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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

NO. 38724-7-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

VICKY FORSYTH,

Appellant

v.

ZURICH PERSONAL UIM

Respondent/Cross Appellant

BRIEF OF RESPONDENT/CROSS APPELLANT

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I. INTRODUCTION

Stanley J. Rumbaugh, counsel for Appellant, Vicky Forsyth ("Forsyth" hereinafter), obtained a UIM award for Forsyth in the amount of \$150,000.00 at UIM arbitration. Thereafter, he acknowledged to Timothy McGarry, then counsel for Assurance Company of America¹ that he knew the award exceeded the \$100,000.00 contractual limits of the UIM policy. Mr. Rumbaugh then accepted the check in payment of \$100,000.00, the full contractual limits of the UIM policy.

Thereafter, on August 6, 1999, Mr. Rumbaugh presented an order affirming the full amount of the award and obtained a judgment for \$150,000.00, without informing the court of the facts stated above, not even that he had been paid the full \$100,000.00 policy limits. Rather, Mr. Rumbaugh misrepresented to the court that counsel for Respondent did not oppose the order and wrote "N/A Telephone App'l" on a signature line for Mr. McGarry. However, the copy of the order and judgment he then sent to Mr. McGarry, with a clerk's filing stamp on the judgment, had nothing written on counsel's signature line, and it was not a copy of the judgment filed with the court.

¹ The UIM insurer that issued the policy to Forsyth is Assurance Company of America. There is no entity "Zurich Personal UIM"

Understandably, Mr. Rumbaugh never took any action to enforce the "excess" portion of the judgment until nearly eight years after entry. After Mr. Rumbaugh filed a motion for supplemental proceedings to collect the judgment (against a non-existent entity), Zurich North America retained its staff counsel to move to vacate the judgment. Judge Kitty-Ann van Doorninck, who had signed the judgment in 1999, promptly vacated the judgment at the hearing, without asking counsel for Respondent to say a word in argument supporting the motion. Why CR 11 sanctions were not awarded is unclear to the respondent.

II. RESPONDENT'S ASSIGNMENTS OF ERROR

Under the circumstances of the original presentation to Judge van Doorninck of the order and judgment, and the disingenuous effort eight years later to enforce the "excess" judgment, did the court err in not awarding CR 11 sanctions to the respondent?

Should this court award RAP 18.9 sanctions to the Respondent and against counsel for the Appellant?

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court properly vacate the judgment in excess of the UIM policy limits under CR 60(b)(5) because the judgment is void; and/or under CR 60(b)(4) for reasons of fraud, misrepresentation, or misconduct of Forsyth; and/or under; and/or under CR 60(b)(6) because the judgment has

been satisfied, released or discharged, or because it is no longer equitable that the judgment should have prospective application; and/or under CR 60(b)(11) because justice requires relief from operation of the judgment?

2. Did Mr. Rumbaugh's presentation of the original order and judgment violate CR 11 and his efforts to enforce the "judgment" eight years later (including this appeal) constitute a renewed violation of CR 11? Is the appeal from the order vacating the judgment a frivolous appeal?

IV. STATEMENT OF THE CASE

This matter arises out of a UIM arbitration between Vicky Forsyth, the insured, under policy number XA-25580300 issued by Assurance Company of America, the insurer. CP 29-36. Policy limits are \$100,000.00. CP 30. The arbitration concluded with an award of \$150,000.00 by a three-arbitrator panel on June 4, 1999. CP 37-38. The arbitrators were not told the limits of the insurance policy, as is common in order not to influence the arbitrators one way or the other. On July 8, 1999, a check for \$100,000.00, the full amount of the policy limits, was tendered in payment of the award, and accepted. CP 40-47

Mr. Rumbaugh's letter dated July 13, 1999 acknowledges the arbitration award exceeded policy limits by \$50,000.00. CP 43-44. He the makes a pitch for settlement of a potential bad faith claim, noting that pursuit of such a claim by Forsyth might expose Zurich to further

damages, perhaps as much as the \$50,000.00 by which the award exceeded limits. CP 44. He then offered to "settle" the bad faith claim for \$25,000.00. CP 44. As is abundantly clear from his letter, and is undisputed, there was no bad faith claim before the arbitrators, no award of bad faith damages and subsequently, no settlement of such a claim. Finally, Mr. Rumbaugh asked for permission to negotiate the \$100,000.00 check and represented that he would then execute an acknowledgment that the funds have been paid and "... constitute the policy limits of Ms. Forsyth's uninsured motorist coverage." CP 44.

Mr. McGarry replied by letter of July 29, 1999, authorizing negotiation of the check. CP 45-47. Zurich has not been able to locate a copy of the back of the \$100,000.00 check, but records indicate that it was paid on August 9, 1999, thus likely negotiated and deposited on or before August 6, 1999. CP 26, 41.

Mr. Rumbaugh, despite knowing that UIM policy limits had been paid and accepting said payment, and despite knowing that there was no basis whatsoever for entry of a judgment in excess of the policy limits (because no bad faith claim had been adjudicated), proceeded to have entered a judgment on the arbitration award in the sum of \$150,000.00 CP 51-52. The report of the proceedings establishes that Mr. Rumbaugh did

not advise Judge van Doorninck that policy limits had been paid and accepted, or that the judgment exceeded UIM policy limits by \$50,000.00. RP 3-4, Aug. 6, 1999.

In fact, Mr. Rumbaugh actively misrepresented to Judge vanDoorninck that Mr. McGarry left him a message that "...he did not oppose this order." RP 3. Mr. McGarry denies that he gave any such approval. CP 19. How can we resolve such a conflict between two members of the bar? Respondent suggests that the Court consider that the copy of the Judgment on Arbitration Award enclosed with Mr. Rumbaugh's letter to Zurich on October 5, 2007, has the signature block for Mr. McGarry filled in with a notation that he approved by telephone the content and form of the Judgment. CP 49-52. It is a copy of what was filed with the court. However, the copy of the Judgment on Arbitration Award that was sent by counsel to Mr. McGarry in 1999, after entry contains no such representation. CP 23-25.

Thus, counsel for Forsyth misrepresented to Judge van Doorninck that Mr. McGarry approved the Judgment as to content and form, and then provided Mr. McGarry a "conformed" copy of the Judgment that has no notation at all in his signature block.

Over eight years later, on October 5, 2007, attorney Rumbaugh wrote to Zurich North America demanding payment of \$50,000.00 plus prejudgment interest at twelve percent per annum. CP 49-52. As the Court can see from the letter and attachments, Mr. Rumbaugh confirms payment of \$100,000.00 and represents that \$50,000.00, plus interest, is the unpaid balance of a judgment entered in 1999.

One might wonder at the opening sentence of the letter: "After reviewing our file ... it has come to my attention that Vicky Forsyth has an outstanding remaining judgment amount against Zurich" CP 49. Over eight years after entry of the judgment and the payment of \$100,000.00, this just came to his attention? What about entry of a partial satisfaction of judgment on March 28, 2007? CP 54-55. What brought that on? By the way, Mr. Rumbaugh never provided Respondent or its attorneys with a copy of the partial satisfaction of judgment before his letter to Zurich of October 5, 2007.

The matter was referred by Zurich North America to its staff counsel, as Mr. McGarry was with this office (f/k/a Law Office of J.J. Hutson) when he defended the insurer on the Forsyth UIM arbitration claim. CP19. After Zurich forwarded Mr. Rumbaugh's October 5, 2007 letter to counsel, we pulled the old file from storage. JJ Hutson of our

office responded by calling Mr. Rumbaugh on October 10, 2007, and writing to him that same day, enclosing a copy of *Anderson v. Farmers Insurance Co.*, 83 Wn.App 725, 923 P.2d 713 (1996). CP 57-63. Mr. Rumbaugh wrote to Mr. Hudson the next day seeking a copy of the UIM portions of the Forsyth policy. CP 65. (He did not have a copy?) It appears the letters crossed in the mail. By letter of October 26, 2007, Mr. Hutson sent attorney Rumbaugh the relevant policy provisions, including those provided to the trial court. CP 67-79.

This should have resolved the matter, and Respondent heard nothing at all from attorney Rumbaugh for nearly six months. Therefore, Mr. Hutson wrote to him on April 18, 2008, enclosing a Satisfaction of Judgment, asking that Mr. Rumbaugh execute the satisfaction and return to us for filing. CP 81. Respondent heard nothing further from Mr. Rumbaugh until June 16, 2008, when we received his letter of June 13, 2008, in which he attempts to justify collection of amounts in excess of the policy limits, and states that "Ms. Forsyth is not making a contractual claim against Zurich. She is simply enforcing a valid judgment against Zurich." CP 86-88. Mr. Hutson left our firm for another opportunity at the end of May 2008. On November 19, 2008, we were served with copies of a motion for an order directing "Zurich Personal UIM" to appear for

supplemental proceedings. CP 90-98. Believing that this nonsense must be brought to an end, Zurich North America authorized us to file a motion to vacate the judgment or, alternatively, obtain a full satisfaction of judgment.

At the hearing on the motion to vacate, Judge van Doorninck directed a few questions to counsel for Forsyth, then promptly entered an order vacating the judgment. RP 3-8, Dec. 12, 2008. CR 11 sanctions were not awarded, and we did not press this with the court, but in response to this baseless appeal seek CR 11 sanctions for the lower court proceedings and RAP 18.9 for this frivolous appeal.

V. ARGUMENT

A. Standard of Review: As the court in *Shaw v. City of Des Moines*, 109 Wn. App. 896, 900-901, 37 P. 3rd 1255 (2002), stated:

A trial court's decision whether to vacate a judgment or order under CR 60 is reviewed for an abuse of discretion. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 309, 989 P.2d 1144 (1999), review denied, 140 Wn.2d 1026 (2000). The decision will not be overturned on appeal unless it plainly appears that the trial court exercised its discretion on untenable grounds or for untenable reasons. *Stoullil v. Edwin A. Epstein, Jr., Operating Co.*, 101 Wn. App. 294, 297, 3 P.3d 764 (2000). The civil rules contain a preference for deciding cases on

their merits. Vaughn, 119 Wn.2d at 280. However, "weighted against this principle is the need for a structured, orderly judicial system." Luckett, 98 Wn. App. at 313-14. In considering whether to grant a motion to vacate under CR 60, a trial court should exercise its authority liberally and equitably to preserve the parties' substantial rights. Vaughn, 119 Wn.2d at 278.

Forsyth cannot establish an abuse of discretion by Judge van Doorninck in vacating the judgment.

B. CR 60(b) Vacation of Judgment. Firstly, the Judgment on Arbitration Award is void for lack of jurisdiction under CR 60(b)(4).

The award exceeds the limits of the insurance contract under which arbitration was held, and is void. In a UIM arbitration, the arbitrators are not advised of the policy limits. Regardless of the amount of the award, "... as a matter of law, the insured [Forsyth] is only entitled to recover damages up to the insurance policy limits." *Tribble v. Allstate*, 134 Wn.App. 163, 169, 139 P.3d 373 (2006). In this case, the UIM policy limits are \$100,000.00, as counsel for Forsyth well knew when he negotiated the \$100,000.00 check in payment of the award on August 6, 1999, but proceeded to enter a judgment for \$150,000.00 the same day.

To the extent the arbitration award exceeded the limits of the UIM policy, it is void. RCW 7.04.150 provides that a party may apply to the court for an order confirming the arbitration award, and

"... the court shall grant such an order **unless the award is beyond the jurisdiction of the court**, or is vacated, or corrected...."

(emphasis added). The court in *ACF Property Mgmt., Inc. v. Chaussee*, 69 Wn.App. 913, 920-921, 850 P.2d 1387 (1993), emphasized this same portion of the statute in holding:

"... arbitration in Washington 'depends for its existence *and for its jurisdiction* [court's emphasis] upon the parties having contracted to submit to it, and upon the arbitration statute...." **A court has no jurisdiction to enter a void judgment ... and, likewise, has no jurisdiction to confirm a void arbitration award.**"

(emphasis added).

It is beyond question in this state that when an arbitration award exceeds the contractual limits of the UIM policy, the award is void to that extent and a court has no jurisdiction to confirm the award. Forsyth can cite to no case in which such an award exceeding policy limits has ever been satisfied or has not been vacated. This issue does not come up often, and is always based upon some theory that the arbitrators had authority to hear and did make an award not limited by the policy limits provision of the policy, such as for bad faith against the insurer. There is no such issue

here. Mr. Rumbaugh simply took the damage award he knew to be in excess of policy limits, and had it reduced to judgment, knowing that no bad faith claim had been before the arbitration panel, and no award for bad faith damages was part of the arbitration award. That is why he tried to "settle" a bad faith claim for \$25,000.00.

The case of *Anderson v. Farmers Insurance Co.*, supra, is controlling. *Anderson* involved a Farmers insurance policy with UIM limits of \$25,000.00. The arbitrators, who were not told the limits, awarded Anderson \$56,000.00. The court vacated the judgment, holding that "... the policy language limited the arbitrators' authority to the amount of the UIM limits...." *Anderson* at 728. There were set-off issues for the recovery by Anderson from the tortfeasor (the underinsured motorist who had \$25,000 coverage), but the balance of the arbitrators' award of \$31,000 still exceeded the Farmers UIM limits. The court held that

"...the arbitrators could award no more than the limit of the UIM coverage. ... Because this difference, \$31,000, exceeds Anderson's UIM limit, Anderson was entitled to a judgment only for the full amount of her UIM limit -- \$25,000."

Anderson at 732.

The *Anderson* court noted at 733: "Here, the arbitrators were asked

only to determine the *value* of Anderson's injuries." (Emphasis added)

In Forsyth's case, the only issue before the arbitrators was the value of her injuries, i.e., damages. The UIM coverage available to Forsyth is and was \$100,000.00, regardless of the amount of damages awarded by the arbitrators. The policy provides:

"The limit of Bodily Injury Liability shown in the Schedule or in the Declarations for each person for Underinsured Motorists Coverage is **our maximum limit of liability for all damages....**"

(emphasis added, CP 79).

This is the agreement between Forsyth and her insurer: they can enter into binding arbitration to determine damages to the insured (Forsyth), but at the end of the day, the maximum limit of liability of the insurer under the policy to the insured is policy limits of \$100,000.00. In this case, policy limits were paid and accepted by Forsyth on the same day (or before) the excessive judgment was entered. That judgment is void, because the award itself is considered void as in excess of the limits of liability of the insuring agreement. Not to mention that it was entered against "Zurich Personal UIM" and not the insurer.

Forsyth argues that the arbitrators' award of damages, regardless of amount, is binding unless the insurer demands a right to trial within 60

days of the arbitrators' decision. Clearly, this provision could apply if the insurer or the insured did not want to accept the award and sought a trial of the damage issues. But, if the verdict or award at a trial exceeded the policy limits, can anyone seriously imagine that the policy limits provision would not limit the liability of the insurer to the limits of the policy? Forsyth's strained policy construction argument simply reads out of the UIM policy the "LIMIT OF LIABILITY" provision of the contract which emphatically states that the \$100,000.00 limits shown in the Schedule "... is our maximum limit of liability **for all damages** ... This is the most we will pay regardless" CP 79, emphasis added).

The policy language in section Arbitration,C,2 has no bearing on the issue before this court. Neither Forsyth or the insurer wanted a trial at which a judge or jury would be able to award an amount more or less than the arbitrators. Forsyth knew she could receive no more than limits regardless of what the arbitrators awarded or a jury or judge could award at a subsequent trial. (Hence, no effort to collect the "excess" \$50,000 of the judgment for nearly eight years). The insurer was content to pay its policy limits in satisfaction of its contractual obligation to Forsyth under the policy, did so, and Forsyth accepted the payment.

As the court held in **ACF Property Management v. Chaussee 69**

Wn. App. 913, 919, 850 P.2d 1387 (1993) :

... [a]n agreement for the submission of a dispute to arbitration defines and limits the issues to be decided. The authority of the arbitrator is wholly dependent upon **the terms of the agreement** of submission. **The arbitration award** must concern only those matters included within the agreement for submission **and must not exceed the powers established by the submission.** (Footnote omitted. Italics ours.) Sullivan v. Great Am. Ins. Co., 23 Wn. App. 242, 246, 594 P.2d 454 (1979). Cf. Allied Fid. Ins. Co. v. Ruth, 57 Wn. App. 783, 791, 790 P.2d 206 (1990) ("**a judgment is void for lack of jurisdiction and is assailable at any time**").

(emphasis added). There is no dispute, the award exceeded the limits of the Forsyth insurance policy. Counsel for plaintiff acknowledged this further by his written offer to "settle" an unstated and untried bad faith claim for \$25,000 "... or one-half of the amount by which the arbitrator's award exceeded the policy limits." CP 43-44.

The court in *ACF v. Chaussee*, supra at 922, made crystal clear that vacation of such a judgment is mandated:

"... once the trial court determines that an arbitration award is void and, thus, beyond its jurisdiction to confirm, the court's inquiry ends. RCW 7.04.150 does not require the court to further determine whether any grounds exist for vacating, modifying, or correcting the award. See RCW 7.04.150 (the court shall grant an order confirming the award "**unless the award is beyond the jurisdiction of the court, or is vacated, modified, or corrected**" (italics ours))."

(emphasis added).

Interestingly, there is additional and very recent authority that is not sighted by Forsyth's attorney, even though he represented the appellant in that case: *Little v. King*, 147 Wn.App. 883 (2008). In *King*, Mr. Rumbaugh obtained a default judgment against an uninsured driver for \$2,155,835.58, and presented it to his client's UIM carrier, St. Paul Insurance Company for payment. Apparently, St. Paul paid its policy limits of \$2,000,000.00, and there is no indication that Mr. Rumbaugh sought to enforce the judgment for more than the policy limits. The main issue for review was whether the contract or tort judgment interest rate would apply.

However, relevant to our case, the opinion explains the nature of UIM insurance and Washington law in the event of an award or a judgment in excess of UIM policy limits:

The insurer must pay its insured's uncompensated damages "until the underinsurance policy coverage is exhausted or until the insured is fully compensated, whichever occurs first." *Mencel v. Farmers Ins. Co. of Wash.*, 86 Wn. App. 480, 484, 937 P.2d 627 (1997) (quoting *Hamilton v. Farmers Ins. Co. of Wash.*, 107 Wn.2d 721, 723, 733 P.2d 213 (1987)). **Because a UIM insurer's liability is limited, as a matter of contract, by the policy, a judgment entered on a jury award in excess of the policy limits must be limited to the amount of the policy limits.** *Tribble v. Allstate Prop. & Cas. Ins. Co.*, 134 Wn. App. 163, 169-70, 139 P.3d 373 (2006).

(emphasis added) *King, supra at 888*. The court went on to hold that the contract rate of interest, rather than the rate for judgments based upon tort, should apply, noting:

Today's decision is consistent with earlier opinions discussing the contract-based nature of UIM claims. *See Barcom*, 112 Wn.2d. at 579-80 (the six-year contract statute of limitation applies to an insured's claim for UIM benefits against his insurer); *Tribble*, 134 Wn. App. 163 (**judgment for insured motorist against insurer in UIM action could not exceed UIM policy limits; insurer was contractually obligated to pay only up to the policy limits**).

(emphasis added). *King, supra at 889-890*.

Therefore, whether an arbitrator or a jury is determining the amount to be awarded an UIM claimant against its insurer, the court presented pleadings to reduce the award to judgment cannot enter a judgment in excess of the contractual UIM policy limits. If it does, it is void.

In closing on this issue, research reveals no case in Washington in which an arbitration award in excess of policy limits has been enforced, by whatever means. No Washington case has stated as clearly the logic of what is so wrong about this attempt by Forsyth to craft such a clever argument for having an insurer pay its insured an amount in excess of policy limits, as the California case of *Campbell v. Farmers Ins. Exchange*, 260 Cal. App. 2nd 105, 111, 67 Cal. Rptr. 175 (1968), in which the court held:

The statutory requirement for arbitration is limited to the issues relating to the liability **of the uninsured motorist** and the amount of damages recoverable from him; it does **not include the issue of the amount of money the insurance company is obligated to pay the insured.** (*Farmers Ins. Exchange v. Ruiz, supra*, p. 744; *Fisher v. State Farm Mut. Auto. Ins. Co., supra*, pp. 751-753.) The italicized portion of the arbitration clause in the present case relates not merely to the amount of damages recoverable from the uninsured motorist, but includes the issue of the amount payable under the terms of the policy. (*Fisher v. State Farm Mut. Auto. Ins. Co., supra.*)

The provisions of the arbitration clause, however, do not encompass disputes concerning interpretation of the insurance contract. It would be unreasonable to construe the words "owing hereunder" as indicating an intention to confer upon the arbitrator jurisdiction to make an award in excess of the policy limits.

In Forsyth's arbitration, the arbitrator determined the damages that would be legally recoverable from the uninsured driver, not from the insurer. CP 33. Under the ARBITRATION clause A. 2., if the insurer and insured do not agree as to the amount of those damages, then they can arbitrate the issue. No party then disputed the amount of damages that would be legally recoverable from the uninsured driver. However, that is not the same as saying the arbitrator determined what amount Assurance Company of America would have to pay to Forsyth under its UIM policy. Nothing in law or in fact justifies entry of an award the results in a judgment against the insurer for an amount exceeding the contract limits of the policy.

Secondly, the conduct of counsel for Forsyth in accepting the policy limits payment, then presenting a judgment for the full amount of the award, without telling the court what he was doing and that policy limits had been paid, supports the vacation of the judgment under CR 60(b)(4). It is clear from Judge van Doorninck's conduct at the hearing, her demeanor and swift resolution of this matter that she never would have entered the judgment had the facts been revealed to her by counsel for Forsyth.

Thirdly, as provided in CR 60(b)(6) the judgment was satisfied on or before the date it was entered, or it is certainly no longer equitable that the judgment have prospective application, following payment of the \$100,000.00 contractual limits of the policy to Forsyth. Obviously, Mr. Rumbaugh accepted the \$100,000.00 in full satisfaction of the award/judgment, although why he proceeded to enter a judgment against a non-existent entity and failed to advise the court that he was entering judgment in excess of policy limits (that he had already accepted), is a mystery. However, accept it he did until something prompted him to make this spurious claim nearly eight years after obtaining the judgment. The court's decision to vacate the judgment is well grounded in CR 60(b)(6). The decision can also be supported based upon accord and satisfaction.

See, *Paopao v. DSHS*, 145 Wn. App. 40, 46 (2008). However, this may require remand to the lower court for entry of findings of fact and conclusions of law.

Fourthly, the court's decision to vacate the judgment is well grounded upon CR 60(b)(11). Turning the language of the rule around a bit, let us ask: "What reason would justify enforcing this judgment that Mr. Rumbaugh knew exceeded the contractual policy limits owed to his client; that was entered with active misrepresentation to the court and intentional omission of the true facts (that he accepted the payment of policy limits); that is a judgment not against the party contracting with his client under the UIM policy, but a non-existent entity; and, that Mr. Rumbaugh sat on for eight years, until he came up with this belated and disingenuous theory to obtain \$50,000, plus post judgment interest (approximately \$100,000.00 at this point) from an insurer that promptly satisfied its obligation to pay policy limits in August of 1999? Respondent submits that there is every reason to vacate this judgment under CR 60(b)(11). Certainly, it was not an abuse of discretion for Judge van Doorninck to do so.

C. CR 11 and RAP 18.9 Relief. This appeal is a continuation of a belated, disingenuous attempt to collect \$50,000.00 over the insurers'

contractual policy limits, plus post judgment interest from August 6, 1999, that Mr. Rumbaugh began by seeking supplemental proceedings to enforce a judgment against "Zurich Personal UIM" eight years after the fact.² We need only recognize that no competent attorney would fail to pursue such a sum of money if it were actually owed by a solvent insurer under a valid judgment for such a period of time, at least without risking a bar complaint by his client. RPC 1.3 One can only wonder what prompted Mr. Rumbaugh to "go for it" eight years after having been paid policy limits on this claim. Is this the kind of lawyering that we want to encourage or discourage?

Recently, this court noted that

An appeal is frivolous when, considering the record in its entirety and resolving all doubts in favor of the appellant, no debatable issues are presented upon which reasonable minds might differ; i.e., it is so devoid of merit that no reasonable possibility of reversal exists.

Marriage of Meredith, 148 Wn.App. 887, 906 (2009).

The proceedings in the lower court violate CR 11 in that Mr. Rumbaugh proceeded knowing that his belated farce was not well grounded in law or fact, and imposed for the improper purpose of

² By August of 2009, the post-judgment interest running for 10 years would be approximately \$60,000 alone. So, after laying in the grass for eight years, until thinking

obtaining approximately \$100,000, or more, from an insurer that properly paid its policy limits to his client nearly ten years ago.

This appeal is frivolous and Mr. Rumbaugh (not his client who may or may not even know about this foolishness), should be held responsible for payment of terms in the amount of all fees and costs incurred by Respondent on appeal. Upon entry of a decision awarding Respondent the right to reasonable attorneys fees and expenses as terms for prosecuting this frivolous appeal, Respondent will present an affidavit of fees and expenses to support the award as provided in RAP 18.9(d).

VI. CONCLUSION

The Order Granting Motion to Vacate Judgment should be affirmed under CR 60(b). Alternatively, this court should remand to Judge van Doorninck for entry of findings of fact and conclusions of law as to whether the judgment, even if not vacated, is valid on its face as not entered against the insurer that contracted with Forsyth and/or was satisfied by payment and acceptance of policy limits. In either case,

up this specious claim, he wants the insurer to pay \$110,000.00 over the policy limits, after promptly paying policy limits to its insured even before entry of the judgment.

sanctions under CR 11 and/or RAP 18.1 should be awarded against Mr.
Rumbaugh and in favor of Respondent.

RESPECTFULLY SUBMITTED this 5th day of June, 2009.


William J. O'Brien, WSBA No. 5907
Attorneys for Respondent/Cross Appellant

FILED
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STATE OF WASHINGTON
BY
DEPUTY

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COURT OF APPEALS
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OF THE STATE OF WASHINGTON

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ZURICH PERSONAL UIM

Respondent/Cross Appellant

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STATE OF WASHINGTON)
) ss:
COUNTY OF KING)

Sheela A. Schlorer, being first duly sworn upon oath, deposes and says:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

I certify that on the 8TH day of June, 2009, I caused a true and correct copy of the:

1. *Brief of Respondent/Cross Appellant; and*
2. *Certificate of Service.*

to be served on the following counsel of record:

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
COUNSEL FOR RESPONDENT	
Stanley J. Rumbaugh	<input checked="" type="checkbox"/> Via U.S. Mail
John E. Wallace	<input type="checkbox"/> Via ABC
Rumbaugh, Rideout, Barnett & Adkins	<input checked="" type="checkbox"/> Via Facsimile (253)756-0355
820 A Street Suite 220	
Tacoma WA 98401	
ORIGINAL TO:	
Clerk of Court	<input checked="" type="checkbox"/> Via U.S. Mail
Court of Appeals of the	<input type="checkbox"/> Via ABC
State of Washington, Division II	<input type="checkbox"/> Via Facsimile
950 Broadway, Suite 300, MS TB-06	
Tacoma, WA 98402-4427	


Sheela A. Schlorer

SUBSCRIBED and Sworn to before me this 8th day of June, 2009.

Susan C. Poulsen
(Print Notary Name)

NOTARY PUBLIC in and for the
State of Washington, residing
at Bainbridge Island.
My Commission Expires: 9-29-12

