

66628-2

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NO. 66628-2-I

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

MARY ANN MONNASTES,

Respondent/Plaintiff

vs.

CHARLES GREENWOOD

Appellant/Defendant

**APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
Honorable DAVID A. KURTZ, Judge**

BRIEF OF RESPONDENT

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I. INTRODUCTION

This appeal stems from the trial court's award of attorney's fees to the respondent/plaintiff (hereinafter plaintiff) pursuant to RCW 7.06.060 and MAR 7.3. The appellant/defendant (hereinafter defendant) requested a trial de novo following mandatory arbitration. Prior to trial, the plaintiff made an Offer of Compromise to settle her claim which the defendant did not accept. A jury trial was held. Following trial the court entered judgment against the defendant. The judgment was for an amount greater than the Offer of Compromise rejected by the defendant. The trial court having found the defendant did not improve his position following the trial de novo awarded the plaintiff her reasonable attorney's fees pursuant to RCW 7.06.060 and MAR 7.3.

II. RESPONSE TO ASSIGNMENT OF ERROR

(a) The trial court did not err in entering the judgment granting plaintiff attorney's fees in the amount of \$22,500.00 on the basis that the defendant had not improved his position at trial relative to the plaintiff's Offer of Compromise.

(b) The trial court did not err in denying defendant's motion for reconsideration.

III. ISSUES PRESENTED

(a) Did the trial court commit reversible error in awarding plaintiff attorney's fees pursuant to RCW 7.06.060 and MAR 7.3 when the plaintiff improved her position following a trial de novo requested by the defendant to the extent that the judgment entered in the plaintiff's favor following trial was in an amount greater than an Offer of Compromise rejected by the defendant prior to trial?

(b) Did the trial court commit error in denying defendant's motion for reconsideration?

IV. STATEMENT OF THE CASE

Plaintiff Mary Ann Monnastes and defendant Charles Greenwood were in a car accident on March 24, 2005. The accident was caused by Mr. Greenwood and as a result a lawsuit was commenced. (CP 2). The matter was transferred to mandatory arbitration. (CP 8). The arbitrator awarded Monnastes \$22,719.38 for economic damages and pain and suffering. (CP 15). Greenwood timely requested a trial de novo. (CP 16). On July 9, 2010 Monnastes made an Offer of Compromise to Greenwood which stated:

Pursuant to RCW 7.06.050 and MAR 7.3, the plaintiff hereby offers to settle her claim against the defendant for the amount of Sixteen Thousand Dollars and no Cents (\$16,000.00). This offer remains open for ten calendar days after receipt of service.

(CP 70).

Greenwood did not accept the offer, and the matter proceeded to trial on September 27, 2010. The jury returned a verdict awarding special and general damages to Monnastes in the amount of \$15,661.00. (CP 71). The trial court then awarded costs to Monnastes pursuant to RCW 4.84.010 and CR 54(d) (CP 62-63, 71). Monnastes moved the court for an award of attorney's fees pursuant to RCW 7.06.060 and MAR 7.3. Monnastes argued that when the statutory costs are added to the verdict she improved her position at the trial de novo when compared to the compromise offer rejected by Greenwood.

The trial court granted Monnastes' motion and ruled attorney's fees were appropriate because after the Offer of Compromise was rejected the defendant did not improve his position following the trial de novo. (RP 27-28). The court concluded:

The plaintiff was better off having gone to trial than if she had just taken that Sixteen Thousand Dollars (\$16,000.00) and the case was over. Mr. Greenwood, or his insurance company, or whoever, was worse off having gone to trial. Accordingly, pursuant to the statute, the court rule and case law, the plaintiff is entitled to attorney's fees, reasonable attorney's fees on top of the award.

(RP 28) The court awarded attorney's fees in the amount of \$22,500.00. (CP 71, 89, 102).

Greenwood moved for reconsideration which was subsequently denied by the trial court. (CP 84). Greenwood following the motion for

reconsideration timely filed his Notice of Appeal (CP 87).

V: ARGUMENT

A Standard of Review.

The appellant court reviews de novo a trial court's decision involving the interpretation of a court rule. *Kin v Pham*, 95 Wn.App. 439, 441 (1995). Similarly, a review of the application of a statute is reviewed de novo. *Basin Paving Co. v. Contractors Bonding and Ins. Co.*, 123 Wn.App. 410, 414 (2004). The trial court properly determined the application of RCW 4.84.010, RCW 7.06.060, and MAR 7.3.

B. The Trial Court did not Err in Awarding Fees and Costs Because Greenwood did not Improve His Position at the Trial De Novo.

A party who requests a trial de novo must only pay the fees and costs of the opponent if he fails to improve his position at the trial de novo. MAR 7.3, RCW 7.06.060(1).

MAR 6.1 entitled "**Form and Content of Award**" provides:

The award shall be in writing and signed by the arbitrator. The arbitrator shall determine all issues raised by the pleadings, including the determination of any damages. Findings of Fact and Conclusions of Law are not required.

It is clear from a reading of MAR 6.1 that the arbitrator could not only determine damages, but has additional authority to award statutory costs and attorney's fees. In the instant case, the arbitrator did not make an award of costs and statutory attorney's fees but confined his original

arbitration award to special and general damages. (CP 15).

RCW 7.06.050(1)(e)(b) provides that the non-appealing party may serve a written Offer of Compromise upon the appealing party and that such 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 his position in the trial de novo.

RCW 7.06.060(1) provides:

The Superior Court shall assess costs and reasonable attorney's fees against a party who appeals the award and failed to improve his or her position on the trial de novo.

Washington courts "compare comparables" to determine whether a party has improved his position following the trial de novo. *Tran v Yu*, 118 Wn.App. 607, 612 (2003); see also *Wilkerson v United Inv., Inc.* 62 Wn.App. 712, 717 (1991). In *Tran*, plaintiff was awarded \$14,675.00 as damages, at arbitration, but which did not contain an award for costs and attorney's fees. The defendant requested a trial de novo. The jury's award of \$13,375.00 in economic and non-economic damages was less than the arbitration award.

In a post trial motion, plaintiff was awarded \$3,205.00 in attorney's fees pursuant to CR 37(c) for costs incurred in proving issues that the defendant had denied in response to requests for admission and \$955.80 in statutory costs as the prevailing party under RCW 4.84.010. *Id at 610*. The CR 37(c) costs and statutory costs were added to the jury's award for a total

judgment of \$17,535.80. Plaintiff then argued that because the total judgment exceeded the arbitration award, she was also entitled attorney's fees under MAR 7.3. *Id.* The trial court denied plaintiff's request for MAR 7.3 fees. *Id at 611.*

The Court of Appeals affirmed. *Id at 616-17.* The *Tran* court noted that plaintiff's proposal to include the costs and sanctions was inconsistent with the purpose of MAR 7.3. *Id at 612.* To this end the court held:

A trial is almost always more expensive than arbitration. If *Tran's* interpretation were accepted, a party would invariably improve its position because additional costs, attorney fees, and interest would be incurred.

The court determined that it was more appropriate to "compare comparables". *Id.*

In *Tran*, comparing comparables meant comparing the compensatory damages awarded by the arbitrator-\$14,675.00-with the compensatory damages awarded by the jury at the trial de novo-\$13,375.00. *Id.*

The *Tran* court explained its reasoning as follows:

In this case, the only issue at arbitration was *Tran's* damages. The arbitrator awarded \$14,675.00 in compensatory damages (\$11,000.00 in general damages and \$3,675.00 for medical bills). At the conclusion of trial, the jury's award for compensatory damages was \$13,375.00, \$1,300.00 less. *Yu* improved her position on that issue and under the reasoning of *Wilkerson*, *Cristie-Lambert* and subsequent cases *Yu* should not be liable under MAR 7.3 for attorney's fees. The total judgment after trial de novo exceeded the arbitration award on

account of CR 37 sanctions and statutory costs. Neither these statutory costs nor the CR 37 sanctions were before arbitration. These are not comparable to the compensatory damages awarded by the arbitrator and therefore should not be considered in a MAR 7.3 determination. The trial court did not err in concluding that Tran was not entitled to MAR 7.3 attorney fees. Id at 616-17.

The facts in the instant case are different those described above and as such the court's reasoning in *Tran v. Yu*, 118 Wn.App. 607 (2003) supports the trial court's award of attorney fees.

Pursuant to RCW 7.06.050 once the Offer of Compromise is duly served upon appellant and is rejected it is substituted for the arbitrator's award. In the instant case the Offer of Compromise includes not only the compensatory award but all of the costs allowable by law at the time of the arbitration. The plaintiff's costs allowable under RCW 4.84 et seq. total \$1,790.18. To determine the amount of the Offer of Compromise which is attributable to compensatory damages, the court must subtract those costs from \$16,000.00. Compensatory damages as part of the Offer of Compromise total \$14,209.82. Therefore, defendant has not improved his position because the jury verdict was for \$15,661.00.

The same health care records were admitted during the arbitration hearing as in the trial. Such costs, along with the service fee, filing fee and statutory attorney's fees are properly awarded by an arbitrator. Particularly because the plaintiff, in her complaint, requested costs and statutory

attorney's fees. (CP 2).

Since the Offer of Compromise is substituted for the arbitrator's award, the compensatory damages must reflect a net amount after subtraction of the statutory attorney's fees and costs to which the prevailing party is entitled.

The plaintiff's request for attorney fees is consistent with the *Tran* case. That is, in order to determine what the compensatory damages are, the costs and statutory attorney fees allowed by RCW 4.84 incurred before arbitration must be taken into consideration. After subtracting those costs from the Offer of Compromise, the question is whether the compensatory damages are greater or less than those contained in the award, which in this case is the award substituted for the arbitrator's decision. Under these circumstances Greenwood did not improve his position following the trial de novo.

C. Additional Language in the Plaintiff's Offer of Compromise Indicating the Offer Included Costs and Statutory Attorney Fees Was not Necessary for the Trial Court to Award Attorney Fees Pursuant to RCW 7.06.060 and MAR 7.3.

Although an Offer of Compromise serves the purpose of establishing a new threshold for determining whether the requesting party improves her position at trial, the Offer of Compromise remains, at its essence a settlement offer. If the defendant accepts the offer, he pays the

agreed amount to the plaintiff. After payment of the settlement amount, plaintiff has no recourse to seek costs. Only a “prevailing party” is entitled to an award of costs. RCW 4.84.010. Where an Offer of Compromise is offered and accepted, both parties agree to compromise for a settlement and neither is entitled to statutory costs. Further, no judgment is entered after a settlement agreement is reached. RCW 4.84.010 is clear that certain costs “shall be allowed to the prevailing party upon the judgment”.

In light of these tenants of case settlement, additional language in the plaintiff’s Offer of Compromise indicating the offer includes costs and statutory attorney fees was not necessary. Plaintiff’s Offer of Compromise was an offer for a global settlement of the case, regardless of whether she allocated certain sums under certain headings. If the defendant had accepted the plaintiff’s offer, the case would have ended. Ms. Monnastes would have had no recourse to seek costs and attorney’s fees because under RCW 4.84.010 she was not a prevailing party. The purpose of the Offer of Compromise is, in effect, a settlement offer. Acceptance of the Offer of Compromise terminates the case and once accepted, the plaintiff loses any right to recover her otherwise allowable court costs.

In *Niccum v. Enquist*, Division III of the Court of Appeals held that whether the plaintiff improved his position after a trial de novo depended on comparing the damages awarded by the arbitrator with those awarded by

the jury. Because an Offer of Compromise constitutes a global settlement of the case and thus implicitly includes statutory fees and costs, the appellant court affirmed the trial court's decision to deduct statutory fees and costs from the Offer of Compromise. *Niccum v Enquist*, 151 Wn.App. 496 (2009).

In *Niccum* the plaintiff, Jeffrey W. Niccum filed the lawsuit naming Ryan L. Enquist as Defendant for damages arising out of a July 4, 2004 automobile accident. *Id* at 498. Following mandatory arbitration, Mr. Niccum presented Mr. Enquist with an Offer of Compromise. The Offer of Compromise set forth as follows:

COMES NOW plaintiff by and through his attorney, Jerry T. Dyreson, and pursuant to RCW 7.06.050 does hereby offer to compromise his claim in the amount of \$17,350.00. Such compromise is intended to replace the arbitrator's award of \$24,496.00 and replace the previous Offer of Compromise, with an award of \$17,350.00 including costs and statutory attorney fees. *Id* at 498.

The case proceeded to a jury trial. The jury returned a verdict of \$16,650.00 in favor of Mr. Niccum. *Id* at 498. The jury verdict included damages for Mr. Niccum's past medical expenses, lost wages and for his general damages. Mr. Niccum sought an award of attorney fees under MAR 7.3 arguing that Mr. Enquist failed to improve his position at trial. The trial court determined that Mr. Enquist had not improved his position at trial. To make this determination, the court subtracted \$1,061.28 in costs

allowable under RCW 4.84.010 from the settlement offer of \$17,350.00 for a total of \$16,288.72. This amount was then compared to the \$16,650.00 jury award to determine that Mr. Enquist had not improved his position at trial. *Id* at 499. Applying MAR 7.3 the court awarded to Mr. Niccum his attorney's fees and costs incurred after arbitration. *Id* at 499.

The appellant court upheld the decision of the trial court and, in doing so, took into consideration the prior decision set forth in *Tran v. Yu*, 118 Wn.App. 607, (2003). In *Tran*, the Appellant Court, as discussed above, concluded that the trial court should "compare comparables" to determine if a party failed to improve his position following a trial de novo. *Id* at 501 citing *Tran v. Yu* 118 Wn.App 607, 612 (2003). In *Niccum* Division III of the Court of Appeals held that the *Tran* analysis is applicable to the extent that the trial court properly considered comparables when the trial court compared the jury verdict to the Offer of Compromise after it properly subtracted costs and fees. *Id* at 501. The Appellant Court in *Niccum* held that Mr. Enquist would have owed less to Mr. Niccum had he accepted the Offer of Compromise. He did not improve his position at trial because when the judgment was entered, he owed more than if he had accepted the Offer of Compromise. *Id* at 501. Thus Mr. Niccum is entitled to costs and attorney's fees. *Id* at 501.

The same is true in the instant case. Ms. Monnastes' Offer of

Compromise was a global resolution of her claim. By its very terms, it included all she was entitled to recover including statutory fees and costs. Had Mr. Greenwood accepted Ms. Monnastes' offer he would have been obligated to pay her \$16,000.00 and no more. Although Ms. Monnastes' offer does not segregate costs and statutory fees as being included in the offer the offer uses the word "claim" to the extent that the offer is to settle her claim as set forth in her November 8, 2007 complaint which includes not only her special and general damages, but also her taxable costs and attorney's fees. Acceptance of the Offer of Compromise terminates the case and the plaintiff would lose any right to recover her otherwise allowable court costs.

D. The Plaintiff is Entitled to an Award of Reasonable Attorney's Fees Incurred as a Result of the Defendant's Appeal to the Court of Appeals.

As stated in *Yoon v Keeling*, 91 Wn.App. 302 (1998), a party entitled to attorney's fees at trial under MAR 7.3 is also entitled to attorney's fees on appeal if the appealing party fails to improve his position. *Id* at 306. Citing *Arment v K-Mart Corp.* 79 Wn.App. 694, 700 (1995).

Monnastes is entitled to attorney's fees on appeal upon compliance with RAP 18.1.

It is respectfully requested that the Court of Appeals determine that Ms. Monnastes is entitled to the additional attorney's fees incurred as a result of Mr. Greenwood's appeal.

VI. CONCLUSION

For the foregoing reasons, the plaintiff, Mary Ann Monnastes is entitled to recovery of her reasonable attorney's fees and other costs awardable as a result of the failure of the defendant to improve his position upon appeal of the mandatory arbitration award.

Respectfully submitted this 9th day of August, 2011.

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