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## I. INTRODUCTION

Vicky Forsyth received an arbitration award for \$150,000 against her underinsured motorist insurer, Zurich. Forsyth moved to confirm the award and enter judgment thereon. Zurich did not oppose entry of judgment, nor did it appeal from the judgment. Zurich made a partial payment of \$100,000. Eight years later, Zurich moved to vacate the remaining balance of the judgment. The trial court granted the motion, on the erroneous premise that it lacked subject matter jurisdiction to enter a judgment that exceeded the UIM policy limits.

The law is clear both that the arbitrators had the authority to determine the full amount of Forsyth's damages, and that the court had jurisdiction to enter the judgment. Forsyth acknowledges as a general proposition that a judgment against a UIM insurer should be limited to the UIM coverage limits. However, errors of law do not render a judgment void and do not nullify subject matter jurisdiction. If Zurich wanted to reduce the judgment to its coverage limits, it could have objected when the judgment was entered, or appealed from the judgment. Zurich has nobody to blame for the judgment but itself. The trial court erred by vacating its judgment. This court should reverse and reinstate the original judgment.

## II. ASSIGNMENTS OF ERROR

### *Assignments of Error*

1. The trial court erred by vacating the judgment entered on the arbitration award.

### *Issues Pertaining to Assignments of Error*

1. Did the insurance contract authorize the arbitrators to determine damages without reference to UIM coverage limits?

2. Did the court lose jurisdiction to enter judgment on the arbitration award by erring, as a matter of law, in determining the judgment amount?

## III. STATEMENT OF THE CASE

On April 29, 1997, Vicky Forsyth was injured in an automobile collision, negligently caused by an underinsured driver.<sup>1</sup> Forsyth had underinsured motorist ("UIM") insurance with Zurich.<sup>2</sup> Zurich offered only \$9,425.98 to settle, so Forsyth demanded arbitration.<sup>3</sup> The insurance contract provided in relevant part:

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<sup>1</sup> CP 110.

<sup>2</sup> *Id.*

<sup>3</sup> CP 43-44, 110.

- A. If we and an "insured" do not agree:
1. Whether that person is legally entitled to recover damages under this endorsement; **or**
  2. As to the **amount of damages**:

either party may make a written demand for arbitration.

...

- C. ... **A decision agreed to by two of the arbitrators will be *binding* as to:**
1. Whether the "insured" is legally entitled to recover damages; and
  2. **The amount of damages**, unless either party demands the right to a trial within 60 days of the arbitrators' decision. If this demand is not made, the amount of damages agreed to by the arbitrators will be binding.<sup>[4]</sup>

(Emphasis added). At arbitration Forsyth was awarded \$150,000 as the amount of her damages.<sup>5</sup> Pursuant to RCW 7.04.150 and .190, as then existed, and with proper notice to Zurich, Forsyth moved to confirm the arbitration award and have judgment entered thereon.<sup>6</sup> The notice of the motion for confirmation included a copy of the proposed judgment

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<sup>4</sup> CP 77-78.

<sup>5</sup> CP 38, 111.

<sup>6</sup> CP 1-5, 111.

for \$150,000.<sup>7</sup> Zurich chose not to appear at the hearing at which judgment was entered. It did not oppose entry of the judgment through submission of opposition pleadings, oral argument, or in any other way.<sup>8</sup>

After filing and serving the motion for confirmation of the award, but before hearing on the motion, Forsyth's counsel, Stanley J. Rumbaugh, contacted Zurich's counsel, Timothy S. McGarry, as a courtesy to ask if he was planning to appear at the hearing.<sup>9</sup> McGarry told Rumbaugh that he had no objection to entry of the proposed judgment and would not attend.<sup>10</sup> The trial court entered judgment against Zurich for \$150,000, as proposed.<sup>11</sup> A conformed copy of the judgment was delivered to McGarry on the date it was entered.<sup>12</sup> Thereafter, Zurich did not move to amend the judgment, or request reconsideration, or appeal.<sup>13</sup> Zurich paid \$100,000, leaving an unpaid

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<sup>7</sup> CP 111.

<sup>8</sup> *Id.*

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

<sup>10</sup> *Id.*

<sup>11</sup> CP 4, 6-7, 111, 113.

<sup>12</sup> CP 19-20.

<sup>13</sup> CP 111.

balance of \$50,000, plus accruing post judgment interest.<sup>14</sup> After paying the \$100,000, Zurich did not demand that Forsyth file a satisfaction of judgment, or move to compel that a satisfaction be filed.<sup>15</sup> A partial satisfaction of judgment was filed on March 28, 2007.<sup>16</sup> Zurich first requested a satisfaction 8 years later, when Forsyth pressed Zurich to pay the balance of the judgment.<sup>17</sup> On November 10, 2008, Forsyth moved for supplemental proceedings to collect the remaining debt.<sup>18</sup> Zurich then moved to vacate the judgment under CR 60(b).<sup>19</sup>

The trial court granted Zurich's motion to vacate, reasoning that the arbitration agreement limited the arbitrators' authority to award damages to the amount of the UIM coverage, and thus, that the court jurisdiction to enter any judgment, making the judgment void. The trial court concluded:

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<sup>14</sup> *Id.*

<sup>15</sup> CP 12-13.

<sup>16</sup> CP 8-9.

<sup>17</sup> CP 13.

<sup>18</sup> CP 14.

<sup>19</sup> CP 10-18.

It just seems to me that it doesn't make sense to have an arbitration clause with that language. I hear what you're saying. It would be more clear. And maybe that's what Defendant needs to do in the future for arbitration clauses, so say, "and as to the amount of damages up to the policy limits," or whatever ...

VRP 6/21 – 7/4. This appeal followed.

#### IV. ARGUMENT

##### A. Standard Of Review

Appellate courts review orders vacating judgments under an abuse of discretion standard.<sup>20</sup> Discretion is abused if it is exercised on untenable grounds or for untenable reasons.<sup>21</sup> A trial court abuses its discretion by basing an order on an erroneous view of the law.<sup>22</sup> Questions of law are reviewed de novo.<sup>23</sup> The interpretation of an insurance contract is a question of law.<sup>24</sup> The analysis here begins with a question of law: did the arbitration agreement at issue grant the

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<sup>20</sup> *Morin v. Burris*, 160 Wn.2d 745, 753, 161 P.3d 956 (2007).

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

<sup>22</sup> *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

<sup>23</sup> *Morin*, 160 Wn.2d at 753.

<sup>24</sup> *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007).

arbitrators authority to award the actual amount of the insured's damages, without restriction?<sup>25</sup>

**B. The Insurance Contract Authorized The Arbitrators To Determine The Amount Of Damages, Without Reference To Coverage Limits.**

Arbitrators' powers are governed by the insurance contract.<sup>26</sup>

Only if arbitrators exceed their authority under the contract, is their award void, and the court without jurisdiction to confirm it.<sup>27</sup>

To determine the extent of the arbitrators' contractual authority, the court must interpret the arbitration agreement.<sup>28</sup> "[I]f the policy language is clear and unambiguous, [the court] must enforce it as written; [the court] may not modify it or create ambiguity where none exists."<sup>29</sup> Language in the contract is ambiguous "only when, on its face, it is fairly susceptible to two different interpretations, both of

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<sup>25</sup> See *Morin*, 160 Wn.2d at 753 (where, in an appeal from an order vacating judgment, the Supreme Court began its analysis with a review of the question of law, and then, based on that analysis, determined if the trial court abused its discretion in vacating the judgment).

<sup>26</sup> *Price v. Farmers Ins. Co.*, 133 Wn.2d 490, 499, 946 P.2d 388 (1997) (quoting *Sullivan v. Great Am. Ins. Co.*, 23 Wn. App. 242, 246, 594 P.2d 454 (1979)). See also, *Anderson v. Farmers Ins. Co.*, 83 Wn. App. 725, 730, 923 P.2d 713 (1996).

<sup>27</sup> *Anderson.*, 83 Wn. App. at 730-31.

<sup>28</sup> See *id.*

<sup>29</sup> *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171, 110 P.3d 733 (2005).

which must be reasonable."<sup>30</sup> Only if a clause is ambiguous may a court consider extrinsic evidence of the parties' intent.<sup>31</sup> Any ambiguity remaining after examination of extrinsic evidence must be resolved against the insurer and in favor of the insured.<sup>32</sup> Here, the arbitration agreement was unambiguous in that it authorized the arbitrators to determine damages, without reference to UIM coverage limits. If Zurich wanted to limit the arbitrators' authority in awarding damages to coverage limits, it could have simply said so.

In vacating Forsyth's judgment, the trial court relied upon *Anderson v. Farmers Ins. Co.*<sup>33</sup> *Anderson* held that "[i]f 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>34</sup> However, the conclusion resulted from the specific language used in the arbitration agreement, which clearly restricted the arbitrators' authority to award damages to the coverage limits:

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> 83 Wn. App. 725, 923 P.2d 713 (1996), *review denied*, 132 Wn.2d 1006, 940 P.2d 656 (1997).

<sup>34</sup> *Id.* at 730-31 (emphasis added).

If an insured person and [Farmers] do not agree ... as to the amount of **payment under this Part [UIM]**, either that person or [Farmers] may demand that the issue be determined by arbitration.<sup>[35]</sup>

(Emphasis added).<sup>36</sup> Interpreting that language, the court held that "the issue" to be arbitrated was "the amount ... [due] under this Part [UIM]."<sup>37</sup>

Zurich's contract language is crucially different. Where Farmers limited arbitrators to determining "the amount of payment under this Part," Zurich simply empowered arbitrators to determine "whether the 'insured' is legally entitled to recover damages; and *[t]he amount of damages.*"<sup>38</sup>

Unlike the arbitration agreement in *Anderson*, Zurich's arbitration agreement did not restrict the arbitrators' authority to

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<sup>35</sup> *Id.* at 732 (emphasis added, brackets in original).

<sup>36</sup> Farmers Insurance Company used similar, if not the same, language in an arbitration agreement that was at issue in *Price v. Farmers Ins. Co.*, 133 Wn.2d 490, 493, 946 P.2d 388 (1997):

If the insured person and we do not agree (1) that the person is legally entitled to recover damages from the owner or operator of an underinsured motor vehicle, **or (2) as to the amount of payment under the Part**, either that person or we may demand that the issue be determined by arbitration.

(Emphasis added).

<sup>37</sup> *Anderson*, 83 Wn. App. at 732 (brackets in original).

<sup>38</sup> CP 78 (emphasis added).

determine the amount of payment due under the UIM endorsement. Rather, as the plain language of its policy clearly states, the arbitrators had unrestricted authority (and an obligation) to determine "the amount of damages" suffered by Forsyth. Zurich's agreement to arbitrate goes even further and explicitly provides that the arbitration award will be "binding" as to "the amount of damages" unless a trial de novo is demanded.

The trial court erroneously found that the modifying phrase "under this endorsement" in subparagraph A(1) also modified the language in subparagraph A(2). The trial court ignored the key disjunctive word "or" found at the end of subparagraph A(1). Our Supreme Court "has consistently read clauses separated by the word 'or' and a semicolon disjunctively."<sup>39</sup> Modifying phrases in one subparagraph do affect different subparagraphs when read in the disjunctive.<sup>40</sup>

Paragraph "A" in Zurich's arbitration agreement, therefore, effectively reads as follows:

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<sup>39</sup> *Cerrillo v. Esparza*, 158 Wn.2d 194, 204, 142 P.3d 155 (2006).

<sup>40</sup> *Id.*

If we and the "insured" do not agree whether that person is legally entitled to recover damages under this endorsement; *or*

If we and the "insured" do not agree as to the amount of damages;

either party may make a written demand for arbitration.

Where language is used in one instance, and different language used in another, courts will presume there is a difference of intent.<sup>41</sup> Accordingly, the plain language of the arbitration agreement makes clear that the issue to be arbitrated was "the amount of [Forsyth's] damages." Zurich wrote the arbitration agreement. If Zurich wanted to limit the arbitrators' authority in awarding damages to the UIM coverage limits, as Farmers did in *Anderson* (and *Price*), it could have simply said so. It didn't.<sup>42</sup> Courts are not at liberty to rewrite a contract.<sup>43</sup> The court must interpret the contract as Zurich wrote it, even if the court believes Zurich intended something different.<sup>44</sup>

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<sup>41</sup> *State v. Jackson*, 137 Wn.2d 712, 724, 976 P.2d 1229 (1999).

<sup>42</sup> See *Edelman v. State*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004) ("If the legislature intended to create an exemption for situations in which the parent organization does not participate, it would have done so in the language of the statute. It didn't.").

<sup>43</sup> *Denaxas v. Sandstone Court of Bellevue*, 148 Wn.2d 654, 670, 63 P.3d 125 (2003).

<sup>44</sup> *Id.* See also, *Quadrant Corp.*, 154 Wn.2d at 171 (the court must enforce an insurance policy as written); *Cerrillo*, 158 Wn.2d at 204.

Our Supreme Court recently applied this very analysis in *Cerrillo v. Esparza*, a Minimum Wage Act appeal. The issue was whether the plain language of RCW 49.46.130(2)(g)(ii) exempted truck drivers who delivered agriculture commodities from the overtime wage requirement.<sup>45</sup> The statute provided in relevant part:

(2) This section does not apply to:

(g) Any individual employed (i) **on a farm** ...; or (ii) in packing, packaging, grading, storing or **delivering** to storage, or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; or (iii) commercial canning, commercial freezing, or any other commercial processing, or with respect to services performed in connection with the cultivation, raising, harvesting, and processing of oysters or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption[.]

(Emphasis added). The plaintiff-truck drivers argued that they were entitled to overtime pay and were not exempt under the above-quoted statute. They argued that the phrase "on a farm" in subparagraph (i) modified all the terms in the subsequent subparagraphs.<sup>46</sup> Since they were not employed on a farm as delivery drivers, they claimed the exemption did not apply to them. The court rejected that argument:

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<sup>45</sup> 158 Wn.2d at 199.

<sup>46</sup> *Id.* at 204-05.

[T]he structure of the statute clearly signals a disjunctive reading. RCW 49.46.130(2)(g) is divided into three subsections enumerated (i), (ii), and (iii), and separated by semicolons and the word "or." This court has consistently read clauses separated by the word "or" and a semicolon disjunctively.

Moreover, a reading of all three subsections of RCW 49.46.130(2)(g) confirms that the legislature specified the requirement that the individual must be employed "on a farm" only in relation to subsection (i) of the statute. If the legislature had intended that the entirety of RCW 49.46.130(2)(g) apply only to the employees of farmers, the legislature could have included similar language in each of the subsections. Or, alternatively, the legislature could have placed the language "on a farm" immediately following the phrase "[a]ny individual employed," preceding the three subsections. However, this court must interpret the statute as written and not add or move language, even if we believe the legislature intended a different result.<sup>[47]</sup>

The present case is remarkably similar to *Cerrillo*. Here, Zurich argued, and the trial court agreed, that the modifying phrase "under this endorsement" in subparagraph A(1) carried over and modified the phrase "the amount of damages" in subparagraph A(2). By the analysis in *Cerrillo*, such a reading was unsound as a matter of law.

As cited above, courts cannot rewrite contracts; yet beyond doubt, that is what the trial court did. The trial court said:

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<sup>47</sup> *Id.* at 204.

*It just seems to me that it doesn't make sense to have an arbitration clause with that language [that is, with the plain language Zurich used in the contract]. I hear what you're saying. It would be more clear. And maybe that's what Defendant needs to do in the future for arbitration clauses, so say, "and as to the amount of damages up to the policy limits," or whatever ...*

VRP 6/21 – 7/4 (emphasis added). The arbitration clause, as Zurich wrote it without limiting the arbitrators' authority to determine damages, did not make sense to the trial court. So, the trial court rewrote the contract, adding language to subparagraph A(2) limiting the arbitrators' authority to determine damages.

To uphold the trial court's ruling, this court would have to do the same thing – add language to the contract that simply is not there. As our Supreme Court has held, when "language in an insurance policy is clear and unambiguous, the court must enforce it as written, and cannot modify the contract."<sup>48</sup>

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<sup>48</sup> *Allstate Ins. Co. v. Peasley*, 131 Wn.2d 420, 424, 932 P.2d 1244 (1997) (emphasis added).

**C. The Trial Court Had Jurisdiction To Enter Judgment On The Arbitration Award, Notwithstanding Error Of Law In Determining The Judgment Amount.**

A court has the authority to hear and decide a proceeding if it has jurisdiction over the parties and the subject matter.<sup>49</sup> It is undisputed that the court had personal jurisdiction over the parties. Subject matter jurisdiction to confirm an arbitration award derives from the parties' contract and the arbitration statute, RCW 7.04 *et seq.*<sup>50</sup> The court has subject matter jurisdiction to confirm an arbitration award when there is an arbitration agreement, and the arbitrators determined only the issues the parties agreed to submit to arbitration.<sup>51</sup>

As a rule, courts, in entering judgment on UIM arbitration awards, should limit the amount of judgment to the coverage limits.<sup>52</sup> If, in not doing so here, the trial court made an error of law, such error

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<sup>49</sup> *Mendoza v. Neudorfer Eng'rs, Inc.*, 145 Wn. App. 146, 149, 185 P.3d 1204 (2008).

<sup>50</sup> *Price*, 133 Wn.2d at 496. It should be noted that Chapter 7.04 RCW was repealed in 2005 and replaced by the Uniform Arbitration Act, codified under Chapter 7.04A RCW.

<sup>51</sup> *Id.* at 496-99.

<sup>52</sup> *Tribble v. Allstate Ins. Co.*, 134 Wn. App. 163, 139 P.3d 373 (2006).

did not render the judgment void.<sup>53</sup> "Courts do not lose subject matter jurisdiction merely by interpreting the law erroneously."<sup>54</sup>

Moreover, "[e]rrors of law are not correctable through CR 60(b). Rather, direct appeal is the proper means of remedying legal errors."<sup>55</sup> See also, *Bjurstrom v. Campbell*, 27 Wn. App. 449, 451, 618 P.2d 533 (1980) ("The exclusive procedure to attack an allegedly defective judgment is by appeal from the judgment, not an appeal from a denial of a CR 60(b) motion") (citing *Filippis v. United States*, 567 F.2d 341, 342 (7th Cir. 1977)). Zurich failed to object to the judgment amount and failed to appeal.

On the motion to vacate, Zurich argued that Forsyth's judgment was premised on a legal error because the amount of the judgment exceeded Zurich's coverage limits, citing *Tribble v. Allstate*, 134 Wn.

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<sup>53</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>54</sup> *Marley*, 125 Wn.2d at 539.

<sup>55</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)).

App. 163, 139 P.3d 373 (2006).<sup>56</sup> This argument should have been made by direct appeal, not by a CR 60(b)(6) motion.

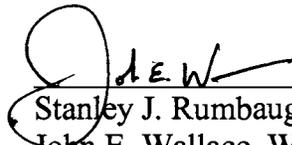
## V. CONCLUSION

The arbitration agreement plainly delegated full authority to the arbitrators to determine "the amount of damages" Forsyth suffered. In determining the full amount of her damages, the arbitrators did not exceed that authority. The trial court should not have vacated the judgment. This Court should reverse and reinstate the judgment.

DATED this 26<sup>th</sup> day of March, 2009.

Respectfully submitted,

**RUMBAUGH RIDEOUT BARNETT & ADKINS**



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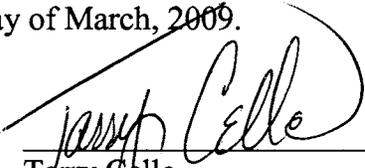
<sup>56</sup> CP 13-15. *Tribble* held that "as a matter of law, the insured is only entitled to recover damages up to the insurance policy limits." 134 Wn. App. at 169-70. There is a crucial distinction between the present case and *Tribble*: in *Tribble* the insurer timely appealed from the judgment. Zurich tacitly invited the court to enter judgment for the full arbitration award, and then failed to appeal from it. Zurich could have moved to vacate the arbitration award under RCW 7.04.160, as then existed; it could have opposed entry of judgment; it could have requested reconsideration of the judgment; it could have appealed from the judgment. Even assuming, arguendo, the trial court committed a legal error in entering judgment for the full \$150,000, the legal error did not deprive the court of jurisdiction, nor render the judgment void, and cannot be challenged in a motion to vacate.

**CERTIFICATE OF SERVICE**

I certify that on the date entered below, I sent via 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 20<sup>th</sup> day of March, 2009.

  
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Tarry Celle  
Legal Assistant to John E. Wallace

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