71709-0

NO. 71709-0-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JESS NELSON, an individual,

Respondent,

vs.

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

Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Mary Yu, Judge

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

Rules and Regulations

I. INTRODUCTION

Despite evidence supporting the jury's award, Nelson argues that the court properly invaded the province of the jury in awarding additur. Further, Nelson seeks to have the Court ignore the primary holding in the *Niccum* case in favor of a tortured analysis supporting the trial court's award of attorney fees. Utilizing the appropriate legal analysis, this Court should reverse the erroneous decisions of the trial court to award additur and attorney fees under MAR 7.3.

II. ARGUMENT

A. THE TRIAL COURT ERRED IN AWARDING ADDITUR.

1. Erickson Elicited Testimony Supporting the Jury's Verdict.

Nelson pays lip service to the legal precedent governing additur, but then engages in arguments that ignore the standard. (Respondent's Brief at 15) This Court must start its analysis with the "strong presumption" that the jury's determination of the amount of damages is valid. *Palmer v. Jensen*, 81 Wn. App. 148, 150, 913 P.2d 413 (1996). If there is sufficient evidence to support the verdict, a trial court should not substitute its own conclusions for those of the jury. *See Tolli v. School Dist. No. 267 of Whitman County*, 66 Wn.2d 494, 495, 403 P.2d 356 (1965). Although Nelson is generally able to point out evidence supporting his claim for future general damages, he is not able to eliminate

the evidence on the record that supported the jury's conclusion to the contrary. Nelson even acknowledges that Erickson disputed his need for future medical treatment and general damages. (Respondent's Brief at 1)

Contrary to Nelson's assertions, Erickson did "attack" the testimony of Nelson's witnesses who testified about his injuries. (Respondent's Brief at 3) For example, defense counsel questioned Nelson's friend, Gary Smith, about his observations of Nelson rebuilding a tractor after the accident and the physical nature of that activity. (RP 182-85) Defense counsel also elicited testimony from another friend, Matthew Nugent, that he and Nelson had been hunting for five days, just a few weeks before trial. (RP 199-201) Nelson even hauled out a deer he had shot. (RP 201) Both of these witnesses testified that they were good friends of Nelson and they wanted what was best for him. (RP 185, 201-02) This testimony certainly questioned the extent to which Nelson was injured by highlighting his recent physical activities and underscored the fact that these witnesses were naturally biased towards their friend. Similarly with Nelson's son, defense counsel established that he was away at school and had not been home the majority of the time to witness his father's condition, thus drawing into question his other testimony about his father's condition. (RP 232-33)

Nelson himself testified that he had declined to participate in further physical therapy prescribed by Dr. Hardy, and that he had stopped doing the exercises recommended by his chiropractor. (RP 373) Further, since the accident, Nelson continued to work 50-60 hours per week. (RP 374-75) All of this testimony from Nelson and his witnesses could allow the jury to conclude that Nelson continued to lead a normal life and that his ongoing pain complaints were overstated, untrue, or not related to the car accident.

The medical experts similarly provided sufficient evidence from which the jury could have discounted Nelson's claims for future pain and suffering. Plaintiff's own physician, Dr. Harper, admitted that he had not treated Nelson for injuries from the car accident since 2011, and that he could not answer whether Nelson's current pain complaints were related to the car accident or would continue. (RP 285-86, 290-92) Dr. Harper could not say that Nelson required any further treatment. At best, he was able to testify that if Nelson hypothetically were to come into his office with pain complaints, then he would treat him. (RP 279, 286) Certainly, the jury was permitted to take this testimony for what it was – a hypothetical scenario considered by a doctor who had not seen or treated Nelson for two years. Dr. Harper had no firsthand knowledge about Nelson's current status and he could not corroborate Nelson's complaints

or their origin. Indeed, no expert testified to a reasonable degree of medical certainty that Nelson had ongoing pain complaints that were related to the accident. [1]

Conversely, Dr. Jackson examined Nelson approximately 7 months before trial, and he concluded that any current pain complaints were not related to the accident. Dr. Jackson conducted a battery of tests, including one for cervical range of motion, and Nelson performed them all normally. (RP 407-17) Dr. Jackson also testified that Nelson had degenerative changes in his neck that were not caused by the accident and were only temporarily exacerbated. (RP 419-22) Dr. Jackson presented his expert opinion on a more probable than not basis to a reasonable degree of medical certainty, and the jury was free to give it the weight it deemed appropriate.[2]

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[1] In light of the lay and expert testimony on the record, it is clear that the trial court erred in stating that it was undisputed that plaintiff's injuries were permanent and that he would suffer pain in the future. (CP 1048)

[2] Dr. Jackson did not testify that Nelson's pain from the accident was permanent. (Respondent's Brief at 8, 16, 22) At most, he testified on cross-examination that if "a hypothetical person" had subjective neck pain symptoms from a car accident that they may be permanent. (RP 450) Dr. Jackson testified consistently that Nelson's subjective pain complaints (which he was unable to objectively verify) were not related to the car accident. (RP 459)

2. An Award of Future Economic Damages Does Not Dictate an Award of Future General Damages.

The primary argument to which Nelson repeatedly returns is that if the jury had not believed that his complaints of ongoing pain were true, then it would not have awarded him damages for future medical treatment. (Respondent's Brief at 19) In a similar vein, Nelson argues that if the jury had believed Dr. Jackson's testimony that there was no objective evidence to support his ongoing pain and that any subjective pain complaints were not related to the accident, then it would not have awarded Nelson damages for future medical costs. (Respondent's Brief, at 17-18, 21, 26) However, that is not the test in Washington. Rather, a trial court may invade the province of the jury only if there is no evidence to support the verdict. *See Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 243, 744 P.2d 605 (1987). In this case, the jury could have concluded that Nelson might require some future treatment to follow up on his past treatment without believing that he was in continued pain as a result of the accident.

The holdings in *Lopez* and *Herriman* directly refute Nelson's primary argument. In both of those cases, the jury awarded economic damages but declined to award general damages. *See Lopez v. Salgado-Guadarama*, 130 Wn. App. 87, 122 P.3d 733 (2005); *Herriman v. May*, 142 Wn. App. 226, 174 P.3d 156 (2007). Indeed, if Nelson's theory were

credited, there could never be an instance in which a plaintiff received economic damages and not general damages because a court could always infer what the jury "believed" from its decision to grant economic damages. The *Palmer* Court also recognized that there is no per se rule requiring general damages to be awarded when special damages are awarded. *Palmer v. Jensen*, 132 Wn.2d 193, 201, 937 P.2d 597 (1997). Rather, the test is whether the evidence would allow a verdict omitting general damages. *Gestson v. Scott*, 116 Wn. App. 616, 620, 67 P.3d 496 (2003). "A jury may award special damages and no general damages when 'the record would support a verdict omitting general damages.'" *Id.* at 620.

There is no evidence that "the jury rejected Dr. Jackson's opinions and accepted Nelson's witnesses' opinions." (Respondent's Brief at 26) Further, there is nothing in the record to support Nelson's assertion that the jury found that Nelson's "pain was permanent." (Respondent's Brief at 39) Likewise, Nelson simply speculates that the jury concluded that his ongoing pain complaints were related to the accident. (Respondent's Brief at 10) In fact, there is no evidence on the record indicating how the jury regarded Dr. Jackson's or any other witnesses' testimony. At best, all Nelson can do is speculate what was behind the jury's decision. It is for this very reason, that courts are instructed not to substitute their will for

the jury's. *See Scanlan v. Smith*, 66 Wn.2d 601, 603-04, 404 P.2d 776 (1965). There was evidence on the record allowing the jury to determine that although Nelson might need some follow-up treatment, he was not entitled to damages for future pain and suffering because such complaints were overstated or not related to the accident.

3. *Lopez* and *Herriman* Are Controlling.

Nelson seeks to differentiate the facts in this case from those in *Lopez*. (Respondent's Brief at 27) Nelson argues that Erickson did not dispute the veracity of his pain and suffering or how it affected his life. (*Id.*) In fact, defense counsel questioned the veracity of Nelson's claims with Nelson, his son, and his two friends. Further, Erickson's medical expert testified about the many tests he conducted and the lack of objective indications that Nelson was in pain or that any pain was linked to the car accident. The *Lopez* Court held that "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." 130 Wn. App. at 93. As in *Lopez*, Erickson's medical expert testified that no objective medical findings supported Nelson's pain complaints and he should have recovered quickly. *Id.* at 92.

Nelson also argues that *Herriman* can be distinguished because there was no testimony that he was exaggerating his symptoms or malingering like the plaintiff in *Herriman*. (Respondent's Brief at 30) In *Herriman*, as in this case, the plaintiff called a variety of friends and family to discuss her condition after the accident. 142 Wn. App. at 229. The *Herriman* Court noted that the jury "was entitled to reject" the testimony of plaintiff's witnesses, and it was disinclined to "reweigh the jury's assessment" of witness credibility. *Id.* at 233. Nelson also notes that the plaintiff in *Herriman* had preexisting injuries. (Respondent's Brief at 30) Nelson also had preexisting degenerative problems that, although temporarily exacerbated, were not ultimately related to the accident. (RP 419-22) Further, neither *Herriman* nor any other Washington case requires a defendant to accuse the plaintiff of lying in order to defeat a claim for future general damages. The jury was entitled to agree with Dr. Jackson and to reject Nelson's testimony as not credible. *Id.* at 233. "The credibility of the witnesses and the weight of the evidence was a question for the jury alone." *Id.* at 234.

Erickson repeatedly questioned Nelson's unverifiable pain complaints and offered expert testimony that those complaints were not related to the car accident. Based on Nelson's own testimony, his friends' testimony, his doctor's testimony, and particularly Dr. Jackson's

testimony, the jury was entitled to conclude that Nelson might require future treatment but that he failed to carry his burden of proving future general damages. *Lopez* and *Herriman* are directly on point.

4. The Trial Court Misapplied RCW 4.76.030.

In addition to improperly granting additur, the trial court also misapplied the statute authorizing additur. By the statutory language, the court should not have granted additur without Erickson's consent. RCW 4.76.030. Nelson argues that Erickson failed to raise this procedural defect with the trial court and thus the Court should remand the matter back to the trial court to give Erickson the option of accepting a new trial or additur. (Respondent's Brief at 32) Nelson misses the importance of the trial court's error.

The trial court's uncertainty over the procedure for granting additur further demonstrates the court's confusion over what conditions must be met in order for additur or a new trial to be granted. The trial court expressedly denied the motion for a new trial. The logical implication of this ruling was that there were no errors made by the jury warranting a new trial. Yet, the trial court granted additur, determining that the jury erred in failing to award future general damages. These two positions are fundamentally incompatible, and they underscore the court's error in invading the province of the jury.

There is no basis to remand the case to the trial court to see if Erickson would agree to a new trial in lieu of additur. Erickson has never challenged the jury's verdict, and has never requested a new trial. Rather, Erickson has properly alleged error in the trial court's decision to invade the jury's determination after a fair trial. Erickson appeals two legal errors made by the trial court after the jury verdict, and there is certainly no basis for the case to be remanded for a new trial as suggested by Nelson. (Respondent's Brief at 13-14)

B. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES.

The parties agree that the *Niccum* case provides the framework for determining whether Erickson improved his position or whether he was liable for fees and costs under MAR 7.3. However, Nelson chooses to focus on the *Niccum* Court's discussion related to the unique facts in that case instead of the court's actual holding which is applicable to this case. In *Niccum*, the plaintiff made an offer of compromise, of which an unspecified amount was purported to be costs and fees. *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012). The plaintiff argued that he should not be required to waive those costs in order make an offer of compromise. *Id.* at 449. In addressing that particular argument, the Washington Supreme Court determined that he was not waiving anything because he was not a prevailing party entitled to such costs. *Id.* at 449-50.

In fact, he could have simply increased his offer of compromise to cover such costs. *Id.* at 450. In the final analysis, though, the *Niccum* Court determined that the total amount for which he offered to settle replaced the amount of the arbitrator's award for comparison to the jury award. *Id.* at 452.

In this case, Nelson did not have a right to "costs," as defined by RCW 4.84.010. 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. So too, 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) Erickson does not propose that "costs" as defined by RCW 4.84.010 should be included in the calculations, but that the known dollar amount that Nelson's language represents should. The reason is simple. The amount is a known quantity, and Nelson plainly

stated in his offer of compromise that he was only willing to settle for $26,000 plus that additional amount.

If Nelson's offer of compromise had stated that he would have settled for "$27,522.19, inclusive of costs and fees," *Niccum* clearly would have required comparing that full amount to the award at trial. In that hypothetical scenario, $27,522.19 was the amount for which Nelson would have settled. In this case, the ultimate assessment of Nelson's demand is no different. He demanded money that amounted to $27,522.19 to resolve the case. That is the amount "an ordinary person" would understand Nelson needed to settle his case. *Niccum*, 175 Wn.2d at 452. An ordinary person would not assume that the language also demanding costs was superfluous such that the demand was only for $26,000.00. Similarly, $27,522.19 is the amount that a reasonable attorney would understand became the threshold amount to beat at trial to avoid an attorney fee award. Indeed, a week and a half before trial, Erickson's counsel confirmed in an email that the amount of the offer of compromise was $27,522.19 ($26,000.00 plus the fees and costs awarded at arbitration). (CP 938) There is nothing on the record to indicate that Nelson's counsel disagreed with that assessment.

Nelson's argument about taxable costs "incurred" versus "awarded" presents a distinction without a difference. (Respondent's

Brief at 36-37) The record reflects exactly the amount of costs the arbitrator awarded – $1,522.19. (CP 928) Nelson does not identify any costs that he allegedly incurred in this case but were not awarded. (Respondent's Brief at 37) Certainly, there is no evidence on the record indicating that Nelson asked for more in costs than what the arbitrator awarded. In fact, Nelson submitted a cost bill at arbitration for exactly the amount awarded. (CP 926, 929-30) Nelson's arbitration cost bill indicates that $1,522.19 was the amount of the costs "incurred in the mandatory arbitration." (CP 929) Because the arbitrator "awarded" exactly the same amount as Nelson claims he "incurred," Nelson's argument is without merit.

Further, Nelson's hypertechnical (and inaccurate) parsing of his own words should not be credited at this stage. Nelson wrote the offer of compromise and chose the language to be used. Even assuming that there is some ambiguity in the word "incurred" or that its meaning differs from "awarded," Nelson should not benefit from language he now twists to fit a novel appellate argument. Generally, the courts construe ambiguous contracts against the drafter. *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 690, 871 P.2d 146 (1994). This is to prevent drafters from later benefiting from "mistakes" that they were in a position to prevent. *McKasson v. Johnson*, 178 Wn. App. 422, 429, 315 P.3d 1138 (2013).

Likewise, courts construe ambiguities in a CR 68 offer of judgment against the drafter. *Lietz v. Hansen Law Offices, PSC*, 166 Wn. App. 571, 581-82, 271 P.3d 899 (2012). "Because CR 68 imposes upon offerees risks not imposed by private settlement offers, any ambiguity in the offer of judgment is construed against the offeror." *Wash. Greensview Apartment Assocs. v. Travelers Prop. Cas. Co. of Am.*, 173 Wn. App. 663, 667, 295 P.3d 284 (2013). Just as with a CR 68 offer of judgment, Nelson, as the party making the offer of compromise, should have any ambiguities in that offer construed against him.[3]

Finally, Nelson argues that a reviewing court would have to "enter into the mind of the party making the offer to determine what amount the plaintiff would have settled his/her case for when the offer was made." (Respondent's Brief at 35). That is not the case at all. Rather, a court merely needs to look at the plain language of the offer and determine what settlement amount is indicated by the language. The "ordinary person" contemplated in *Niccum* would understand that $26,000.00 was not the full amount that Nelson demanded to settle the case. 175 Wn.2d at 452. Rather, "the total sum of money that [Nelson] offered to accept in exchange for settling the lawsuit" was $27,522.19. *Id.* Tellingly, Nelson

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[3] This is particularly true in this case, where Erickson confirmed shortly before trial that Nelson's offer of compromise was for $27,522.19. (CP 938)

does not even argue in his brief that he would have settled for $26,000.00.[4]

C. NELSON IS NOT ENTITLED TO FEES AND COSTS ON APPEAL.

If this Court determines that MAR 7.3 fees were improperly granted (by finding that the trial court erred either in awarding additur or in interpreting *Niccum*), then Nelson is not entitled to any additional fees or costs for this appeal. (Respondent's Brief at 39)

III. CONCLUSION

The trial court committed two legal errors after the conclusion of a fair jury trial. First, the court erroneously awarded Nelson additur despite evidence supporting the jury's verdict. Second, the court misread Nelson's offer of compromise and the holding in *Niccum*, and it awarded MAR 7.3 fees and costs to Nelson. Erickson requests that this Court vacate the judgment and order entry of a new judgment consistent with the jury's award and without additur or MAR 7.3 attorney fees and costs.

Dated this 24th day of October, 2014.

REED McCLURE

By _____
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Attorneys for Appellant

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[4] Similarly, the trial court never specifically addressed *Niccum's* question of what amount Nelson actually would have settled for. Instead, it excluded Nelson's language demanding the amount of arbitration costs and concluded that the offer of compromise was merely for $26,000.00. (CP 1048, 1052, 1055)

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JESS NELSON, an individual, Respondent, vs. MICHAEL ERICKSON and JANE DOE ERICKSON, and the marital community composed thereof, Appellants.	NO. 71709-0-I AFFIDAVIT OF SERVICE BY MAIL

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

The undersigned, being first duly sworn upon oath, deposes and says:

That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action, and competent to be a witness therein; that on October 24, 2014, affiant served via United States mail, postage prepaid, copies of the following documents:

1. Reply Brief of Appellants and
2. Affidavit of Service By Mail

addressed to the following parties:

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DATED this 24th day of October, 2014.

Katherine McBride

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

SIGNED AND SWORN to (or affirmed) before me on 10-27-14 by Cathi Key.

REBECCA CAROLINE LEWIS
NOTARY PUBLIC
STATE OF WASHINGTON
Commission Expires
04-09-2018

Print Name: REBECCA LEWIS
Notary Public Residing at LYNNWOOD, WA
My appointment expires 4-9-2018

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