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NO. 66628-2-I

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

MARY ANN MONNASTES,

Respondent,

vs.

CHARLES GREENWOOD,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP -9 11:11 33

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable DAVID A. KURTZ, Judge

REPLY BRIEF OF APPELLANT

REED McCLURE

By Marilee C. Erickson

WSBA #16144

Michael N. Budelsky

WSBA #35212

Attorneys for Appellant

Address:

Two Union Square
601 Union Street, Suite 1500
Seattle, WA 98101-1363
(206) 292-4900

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I. INTRODUCTION

Respondent fails to address two key issues raised in this appeal. First, respondent does not discuss the trial court's failure to properly interpret the statute's language according to its plain meaning. Second, respondent ignores the fact that the trial court's ruling thwarts the basic purposes of the mandatory arbitration system. An appropriate review of the applicable law and facts reveals that the jury award was less than the offer of settlement, and attorney fees were improperly granted by the trial court. Mr. Greenwood asks this Court to reverse the judgment.

II. ARGUMENT

A. THE PLAIN LANGUAGE OF THE STATUTE MANDATES REVERSAL.

Monnastes does not dispute that a court must interpret the legislature's intent behind rules and statutes as expressed in the plain language. *See State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). Further, Monnastes does not contest that the plain language of RCW 7.06.050 instructs that "the amount" of the offer of compromise replaces "the amount" of the arbitrator's award. Instead, Monnastes ignores this language and repeatedly asserts simply (and incorrectly) that the offer of compromise shall replace the arbitrator's award. (Respondent's Brief, 5, 7, 8) This approximation of the actual language of the statute is purposefully imprecise and misrepresents the plain language and intent. *See Hansen v. City of Everett*, 93 Wn. App. 921, 929, 971 P.2d 111, *rev. denied*, 138 Wn.2d 1009 (1999) (A court should not construe a statute as the legislature could have but did not phrase it).

RCW 7.06.050 clearly states that “the amount of 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. Thus, the amount of Monnastes’s offer of compromise (\$16,000.00) replaced the amount of the arbitrator’s award (\$22,719.38). With the substitution, the amount of the arbitrator’s award was lowered, but it remained an award for economic damages and pain and suffering (and not one which included costs or fees).

B. THE TRIAL COURT’S DECISION GOES AGAINST THE PURPOSE OF THE MANDATORY ARBITRATION SYSTEM.

Monnastes also fails to address the fact that the trial court’s ruling impedes the goals of the mandatory arbitration system to reduce congestion and delays in the courts and to discourage meritless appeals. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997); *Wiley v. Rehak*, 143 Wn.2d 339, 348, 20 P.3d 404 (2001). As Justice Talmadge artfully explained:

[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.

There is no way to meet the objectives of the mandatory arbitration process if the parties do not know the amount of the arbitration award that will later be compared to the jury verdict. In other words, when the offer of compromise is made, it must be a liquidated sum so that a party contemplating a trial de novo can assess the merits of a trial “with frankness and prudence.” A party who does not know the threshold number cannot intelligently assess whether a de novo trial would have merit. Therefore, a party contemplating a trial de novo must know, at the time he makes his decision, the exact dollar amount that he needs to beat in order to avoid paying attorney fees.

Monnastes concedes that at the time she made the offer of compromise she made no effort to quantify what costs she would seek as the prevailing party. Further, she never indicated that costs were a factor in the compromise offer. Instead, she waited until after the jury verdict to introduce the new dollar figure to Greenwood and the trial court. Monnastes now argues that such machinations were implicit in her global settlement offer. (Respondent’s Brief, 9-10) Monnastes fails to explain how Greenwood could have assessed her unliquidated offer of settlement with “frankness and prudence.” Monnastes’s “implicit global settlement” required Greenwood to anticipate that the language of the offer included costs, guess at the amount of those costs, and then base his decision on whether to pursue a trial de novo on this imaginary number. Such uncertainty frustrates the goal of reducing congestion of the court by

discouraging meritless appeals – it is impossible for an attorney to assess whether a new trial may have merit.

C. APPELLANT IMPROVED HIS POSITION.

Monnastes correctly states that an arbitrator may have the authority to award statutory costs and attorney fees. (Respondent’s Brief 4) However, this fact is irrelevant to the analysis of this case. The arbitrator did not award Monnastes statutory costs or attorney fees. The arbitrator’s award was explicitly for economic damages and pain and suffering. (CP 64) Monnastes cannot supplant a damages award with an amount that purports to be damages plus costs (particularly when costs are not even referenced in the offer).

Monnastes’s insistence that she was entitled to those costs is also misguided.¹ (Respondent’s Brief 12) Monnastes received an award of economic and general damages from the arbitrator and was the prevailing party at that hearing. However, once Greenwood requested a trial de novo, the slate was wiped clean. MAR 7.2 instructs that:

The trial de novo shall be conducted as though no arbitration proceeding had occurred. No reference shall be made to the arbitration award, in any pleading, brief, or other written or oral statement to the trial court or jury

¹ In justifying her entitlement to costs, Monnastes alleges that the same health care records were admitted at the arbitration and the trial. (Respondent’s Brief 7) However, there is nothing in the record to support this assertion. The only cost bill filed was for the trial. (CP 56-57) Monnastes cannot even demonstrate the costs to which she theoretically might have been entitled after the arbitration. The best she can calculate are the costs from the de novo trial.

either before or during the trial, nor, in a jury trial, shall the jury be informed that there has been an arbitration proceeding.

MAR 7.2(b)(1) (emphasis added). The parties start the trial process fresh. See 4A Tegland, WASH. PRAC. *Rules Practice* at 70 (7th ed. 2008) (“The general policy expressed by the rule is that the trial de novo shall be conducted as though no arbitration had occurred.”) After Greenwood requested a trial de novo, it was as though the arbitration had never occurred and Monnastes was no longer a prevailing party. The prevailing party would not be determined until the trial was concluded and the jury made its determination. Thus, at the time she made the offer of compromise, Monnastes was not entitled to any costs.

Monnastes’s assertion that an offer of compromise is essentially a settlement also fails to bolster her argument. (Respondent’s Brief 8-9) If the offer had been accepted, then Monnastes would have been entitled to the amount of the offer and no more. She would not have been entitled to costs because she was not a prevailing party. RCW 4.84.010. Because the offer was declined, the amount of the offer simply replaced the amount of the arbitrator’s award. As discussed above, Monnastes was not a prevailing party for purposes of recovering costs at the time she made the offer. The subsequent trial de novo determined who was the prevailing party. Either way, costs could not have been implicitly included in her offer.

Monnastes seeks to turn the case of *Tran v. Yu*, 118 Wn. App. 607, 75 P.3d 970 (2003), on its head in order to justify her manipulation of the

arbitrator's award after the jury trial. *Tran* specifically rejected an attempt to manipulate the numbers for comparison by adding or subtracting costs. *Tran* compared comparables by looking at the compensatory damages of the arbitrator's award and the compensatory damages awarded by the jury at the trial de novo. *Id.* at 616. In this case, as in *Tran*, the arbitrator's award (as downwardly adjusted by the amount of the offer of compromise) and the jury award were both awards for compensatory damages. These "comparables" did not require any further mathematical manipulations for comparison.

Monnastes argues that consistent with *Tran*, costs and fees allowed by RCW ch. 4.84 must be taken into consideration. (Respondent's Brief 8) This is exactly the opposite of what *Tran* holds. *Id.* at 616. Indeed, *Tran* noted that if a court adopted a scheme that adds costs and fees to a jury award and then compares it to the arbitration award, "a party would invariably improve its position because additional costs, attorney fees, and interest would be incurred." 118 Wn. App. at 612.

D. THIS CASE IS DISTINGUISHABLE FROM *NICCUM V. ENQUIST*.

Division III's recent decision in *Niccum v. Enquist*, 152 Wn. App. 496, 215 P.3d 987 (2009), *rev. granted*, 168 Wn.2d 1022 (2010), does not support the award of attorney fees in the current case because it is distinguishable on its key fact. In *Niccum*, the plaintiff's offer of compromise expressly stated that the amount included costs and attorney fees. *Id.* at 498. The *Niccum* Court's decision hinged on this specific

language. *Id.* at 500-01. In this case, Monnastes’s offer did not contain similar confusing language.²

Contrary to Monnastes’s assertion, *Niccum* does not hold that an offer of compromise constitutes a global settlement and implicitly includes statutory fees and costs. (Respondent’s Brief 10) *Niccum* hinged on the fact that the offer of compromise specifically included language indicating that costs and fees were included in the offer. The *Niccum* Court held that “any segregated amount of an offer must replace an amount in the same category granted under the arbitrator’s award.” *Id.* at 500-01 (emphasis added). Monnastes made no such segregation in her offer of compromise. Further, *Niccum* is not based on an analysis that the defendant would have owed less to the plaintiff if he had accepted the offer of compromise. (Respondent’s Brief 11) Rather, *Niccum* sought to determine whether the defendant improved his position at trial. *Id.* at 501. The “better off – worse off” analysis espoused by the trial court in the matter before this Court is not founded in the statute or any case precedent. (RP 28)

E. RESPONDENT IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL.

Monnastes seeks attorney fees on this appeal under MAR 7.3. (Respondent’s Brief 12) If this Court determines that the trial court erred

² At the time this reply brief is filed, the Supreme Court has not issued its ruling in *Niccum*. However, even if the Washington Supreme Court allows the manipulation of costs in *Niccum*, that case is not necessarily controlling on this case due to the markedly different language in the respective offers of compromise.

in granting attorney fees below, then Monnastes is not entitled to fees on this appeal. The Court should deny Monnastes's attorney fee request.

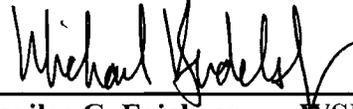
III. CONCLUSION

Mr. Greenwood improved his position at the trial de novo. The trial court erred in awarding MAR 7.3 fees and costs. This Court should reverse the judgment and remand for entry of judgment on the jury verdict only.

DATED this 8th day of September, 2011.

REED McCLURE

By



Marilee C. Erickson

WSBA #16144

Michael Budelsky

WSBA # 35212

Attorneys for Appellant

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