

FILED
October 10, 2016
Court of Appeals
Division I
State of Washington

No. 75147-6-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

OAK HARBOR FREIGHT LINES, INC.,

Respondent,

v.

XL INSURANCE AMERICA, INC.,

Appellant.

APPELLANT'S OPENING BRIEF

William H. Walsh, WSBA No. 21911
E-mail: wwalsh@cozen.com
Robert D. Lee, WSBA No. 46682
E-mail: rlee@cozen.com
COZEN O'CONNOR
999 Third Avenue, Suite 1900
Seattle, WA 98104
Telephone: 206.340.1000
Toll Free Phone: 800.423.1950
Facsimile: 206.621.8783

*Attorneys for Appellant
XL Insurance America, Inc.*

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I. INTRODUCTION

This appeal concerns whether a mandatory arbitration provision contained in a contractual agreement between XL Insurance America, Inc. (“XL”) and Oak Harbor Freight Lines, Inc. (“Oak Harbor”) can be enforced under Washington law. The agreement was negotiated and executed by the parties in order to address their respective rights with regard to collateral posted by Oak Harbor as security for its obligations on a separate workers’ compensation policy with XL.

Following a dispute regarding Oak Harbor’s inability to meet its collateral obligations, Oak Harbor refused arbitration and filed suit in an attempt to avoid its obligations under the contract and in particular, have the arbitration provision ruled void and unenforceable. Faced with XL’s motion to dismiss and compel arbitration, Oak Harbor put forth the theory that the agreement was an “insurance contract” under the Washington Insurance Code and thus subject to the Code’s prohibition on arbitration provisions in insurance policies. The trial court ultimately agreed and denied XL’s motion to dismiss and compel arbitration.

However, by finding the agreement to be an “insurance contract” the trial court fused the collateral agreement and the workers’ compensation policy into a new hybrid insurance contract, selectively picking portions of the two separate agreements without fully analyzing

and discerning the intent of the parties. The trial court justified its decision under the guise of complying with the Insurance Code. The trial court, however, erred in its statutory construction analysis and more importantly, failed to adhere to the Washington Supreme Court's decision in *State v. Mau*, 178 Wn.2d 308, 308 P.3d 629 (2013), which found the term "insurance contract" to be synonymous with the insurance policy itself.

The agreement is not an "insurance contract" for the simple reason that it did not provide Oak Harbor with insurance coverage. The agreement was negotiated and executed by two sophisticated business entities in order to address their rights and obligations as to the collateral. The agreement does not transfer risk. It does not address scope of coverage, period of coverage, or any of the other factors statutorily required in an insurance policy. Accordingly, there was no basis under the Code to support the trial court's finding that the agreement was an "insurance contract."

Further, the trial court erred in finding, in the alternative, that the agreement was incorporated into the workers' compensation policy. By creating a new hybrid insurance contract, the trial court ignored express integration provisions contained in both the agreement and policy.

Moreover, the trial court was statutorily precluded from incorporating parol evidence into a policy which was undisputedly unambiguous.

Accordingly, the trial court's order should be reversed as there was no legal basis under the Washington Insurance Code to justify disregarding the express intent of the parties in an agreement that was not an "insurance contract."

II. ASSIGNMENTS OF ERROR

1. Did the trial court err in finding that the Insurance Program Agreement was an "insurance contract" under the Insurance Code, RCW 48, and subject to RCW 48.18.200 where the agreement relates strictly to the parties' rights and obligations relating to collateral and does not provide Oak Harbor with insurance coverage or facilitate the transfer of risk?

2. Did the trial court err in finding, in the alternative, that the Insurance Program agreement was incorporated into the policy where the policy and agreement each contain separate integration clauses, the agreement is not an endorsement of the policy and the policy terms are unambiguous?

III. STATEMENT OF THE CASE

A. The Insurance Program Agreement

From 2006 to 2011, Oak Harbor negotiated and purchased a Workers' Compensation and Employers Liability Policy (the "Policy") from XL. CP 2. Pursuant to the Policy, XL assumed liability for the payment of workers' compensation claims made by Oak Harbor employees. CP 3. In turn, Oak Harbor was required to reimburse XL for any claims paid up to the deductible amount of \$350,000 per claim. *Id.* In order to secure these reimbursement and payment obligations, Oak Harbor agreed to post collateral. *Id.*

To address the rights and obligations of the parties with respect to the collateral, Oak Harbor and XL entered into a separate agreement titled, the Insurance Program Agreement (the "Agreement"). CP 46-60.

Pursuant to Article V, Section A of the Agreement, Oak Harbor was required to deliver to XL a letter of credit or other collateral in an amount and form acceptable to XL. CP 51. Oak Harbor posted a \$3.2 million letter of credit issued by Frontier Bank. CP 4. In 2010, the Frontier Bank letter of credit could no longer be guaranteed. CP 5.

Pursuant to Article V, Section F of the Agreement, Oak Harbor was required to provide XL with replacement collateral but was unable to do so. CP 5-6, 19. Without an acceptable form of collateral, XL exercised

its right under the Agreement to draw on and hold the \$3.2 million Frontier Bank letter of credit. CP 5-6. In 2010, XL released \$490,966.00 from the Frontier Bank letter of credit back to Oak Harbor while retaining the remainder collateral as security for future claims made on the Policy. CP 6-7.

B. The Instant Lawsuit Against XL and Demand for Arbitration

Seeking to obtain the remaining collateral, Oak Harbor did not assert its arbitration rights under the Agreement but chose instead to file suit against XL on August 17, 2015, asserting claims of breach of duty of good faith and fair dealing, conversion, insurance bad faith, violation of the consumer protection act, and violation of the unfair competition law. CP 1-11. On December 11, 2015, XL filed a CR 12(b)(3) motion to dismiss and compel arbitration on the basis that the mandatory arbitration provision in the Agreement governed the dispute. CP 30-60. Article VIII of the Agreement states:

A. Submission to Arbitration – *In the event of any dispute between Company [XL] and the Insured [Oak Harbor] with reference to the interpretation, application, formation, enforcement or validity of this Agreement or any other agreement between them, or their rights with respect to any transaction involved, whether such dispute arises before or after termination of this Agreement, such dispute, upon written request of either party, shall be submitted to the decision of a board*

of arbitration composed of two arbitrators and an umpire meeting in New York unless otherwise mutually agreed. Notwithstanding the generality of the foregoing, Company's right to exercise any of the options contained in Article VI.B. shall not be limited by the submission of any dispute to arbitration.

B. Sole Remedy – The parties agree *that arbitration pursuant to the terms of this Article is the sole remedy for the resolution of disputes between them under this Agreement* or any other agreement between them. The board of arbitration will have complete and exclusive jurisdiction over the entire matter in dispute, including any question as to its arbitrability, and shall only conduct the arbitration proceeding to resolve disputes between the parties to this Agreement, and not as a class action involving other parties.

CP 56 (emphasis added). Further, Article X of the Agreement provides the U.S. District Court for the Southern District of New York or the Supreme Court of the State of New York, County of New York, with exclusive jurisdiction over enforcement of the terms of the Agreement and/or confirming any arbitration award made pursuant thereto:

A. Applicable Law – The rights of the parties to this agreement shall be governed by and construed in accordance with the laws of the state of New York without regard to New York's Rules on conflict of laws.

I. Jurisdiction – For the purposes of enforcing the terms of Article VIII and

confirming any arbitral award made pursuant thereto, the parties hereby consent to the exclusive jurisdiction of either the U.S. District Court for the Southern District of New York or the Supreme Court of the State of New York, County of New York...

CP 59-60. In an effort to avoid these obligations under the Agreement, Oak Harbor opposed the Motion, asserting that the Agreement was now an “insurance contract” under the Washington Insurance Code (the “Code”), and that RCW 48.18.200 prohibited enforcement of the binding arbitration provision. CP 61-85. Oral argument was held before the Honorable Theresa Doyle. *See* Verbatim Report of Proceedings (VRP April 1, 2016).

The trial court ultimately denied XL’s motion, finding that the Agreement was an “insurance contract” under the Code and that pursuant to RCW 48.18.200 and *State Department of Transportation v. James River Ins. Co.*, 176 Wn.2d 390, 292 P.3d 118 (2013), the arbitration, choice of law and forum selection provisions were void and unenforceable.

CP 361-62. The trial court further found the Agreement to be part of the “insurance transaction,” subject to the Code. VRP 32:5-6. The trial court also held, in the alternative, that the Agreement was incorporated into the Policy (1) “given all the references in the [Agreement] to the insurance policy,” (2) the Agreement’s facilitation of coverage in the Policy and because (3) the Agreement contained provisions “with respect to default,

allowing the company to cancel the policies.” VRP 32:2-19. XL then filed its notice of appeal to this Court. CP 359-363.

IV. ARGUMENT

A. Summary of Argument

The trial court erred in denying XL’s Motion to Dismiss and Compel Arbitration because it took two separate, carefully negotiated contractual agreements and fused them into a new hybrid insurance policy under the guise of complying with the Code. The Code, however, is inapplicable here because the Agreement is not an “insurance contract” and thus, not subject to the prohibition on arbitration in RCW 48.18.200 and *Dept. of Transportation v. James River Insurance Company*, 176 Wn.2d 390, 292 P.3d 118 (2013). Although the term “insurance contract” is not specifically defined in the Code, the Washington Supreme Court has found it to be synonymous with the insurance policy and strictly defined it as the contract by which risk is transferred from insured to insurer.

Accordingly, the Agreement is not an “insurance contract” for the simple reason that it does not provide Oak Harbor with insurance coverage. The Agreement is not an endorsement of the Policy. The Agreement does not address risk, scope of coverage, or any of the other factors statutorily required under the Code to be included in an insurance

policy. It is a separate document which governs the parties' rights and obligations with regard to Oak Harbor's collateral requirements. While the Agreement may reference the Policy, for it to be an "insurance contract" it must meet this threshold determination of transfer of risk. The trial court failed to make such a finding.

The trial court further erred in finding that the Agreement was incorporated into the Policy because it created a new hybrid insurance contract without first analyzing and discerning the intent of the parties. By failing to do so, the trial court ignored express integration provisions contained in both the Agreement and Policy. Further, the trial court was prohibited from incorporating the Agreement because RCW 48.18.190 precludes contemporaneous agreements or other parol evidence from being used to modify the terms of an unambiguous contract. The trial court made no finding that the Policy was ambiguous. Thus, its decision to incorporate new terms from a separate agreement violated the Code.

B. Standard for Statutory and Contract Interpretation

A Court's objective in interpreting a statute is to ascertain and give effect to legislative intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The court discerns legislative intent from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision

is found, related provisions, amendments to the provision, and the statutory scheme as a whole. *Association of Washington Spirits and Wine Distributors v. Washington State Liquor Control Bd.*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015).

The criteria for interpreting insurance contracts in Washington are well settled. Insurance policies are construed as contracts. *Quadrant Corp. v. American States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005) (citing *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 665, 15 P.3d 115 (2000)). The Court must consider the policy as a whole and give it a fair, reasonable and sensible construction as would be given to the contract by the average person purchasing insurance. *Id.* “Most importantly, if the policy language is clear and unambiguous, we must enforce it as written; we may not modify it or create ambiguity where none exists.” *Id.* The goal of contract interpretation is to ascertain the intent of the parties. *Dice v. City of Montesano*, 131 Wn. App. 675, 683, 128, P.3d 1253 (2006).

C. **The Agreement is Not an “Insurance Contract”**

The trial court erred in denying XL’s Motion to Dismiss and Compel Arbitration because the Agreement is not an “insurance contract” under the Code and thus not subject to the prohibition on arbitration

pursuant to RCW 48.18.200 and *Dept. of Transportation v. James River Insurance Company*, 176 Wn.2d 390, 292 P.3d 118 (2013).¹

While the Code does not specifically define the term “insurance contract,” it is not ambiguous. The Code defines “insurance” as “a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies.” RCW 48.01.010. The Code defines an “insurance policy” as a “written instrument, in which a contract of insurance is set forth.” RCW 48.18.140(1). An insurance policy must include:

- (a) The names of the parties to the contract. The insurer’s name shall be clearly shown in the policy.
- (b) The subject of the insurance.
- (c) The risk insured against.
- (d) The time at which the insurance thereunder takes effect and the period during which the insurance is to continue.
- (e) A statement of the premium, and if other than life, disability, or title insurance, the premium rate where applicable.

¹ RCW 48.18.200 states “No insurance contract delivered or issued for delivery in this state ... shall contain any condition, stipulation, or agreement”:

- (a) requiring it to be construed according to the laws of any other state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other state or country; or
 - (b) depriving the courts of this state of the jurisdiction of action against the insurer; or
 - (c) limiting right of action against the insurer to a period of less than one year from the time when the cause of action accrues in connection with all insurances other than property and marine and transportation insurances. In contracts of property insurance, or of marine and transportation insurance, such limitation shall not be to a period of less than one year from the date of the loss.
- (2) Any such condition, stipulation, or agreement in violation of this section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.

(f) The conditions pertaining to the insurance.

RCW 48.18.140(2). Further, the Code makes clear no “agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.” RCW 48.18.190. The legislature’s decision to use the terms “contract” and “contract of insurance” to define both “insurance” and “insurance policy,” demonstrates an equivalency of the terms – that an “insurance contract” is synonymous with an insurance policy.

The Washington Supreme Court addressed this exact issue in *State v. Mau*, 178 Wn.2d 308, 308 P.3d 629 (2013), and its analysis is instructive here. In *Mau*, defendant Mau rented a U-Haul rental truck and purchased an optional cargo protection policy called “Safemove Protection.” *Id.* at 309-310. Mau later returned the truck, complaining that the roof had leaked and that her property had been damaged by rainwater during a move. *Id.* at 310. Although the policy did not cover water damage, a general liability claim was opened and Mau provided U-Haul’s claims administrator with a list of damaged items. *Id.* Suspecting fraud, the Office of the Insurance Commissioner opened an

investigation and Mau was charged with making a false insurance claim under RCW 48.30.230.² *Id.* at 311. Mau was convicted and she appealed.

On appeal, the issue was whether the contract upon which Mau had made the false claim was a “contract of insurance” under RCW 48.30.320. *Mau*, 178 Wn.2d at 313. The State argued that, although it wasn’t an insurance policy, U-Haul’s contract with its claims administrator was nonetheless a “contract of insurance” and Mau had filed her claim or payment under this contract. *Id.* at 314-15. In analyzing whether the claims administration contract constituted a “contract of insurance,” the Supreme Court reviewed the relevant provisions of the Code and disagreed with the States’ attempt to broaden the statutory term:

As just one example, the phrase, “contract of insurance” appears 14 times in chapter 48.18 RCW, which governs “The Insurance Contract.” **In every instance, the phrase is used as a synonym for “insurance.”** See, e.g., RCW 48.18.140(1) (“The written instrument, in which a contract of insurance is set forth, is the policy.”); RCW 48.18.040(1) (“No contract of insurance on property or of any interest therein or arising therefrom shall be enforceable except for the benefit of persons having an insurable interest in the things insured.”); RCW 48.18.190 (“No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.”). **Indeed, this**

² Under RCW 48.30.230, it is unlawful to present a false or fraudulent claim “for the payment of a loss under a contract of insurance.” RCW 48.30.230.

court can find no Washington case or statute in which the phrase “contract of insurance” denotes a broader category of contract than that transferring risk from insured to insurer.”

Mau, 178 Wn.2d at 316 (emphasis added). Thus, the Supreme Court found that the term “insurance contract” was synonymous with the insurance policy and at most, the contract which transferred “risk from insured to insurer.” *Id.*

Indeed, the Washington Supreme Court has repeatedly reaffirmed its definition of a “contract of insurance” to be limited to the contract that transfers risk. *See e.g., Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 669, 999 P.2d 29 (2000) (“Insurance is by its nature prospective and not retrospective, as can be seen from the statutory definition of an insurance contract as ‘a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable *contingencies*’”); *In re Estate of Smiley*, 35 Wn.2d 863, 867, 216 P.2d 212 (1950) (holding that in order to constitute “a contract of insurance, which is a risk-distributing device, it must possess both features [risk-shifting and risk-distributing], and unless it does it is not a contract of insurance whatever be its name or its form”); *State ex rel. Fishback v. Universal Serv. Agency*, 87 Wn. 413, 424, 151 P. 768 (1915) (stating that the essential elements of an insurance contract are “(1) an insurer, (2) a consideration, (3) a person insured or his beneficiary,

(4) a hazard or peril insured against whereby the insured or his beneficiary may suffer loss or injury”).

Here, the Agreement is not an “insurance contract” because it did not provide Oak Harbor with insurance coverage. It was a separate agreement entered into between Oak Harbor and XL to address the rights and obligations of the parties with regard to collateral posted by Oak Harbor. While the Agreement references the Policy, addresses premium payments and outlines XL’s right to cancel the Policy in the event of a default³, the simple fact cannot be ignored that it was not the vehicle by which risk was transferred from Oak Harbor to XL. CP 46-60. Pursuant to *Mau*, this lack of “transfer of risk” is determinative. *See Mau*, 178 Wn.2d at 316.

It is the Policy, not the Agreement, which defines and governs the parties’ substantive rights and duties with regard to insurance coverage. CP 90-280. It is the Policy that creates and defines XL’s risk and Oak Harbor’s obligations. *Id.* Nowhere in the Agreement does it purport to transfer risk. It does not address scope of coverage, period of coverage, or any of the other factors statutorily required in an insurance policy. *See* RCW 48.18.140.

³ This is a reiteration of the right to cancel contained in the Policy. CP 199-200. It does not give XL any new or extended rights.

Finally, an insurance contract is distinguishable by its prospective nature, as it seeks to transfer risk based upon “determinable contingencies.” *See Mendoza*, 140 Wn.2d at 669. That is not present in the Agreement. Unlike the Policy, the Agreement is not dependent on the occurrence of an uncertain future event to be triggered. Oak Harbor’s obligation to produce collateral was not dependent on a possible future event but a known obligation.

In sum, the Agreement was not the vehicle by which risk was transferred from Oak Harbor to XL. Accordingly, the trial court erred in denying XL’s Motion because the Agreement was not an “insurance contract” under the Code, and RCW 48.18.200 and *James River* are inapplicable here.

1. The Agreement is Not Part of an Insurance Transaction

The trial court further erred in finding that the Agreement was “part of an insurance transaction” subject to the Code. VRP 32:6-7. RCW 48.01.020 states, “All insurance and insurance transactions ... affecting subjects located within this state ... are governed by this code.” An “insurance transaction” includes (1) solicitation, (2) negotiations prior to execution, (3) execution of an insurance contract, (4) “[t]ransaction of matters subsequent to execution of the contract and arising out of it” and

(5) insuring. RCW 48.01.060. The trial court, however, conducted no statutory analysis as to the scope of the term “insurance transaction.”

Indeed, the text of the statute, related provisions, and the statutory scheme as a whole, support a more restrictive interpretation of “insurance transaction” and RCW 48.01.060. Use of the term “insurance,” as defined in RCW 48.01.010, necessarily limits the scope of “insurance transactions” to those matters which actually relate to the transfer of risk. RCW 48.01.010. Further, subsections (1), (2), (3), and (5) of RCW 48.01.060, all specifically relate to different stages in the process of enacting an insurance policy, indicating a more restrictive scope of what should be included in a “transaction.” RCW 48.01.060.

Read in the context of these other subparts, the text of RCW 48.01.060(4) most logically identifies an endorsement to an insurance policy, as those arise out of the policy, are a part of the policy process, relate to the transfer of risk and can be enacted subsequent to the policy. Moreover, this restrictive interpretation comports with the Supreme Court decision in *Mau*, which limits the scope of an “insurance contract” to that which transfers risk. There is no case law to support the trial court’s expansive finding that the Agreement, which does not transfer risk or relate to the transfer of risk, fell within the scope of an “insurance transaction.”

Even if it could be considered part of the “insurance transaction,” which is denied, the trial court erred in applying RCW 48.16.200 because it is strictly limited to “insurance contracts,” not “insurance transactions.” *See* RCW 48.16.200(1) (“No insurance contract ... shall contain any condition, stipulation, or agreement ...”). Indeed, RCW 48.16.200 fails to include the term “insurance transaction.” There is no indication from the text of the statute, or case law, to support expanding RCW 48.16.200 to include insurance transactions where not explicitly mentioned in the statute. The trial court, however, conducted no statutory analysis as to the scope of the term “insurance transaction.” Thus, even if the trial court had found the Agreement to be included in an “insurance transaction,” RCW 48.16.200 does not apply to “insurance transactions” and arbitration should have been compelled.

D. The Agreement Was Not Incorporated Into the Policy

1. The Policy and Agreement Were Fully Integrated

The trial court further erred in finding, in the alternative, that the Agreement was incorporated into the Policy because it created a new insurance contract without first analyzing and discerning the intent of the parties. Washington courts “are loath[] to interfere with the rights of parties to contract as they please between themselves.” *Salewski v. Pilchuck Veterinary Hosp., Inc.*, 189 Wn. App. 898, 908, 359 P.3d 884

(2015) (quoting *Mgmt., Inc. v. Schassberger*, 39 Wn.2d 321, 326, 235 P.2d 293 (1951)).

It is not the role of the court to enforce contracts so as to produce the most equitable result. The parties themselves know best what motivations and considerations influenced their bargaining, and, while ‘[t]he bargain may be an unfortunate one for the delinquent party, ... it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence ...’

Id. (quoting *Watson v. Ingram*, 124 Wn.2d 845, 852, 881 P.2d 247 (1994)).

Here, the trial court violated these principles when it forged a new hybrid insurance contract, selectively picking portions from the Agreement and Policy in direct contradiction of the parties’ intent. VRP 32:2-19. Specifically, the trial court ignored express integration provisions contained in both the Agreement and Policy. Section A of the Policy states:

This policy includes at its effective date the Information Page and all endorsements and Schedules listed there. It is a contract of insurance between you ... and us ... The only agreements relating to this insurance are stated in this policy. The terms of this policy may not be changed or waived *except by endorsement issued by us to be part of this policy.*

CP 100 (emphasis added). Similarly, Section K of the Agreement states:

This Agreement constitutes the entire agreement of the parties with respect to the subject matter herein and supersedes any other previous agreements or quotations, whether written or oral, between Company and the Insured, unless specifically referred to within this Agreement. This Agreement may be amended altered, or modified only in writing signed by both parties.

CP 60. This intent is further evidenced by the fact that, pursuant to Article XI(B), the expiration or cancellation of the Policy does not “terminate this Agreement.” CP 58. If the parties had intended the Agreement to be part of, or incorporated into the Policy, they would not have allowed the Agreement to somehow survive termination of the Policy. Further, it is undisputed that the Agreement was not an endorsement attached to the Policy. Although Oak Harbor asserted in briefing that the Agreement was “essentially a policy endorsement,” this argument was rejected by the trial court. CP 13, 361-62; VRP 32:2-19.⁴

Thus, prior to incorporating the Agreement into the Policy, the trial court was required to discern whether the parties intended such a result.

The trial court failed to conduct such an analysis and ignored both of these

⁴ The Supreme Court has stated “[a]n endorsement *attached to a policy, which expressly provides that it is subject to the terms, limitations and conditions of the policy, must be read with the policy and will not abrogate or nullify any provision of the policy unless it is so stated in the endorsement.*” *Transcontinental Ins. Co. v. Washington Public Utilities Districts' Utility System*, 111 Wn.2d 452, 462, 760 P.2d 337 (1988) (emphasis added). Here, the Agreement was not attached to the Policy, nor does it state that it is subject to the terms of the Policy.

provisions. There is no evidence the parties intended to incorporate the Agreement. If Oak Harbor and XL, two sophisticated business parties, had intended on incorporating these two contracts, they could have done so by including an express incorporation provision, or making the Agreement a formal endorsement of the Policy. They did not do so, but instead chose the opposite result by including separate integration provisions. There was no finding by the trial court that these integration provisions were unenforceable. CP 361-62; VRP 32:2-19. As such, the trial court was required to carry out the intent of contracting parties but failed to do so.

2. The Policy Was Unambiguous

Further, the trial court's incorporation of the Agreement into the Policy violated RCW 48.18.190 because the Policy itself was unambiguous. Accordingly, the trial court was prohibited from looking outside the terms of the Policy to incorporate new terms. RCW 48.18.190 states that "[n]o agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made part of the policy." RCW 48.18.190. "Evidence of prior or contemporaneous agreements of the parties will not be allowed by RCW 48.18.190 to modify or vary the terms of an unambiguous contract." *Continental Insurance Co. v. Paccar, Inc.*, 26 Wn. App. 850, 858–59, 614 P.2d 675

(1980), *rev'd on other grounds*, 96 Wn.2d 160, 634 P.2d 291 (1981) (citing *Safeco Ins. Co. v. Dairyland Mut. Ins. Co.*, 74 Wn.2d 669, 446 P.2d 568 (1968)).

Under RCW 48.18.190, the clear policy language must be considered the final integration of the parties' intent. *See e.g., Michelman v. Lincoln Nat. Life Ins. Co.*, 685 F.3d 887, 897 (9th Cir. 2012) (finding that a "side agreement" was not incorporated into an insurance agreement because it was not made a part of the policy, and thus violated RCW 48.18.190); *Marvin v. State Farm Fire and Cas. Co.*, No. C 14-5506 KLS, 2015 WL 1636529, at *6 (W.D. Wa. April 10, 2015) (stating that RCW 48.18.190 prohibits parol evidence to vary the terms of an insurance policy unless made a part of the contract); *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 919 P.2d 594 (1996) ("extrinsic evidence should not be considered for the purpose of contradicting and modifying other written parts of the insurance contract").

The trial court made no findings that the Policy was ambiguous nor did Oak Harbor argue as such. Given that the Agreement was not an endorsement of the Policy, there was no basis for the trial court to incorporate it into the Policy. The clear language of the Policy precluded the trial court from looking outside the scope of the Policy and incorporating new terms. The trial court instead relied on the Agreement's

ability to modify the Policy as the basis for incorporation, reasoning that the Agreement made repeated references to the Policy, facilitated coverage, and contained provisions allowing XL to cancel the Policy in the event of a default. VRP 32:2-19. This, however, is strictly prohibited by RCW 48.18.190.

Even if the trial court had found that the Agreement did not conflict with or modify the Policy, it would still be error for the trial court to go outside the Policy and incorporate new terms because there was no ambiguity in the Policy or its terms. The trial court made no finding that the Policy was ambiguous, nor was this argument even asserted by Oak Harbor. Thus, the trial court violated RCW 48.18.190 by incorporating the Agreement into the unambiguous Policy.

V. CONCLUSION

XL is entitled to enforce the arbitration provision in the Agreement because it is not an insurance contract. Based on the foregoing, XL requests that the trial court's order denying XL's motion to dismiss and compel arbitration be reversed and the parties be ordered to arbitrate in accordance with the Agreement's terms and conditions.

