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095690

NO. 69569-0-I
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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COURT OF APPEALS
STATE OF WASHINGTON

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Michael Trickey, Judge

REPLY BRIEF OF CROSS-APPELLANT

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I. ARGUMENT

A. GULL FAILED TO MEET ITS BURDEN TO AUTHENTICATE THE NEBEKER NOTE.

Gull failed to properly authenticate the Nebeker note as an ancient document. Contrary to Gull's assertion, Steven Jones, Gull's attorney, did not testify he found the note. He testified "Gull thoroughly searched its station lease files", and certain documents were "[i]ncluded in the Johnsons' Station Lease File". CP 179 (emphasis added). He said the Nebeker note was "[f]iled with the 1978 Acknowledgement of Cancellation Request". CP 179. Counsel's declaration, made without personal knowledge, was insufficient to properly authenticate the Nebeker note.

Gull had the burden to show the note: "(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). Gull's attorney failed to provide any basis for concluding that he had personal knowledge which would permit him to authenticate the note as required by ER 602 and CR 56(e). He did not testify he found the note. Gull produced no evidence indicating who at Gull conducted the search, or who found the note. Washington courts reject the "loose practice" of attempting to authenticate documents through the declaration of an attorney without personal

knowledge. *In re Pers. Restraint of 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). Gull failed to properly authenticate the note as an ancient document.

Gull has failed to establish that this document is in such condition as to create no suspicion concerning its authenticity. ER 901(b)(8). This “ancient document” is like no ancient document in any of the cases relied on by Gull. It is not a dictionary, treatise, or even a newspaper article. Gull relies on a one line handwritten note confirming a communication between two Gull employees describing an alleged conversation, not involving the author, with an unidentified third person, to establish the existence of an insurance policy. And Gull was not even a party to the insurance policy.

Moreover, the declaration of Gull’s counsel itself, if considered, creates suspicion concerning authenticity of the note. The note states that a “binder s/b coming in”. CP 431. Mr. Jones testified that the note was found in the Johnsons’ Station Lease File, where certificates of insurance and other station-related information are kept. He testified that two certificates of insurance, a Cancellation Notice and an Acknowledgment of Cancellation Request, were found in the file, but these only related to the policies issued before the Johnsons canceled the second policy. CP

179. No binder, certificate of insurance, or other State Farm document indicating that the Johnson policy had been “renewed”, reinstated, or reissued was found in the file. No such document has ever been produced. This creates suspicion about the authenticity of the statement by the unknown declarant that the policy was being “renewed”. The court’s ruling finding the note admissible should therefore be reversed.

B. OUR SUPREME COURT REQUIRES THAT EACH HEARSAY STATEMENT MUST HAVE ITS OWN HEARSAY EXCEPTION.

The Washington Supreme Court recently enforced ER 805 and held that where there are multiple levels of hearsay, each level must meet a hearsay exception. Since the statement by the unknown person who spoke to “Tom” does not meet an exception, the trial court erred in considering it.

In *In re Detention of Coe*, 175 Wn.2d 482, 286 P.3d 29 (2012), the Supreme Court reversed admission of results from the HITS database, an investigatory tool that allows law enforcement agencies to search using signature details from similar crimes in a specific area. The HITS results included information about previous sexual assaults fulfilling certain criteria used in the database search. The State argued that the HITS evidence was admissible under either the business record (RCW 5.45.020) or public record (5.44.040) exceptions to the hearsay rule.

The Supreme Court disagreed, holding that the police reports and witness statements upon which the results were based were inadmissible double hearsay.

The State completely ignores the double hearsay that bars application of both exceptions. Without an applicable exception to the underlying layers of hearsay—the police officers’ observations and the victims’ statements—the HITS evidence is inadmissible. *See* ER 805.

In re Detention of Coe, 175 Wn.2d at 505-06.

The holding of *In re Detention of Coe* applies equally to any exception to the hearsay rule, including the ancient documents exception. Indeed, the fact that the *In re Detention of Coe* decision involved the business record and public record hearsay exceptions defeats Gull’s statutory construction argument.

ER 803(a)(16) provides that the following is not hearsay: “Statements in a document in existence 20 years or more whose authenticity is established”. Gull argues that because ER 803(a)(16) refers to “statements in a document”, none of the statements in an ancient document are hearsay, and ER 805 does not apply. (Gull’s Reply at 29-30) However, the business record and public record exceptions are even broader than the ancient document exception.

RCW 5.45.020, the business record statute, provides: “A record of an act, condition or event, shall in so far as relevant, be competent

evidence . . .” if authentication requirements are met. This statute is not even limited by its terms to a hearsay exception. The only limitation is relevance. The statute provides that a business record shall be competent evidence. Yet, the Supreme Court held that ER 805 must be applied to hearsay within business records.

RCW 5.44.040, the public record statute, provides: “Copies of all records and documents on record or on file in the offices of the various departments of the United States and of this state or any other state or territory of the United States, when duly certified . . . shall be admitted in evidence in the courts of this state.” This statute is even more direct than the business record statute. It states that public records and documents shall be admitted into evidence, with no limitations. Yet, the Supreme Court held that ER 805 must be applied to hearsay within public records.

In contrast, ER 803(a)(16) merely creates a hearsay exception for properly authenticated ancient documents. But all hearsay exceptions are subject to ER 805, which requires that hearsay within hearsay is not excluded if each part of the combined statements conforms with an exception to the hearsay rule. The statement by the unknown declarant in the Nebeker note failed to meet a hearsay exception. The trial court therefore erred in considering it.

C. MOST FEDERAL COURTS ADDRESSING THE ISSUE HAVE CONCLUDED THAT RULE 803(a)(16) IS SUBJECT TO RULE 805.

Gull cites a number of federal cases at pages 33-35 of its reply¹. However, only one addressed Rule 805 or multiple hearsay, an unpublished trial court decision, *Langbord v. U.S. Dept. of Treasury*, 2011 U.S. Dist. LEXIS 71779 (E.D. Pa. 2011). *Langbord* must be rejected because it is inconsistent with *In re Detention of Coe*, 175 Wn.2d 482, which requires each level of hearsay to conform to a hearsay exception.

Further, *Langbord* is not even good law in its own jurisdiction. Another federal judge in the same jurisdiction concluded that Rule 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 (3rd Cir. 1996), *cert. denied*, 520 U.S. 1241, 117 S. Ct. 1847, 137 L. Ed. 2d 1050 (1997).

Langborn is also inconsistent with holdings of other federal courts. Most courts considering the issue have held that the ancient document hearsay exception is subject to Rule 805.

¹ Notably, three of the cases cited by Gull have been reversed or vacated.

In *United States v. Hajda* 135 F.3d 439, (7th Cir. 1998), the Seventh Circuit Court of Appeals held that Rule 805 applied to multiple hearsay in statements given by concentration camp guards.

These documents are more than 20 years old and they were properly authenticated, so they are exceptions to the hearsay rule admissible under Rule 803(16) of the Federal Rules of Evidence. However, this admissibility exception applies only to the document itself. If the document contains more than one level of hearsay, an appropriate exception must be found for each level. Fed. R. Evid. 805.

Hajda, 135 F.3d at 444.

In *Stelmokas*, 1995 U.S. Dist. LEXIS 11240, the federal court held that if multiple hearsay in an ancient document did not have to come within its own hearsay exception, Rule 805 would be rendered superfluous. The court disagreed that multiple hearsay in ancient documents is inherently trustworthy.

The Court concludes that the hearsay statements within the Marcinkus report are not admissible under Rule 805. As a general matter, evidence admitted under the hearsay exceptions in Rule 803 remains subject to the multiple hearsay requirement of Rule 805. If the law were otherwise, Rule 805 would be rendered superfluous. More important, the Government's argument overlooks the fact that age is not the sole indicia of trustworthiness underlying the Rule 803(16) exception. The requirement that the ancient document be written generally guarantees that the fact finder possesses the statement of the document's author made more than twenty years ago without risk of mistransmission. However, there is no guarantee that a hearsay statement contained in the document is accurate. The author of the ancient document may have misheard or

misunderstood the hearsay statement or his written words may not convey the meaning intended by the hearsay declarant. These issues of perception and narration are not merely peripheral but are fundamental problems of hearsay evidence. See *McCormick on Evidence* § 245, at 93. Consequently, hearsay statements contained within an ancient document lack the same indicia of trustworthiness and reliability that provide the rationale for admitting statements where the declarant is the author of the ancient document. It is for these reasons that the Court interprets Rule 803(16) as an exception to the hearsay rule only for statements where the declarant is the author of the ancient document. This ruling best gives effect to the combined purposes of Rules 803(16) and 805.

Stelmokas, 1995 U.S. Dist. LEXIS 11240, at *17-19. *Accord Hicks v. Charles Pfizer & Co.*, 466 F. Supp. 2d 799, 805-07 (E.D. Tex. 2005).

In *Columbia First Bank, FSB v. United States*, 58 Fed. Cl. 333 (2003), a federal court rejected the very argument made by Gull here, that the language of Rule 803(a)(16) precludes operation of Rule 805.

Defendant asserts that Fed. R. Evid. 803(16) “precludes the application” of Fed. R. Evid. 805, which states that “[h]earsay 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.” Def.’s Br. at 6. Courts that have dealt with the issue of hearsay statements within ancient documents that are brought in by Fed. R. Evid. 803(16) have concluded that the hearsay within hearsay problem persists, and that excluding parts of such documents because of double hearsay is an appropriate application of Rule 805. . . . While the text of Fed. R. Evid. 803(16) might be read to conform with defendant’s interpretation that hearsay statements within an admitted ancient document are also admissible, the weight of authority distinguishes between

single hearsay and double hearsay in ancient documents. . .

If defendant's interpretation of Rule 803(16) were correct, Rule 805 would be superfluous. . . "A legislative body is presumed not to have used superfluous words. Courts are bound to accord meaning, if possible, to every word in a statute." 2A Norman J. Singer, *Statutes and Statutory Construction* § 47:38, at 392 (6th ed. 2000). The court will consider at trial Fed. R. Evid. 805 hearsay within hearsay challenges to hearsay statements incorporated within documents admitted under Fed. R. Evid. 803(16).

Columbia First Bank, 58 Fed. Cl. at 338.

Washington courts also will not interpret statutes in a way that renders portions of statutes meaningless. *Progressive Animal Welfare Society v. University of Washington*, 125 Wn.2d 243, 260, 884 P.2d 592 (1994) (refusing to construe one section of the Public Records Act as a broad exemption because to do so would render carefully crafted exemptions in another section superfluous). Gull's argument that ER 803(a)(16) should be construed in a way that gives no effect to ER 805 therefore should be rejected.

D. GULL FAILED TO MEET ITS BURDEN TO ESTABLISH THAT THE OUT-OF-COURT DECLARANT HAD PERSONAL KNOWLEDGE.

Gull has the burden to establish that each out-of-court declarant had personal knowledge to support his or her out-of-court statement. The Nebeker note contained three levels of hearsay: 1) Nebeker, who wrote the note; 2) Tom, who apparently told Nebeker about a conversation with a

third person; and 3) the third person, who allegedly told Tom that “they are renewing with present agent and binder s/b coming in”. CP 431. The third person has never been identified. Therefore, whether that person had personal knowledge to support the statement has not been established.

“[F]ederal courts uniformly impose a personal knowledge requirement on hearsay declarations”.² *People v. Valencia*, 52 Cal. Rptr. 3d 649, 657 (Cal. App. 2006). “Generally, a witness must have ‘personal knowledge of the matter’ to which she testifies. Fed. R. Evid. 602. In the context of hearsay, the declarant must also have personal knowledge of what she describes”. *Bemis v. Edwards*, 45 F.3d 1369, 1373 (9th Cir. 1995).

The rationale for requiring a hearsay declarant to have personal knowledge when the declarant’s statement is admitted for its truth is identical to the rationale for requiring a witness to have personal knowledge of the subject matter of the witness’s testimony. In the absence of personal knowledge, a witness’s testimony or a declarant’s statement is no better than rank hearsay or, even worse, pure speculation. The admission of a hearsay statement not based on personal knowledge puts the fact finder in the position of determining the truth of a statement without knowledge of its source and without any means of evaluating the reliability of the source of the information. We are convinced the personal knowledge requirement

² State Farm raised an objection based on the absence of the declarant’s personal knowledge both in the trial court, CP 995-96, and in this court, Respondent’s Brief at 39, 42. Gull addressed the personal knowledge issue in Gull’s Reply at 30.

applicable to witnesses is equally applicable to hearsay declarants.

People v. Valencia, 52 Cal. Rptr. 3d at 657.

Washington courts similarly do not allow admission of statements in a document which would be inadmissible if the declarant was testifying in court, even where the statement itself falls within a hearsay exception. For example, in *Young v. Liddington*, 50 Wn.2d 78, 309 P.2d 761 (1957), a hospital record was admitted into evidence under the former Uniform Business Records Act, RCW 5.44.110, which creates a hearsay exception for business records. The record included an opinion that epilepsy was the result of diphtheria. The record did not reveal a basis for this opinion, and the Court concluded it was based on speculation and conjecture.

The Court held that the statement must be excluded even though the record itself was admissible.

“The statute does not change the rules of competency or relevancy with respect to recorded facts. It does not make that proof which is not proof. It merely provides a method of proof of an admissible ‘act, condition or event.’ It does not make the record admissible when oral testimony of the same facts would be inadmissible.”

Young, 50 Wn.2d at 84 (quoting *McGowan v. Los Angeles*, 223 P.2d 862 (Cal. App.1950)).

As held in *Young*, a hearsay exception does not change the rules of competency or relevancy with respect to recorded facts. If a witness

would not be competent to testify to facts in court, an out-of-court statement concerning those facts should likewise be inadmissible. One basic requirement for competency is personal knowledge.

Like the federal courts, Washington courts require witnesses to have personal knowledge of a matter before they can testify to a matter. ER 602. Specifically, summary judgment affidavits or declarations must be based on personal knowledge, and set forth facts as would be admissible in evidence. CR 56(e). To ensure reliability, this personal knowledge requirement must be extended to statements by an out-of-court declarant, regardless of whether they fall within a hearsay exception.

In this case, Gull has failed to even identify the declarant, much less show he or she had personal knowledge. We do not know if this person was a State Farm agent, a State Farm policy holder, or somebody else. We only know that the information surfaced in a conversation between two of Gull's own employees.

Gull has provided no basis to determine whether the alleged declarant had personal knowledge to support the statement. Certainly the two Gull employees, Mr. Nebeker and Tom, did not have such knowledge. Neither would be allowed to testify in court concerning what the third party allegedly said. The court erred in considering the statement by the unknown declarant.

E. THE NOTE IS NOT PROBATIVE ON WHETHER A POLICY WAS ACTUALLY “RENEWED”.

Even if considered, the Nebeker note fails to create a genuine issue of material fact whether State Farm “renewed” the Johnsons’ insurance policy. The Johnsons cancelled the policy themselves, pursuant to RCW 48.18.300. State Farm had no ability to renew it.

In Washington, insurance policies must be in writing, and executed by the insurer. RCW 48.18.140, .210. Every policy must be delivered to the insured. RCW 48.18.260. Gull has failed to produce any evidence State Farm issued, executed, or delivered a written insurance policy after the Johnsons cancelled their policy.

A policy is “renewed” when it terminates by its terms at a specified expiration date. RCW 48.18.280. The Johnsons’ policy terminated because they cancelled it, not because it expired. The policy could not be “renewed”.

A “binder” is used to bind insurance temporarily pending the issuance of a policy. Binders are not valid after a policy is issued, or after 90 days, whichever period is shorter. RCW 48.18.230. The note did not say that a binder had been issued, only that a binder should be coming in. There is no evidence a binder was actually issued, or that a binder ever

came in. The fact no binder was found in Gull's lease file indicates that one did not. And again, there is no evidence a policy was issued.

Even if considered, the Nebeker note failed to create a genuine issue of material fact whether a third policy was issued after the Johnsons cancelled the second policy. The court erred in denying State Farm's motion for summary judgment.

F. SCOPE OF REVIEW.

Gull asserts that denial of State Farm's motion to strike is not subject to review. However, the court's evidentiary ruling on admissibility of the Nebeker note is subject to review because it prejudicially affected the summary judgment order. The motion to strike was not even necessary.

Once review is granted, RAP 2.4 defines the scope of review, regardless of the basis for acceptance of review. *Right-Price Recreation, LLC v. Connells Prairie Community Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002), *cert. denied by Gain v. Washington* 540 U.S. 1149 (2004). RAP 2.4(b) provides:

The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

Any rulings on which the summary judgment order is based are brought up for review. *See Behavioral Sciences Institute v. Great-West Life*, 84 Wn. App. 863, 870, 930 P.2d 933 (1997) (holding that appeal from partial summary judgment order brought up for appeal previous orders on which order was based). Thus, review of a summary judgment order brings up for review all evidentiary rulings that prejudicially affect the summary judgment decision. In fact, State Farm appealed from each and every adverse ruling and determination made during the summary judgment proceedings. CP 1000.

Technically, the motion to strike was unnecessary. Materials submitted to the trial court in connection with a motion for summary judgment cannot actually be stricken from consideration, unlike evidence that is removed from consideration by a jury. These materials remain in the record to be considered on appeal. Thus, a “motion to strike” is actually an objection to the admissibility of evidence, which could be preserved in a reply brief rather than by a separate motion. *Cameron v. Murray*, 151 Wn. App. 646, 658, 214 P.3d 150 (2009), *rev. denied*, 168 Wn.2d 1018 (2010). Therefore, no separate written order was even necessary for the motion to strike.

Review of the summary judgment order brings up for review all evidentiary rulings that affected that order. The court's decision on admissibility of the Nebeker note is therefore subject to review.

G. STATE FARM'S CROSS-APPEAL IS PROPER BECAUSE STATE FARM APPEALED FROM THE SAME ORDER AS GULL.

Gull asserts that the decision from which State Farm appealed "does not meet the criteria for immediate appeal". However, State Farm cross-appealed from the same decision, i.e. order, as Gull. State Farm's cross-appeal is properly before this court pursuant to RAP 2.4(a).

Preliminarily, Gull concedes that it did not raise this argument below, nor did it appeal from the trial court's designation of the order as a final order, nor has Gull even filed a motion with this court. Consequently, Gull asks this Court to consider the issue "*sua sponte*". (Gull's Reply at 24) Obviously this court need not entertain a request by a party that it take up an issue "*sua sponte*". Such a request contradicts the term.

Gull and State Farm both seek review from the same "Order Granting Defendant State Farm's Motion For Partial Summary Judgment to Establish Insurance Policy". CP 793-95. Gull moved for entry of final judgment under CR 54(b) to allow an immediate appeal. CP 804. State Farm did not oppose the motion, but requested that the entire summary

judgment order be certified as a final judgment. CP 910. The court granted State Farm's request, entering final judgment "on all rulings made in its September 28, 2012 Order". CP 944.

RAP 2.2(a) allows a party to appeal from certain specified "decisions". The term "decision" refers to rulings, orders, and judgments of the trial court. RAP 2.1(a). The decision from which Gull appealed, pursuant to RAP 2.2(d), was the "Order Granting Defendant State Farm's Motion For Partial Summary Judgment to Establish Insurance Policy".

RAP 2.4(a) permits an appellant to designate in the notice of appeal the decision or parts of the decision which that party wants reviewed. Gull did that. However, RAP 2.4(a) further provides: "The appellate court will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case".

State Farm timely filed a notice of appeal from the "decision" appealed by Gull, the "Order Granting Defendant State Farm's Motion For Partial Summary Judgment to Establish Insurance Policy". CP 999-1014. The order was appealable under CR 54(b) because, as contended by Gull, it was final with respect to at least one claim or party. *See Glass v. Stahl*

Specialty Co., 97 Wn.2d 880, 883, 652 P.2d 948 (1982). RAP 2.4(a) does not require State Farm to designate for review the same “parts” of that decision as Gull. Indeed, such a requirement would make no sense, since opposing parties appealing from the same decision will usually be aggrieved by different parts of the same decision. Pursuant to RAP 2.4(a), State Farm’s appeal is properly before the court.

Notably, the rulings on the duty to defend and the establishment of State Farm’s policies are interrelated. State Farm asked the court to declare that the policy forms and terms were as set forth in Exhibit A to its motion. CP 26. Gull’s only opposition to this requested relief was its contention that the second policy was “renewed” after it was cancelled by the Johnsons. The ruling on the duty to defend was based on the policy language as established by the forms submitted by State Farm. CP 119; *see also* Appellants’ Opening Brief at 12. Contrary to Gull’s argument, *see* Gull’s Reply at 13, the court must have determined the terms and conditions of the State Farm policies, a necessary precondition to reaching the duty to defend issue. Since the ruling on duty to defend was based on the terms and conditions of the policies as found by the court, the court’s ruling regarding the terms and conditions of the policies is subject to review. *See Behavioral Sciences Institute v. Great-West Life*, 84 Wn. App. 863.

In addition, the appellate court will, at the instance of the respondent, review those acts in the proceeding below which if repeated on remand would constitute error prejudicial to respondent. RAP 2.4(a). The court's finding that an issue of fact precluded summary judgment on whether the State Farm policy was renewed, based on inadmissible evidence, would require an unnecessary trial to establish the terms and conditions of the policy, and was error prejudicial to State Farm. Therefore, the order denying State Farm's motion for summary judgment on this issue is subject to review.

The court should note that State Farm's cross-appeal raises no concern about piecemeal appeals. State Farm did not commence an additional appeal. State Farm filed a cross-appeal. Gull's appeal and State Farm's appeal are part of the same proceeding.

In any event, the cross-appeal issue has been raised and briefed. In the interests of judicial economy, the court should consider the court's denial of State Farm's motion for summary judgment. *See Waller v. State*, 64 Wn. App. 318, 338, 824 P.2d 1225, *rev. denied*, 119 Wn.2d 1014 (1992).

State Farm cross-appealed from the same decision as Gull. Therefore, State Farm's cross-appeal is properly before this court pursuant to RAP 2.4(a).

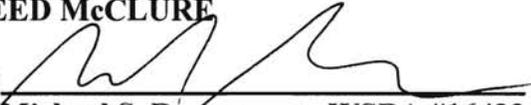
II. CONCLUSION

It is ironic that Gull waited 25 years after it discovered contamination to notify State Farm of this claim, and now seeks to establish coverage through the ancient document exception to the hearsay rule because witnesses are no longer available. Meanwhile, due to the passage of time, State Farm no longer has any records of its own relating to insurance policies issued to the Johnsons.³

Gull has failed to properly authenticate the Nebeker note as an ancient document, failed to show that a hearsay exception applies to the statement by the unknown declarant as required by ER 805, and failed to show that the unknown declarant had personal knowledge. The court should therefore reverse the trial court and grant State Farm the relief requested in its motion for summary judgment.

DATED this 15th day of August, 2013.

REED McCLURE

By 

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³ This prejudice to State Farm strengthens State Farm's late notice defense based on Gull's breach of policy conditions.