

**FILED**

**MAR 25 2009**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

83983-2

NO. 27504-3-III

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III**

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**JEFFERY W. NICCUM, a married man,**

**Respondent,**

**vs.**

**RYAN L. ENQUIST, individually and the marital community composed of he and  
his wife, if any,**

**Appellants.**

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**APPEAL FROM SPOKANE COUNTY SUPERIOR COURT  
Honorable Robert Austin, Judge**

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**REPLY BRIEF OF APPELLANTS**

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**Address:**

**Two Union Square  
601 Union Street, Suite 1500  
Seattle, WA 98101-1363  
(206) 292-4900**

**REED McCLURE**

**By Marilee C. Erickson  
Michael N. Budelsky  
Attorneys for Appellants**

**37 S. Wenatchee Ave., Suite F  
Wenatchee, WA 98807  
(509) 662-6131**

**CARLSON, MCMAHON & SEALBY,  
PLLC**

**By David L. Force  
Attorneys for Appellants**

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## I. INTRODUCTION

Plaintiff fails to address a central issue involved in this appeal, namely, the need for an arbitrator's award (or any offer of compromise that replaces it) to be a liquidated amount. Unless the amount is known, a party cannot fairly determine whether an appeal has merit and thus whether he should request a trial de novo, risking attorney fees. Here, plaintiff did not request or calculate costs until after the trial de novo. Plaintiff then alleged that previously unspecified costs should be subtracted from his offer of settlement to justify an award of MAR 7.3 attorney fees and costs. An appropriate review of the applicable law and facts reveals that the jury award was less than the offer of settlement, and attorney fees were improperly granted by the trial court. Mr. Enquist asks this Court to reverse the judgment.

## II. ARGUMENT

### A. THE RECORD IS DEVOID OF ANY PROOF OF WHAT COSTS WERE INCURRED AT ARBITRATION.

Plaintiff makes several inaccurate factual assertions in support of his position. First, plaintiff alleges that the trial court concluded that costs and fees "were properly awardable by an arbitrator." (Respondent's Brief at 1) The record contains no such assertion by the trial court. (CP 39-40; RP 8-9) The trial court never articulated a position that the arbitrator could have or should have made such an award.

Second, plaintiff states that only those costs “incurred through the date of arbitration” were considered and allowed by the trial court. (Respondent’s Brief at 1) Nothing in the record indicates that the costs awarded by the trial court were only those costs incurred at the arbitration. Plaintiff did not articulate that he sought costs only from the arbitration. The trial court did not attribute the costs to either the trial or the arbitration. In fact, counsel’s declaration discusses only the trial and the jury verdict. (CP 24) It does not discuss the arbitration at all. (CP 23-25) At ¶¶ 4 and 5, the declaration outlines the requested costs stating that “[t]he following costs were incurred by the Plaintiff in trying this case.” (CP 24) (emphasis added). The requested costs clearly relate only to the trial, and not the arbitration. (CP 23-24) The record reflects that the costs claimed by plaintiff were incurred trying the case before the superior court, and not during the arbitration.

Third, plaintiff alleges that the “same health care records were admitted during the arbitration hearing as in the trial.” (Respondent’s Brief at 9) There is nothing in the record to support this statement. As explained above, counsel’s declaration did not distinguish between costs incurred at the arbitration and costs incurred at the trial de novo. (CP 23-25) Similarly, the declaration did not indicate what evidence was

introduced at the arbitration or trial. Finally, the trial court made no finding about what records were admitted during which proceeding.

The record fails to establish what amount of costs were allegedly attributed to the arbitration. Without a method to determine the amount of costs included in the offer of settlement, the compromise offer was unliquidated. A party should not be forced to accept or reject a settlement offer of an uncertain amount. Here the costs, which never were actually attributed to the arbitration, were only calculated after the trial de novo and with the hindsight needed to arrive at an amount which would support plaintiff's novel attorney fees argument.

**B. THE COURT IMPROPERLY AWARDED ATTORNEY FEES.**

Washington's Legislature adopted mandatory arbitration to reduce congestion and delays in the courts. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997). The provision allowing a party to recover costs when the appealing party fails to improve its position at the trial de novo was intended to discourage meritless appeals of the arbitrator's award.<sup>1</sup> *Tran v. Yu*, 118 Wn. App. 607, 611-12, 75 P.3d 970 (2003). A party can only make a meaningful decision about whether or not to appeal

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<sup>1</sup> Enquist's appeal of the arbitrator's decision in this case clearly had merit, as evidenced by a comparison of the jury's award to the arbitrator's award. The jury's award (\$16,650.00) cut the arbitrator's award (\$24,496.00) by approximately one third. (CP 6, 9)

if he knows with certainty the amount of the arbitrator's award (or the offer of settlement replacing it). Without a fixed sum, it is impossible for a party, like Mr. Enquist, to know whether or not an attempt to "beat" that amount at a trial has merit.

Plaintiff points out that he requested costs and statutory attorney fees in his complaint and that the arbitrator had the authority to award such. (Respondent's Brief at 5; 9) However, what the arbitrator could have done is irrelevant because he did not, in fact, award those costs and fees. The arbitrator's award was for damages only. (CP 9) No statute or court rule permits a party to replace a fixed damages award with a settlement offer of an unspecified amount of damages and an unspecified amount of costs. Plaintiff acknowledges that the amount of those costs that he sought to subtract (and thus the amount of damages, as well) was not fixed until after the trial de novo had occurred. (Respondent's Brief at 3)

Plaintiff did not identify the amount of RCW ch. 4.84 costs until after the jury returned its verdict. Only after the trial did plaintiff assert costs of \$1,016.28. (CP 23-25) Only after the trial did plaintiff state that he intended to subtract the newly claimed costs from his offer of compromise for purposes of determining whether MAR 7.3 fees should be awarded. (CP 20, 23-25) When weighing whether or not to pursue a trial

de novo after the arbitrator's award (and the subsequent offers of compromise), Mr. Enquist had no way of knowing that plaintiff would later claim costs in the amount of \$1,016.28 or what the court might award. Until the judge fixed those costs, the amount of costs did not exist. Because these theoretical costs were unknown, the amount of the offer of compromise that plaintiff later would label damages was equally unknown. If plaintiff's argument is accepted, Mr. Enquist would have had no idea what amount he needed to beat in order to avoid the additional imposition of attorney fees under MAR 7.3 and RCW 7.06.060.

Clearly, such uncertainty does not further the purpose of discouraging meritless appeals. *Tran*, 118 Wn. App. at 611-12. Instead, the approach of plaintiff and the trial court benefits a party who can manipulate his claimed costs after the fact. Such an approach is contrary to the purposes of the MAR scheme and basic principals of fairness because a party cannot meaningfully decide whether an appeal would have merit.

After Mr. Enquist requested a trial de novo, plaintiff made two compromise offers. Only the second compromise offer incorporated had the phrase "including costs and statutory attorney fees." (CP 11-12) This language is curious because it is essentially meaningless. If Mr. Enquist had accepted the compromise offer, the settlement would have been for

the amount offered regardless of whether plaintiff stipulated that costs and fees were included. Had Mr. Enquist accepted either offer, plaintiff would not have been able to seek costs and attorney fees regardless of whether the offer stated that it “includ[ed] costs and statutory attorney fees.” RCW 4.84.010.

In hindsight, the only effect—intended or not—of the additional language was to create uncertainty. Based on plaintiff’s interpretation, the compromise offer language transformed the fixed sum of the arbitrator’s award of damages into an unliquidated sum that included an unknown amount for damages and an unknown amount for costs. A compromise offer cannot change the nature of the arbitration award from a liquidated sum to an unliquidated sum.

Plaintiff incorrectly argues that the *Tran* mandate to “compare comparables” supports the mathematical gyrations employed here. In fact, the *Tran* Court invalidated a similar attempt to circumvent the MAR rules with creative addition and subtraction of costs imposed by the trial court. Whether costs are unspecified after the arbitration and then subtracted out by the trial court (as attempted in this case) or the costs are unspecified after the arbitration and then added to the jury award (as attempted in *Tran*), the results are similarly impermissible.

**C. PLAINTIFF CONCEDES THE AWARD OF EXPERT WITNESS FEES WAS ERROR.**

Plaintiff does not dispute the impropriety of the award of expert fees by the trial court. Statutory costs are strictly limited to those enumerated in RCW 4.84.010, and expert witness fees are not included as recoverable costs. *Colarusso v. Petersen*, 61 Wn. App. 767, 771-72, 812 P.2d 862, rev. denied, 117 Wn.2d 1024 (1991).

**D. PLAINTIFF IS NOT ENTITLED TO ATTORNEY FEES AND COSTS ON APPEAL.**

Plaintiff asks this Court to award fees and costs pursuant to MAR 7.3. The trial court erred in awarding MAR 7.3 fees and costs. Therefore, plaintiff is not entitled to MAR 7.3 fees and costs at superior court or this Court. This Court should reject plaintiff's request for an award of fees and costs.

**III. CONCLUSION**

Mr. Enquist improved his position at the trial de novo. The trial court erred in awarding MAR 7.3 fees and costs. This Court should reverse the judgment and remand for entry of judgment on the jury verdict only.

DATED this 20<sup>th</sup> day of March, 2009.

**REED McCLURE**

By Marilee C. Erickson  
Marilee C. Erickson    WSBA #16144  
Michael N. Budelsky    WSBA #35212  
Attorneys for Appellants

**CARLSON, McMAHON & SEALBY,  
PLLC**

By David L. Force        WSBA #29997  
Attorneys for Appellants

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