STATE OF MICHIGAN

COURT OF APPEALS

LEESA KAMEN,

Plaintiff-Appellant/Cross-Appellee,

v

SPECTRUM HR, LLC,

Defendant,

and

LEXINGTON INSURANCE COMPANY,

Garnishee Defendant-
Appellee/Cross-Appellant

UNPUBLISHED
December 1, 2011

No. 299585
Oakland Circuit Court
LC No. 2005-066091-CD

Before: K.F. KELLY, P.J., and GLEICHER and METER, JJ.

PER CURIAM.

Plaintiff-appellant/cross-appellee, Leesa Kamen, appeals as of right from an order that dismissed her garnishment action against defendant garnishee-appellee/cross-appellant, Lexington Insurance Company. Lexington also appeals as of right from the trial court's earlier order, which denied its motion for summary disposition. We affirm the trial court's order dismissing Kamen's action and, therefore, find it unnecessary to address Lexington's cross appeal.

I. BASIC FACTS

On May 2, 2005, Kamen filed a complaint against her former employer, defendant Spectrum HR, LLC, alleging that she was fired from her position as Vice President of Risk Management after she reported that some of Spectrum's insurance practices were fraudulent and violated state law. Spectrum HR filed an answer to the complaint on May 23, 2005, engaged in limited discovery, and otherwise appeared ready to defend the lawsuit. However, on January 18, 2006, counsel for Spectrum HR moved to withdraw as counsel, citing that Spectrum HR had ceased doing business, was insolvent, and had no place of business or employees. Spectrum HR was not available for consultation on its defense and was unwilling to assist in defending itself. The trial court granted counsel's motion on January 25, 2006. No other attorney filed an

appearance on Spectrum HR's behalf. On February 9, 2006, the trial court entered default judgment against Spectrum HR in the amount of $500,000.

On August 4, 2008, Kamen filed a request for garnishment, naming Lexington as garnishee. Lexington was Spectrum HR's insurer on an Employment Practices Liability Insurance Policy. Lexington denied liability because Spectrum HR (its insured) failed to comply with the notice requirements of the claims-made insurance policy. Because of Spectrum HR's failure to comply with the conditions precedent to coverage, the policy did not cover the default judgment against Spectrum HR.

The parties filed competing motions for summary disposition. Kamen argued that Lexington was legally obligated to pay Kamen because the claim against Spectrum HR was made during the policy period. Lexington argued that, although Kamen's counsel sent a copy of the lawsuit to Aon, Spectrum HR's insurance broker, at no time did Spectrum HR – the actual insured – seek coverage under the policy. In fact, Spectrum HR defended itself against the suit. Lexington, therefore, had no opportunity to defend the suit.

The trial court entered an opinion and order denying both motions. The trial court found that Spectrum HR's failure to tender the claim, standing alone, did not preclude coverage under the insurance policy for a subsequently entered default judgment. Nor did Lexington demonstrate beyond any factual dispute that it suffered prejudice as a result of Spectrum HR's failure to provide notice of the lawsuit or failure to comply with the policy requirements. In fact, the record indicated Lexington may have had actual knowledge of the lawsuit. The trial court also rejected Lexington's argument that a "claim" under the policy meant only a lawsuit.

In denying Kamen's motion for summary disposition, the trial court again looked to the issue of prejudice and concluded that Kamen failed to show that there was no genuine issue of material fact as to whether Lexington was prejudiced by Spectrum HR's failure to tender the claim. Even if Lexington had knowledge of the lawsuit, Spectrum HR never made a claim under the insurance policy and even undertook its own defense.

Lexington filed a motion for reconsideration, reiterating that, although it "technically had notice of the lawsuit, *it was never asked to defend or to participate in the defense of the Kamen lawsuit* prior to the entry of default judgment." (Emphasis in original.) Thus, it argued that prejudice existed as a matter of law because Lexington was not given an opportunity to defend the underlying claim prior to entry of default. In addition, Spectrum HR did not merely fail to request coverage, it explicitly disclaimed coverage in an e-mail dated May 24, 2005, when Spectrum HR's insurance broker (Aon) advised "[a]s per my voice message to you, today, 5/24/0, I have been informed, our client, Spectrum HR, did not intend for this matter to be submitted as a claim. With respect to our client's request, please discontinue the claims process."

In denying Lexington's motion for reconsideration, the trial court acknowledged that an express disclaimer by Spectrum HR, as the insured, would be a valid defense in the case. Nevertheless, "[s]tating a valid defense, however, is not the same as establishing it beyond factual dispute."

Lexington's application for leave to appeal was denied. *Kamen v SpectrumHR*, unpublished order of the Court of Appeals, entered May 3, 2010 (Docket No. 296476).

II. TRIAL ON STIPULATED FACTS

Subject to their respective evidentiary objections, the parties stipulated to the following facts prior to trial:

1. Ms. Kamen became employed with Defendant/SpectrumHR, LLC ("SpectrumHR") as Vice President of Risk Management on February 1, 2003. SpectrumHR was in the business of providing other businesses with payroll and employee benefits administration, unemployment and workers' compensation insurance, health care insurance and other human resources services. SpectrumHR was what is commonly known as a Professional Employer Organization ("PEO").

2. On July 16, 2004, Kamen was wrongfully terminated from her employment with SpectrumHR. At the time Kamen was terminated, SpectrumHR carried an Employment Practices Liability Insurance Policy Nos. 1323936 and 1324593 (the "Lexington Policy") with Lexington Insurance Company ("Lexington"). The Policy provided insurance coverage against claims made during the "Policy Period" for wrongful termination. The insured event limit under the Policy is $2 million.

3. Kamen's claim for wrongful termination was an "Insured Event" under the Lexington Policy.

4. In 2004, Kamen learned that SpectrumHR was not maintaining workers' compensation insurance for its clients, and had failed to pay payroll taxes on behalf of a number of clients who had remitted funds to SpectrumHR in trust, in violation of the laws of at least seven states, including Michigan. When Kamen brought these matters to the attention of Bert Danzig, President of SpectrumHR, he instructed her not to divulge this information to SpectrumHR's clients, or to the Chairman and CEO of SpectrumHR.

5. Because Kamen refused to participate in this fraudulent concealment of wrongdoing, she was wrongfully terminated by SpectrumHR on July 16, 2004. Within a week of her termination, David Trent, the Vice-President of Human Resources for SpectrumHR, sent Kamen a proposed Separation Agreement and Release, under which Kamen would be required to release SpectrumHR from all claims, including those for wrongful termination and discrimination.

6. In response to Mr. Trent's proposal, on August 2, 2004 (in other words, well within the "Policy Period"), Kamen informed Trent that SpectrumHR's proposal was inadequate, and gave notice of her claim for wrongful termination, stating:

> It should come as no surprise that I continue to remain shocked that I was abruptly terminated ironically after I had repeatedly pointed out areas of unlawful conduct.
>
> ***
>
> The response my suggestions or comments received, as witnessed by yourself and others, usually resulted in Bert verbally assaulting me or publicly criticizing me and ultimately threatening my job for my refusal to support a fraudulent position. His constant criticism and continuous threats to my job created a hostile working environment for me.
>
> ***
>
> Spectrum has offered a separation package to me in an effort to eliminate it[]s risk, namely litigation against Spectrum for my wrongful discharge and for hostile and unlawful discrimination.
>
> ***
>
> As one of the few key Executive Officers at Spectrum, the current offer is inadequate to compensate me for both the loss of my prominent position and for the professional assaults that I have endured during my time with Spectrum.

7. In response to Mr. Trent's email, Ms. Kamen's attorney, Donald A. Van Suilichem, wrote in an email to Mr. Trent on September 16, 2004, that his response to the counter-offer was a violation of the Older Worker's Benefit Protection Act, and concluded with the following statement, *I would hope that you would not wish to add additional litigation exposure to you and the company*.

8. For the next several months Mr. Van Suilichem attempted to negotiate a settlement on Ms. Kamen's behalf with SpectrumHR's attorney, Sheryl Laughren of Dickinson Wright PLLC, but without success.

9. On May 2, 2005, after further negotiations between Kamen's counsel and SpectrumHR proved unsuccessful, Kamen filed suit against SpectrumHR. Kamen's former counsel, Lucetta Franco, contemporaneously transmitted a copy of Kamen's Complaint to AON Insurance Company.

10. On May 23, 2005, SpectrumHR, through its attorney, Sheryl Laughren, filed an Answer to the Complaint. On January 25, 2006, the Circuit Court entered an Order allowing Laughren to withdraw as SpectrumHR's attorney.

11. Neither SpectrumHR nor any attorney acting on its behalf appeared at the time of trial, and a Default Judgment was therefore entered on February 9, 2006 awarding Kamen damages in the amount of $500,000.00.

12. On May 4, 2005, the attorney for Plaintiff, Lucetta Franco, mailed Plaintiff[']s Exhibit 6 to AON.[1]

13. Lucetta Franco's May 4, 2005 letter was sent to AON because, not having a copy of the Lexington EPL Policies, Ms. Franco believed AON was Lexington's agent.

14. On May 18, 2005 Gene Huddleston of AON, by voice mail, notified Lexington of the Kamen claim.

15. On May 20, 2005, Gene Huddleston emailed a copy of the May 4, 2005 letter from Lucetta Franco and the Kamen Complaint and Jury Demand to Lexington.

16. On May 24, 2005, AON advised Lexington that AON had mistakenly submitted the Kamen claim to Lexington, as Spectrum did not intend to submit it, and advised Lexington to discontinue the claims process.

17. As a result, Lexington discontinued the claims process and closed its file with no activity.

18. On February 7, 2006 Lucetta Franco mailed Plaintiffs Exhibit 7 to AON.[2]

The parties also stipulated that the deposition testimony of Gene Huddleston would be admissible at trial. Huddleston testified that Aon was a risk services management corporation that assisted clients in procuring insurance policies. Huddleston worked for Aon as a client specialist, invoicing requests and ensuring that certificates of insurance were issued on behalf of their clients as requested. Huddleston described Aon's relationship with Spectrum as that of "broker" who acted as a "go between" between an insured and an insurer.

In response to the subpoena duces tecum, Huddleston conducted a search in the Aon computer system for documents relating to Leesa Kamen's lawsuit against Spectrum HR from May 2005. One of the documents dated May 18, 2005, contains a message to Huddleston from

[1] The letter to AON provided: "I am enclosing a courtesy copy of the Complaint filed on behalf of Leesa Kamen against Spectrum HR. I understand that Spectrum HR currently has a policy of insurance for this type of claim with Lexington Insurance. If you have any additional questions please do not hesitate to contact me."

[2] The letter to AON provided, in part: "The purpose of this letter is to appeal your declination of coverage for the above litigation filed against your policyholder, Spectrum HR. We have been advised that this matter will proceed to trial on Thursday morning at 8:30 a.m. in the courtroom of the Hon. Nanci Grant . . . The law firm representing Spectrum has withdrawn from the case, effective January 25, 2006. We will proceed to a judgment and look to your company to pay the judgment."

"Carter C.," which included a copy of Kamen's lawsuit and instructed Huddleston to "[p]lease report directly to Lexington with specific instructions to keep Allison, myself and you in the loop." Huddleston reported the claim to Lexington that same day. Huddleston did not remember who "C. Carter" was, but had no reason to doubt the accuracy of the notations.

On May 20, 2005, Huddleston e-mailed the attachment to Mark Garafano, and left a voicemail message for Garfano three days later. A May 24, 2005, notation indicated that Huddleston received "an acknowledgment (via e-mail) from Jay Medailleu of Lexington Ins., Jay has been assigned this claim. Per Carolyn Carter, client did not intend this to be submitted to Lexington. I advised Jay of this request. I am awaiting Jay's response." Huddleston closed the service request on May 25, 2005. Based upon the entries, Huddleston understood that the lawsuit submitted by Spectrum HR was terminated and was not supposed to be submitted as a claim. Huddleston did not remember who Carolyn Carter was other than a fellow Aon employee.

Huddleston also identified certain Lexington documents (not kept by Aon), including the May 20, 2005, e-mail Huddleston sent to Garafano regarding the lawsuit and an email from Medailleu to Huddleston indicating that he had been assigned to the claim. Huddleston did not find a letter dated February 7, 2006, because the claim had been closed. (This was the letter from Kamen indicating that counsel for Spectrum HR had withdrawn and the matter was proceeding to trial.) Huddleston had no way of knowing whether the letter was ever transmitted to Lexington. It was possible that a new service request was opened upon Aon's receipt of the February 7, 2006, letter.

Huddleston never had direct contact with anyone from Spectrum HR. And although the e-mail said "Per Carolyn Carter," Huddleston could not remember who she was. There was nothing in Aon's files from *Spectrum HR* indicating that they were not submitting the claim for coverage.

> *Q.* [by Kamen's counsel] Somebody else told you. Somebody else told you; is that right?
>
> *A.* Correct.
>
> *Q.* But nobody from Spectrum told you that they didn't want to submit the claim.
>
> *A.* I don't know who told me.

Nevertheless, Huddleston had no reason to doubt the truth, accuracy, and voracity of the statement made on May 24, 2005, that Spectrum HR disclaimed the lawsuit under the policy. Prior to his deposition, Huddleston had no independent recollection of the e-mails.

In lieu of a bench trial, the trial court considered Hudleston's deposition testimony, the parties' stipulated facts, trial briefs, and respective exhibits. Kamen argued the e-mail purporting to disclaim coverage was inadmissible hearsay. The author of the e-mail, Gene Huddleston, admitted that he did not have direct contact with anyone from Spectrum HR; instead, his understanding that Spectrum HR wanted to discontinue the claims process was based on

statements of an unidentified third party. It was, therefore, hearsay within hearsay. Huddleston got his information from a co-worker who, in turn, received the information from an employee of Spectrum HR. Kamen also argued that Lexington failed to show that AON (through Huddleston) was Spectrum HR's agent as opposed to merely its insurance broker. Finally, Kamen argued that Lexington failed to show an intentional relinquishment of a known right. The e-mail only shows that Spectrum HR wanted to cancel the policy. Disclaiming coverage for the underlying claim had to have been a mistake – there was no other explanation for Spectrum HR's doing so, given the amount of funds it spent on policy premiums.

In contrast, Lexington argued that Aon was Spectrum's agent and was authorized to speak on Spectrum's behalf when it advised Lexington to discontinue the claims process. Lexington also argued that e-mail's and notes of Aon's employee Gene Huddleston were admissible under the business records exception to the hearsay rule.

On July 27, 2010, the trial court dismissed the claim against Lexington, finding that "evidence regarding the Defendant Spectrum HR, LLC's disclaimer of coverage for the underlying claim is admissible, and establishes beyond factual dispute that Spectrum, in fact, disclaimed coverage."

Kamen now appeals as of right from the final order entering judgment in Lexington's favor. Lexington also appeals as of right from the trial court's earlier order denying summary disposition.

III. HEARSAY EVIDENCE

Kamen argues that the trial court erred in admitting Huddleston's e-mail because there was no analysis of, nor basis to admit, the inner part of the hearsay within hearsay evidence. Even if Huddleston's e-mail was admissible under the business records exception to the hearsay rule, the trial court ignored the fact that the contents of Huddleston's e-mail was based entirely on what a third party told him regarding Spectrum HR's desire to disclaim coverage under the policy. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

MRE 801(c) provides that "'[h]earsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible as a matter of law unless it falls under an established hearsay exception. MRE 802. The trial court determined that Huddleston's e-mail was admissible under the records exception to the hearsay rule, MRE 803(6), which provides:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of

> information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

The trial court specifically noted:

> In the present case, it is beyond dispute that it was Aon's regular practice to obtain information regarding its client's insurance needs from the clients, and relied on these statements. Moreover, there is little to suggest that Aon's representations in this regard, as expressed in its records and through Huddleston's testimony, are not reliable, as Aon simply has no motive to fabricate evidence regarding what it was told by Spectrum. Therefore, the Court agrees that the email, Huddleston's testimony, and the records of the Aon agency regarding Spectrum's instructions are admissible pursuant to MRE 806(3).

On appeal, Kamen asserts that the e-mail was "hearsay within hearsay" in that Huddleston's statement regarding the disclaimer was received from a third party. MRE 805 provides that "[h]earsay 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." It follows that hearsay within hearsay is excluded where no foundation has been established to bring each independent hearsay statement within a hearsay exception. *Solomon v Shuell,* 435 Mich 104, 129; 457 NW2d 669 (1990).

Huddleston's May 24, 2005, e-mail to Jay Medailleu, the Lexington employee assigned to the claim, provided "[t]hank you for your acknowledgment of this claim. As per my voice message to you, today, 5/24/0, I have been informed, our client, Spectrum HR, did not intend for this matter to be submitted as a claim. With respect to our client's request, please discontinue the claims process." In his deposition testimony, Huddleston acknowledged that he sent the e-mail. He also admitted that, in so doing, he was reciting statements by others, specifically fellow Aon employee Carolyn Carter. Nevertheless, the fact that Huddleston received this information from a fellow employee does nothing to remove the e-mail from the records exception to the hearsay rule. Information flowing from one employee to another regarding an insured's account is exactly the type of information kept in the regular practice of Aon's business. As the trial court notes, there is simply no reason to believe that any Aon employee would fabricate information about the disclaimer when there was no incentive to do so.

Additionally, although the statement "I have been informed" indicates that Huddleston learned the information from a third party and not from Spectrum HR itself, the e-mail was not being used to prove the truth of the matter asserted (that Spectrum HR specifically informed Carolyn Carter that it disclaimed coverage); rather, the email was relevant to show that Aon, acting on behalf of Spectrum HR, disclaimed coverage on the insured's behalf. As Lexington aptly argues, whether a statement by Spectrum HR to Aon (its agent) constituted inadmissible hearsay is irrelevant where Aon acted as Spectrum HR's agent and was authorized to act on its behalf. Thus, even if Spectrum HR had not, in fact, disclaimed coverage by telling Aon employee Carolyn Carter, who then told a fellow Aon employee (Huddleston), who then

forwarded the information to Lexington (Medailleu), that would not change the fact that Lexington acted in reliance of Aon's disclaimer of coverage on Spectrum HR's behalf.

In finding that Aon was authorized to speak on behalf of Spectrum HR, the trial court noted:

> First, when an insurance policy is facilitated by an independent insurance agent or broker, the independent insurance agent is considered an agent of the insured rather than an agent of the insurer. *Genesee Foods Servs, Inc*, 279 Mich App 649 (2008). Second, Plaintiff does not dispute that Aon acted as Spectrum's agent in regard to Plaintiffs claim, at least when it initially forwarded the claim to Lexington for coverage. If so, it stands to reason that Aon was also authorized to act on Spectrum's behalf in conveying its intent to disclaim coverage to Lexington. Thus, Plaintiff cannot defeat Lexington's argument on this basis.

Kamen does not take issue with the trial court's findings on appeal and has, therefore, waived the issue. *Steward v Panek*, 251 Mich App 546, 558; 652 NW2d 232 (2002). Even if Kamen had properly raised and briefed the issue on appeal, there is simply no support for the position that Aon lacked the authority to disclaim coverage on Spectrum HR's behalf. As the trial court notes, Kamen's own actions in submitting the complaint to Aon (as opposed to Lexington) for review indicates Kamen's belief that Aon was authorized to consider and process the claim. Kamen should be estopped from now arguing that Aon was not Spectrum HR's agent with the authority to disclaim coverage. Additionally, case law provides that "[w]hen an insurance policy 'is facilitated by an independent insurance agent or broker, the independent insurance agent or broker is considered an agent of the insured rather than an agent of the insurer.'" *Genesee Foods Servs, Inc v Meadowbrook, Inc*, 279 Mich App 649, 654; 760 NW2d 259 (2008), quoting *West American Ins Co v Meridian Mut Ins Co*, 230 Mich App 305, 310; 583 NW2d 548 (1998). Aon is an insurance broker and, therefore, the agent of the insured – Spectrum HR.

IV. LEXINGTON'S CROSS APPEAL

Because we affirm the order dismissing the garnishment proceeding, it is unnecessary to visit Lexington's issues on appeal.

Affirmed. As the prevailing party, Lexington may tax costs pursuant to MCR 7.219.

/s/ Kirsten Frank Kelly
/s/ Patrick M. Meter

STATE OF MICHIGAN

COURT OF APPEALS

LEESA KAMEN,

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UNPUBLISHED
December 1, 2011

No. 299585
Oakland Circuit Court
LC No. 2005-066091-CD

Before: K. F. KELLY, P.J., and METER and GLEICHER, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

Plaintiff Leesa Kamen brought a wrongful discharge claim against defendant Spectrum HR, LLC, and obtained a $500,000 default judgment. At the time Spectrum fired Kamen, an insurance policy issued by the Lexington Insurance Company covered Spectrum for employment-related claims. Kamen attempted to execute the default judgment by serving Lexington with a writ of garnishment. Lexington moved for summary disposition, asserting that Spectrum had not sought coverage for Kamen's claim. Despite that Kamen produced no evidence that Spectrum ever tendered Kamen's claim to Lexington, the trial court denied Lexington's summary disposition motion.

The parties proceeded to a bench trial on stipulated facts. They agreed that after the trial court entered a default judgment in Kamen's favor, her counsel mailed a copy of the complaint to the AON Corporation, an independent insurance broker. Gene Huddleston, an AON employee, notified Lexington of Kamen's claim by leaving a voicemail and by forwarding the complaint to Lexington. The parties stipulated that four days after Huddleston forwarded the complaint, "AON advised Lexington that AON had mistakenly submitted the Kamen claim to Lexington, as Spectrum did not intend to submit it, and advised Lexington to discontinue the claims process."

In addition to the stipulated facts, the parties presented the trial court with Huddleston's deposition testimony. During the deposition, Huddleston produced a copy of the email he sent to Lexington advising that Spectrum had not intended to submit the claim. The email stated in relevant part:

> As per my voice message to you, today, 5/24/05, I have been informed, our client, SpectrumHR, did not intend for this matter to be submitted as a claim. With respect to our client's request, please discontinue the claims process.

Huddleston identified his informant as "Carolyn Carter," but could not recall anything about Carter or where she worked. Kamen objected to the introduction of this email, asserting that it contained inadmissible hearsay. The trial court admitted it as a "record of regularly conducted activity" under MRE 803(6), the business record exception to the hearsay rule. In a written opinion, the trial court ruled that the email supported that Spectrum had "disclaimed" coverage, eliminating Kamen's right to garnish the Lexington policy.[1]

Kamen's argument on appeal focuses exclusively on the Huddleston email. According to Kamen, the email's "inner" statement, asserting "SpectrumHR, did not intend for this matter to be submitted as a claim," constituted inadmissible hearsay. Kamen contends that absent this e-mail, Lexington presented no evidence supporting summary disposition. In a cross-appeal, Lexington argues that the trial court erred by denying its motion for summary disposition based on Spectrum's failure to tender the claim to Lexington.

The majority holds that Huddleston's e-mail falls within MRE 803(6), despite that it "recit[ed] statements by others." *Ante* at 11. According to the majority, "Information flowing from one employee to another regarding an insured's account is exactly the type of information kept in the regular practice of Aon's business." *Id.* The majority further concludes that "the e-mail was not being used to prove the truth of the matter asserted (that Spectrum HR specifically informed Carolyn Carter that it disclaimed coverage); rather, the email was relevant to show [that] Aon, acting on behalf of Spectrum HR, disclaimed overage on the insured's behalf." *Ante* at 12.

I believe that the email contained inadmissible hearsay, and should have been excluded on this ground. I respectfully disagree with the majority's conclusion that "the e-mail was not being used to prove the truth of the matter asserted." *Id.* However, because Kamen stipulated to the content of the e-mail, and because the trial court erred by denying Lexington's motion for summary disposition based on Spectrum's failure to tender the claim, I agree with the majority's decision to affirm dismissal of the garnishment proceeding.

Kamen expressly stipulated that "AON advised Lexington that AON had mistakenly submitted the Kamen claim to Lexington, as Spectrum did not intend to submit it, and advised Lexington to discontinue the claims process." With this stipulation, Kamen agreed to the factual

[1] More accurately, Spectrum never tendered a request for coverage. Consequently, Lexington never investigated the claim or took any action, including disclaiming it.

substance of the disputed Huddleston e-mail. By voluntarily placing before the trial court that Spectrum never intended to seek coverage, Kamen provided the trial court facts compelling summary disposition in Lexington's favor. I would resolve Kamen's appellate claim on this obvious basis alone. Consequently, I believe the majority's hearsay analysis is unnecessary as well as incorrect.

In my view, the statement within the e-mail referencing Spectrum's intent qualifies as inadmissible hearsay. MRE 801(c) defines "hearsay" as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 803(6) sets forth an exception to the hearsay rule for records of "regularly conducted activity," also called business records, defined as:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

Kamen does not contest Lexington's assertion that AON compiled and kept Huddleston's e-mail message in the regular course of its business.[2]

Assuming that the e-mail message itself qualified as a properly authenticated business record, I respectfully disagree with the majority's declaration that because "[i]nformation flowing from one employee to another regarding an insured's account is exactly the type of information kept in the regular practice of Aon's business," *ante* at 11, it cannot constitute hearsay. If offered to prove the truth of the matter asserted, a statement "flowing from one employee to another" falls squarely within the definition of hearsay. Huddleston may have acted in the regular course of his business by writing the email message to Lexington, but he

[2] Despite Kamen's apparent concession, I am not convinced that Huddleston's testimony established an adequate foundation for the admission of the e-mail itself as a business record. Neither Huddleston nor any other witness testified that the email was "kept in the course of a regularly conducted business activity," or that "it was the regular practice of that business activity to make the . . . record." The e-mail was not authenticated by certification. See MRE 902(11). The mere fact that someone found the e-mail within an AON computer's memory does not, standing alone, establish that the e-mail qualifies as a record of a "regularly conducted activity." See *White Industries, Inc v Cessna Aircraft Corp*, 611 F Supp 1049, 1059 (WD Mo, 1985).

incorporated in the email an out-of-court statement made by Crawford. "Double hearsay exists when a business record is prepared by one employee from information supplied by another employee." *United States v Baker*, 224 US App DC 68; 693 F2d 183, 188 (1982). "[H]earsay within hearsay is excluded where no foundation has been established to bring each independent hearsay statement within a hearsay exception." *Solomon v Shuell*, 435 Mich 104, 129; 457 NW2d 669 (1990) (lead opinion of Archer, J.). "[S]tatements made by third parties in an otherwise admissible business record cannot properly be admitted for their truth unless they can be shown independently to fall within a recognized hearsay exception." *Woods v City of Chicago*, 234 F3d 979, 986 (CA 7, 2000). "The fact that third-party hearsay is contained in an otherwise-admissible business record does not cleanse it of the 'untrustworthy' hearsay taint." *State v Reynolds*, 746 NW2d 837, 842-843 (Iowa, 2008). The business records exception simply does not shield Crawford's out-of-court assertion from the rule against hearsay.

Huddleston's contested statement recited: "I have been informed, our client, SpectrumHR, did not intend for this matter to be submitted as a claim." Crawford's assertion, "SpectrumHR, did not intend for this matter to be submitted as a claim," is classic hearsay. Spectrum has offered no argument that an exception to the hearsay rule applies to this out-of-court statement, and neither has the majority. Nor do I agree with the majority's puzzling determination that:

> although the statement 'I have been informed' indicates that Huddleston learned the information from a third party and not from Spectrum HR itself, the e-mail was not being used to prove the truth of the matter asserted (that Spectrum HR specifically informed Carolyn Carter that it disclaimed coverage); rather, the email was relevant to show [that] Aon, acting on behalf of Spectrum HR, disclaimed coverage on the insured's behalf. [*Ante* at 12.]

The "inner" statement made by Crawford to Huddleston constituted the only relevant portion of the e-mail. Lexington introduced it to prove that Spectrum had not requested coverage for Kamen's claim.[3] Spectrum never "disclaimed" coverage; rather, it never sought coverage in the first place. "[I]nsurance contracts require a claim to be made for benefits before entitlement can be established." *Morley v Automobile Club of Michigan*, 458 Mich 459, 466; 581 NW2d 237 (1998). *Spectrum* never informed either Huddleston or Lexington of Kamen's lawsuit; AON's information came from Kamen's attorney. Huddleston submitted the claim to Lexington at *Kamen's* request, not Spectrum's; and in doing so, he acted as Kamen's agent, not Spectrum's. Lexington sought to introduce Huddleston's e-mail because it confirmed that Spectrum "did not intend for this matter to be submitted as a claim." In other words, Lexington relied on the third-party hearsay within Huddleston's e-mail to prove that Spectrum never tendered Kamen's claim. The hearsay contained in Huddleston's email proved that Spectrum never submitted the claim, and Lexington introduced it for precisely that purpose.

[3] "Absent a request, an insurer has no duty to defend an insured." *DAIIE v Higginbotham*, 95 Mich App 213, 218; 290 NW2d 414 (1980).

Although the trial court improperly admitted the email, unrebutted evidence proved that Lexington bore no liability as a garnishee to Kamen. Accordingly, I concur with the result reached by the majority.

/s/ Elizabeth L. Gleicher