

**FILED**

**JAN 26 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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**BRIEF OF APPELLANTS**

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## **I. NATURE OF THE CASE**

This appeal stems from the trial court's MAR 7.3 award of attorney fees and expert witness fees. Defendant requested a trial de novo following the arbitrator's award. Prior to trial, plaintiff made two offers of compromise. Defendant did not accept either offer. A jury trial was held. The jury's damages award was less than either of the offers of compromise.

Nevertheless, the trial court awarded plaintiff MAR 7.3 fees and costs. By improperly subtracting costs from the last offer of compromise, the trial court erroneously concluded that defendant had not improved his position. The trial court's order and judgment are reversible error.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering the judgment and granting plaintiff \$15,640.00 in attorney fees where it included the costs it in its calculations for determining whether defendant improved his position at trial relative to the award at arbitration. (CP 39-41)

2. The trial court erred in entering the judgment and granting plaintiff \$1,461.00 in expert witness fees where such fees are not permitted under RCW 4.84.010 and plaintiff was not entitled to the fees or costs under MAR 7.3. (CP 39-41)

### **III. ISSUES PRESENTED**

1. Did the trial court commit reversible error in awarding plaintiff MAR 7.3 fees where defendant did, in fact, improve his position at trial relative to the award at arbitration? (Pertaining to Assignment of Error No. 1)

2. Did the trial court commit reversible error by subtracting costs from the offer of compromise to determine whether defendant had improved his position on the trial de novo? (Pertaining to Assignment of Error No. 1)

3. Did the trial court commit reversible error by awarding expert witness expenses as costs where such expenses are not permitted under RCW 4.84.010? (Pertaining to Assignment of Error No. 2)

### **IV. STATEMENT OF THE CASE**

Plaintiff Jeffery Niccum (“plaintiff”) and defendant Ryan Enquist (“Enquist”) were involved in an automobile accident on July 4, 2004. (CP 2) In 2007, plaintiff sued Enquist to recover for his injuries. (CP 1-2)

The matter was transferred to mandatory arbitration. (CP 9) In February 2008, the arbitrator issued an award for plaintiff in the amount \$24,496.00 for medical bills, wage loss, and pain and suffering. (CP 9) Enquist timely filed a request for trial de novo. (CP 23)

On March 20, 2008, plaintiff presented Enquist with the first offer of compromise in the amount of \$22,000.00. (CP 11) The first compromise offer stated:

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 \$22,000.00. Such compromise is intended to replace the arbitrator's award of \$24,496.00 with an award of \$22,000.00.

(CP 11)

On July 8, 2008, plaintiff presented Enquist with a second offer of compromise in the amount of \$17,350.00. (CP 12) The second offer stated:

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.

(CP 12) Enquist did not accept either offer.

The case proceeded to a jury trial. On August 14, 2008, the jury returned a \$16,650.00 verdict in favor of plaintiff. (CP 6) The jury verdict stated:

We, the jury, find for the Plaintiff in the following sums:

- (1) for past medical expenses     \$6,650.00
- (2) for past lost wages             \$ -0-

(3) for past noneconomic damages \$10,000

(CP 6)

Plaintiff sought fees under MAR 7.3 claiming that Enquist had failed to improve his position at the trial de novo. (CP 23-36, 37-38) Plaintiff sought \$15,640.00 in attorney fees and \$1,016.28 in costs. (CP 23-36) Plaintiff also sought expenses related to the testimony of his expert witnesses. (CP 25) He sought \$1,000.00 for fees to Sara Rudolph, LMP, for "5 h[ou]rs of preparation and courtroom time for the Niccum trial" and \$461.00 for fees to Kelli Pearson, DC. (CP 33-36)

Plaintiff argued that costs should be subtracted from the amount of the offer of compromise. When costs were subtracted from the compromise offer, the amount was less than the jury award. So according to plaintiff's argument, Enquist had not improved his position. Plaintiff explained his theory as follows:

That offer of compromise includes not only the compensatory award but the Court costs allowable by law. Plaintiff's costs allowable under RCW 4.84 et seq. total \$1,016.28. To determine the amount of the offer of compromise which is attributable to compensatory damages, the Court must subtract those costs from \$17,350.00. Compensatory damages as a part of the offer of compromise total \$16,333.72. Therefore, defendants have not improved their position because the jury verdict was for \$16,650.00.

(CP 20) Enquist opposed the motion, arguing as he does here, that he did improve his position and that plaintiff's manipulation of the compromise offer was improper. (CP 7-13, 14-18 )

The trial court accepted plaintiff's argument and granted his motion. (RP 8-9) The court entered a judgment awarding plaintiff \$15,640.00 in "reasonable attorney fees after date of arbitration" and \$1,461.00 in "expert witness fees." (CP 39-41) Enquist appealed. (CP 42-47)

## V. ARGUMENT

### A. STANDARD OF REVIEW.

This Court reviews de novo a trial court's decision involving the interpretation of a court rule. *Kim v. Pham*, 95 Wn. App. 439, 441, 975 P.2d 544, *rev. denied*, 139 Wn.2d 1009 (1999). 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, 98 P.3d 109 (2004). The superior court committed a legal error in its interpretation and application of RCW 4.84.010, 7.06.050, and MAR 7.3.

### B. THE TRIAL COURT ERRED IN AWARDING FEES AND COSTS BECAUSE ENQUIST IMPROVED HIS POSITION AT THE TRIAL DE NOVO.

A party who requests 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). Enquist improved his position at the trial de novo because the jury's award was less than the arbitration award and less than both of plaintiff's offers of compromise. The arbitration award was \$24,496. (CP 9) Plaintiff's two offers of compromise were \$22,000 and \$17,350. (CP 11-12) The jury awarded damages of \$16,650. (CP 6) It was error to award MAR 7.3 fees and costs.

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.

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.**

(Emphasis added.)

Washington courts "compare comparables" to determine whether a party has improved his position on the trial de novo. *Tran v. Yu*, 118 Wn. App. 607, 612, 75 P.3d 970 (2003); *see also Wilkerson v. United Inv., Inc.*, 62 Wn. App. 712, 717, 815 P.2d 293 (1991), *rev. denied*, 118 Wn.2d 1013 (1992). In *Tran*, plaintiff was awarded \$14,675.00 at arbitration. 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 fees pursuant to CR 37(c) (for costs incurred in proving issues that 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 to attorney 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.

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.

*Id.* The court determined that it was more appropriate to "compare comerables." *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.* Using this simple comparison, it was obvious that

defendant had improved his position and therefore, plaintiff was not entitled to an award of fees and costs under MAR 7.3.

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 in compensatory damages (\$11,000 in general damages and \$3,675 for medical bills). At the conclusion of trial, the jury's award for compensatory damages was \$13,375, \$1,300 less. Yu improved her position on that issue and under the reasoning of *Wilkerson*, *Christie-Lambert* and subsequent cases, Yu should not be liable under MAR 7.3 for attorney fees. The total judgment after trial de novo exceeded the arbitration award on account of CR 37 sanctions and statutory costs. Neither the statutory costs nor the CR 37 sanctions were before arbitrator. 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.

Similarly here, a simple comparison of comparables shows that Enquist improved his position at the trial de novo. At plaintiff's urging, the trial court here did precisely what the *Tran* Court rejected, namely including statutory costs in the calculations in an attempt to boost the jury verdict over the threshold set at arbitration. Our case has one procedural feature that was not present in *Tran*: here plaintiff made two offers of compromise. The offer of compromise does not, however, change the result because it is merely substituted for the arbitration award.

When a party serves an offer of compromise, the compromise offer becomes the amount used to determine whether a party has improved his position on 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.**

(Emphasis added.)

Plaintiff's second offer of compromise of \$17,350 "replace[d] 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). The \$17,350 offer of compromise was greater than the jury's \$16,650 verdict. Thus, Enquist improved his position on the trial de novo.

Although an offer of compromise serves the purpose of establishing a new threshold for determining whether the party requesting a trial de novo improves his position pursuant to RCW 7.06.050, it remains at its essence, a settlement offer. If the defendant accepts the offer, he pays the agreed amount to 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” (emphasis added).

In light of these basic tenets of case settlement, plaintiff’s addition of language indicating that the offer was inclusive of costs and statutory attorney fees is entirely irrelevant. Plaintiff’s offer of compromise was an offer for global settlement of the case, regardless of whether he allocated certain sums under certain headings. If Enquist had accepted either offer, the case would have ended. Plaintiff would have had no recourse to seek the costs and attorney fees because under RCW 4.84.010 he was not a prevailing party. The language in the offer is superfluous and meaningless.

Just as the language is ineffectual for purposes of settlement, it also has no bearing on the sum that replaces the arbitrator’s award and establishes a new threshold for the jury award. The arbitrator’s award of \$24,496.00 included amounts for medical bills, wage loss, and pain and suffering. (CP 9) It did not include any costs. It cannot be replaced, for

purposes of MAR 7.3, with part of the amount of an offer of settlement, particularly when the alleged costs and attorney fees are not quantified. Plaintiff cannot unilaterally change the character of the arbitrator's award from one for only compensatory damages to one for compensatory damages plus an unspecified amount of costs. As the *Tran* Court discussed, only "comparables" should be compared in the MAR system. 118 Wn. App. at 612. The trial court here failed to compare comparables.

**C. THE TRIAL COURT'S ORDER AND JUDGMENT CONFLICT WITH THE PLAIN MEANING OF THE RULE AND STATUTE.**

When interpreting statutes, courts should not rewrite explicit and unequivocal language. *In re Estate of Black*, 153 Wn.2d 152, 162, 102 P.3d 796 (2004). Courts must assume that the legislature meant exactly what it said and must apply the statute as written. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). Further, statutes should be construed to effect the legislative purpose and to avoid unlikely, strained, or absurd results. *Thurston County v. City of Olympia*, 151 Wn.2d 171, 175, 86 P.3d 151 (2004). A court should not construe a statute as the legislature could have but did not phrase it. *See Hansen v. City of Everett*, 93 Wn. App. 921, 929, 971 P.2d 111, *rev. denied*, 138 Wn.2d 1009 (1999).

RCW 7.06.050 is clear that the offer of compromise “shall replace the amount of the arbitrator’s award” for determining whether a party improved his position and whether attorney fees are appropriate. RCW 7.06.050(1)(b) (emphasis added). There is no ambiguity about this language, and it should be applied as written. *See Roggenkamp*, 153 Wn.2d at 625. Plaintiff’s offer of compromise for \$17,350.00 replaced the amount of the arbitrator’s award for \$24,496.00. The statute makes provides no provision for some of the offer to replace the arbitrator’s award and for some unknown amount of costs to be adjusted out. There is no mechanism to account for plaintiff’s apparent attempt to include costs and fees in this offer of compromise.

The figure of \$17,350.00, regardless of the language in the offer, simply replaced the award of \$24,496.00 as the threshold amount. Plaintiff’s attempt to incorporate costs into the arbitrator’s award through his offer would require additional language to be read into RCW 7.06.050 that simply is not there. *See Hansen*, 93 Wn. App. at 929. Further, Plaintiff’s approach would result in the absurd situation in which the parties would not know what amount needed to be bettered at trial by the party requesting de novo review because the amount of costs had not been set. *See Thurston County*, 151 Wn.2d at 175.

Plaintiff improperly deducted the amount of his cost bill from the offer of compromise amount, after the jury award was known, in an attempt to artificially deflate that number so it fell below the ultimate jury award in an attempt to recover attorney fees. It is telling that plaintiff waited until after the jury made its award and he realized that Enquist had improved his position to then assert that previously-unspecified costs needed to be taken out of the offer of compromise figure. In addition, plaintiff had never made any effort to quantify those costs which he would later seek to subtract out after the jury award.

The trial court accepted this revisionist accounting despite the fact that it is inconsistent with the plain interpretation of an unambiguous statute, the caselaw, and common sense. The amount of the costs was an unliquidated amount at the time of the offer of compromise. It was not known what amount of costs, if any, to which plaintiff would be entitled. If plaintiff's argument was credited, Enquist would not have known what amount he had to "beat" at trial in order to avoid attorney fees. He would not have been able to fairly assess whether he should consent to settle or pursue his jury trial. The scheme's purpose of discouraging meritless appeals would not be furthered where a party did not know exactly what amount would serve as the threshold for being meritless. Thus, the

attempt to include these costs in the calculation of whether plaintiff is entitled to attorney fees is patently unfair.

Whether this situation is examined as one in which plaintiff subtracted costs from the arbitrator's award (as replaced by the offer of compromise) or one in which plaintiff added the costs to the jury award and then compared it to the arbitration award, the effect is the same. As the *Tran* Court held, because the statutory costs were not before the arbitrator, they cannot be considered in connection with the jury verdict to determine whether a party has or has not improved his position on the trial de novo. 118 Wn. App. at 616. The arbitrator did not award costs or statutory attorney fees to plaintiff so such costs cannot be involved in the calculation of the jury verdict or the arbitrator's award. *See Tran*, 118 Wn. App. at 616 ("Neither the statutory costs nor the CR 37 sanctions were before arbitrator. These are not comparable to the compensatory damages awarded by the arbitrator and therefore should not be considered in a MAR 7.3 determination."). In the final analysis, the jury award in this case (\$16,650.00) was an improvement of defendant's position from the last offer of compromise (\$17,350.00), so plaintiff is not entitled to attorney fees pursuant to MAR 7.3, RCW 7.06.050 and RCW 7.06.060.

**D. PLAINTIFF WAS NOT ENTITLED TO EXPERT WITNESS FEES.**

Pursuant to MAR 7.3 and RCW 7.06.060, the trial court may assess costs against a party who requests a trial de novo after an arbitration but does not improve his position. As Enquist has demonstrated above, he improved his position at trial, so plaintiff was not entitled to any costs or attorney fees pursuant to MAR 7.3 or RCW 7.06.060.

Plaintiff's costs are limited to statutory costs. RCW 4.84.010. Plaintiff is presumably the prevailing party for purposes of RCW 4.84.010 because he received a jury verdict awarding damages which was reduced to a judgment. However, the statutory costs allowed to a prevailing party under that statute do not include expert witness fees.

Costs have historically been very narrowly defined, and RCW 4.84.010, which statutorily defines costs, limits that recovery to a narrow range of expenses such as filing fees, witness fees, and service of process expenses.

*Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 743, 733 P.2d 208 (1987). 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).

In this case, plaintiff sought \$1,000.00 for fees to Sara Rudolph, LMP, for "5 h[ou]rs of preparation and courtroom time for the Niccum trial" and \$461.00 for fees to Kelli Pearson, DC, presumably also for time spent working on the case. (CP 33, 35-36) The two expenses were

combined to total \$1,461.00 in “expert witness fees” which the trial court granted in its judgment. (CP 40; RP 10) If these fees were awarded based on Enquist not having improved his position pursuant to MAR 7.3 and RCW 7.06.060, then they are improper because Enquist did improve his position and Plaintiff is not entitled to costs (just as he is not entitled to attorney fees). If these fees were awarded based on plaintiff being the prevailing party pursuant to RCW 4.84.010, they were improper because such fees are not recoverable under the narrowly defined and construed language of that statute. Either way, the trial court’s decision to grant these expenses as costs was clear error.

## VI. CONCLUSION

The trial court improperly included the costs awarded to plaintiff as a prevailing party to calculate whether Enquist improved his position at the trial de novo. This contradicted the plain language of the rules and statutes and the applicable caselaw. Further, the trial court granted plaintiff expert witness fees despite the statute and caselaw which holds that such fees are not recoverable costs.

For these reasons, and in the interest of justice, Enquist respectfully requests that this Court reverse the trial court’s judgment and remand for entry of judgment on the jury verdict.

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

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