

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

VICKY FORSYTH,

Appellant/Cross-Respondent,

v.

ZURICH PERSONAL UIM,

Respondent/Cross-Appellant.

No. 38724-7-II (consolidated with
No. 39734-0-II)

UNPUBLISHED OPINION

Hunt, J. — Vicky Forsyth appeals the superior court’s vacating a \$150,000 judgment she obtained against Zurich Personal UIM,¹ her insurance carrier, after an underinsured motorist injured her in a collision. Forsyth secured the judgment *ex parte*, based on an arbitration panel’s award of \$150,000, without informing the superior court about her \$100,000 policy limit and

¹ “UIM” stands for “underinsured motor vehicle.” *See* RCW 48.22.030(1). Assurance Company of America underwrote this UIM policy that Zurich sold to Forsyth. The website for Zurich Insurance Services, Inc., states, “All policies issued on this site are underwritten by the companies of Zurich North America, including Assurance Company of America and Maryland Casualty Company.” (<http://zis.zurichna.com/>). Zurich contends, however, that the judgment was not entered against the insurer that contracted with Forsyth, Assurance Company of America, and that “[t]here is no entity ‘Zurich Personal UIM,’ ” the party against whom the judgment was entered. Br of Resp’t at 1, n.1. We do not reach this issue because we affirm the superior court’s vacation of the judgment.

Zurich's having paid this limit. Forsyth argues that the judgment entitles her to an additional \$50,000 because, she contends, her UIM policy's limit does not apply to arbitration awards.²

Zurich cross-appeals the superior court's failure to impose CR 11 sanctions against Forsyth's counsel for (1) failing to advise the court, when it entered the judgment ex parte, that Forsyth had already demanded and accepted a \$100,000 policy limit payment from Zurich and that the arbitration award exceeded the policy limit by \$50,000; and (2) by writing in "N/A Telephone App'l" on the judgment's signature line for Zurich's counsel without authorization, thereby misrepresenting to the court that Zurich's counsel did not oppose its entry. Br. of Resp't at 1. Zurich also seeks attorney fees on appeal under RAP 18.9 on the ground that Forsyth's appeal is frivolous; Zurich argues that Forsyth's counsel knew that his belated attempt below to collect money in excess of the paid policy limit was not grounded in law and or fact, in violation of CR 11.

We affirm. Forsyth's motion to allow the superior court to extend the judgment is now moot. We also deny Zurich's request for attorney fees on appeal under RAP 18.9, but we award statutory attorney fees and costs to Zurich as the prevailing party under RAP 14.1, 14.2, 14.3, and 14.4.

FACTS

In 1997, Vicky Forsyth sustained severe injuries when an underinsured motorist collided with her vehicle. Her Zurich automobile insurance had a \$100,000 limit for bodily injury by an

² Forsyth filed a second appeal, which we consolidated with this first appeal. As we explain later in this opinion, we do not reach the issues in the second appeal.

underinsured motorist. She filed a claim with Zurich, which offered her less than \$10,000. She rejected Zurich's offer and submitted a written demand for arbitration under her policy.³

I. \$150,000 Arbitration award and Judgment

The case went to arbitration. To avoid influencing the arbitrators, neither Forsyth nor Zurich informed the panel of Forsyth's \$100,000 UIM policy limit. In June 1999, the arbitration panel awarded Forsyth \$150,000. In July, Forsyth sent a letter to Zurich acknowledging her policy's \$100,000 limit: "[T]he \$100,000 policy limits to which [Forsyth's] entitlement is beyond any dispute needs to be tendered forthwith." Clerk's Papers (CP) at 44. Zurich tendered a check to Forsyth for \$100,000 on July 8, 1999. The check was honored on August 9.

Nevertheless, in August, Forsyth reduced the entire \$150,000 arbitration award to

³ The policy's arbitration provisions provided:

ARBITRATION

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 If this demand is not made, the amount of damages agreed to by the arbitrators will be binding.

Clerk's Papers (CP) at 34-35.

LIMIT OF LIABILITY

The limit of Bodily Injury Liability shown in the Schedule [\$100,000]. . . is [Zurich's] *maximum limit of liability for all damages* . . . arising out of "bodily injury["] sustained by any one person in any one auto accident. . . .

This is the most we will pay

CP at 36 (emphases added). *See also* almost identical "Limit of Liability" language at CP at 32.

judgment without advising the superior court that she had received and planned to cash Zurich's check for the \$100,000 policy limit.⁴ Zurich's counsel did not attend the superior court hearing, at which Forsyth represented that Zurich had left a voice mail "saying [it] did not oppose this order." Record of Proceedings (RP) (Aug. 6, 1999) at 3; CP at 115. But according to Zurich, "[A]t no time did [it] approve, by telephone or otherwise, content or form of the judgment . . . as represented . . . by [Forsyth]." CP at 19. Forsyth, however, took no further action on this judgment for eight years.

II. 2007 Vacation of Judgment; First Appeal

In 2007,⁵ Forsyth filed a "Partial Satisfaction of Judgment" in superior court, claiming receipt of only \$100,000 of the \$150,000 judgment. CP at 8. Seeking to obtain the remaining \$50,000, she moved to compel Zurich to appear before the superior court for supplemental proceedings. Zurich responded by filing a "Motion To Vacate Judgment and/or for Entry of Satisfaction of Judgment." CP at 10. Articulating the issues, Zurich argued:

[T]he judgment in excess of policy limits [must] be set aside under CR 60(b)(4) for reasons of fraud, misrepresentation, or misconduct of the plaintiff; and/or under CR 60 (b)(5) because the judgment is void; 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.

CP at 14. Zurich also argued that "plaintiff's negotiation of the \$100,000 payment of policy limits

⁴ Forsyth filed a motion for confirmation of the arbitrators' award on July 23, 1999. The superior court considered and granted the motion and entered an order reducing the award to judgment on August 6. The check was honored on August 9.

⁵ The record does not explain the almost eight-year gap between Forsyth's 1999 acceptance of Zurich's \$100,000 payment of the policy limits and her 2007 filing of the "Partial Satisfaction of Judgment." CP at 8-9.

constitute[d] settlement of the claims and/or satisfaction of the judgment.” CP at 14.

Zurich’s motion explained that after the arbitrators set \$150,000 as the amount of Forsyth’s damages, her attorney acknowledged that this amount exceeded the policy limits by \$50,000, offered to “settle” a “potential bad faith” claim for \$25,000, finally “asked for permission to negotiate [Zurich’s] \$100,000 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.’⁶ (Exhibit 4).” CP at 11.

Zurich further explained how Forsyth’s counsel nevertheless proceeded to reduce the \$150,000 arbitrator’s award to judgment by withholding information from and making material misrepresentations to the superior court that entered the judgment *ex parte*. First, the record does not reflect that Forsyth’s counsel informed the court of the policy limits or that Forsyth had already accepted Zurich’s payment of the \$100,000 policy limits. Second:

Mr. Rumbaugh [Forsyth’s counsel] actively misrepresented to the Court Commissioner that Mr. McGarry [Zurich’s counsel] had approved the Judgment as to form and content. 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. (Exhibit. 1 to Exhibit. 6). *This is a false representation.* (McGarry Declaration). . . . Thus, counsel for Forsyth misrepresented to the Court Commissioner 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.

CP at 12.⁷ (Emphasis added).

⁶ More specifically, Zurich argued, the *agreement* in this case (the policy) states, “The [\$100,000] limit of Bodily Injury Liability shown in the Schedule . . . is [Zurich’s] *maximum limit of liability for all damages.*” CP at 16 (referencing policy, CP at 36) (emphasis added).

⁷ In addition, before his October 5, 2007 letter to Zurich confirming payment of the \$100,000 and

Zurich also asked the superior court to impose CR 11 sanctions on Forsyth's counsel for lack of "good faith basis for the pleadings he filed in order to obtain [the] judgment," CP at 122, and for "knowingly present[ing] for entry a judgment on an award that not only exceed[ed] policy limits, but [did] so after [his client] ha[d] accepted full payment." CP at 122.

The same superior court department that had entered the judgment eight years earlier heard Zurich's motion to vacate. At the hearing, Forsyth's counsel argued that (1) although the arbitration portion of her policy, paragraph A1, states "under this endorsement," paragraph A2, which addresses arbitration awards, omits this "endorsement" language; (2) therefore, the \$100,000 policy limit does not apply to arbitration awards, CP at 34; RP (Dec. 12, 2008) at 4; and (3) paragraph C2 of arbitration portion of her policy, which also addresses arbitration awards, fails to state "under this endorsement," further indicating that an arbitration damages award is binding even if it exceeds the policy limit. RP (Dec. 12, 2008) at 5.

Acknowledging some ambiguity⁸ in paragraphs A1 and A2 of the policy, the superior court stated, "[I]t clearly is the intent of the contract that we're talking about the contract limits, and it says that in the paragraph before that [i.e. A1]." RP (Dec. 12, 2008) at 7; CP at 125. Having considered the parties' arguments, the superior court granted Zurich's motion to vacate

demanding payment of the "outstanding remaining judgment amount," Forsyth's counsel "never provided Zurich or its attorneys with a copy of the partial satisfaction of judgment." CP at 12-13.

⁸ The superior court said to Forsyth's counsel:

I hear what you're saying. It would be more clear [if Zurich had included the language "under this endorsement" under both paragraphs A1 and A2]. And maybe that's what [Zurich] needs to do in the future for arbitration clauses, to say, "and as to the amount of damages up to the policy limits," or whatever.

RP (Dec. 12, 2008) at 6-7.

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the judgment, ruling, “The judgment is void as it exceed [p]olicy limits, pursuant to CR 60(b)(5) and *Anderson v[.] Farmers Ins. Co.*, 83 Wn. App. 725, 923 P.2d 713 (1996).”⁹ CP at 178. The superior court neither addressed nor imposed sanctions.

Forsyth appealed the superior court’s order granting Zurich’s motion to vacate the judgment. Zurich cross appealed, arguing that the superior court had erred in failing to impose sanctions against Forsyth’s counsel.

III. 2009 Petition to Extend Judgment’s Enforcement Period; Second Appeal

To protect against the risk of the judgment’s expiring “if . . . reinstated on appeal,” in 2009, CP at 144, Forsyth petitioned the superior court to extend the enforcement period of the judgment, set to expire ten years from the date the superior court had entered it in 1999.¹⁰ Citing 7.2(e), the superior court denied Forsyth’s petition, reasoning that it lacked authority because extending the judgment would impermissibly “change a decision then being reviewed by the appellate court.”

Forsyth then filed a motion with this court under RAP 7.2, asking permission for the superior court to extend the life of the judgment.¹¹ She also filed a second notice of appeal—from the superior court’s denial of her petition to extend the life of the judgment. We consolidated her two appeals (former No. 39734-0-II; No. 38724-7-II).

ANALYSIS

⁹ The superior court declined to address the implications of paragraph C2, which governed venue.

¹⁰ *See* RCW 6.17.020.

¹¹ Our commissioner referred the motion to this panel of judges.

I. Vacation of Judgment

Forsyth argues that the superior court erred by granting Zurich's motion to vacate the judgment. We disagree.

Generally, we review for abuse of discretion a superior court's granting a motion to vacate a judgment.¹² Here, however, the superior court interpreted case law to justify vacating the judgment. We review matters of law de novo. *Quality Rock Prod. v. Thurston County*, 139 Wn. App. 125, 133, 159 P.3d 1 (2007) (citation omitted). We hold that the superior court here did not err as a matter of law in granting Zurich's motion to vacate the judgment.

Relying on CR 60(b)(6) and *Anderson v. Farmers Ins. Co.*, 83 Wn. App. 725, 923 P.2d 713 (1996), *review denied*, 132 Wn 2d 1006 (1997), the superior court voided the judgment because it exceeded the \$100,000 UIM policy limit. In *Anderson*, Farmers provided Anderson with UIM coverage with a \$25,000 policy limit. *Anderson*, 83 Wn. App. at 727. After a Anderson was injured in a collision with another driver, Anderson demanded arbitration of her UIM claim with Farmers. *Anderson*, 83 Wn. App. at 728. "The parties agreed that the arbitrators were given no instructions as to their authority." *Anderson*, 83 Wn. App. at 732 n.1. The arbitrators awarded Anderson \$56,000. *Anderson*, 83 Wn. App. at 728.

The relevant portion of Anderson's UIM policy with Farmers stated:

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.

¹² See, e.g., *In re the Matter of Marriage of Dugan-Gaunt*, 82 Wn. App. 16, 18, 915 P.2d 541 (1996); *Haller v. Wallis*, 89 Wn.2d 539, 543, 573 P.2d 1302 (1978).

Anderson, 83 Wn. App. at 732 (emphasis in original). As we explained in *Anderson* :

An arbitrator’s powers are governed by the agreement to arbitrate. The ensuing award must not exceed the authority established in the agreement. 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.^{13]}

Anderson, 83 Wn. App. at 730-31 (internal citations omitted). We reasoned that the UIM policy limited the arbitrators’ authority to award payment to the extent allowed “under this Part [UIM],” which was anywhere “between \$0 to \$25,000.” *Anderson*, 83 Wn. App. at 732. Concluding that, because the UIM policy entitled Anderson to a maximum \$25,000 award, the arbitrators exceeded their authority by awarding Anderson \$56,000—an amount in excess of that maximum, we reversed and remanded. *Anderson*, 83 Wn. App. at 732-33, 735.

The facts here are comparable to those in *Anderson*. Forsyth’s UIM policy with Zurich had a \$100,000 limit. The parties did not inform the arbitrators of this limit. As in *Anderson*, the arbitrators awarded Forsyth damages in excess of that limit (\$150,000). Moreover, the pertinent language of Forsyth’s insurance policy closely resembles the pertinent language of Anderson’s policy:

If [Zurich] 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.

¹³ Former RCW 7.04.150 (1982), *repealed by* Laws of 2005, ch. 433, § 50, stated:

Confirmation of award by court. At any time within one year after the award is made, unless the parties shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order unless the award is beyond the jurisdiction of the court, or is vacated, modified, or corrected, as provided in RCW 7.04.160 and RCW 7.04.170. Notice in writing of the motion must be served upon the adverse party, or his attorney, five days before the hearing thereof. The validity of an award, otherwise valid, shall not be affected by the fact that no motion is made to confirm it.

CP at 184. This language establishes the arbitrators' authority to award damages only to the extent permitted "under th[e] endorsement." CP at 184. Here, the parties "d[id] not agree," CP at 184, about the amount of damages Zurich owed Forsyth under the policy's UIM coverage; and the policy limited the arbitrators' authority to award damages to an amount between \$0 and \$100,000. As in *Anderson*, the arbitrators exceeded their authority by awarding Forsyth \$150,000 in damages, \$50,000 more than the UIM policy limit. Accordingly, the 1999 superior court should have limited the damages award to \$100,000, the highest amount it had jurisdiction to enter under *Anderson*, before it reduced the award to judgment. *Anderson*, 83 Wn. App. at 731. Because it did not, the \$150,000 judgment was void when entered in 1999. Therefore, the superior court did not err in 2008 in vacating the 1999 judgment.

Under the circumstances of this case, we cannot say that no reasonable person would have taken the position that the superior court took in granting Zurich's motion to vacate the judgment. We discern no abuse in its exercise of discretion. Accordingly, we affirm the superior court's vacation of the \$150,000 judgment.

II. CR 11 Sanctions

In its cross appeal, Zurich argues that the trial court erred in failing to sanction Forsyth's counsel under CR 11 for lack of "good faith basis for the pleadings he filed in order to obtain [the] judgment," CP at 122, and for "knowingly present[ing] for entry a judgment on an award that not only exceeds policy limits, but does so after [his client] has accepted full payment." CP at 122. Again, we disagree.

We review a superior court’s decision to impose or to deny CR 11 sanctions for an abuse of discretion. *Bldg. Indus. Ass’n of Wash. v. McCarthy*, 152 Wn. App. 720, 745, 218 P.3d 196 (2009) (citing *Brin v. Stutzman*, 89 Wn. App. 809, 827, 951 P.2d 291 (1998)). In light of the superior court’s notice of the UIM policy’s ambiguities, Forsyth’s argument met CR 11’s minimum threshold of “a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law.” Thus, we cannot say that the superior court took an unreasonable position in failing to sanction Forsyth’s counsel under CR 11.

III. Motions To Extend Judgment

Forsyth’s second appeal (former cause No. 39734-0-II, ultimately consolidated with this appeal), from the superior court’s denial of her petition to extend the life of the judgment, also fails. Once the superior court vacated the judgment, there was no longer any judgment for it to extend. For this same reason, we deny Forsyth’s related motion on appeal, referred to us by our commissioner, in which she asks us for permission for the superior court to extend the life of the judgment. In light of our affirming the superior court’s vacation of the \$150,000 judgment, Forsyth’s request for extension is moot.

ATTORNEY FEES

Zurich requests attorney fees under RAP 18.9, arguing that Forsyth's appeal is "frivolous." Br. of Resp't at 21. A frivolous appeal is one presenting "no debatable issues . . . upon which reasonable minds might differ; i.e. it is so devoid of merit that no reasonable possibility of reversal exists." *In re Marriage of Meredith*, 148 Wn. App. 887, 906, 201 P.3d 1056 (citing *Brin*, 89 Wn. App. at 828), *review denied*, 167 Wn.2d 1002, 220 P.3d 207 (2009). Forsyth's appeal does not meet this definition, especially in light of Zurich's letting the judgment stand without challenge for many years. Just as Forsyth's superior court position constituted "a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law," CR 11(a), her appeal is not frivolous. Accordingly, we deny Zurich's request for attorney fees on appeal under RAP 18.9. We do, however, award Zurich, the prevailing party, statutory attorney fees and costs under RAP 14.1, 14.2, and 14.3, and 14.4.

We affirm the superior court's vacation of the judgment, denial of sanctions below, and denial of Forsyth's motion to extend the vacated judgment. Forsyth's pending motion to extend

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the judgment is now moot. We deny Zurich's request for attorney fees on appeal under RAP 18.9, but we award statutory attorney fees and costs to Zurich as the prevailing party under RAP 14.1, 14.2, 14.3, and 14.4.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

I concur:

Quinn-Brintnall, J.

I concur in result only:

Armstrong, P.J.