FEES OR COSTS.**

Gull asserts that “this appeal does *not* address the characterization, as between defense or indemnity, of the work performed in connection with the Site.” (Gull’s Opening Brief at 11) (emphasis in original). This is not true. The obvious issue raised by State Farm’s summary judgment

motion, and this appeal, is what did Gull defend? Gull's admissions demonstrate that Gull incurred no attorney's fees or defense costs. Instead, Gull is seeking the same investigative and remediation expenses as "defense costs" that it would seek as "damages" for the claim against it. Why? Because the defense obligation is not subject to a policy limit.

Gull has expressly admitted that it incurred no attorney's fees or other traditional defense costs; Gull has not had to defend anything. CP 420-21. Gull further admitted "The only costs that Gull has tendered to State Farm . . . are those incurred to characterize the contamination, evaluate remediation options, and implement and run a cleanup operation. These costs fall within the indemnity coverage of the State Farm policies." "[T]he investigation costs incurred by Gull . . . are most appropriately characterized as indemnity." CP 421.

Gull's admissions are consistent with Washington law. Costs incurred to clean up third party property under environmental statutes are damages within the meaning of a CGL policy. *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d at 901. Damages in remediation actions include costs of site assessment and investigation to determine the extent of problem. *Dash Point Village Associates v. Exxon Corp.*, 86 Wn. App. 596, 604-05, 937 P.2d 1148 (1997). If covered, such costs would fall within the duty to indemnify, not the duty to defend.

Gull asserts “the insurers” argued that costs incurred to investigate the source, type, and extent of the contamination fall within the duty to defend, and are never payable under the duty to indemnify. (Gull’s Opening Brief at 20-21). Gull fears the insurers will argue for an expansive definition of defense costs to avoid paying such expenses. (*Id.* at 21 n.4.) State Farm has never made this argument. State Farm believes Gull has incurred no defense costs at all.

Since Gull has not “defended” anything, State Farm can have no duty to “defend any **suit** against the Insured seeking damages payable under the terms of this policy.” Gull’s attempt to avoid the policy limit should be rejected.

**E. NO PUBLIC POLICY REQUIRES STATE FARM TO “DEFEND” GULL.**

Most of Gull’s brief is spent arguing that public policy requires State Farm to “defend” Gull. In other words, Gull argues that public policy requires the court to ignore the word “suit” in State Farm’s policy. To the extent Gull discusses policy interpretation at all, it asserts that MTCA makes the word “suit” ambiguous. (Gull’s Opening Brief at 27). In effect, Gull is arguing that public policy requires State Farm to uncap its policy limit and pay to clean up Gull’s property, regardless of what the policy says. Washington has no such public policy.

The Washington Supreme Court has repeatedly held that an insurer, as a private contractor, is permitted to limit its liability unless to do so would be inconsistent with public policy. *Findlay v. United Pacific Ins. Co.*, 129 Wn.2d 368, 379, 917 P.2d 116 (1996). Public policy is generally determined by the Legislature and expressed through statutory provisions. *American Home Assur. Co. v. Cohen*, 124 Wn.2d 865, 875, 881 P.2d 1001 (1994); accord *Findlay*, 129 Wn.2d at 379. Without statutory evidence of a public policy, Washington courts will not override the insurance contract “even though its terms may be harsh and its necessity doubtful.” *Cohen*, 124 Wn.2d at 874 (quoting *State Farm General Ins. Co. v. Emerson*, 102 Wn.2d at 483).

Gull relies on MTCA to support its public policy argument. But MTCA is not an insurance statute. MTCA does not even mention insurance. State Farm is not a PLP under MTCA. Nothing in MTCA compels an insurer to pay for an environmental cleanup when it did not contract to do so.

Gull relies upon *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891. But in *Weyerhaeuser*, the Supreme Court did not base its holding on public policy. *Weyerhaeuser* was a straightforward case of policy interpretation.

Weyerhaeuser, like Gull, sought coverage for its liability for environmental cleanup costs under MTCA. However, the issue in *Weyerhaeuser* was whether Weyerhaeuser's insurers owed a duty to indemnify, not a duty to defend. This distinction is critical because, unlike the duty to defend, Weyerhaeuser's insurance policies did not require a "suit" for the duty to indemnify.

Under standard form CGL policies, the duty to defend usually arises when there is a "suit", and the older standard policies often failed to define "suit". . .

However, the duty to defend and the duty to indemnify are different duties under a CGL policy. . . .

The insuring clause here, however, does not require a "suit"; it requires coverage for all sums the insured shall be obligated to pay by reason of the liability imposed upon the insured by law. We therefore decline to hold that the standard used . . . to determine the duty to defend against a suit should be used to determine whether there may be a duty to indemnify. . . . The two duties, to defend and to indemnify, should be examined independently.

*Weyerhaeuser*, 123 Wn.2d at 902.

The Court found Weyerhaeuser's insurers owed a duty to indemnify, concluding that Weyerhaeuser was "obligated to pay by reason of the liability" imposed upon the insured by law for damages on account of property damage, as required by the insurance policies in that case. To the extent public policy was discussed, it was public policy making Weyerhaeuser liable under MTCA. The Court did not disregard any insurance policy language based on public policy.

Gull relies on a “scenario” raised by the *Weyerhaeuser* court in response to the insurers’ argument that there had to be a lawsuit or claim before liability coverage was triggered. If pollution damaged other property, and an environmental agency told the landowner it was responsible but had not threatened suit, the landowner would have to either begin cleanup and risk losing insurance, or refuse to clean up until it was sued and risk losing coverage because it failed to mitigate damage, or because the claim fell within the expected or intended damage exclusion. The court noted that this would be unfair because the policyholder reasonably believed it had coverage. *Weyerhaeuser*, 123 Wn.2d at 912.

What Gull fails to understand is that, under the circumstances presented in *Weyerhaeuser*, a policyholder would reasonably believe it had coverage because the policies did not require a suit. The Court based its holding on the absence of a “suit” requirement:

There is nothing in the insurance policy language which requires a “claim” or an overt threat of legal action and, therefore, the insurers’ argument that a claim is a prerequisite to coverage seems to us to be an effort to add to the language of the policies. If the insurers intended to provide coverage only if there were a lawsuit or a threat of such, that requirement could have been included in the policy. In this case, the policy language does not require an adversarial claim or a third party threat or a formal threat of legal action. We decline to add language to the words of an insurance contract that are not contained in the parties’ agreement.

*Id.* at 913.

Thus, the Court in *Weyerhaeuser* did not find coverage based on public policy; it interpreted the contract. In contrast, State Farm's policy does require a "suit" to trigger its duty to defend. No suit was brought against Gull.

Gull extends its flawed understanding of the *Weyerhaeuser* holding by arguing that if State Farm is not required to "defend" Gull, Gull would be in the "catch 22" discussed by the court in *Weyerhaeuser*. Gull ignores that State Farm's duty to indemnify, like that of the insurers in *Weyerhaeuser*, does not require a suit. If other coverage requirements are met, State Farm would have a duty to indemnify in the absence of a "suit." As Gull has admitted, Gull's investigative and remediation expenses for cleaning up third party property would fall within the duty to indemnify, if covered. The difference is that the duty to indemnify has a policy limit, whereas the duty to defend does not.

Gull cites no authority or public policy requiring State Farm to pay more than its policy limit for Gull's alleged liability. With the indemnity obligation potentially available, the absence of a defense obligation creates no "catch 22."

**F. CERCLA DOES NOT SUPPORT GULL’S POSITION.**

Gull relies upon the CERCLA, 42 U.S.C. §§ 9601-9675, and *United States v. Atlantic Research Corp.*, 551 U.S. 128, 127 S. Ct. 2331, 168 L. Ed. 2d 28 (2007), in an apparent attempt to import federal public policy to construction of the State Farm policies. However, Gull does not seek insurance coverage for liability under CERCLA<sup>9</sup>. Moreover, CERCLA, like MTCA, does not address insurance coverage. Neither did the U.S. Supreme Court in *Atlantic Research*.

The holding in *Atlantic Research* is a straightforward application of statutory construction. The court determined what “other persons” may sue potentially responsible parties for contribution under Section 107(a)(4)(B) of CERCLA. The court concluded that any PRP other than the United States, a State, or an Indian tribe may sue. The opinion did not address insurance at all.

Gull relies on an amicus brief filed by various States, including Washington, in the *Atlantic Research* case. CP 679-719. But this brief did not mention insurance, either. It simply argued for a broad construction of the statutory language regarding who may sue PRPs for contribution under CERCLA.

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<sup>9</sup> CERCLA excludes petroleum products from its coverage. 42 U.S.C. § 9601(14).

Recently the Ninth Circuit held that CERCLA does not authorize a contribution claim by or against an insurer because insurers are not statutorily liable under CERCLA. The court noted that in *Atlantic Research*, the Supreme Court's interpretation of "any other person" under Section 107(a) is limited to "a private party that has itself incurred cleanup costs." *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 963-64 (9<sup>th</sup> Cir. 2013). The ruling does not authorize a private party that has only incurred reimbursement costs, such as an insurer, to file suit.

The court went on to hold that insurance recovery is not part of the CERCLA statutory scheme.

[T]here is no evidence . . . that Congress contemplated funding of environmental cleanups through insurance money. CERCLA establishes a trust fund, commonly known as "Superfund," which is financed through taxes on certain chemicals and by general revenues. . . . Under certain conditions, the federal government may use the Superfund to finance cleanup efforts, which it may then replenish by filing suits against PRPs under section 107(a). . . . Alternatively, the federal government can issue an order directing the PRPs to finance and clean up the site. . . . PRPs may then seek direct recovery or contribution from other PRPs under sections 107(a) and 113(f), respectively. A PRP, which is the subject of a cleanup order . . . may have abated its risk through an environmental insurance policy, but it is ultimately responsible for financing and cleaning up the polluted site. Insurance companies generally do not themselves pay for the cleanup costs *as they are incurred*, but only after its completion and after a claim is made.

710 F.3d at 968 (emphasis in original).

Finally, plaintiff's attempt to use CERCLA to alter Washington rules of insurance policy construction violates the McCarran-Ferguson Act, which provides that no act of Congress "shall be construed to invalidate, impair, or supersede" any state law regulating the business of insurance, unless such act specifically relates to the business of insurance. 15 U.S.C. § 1012. Therefore, Gull's assertion that public policy under CERCLA supports finding a duty to defend under State Farm's policies is simply wrong.

**G. DOE DOES NOT CREATE INSURANCE PUBLIC POLICY.**

Gull relies on the Declaration of James Pendowski<sup>10</sup>, a program manager with DOE, CP 676, the amicus brief submitted in *U.S. v. Atlantic Research* (CP 679-719) and a publication entitled Washington State Brownfield Policy Recommendations, apparently issued by DOE, CP 564-673. Gull attempts to establish public policy with these materials to override the "suit" requirement in the State Farm policies. Gull has failed.

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<sup>10</sup> Gull submitted Mr. Pendowski's Declaration only four days prior to the summary judgment hearing. State Farm objected based on timeliness, among other grounds. CP 791-92. The court did not indicate it considered the declaration in its decision. CP 793-94.

- The Legislature creates public policy, not DOE, and not the attorney general, who filed the amicus brief in *Atlantic Research. Cohen*, 124 Wn.2d at 875.
- DOE has no powers or duties relating to insurance. See RCW ch. 43.21A That is the domain of the insurance commissioner. See, e.g., RCW 48.18.100.
- Pendowski purports to speak for DOE's Toxics Cleanup Program. The Director of DOE is its executive and administrative head. RCW 43.21A.050. Pendowski is not the director. Pendowski is just an employee of DOE. There is no evidence he has authority to speak for DOE. CP 676-78.
- DOE is not a party in this action. Pendowski's declaration and the *Atlantic Research* brief are apparently intended by Gull to be a pseudo-amicus brief. Neither this court nor the trial court authorized the filing of an amicus brief.
- Pendowski purports to testify about legal positions taken by DOE's Toxics Cleanup Program. These are not admissible facts which may be considered on summary judgment. The court may not consider legal opinions or conclusions in summary judgment declarations. *King County Fire*

*Protection Dist. No. 16 v. Housing Authority of King County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994); *Marks v. Benson*, 62 Wn. App. 178, 182-83, 813 P.2d 180, *rev. denied*, 118 Wn.2d 1001 (1991); *Odessa School Dist. No. 105 v. Insurance Co. of America*, 57 Wn. App. 893, 899, 791 P.2d 237, *rev. dismissed*, 115 Wn.2d 1022 (1990).

- Most importantly, Pendowski’s declaration, the amicus brief, and the Brownfield Recommendations do not even mention insurance.

The materials submitted by Gull provide no basis to ignore unambiguous insurance policy language. The court should reject them.

**H. ANY CONCESSION BY TIG IS NOT BINDING ON STATE FARM.**

Gull asserts that TIG conceded the “suit” requirement is ambiguous by accepting Gull’s tenders with regard to some other service stations. State Farm defers to TIG to respond whether it made any concession. Even if it did, TIG’s concession would not bind State Farm.

TIG’s actions are not State Farm’s, and State Farm is not bound by them. Gull provides no legal theory for its argument, but apparently relies upon estoppel. “Equitable estoppel may apply in a situation where one party makes an admission, statement, or act, which another party justifiably relies on to its detriment.” *Schoonover v. State*, 116 Wn. App.

171, 179, 64 P.3d 677 (2003). Equitable estoppel is available only as a defense; it is not available as a cause of action. *Motley-Motley, Inc. v. Pollution Control Hearings Board*, 127 Wn. App. 62, 73, 110 P.3d 812 (2005), *rev. denied*, 156 Wn.2d 1004 (2006). Since State Farm is not the party who made the alleged concession, it is not bound.

Further, TIG's views on the meaning of the term "suit" are irrelevant to whether the term is ambiguous. As Gull concedes, policy interpretation is a question of law for the court. (Gull's Opening Brief at 11) The court will give the term its plain, ordinary meaning using English dictionaries. *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d at 877. TIG's alleged concession has no bearing on this analysis. TIG is not even a party to the State Farm policies.

Even if TIG disagreed on the meaning of "suit," that by itself would not create an issue of fact. Even a difference of opinion among courts of different jurisdictions does not render policy language ambiguous. *Federal Ins. Co. v. Pacific Sheet Metal, Inc.*, 54 Wn. App. 514, 516, 774 P.2d 538, *rev. denied*, 113 Wn.2d 1008 (1989). Washington courts conduct their own analysis into whether policy language is fairly susceptible to two different reasonable interpretations. *Id.* at 517-18. Policy language is given an objective interpretation, not a unilateral or subjective interpretation independent of the language used. *Lynott v.*

*National Union Fire Ins. Co.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994).

Gull has failed to provide evidence of a reasonable interpretation of “suit” different than State Farm’s.

State Farm did not make any admission, statement, or act.<sup>11</sup> State Farm therefore cannot be bound.

## **V. ARGUMENT FOR CROSS-APPEAL**

### **A. STANDARD OF REVIEW.**

Review of a trial court’s evidentiary rulings made in conjunction with a summary judgment motion is de novo. *Ross v. Bennett*, 148 Wn. App. 40, 45, 203 P.3d 383 (2008), *rev. denied*, 166 Wn.2d 1012 (2009).

### **B. THE COURT MAY NOT CONSIDER INADMISSIBLE HEARSAY EVIDENCE TO FIND A FACT ISSUE ON SUMMARY JUDGMENT.**

State Farm’s cross-appeal presents a straightforward legal issue: whether hearsay within hearsay in an “ancient document” is made admissible solely by the ancient document hearsay exception, ER 803(a)(16). It is not. ER 805. The trial court found an issue of fact concerning the policy period for State Farm’s second policy based solely on such inadmissible evidence. This ruling should be reversed to avoid a pointless trial on this issue.

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<sup>11</sup> Further, Gull has not shown any detrimental reliance caused by TIG’s alleged acceptance of Gull’s tenders.

State Farm moved for partial summary judgment asking the court to find that the second policy, having been cancelled at the policyholders' request, was effective 7/28/78 to 8/21/78 as to Gull's interest. Gull did not dispute that the Johnsons cancelled the policy. *See* CP 101 (attached as Appendix A). Instead, Gull argued that the second policy was "renewed," based on a one sentence handwritten note from 1978, authored by former Gull employee Dale Nebeker<sup>12</sup>. The note stated: "Note to Tom re: cancellation of insurance Tom advises they are renewing with present agent and binder s/b coming in." CP 431 (attached as Appendix B).

Mr. Nebeker testified in a declaration that he does not recall the facts and circumstances surrounding the writing of the note. CP 429. He

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<sup>12</sup> Gull also relied upon the fact that State Farm had cancelled the earlier 1977-1978 policy, and then reinstated it. However, in 1977, State Farm cancelled the policy, and then reinstated it at the agent's request. CP 191. The policy was not "renewed." The fact it was reinstated is confirmed by the certificate of insurance for the 1978-1979 policy. CP 195. In contrast, the Johnsons cancelled the 1978-1979 policy. CP 190. State Farm had no power to "renew" a policy cancelled by its policyholders. The reinstatement of the policy in 1977 is not evidence of events that occurred in 1978.

Gull also relied upon the fact that the Johnsons agreed in their lease with Gull to obtain insurance. CP 185. However, the Johnsons' agreement does not bind State Farm, and cannot create coverage in a policy that was cancelled. *Higgins v. Scottsdale Ins. Co.*, 127 Wn. App. 486, 111 P.3d 893 (2005), *rev. denied*, 156 Wn.2d 1008 (2006); *see also Seabed Harvesting v. Department of Natural Resources*, 114 Wn. App. 791, 60 P.3d 658 (2002) (insured breached agreement to procure insurance where policy did not cover claim); *U.S. Oil & Ref. Co. v. Lee & Eastes Tank Lines, Inc.*, 104 Wn. App. 823, 16 P.3d 1278 (2001) (insured breached agreement where policy failed to add additional insured). Moreover, Gull has submitted no evidence that the Johnsons did not purchase insurance from another insurer when they cancelled the State Farm policy. The lease is not evidence that the State Farm policy was "renewed."

thinks that the note was addressed to another Gull employee named Tom Taylor. He concludes that he spoke with Tom about the information in the note. *Id.* The person who provided “Tom” with information about renewal has never been identified.

The note does not refer to State Farm, the Johnsons, or the Sedro-Woolley gas station. Mr. Nebeker does not refer to State Farm, the Johnsons, or the Sedro-Woolley gas station in his declaration. CP 427-31. No other evidence has been presented that the State Farm policy was “renewed.”

The note would make no sense in the context of a cancelled policy. Renewal refers to extending a policy when it terminates at the end of the policy period. *See* RCW 48.18.280. Here, however, the Johnsons cancelled their policy, as permitted by RCW 48.18.300. Since the Johnsons cancelled their policy, it could not be “renewed.”

In contrast to this inadmissible hearsay note, State Farm policyholder Mary Johnson (now McGunnigle) testified that “we cancelled this and used another insurance company.” CP 453. Prior to 1977, the Johnsons had also obtained insurance from a company other than State Farm. CP 452. Moreover, State Farm stopped issuing Service Station policies in 1979. CP 96. The admissible evidence indicates the 1978-1979 policy was not “renewed.”

The trial court decided to consider all statements in the note based on the ancient document hearsay exception, ER 803(a)(16), and denied summary judgment based on the factual issue of whether the policy was “renewed.” RP 44-45, 47; CP 795. This was error, because Gull failed to properly authenticate the document as an ancient document under ER 901(b)(8), and failed to show a hearsay exception applied to the statement made by “Tom,” or to the statement made to “Tom,” as required by ER 805.

**C. THE NOTE WAS NOT PROPERLY AUTHENTICATED AS AN ANCIENT DOCUMENT.**

Ancient documents fall within an exception to the hearsay rule, ER 802. An ancient document is one in existence 20 years or more, whose authenticity is established. ER 803(a)(16). Here, Gull failed to properly establish the authenticity of the handwritten note as an ancient document.

To authenticate an ancient document, a party must show it: “(i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence 20 years or more at the time it is offered.” ER 901(b)(8); *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 576, 157 P.3d 406 (2007), *rev. denied*, 162 Wn.2d 1022 (2008).

First, the handwritten note was not authenticated because there is “suspicion concerning its authenticity.” Neither the note nor Mr. Nebeker’s testimony refer to State Farm, the Johnsons, or the Sedro-Woolley gas station. The note could just as easily have related to a different policy issued by a different insurer for a different property. The court has no basis to conclude that the information in the note “is what its proponent claims.” ER 901(a).

Further, while Mr. Nebeker does not recall the document or its circumstances, he speculates that the document reflects a communication with another Gull employee named “Tom.” It is clear that neither Gull employee had personal knowledge of the statement in the note that “they are renewing with present agent.” Instead, the document is submitted as evidence of information provided to “Tom.” But the document does not identify the person who provided this information. The court has no basis to eliminate suspicion concerning the document’s authenticity.

Second, Gull has failed to submit admissible evidence showing the note was in a place where it, if authentic, would likely be. Mr. Nebeker does not indicate where the note was found. Instead, Steven Jones, one of Gull’s attorneys, submitted his own declaration stating that a handwritten note signed by “DM” was “[f]iled with the 1978 Acknowledgement of Cancellation Request.” CP 179. Mr. Jones did not state who “filed” or

found the document, or when. He did not testify he was the records custodian, or otherwise familiar with Gull's records. Thus, this case is different from *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, where a party's former attorney testified that he himself found documents.

Washington courts reject the "loose practice" of attempting to authenticate documents through the declaration of an attorney without personal knowledge. *In re Connick*, 144 Wn.2d 442, 455, 458, 28 P.3d 729 (2001), *overruled in part on other grounds by In re Goodwin*, 146 Wn.2d 861, 876, 50 P.3d 618 (2002); *accord Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 366-67, 966 P.2d 921 (1998). Mr. Jones failed to show he has personal knowledge to authenticate the document. ER 602; CR 56(e). Gull has failed to submit admissible evidence showing that the note was in a place where it, if authentic, would likely be. Therefore, the note was not admissible, and the trial court erred in considering it.

**D. HEARSAY WITHIN HEARSAY IN AN ANCIENT DOCUMENT MUST FALL WITHIN ITS OWN HEARSAY EXCEPTION.**

Even if Gull had authenticated the note as an ancient document, hearsay within hearsay in the note is still inadmissible. Although Mr. Nebeker's own handwritten statement may fall within the ancient document hearsay exception, Tom's statement to Mr. Nebeker, and the

unknown person's statement to Tom, are not admissible unless they fall within their own hearsay exceptions. Gull failed to establish that any exception applied to this hearsay within hearsay.

ER 805 provides: "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules." The trial court erred when it concluded that the ancient document hearsay exception, ER 803(a)(16), made the statements by and to Tom admissible. Where multiple levels of hearsay are contained in a document, each level must meet an exception. *In re Detention of Coe*, 175 Wn.2d 482, 505, 286 P.3d 29 (2012).

The ancient document hearsay exception applies to the document itself, but not the author's reporting in the document of statements made by others. Courts construing the substantially identical federal evidentiary rules, FED. R. EVID. 803(16) and FED. R. EVID. 805, distinguish between the ancient document itself as a statement, and "hearsay within hearsay" described in the document. If the ancient document contains more than one level of hearsay, an appropriate exception must be found for each level. *United States v. Hajda*, 135 F.3d 439, 444 (7<sup>th</sup> Cir. 1998). Otherwise Rule 805 would be rendered superfluous. *Columbia First Bank, FSB v. United States*, 58 Fed. Cl. 333, 338 (2003).

In *Hicks v. Charles Pfizer & Co.*, 466 F. Supp.2d 799, 805-07 (E.D. Tex. 2005) (citations omitted), a federal judge explained why the ancient document exception must be subject to the limitations of Rule 805:

An assertive statement found in an ancient document is more likely to be truthful because “age affords assurance that the writing antedates the present controversy,” as such a document must have been written before the current motive to fabricate arose. Moreover, the requirement that an ancient document be written protects against the danger of inaccurate narration. Finally, an ancient document is more likely to be accurate than the memory of a person after the passing of a lengthy period of time. Thus, if the author of the ancient document had personal knowledge of the substance underlying the relevant assertive statements, then Rule 803(16) clearly applies.

The crucial issue, however, is whether Rule 803(16) inoculates all assertive statements contained within an ancient document, including double hearsay, against application of the general prohibition against hearsay contained in Rule 802. The rationale of Rule 803(16) in permitting the admission of statements in ancient documents where the author is the declarant does not justify the admission of double hearsay merely because of its presence in an ancient document. The danger of faulty perception persists unabated because a narrator, such as a reporter, may not properly record the remarks of the speaker. More generally, the risk of deception or mistake is compounded with each additional layer of hearsay, as any error will inevitably be passed on regardless of the accuracy or sincerity of the author of the ancient document or prior relators.

...

Better reasoned authority indicates that the ancient documents exception permits the introduction of statements only where the declarant is the author of the document. Even if a document qualifies as ancient under Rule 803(16), other hearsay exceptions must be used to render

each individual layer of hearsay admissible. This interpretation best reconciles the underlying justifications of Rule 803(16) with the limitations of Rule 805. Rule 805 provides that “hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule....” “As long as there is no ‘positive repugnancy’ between two laws ... a court must give effect to both.” Rule 805 would be superfluous if the explicit hearsay exceptions excused double hearsay.

In the trial court, Gull relied on a Pennsylvania federal judge’s unpublished decision concluding otherwise, but the reasoning set forth above is much more persuasive. Further, the ruling cited by Gull is questionable authority even in its own jurisdiction. Another federal judge in the same jurisdiction concluded that FED. R. EVID. 805 requires a separate exception for each layer of hearsay within an ancient document, and that decision was affirmed by the Third Circuit. *United States v. Stelmokas*, 1995 U.S. Dist. LEXIS 11240 (E.D. Pa. 1995), *aff’d*, 100 F.3d 302 (3<sup>rd</sup> Cir. 1996), *cert. denied*, 520 U.S. 1241, 117 S. Ct. 1847, 137 L. Ed. 2d 1050 (1997).

The trial court erred in considering multiple hearsay within the handwritten note. Each level of hearsay must meet its own exception. *In re Detention of Coe*, 175 Wn.2d at 505. A court may not consider inadmissible evidence when ruling on a motion for summary judgment. *King County Fire Protection District No. 16 v. Housing Authority of King*

*County*, 123 Wn.2d 819, 826, 872 P.2d 516 (1994). In particular, a court may not consider inadmissible hearsay on summary judgment. *Warner v. Regent Assisted Living*, 132 Wn. App. 126, 135-36, 130 P.3d 865 (2006). The trial court's ruling finding a factual issue based solely on inadmissible hearsay must be reversed.

## VI. CONCLUSION

The trial court correctly found that State Farm owes no duty to defend. Gull has not "defended" anything, and admits as much. Gull is asking State Farm to pay as defense costs the same expenses to evaluate remediation options and run a cleanup operation for which it seeks indemnity. Gull's voluntary remediation is not defense of a "suit", and no public policy requires an insurer to pay for such expenses above and beyond its policy limit.

The Johnsons cancelled their own policy. State Farm could not and did not "renew" it. The statements made by "Tom" and the unidentified third person in the handwritten note by Gull's employee were inadmissible hearsay within hearsay, and the trial court erred when it found an issue of fact based on that note. This court should reverse that ruling to avoid a useless trial on whether the policy was "renewed."

DATED this 9<sup>th</sup> day of May, 2013.

**REED McCLURE**

By 

**Michael S. Rogers** **WSBA #16423**  
**Attorneys for Respondent**

067824.099410/393226

STATE FARM FIRE AND CASUALTY  
4600 25TH AVENUE N. E.  
SALEM, OREGON 97313

ACKNOWLEDGEMENT  
OF  
CANCELLATION REQUEST



POLICY NUMBER 96 060 0439 6	DATE CANCELLED 07/28/78	RETURN PREMIUM \$ NCNE	TO: <input type="checkbox"/> INSURED <input type="checkbox"/> MORTGAGEE <input type="checkbox"/> OTHER	DATE PROCESSED 08/04/78
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AGENT: SORESTAD, K G

1467

INSURED

CULL-U-SERVE & ET AL  
1945 HWY 20  
SEDRO WOOLLEY WA

98284

MORTGAGEE

GULL IND INC  
P O BOX 24687  
SEATTLE WA

98124

LOAN NO.

TO MORTGAGEE: Your interest is protected for 17 days from the "Date Processed" shown above.

Dear Policyholder,  
As requested, this policy has been cancelled as of the "Date Cancelled" shown above. We thank you for giving us the opportunity to provide this insurance.

*Philip C. Ruffin* Secretary

GUL0073536

LOCATION  
(if other than  
mailing address  
above)

F1:147

8/24/78

Note to Tom re: cancellation of insurance.

Tom advises they are renewing with present agent and under A/S Company  
in —

AK