

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JUL 11 PM 3:52 *U*

No. 68257-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

SOON KIM,

Respondent,

vs.

LINDSAY ROGER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR SNOHOMISH COUNTY

Honorable Larry McKeeman, Judge

RESPONDENT'S BRIEF

ERICA B. BUCKLEY, WSBA #40999
Attorneys for Respondent

BUCKLEY & ASSOCIATES P.S. INC.
675 S. Lane Street, Suite 300
Seattle, WA 98104
Telephone (206) 622-1100
Facsimile (206) 622-0688

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. RESPONSE TO ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT.....	2
1. Standard of Review.....	2
2. The Trial Court Did Not Err in Awarding Attorney Fees and Costs Because Roger Did Not Improve Her Position at Trial de Novo	2
3. The Trial Court’s Ruling is Consistent with the Purpose of MAR 7.3.....	6
4. Respondent is Entitled to an Award of Reasonable Attorney Fees Incurred as a Result of Appellant’s Appeal.....	7
V. CONCLUSION.....	8

TABLE OF AUTHORITIES

Page

Table of Cases

Arment v. Kmart Corp.,
79 Wash.App. 694, 700, 902 P.2d 1254 (1995).....8

Basin Paving Co. v. Contractors Bonding and Ins. Co.,
123 Wn.App. 410, 414, 98 P.3d 109 (2004).....2

Christie-Lambert Van & Storage Co. v. Mcleod,
39 Wn3 App. 298, 302, 693 P.2d 161 (1984).....6

Cormar, Ltd. v. Sauro,
60 Wn. App. 622, 624, 806 P.2d 253 (1991).....6

Kim v. Pham,
95 Wash.App. 439, 441, 975 P.2d 544 (1999).....2

Niccum v. Enquist,
152 Wash.App. 496, 215 P.3d 987 (2009).....2, 3, 4, 5

Tran v. Yu,
118 Wash.App. 607, 75 P.3d 970 (2003)3, 4, 5

Wilkerson v. United Inv., Inc.,
62 Wash.App. at 717, 815 P.2d 293.....5, 7, 8

Yoon v. Keeling,
91 Wn.App. 302, 956 P.2d 1116 (1998).....7

Statutes and Court Rules

CR 37.....3

MAR 7.3.....1, 2, 3, 5, 6, 7, 8

RAP 14.2.....8

RAP 18.1.....8

RCW 4.84.....3, 4, 6, 7

RCW 7.06.050.....2

RCW 7.06.060.....2

I. INTRODUCTION

This appeal arises from the trial court's award of attorney fees and expert witness fees pursuant to MAR 7.3. Defendant requested a trial de novo following an arbitration.

Prior to trial, plaintiff made an offer of compromise for \$16,500, inclusive of attorney fees and costs. At trial, the jury returned a verdict in favor of plaintiff for \$14,761. The court entered a judgment against the defendant for \$17,096.39 which included the verdict and the plaintiff's cost bill. The trial court concluded that defendant did not improve her position at trial and awarded plaintiff MAR 7.3 attorney fees and costs.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not error in entering judgment including an award of attorney fees and costs pursuant to MAR 7.3 because defendant did not improve her position at trial relative to the offer of compromise.
2. The trial court did not error in entering findings of fact and conclusions of law which included an award of attorney fees and costs pursuant to MAR 7.3 because defendant did not improve her position at trial relative to the offer of compromise.

III. STATEMENT OF THE CASE

Appellant correctly states the relevant facts in her statement of the case.

IV. ARGUMENT

A. Standard of Review.

This Court reviews de novo a trial court's application of court rules and statutes to facts. *Kim v. Pham* 95 Wash.App. 439, 441, 975 P.2d 544 (1999); *Basin Paving Co. v. Contractors Bonding and Ins. Co.*, 123 Wn.App. 410, 414, 98 P.3d 109 (2004). The trial court correctly applied MAR 7.3, RCW 7.06.050, and RCW 7.06.060.

B. The Trial Court Did Not Err in Awarding Attorney Fees and Costs Because Roger Did Not Improve Her Position At Trial De Novo.

Appellant argues that the trial court erred in determining that she failed to improve her position at trial. She states that in order to determine who is the prevailing party at trial de novo, the court should compare the dollar amount in the offer of compromise to the dollar amount in the jury verdict. However, the trial court concluded and the respondent agrees that the amount to compare here is the \$16,500 inclusive of attorney fees and costs contained in the offer of compromise to the \$17,096.39 of the verdict and costs. Based on that comparison, Roger failed to improve her position at trial and is responsible for Kim's attorney fees and expert witness fees in the amount of \$24,211.25.

The *Niccum v. Enquist* case previously dealt with an issue analogous to the one at hand. *Niccum v. Enquist*, 152 Wash.App. 496, 215

P.3d 987 (2009). In that case, the defendant requested a trial de novo following an arbitration award in plaintiff's favor. *Id.* Plaintiff submitted two offers of compromise. *Id.* at 498. The second offer of compromise stated in part: "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. In determining that the defendant failed to improve his position at trial, the trial court segregated the compensatory damages from the costs by subtracted the costs allowable under RCW 4.84 from the offer of compromise and compared that amount to the compensatory damages awarded by the jury. *Id.* at 499. The Court of Appeals upheld the trial court's ruling relying, in part, on the reasoning in *Tran v. Yu*, 118 Wash.App. 607, 75 P.3d 970 (2003).

In *Tran*, the trial court awarded plaintiff attorney fees and costs under MAR 7.3 because the total judgment, including the CR 37 sanctions and statutory costs, was higher than the arbitrator's award and therefore, defendant failed to improve his position at trial de novo. However, the Court of Appeals reversed the trial court because when comparing the compensatory damages awarded by the arbitrator to those awarded by the jury, the defendant did improve his position at trial since the jury awarded less than the arbitrator awarded. The gist of the *Tran* case as well as the

gist of the *Niccum* case is to compare comparables when determining whether a party has improved his position at trial. As stated in the *Tran* case:

The court should compare comparables to determine whether a party failed to improve its position. Thus here, the court would compare the compensatory damages awarded by the arbitrator and the compensatory damages awarded at the trial de novo.

Id. at 612.

Using the reasoning and methodology of both the *Tran* and *Niccum* cases, the outcome of this case should mirror the *Niccum* case because the facts are the same to *Niccum* and distinguishable from the *Tran* case. Ms. Kim submitted an offer of compromise which included costs and attorney fees, just like the plaintiff in *Niccum*. In the *Tran* case, there was no offer of compromise including costs and attorney fees; there was only an arbitration award which did not include costs or attorney fees. In our case, when the costs allowable under RCW 4.84 are subtracted from the amount of the offer of compromise, the compensatory damages in the jury verdict (\$14,761.00) is higher than the compensatory damages in the offer of compromise (\$14,164.61) and therefore, Roger failed to improve her position at trial. Or, looking at the numbers in the alternative, the total judgment of \$17,096.39 (which includes statutory attorney fees and costs) is more than the \$16,500 offer of compromise (which included attorney

fees and costs. Essentially, Ms. Roger would have owed less to Ms. Kim had she accepted the offer of compromise. *Niccum v. Enquist*, 152 Wash.App. 496, 501, 215 P.3d 987 (2009).

Appellant argues that there was no segregated amount for compensatory damages versus statutory attorney fees and costs in Kim's offer of compromise and that the phrase "inclusive of attorney fees" is immaterial. However, the language contained in Kim's offer of compromise is almost identical to that in *Niccum's* offer of compromise and the Court in that case concluded, "...the trial court correctly considered comparables in the offer of compromise and the jury verdict, and properly subtracted costs and fees." *Id.* at 501. In *Wilkerson v. United Inv., Inc.*, when determining which amounts to compare, the Court wrote:

It would be inequitable to compare the jury verdict for compensatory damages with an arbitrator's combined award of compensatory damages, attorney fees, and costs. The better approach to determine whether one's position has been improved, is to compare comparables. Here the jury's compensatory damage award exceeded the arbitrator's compensatory damage award.

Tran v. Yu, 118 Wash.App. 607, 613, 75 P.3d 970 (2003), citing *Wilkerson v. United Inv., Inc.*, 62 Wash.App. at 717, 815 P.2d 293.

C. The Trial Court's Ruling is Consistent with the Purpose of MAR 7.3.

The appellant claims that the goals of mandatory arbitration are hindered by the trial court's ruling. However, the purpose of arbitration, which is to keep disputes out of the courts, "is best served by reading MAR 7.3 as a broad warning that one who asks for a trial de novo, and thereafter suffers a judgment for a greater amount than the arbitration award, will be liable for attorneys fees." *Cormar, Ltd. v. Sauro*, 60 Wn. App. 622, 624, 806 P.2d 253 (1991). A supplemental goal of the mandatory arbitration statute is to discourage meritless appeals. *Christie-Lambert Van & Storage Co. v. Mcleod*, 39 Wn. App. 298, 302, 693 P.2d 161 (1984).

Appellant argues that she did not know how much those RCW 4.84 costs would be until plaintiff filed the cost bill and as such, Kim manipulated the numbers post-verdict in order to prevail, however, appellant has not suggested the cost bill is incorrect and is not appealing that amount. In this case, Kim offered Roger an opportunity to settle the entire case, including attorney fees and costs, for \$16,500. Upon receiving that offer of compromise, Roger knew that in order to avoid paying MAR 7.3 fees, she would have to leave court owing less than \$16,500 in damages, including attorney fees and costs. There is no ambiguity or uncertainty with that premise. It is upon the party appealing an arbitration

award to assess the total value of the case before deciding whether to appeal, and likewise, upon receiving the offer of compromise, it was incumbent upon defendant to assess whether the total value of the case was more or less than \$16,500 and act accordingly. The argument that the trial court's ruling is unfair because the amount of the cost bill is unpredictable is unpersuasive in light of the much greater unpredictability of a jury verdict than a cost bill, and considering that there are statutes which specifically outline those costs to be recovered in a cost bill (RCW 4.84 et. seq.). The whole scheme of MAR 7.3 involves an element of guesswork, and the penalty for guessing incorrectly is high in order to dissuade meritless appeals. The fact that Roger did not know the amount of the cost bill until the conclusion of the case should not prevent her, as the appealing party who failed to improve her position, from paying fees pursuant to MAR 7.3.

D. Respondent is Entitled to an Award of Reasonable Attorney Fees Incurred as the Result of Appellant's Appeal.

Kim requests that the Court of Appeals award her attorney fees incurred as a result of Roger's appeal. According to *Yoon v. Keeling*, 91 Wn.App. 302, 956 P.2d 1116 (1998), "A party entitled to attorney fees under MAR 7.3 at the trial court level is also entitled to attorney fees on appeal if the appealing party again fails to improve its position." *Id* at

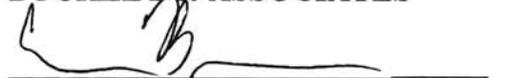
306. Citing *Arment v. Kmart Corp.*, 79 Wash.App. 694, 700, 902 P.2d 1254 (1995) (citing *Wilkerson v. United Inv., Inc.*, 62 Wash.App. 712, 717, 815 P.2d 293). Therefore, pursuant to MAR 7.3, RAP 14.2, and RAP 18.1, respondent requests attorney fees and costs incurred.

V. CONCLUSION

Respondent requests that this Court uphold the trial court's ruling granting Kim attorney fees pursuant to MAR 7.3 and requests additional attorney fees and costs incurred as a result of this appeal.

Dated this 11th day of July, 2012.

BUCKLEY & ASSOCIATES


ERICA B. BUCKLEY, WSBA#40999
Attorney for Respondent