

No. 38724-7-II

COURT OF APPEALS  
DIVISION II

03/11/15 10:15

---

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY ks  
DEPUTY

---

VICKY FORSYTH,

Appellant,

v.

ZURICH PERSONAL UIM,

Respondent / Cross Appellant.

---

**APPELLANT'S REPLY BRIEF**

---

Stanley J. Rumbaugh, WSBA No. 8980  
John E. Wallace, WSBA No. 38073  
Rumbaugh Rideout Barnett & Adkins  
PO Box 1156  
Tacoma, WA 98401  
Phone: (253) 756-0333

ORIGINAL

## TABLE OF CONTENTS

I. REPY.....	1
A. Zurich Failed To Analyze The Plain Language Of Its Arbitration Clause.....	1
B. Zurich Confuses Judgments Containing Alleged Alleged Errors Of Law With Void Judgments.....	3
C. If Arbitrators Award Damages In Excess Of Policy Limits, There Are Specific Procedures An Insurer Can Utilize To Reduce The Award.....	5
D. Judicial Estoppel Precludes Zurich From Arguing Forsyth Misnamed It .....	8
E. Zurich's Request For Fees Under RAP 18.9 Should Be Denied .....	9
F. Zurich's Throw Away Arguments Under CR 60(b)(4), (6), And (11) Should Be Discarded.....	10
II. CONCLUSION.....	11

## TABLE OF AUTHORITIES

### Cases

<i>Anderson v. Farmers Ins. Co.</i> , 83 Wn. App. 725, 923 P.2d 713 (1996) .....	1, 2, 3, 6, 7
<i>Bjurstrom v. Campbell</i> , 27 Wn. App. 449, 618 P.2d 533 (1980) .....	4
<i>Burlingame v. Consol. Mines &amp; Smelting Co.</i> , 106 Wn.2d 328, 722 P.2d 67 (1986) .....	4
<i>Campbell v. Farmers Ins. Co.</i> , 260 Cal. App. 2d 105, 67 Cal. Rptr. 175 (1968) .....	2, 3
<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.3d 155 (2006) .....	1
<i>Dike v. Dike</i> , 75 Wn.2d 1, 448 P.2d 490 (1968) .....	3
<i>Doe v. Fife Mun. Court</i> , 74 Wn. App. 444, 874 P.2d 182 (1994) .....	3
<i>Filippis v. United States</i> , 567 F.2d 341 (7th Cir. 1977) .....	4
<i>Groves v. Progressive Cas.</i> , 50 Wn. App. 133, 747 P.2d 498 (1987) .....	5
<i>In re Marriage of Maxfield</i> , 47 Wn. App. 699, 737 P.2d 671 (1987) .....	4
<i>Marley v. Dep't of Labor &amp; Indus.</i> , 125 Wn.2d 533, 886 P.2d 189 (1994) .....	3
<i>Miller v. Campbell</i> , 164 Wn.2d 529, 192 P.3d 352 (2008) .....	8

<i>ML Park Place Corp. v. Hedreen</i> , 71 Wn. App. 727, 862 P.2d 602 (1994) .....	5
<i>Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.</i> , 95 Wn.2d 398, 622 P.2d 1270 (1981) .....	4
<i>State v. Keller</i> , 32 Wn. App. 135, 647 P.2d 35 (1982) .....	4
<i>Tribble v. Allstate Ins. Co.</i> , 134 Wn. App. 163, 139 P.3d 373 (2006) .....	3, 4, 7, 9

### Statutes

RCW 7.04.150 .....	1, 5
RCW 7.04.160 .....	5
RCW 7.04.170 .....	5
RCW 7.04.180 .....	5
RCW 7.04.220 .....	6

### Court Rules

CR 60(b) .....	4, 8, 10
----------------	----------

### Other Authorities

1 Kelly Kunsch, <i>Washington Practice: Methods of Practice</i> (4th ed. 1997) .....	4
---	---

## I. REPLY

### A. Zurich Failed To Analyze The Plain Language Of Its Arbitration Clause.

In the Respondent's Brief, Zurich sidestepped the main issue presented to this Court – whether the plain language of Zurich's arbitration agreement empowered the arbitrators to determine the full value of Forsyth's damages. It is only when arbitrators act outside the scope of their delegated authority that an arbitration award is void, and hence the court lacks subject matter jurisdiction to enter judgment thereon.<sup>1</sup> As detailed in Forsyth's opening brief, the plain language of Zurich's arbitration clause gave the arbitrators authority to determine the full amount of her damages.<sup>2</sup> The arbitrators did not exceed that authority.

---

<sup>1</sup> *Anderson v. Farmers Ins. Co.*, 83 Wn. App. 725, 730-31, 923 P.2d 713 (1996) ("If the arbitrators exceed their authority under the agreement, the award is deemed void and the court has no jurisdiction to confirm it under RCW 7.04.150.").

<sup>2</sup> The fact that paragraph A(1) of Zurich's arbitration agreement is separated from paragraph A(2) by the word "or" and a semicolon means that those paragraphs must be read disjunctively. *Cerrillo v. Esparza*, 158 Wn.2d 194, 204, 142 P.3d 155 (2006). Accordingly, the modifying phrase "under this endorsement" found in paragraph A(1) does not carry over and modify the phrase "the amount of damages" in paragraph A(2). *See id.* The plain language of the arbitration agreement authorized the arbitrators to determine "the amount of damages" without restriction. The trial court erred as a matter of law in concluding the modifying language in paragraph A(1) also modified the language in paragraph A(2). *See* VRP at 4-7.

In its discussion of *Anderson v. Farmers Ins. Co.* and the California case of *Campbell v. Farmers Ins. Exch.*,<sup>3</sup> Zurich failed to quote or analyze the language of the arbitration agreements involved in those cases. In both cases, Farmers' arbitration agreement clearly limited the arbitrators' authority to only determine the amount of payment owed under the UIM endorsement. The language of the arbitration agreement in *Anderson* was discussed at length in Forsyth's opening brief at pages 8-11, so will not be reiterated here. In *Campbell*, the arbitration agreement at issue provided in relevant part:

In the event the insured and the Company do not agree that the insured is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle under this Part II *or do not agree as to the amount of payment which may be owing hereunder*, [then the matter can be submitted to arbitration].

260 Cal. App. 2d at 110 (emphasis in original). The court concluded that the plain language of the arbitration agreement limited the arbitrators' authority to determine only the amount of damages payable under the UIM endorsement: "It would be unreasonable to construe the

---

<sup>3</sup> 260 Cal. App. 2d 105, 67 Cal. Rptr. 175 (1968).

words 'owing hereunder' as indicating an intention to confer upon the arbitrator jurisdiction to make an award in excess of policy limits."<sup>4</sup>

Unlike Farmers' arbitration agreements in *Anderson* and *Campbell*, Zurich's agreement granted the arbitrators full authority to determine "the amount of damages" suffered by Forsyth.<sup>5</sup> Since the arbitrators did not exceed their authority, Forsyth's arbitration award was not void.

**B. Zurich Confuses Judgments Containing Alleged Errors Of Law With Void Judgments.**

Judgments based on errors of law do not render them void.<sup>6</sup> As our Supreme Court has held, "[c]ourts do not lose subject matter jurisdiction merely by interpreting the law erroneously."<sup>7</sup> The crux of Zurich's entire argument is based on the faulty premise that judgments in excess of policy limits are void, citing *Tribble v. Allstate Prop. &*

---

<sup>4</sup> *Id.* at 111.

<sup>5</sup> In its brief, Zurich quotes from the Liability section of the insurance policy where it indicates the liability limits are \$100,000. That section did not limit the arbitrators' authority. The arbitrators' authority is determined by the arbitration agreement, paragraphs A and C. Indeed, in determining the scope of the arbitrators' authority in *Anderson* and *Campbell*, the court only looked to the arbitration agreement that granted the authority.

<sup>6</sup> *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 539, 543, 886 P.2d 189 (1994); *Dike v. Dike*, 75 Wn.2d 1, 8, 448 P.2d 490 (1968); *Doe v. Fife Mun. Court*, 74 Wn. App. 444, 450, 874 P.2d 182 (1994).

<sup>7</sup> *Marley*, 125 Wn.2d at 539.

*Cas. Ins. Co.*<sup>8</sup> *Tribble*, a case decided seven years after the judgment at issue, stands for no such rule. Indeed, the words "void" or "jurisdiction" are not used in the opinion. *Tribble* simply states that as a general rule of law, UIM insurers are only responsible for up to the UIM coverage limits.<sup>9</sup>

Here, even if the trial court erred when it entered judgment for the full amount of the arbitration award, such error did not render the judgment void nor nullify the court's jurisdiction. Moreover, if the trial court committed an error of law, Zurich's only remedy was to appeal. Errors of law cannot be attacked in a CR 60(b) motion to vacate.<sup>10</sup> "The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not ... a CR (60)(b) motion."<sup>11</sup>

---

<sup>8</sup> 134 Wn. App. 163, 139 P.3d 373 (2006).

<sup>9</sup> *Id.* at 169.

<sup>10</sup> *Burlingame v. Consol. Mines & Smelting Co.*, 106 Wn.2d 328, 336, 722 P.2d 67 (1986) (citing *State v. Keller*, 32 Wn. App. 135, 647 P.2d 35 (1982); *Pamelin Indus., Inc. v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 622 P.2d 1270 (1981)). See also, 1 Kelly Kunsch, *Washington Practice: Methods of Practice* § 11.5, at 198 (4th ed. 1997) ("The trial court may not correct errors of law on a CR 60(b) motion; the proper method of correcting legal errors is through direct appeal from the final judgment.") (citing *Burlingame*, 106 Wn.2d 328; *In re Marriage of Maxfield*, 47 Wn. App. 699, 737 P.2d 671 (1987)).

<sup>11</sup> *Bjurstrom v. Campbell*, 27 Wn. App. 449, 451, 618 P.2d 533 (1980) (citing *Filippis v. United States*, 567 F.2d 341, 342 (7th Cir. 1977)).

**C. If Arbitrators Award Damages In Excess Of Policy Limits, There Are Specific Procedures An Insurer Can Utilize To Reduce The Award.**

There are several legal procedures available to an insurer to reduce an arbitration award when it exceeds policy limits. First of all, under the arbitration act, RCW 7.04 *et seq.* as it then existed, Forsyth had the legal right to have the court confirm the arbitration award.<sup>12</sup> Likewise, Zurich had the legal right to request the court modify or vacate the award.<sup>13</sup> Had Zurich requested such relief, it would have had the burden of proof to show the relief was proper.<sup>14</sup> Forsyth was under no obligation to seek relief for Zurich. Moreover, such relief had to be sought within 90 days of receipt of the arbitration award.<sup>15</sup> Since Zurich's motion to vacate was not brought within the 90 day deadline, it was untimely.<sup>16</sup>

---

<sup>12</sup> RCW 7.04.150 (1999).

<sup>13</sup> RCW 7.04.160 and .170 (1999).

<sup>14</sup> *Groves v. Progressive Cas.*, 50 Wn. App. 133, 747 P.2d 498, rev. denied, 110 Wn.2d 1016 (1987).

<sup>15</sup> RCW 7.04.180 (1999).

<sup>16</sup> *ML Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 743, 862 P.2d 602, rev. denied, 124 Wn.2d 1005 (1994).

Zurich could also have opposed the motion to confirm the arbitration award; it could have opposed entry of the judgment; it could have moved for reconsideration; or it could have appealed the judgment.<sup>17</sup> Rather than take those reasonable steps to protect its interests, Zurich chose to do nothing.

*Anderson* provides an example of what Zurich could have done. There, the insured received a UIM arbitration award that exceeded the policy limits.<sup>18</sup> The insured moved to confirm the award, and the insurer opposed.<sup>19</sup> The insurer argued that the arbitration award had to be reduced to policy limits.<sup>20</sup> The trial court confirmed the award and entered a judgment.<sup>21</sup> The insurer then moved for reconsideration, arguing this time that the arbitrators exceeded their authority, as expressly limited in the agreement to arbitrate, in awarding more than

---

<sup>17</sup> See RCW 7.04.220 (1999).

<sup>18</sup> *Anderson*, 83 Wn. App. at 728-29.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 729.

<sup>21</sup> *Id.*

policy limits.<sup>22</sup> The trial court affirmed the judgment, and the insurer appealed.<sup>23</sup>

Similarly, in *Tribble*, the insured received a UIM arbitration award of \$35,000, which was within policy limits of \$50,000.<sup>24</sup> The insurer requested a trial de novo.<sup>25</sup> The jury returned a verdict for \$373,542.50.<sup>26</sup> The trial court entered judgment for the full amount of the verdict over the insurer's objection.<sup>27</sup> The insurer then timely appealed.

In the present case, Zurich did not request a trial de novo, as the insurer did in *Tribble*. Zurich did not oppose confirmation of the arbitration award or entry of judgment, as the insurer did in *Anderson*. Zurich did not appeal from the judgment as both insurers did in *Anderson* and *Tribble*. By choice or neglect, Zurich did not pursue the available avenues to reduce the arbitration award. Its attempt now to

---

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> 134 Wn. App. at 166-67.

<sup>25</sup> *Id.* at 166

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

challenge an alleged legal error in the judgment through a CR 60(b) motion should fail.

**D. Judicial Estoppel Precludes Zurich From Arguing Forsyth Misnamed It.**

Under the doctrine of judicial estoppel, a party is prohibited from asserting one position and later seeking an advantage by taking an inconsistent position.<sup>28</sup> The doctrine will be applied when (1) a party's later position is inconsistent with its earlier position, (2) judicial acceptance of the inconsistent position in a later proceeding would create the perception that either the first or second tribunal was misled, and (3) the party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.<sup>29</sup>

Here, Zurich maintained throughout the arbitration that it was properly named as "Zurich Personal UIM."<sup>30</sup> The correspondence between Forsyth's counsel and Zurich's counsel identified Zurich as the

---

<sup>28</sup> *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008).

<sup>29</sup> *Id.*

<sup>30</sup> *See, e.g.*, CP 38.

insurer.<sup>31</sup> Zurich represented to the trial court that it was properly named.<sup>32</sup> Now, for the first time, it argues that Forsyth misnamed it. Its current position is inconsistent with its prior positions, indicating the arbitrators and the trial court were misled. Zurich is attempting to obtain an unfair advantage and cause unfair detriment to Forsyth. Accordingly, Zurich/Assurance Company of America should be estopped from claiming Forsyth misnamed it.

**E. Zurich's Request For Fees Under RAP 18.9 Should Be Denied.**

As shown in Forsyth's opening brief and this reply brief, Forsyth's appeal has merit. In the similar, but distinguishable, cases of *Anderson* and *Tribble*, the court never suggested the appeals or the plaintiff's positions were frivolous. Further evidence that Forsyth's appeal is not frivolous is the fact the Commissioner for the Court of

---

<sup>31</sup> See, e.g., CP 40-49, 57-59, 81-84.

<sup>32</sup> See, e.g., CP 26 (declaration of William J. O'Brien wherein he declares under penalty of perjury "I am the attorney of record for Zurich Personal UIM..."). See also, CP 19 (declaration of Timothy S. McGarry wherein he declares under penalty of perjury, "I was the attorney of record for Zurich Personal UIM...").

Appeals, without requesting a response from Forsyth or hearing oral argument, rejected Zurich's motion on the merits.<sup>33</sup>

**F. Zurich's Throw Away Arguments Under CR 60(b)(4), (6) And (11) Should Be Discarded.**

Zurich briefly, without citation or analysis, claimed that CR 60(b)(4), (6), and (11) provide grounds for relief. With regard to its CR 60(b)(4) argument, the only misrepresentation alleged by Zurich is the accusation that Forsyth's counsel, at the hearing to confirm the arbitration award, misrepresented that Zurich's counsel did not object to the entry of judgment. The fact that Zurich's counsel did not appear at the hearing despite receiving adequate notice, did not submit any pleadings in opposition to the motion, did not request reconsideration or appeal despite receiving a copy of the order and judgment, indicates Forsyth's counsel's representation was truthful.

Zurich's arguments pertaining to CR 60(b)(6) and (11) are likewise devoid of merit. The judgment has not been satisfied and Forsyth never agreed Zurich's partial payment was a satisfaction of the judgment. Equity does not require Zurich, who failed to exercise due diligence and employ numerous procedural avenues to reduce the

---

<sup>33</sup> Zurich's request for fees before the trial court under CR 11 should likewise be denied. The arguments Forsyth raises in her motion to strike Zurich's cross appeal are incorporated into this brief by this reference.

judgment, be relieved from it. Zurich has nobody to blame for the judgment but itself. No other grounds exist for vacating the judgment. Forsyth merely did what she had a right to do – reduce the arbitration award to a judgment.

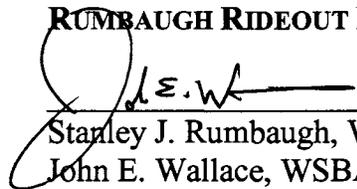
## II. CONCLUSION

The trial court erred as a matter of law by misinterpreting the arbitration agreement. It added language to the agreement that was not there. The plain language of Zurich's arbitration agreement delegated authority to the arbitrators to determine the full value of Forsyth's damages. They did not exceed that authority. As such, the arbitration award was not void, and hence, the court had jurisdiction to enter judgment thereon. If the trial court committed a legal error in not reducing the judgment to the policy limits, such legal error could only be challenged by a direct appeal. A party cannot seek relief from legal errors in a CR 60(b) motion. The judgment should be reinstated.

DATED this 9<sup>th</sup> day of July, 2009.

Respectfully submitted,

**RUMBAUGH RIDEOUT BARNETT & ADKINS**

  
Stanley J. Rumbaugh, WSBA No. 8980  
John E. Wallace, WSBA No. 38073  
Attorneys for Vicky Forsyth

**CERTIFICATE OF SERVICE**

I certify that on the date entered below, I sent via fax and legal messenger a copy of this brief to:

William J. O'Brien  
Attorney at Law  
999 Third Ave., Suite 805  
Seattle, WA 98104

DATED this 9<sup>th</sup> day of July, 2009.



Pamela L. Rainwater  
Pamela L. Rainwater  
Paralegal to John E. Wallace

CO. III - 99 JUL 16 2009  
STATE OF WASHINGTON  
BY Kse  
K. S. ELLIOTT  
CLERK OF SUPERIOR COURT