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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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No. 27504-3-III

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

JEFFERY W. NICCUM, a married man,

Respondent,

v.

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

Appellants.

APPEAL FROM THE SUPERIOR COURT
FOR SPOKANE COUNTY
Honorable Robert Austin, Judge

RESPONDENT'S REPLY BRIEF

JERRY T. DYRESON
Attorney for Respondent
4407 N. Division, Suite 714
Spokane, WA 99207
(509) 484-3818

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

I. INTRODUCTION.....1

II. RESPONSE TO ASSIGNMENTS OF ERROR.....1

III STATEMENT OF THE CASE.....2

IV. ARGUMENT.....4

 A. Standard of Review.....4

 B. The Trial Court Did Not Err in Awarding Fees
 and Costs Because Enquist Did Not Improve His
 Position at the Trial De Novo.....4

 C. Niccum Is Entitled to an Award of Reasonable
 Attorney Fees Incurred as the Result of Enquist’s
 Appeal to the Court of Appeals.....10

V. CONCLUSION.....10

TABLE OF AUTHORITIES

CASES

Arment v. K-Mart Corp., 79 Wn.App. 694, 700, 902 P.2d 1254 (1995) .. 10
Basin Paving Co. V. Contractors Bonding and Ins. Co., 123 Wn.App. 410,
414, 98 P.3d 109 (2004)..... 4
Kim v. Pham, 95 Wn.App. 439, 441, 975 P.2d 544, *rev. denied*, 139
Wn.2d 1009 (1999). 4
Tran v. Yu, 118 Wn. App. 607, 612, 75 P.3d 970 (2003) 6, 7, 8, 9
Wilkerson v. United Inv., Inc., 62 Wn.App. 712, 717, 815 P.2d 293 (1991),
rev. denied, 118 Wn.2d 1013 (1992). 6, 7, 10
Yoon v. Keeling, 91 Wn.App. 302, 956 P.2d 1116 (1998) 10

STATUTES

RCW 4.84 1, 8, 9
RCW 4.84.010 4, 6
RCW 7.06.050 2, 4, 8
RCW 7.06.050 (1)(a)(b)..... 5
RCW 7.06.060(1)..... 4, 5

RULES

CR 37 6, 7
MAR 6.1 4, 9
MAR 7.3 1, 3, 4, 6, 7, 8

I. INTRODUCTION

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 an arbitrator's award.

The trial court determined that the Defendant had not improved its position at trial. The court concluded that the statutory costs and attorney fees incurred up to the time of mandatory arbitration were properly awardable by an arbitrator and therefore the offer of compromise consisted of those costs incurred through the date of arbitration, but without consideration of the costs incurred thereafter, which resulted in an award of actual damages in the amount of \$16,333.72 and allowable court costs under RCW 4.84 et seq. in the amount of \$1,016.28.

II. RESPONSE TO ASSIGNMENTS OF ERROR

(1) The trial court did not err in entering the judgment granting Plaintiff attorney fees in the amount of \$15,640.00 on the basis that the Defendant had not improved its position at trial relative to Plaintiff's offer of compromise which is substituted for the arbitration award. (CP 39-41)

(2) The trial court did not err in entering the judgment granting the Plaintiff \$1,461.00 in expert witness fees.

III. STATEMENT OF THE CASE

Plaintiff Jefferey Niccum and Defendant Ryan 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) Such award did not include the statutory costs incurred in pursuing the action.(CP 9)

Defendant Enquist timely filed a request for trial de novo. (CP 23) On July 8, 2008, Plaintiff presented Enquist with its 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 non-economic damages \$10,000.00

(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 fees for testimony of his expert witnesses. (CP 25) He sought \$1,000.00 for fees to Sara Rudolph, LMP, for "5 hours of preparation and courtroom time for the Niccum trial" and \$461.00 for fees to Kelli Pearson, DC. (CP 33-36)

The trial court determined that the Defendant had not improved its position and granted Plaintiff's motion for reasonable attorney fees and expert witness fees. (CP 8-9) The court then entered judgment awarding Plaintiff \$15,640.00 in reasonable attorney fees incurred after the arbitration and \$1,461.00 in expert witness fees incurred after the

arbitration. (CP 39-41) Thereafter Defendant Enquist appealed to this Court. (CP 42-47)

IV. 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 trial court properly determined application of RCW 4.84.010, RCW 7.06.050, and MAR 7.3.

B. **The Trial Court Did Not Err in Awarding Fees and Costs Because Enquist Did Not Improve 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).

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 that statute that the arbitrator could not only determine damages, but has additional authority to award statutory costs and attorney fees. In the instant case, the arbitrator did not make an award of costs and statutory attorney fees, but confined his original arbitration award to damages.

However, the Plaintiff's second offer of compromise contained not only an award of damages, but contained the statutory costs and attorney fees incurred up to the arbitration award.

RCW 7.06.050 (1)(a)(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 its 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 failed 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 as damages, at arbitration, but which did not contain an award for costs and statutory attorney fees. Defendant requested a trial de novo. The jury’s award of \$13,375.00 in economic and non-economic damage 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 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 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 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.

Plaintiff is entitled to attorney fees under MAR 7.3. *Tran v. Yu*, 118 Wn. App. 607 (2003) supports Plaintiff's request for attorney fees.

RCW 7.06.050 provides:

...

(a) Up to 30 days prior to the actual date of a trial de novo, a non-appealing party may serve upon the appealing party a written offer of compromise.

(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.

The offer of compromise duly served upon Appellant is substituted for the arbitrator's award pursuant to statute. That offer of compromise includes not only the compensatory award but the court costs allowable by law at the time of the arbitration. Respondent'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 damage, the Court must subtract those costs from \$17,350.00. Compensatory damages as part of

the offer of compromise total \$16,333.72. Therefore, appellant has not improved his position because the jury verdict was for \$16,650.00.

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 fees, are properly awarded by an arbitrator.

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 fees and costs to which the prevailing party is entitled.

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 a determination of any damages. Findings of Fact and Conclusions of Law are not required.

Respondent in his Complaint requested costs and statutory attorney fees. (CP 1-2)

Respondent'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 lesser than that contained in the award, which in this case is the award substituted for the arbitrator's decision. Enquist did not improve his position.

C. Niccum Is Entitled to an Award of Reasonable Attorney Fees Incurred as the Result of Enquist's Appeal to the Court of Appeals.

As stated in *Yoon v. Keeling*, 91 Wn.App. 302, 956 P.2d 1116 (1998), a party entitled to attorney fees at trial under MAR 7.3 also is entitled to attorney fees on appeal if the appealing party fails to improve its position. *Yoon* at p. 306. Citing *Arment v. K-Mart Corp.*, 79 Wn.App. 694, 700, 902 P.2d 1254 (1995) (citing *Wilkerson*, 62 Wn.App. at 717).

Niccum is entitled to attorney fees on appeal upon compliance with RAP 18.1.

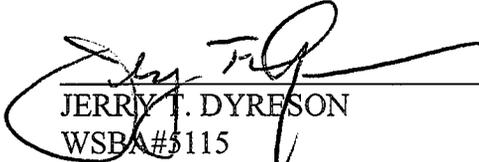
It is respectfully requested that the Court of Appeals determine that Niccum is entitled to the additional attorney fees incurred as the result of Enquist's appeal.

V. CONCLUSION

For the foregoing reasons, Respondent is entitled to recovery of his reasonable attorney fees and other costs awardable as a result of the failure

of the Appellant to improve his position upon appeal of the mandatory arbitration award.

RESPECTFULLY SUBMITTED this ^{20th} day of February, 2009.



JERRY T. DYRESON
WSBA #5115
Attorney for Respondent

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2009 I caused to be mailed in the U.S. Mail a true and correct copy of the foregoing Respondent's Reply Brief and addressed to the following:

Reed McClure
Attorneys at Law
ATTENTION: Marilee Erickson
Two Union Square
610 Union Street, Suite 1500
Seattle, WA 98101-1363


Laurel Morehouse