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

SUPREME COURT
OF THE STATE OF WASHINGTON

JESS NELSON,

Plaintiff-Petitioner,

v.

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

Defendants.

REPLY IN SUPPORT OF PETITION FOR SUPREME COURT REVIEW

PREMIER LAW GROUP PLLC
By: Patrick Kang
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A. Any distinction between *Niccum* and the instant case are distinctions without a difference.

Respondent incorrectly argues that the instant case is factually distinguishable from *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012). Respondent relies heavily on the fact that the costs in *Niccum* were unknown, whereas in Nelson, Respondent argues that the costs were a "sum certain". *See Respondent's Answer*, pg. 8-9. First off, this is incorrect, as the costs in both cases were set amounts. For example, in *Niccum*, the trial court awarded $1,016.28 in costs, and similarly, in Nelson, the arbitrator awarded $1,522.19 in costs. *Compare Niccum*, 175 Wn.2d at 445, and fn 1, *with* CP 1081.

Respondent's assertion rests on a misinterpretation of dicta at the end of the Supreme Court's decision in *Niccum*. *Niccum*, 175 Wn.2d at 452. Reference to the "unspecified" amount of costs in *Niccum* is the Supreme Court presenting the dissent with a hypothetical scenario which would make the dissent's proposed method of handling similar cases untenable. *See id.* Forcing trial courts to "unpack" an offer of compromise and separate what amount is costs and what amount is damages (which is the path the dissent recommends) would lead to inconsistent results and added difficulty for trial courts. *See id.* Instead, the Supreme Court proposes a possibility where a

trial court is "[c]onfronted with an offer purporting to contain unspecified costs" and shows the difficulty with this method. Id.

In addition, the Supreme Court questions whether the $1,016.28 of "costs" awarded by the trial court actually includes ALL of the costs associated with the arbitration. See id. The Supreme Court is in fact noting that there could be other costs that were incurred at arbitration that were not awarded by the trial court, and thus the $1,016.28 might not take all of those costs into account, whereas the offer of compromise as written intended to. Thus, the Supreme Court notes that "[t]he sorting out of offers after the fact, moreover, is likely to increase rather than decrease litigation. This appeal is a case in point." Id. That is why, the issue in *Niccum* is NOT whether there was a "sum certain" (a term never used in *Niccum*) amount in costs included in the offer, but rather that costs are not even available in an offer of compromise because costs are only available when a judgment has been entered, and when an offer of compromise is made, no judgment has been entered.

B. Division I's analysis is based on contract interpretation.

Respondent erroneously argues that Division I did not use contract law because it never cites contract law or references contract law. See *Respondent's Answer*, pg. 9. The analysis of Division I incorrectly relies on an October 24, 2013 email confirmation of the terms of the offer of

compromise. Relying on an email by Erickson's counsel from October 23, 2013 (AFTER the window to accept the offer of compromise had closed) is wholly irrelevant to the offer of compromise. Any inference from a lack of response by Nelson's attorneys to said email is also improper, because what point would there have been in responding to the email? The offer would not be revived, nor would Erickson's attorney have been able to accept the offer at that point. The reliance on this email is an indication that Division I was using contract law, which would allow extrinsic documents at the time of a contract to help inform the court on the interpretation of said contract. The problem, as discussed in *Niccum*, is that NO CONTRACT was formed because the offer was not accepted, and was deemed rejected pursuant to statute at the end of 10 days. *Niccum*, 175 Wn.2d at 451; RCW 7.06.050.

Similarly, Respondent relies on a misinterpretation of Niccum's ruling where it notes that a party may ask for extra dollars in an offer to cover expenses, but those dollars are not costs because costs are only given effect under statute. *See Respondent's Answer*, pg. 12 (citing *Niccum*, 175 Wn.2d at 450). In using that quotation, Respondent conveniently omits the sentence that follows in the *Niccum* decision: "**The fact that a party is unable to include costs in an offer of compromise** does not mean that the benefits of prevailing at arbitration will be extinguished by a request for a trial de novo." *Id.* Respondent essentially argues that the "just dollars"

means that the costs awarded at arbitration in Nelson should be substituted by the trial court into the offer of compromise, despite the fact that *Niccum* clearly states that "a party is unable to include costs in an offer of compromise." *Id.* This is the crux of the issue, that Division I incorrectly used contract interpretation in an effort to include costs in an offer of compromise, despite the analysis in *Niccum* stating that costs cannot be included (whether known or unknown) in an offer of compromise because "costs" are defined by statute, and the statute gives no effect to costs until a judgment is entered (and no judgment can ever be entered at the time an offer of compromise has been made). As a result, Petitioner respectfully requests that this petition be granted.

III. CONCLUSION

Division I incorrectly held that costs should be included in an offer of compromise, in contradiction to the Supreme Court ruling in *Niccum* that established that costs are a function of statute, and pursuant to the statute, costs can only be awarded after a judgment has been entered and can therefore NOT be included in an offer of compromise. Division I, however, incorrectly applied contract theory when interpreting the offer of compromise, and relied on an email sent 21 days after the offer of compromise was deemed statutorily rejected. The Supreme Court should

overturn the Division I ruling, reaffirming its decision in *Niccum* that costs cannot be included in an offer of compromise.

Respectfully submitted this 30th day of November, 2015.

PREMIER LAW GROUP, PLLC

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Jess Nelson

SUPREME COURT
OF THE STATE OF WASHINGTON

JESS NELSON, Plaintiff-Petitioner, v. MICHAEL ERICKSON and JANE DOE ERICKSON, and the marital community composed thereof, Defendants-Respondents.	No. 92489-9 (Court of Appeals No. 71709-0-I) AFFIDAVIT OF SERVICE

SYUZANNA BALIYAN, being first duly sworn on oath, states:

1. I am now and at all times mentioned herein was a resident of the State of Washington, over the age of 18 years, not a party to the above-entitled action or interested therein, and competent to be a witness in this cause.

2. On December 1, 2015 I caused to be served a copy of the *Reply in Support of Petition for Supreme Court Review* and *Affidavit of Service* via legal messenger to the following individuals identified below:

Marilee C. Erickson
Pamela A. Okano
Reed McClure
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161

PREMIER LAW GROUP PLLC
1408 140th Place NE
Bellevue, Washington 98007
(206) 285-1743 / Fax: (206) 599-6316

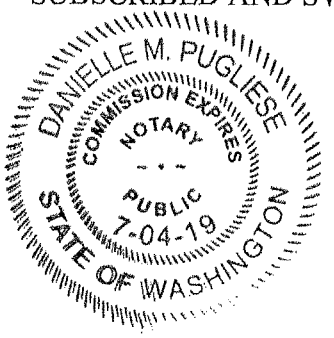
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 1st day of December, 2015 in Bellevue, Washington.

SBaliyan

SYUZANNA BALIYAN

SUBSCRIBED AND SWORN to before me this 1st day of December 2015.



Danielle M. Pugliese

NOTARY PUBLIC in and for the State of WA
Printed Name: Danielle M. Pugliese
My commission expires: 7-4-19

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OFFICE RECEPTIONIST, CLERK

To: Syuzanna Baliyan
Cc: Jared Stueckle; Patrick Kang
Subject: RE: Nelson v. Erickson/ No. 92489-9 (Court of Appeals No. 71709-0-I)

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Supreme Court Clerk's Office

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Sent: Tuesday, December 01, 2015 9:51 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
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- Nelson v. Erickson
- No. 92489-9 (Court of Appeals No. 71709-0-I)
- Jared D. Stueckle, 206-285-1743, WSBA # 43220, jared@premierlawgroup.com

Dear Sir or Madam,

Attached, for filing, please find the Reply in Support of Petition for Supreme Court Review and Affidavit of Service. Thank you.

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