71709-0

71709-0

NO. 71709-0-I

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

JESS NELSON, an individual,

Respondent,

vs.

MICHAEL ERICKSON and JANE DOE ERICKSON, and the marital community composed thereof,

Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Mary Yu, Judge

BRIEF OF APPELLANTS

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I. NATURE OF THE CASE

This appeal stems from the trial court's compounding mistakes at a de novo trial following mandatory arbitration. First, although the jury issued an award grounded in the evidence, the court awarded $3,000 in additur. Second, the court misapplied *Niccum v. Enquist*, 175 Wn.2d 441 (2012), to the additur-increased verdict and awarded plaintiff attorney fees pursuant to MAR 7.3. The court's orders and judgment constitute reversible errors.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in awarding additur and entering the corresponding judgment where the jury was able to conclude, based on the evidence, that plaintiff was not entitled to future general damages. (CP 670-71, 1044-46)

2. The trial court erred in entering Finding of Fact No. 2 in which it stated that it was undisputed that plaintiff's injuries were permanent and that he would continue to suffer pain in the future.[1] (CP 1048)

3. The trial court erred in subtracting costs from an offer of compromise resulting in an award of attorney fees pursuant to MAR 7.3 and a corresponding judgment. (CP 1044-46, 1054-55)

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[1] A copy of Findings of Fact Nos. 1, 2, and 4 is in the Appendix pursuant to RAP 10.4(c).

4. The trial court erred in entering Finding of Fact No. 1 in which it stated that plaintiff made an offer of compromise in the amount of $26,000.00. (CP 1048)

5. The trial court erred in entering Finding of Fact No. 4 in which it stated that the verdict amount exceeded the amount of the offer of compromise. (CP 1048)

III. ISSUES PRESENTED

1. Did the trial court make a reversible error in granting additur where there was sufficient evidence for the jury to conclude that plaintiff was not entitled to future general damages? (Pertaining to Assignments of Error Nos. 1-2)

2. Did the trial court make a reversible error by awarding attorney fees pursuant to MAR 7.3 where defendant improved his position at trial compared to the offer of compromise? (Pertaining to Assignments of Error Nos. 3-5)

IV. STATEMENT OF THE CASE

Jess Nelson and Michael Erickson were involved in an automobile accident on December 23, 2010. (CP 2) In 2012, Nelson sued Erickson and moved the case to mandatory arbitration. (CP 1-4, 9-10) In May of 2013, the arbitrator awarded in favor of Nelson as follows: special medical damages ($11,167.00); out-of-pocket ($234.59); general damages

($32,000); and attorney fees and costs ($1,522.19). (CP 832, 928, 1081) Erickson filed a timely request for a trial de novo. (CP 12) On September 25, 2013, Nelson presented Erickson with a written offer of compromise which stated:

> Pursuant to RCW 7.06.050 and MAR 7.3 Plaintiff JESS NELSON hereby offers to settle his claim against Defendant MICHAEL ERICKSON and JANE DOE ERICKSON in the amount of $26,000 plus taxable costs incurred at arbitration. This offer is open for ten calendar days after receipt of service.

(CP 839) Erickson did not accept the offer, and the case proceeded to a jury trial. (CP 544)

Nelson testified at trial, and he called several family members and friends as lay witnesses. (CP 553) Nelson also called Larry Harper, M.D. (his primary care doctor) and Daniel Washeck (his physical therapist) as witnesses. (CP 632) Nelson testified that he continued to experience pain in his neck. (RP 341) However, Nelson also testified that he had declined to participate in further physical therapy prescribed by Dr. Hardy and that he had stopped doing the exercises recommended by his chiropractor. (RP 373) Further, since the accident, Nelson continued to work 50-60 hours per week. (RP 374-75) Nelson's own physician, Dr. Harper, acknowledged that he could not relate Nelson's ongoing pain complaints to the accident, and he could not say that the injuries were permanent. (RP

286) Further, Dr. Harper admitted that he could not say that Nelson required any further treatment.[2] (RP 286)

In addition to Erickson testifying on his own behalf, the defense also called a medical expert, Allen Jackson, M.D. Dr. Jackson had performed a physical examination of Mr. Nelson on March 6, 2013. (RP 406) The examination included a large number of tests, all of which Mr. Nelson performed normally.[3] (RP 407-17) Dr. Jackson observed through his extensive testing that Mr. Nelson did not demonstrate any positive findings to support continued injury. (RP 417) Further, Dr. Jackson's review of Nelson's post-accident MRI did not reveal any traumatic injury. (RP 422) Based on his examination and review of the records, Dr. Jackson determined that Nelson experienced a strain of his cervical spine and a strain of his lumbar spine related to the accident. (RP 417) The accident may have aggravated Nelson's pre-existing degenerative changes in his lower back, but the aggravation was only temporary. (RP 419) Dr. Jackson concluded that Nelson's treatment for 6-8 months after the

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[2] At best, Dr. Harper responded to a hypothetical question that if Nelson were to come into his office with certain complaints, he would hypothetically recommend certain treatment. (RP 279)

[3] There was a slight difference in the recorded averages for cervical spine motion test, but Dr. Jackson did not believe these represented a restricted range of motion and rather was "a relatively normal exam." (RP 409-10, 417)

accident was reasonable, but beyond that symptoms and treatment from them could not correlate to the accident. (RP 422)

Dr. Jackson testified that Nelson's ongoing complaints of neck pain were not related to the collision. (RP 423) There was no objective evidence to correlate his subjective symptoms to the accident. (RP 423) Further, there was no objective measure to indicate that Mr. Nelson had sustained a permanent injury. (RP 424) Although Dr. Jackson did not say that Nelson was lying about his complaints, he was clear that Nelson's pain was not measurable, and there was no way to causally link it to the accident. (RP 424)

The court instructed the jury on damages, including past and future medical treatment and a variety of past and future noneconomic damages. (CP 625-26) On November 8, 2013, the jury returned the special verdict form which read as follows:

> We, the jury, answer the questions submitted by this Court as follows:
>
> What do you find to be the amount of damages for each of the following:
>
> | | | |
> |---|---|---|
> | (1) | Stipulated medical expenses: | $9,361.00 |
> | (2) | Past medical expenses: | $1,806.00 |
> | (3) | Future medical expenses: | $10,000.00 |
> | (4) | Past noneconomic damages: | $3,000.00 |
> | (5) | Future noneconomic damages: | $0.00 |

(CP 635)

Nelson moved the court for additur or a new trial. (CP 636-47) Erickson opposed the motion, and Nelson filed a reply. (CP 652-61, 664-69) The court ruled as follows:

> IT IS HEREBY ORDERED as follows:
>
> 1) the request for oral argument IS DENIED;
>
> 2) the motion for a new trial IS DENIED;
>
> 3) the motion for an additur for future noneconomic damages IS GRANTED and an additur in the amount of $3,000.00 shall replace the jury award of $0.00. All other relief and the request for any other additional additur IS DENIED.
>
> The court finds that the lack of a jury award for future noneconomic damages in inconsistent with the evidence and the decision to award future medical expenses. The evidence supporting future medical expenses was based on uncontroverted testimony that the Plaintiff was continuing to experience pain now and in the future. The request for future treatment was specific to the treatment of that pain and there was no evidence to support any intervening cause for the pain. Although this court is reluctant to disturb a jury verdict, justice was not served by the verdict and an award that does not even acknowledge the pain while providing for future medical treatment is inconsistent. It is difficult for the court to substitute its judgment for a jury's determination of future pain and suffering, and despite Plaintiff's desire for a larger measure of damages, the court declines to exceed the value placed on Plaintiff's past pain and suffering.

(CP 670-71)

Erickson's motion to reconsider was denied. (CP 681-86, 728-29) Nelson moved for entry of a judgment of $29,661.74 – this included the jury verdict and additur in the amount of $27,167.00 and statutory costs in

the amount of $2,494.74. (CP 673-75) Ultimately, the court entered an order and judgment in the total amount of $27,896.98, which included $24,167.00 for the jury verdict, $3,000.00 for the additur, and $729.98 in costs. (CP 723-24)

Nelson then filed a motion for attorney fees pursuant to MAR 7.3 and RCW ch. 7.06. (CP 795-822) The court denied the motion for fees on January 6, 2014. (CP 1005-09) Nelson moved for reconsideration, and the court invited a response and reply. (CP 1010-18, 1024) The trial court then granted the motion for reconsideration and awarded fees in the amount of $58,980.00 and costs in the amount of $4,488.90.[4] (CP 1047-55) On March 3, 2014, the court issued its Findings of Fact and Conclusions of Law Regarding Attorney's Fees and Costs and entered a Second Amended Judgment in the total amount of $91,365.88. (CP 1044-46, 1047-53) Erickson timely appealed. (CP 1056-80)

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[4] In a handwritten addendum to the order, the court stated as follows:

> The Ct. grants the Motion to Reconsider based on a re-reading of Niccum. This Ct. erred in the first instance by including costs in the offer. Mr. Nelson's offer of compromise was for $26,000.00. Defendant Erickson failed to improve his position at trial and Pl. is entitled to fees + costs.

(CP 1055)

V. ARGUMENT

A. STANDARD OF REVIEW.

The trial court's modification of a jury's determination of damages will be reviewed de novo by the appellate court and with the presumption that the verdict of the jury was correct. *Usher v. Leach*, 3 Wn. App. 344, 345, 474 P.2d 932 (1970). In this case, a de novo review reveals that the trial court erred in granting additur in light of the trial testimony.

The standard of review for a trial court's decision involving the interpretation of a court rule is de novo. *See Kim v. Pham*, 95 Wn. App. 439, 441, 975 P.2d 544, *rev. denied*, 139 Wn.2d 1009 (1999). Similarly, a trial court's 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). In this case, the superior court made a legal error in its interpretation and application of RCW 7.06.050, 7.06.060, and MAR 7.3.

B. THE TRIAL COURT ERRED IN AWARDING ADDITUR.

1. There Is a Presumption in Favor of the Jury's Verdict.

In Washington, there is a "'strong presumption'" that a jury's determination of the amount of damages is valid. *Palmer v. Jensen*, 81 Wn. App. 148, 150, 913 P.2d 413 (1996), quoting 16 David K. DeWolf & Keller W. Allen, WASH. PRAC., *Tort Law and Practice* § 4.44, at 97 (1993). Regardless of the trial court's assessment of plaintiff's damages,

after a fair trial it may not substitute its own conclusions for those of the jury with regard to the amount of damages. *See Tolli v. School Dist. No. 267 of Whitman County*, 66 Wn.2d 494, 495, 403 P.2d 356 (1965). The jury must remain the final arbiter of the value and effect of the evidence, including determining the credibility of the witnesses, the weight of their testimony, and the ultimate consequence of the evidence. *See Scanlan v. Smith*, 66 Wn.2d 601, 603, 404 P.2d 776 (1965).

On review, an appellate court begins its analysis with the presumption that the jury's verdict was correct. *Herriman v. May*, 142 Wn. App. 226, 234, 174 P.3d 156 (2007). Courts are obligated to view the question of whether "substantial evidence" exists to support a verdict in the light most favorable to party not requesting additur. *Bunch v. Dept. of Youth Services*, 155 Wn.2d 165, 176, 178, 116 P.3d 381 (2005). A new trial or additur must be denied if the verdict is within the range of credible evidence. *See Robinson v. Safeway Stores, Inc.*, 113 Wn.2d 154, 161-62, 776 P.2d 676 (1989). If there is any justifiable evidence upon which reasonable minds could reach conclusions to sustain the verdict, then the jury's verdict must stand. *See Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 243, 744 P.2d 605 (1987).

2. A Jury Is Not Required to Award General Damages.

There is no per se rule that general damages must be awarded to every plaintiff who sustains an injury. *Palmer v. Jensen*, 132 Wn.2d 193, 201, 937 P.2d 597 (1997). In fact, a "jury may award special damages and no general damages when 'the record would support a verdict omitting general damages.'" *Gestson v. Scott*, 116 Wn. App. 616, 620, 67 P.3d 496 (2003) (quoting *Palmer*, 132 Wn.2d at 202). In *Palmer*, the jury awarded economic damages to the plaintiff, but no general damages. 132 Wn.2d at 201. The Supreme Court reviewed the proceedings to determine if the omission of general damages was contrary to the record. *Id.* at 201-02. The court determined that the defense presented "no evidence" to refute the medical testimony of plaintiff's treaters. *Id.* at 196 (emphasis added). In the absence of contradicting testimony, the trial evidence demonstrated that plaintiff experienced pain and suffering related to the accident, and the jury's failure to provide general damages was contrary to the evidence. *Id.* at 203. Under these limited circumstances, the court determined that a new trial was appropriate. *Id.*

However, if the evidence at trial calls into question the cause, degree, or credibility of alleged pain and suffering, a verdict awarding medical expenses without general damages may be within the range of evidence. *See Lopez v. Salgado-Guadarama*, 130 Wn. App. 87, 122 P.3d

733 (2005). In *Lopez*, the Court of Appeals upheld the jury's determination that no general damages were warranted despite awarding all of plaintiff's economic damages. *Id.* at 93.

> In contrast to the facts presented in *Palmer* the defense disputed every aspect of Mr. Lopez's damages. Defense experts testified no objective medical findings supported Mr. Lopez's extensive complaints of pain. Dr. Sears opined Mr. Lopez should have recovered from any injuries quickly after the accident.

Id. at 92. The *Lopez* Court held that "the jury was entitled to conclude that the plaintiff incurred reasonable medical expenses as a result of the accident, while at the same time concluding he failed to carry his burden of proving general damages." *Id.* at 93.

Similarly, in *Herriman v. May*, the defendant presented expert testimony that plaintiff's claimed pain was exaggerated and that she did not have an objective basis for her complaints or need future medical care. 142 Wn. App. at 230, 233. The trial court granted additur, ruling that the evidence did not support the claim that plaintiff's pain was nonexistent or exaggerated. *Id.* at 231. The Court of Appeals reversed. The appellate court noted that the jury was entitled to agree with the defense expert and to reject plaintiff's testimony as not credible. *Id.* at 233. The record contained sufficient evidence to support the jury's award, and both additur and a new trial were inappropriate. *Id.* at 233-34.

3. The Trial Court Misapplied RCW 4.76.030.

Washington statute allows for a trial court to grant a new trial, or award additur in the alternative, under limited circumstances:

> If the trial court shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakably to indicate that the amount thereof must have been the result of passion or prejudice, the trial court may order a new trial or may enter an order providing for a new trial unless the party adversely affected shall consent to a reduction or increase of such verdict, and if such party shall file such consent and the opposite party shall thereafter appeal from the judgment entered, the party who shall have filed such consent shall not be bound thereby, but upon such appeal the court of appeals or the supreme court shall, without the necessity of a formal cross-appeal, review de novo the action of the trial court in requiring such reduction or increase, and there shall be a presumption that the amount of damages awarded by the verdict of the jury was correct and such amount shall prevail, unless the court of appeals or the supreme court shall find from the record that the damages awarded in such verdict by the jury were so excessive or so inadequate as unmistakably to indicate that the amount of the verdict must have been the result of passion or prejudice.

RCW 4.76.030 (emphasis added).

In this case, the trial court erred procedurally in awarding additur. According to RCW 4.76.030, if the court finds that the awarded damages are so inadequate as to indicate passion or prejudice, the remedy is to award a new trial "unless the party adversely affected shall consent to a reduction or increase of such verdict." (Emphasis added.) *See Green v. McAllister*, 103 Wn. App. 452, 462, 14 P.3d 795 (2000) (in a case

involving remittitur, the court should order a new trial unless the plaintiff consents to a reduced award). In this case, the trial court expressedly denied Nelson's motion for a new trial. (CP 670) However, the trial court then granted additur in the amount of $3,000.00 despite the fact that Erickson never consented. (*Id.*) Not only did Erickson oppose the motion for new trial or additur, but he also filed a motion for reconsideration of that order which was also denied. (CP 652-61, 681-86) Based on the unambiguous language of RCW 4.76.030,[5] the trial court was not permitted to award additur without Erickson's consent.

4. The Jury's Verdict Was Supported by the Evidence.

Additur (or a new trial) was improper in this case because substantial evidence supported the jury's verdict. The court inaccurately stated in its ruling that there was "uncontroverted testimony that the Plaintiff was continuing to experience pain now and in the future." (CP 670) The court similarly noted in its Finding of Fact No. 2 that "it was undisputed that Mr. Nelson's injuries were permanent, that he would continue to suffer pain in the future...." (CP 1048) This is not true. Although plaintiff testified that he continued to experience pain, the nature

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[5] When determining the meaning of a statute, a Washington court's fundamental objective is to ascertain the intent of the Legislature. *State v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

and cause of that pain was called into question throughout the trial. First, Nelson admitted that he was able to continue to work. (RP 374-75) He acknowledged that he declined to continue with recommended physical therapy or home exercises. (RP 373) This testimony could allow the jury to conclude that his ongoing pain complaints were overstated or untrue. Second, Dr. Jackson testified that through his review of the records and imaging studies and his extensive array of tests at a physical examination, he could not find any objective evidence to support Nelson's subjective pain complaints. (RP 417, 424) Dr. Jackson opined that if Nelson had any pain, it was not related to the accident. (RP 423) Finally, even Nelson's own physician admitted that he could not relate the ongoing pain complaints to the accident or testify that Nelson had any permanent injuries. (RP 286) Viewing the evidence in a light most favorable to the jury's verdict, there was ample evidence from which the jury could reasonably conclude that plaintiff was not entitled to future noneconomic damages.

The court properly instructed the jury members that they were "the sole judges of the credibility of the witness." (Instruction No. 1; CP 616) It also instructed them that in addition to economic damages they "should consider" a variety of noneconomic damages "with reasonable probability to be experienced in the future." (Instruction No. 8; CP 625-26) The

court cautioned the jury that the "burden of proving damages rests upon the plaintiff" by a preponderance of the evidence. (CP 626) There is nothing in the record to suggest that the jury disregarded these instructions.

Unlike *Palmer* in which "[t]he defendant presented no evidence to refute [plaintiff's] medical opinions," in this case, Erickson did present contradicting expert medical opinions. 132 Wn.2d at 196. The facts before this Court are more similar to those in *Lopez*, in which evidence at trial called into question the cause, degree, or credibility of alleged pain and suffering. 130 Wn. App. 87. In *Lopez,* "the jury was entitled to conclude that the plaintiff incurred reasonable medical expenses as a result of the accident, while at the same time concluding he failed to carry his burden of proving general damages." *Id.* at 93. As in *Lopez*, Erickson's medical expert testified that no objective medical findings supported Nelson's pain complaints and he should have recovered quickly. *Id.* at 92. Erickson presented evidence that Nelson did not have an objective basis for his complaints or need future medical care.[6] The jury was entitled to

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[6] Although *Lopez* deals with past economic damages and past general damages, the same reasoning applies to future economic damages and future general damages. At least one court from another jurisdiction addressed this very scenario. *See Warwick v. Mills*, 1998 Ohio App. LEXIS 1914 (Ohio Ct. App. 1998) (a jury's award for past economic and general damages and future medical expenses and lost wages is not inconsistent with its failure to award future general damages).

agree with Dr. Jackson and to reject Nelson's testimony as not credible. *See Herriman,* 142 Wn. App. at 233. Based on Nelson's own testimony, his doctor's testimony, and particularly Dr. Jackson's testimony, the jury was entitled to conclude that Nelson might require future treatment but that he failed to carry his burden of proving future general damages. It was error for the court to substitute its judgments for those of the jury. *See Tolli*, 66 Wn.2d at 495.

The trial court's comments that Nelson's testimony about continued pain was "uncontroverted" and that there was no evidence of "any intervening cause for the pain" imply that the defense needed to prove that Nelson was malingering. (CP 671) There is no case law in Washington that requires a defendant to demonstrate definitively that a plaintiff is lying about subjective pain complaints. Indeed, Dr. Jackson declined to accuse Nelson of lying, but he did question those subjective complaints based on the utter lack of supporting objective findings. (RP 423) He testified that if Nelson currently had pain, it could not be causally linked to the accident. (RP 423) Even Dr. Harper could not link the current pain to the accident. (RP 286) In *Palmer*, the defense did not challenge the damages or causation in any way, and only argued in closing that plaintiff failed to prove that plaintiff was injured. 132 Wn.2d at 196.

Conversely, in this case (as in *Lopez* and *Herriman*), the defense did challenge Nelson's pain complaints.

Beginning with the presumption that the jury's verdict was correct and applying the evidence questioning the causation and verifiability of future pain and suffering, this Court must necessarily conclude that the trial court erred in disturbing the province of the jury and granting additur. The jury's original award should be reinstated. A reinstatement of the jury's award also definitively eliminates any possible claim Nelson could have to MAR 7.3 fees.

C. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES.

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.

MAR 7.3 (emphasis added). Similarly, 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.

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

RCW 7.06.050(b) (emphasis added).

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, 348, 20 P.3d 404 (2001). 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.

In *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012), the Washington Supreme Court addressed an offer of compromise with confusing language that affected computations for determining the propriety of attorney fees. The plaintiff in *Niccum* made an offer of compromise after defendant sought a trial de novo from mandatory arbitration. *Id.* at 444. The offer was for an amount that purported to include costs and statutory attorney fees. *Id.* The trial court subtracted the

amount of costs from the offer and compared it to the jury award in order to determine that attorney fees were warranted under MAR 7.3. *Id.* at 445. The Supreme Court reversed. *Id.* at 452. The *Niccum* Court held that the trial court should have made "a comparison of damages to the lump sum that he offered to accept in exchange for settling the lawsuit." *Id.* at 450. The *Niccum* Court further explained that:

> It is our view that an ordinary person would consider that the "amount" of an offer of compromise is the total sum of money that a party offered to accept in exchange for settling the lawsuit.

Id. at 452. This is the key language of the opinion, and the critical language for this Court to decide Nelson's claim for attorney fees. In *Niccum*, regardless of the language about inclusive costs, plaintiff was willing to settle for $17,350. Despite the confusing cost language, that was the number the Supreme Court mandated be compared to the damages awarded at trial.

In this case, Nelson's offer of compromise also includes language about costs. However, it is clear from the wording of his offer of compromise, that Nelson was not willing to settle for only $26,000.00, as the trial court determined.[7] (CP 1048, 1055) Rather, plaintiff was willing

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[7] See Finding of Fact No. 1.

to settle for $27,522.19 – $26,000.00 plus the "taxable costs incurred at arbitration." (CP 839) It is not surprising that if Nelson was willing to settle, he wanted to collect the costs he incurred at the arbitration in addition to an amount of damages he felt he needed to be made whole. Thus, for MAR 7.3 determinations, the court should have compared the damages from trial to the lump sum plaintiff offered to accept in exchange for settling the lawsuit. As the *Niccum* Court even noted, "[a] party may ask for an extra $1,000 in an offer of compromise to cover its expenses, but those dollars do not constitute 'costs' as that term is defined in RCW 4.84.010, i.e., sums 'allowed to the prevailing party upon the judgment.' They are just dollars." 175 Wn.2d at 450.

So although Nelson labeled part of the money that he wanted in settlement as "taxable costs," those additional amounts are simply additional dollars because there were no taxable costs at that point in the litigation. The plain meaning of the language in Nelson's offer of compromise is that he would settle the case for $26,000.00 plus the costs awarded at arbitration which was $1,522.19 (CP 832, 928, 1081) (an amount known at the time of the offer because it was a separate amount

awarded by the arbitrator).[8] The only reasonable reading of the offer of compromise is that plaintiff was offering to settle the case for $27,522.19.[9] The trial court was apparently overly-concerned with the notion of adding or subtracting costs from an offer of compromise that it missed the critical language in the *Niccum* opinion about the offer constituting the amount for which the party would settle.

This Court should not fall prey to the same mistake made by the trial court and adjust for amounts Nelson claims are related to costs. The *Niccum* Court engaged in a lengthy analysis as to why a party's classification of its offer is not relevant to the end comparison. 175 Wn.2d at 449-51. *Niccum* did not dictate that if an offer of compromise referenced costs, such amount must be ignored in the calculations. Rather, the *Niccum* Court focused on the need to compare the amount that the party making an offer of compromise would actually settle for to the damages at trial. *Id.* at 452. Any interpretation of confusing language in

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[8] This is an important distinction from *Niccum*, in which the amount of costs purportedly included in the offer was unknown at the time. 175 Wn.2d at 452. There is no concern in this case that the purposes of mandatory arbitration would be frustrated because a party would be unable to make an informed decision about what number he needed to better at trial.

[9] It is not clear why Nelson chose to phrase the offer of compromise the way he did. Certainly, it would have been clearer to eventual analysis of MAR 7.3 fees if he had worded the offer differently, specifically referenced the $1,522.19 in costs, or simply offered to settle for $27,522.19. Regardless, it is disingenuous and contrary to what he wrote for Nelson to now insist he would have settled the case simply for $26,000.00.

an offer of compromise must come back to this bedrock principle of the *Niccum* decision. Under the facts in *Niccum*, that analysis resulted in the court refusing to subtract costs from the offer as plaintiff urged. In this case, the Court must not subtract costs from the offer of compromise (or decline to include them) in order to be consistent with *Niccum*. Although oddly phrased, Nelson's offer was a sum certain because the amount of the arbitrations costs was known to both parties. It was only several months later and after court-awarded additur that Nelson sought to manipulate the amount for which he would have settled in September of 2013.

The unusual factual scenario and linguistic gymnastics in this case present the type of confusion that the *Niccum* Court sought to avoid when it reduced the analysis to a fairly simple question: what would plaintiff have accepted to dismiss the case? That amount then replaces the amount of the arbitrator's award and is used to compare to the jury verdict. A straightforward reading of plaintiff's offer of compromise reveals that Nelson would have settled for $27,522.19. A straightforward reading of RCW 7.06.050 and the holding in *Niccum* results in "the amount" of $27,522.19 replacing "the amount" of the arbitrator's award for purposes of comparison to the jury award. Erickson did improve his position at trial

(with ($27,167) or without ($24,167) the erroneous additur) relative to the offer of compromise, and attorney fees are not warranted.[10]

VI. CONCLUSION

The trial court made two critical errors after the conclusion of the jury trial. First, despite the disputed evidence about Nelson's future treatment and pain, it substituted its own impression of the evidence for the jury's, and it erroneously awarded Nelson an extra $3,000. Then, based on a misreading of the *Niccum* case, the trial court awarded Nelson an additional $63,468.90 in attorney fees and costs. Erickson requests that the Court vacate the judgment and order entry of a new judgment consistent with the jury's award and without additur or MAR 7.3 attorney fees and costs.

Dated this 11th **day of** August **2014.**

REED McCLURE

By _____
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Attorneys for Appellants

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[10] See Finding of Fact No. 4.

now, therefore, the court hereby makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This personal injury case went through mandatory arbitration before attorney Dubs Herschlip, who entered an MAR award in the amount of $43,401.59. Defendant then timely filed a Request for Trial De Novo and Jury Trial on May 9, 2013. Plaintiff then timely made an offer of compromise pursuant to RCW 7.06.050 on September 25, 2013, offering to settle the case for $26,000.00. Ten days passed and Defendant failed to accept the Offer of Compromise. As a result, the $26,000.00 therefore became the amount to determine if Defendant subsequently improved its position upon trial de novo.

2. On November 4, 2011, this matter was tried in King County Superior Court before the Hon. Mary Yu. On the afternoon of November 7, 2013, the matter went to the jury. After approximately four hours of deliberation, the jury returned a verdict awarding Plaintiff $24,167.00. Pursuant to a motion for additur, this Court awarded Mr. Nelson $3,000 in future noneconomic damages, since it was undisputed that Mr. Nelson's injuries were permanent, that he would continue to suffer pain in the future, and because the jury also awarded future medical treatment but failed to award future noneconomic damages. Following the Court's ruling on additur, Mr. Nelson's judgment totaled $27,167 before the addition of statutory fees and costs.

3. On December 11, 2013, this Court entered judgment of the jury verdict in the amount of $27,167.00. The Court awarded costs pursuant to RCW 4.84.010 in the amount of $729.58, for a total judgment of $27,896.98.

4. The $27,167.00 verdict amount exceeded the Plaintiff's Offer of Compromise for $26,000.

APPENDIX A

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PREMIER LAW GROUP PLLC
3380 – 146th PL SE, Suite 430
Bellevue, Washington 98007
(206) 285-1743 / Fax: (206) 599-6316

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

JESS NELSON, an individual, Respondent, vs. MICHAEL ERICKSON and JANE DOE ERICKSON, and the marital community composed thereof, Appellants.	NO. 71709-0-I AFFIDAVIT OF SERVICE BY MAIL

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

The undersigned, being first duly sworn upon oath, deposes and says:

That she is a citizen of the United States of America; that she is over the age of 18 years, not a party to the above-entitled action, and competent to be a witness therein; that on August 11, 2014, affiant served via United States mail, postage prepaid, copies of the following documents:

1. Brief of Appellants and
2. Affidavit of Service By Mail

addressed to the following parties:

Jared Stueckle
Premier Law Group, PLLC
1408 140th Place N.E.
Bellevue, WA 98007

Nicholas Jones
Mary E. Owen and Associates
130 Nickerson Street, Suite 305
Seattle, WA 98109

DATED this 11th day of August, 2014.

Cathi Key

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

SIGNED AND SWORN to (or affirmed) before me on 8-11-14 by Cathi Key.

REBECCA CAROLINE LEWIS
NOTARY PUBLIC
STATE OF WASHINGTON
Commission Expires 04-09-2018

Print Name: REBECCA LEWIS
Notary Public Residing at LYNNWOOD WA
My appointment expires 4-9-2018

REED McCLURE

ATTORNEYS AT LAW

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IN REPLY REFER TO OUR FILE NUMBER
063060.000054

WRITER'S DIRECT LINE
(206) 386-7145
ckey@rmlaw.com

August 11, 2014

Mr. Richard Johnson
Clerk, Court of Appeals, Division I
600 University Street
Seattle, WA 98101-4170

Re: Jess Nelson v. Michael Erickson
Court of Appeals Case No. 71709-0-I

Dear Mr. Johnson:

Please find enclosed for filing an original and one copy of Brief of Appellants, and Affidavit of Service by Mail in the above-referenced matter.

Please conform the enclosed face sheets and return them in the enclosed self-addressed, stamped envelope.

Thank you for your attention to this matter.

Very truly yours,

REED McCLURE

Cathi Key

Cathi A. Key
Assistant to Michael N. Budelsky

Enclosures

cc: Jared Stueckle, w/enclosures, and copy of Verbatim Report of Proceedings
Nicholas Jones, w/enclosures