NO. 92489-9
(Court of Appeals No. 71709-0-I)

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JESS NELSON, an individual,

Petitioner,

vs.

MICHAEL ERICKSON and JANE DOE ERICKSON, and the marital community composed thereof,

Respondents.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Mary Yu, Judge

ANSWER TO PETITION FOR REVIEW

REED McCLURE
By Marilee C. Erickson WSBA #16144
Suzanna Shaub WSBA #41018
Attorneys for Respondents

Address:

Financial Center
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161-1087
(206) 292-4900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

Rules and Regulations

I. NATURE OF THE CASE

After a trial de novo from a mandatory arbitration of claims arising from a motor vehicle accident, the trial court awarded the plaintiff his attorney fees pursuant to MAR 7.3 on the grounds that he had improved his position at trial compared to the offer of compromise. Petitioner seeks review of an unpublished decision of Division I, which properly reversed the trial court's award of costs and attorney fees to the plaintiff. The Court of Appeals correctly determined that the plaintiff failed to improve his position at the trial de novo and remanded with instructions to vacate the MAR 7.3 attorney fees and costs awarded to plaintiff.

II. ISSUE PRESENTED

Should this Court review Division I's decision reversing the superior court's award of attorney fees to plaintiff pursuant to MAR 7.3 where defendant improved his position at trial relative to the offer of compromise when that decision does not conflict with any decisions of this Court?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

Plaintiff/petitioner Jess Nelson and defendant/respondent Michael Erickson were involved in an automobile accident. (CP 2) Nelson sued Erickson in King County Superior Court and moved the case to mandatory

arbitration. (CP 1-4, 9-10) In May of 2013, the arbitrator awarded Nelson $43,401.59. (CP 832, 928, 1081) Erickson filed a timely request for a trial de novo. (CP 12)

On September 25, 2013, Nelson presented Erickson with a written offer of compromise stating:

> Pursuant to RCW 7.06.050 and MAR 7.3 Plaintiff JESS NELSON hereby offers to settle his claim against Defendant MICHAEL ERICKSON and JANE DOE ERICKSON in the amount of $26,000 plus taxable costs incurred at arbitration. This offer is open for ten calendar days after receipt of service.

(CP 839) Erickson did not accept the offer, and the case proceeded to a jury trial. (CP 544)

On November 8, 2013, the jury returned a verdict in Nelson's favor in the amount of $24,167. (CP 635) The court denied Nelson's motion for a new trial, but granted his motion for additur and awarded a $3,000 additur. (CP 670-71) The court then denied Erickson's motion to reconsider. (CP 681-86, 728-29) The court entered an order and judgment in the total amount of $27,896.98, which included $24,167.00 for the jury verdict, $3,000.00 for the additur, and $729.98 in costs. (CP 723-24)

B. STATEMENT OF RELEVANT PROCEDURE.

Following entry of the judgment, Nelson filed a motion for attorney fees pursuant to MAR 7.3 and RCW ch. 7.06. (CP 795-822) The

court initially denied the motion for fees. (CP 1005-09) Nelson moved for reconsideration, and the court invited a response and reply. (CP 1010-18, 1024) The trial court then granted the motion for reconsideration and determined that Erickson had not improved his position at trial relative to the $27,167.00 verdict because Nelson's offer of compromise was for $26,000 and excluded costs.[1] (CP 1047-55) The court awarded Nelson fees in the amount of $58,980.00 and costs in the amount of $4,488.90. (CP 1047-55) On March 3, 2014, the trial court issued its Findings of Fact and Conclusions of Law Regarding Attorney's Fees and Costs and entered a Second Amended Judgment in the total amount of $91,365.88. (CP 1044-46, 1047-53) Erickson timely appealed. (CP 1056-80)

On September 14, 2015, Division I of the Court of Appeals issued its unpublished decision affirming the superior court's award of additur, reversing the superior court's award of attorney fees pursuant to MAR 7.3, and remanding with instructions to vacate the award of fees and costs to Nelson. A copy of the Court's decision is attached as Appendix A.

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[1] In a handwritten addendum to the order, the court stated as follows:

> The Ct. grants the Motion to Reconsider based on a re-reading of Niccum. This Ct. erred in the first instance by including costs in the offer. Mr. Nelson's offer of compromise was for $26,000.00. Defendant Erickson failed to improve his position at trial and Pl. is entitled to fees + costs.

(CP 1055)

Division I determined that Erickson improved his position at the trial de novo because the jury verdict did not exceed Erickson's offer of compromise in the amount of $27,522.19 ($26,000.00 plus the $1,522.19 in costs awarded by the arbitrator). (Appendix A at 19) Nelson was therefore not entitled to a MAR 7.3 award of fees and costs. (*Id.*)

Nelson (hereafter "petitioner") now petitions for review under RAP 13.4. This Court should deny review.

IV. ARGUMENT

This Court will only accept review if the Court of Appeals' decision fits one of the four criteria in RAP 13.4(b):

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Petitioner contends this case qualifies for review under RAP 13.4(b)(1) because it conflicts with *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012). (Petition at 2) Division I's decision does not conflict with *Niccum,* and this Court should therefore deny review.

A. DIVISION I'S DECISION DOES NOT CONFLICT WITH *NICCUM V. ENQUIST.*

To understand why Division I's decision is correct and does not conflict with *Niccum,* a brief discussion of MAR 7.3 is necessary. MAR 7.3 provides in relevant part:

> The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo.

MAR 7.3 (emphasis added). Similarly, RCW 7.06.060(1) provides:

> The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo.

When a party serves an offer of compromise after the arbitration, the compromise offer becomes the amount used to determine whether a party has improved his position at the trial de novo. RCW 7.06.050(1)(a) and (b). The statute provides as follows:

> (b) In any case in which an offer of compromise is not accepted by the appealing party within ten calendar days after service thereof, for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator's award for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo.

RCW 7.06.050(1)(b) (emphasis added).

Justice Talmadge explained the purpose behind MAR 7.3 as follows:

> [The possibility of MAR 7.3 fees] should compel parties to assess the arbitrator's award and the likely outcome of a trial de novo with frankness and prudence; meritless trials de novo must be deterred.

Haley v. Highland, 142 Wn.2d 135, 159, 12 P.3d 119 (2000), concurring opinion.

Petitioner argues Division I's decision conflicts with this Court's holding in *Niccum.* (Petition at 2) He asserts *Niccum* supports his position that it is always improper to include costs in an offer to compromise. (Petition at 5-6) Division I properly rejected petitioner's arguments regarding the application of *Niccum* here. Not only is this case factually distinguishable from *Niccum,* the Court of Appeals' ruling is actually consistent with the *Niccum* holding. Petitioner's misguided arguments to the contrary do not create any basis for this Court's review.

In *Niccum,* the Washington Supreme Court addressed the propriety of subtracting costs from an offer of compromise that purports to include them before comparing that offer to the jury's award for purposes of MAR 7.3. 175 Wn.2d at 446. After the defendant sought a trial de novo from mandatory arbitration, the plaintiff made a confusing offer of compromise. *Id.* at 444. The offer of compromise was for "$17,350.00 including costs and statutory attorney fees." *Id.* (emphasis omitted). The unspecified amount of "costs and statutory attorney fees" the compromise offer

purported to include was unknown at the time. *Id.* In determining whether attorney fees were warranted under MAR 7.3, the trial court subtracted $1,016.28 in "costs" from the offer of compromise before comparing it to the $16,650.00 jury award. *Id.* at 445. The Supreme Court reversed. *Id.* at 452-53. The *Niccum* Court held that the trial court should have made "a comparison of damages to the lump sum that he offered to accept in exchange for settling the lawsuit." *Id.* at 450. The Court further explained:

> It is our view that an ordinary person would consider that the "amount" of an offer of compromise is the total sum of money that a party offered to accept in exchange for settling the lawsuit.

Id. at 452. Despite the confusing language about inclusive costs in the offer of compromise, the Court determined that the amount the plaintiff was willing to settle for was $17,350, and that was the number the Supreme Court mandated be compared to the damages awarded at trial. *Id.*

As Division I appropriately pointed out in this case (Appendix A at 18), the essential point in *Niccum* was to discourage litigants from making confusing compromise offers.

> Niccum's position rests on the premise that an offer of compromise that purports to include costs actually does so. There is, however, no statutory justification for segregating an offer of compromise into separate amounts corresponding to damages and costs. A party may ask for an extra $1,000 in an offer of compromise to cover its

> expenses, but those dollars do not constitute "costs" as that term is defined in RCW 4.84.010, i.e., sums "allowed to the prevailing party upon the judgment." They are just dollars. Thus, comparing the jury's $16,650 award to Niccum's $17,350 offer of compromise does not involve a comparison of damages to damages plus costs, as Niccum suggests, but rather a comparison of damages to the lump sum that he offered to accept in exchange for settling the lawsuit.

Id. at 450.

Division I's decision here is not inconsistent with *Niccum*, as petitioner argues, because the cases are factually distinct in a key way. (Petition at 2) In *Niccum*, the amount of "costs and statutory attorney fees" purportedly included in the offer of compromise was unspecified and unknown at the time of the offer. 175 Wn.2d at 452. Unlike in *Niccum*, however, the "taxable costs" included in Nelson's offer of compromise constituted a sum certain at the time of the offer. The plain language in Nelson's offer of compromise is that he would settle the case for "$26,000.00 plus taxable costs incurred at arbitration." (CP 839) (emphasis added). The amount of the arbitration costs was a sum certain because those costs ($1,522.19) had already been awarded by the arbitrator and were known by both parties at the time of the offer. (CP 832, 928, 1081)

This is an important factual distinction from *Niccum*. When the offer of compromise is a known sum certain as here, there is no concern

that the purposes of RCW 7.06.050 and MAR 7.3 will be frustrated. A party presented with an offer of compromise for a sum certain can make an educated and informed decision about what number he needs to better at trial. The party can make a reasoned decision regarding whether accepting an offer is in his best interest. As *Niccum* pointed out, "Confronted with an offer purporting to contain unspecified costs, a party will have difficulty determining what position it must improve upon to avoid paying reasonable attorney's fees if it elects to continue to trial." *Id.*

Petitioner also erroneously contends that Division I's decision conflicts with *Niccum* because it impermissibly used contract law by relying on an e-mail confirming the details of the offer of compromise. (Petition at 7-8) First, nowhere in the opinion does the appellate court state that it relied on principles of contract law, nor does it even reference contract law. (Appendix A) Rather, Division I relied on the plain language of petitioner's offer of compromise to interpret its terms ("Nelson's offer was quite clear. He offered to settle his case for $26,000 plus taxable costs incurrent in arbitration"). (Appendix A at 19) The court merely used the October 24, 2013 e-mail as confirmation of the terms of the offer of compromise.[2] (*Id.*; CP 839, 938) In other words, it

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[2] The e-mail from Erickson's counsel to Nelson's counsel provided, "... I understand that your current demand is: Your prior Offer of Compromise of $26,000 plus fees and costs awarded at arbitration ($27,522.19)...." (CP 938)

used the e-mail to confirm the amount for which petitioner was willing to settle. *Id.*

The fact the offer of compromise had been rejected by the time of the e-mail does not make the e-mail irrelevant, as petitioner contends, nor does it make its content any less accurate. (Petition at 7-8; CP 839) In fact, Erickson's counsel requested that Nelson's counsel inform him if the content of the e-mail was incorrect, and there is nothing on the record to indicate that Nelson's counsel disagreed with that assessment. (CP 938) It was only several months later and after the court awarded additur that Nelson sought to manipulate the amount for which he would have settled at the time of the offer of compromise.

Because Division I's decision can be reconciled with *Niccum* based upon key factual differences between the cases, Division I's ruling does not conflict with *Niccum* and there is no basis for this Court to grant review.

B. DIVISION I'S DECISION IS CORRECT BECAUSE NELSON FAILED TO IMPROVE HIS POSITION AT THE TRIAL DE NOVO.

Division I correctly held that Erickson improved his position at the trial de novo for purposes of MAR 7.3 fees and costs. (Appendix A at 19) Contrary to petitioner's arguments, *Niccum* did not dictate that if an offer of compromise references costs, such amount must be ignored in the MAR

7.3 award calculations. The *Niccum* Court engaged in a lengthy analysis as to why a party's classification of its offer is not relevant to the end comparison. 175 Wn.2d at 449-51. Rather, the *Niccum* Court focused on the need to compare the amount that the party making an offer of compromise would actually settle for the amount of the damages awarded at trial. *Id.* at 452. In determining whether attorney fees were warranted under MAR 7.3, the *Niccum* Court required that the trial court compare the damages to "the lump sum that he offered to accept in exchange for settling the lawsuit." *Id.* at 450. The *Niccum* Court further explained that:

> It is our view that an ordinary person would consider that the "amount" of an offer of compromise is the total sum of money that a party offered to accept in exchange for settling the lawsuit.

Id. at 452.

Any interpretation of confusing language in an offer of compromise must come back to this bedrock principle of the *Niccum* decision. Under the facts in *Niccum*, that analysis resulted in this Court refusing to subtract unspecified costs from the offer as plaintiff urged. Regardless of the language about inclusive costs, this Court determined that plaintiff was willing to settle for $17,350, and $17,350 was the number the Supreme Court mandated be compared to the $16,650 in damages awarded at trial. *Id.*

In this case, Nelson's offer of compromise also included language about costs, and the Court of Appeals properly determined that petitioner's offer included the amount of these "costs." The arbitration award here specifically included $1,522.19 in costs. Although Nelson labeled part of the money that he wanted in settlement as "taxable costs," those additional amounts are simply additional dollars because Nelson did not have a right to "costs," as defined by RCW 4.84.010 at that point in the litigation. However, he was entitled to make an offer of compromise for any amount he chose, including one that ensured that money spent for the arbitration was included. Nelson's offer of compromise was, at its heart, a settlement offer, and he could make it whatever amount he wanted. As the *Niccum* Court noted:

> A party may ask for an extra $1,000 in an offer of compromise to cover its expenses, but those dollars do not constitute "costs" as that term is defined in RCW 4.84.010, i.e., sums "allowed to the prevailing party upon the judgment." They are just dollars.

175 Wn.2d at 450. Likewise, the "taxable costs incurred at arbitration" by Nelson are not "costs" as defined in RCW 4.84.010; rather, they are additional dollars that Nelson made part of the amount for which he was willing to settle. (CP 839) The amount is a known quantity, and Nelson plainly stated in his offer of compromise that he was willing to settle for $26,000 plus that additional amount.

Despite the potentially ambiguous cost language, it is clear from the wording of petitioner's offer of compromise that he was not willing to settle for only $26,000.00, as the trial court erroneously determined.[3] (CP 839, 1048, 1055) Rather, a straightforward reading of petitioner's offer of compromise reveals that Nelson would settle the case for $26,000.00 plus the costs awarded at arbitration, which was $1,522.19. (CP 832, 839, 928, 1081) The only reasonable reading of the offer of compromise is that petitioner was offering to settle the case for nothing less than $27,522.19. Although it is unclear why Nelson chose to phrase the offer of compromise the way he did, it is disingenuous and contrary to the express language of the offer of compromise for Nelson to insist he would have settled the case simply for $26,000.00.

The unusual factual scenario and linguistic gymnastics in this case present the type of confusion that the *Niccum* Court sought to avoid when it reduced the analysis to a fairly simple question: what would petitioner have accepted to dismiss the case? That amount then replaces the amount of the arbitrator's award and is used to compare to the jury verdict. Petitioner's offer of compromise clearly reveals that he would have settled for $27,522.19.

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[3] See Finding of Fact No. 1. (CP 1048)

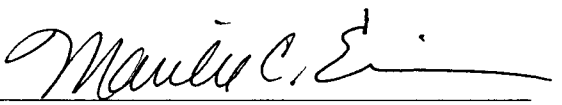
A straightforward application of RCW 7.06.050 and the holding in *Niccum* reveal that Erickson did improve his position at trial. Comparing the damages awarded at trial ($27,167) to the lump sum petitioner offered to accept in exchange for settling the lawsuit ($27,522.19), as required by *Niccum*, Erickson in fact improved his position at trial. As Division I correctly determined, attorney fees to Nelson were therefore not warranted.[4] Petitioner's arguments to the contrary are misguided and do not create any basis for this Court's review.

V. CONCLUSION

The Court of Appeals correctly reversed the trial court's award of MAR 7.3 attorney fees and costs to plaintiff/petitioner Nelson. Division I's decision does not qualify for review under RAP 13.4. Respondent Erickson respectfully requests that this Court deny review.

DATED this 12th day of November, 2015.

REED McCLURE

By 

Marilee C. Erickson WSBA #16144
Suzanna Shaub WSBA # 41018
Attorneys for Respondents

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[4] See Finding of Fact No. 4. (CP 1048)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JESS NELSON, an individual, Respondent, v. MICHAEL ERICKSON and JANE DOE ERICKSON, and the marital community composed thereof, Appellants.	)	NO. 71709-0-I DIVISION ONE UNPUBLISHED OPINION FILED: September 14, 2015

LAU, J. — Jess Nelson sued Michael Erickson for personal injuries suffered in a car accident. Erickson appealed the arbitrator's award. After a Mandatory Arbitration Rule (MAR) trial de novo, the jury awarded past and future medical expenses and past general damages. It awarded no amount for future pain and suffering. The trial court granted additur and increased the award by $3,000 for future pain and suffering. It granted attorney fees and costs to Nelson ruling that Erickson failed to improve his position at trial. Erickson appeals the grant of additur and award of MAR fees and costs.

APPENDIX A

He argues the evidence is insufficient to warrant additur and he improved his position at trial. The award of no general damages for future pain and suffering is contrary to the evidence and Erickson improved his position at the trial de novo. We affirm in part, reverse in part, and remand with instructions to vacate the MAR attorney fees and costs award to Nelson.

FACTS

Procedural History

In December 2010, Michael Erickson totaled his Jeep after he hit the rear of Jess Nelson's truck.

In October 2012, Nelson filed a personal injury lawsuit in King County Superior Court.

Nelson transferred his case to mandatory arbitration pursuant to chapter 7.06 RCW. The arbitrator awarded Nelson $11,167 in special medical damages, $234.59 in out of pocket expenses, $32,000 in general damages for pain and suffering, and attorney fees and costs of $1,522.19.

In May 2013, Erickson requested a MAR trial de novo.

In September 2013, Nelson sent Erickson an offer of compromise to settle the claim for "$26,000 plus taxable costs incurred at arbitration." Clerk's Papers (CP) at 839. Erickson rejected the offer.

Before trial, the parties stipulated that Nelson was injured in the accident and incurred $9,361 in past medical expenses for the eight months following the accident. Erickson disputed Nelson's remaining claims for $1,806 in past medical expenses, the

necessity and reasonableness of future medical expenses, and past and future noneconomic damages.

Trial Testimony

At the three day trial, Nelson and his friends and family testified about the impact of the injuries on his life, daily activities, and recreational activities. His treating doctor and physical therapist spoke about Nelson's diagnosis and treatment.

Nelson's family and friends generally described how his injuries caused him to stop or limit the activities they enjoyed together before the accident. For example, several long-time friends said Nelson quit fly fishing and boating due to the noticeable pain these activities caused.

Nena Nelson said her husband stopped training for a planned hiking trip. She considered moving out because his pain made living with him after the accident unbearable.

Nelson testified about his physical condition before and after the accident. He was pain free before the accident. He described the effect of the injuries on his life, daily activities, and recreational activities. His pain limited his ability to golf, hunt, fish, hike, go boating, and to do hobby projects.

He received six to eight months of chiropractic treatment and completed an initial course of physical therapy. He also exercised at the gym as suggested by his chiropractor. According to Nelson, his pain has never gone away since the accident.

Dr. Larry Harper diagnosed and treated Nelson's injuries. He diagnosed Nelson with cervical dysfunction and lower back dysfunction caused by the accident. He agreed on the necessity and reasonableness of Nelson's chiropractic and physical

therapy treatments for pain. He referred Nelson to a nonsurgical neck and back specialist to evaluate the possibility of nerve involvement.

Dr. Harper reviewed the specialist's medical records. The records indicated some neck dysfunction, muscle strain and soft tissue pain in the neck and upper shoulders, numbness and tingling in his right fourth and fifth fingers, lower back muscle spasm, and dysfunction of the lower back. The specialist discussed various treatment options for Nelson including treatment with injections if Nelson continued to have ongoing persistent pain. The cost for cervical epidural steroid injections is about $2,000-3,000 for each. Imaging revealed the presence of asymptomatic "degenerative disk disease," an age related, often asymptomatic condition. Report of Proceedings (RP) (Nov. 6, 2013) at 272-73. Dr. Harper excluded degenerative disk condition as the source of Nelson's postaccident pain. In his opinion, an accident "[c]ertainly may aggravate or accelerate the rate of development of symptomology" and may speed up the rate of degeneration. RP (Nov. 6, 2013) at 281. According to Dr. Harper, the accident caused Nelson's injury, his condition was permanent, and he continued to experience pain. On future treatment, Dr. Harper stated:

> I would recommend either seeing a pain specialist about ongoing chronic pain issues or back to physical medicine to look at changes in possible MRI scans and need for injection treatments. Or I send a lot of people to acupuncturists also.

RP (Nov. 6, 2013) at 279.

Physical therapist Daniel Washeck testified that he treated Nelson for about nine months following the accident. He noted Nelson experienced pain when moving his head and neck. Washeck also noted muscle guarding and diminished range of motion. During his last visits, Nelson's neck stiffness and immobility persisted. Nelson reached

75 percent of his range of motion by his last visit in December 2011. In Washeck's opinion, Nelson's pain was permanent if it persisted for three years postaccident.

Hired by the defense, retired orthopedic surgeon Allen Jackson testified about his medical records review and physical examination of Nelson.

Dr. Jackson concluded that Nelson suffered a soft tissue injury to his neck and lower back. He expected full recovery in a normal anatomy in about three weeks to three or four months. He noted Nelson's abnormal anatomy due to normal age-related wear and tear—"multilevel degenerative changes." RP (Nov. 6, 2013) at 419. He offered no opinion on the effect of these degenerative changes on Nelson's symptoms. In his experience, such changes often prolong the recovery period.

Dr. Jackson agreed that Nelson, his family, and his friends truthfully described Nelson's pain and symptoms. He also agreed that Nelson's use of medication, massage and chiropractic treatments for six to eight months was necessary and reasonable given his accident-related injuries. But any treatment beyond this period was not reasonable and necessary absent objective evidence of accident-related symptoms.

> I need some kind of objective evidence that I can measure that correlates this event with these symptoms. And if I can't—if I don't have some objective finding, whether it's on an MRI or an EMG or an X ray or a physical exam, that shows that there is some reason that I can explain that connects these two events, that is, his ongoing symptoms with his injury, then I have to conclude that I don't see objective evidence that correlates the two, subjective symptoms or basically his symptoms. I mean, I can't measure or nor can anyone else measure his symptoms.

RP (Nov. 6, 2013) at 423.

He also declined to conclude that Nelson "sustained a permanent injury." RP (Nov. 6, 2013) at 424. He acknowledged that Nelson was asymptomatic before the

accident and suffered injuries from the accident. Dr. Jackson's tests showed Nelson was not faking his injuries or pain. Dr. Jackson admitted he relied on averages to estimate Nelson's recovery time.

> [Defense Counsel]: Okay. So the average has nothing to do with how Jess Nelson would recover?
> [Jackson]: Other than it gives you some yardstick to what your expectations would be, yeah. That doesn't specifically address him as an individual.

RP (Nov. 6, 2013) at 433.

He readily conceded that soft tissue injuries cannot be diagnosed by imaging studies. Instead, treatment for soft tissue injury depends upon the patient's subjective complaints and a physical exam. He declined to give an opinion on whether Nelson was symptom free after he completed chiropractic treatments.

Dr. Jackson acknowledged that a person who still experiences neck pain and intermittent back pain three years postaccident likely suffered a permanent injury. He conceded that from an orthopedic surgeon's perspective, nothing could be done for a person still suffering neck and back pain three years after the accident. Dr. Jackson agreed that referral to a pain management specialist or a physical therapist would be reasonable for a patient with Nelson's symptoms:

> [Defense Counsel]: And what you would do if that person came to you is you would probably refer them to a pain management specialist; is that right?
> [Dr. Jackson]: I might do that, yes.
>
> . . . .
>
> [Defense Counsel]: Okay. How about more physical therapy? Would that be something that would be reasonable?
> [Dr. Jackson]: I think physical therapy is helpful for people who have certain conditions of the spine. And I think if their symptoms wax and wane, that repeat physical therapy for short periods of time are helpful when their symptoms flare. So, yeah, I think physical therapy is helpful.

RP (Nov. 6, 2013) at 455.

Dr. Jackson recommended treatment options for a patient like Nelson:

> [Dr. Jackson]: Well, if [Nelson] were my patient, I'm not exactly sure what I would recommend for him. I mean, I might recommend some additional medication for him. I might recommend short-term physical therapy for him. But I might recommend he see a rheumatologist for treatment. So there are lots of modalities that I might consider if he were my patient.
> [Defense Counsel]: And any of those modalities would be reasonable, right?
> [Dr. Jackson]: Well, I think they would be.

RP (Nov. 6, 2013) at 457.

Dr. Jackson agreed that some patients experience chronic pain:

> [Defense Counsel]: You—in your practice you had a bunch of—well, I don't know about a bunch—but you've treated people that wound up being—having chronic pain?
> [Dr. Jackson]: I have.
> [Defense Counsel]: That's not an abnormal thing to have happen?
> [Dr. Jackson]: Well, I wouldn't say it's—I wouldn't qualify it as saying it's not abnormal. I think pain is—you know, chronic pain is not the usual.

RP (Nov. 6, 2013) at 455.

Dr. Jackson expressed "no doubt" that Nelson truthfully described his condition. RP (Nov. 6, 2013) at 459. He doubted that Nelson's ongoing pain was related to the accident.

> [Defense Counsel]: Okay. So just to summarize it, just so it's clear for the jury, the issue here is not—there's pain. It's that pain related to the collision. At some point you say no, correct?
> [Dr. Jackson]: That's my opinion, yes.
> [Defense Counsel]: And at what point do you believe the pain is no longer related to the collision?
> [Dr. Jackson]: Somewhere between six and eight months, as I previously said.

RP (Nov. 6, 2013) at 459.

He acknowledged he treated patients who, like Nelson, complain of pain but with no objective confirmation such as imaging.

Closing Arguments

Nelson argued in closing that the accident caused his previously asymptomatic degenerative disk condition to "light up,"[1] resulting in ongoing chronic pain:

> That's exactly what we've got here, a condition not causing any pain or disability, didn't even know he had it. Gets hit. It's lighted up, made symptomatic, and now it's permanent. And the—the law is, Instruction No. 9, this is the law that needs to guide this case for you, is that this defendant is responsible for everything that comes with that lighting up. Not part of it. Not some of it. All of it.

RP (Nov. 7, 2013) at 507.

He argued that future injections and physical therapy for chronic pain was reasonable according to Dr. Jackson.[2] He noted Dr. Harper recommended regular pain management treatment. Assuming a life expectancy of 24 years, Nelson estimated necessary and reasonable medical expenses of $10,000 to $15,000. He asked for $33,000 in past noneconomic damages and a fair award for future noneconomic damages.

Erickson admitted liability for the accident. He claimed six months of treatment for Nelson's "sprain/strain" injury was reasonable. RP (Nov. 7, 2013) at 516. Erickson did not dispute that Nelson's pain was "ongoing." He argued that the dispute centered on whether the accident proximately caused the pain that extended beyond six to eight months:

> And I think it's important to think about and consider in coming to your decision because what we have disputed in this case is not that Mr. Nelson has pain. It seems clear. I think he's an honest guy. He seems to

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[1] The court instructed the jury on Nelson's theory that the accident caused his previously asymptomatic degenerative disk condition to "light up," causing his ongoing pain. The presence of degenerative changes in Nelson's spine was not a disputed issue. Dr. Jackson said the accident exacerbated the degenerative condition.

[2] The evidence shows that Dr. Harper and the back specialist, not Dr. Jackson, indicated that injection treatment for Nelson's chronic pain is reasonable.

> have pain in his neck that's ongoing. But a bigger issue is was that—is that related to the collision that occurred almost three years ago. What—what could we point to?

RP (Nov. 7, 2013) at 520.

> What you have is essentially injury to soft tissue that in normal human beings resolves in four to 12 weeks. If you have some degenerative changes, six to eight—even eight months. But beyond that, on a more-probable-than-not basis, which is the standard here, to a reasonable degree of medical certainty, Dr. Jackson says I can't say that's related.

RP (Nov. 7, 2013) at 521-22.

Erickson agreed on past medical expenses of $9,361. He disputed $1,806[3] in past medical expenses as not reasonable and necessary. Erickson asked the jury to award Nelson $10,000 as reasonable compensation for past noneconomic damages.

The court instructed the jury on Nelson's burden of proving damages and the factors to consider when awarding past and future general damages proximately related to the accident.

The jury returned the following verdict, totaling $24,167:

(1) Stipulated medical expenses: $9,361.00
(2) Past medical expenses: $1,806.00
(3) Future medical expenses: $10,000.00
(4) Past noneconomic damages: $3,000.00
(5) Future noneconomic damages: $0.00

CP at 843.

[3] Erickson's closing remarks misstated the amount in dispute as $1800.06. The jury awarded Nelson $1,806.

The trial court denied Nelson's motion for a new trial but granted the motion for additur:

> 3) [T]he motion for additur for future noneconomic damages IS GRANTED and an additur in the amount of $3,000.00 shall replace the jury award of $0.00. All other relief and the request for any other additional additur IS DENIED.
>
> The court finds that the lack of a jury award for future noneconomic damages is inconsistent with the evidence and the decision to award future medical expenses. The evidence supporting future medical expenses was based on uncontroverted testimony that the Plaintiff was continuing to experience pain now and in the future. The request for future treatment was specific to the treatment of that pain and there was no evidence to support any intervening cause for the pain. Although this court is reluctant to disturb a jury verdict, justice was not served by the verdict and an award that does not even acknowledge the pain while providing for future medical treatment is inconsistent. It is difficult for the court to substitute its judgment for a jury's determination of future pain and suffering, and despite Plaintiff's desire for a larger measure of damages, the court declines to exceed the value placed on Plaintiff's past pain and suffering.

CP at 670-71 (emphasis added).

Erickson moved unsuccessfully to reconsider. He argued that it was not inconsistent for the jury to award future special damages but no future general damages.

Nelson moved for attorney fees and costs under MAR 7.3 and RCW 7.06. On reconsideration, the court granted the request and awarded $58,980 in attorney fees and $4,488.90 in costs.[4]

Erickson appeals the award of additur and MAR attorney fees and costs.

[4] The court entered final judgment in the amount of $91,365.88.

ANALYSIS

Additur

Under RCW 4.76.030,[5] when a party moves for a new trial, the trial court is authorized to reduce or increase the verdict in lieu of a new trial if it obtains the consent of the adversely affected party.[6]

Here, the trial court denied Nelson's motion for a new trial but granted additur in the amount of $3,000 for future pain and suffering. Erickson moved unsuccessfully for

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[5] RCW 4.76.030 states in relevant part:
If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict, and if such party shall file such consent and the opposite party shall thereafter appeal from the judgment entered, the party who shall have filed such consent shall not be bound thereby, but upon such appeal the court of appeals or the supreme court shall, without the necessity of a formal cross-appeal, review de novo the action of the trial court in requiring such reduction or increase, and there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct and such amount shall prevail, unless the court of appeals or the supreme court shall find from the record that the damages awarded in such verdict by the jury were so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.

[6] Erickson argues that RCW 4.76.030 requires the trial court to obtain his consent before granting additur. Absent his consent, the trial court lacked authority to make the award. Erickson raises this issue for the first time on appeal. We do not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988) ("The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial"). Further, "[n]onconstitutional issues, as well as most constitutional ones, may not be raised for the first time on appeal in a regular civil appeal from a superior court judgment." City of Bellevue v. King County Boundary Review Bd., 90 Wn.2d 856, 863-64, 586 P.2d 470 (1978).

reconsideration, arguing that he produced sufficient evidence at trial to justify the jury's refusal to award future general damages.

Erickson argues that the trial court erred by granting additur.[7]

Determination of the amount of damages is within the jury's province, and courts are reluctant to overturn a verdict when fairly made. Palmer v. Jensen, 132 Wn.2d 193, 197, 937 P.2d 597 (1997). This court begins with the presumption that the jury's verdict was correct. RCW 4.76.030; Herriman v. May, 142 Wn. App. 226, 234, 174 P.3d 156 (2007). A decision to increase a jury's award is reviewed de novo. Robinson v. Safeway Stores, 113 Wn.2d 154, 161-62, 776 P.2d 676 (1989).

A trial court may grant additur where the jury's verdict on its face is so inadequate as to indicate it must have resulted from passion or prejudice. RCW 4.76.030; Robinson, 113 Wn.2d at 161. The question of whether a plaintiff is entitled to general damages turns on the evidence. Palmer, 132 Wn.2d at 201. "Although there is no per se rule that general damages must be awarded to every plaintiff who sustains an injury, a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages." Palmer, 132 Wn.2d at 201. Where the record shows "categorically" an award for special damages but not for proved general damages, additur and a new trial may lie. Cox v. Charles Wright Academy, Inc., 70 Wn.2d 173, 177, 422 P.2d 515 (1967).

[7] He assigns error to the court's related finding that there was no dispute Nelson's injuries were permanent or that he would continue to suffer pain in the future. Our review of this issue is de novo. Thus any findings are superfluous. The trial court made this finding to support its fees and costs award not its additur award.

Appellate courts look to the record in determining whether sufficient evidence supports a verdict. Palmer, 132 Wn.2d at 197-98. If the verdict is within the range of credible evidence, the trial court lacks discretion to find passion or prejudice affected the verdict for the purpose of awarding additur. Robinson, 113 Wn.2d at 161-62.

Erickson relies on Lopez v. Salgado-Guadarama, 130 Wn. App. 87, 89-90, 122 P.3d 733 (2005), and Herriman. In Lopez, plaintiff sued the defendant after a low-impact, no property damage car accident. At trial, the defendant's expert witness claimed a quick recovery and no objective findings supported the plaintiff's pain. Lopez, 130 Wn. App. at 89-90. The jury awarded special damages for medical expenses, but no general damages for pain and suffering. The trial court denied the plaintiff's motion for a new trial or additur. Division Three of this court affirmed, concluding that unlike in Palmer, the defendant disputed every aspect of the plaintiff's damages, and the plaintiff's credibility was in question. Lopez, 130 Wn. App. at 92. The court held that "[g]iven the evidence, the jury was entitled to conclude that the plaintiff incurred reasonable medical expenses as a result of the accident, while at the same time concluding he failed to carry his burden of proving general damages." Lopez, 130 Wn. App. at 93.

In Herriman, the defendant rear-ended the plaintiff while driving at a low rate of speed. Herriman, 142 Wn. App. at 228. At trial, a defense expert testified about plaintiff's preexisting back injury and attributed her symptoms to "extensive emotional overlay." Herriman, 142 Wn. App. at 230. He said she greatly exaggerated her pain complaints and secret surveillance indicated she faked her range of motion. He said no objective evidence explained her "physical restrictions." Herriman, 142 Wn. App. at

230. The jury awarded past economic damages, no future economic damages, and $10,000 for past and future noneconomic damages. The trial court granted the plaintiff's request for additur or, in the alternative, a new trial. Division Three of this court reversed the grant of additur noting significant disagreement over the seriousness and permanence of the injuries, evidence of exaggeration and malingering, preexisting ailments, and emotional component to the pain. Herriman, 142 Wn App. at 233. The jury was entitled to conclude that the plaintiff exaggerated her pain, should have recovered within three weeks, suffered no permanent injuries, and required no additional medical treatment. Herriman, 142 Wn. App. at 234-35.

Nelson analogizes to Palmer v. Jensen. There, the plaintiff presented uncontested medical evidence that she experienced pain after she was rear-ended by the defendant. The jury returned a verdict for $8,414.89 in special damages claimed at trial. Palmer, 132 Wn.2d at 201. The jury declined to award general damages for pain and suffering. Palmer, 132 Wn.2d at 198-99. The trial court denied the plaintiff's motion for a new trial. The Supreme Court reversed, concluding that the jury's failure to award general damages was contrary to the evidence because she presented uncontroverted evidence of ongoing, serious pain. The court reasoned, "a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages." Palmer, 132 Wn.2d at 201. The court concluded that the jury's failure to provide for such an award was contrary to the evidence. Palmer, 132 Wn.2d at 203.

We are not persuaded by Lopez and Herriman. This case is more like Palmer. Nelson presented undisputed evidence that three years postaccident, he continued to suffer chronic pain from the accident. Nelson, his friends, and family testified to

Nelson's ongoing pain and its effect on his daily and recreational activities. Both Dr. Jackson and Dr. Harper agreed that Nelson was pain-free before the accident. Dr. Jackson, Dr. Harper and physical therapist Washeck all agreed that existence of chronic, ongoing pain three years postaccident is a permanent injury. Dr. Jackson and Dr. Harper suggested treatment modalities for a person suffering chronic pain—referral to a pain management specialist, treatment by rheumatologist, additional physical therapy, medication, and treatment with injections. Dr. Jackson acknowledged his medical review indicated no other cause for Nelson's present pain complaints. Erickson agreed in closing remarks that Nelson was truthful when he testified that three years postaccident he continued to experience pain. He referred to Nelson as "an honest guy." RP (Nov. 7, 2013) at 520. Counsel disputed a discrete issue—whether Nelson's symptoms after eight months of treatment were proximately caused by the accident. The jury awarded $10,000 for future medical expenses, the exact amount Nelson requested in his closing argument. But it declined to award any amount for future pain and suffering. This award of future medical treatment expenses necessarily establishes that the accident proximately caused Nelson's injuries and need for future medical treatment.

Our review of the record shows the jury's omission of future general damages for pain and suffering is contrary to the evidence discussed above. Here the jury awarded $10,000 for future medical expenses. The trial evidence established Nelson's need for future medical treatment due to his ongoing chronic pain. In awarding damages for future medical expenses, the jury necessarily determined that such future expenses were reasonable, necessary, and causally related to the accident and for treatment of

Nelson's ongoing chronic pain. Unlike in Lopez and Herriman, here there was no evidence of preexisting neck-back pain, exaggeration, malingering, emotional component or lack of credibility. As Erickson candidly acknowledged, Nelson is "an honest guy."

In sum, the medical and lay witness evidence substantiates Nelson's claim that he experienced past and future special and general damages. We conclude the jury's verdict providing no damages for future general pain and suffering contradicts the evidence. Accordingly, we affirm the court's grant of additur in the amount of $3,000.

MAR Attorney Fees

Erickson argues that the trial court improperly awarded Nelson attorney fees and costs under MAR 7.3 and RCW 7.06.050 because he improved his position at trial. He assigns error to the court's finding that Nelson's offer of compromise was for $26,000 and its related finding that the verdict amount exceeded the offer of compromise.

The trial court denied Nelson's initial request for attorney fees and costs. On reconsideration, the court reversed the decision and granted the award because it misapplied the holding in Niccum v. Enquist, 175 Wn.2d 441, 286 P.3d 966 (2012):

> The Ct. grants the Motion to Reconsider based on a re-reading of Niccum. This Ct. erred in the first instance by including costs in the offer. Mr. Nelson's offer of compromise was for $26,000.00. Defendant Erickson failed to improve his position at trial and Pl. is entitled to fees + costs.

CP at 1055.

The application of a court rule is a question of law subject to de novo review. Niccum, 175 Wn.2d at 446. Whether a statute authorizes an award of attorney fees is a question of law this court reviews de novo. Niccum, 175 Wn.2d at 446.

Under MAR 7.3, "[t]he court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo." Likewise, "[t]he superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position." RCW 7.06.060.

The question here is whether Erickson improved his position on trial de novo.

Before trial, Nelson served Erickson with a written offer of compromise:

> Pursuant to RCW 7.06.050 and MAR 7.3 Plaintiff JESS NELSON hereby offers to settle his claim against Defendant MICHAEL ERICKSON and JANE DOE ERICKSON in the amount of $26,000 plus taxable costs incurred at arbitration. This offer is open for ten calendar days after receipt of service.

CP at 839 (emphasis added).

Erickson contends that under the statute, rule, and case law he improved his position. He asserts that Nelson made a clear offer to settle his case for a total of $27,522.19. He confirmed this compromise offer in an e-mail to Nelson.

Nelson responds by pointing to Niccum v. Enquist, 175 Wn.2d 441, 286 P.3d 966 (2012), for support. There, our Supreme Court addressed "whether it is proper to subtract costs from an offer of compromise that purports to include them before comparing that offer to the jury's award for purposes of MAR 7.3." Niccum, 175 Wn.2d at 446. The defendant filed a request for a trial de novo following an arbitrator's award in favor of the plaintiff. Before trial, the plaintiff made a confusing compromise offer that included costs to which he was not entitled because "Niccum did not enjoy 'prevailing party' status, he did not have the right to include costs in his offer of compromise." Niccum, 175 Wn.2d at 450.

The question here is whether Erickson improved his position on the trial de novo for purposes of a MAR 7.3 award of fees and costs.

When a party makes an offer of compromise following arbitration, the offer becomes the amount used to determine whether a party improved his position on trial de novo. RCW 7.06.050(1)(a). Under subsection (b) of this provision, the offer of compromise "shall" replace the amount of the arbitrator's award for determining whether the appealing party failed to improve its position at the end of the trial de novo. RCW 7.06.050(1)(b). From the offer of compromise amount compared to the jury's award, a court determines whether the appealing party after arbitration improves its position for purposes of MAR 7.3.

The essential point in Niccum was to discourage litigants from making confusing offers.[8]

> Niccum's position rests on the premise that an offer of compromise that purports to include costs actually does so. There is, however, no statutory justification for segregating an offer of compromise into separate amounts corresponding to damages and costs. A party may ask for an extra $1,000 in an offer of compromise to cover its expenses, but those dollars do not constitute "costs" as that term is defined in RCW 4.84.010, i.e., sums "allowed to the prevailing party upon the judgment." They are just dollars. Thus, comparing the jury's $16,650 award to Niccum's $17,350 offer of compromise does not involve a comparison of damages to damages plus costs, as Niccum suggests, but rather a comparison of damages to the lump sum that he offered to accept in exchange for settling the lawsuit.

Niccum, 175 Wn.2d at 450.

> Confronted with an offer purporting to contain unspecified costs, a party will have difficulty determining what position it must improve upon to avoid paying reasonable attorney's fees if it elects to continue to trial. Indeed, it is not entirely clear whether the figure Niccum provided the trial court for his "costs," $1,016.28, is limited to expenses incurred for arbitration.

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[8] Niccum was decided a year before Nelson made his offer.

Niccum, 175 Wn.2d at 452.

We are not persuaded by Nelson's argument that Erickson should have known Nelson did not have the right to include costs in his offer of compromise. Nelson wanted to settle the case and controlled the substance of his offer. Nelson's offer was quite clear. He offered to settle his case for "$26,000 plus taxable costs incurred in arbitration." Unlike in Niccum, the costs here constituted a sum certain—$1,522.19. Erickson's October 24, 2013 e-mail to Nelson left no doubt when it referred to $27,522.19 as the amount of Nelson's "prior offer of compromise" and asked Nelson to let him know if this was incorrect. CP at 938.

Under these circumstances, Nelson's offer—which was intended to replace the arbitrator's award—would be understood as having the same structure as the arbitrator's award—damages plus attorney fees and costs.

> The statute requires the court to determine whether the appealing party failed to improve his position. RCW 7.06.050. The rule "was meant to be understood by ordinary people who, if asked whether their position had been improved following a trial de novo, would certainly answer 'no' in the face of a superior court judgment against them for more than the arbitrator awarded." Cormar, Ltd. v. Sauro, 60 Wn. App. 622, 623, 806 P.2d 253, review denied, 117 Wn.2d 1004, 815 P.2d 266 (1991).

Gautam v. Hicks, 177 Wn. App. 112, 118, 310 P.3d 862 (2013).

"It is our view that an ordinary person would consider that the 'amount' of an offer of compromise is the total sum of the money that a party offered to accept in exchange for settling the lawsuit." Niccum, 175 Wn.2d at 452.

A straightforward application of the rule under the circumstances here shows that Erickson improved his position on trial de novo. Nelson is not entitled to reasonable attorney fees and costs.

Attorney Fees on Appeal

Nelson requests an award of attorney fees under MAR 7.3, RCW 7.06.060, RAP 14.2, and RAP 18.1.

Under RAP 18.1, appellate courts are authorized to award reasonable attorney fees or expenses where authorized by applicable law. Although not expressly stated in MAR 7.3 or RCW 7.06.060, a "party entitled to attorney fees under MAR 7.3 at the trial court level is also entitled to attorney fees on appeal if the appealing party again fails to improve her position." Arment v. Kmart Corp., 79 Wn. App. 694, 700, 902 P.2d 1254 (1995). Because Erickson improved his position at trial, we decline to award fees and costs on appeal to Nelson. And because neither party substantially prevailed, we decline to award costs under RAP 14.2.

CONCLUSION

For the reasons discussed above, the trial court properly awarded additur but erroneously awarded MAR fees and costs to Nelson. Accordingly, we affirm the judgment in part, and reverse in part, and remand with instructions to vacate the award of fees and costs to Nelson.

WE CONCUR: