

NO. 83983-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JEFFERY W. NICCUM, a married man,

Respondent,

vs.

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

Petitioner.

APPEAL FROM SPOKANE COUNTY SUPERIOR COURT
Honorable Robert Austin, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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I. NATURE OF THE CASE

After a mandatory arbitration, defendant requested a trial de novo. Defendant declined an offer of compromise made by plaintiff before trial. Defendant improved his position at a trial de novo when the jury awarded less than the plaintiff's offer of compromise. Despite this fact, the trial court awarded plaintiff MAR 7.3 fees and costs. To arrive at this erroneous decision, the trial court determined trial costs and then subtracted those trial costs from the amount of the offer of compromise.

The trial court's award and rationale run counter to the most basic goals underpinning the arbitration rules. Further, the appellate court's application of the MAR statutes disregards the rules of statutory interpretation. The MAR 7.3 award and judgment should be reversed.

II. ISSUES PRESENTED

1. Does a party improve his position on trial de novo when the jury awards less than the amount of a compromise offer?
2. In comparing comparables for purposes of determining whether a party improved his position at a trial de novo, must the court compare liquidated, fixed amounts?
3. Should a court permit a party's compromise offer to alter the nature of the arbitrator's award from a liquidated amount to an unliquidated amount?

III. STATEMENT OF THE CASE

Plaintiff Jeffery Niccum (“plaintiff”) and defendant Ryan Enquist (“Mr. Enquist”) were involved in an automobile accident on July 4, 2004. (CP 2) In 2007, plaintiff sued Mr. Enquist to recover for his injuries. (CP 1-2) The matter was transferred to mandatory arbitration. (CP 9) The arbitrator awarded plaintiff \$24,496.00 for medical bills, wage loss, and pain and suffering. (CP 9) Mr. Enquist timely filed a request for trial de novo. (CP 23)

On March 20, 2008, plaintiff presented Mr. Enquist with an offer of compromise in the amount of \$22,000.00. (CP 11) On July 8, 2008, plaintiff presented Mr. 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. DYRESO, 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)

Mr. 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 for plaintiff. The \$16,650.00 awarded was comprised of past medical expenses and past noneconomic damages. (CP 6)

After the trial, plaintiff sought MAR 7.3 fees and costs: \$15,640.00 in fees, \$1,016.28 in statutory costs, and \$1,461.00 in expert expenses. (CP 23-36, 37-38) In moving for MAR 7.3 attorney fees, plaintiff argued the \$1,016.28 in statutory trial costs should be subtracted from the \$17,350.00 offer of compromise. (CP 20, 24) The modified offer of compromise – \$16,333.72 – was less than the \$16,650.00 jury award. The trial court granted plaintiff’s motion. (RP 8-9) The court entered a judgment awarding plaintiff \$15,640.00 in “reasonable attorney fees after date of arbitration” and statutory costs and attorney’s fees of \$1,016.28. (CP 39-41)

Mr. Enquist appealed. (CP 42-47) Division III of the Court of Appeals issued a published decision upholding the trial court’s rulings. *Niccum v. Enquist*, 152 Wn. App. 496, 215 P.3d 987 (2009), and denied Mr. Enquist’s motion for reconsideration.¹ This Court accepted Mr. Enquist’s Petition for Review.

¹ In its original opinion, the Court of Appeals reversed the trial court’s granting of expert expenses. However, it granted plaintiff’s motion for reconsideration and reinstated the award of expert expenses. Mr. Enquist does not seek review of the expert expense issue. However, if this Court reverses the award of attorney fees and determines that Mr. Enquist did improve his position, then those expert expenses likewise will not be available to plaintiff under RCW 7.06.060(2).

IV. ARGUMENT

A. THE LOWER COURTS' RULINGS CONFLICT WITH THE PURPOSE OF THE MANDATORY ARBITRATION SYSTEM.

Washington's mandatory arbitration system is codified in RCW ch. 7.06 and in the Superior Court Mandatory Arbitration Rules. The purpose of the mandatory arbitration system is to reduce congestion and delays in the courts. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997). A supplementary goal of the mandatory arbitration statute is to discourage meritless appeals. *Wiley v. Rehak*, 143 Wn.2d 339, 20 P.3d 404 (2001). 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.) Similarly, 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.

Justice Talmadge explained the purpose behind MAR 7.3 as follows:

[The possibility of MAR 7.3 fees] should compel parties to assess the arbitrator's award and the likely outcome of a trial de novo with frankness and prudence; meritless trials de novo must be deterred.

Haley v. Highland, 142 Wn.2d 135, 159, 12 P.3d 119 (2000), concurring opinion. The lower courts' rulings in this case adopt an approach to

compromise offers which allows manipulation of the mandatory arbitration process and creates confusion.

1. Costs Cannot Be Retroactively Applied.

In the case before this Court, it is undisputed that the amount of costs were not known at the time the offer of compromise was made. Costs were not established until after the trial de novo. These costs were then applied to the offer of compromise – made over two months before – to change the amount of the offer. In July 2008, Mr. Enquist believed that if the jury returned a verdict less than \$17,350, he would avoid attorney fees. In September 2008 – after the trial was concluded – he learned that the threshold number was actually \$16,333.72.

Allowing a retroactive application of costs in a MAR 7.3 analysis undermines the requesting party's ability to assess whether to accept a compromise offer. Without a precise figure, the requesting party will be unable to fairly and accurately determine whether the trial de novo has merit. Such uncertainty thwarts the statute's purpose of discouraging meritless appeals and permits manipulation by the party making the compromise offer. The parties are unable to assess the arbitrator's award and the likely outcome at trial with the "frankness and prudence" contemplated by Justice Talmadge. *Haley*, 142 Wn.2d at 159, concurring opinion.

2. *Tran v. Yu* Does Not Support the Lower Courts' Rulings.

Division I of the Court of Appeals addressed the issue of manipulating the arbitrator's award and jury verdict in determining attorney fees under MAR 7.3. *Tran v. Yu*, 118 Wn. App. 607, 75 P.3d 970 (2003). In *Tran*, defendant requested a trial de novo after plaintiff was awarded \$14,675 at arbitration. The jury awarded plaintiff only \$13,375. After trial, plaintiff was awarded \$3,205 under CR 37(c) and \$955.80 in statutory costs. *Id.* at 610. When the CR 37(c) award and statutory costs were added to the jury's verdict, the judgment totaled \$17,535.80. Plaintiff argued she was entitled to MAR 7.3 fees and costs because the total judgment exceeded the arbitration award. *Id.*

Defendant argued that only the jury award could be compared to the arbitration award. The CR 37 award and statutory costs should not be included because there was no cost award as part of the arbitration award. The trial court agreed with defendant and denied plaintiff's request for MAR 7.3 fees. Division I affirmed. *Id.* at 611, 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. The court determined that it was more appropriate to "compare comparables." *Id.* In *Tran*, comparing comparables meant comparing the damages awarded

by the arbitrator – \$14,675 – with the damages awarded by the jury at the trial de novo – \$13,375. *Id.* Neither of those awards included an award of costs.

In this case, plaintiff purports to be comparing comparables by subtracting out an amount of statutory trial costs from the compromise offer so that it can be compared to the jury award. This approach is fatally flawed. No adjustment is necessary because neither the arbitration award nor the jury verdict included costs. Those awards were already “comparables.” Essentially, plaintiff altered the nature of the arbitrator’s award to include costs, so that it could then be manipulated back to not include costs. At plaintiff’s urging, the trial court here did precisely what the *Tran* Court rejected, namely manipulating statutory costs – which were not awarded by the arbitrator (CP 9) – in an attempt to reduce the offer of compromise to an amount below the jury’s verdict. The fact that this case involves a compromise offer on top of an arbitration award does not justify a departure from the *Tran* decision.

Both parties agree that a court should compare comparables in applying the attorney fees provision. The dispute is whether *Tran* should be interpreted in a manner that thwarts the purposes of mandatory arbitration. *Niccum*, 152 Wn. App. 496, is the first written opinion to interpret the offer of compromise component to the mandatory arbitration

attorney fee rule. The decision invites parties to play word games with the phrasing of offers of compromise. It also encourages after-the-fact mathematical alterations to mold an award after trial to reach a desired amount. This is not consistent with the open and frank deliberations necessary to fairly discourage meritless appeals.

3. Plaintiff's Offer of Compromise Did Not Include a "Segregated Amount."

Even more uncertainty is created by Division III's conclusion that plaintiff's compromise offer was a "segregated amount." *Niccum*, 152 Wn. App. at 500-01. There were no segregated amounts in either the arbitrator's award of \$24,496 or the compromise offer of \$17,350. (CP 9, 12) The arbitrator's award was a single amount – the compensatory award without any award for costs. Similarly, the offer of compromise was for one, undivided amount. The lack of "segregation" is precisely the problem with plaintiff's position. The amount was not segregated until after the trial when the court determined costs. The amount was then retroactively applied to the lump sum of the offer and shifted the number that both parties believed was the threshold amount.

When the arbitrator handed down a grossly-inflated award, Mr. Enquist had the right to a jury trial. He risked the added expense of trial, the chance that plaintiff could recover more than the arbitrator awarded,

and the possibility that he would be responsible for paying plaintiff's attorney fees if he did not fair better. Allowing the uncertainty created by plaintiff's curious wording and the unanticipated mathematical manipulations adopted by the lower courts unfairly added further burdens on Mr. Enquist. Future litigants should not be similarly encumbered with the confusion created by the Division III opinion.

4. Unliquidated Offers Are Inconsistent With the MAR System.

Without a method to determine the amount of costs included in the offer of settlement, a compromise offer is unliquidated. A party should not be forced to accept or reject a settlement offer of an uncertain amount. In this case, the costs were calculated only after the trial de novo and with the hindsight needed to arrive at an amount which would support plaintiff's novel attorney fees argument. 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 to anticipate that plaintiff would later claim costs in the amount of \$1,016.28 or what the court might actually award. 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.

In fact, the language in plaintiff's offer of compromise is 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." (CP 12) RCW 4.84.010.

Whether intended or not, the only effect of the additional language was to create uncertainty. Such uncertainty runs counter to the goal of frank and prudent assessments of whether a trial de novo is warranted. The language of an offer of compromise cannot justly transform the fixed sum of the arbitrator's award of damages into an unliquidated sum that includes an unknown amount for damages and an unknown amount for costs.

B. THE TRIAL AND APPELLATE COURTS IMPROPERLY INTERPRETED THE MAR STATUTE.

When determining the meaning of a statute, a Washington court's fundamental objective is to ascertain the intent of the Legislature. *State, Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d

4 (2002). Similarly, the Mandatory Arbitration Rules should be interpreted as though they were drafted by the Legislature and construed in accordance with their purpose. *Nevers*, 133 Wn.2d at 809. “[I]f the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of Ecology*, 146 Wn.2d at 9-10.

RCW 7.06.050(1)(b) states that “...**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.) The plain meaning of the statute is that the amount of the offer simply replaces the amount of the arbitrator’s award. One dollar figure should be substituted for another dollar figure without any accommodation for supposed categories of the amount (i.e. some for damages, some for costs).

If the statute had instead stated that “the offer of compromise shall replace the arbitrator’s award...,” then plaintiff might have a better argument to support his attempt to apply the supposed terms in his compromise offer. However, the statute clearly articulates that only the dollar amount of the offer shall replace the dollar amount of the arbitrator’s award. It is still the arbitrator’s award and terms that are to be

compared to the jury award – the only change is in the dollar value to be compared. This Court has previously required strict compliance with the plain language of the mandatory arbitration statute to further the Legislature’s intent. *Nevers*, 133 Wn.2d at 815. Following the plain language of the offer of compromise rule in this case is appropriate as well.

Where a statute contains both the words “may” and “shall,” it is presumed that the Legislature intended to distinguish between them, with “shall” being construed as mandatory and “may” as permissive. *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435, 656 P.2d 1083 (1982). RCW 7.06.050 contains both “may” and “shall.” Therefore, where RCW 7.06.050(1)(b) states the amount of the offer “shall” replace the amount of the arbitrator’s award, the statute is mandatory. The amount of the compromise offer becomes the amount of the arbitrator’s award. There is no room for mathematical adjustment. The plain meaning of the statute does not allow for the offer of compromise to include qualifiers meant to complicate the nature of that amount.

Rather than apply the plain language of the statute, Division III added to the statutory language, misconstruing the facts in the process. Division III’s decision states:

We conclude that RCW 7.06.050(1)(b) should be read so that **any segregated amount of an offer** must replace an amount in the same category granted under the arbitrator's award.

Niccum, 152 Wn. App. at 500-01 (emphasis added). The statute makes no mention of segregated amounts. RCW 7.06.050(1)(b). Further, costs and damages were not amounts segregated from one another in either the compromise offer or the arbitrator's award.

A basic tenet of statutory construction is that words should not be added or subtracted from the plain statutory language. *Washington State Coalition for the Homeless v. Department of Social and Health Services*, 133 Wn.2d 894, 904, 949 P.2d 1291 (1997) ("An unambiguous statute is not subject to judicial construction, and we will not add language to a clear statute even if we believe the Legislature intended something else but failed to express it adequately.") Division III's interpretation of the statute is inconsistent with the statutory language and the rules of statutory interpretation. The statute should be applied as written: the compromise offer amount of \$17,350.00 replaced the amount of the arbitration award. Thus, because the jury awarded plaintiff only \$16,650 at the trial de novo, Mr. Enquist improved his position.

Not only is this a proper statutory interpretation, but it also provides the easiest rule for practitioners faced with offers of compromise.

Regardless of any ambiguous or deceptive language a party uses to couch its offer of compromise in, only the stated dollar figure is important because that will become the new arbitrator's award. Litigants will know with certainty what figure serves as the threshold for attorney fees. This approach satisfies the rules of statutory interpretation, comports with common sense, and can be most consistently applied in the future.

V. CONCLUSION

From a cursory review of the facts here and the *Tran* holding, a reader might mistakenly conclude the trial court properly subtracted statutory trial costs from the compromise offer to "compare comparables." However, justice mandates a more complete look and consideration of several important factors: when the costs were determined; the fact that the court's interpretation would require substituting an unliquidated amount for a formerly liquidated award; the clear language of the statute; and the purposes of the mandatory arbitration system. The trial court's mathematical manipulations and the appellate court's statutory interpretation were erroneous. This case should be remanded to the trial court for determination that Mr. Enquist improved his position at the trial de novo and for entry of a new judgment without MAR 7.3 attorney fees.

DATED this 7th day of May, 2010.

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