

66628.2

66628.2

NO. 66628-2-I

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

---

MARY ANN MONNASTES,

Respondent,

vs.

CHARLES GREENWOOD,

Appellant.

---

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

---

BRIEF OF APPELLANT

---

REED McCLURE

By Marilee C. Erickson

Michael N. Budelsky

Attorneys for Appellant

WSBA #16144

WSBA #35212

Address:

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

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2010 JUN 17 AM 10:52

## TABLE OF CONTENTS

	Page
<b>I NATURE OF THE CASE.....</b>	<b>1</b>
<b>II. ASSIGNMENTS OF ERROR .....</b>	<b>1</b>
<b>III. ISSUES PRESENTED.....</b>	<b>1</b>
<b>IV. STATEMENT OF THE CASE.....</b>	<b>2</b>
<b>V. ARGUMENT.....</b>	<b>4</b>
<b>A. STANDARD OF REVIEW.....</b>	<b>4</b>
<b>B. THE TRIAL COURT ERRED IN AWARDING FEES         AND COSTS BECAUSE GREENWOOD IMPROVED HIS         POSITION AT THE TRIAL DE NOVO.....</b>	<b>4</b>
<b>1. The Party Who Requests Trial de Novo             Must Only Pay Attorney Fees if He Fails             to Improve His Position .....</b>	<b>4</b>
<b>2. Courts Must “Compare Comparables”             and Should Reject Manipulations of the             Award Amounts by Unnecessarily             Adding and Subtracting Costs.....</b>	<b>6</b>
<b>3. The Trial Court’s Rulings Conflict with             the Purposes of Mandatory Arbitration .....</b>	<b>9</b>
<b>4. The Trial Court’s Order and Judgment             Conflict with the Plain Meaning of the             Rules and Statutes.....</b>	<b>11</b>
<b>VI. CONCLUSION .....</b>	<b>14</b>

## TABLE OF AUTHORITIES

### Washington Cases

	<b>Page</b>
<i>Basin Paving Co. v. Contractors Bonding and Ins. Co.</i> , 123 Wn. App. 410, 98 P.3d 109 (2004) .....	4
<i>Haley v. Highland</i> , 142 Wn.2d 135, 12 P.3d 119 (2000) .....	9
<i>Hansen v. City of Everett</i> , 93 Wn. App. 921, 971 P.2d 111, <i>rev. denied</i> , 138 Wn.2d 1009 (1999).....	11
<i>Hudson v. Hapner</i> , 170 Wn.2d 22, 239 P.3d 579 (2010) .....	13
<i>In re Estate of Black</i> , 153 Wn.2d 152, 102 P.3d 796 (2004).....	11
<i>Kim v. Pham</i> , 95 Wn. App. 439, 975 P.2d 544, <i>rev. denied</i> , 139 Wn.2d 1009 (1999) .....	4
<i>Nevers v. Fireside, Inc.</i> , 133 Wn.2d 804, 947 P.2d 721 (1997).....	9
<i>Niccum v. Enquist</i> , 152 Wn. App. 496, 215 P.3d 987 (2009), <i>rev. granted</i> 168 Wn.2d 1022 (2010) .....	3, 8
<i>State v. Roggenkamp</i> , 153 Wn.2d 614, 106 P.3d 196 (2005) .....	11, 12
<i>Thurston County ex rel. Bd. of County Comm'rs v. City of Olympia</i> , 151 Wn.2d 171, 86 P.3d 151 (2004).....	10, 11
<i>Tran v. Yu</i> , 118 Wn. App. 607, 75 P.3d 970 (2003) .....	4, 6, 7, 8, 10, 11, 14
<i>Wiley v. Rehak</i> , 143 Wn.2d 339, 20 P.3d 404 (2001).....	9

### Statutes

RCW 4.84.010 .....	3, 8
RCW 7.06.050 .....	4, 11, 12
RCW 7.06.050(1)(b).....	5, 7, 12

RCW 7.06.060 .....	3, 4, 11, 12
RCW 7.06.060(1).....	5
RCW 7.06.060(3).....	12

**Rules and Regulations**

CR 37 .....	6
CR 37(c).....	6
CR 54(d).....	3
MAR 7.3 .....	1, 3, 4, 5, 6, 7, 9, 10, 11, 14

060349.099291/304772

## **I. NATURE OF THE CASE**

This appeal stems from the trial court's award of MAR 7.3 attorney fees. Defendant requested a trial de novo following mandatory arbitration. Prior to trial, plaintiff made an offer of compromise which defendant did not accept. A jury trial was held. The jury's damages award was less than the arbitrator's award and the offer of compromise.

Nevertheless, the trial court awarded plaintiff MAR 7.3 fees and costs. By improperly adding costs to the jury's award, the trial court erroneously concluded that defendant had not improved his position. The trial court's order and judgment constitute reversible error.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering the judgment and granting plaintiff \$22,500.00 in attorney fees where defendant improved his position at trial relative to the award at arbitration as modified by the offer of compromise. (CP 17-18, 30-31, 85-86, 95-96)

2. The trial court erred in denying defendant's motion for reconsideration where defendant improved his position at trial and plaintiff was not entitled to attorney fees. (CP 9-10)

## **III. ISSUES PRESENTED**

1. Did the trial court commit reversible error in awarding plaintiff MAR 7.3 fees where defendant did, in fact, improve his position at trial relative to the award at arbitration? (Pertaining to Assignment of Error No. 1)

2. Did the trial court commit reversible error by adding costs to the jury award to determine whether defendant had improved his position on the trial de novo? (Pertaining to Assignment of Error No. 1)

3. Did the trial court commit reversible error by denying defendant's motion for reconsideration where caselaw did not support its decision and rationale? (Pertaining to Assignment of Error No. 2)

#### IV. STATEMENT OF THE CASE

Plaintiff Mary Ann Monnastes and defendant Charles Greenwood were in a car accident on March 24, 2005. (CP 73) Monnastes sued Greenwood, and the matter was transferred to mandatory arbitration. (CP 66-67, 70-74) The arbitrator awarded Monnastes \$22,719.38 for economic damages and pain and suffering. (CP 64-65) Greenwood timely requested a trial de novo. (CP 62-63) On July 9, 2010, Monnastes made an offer of compromise to Greenwood which stated:

Pursuant to RCW 7.06.050 and MAR 7.3, the Plaintiff hereby offers to settle her claim against the Defendant for the amount of sixteen thousand dollars and no cents (**\$16,000.00**). This offer remains open for ten (10) calendars [sic] days after receipt of service.

(CP 32) (emphasis added).

Greenwood did not accept the offer, and the matter proceeded to trial on September 27, 2010. (CP 21) The jury returned a verdict awarding special and general damages to Monnastes in the amount of

\$15,661.00. (CP 61) The trial court then awarded costs to Monnastes pursuant to RCW 4.84.010 and CR 54(d). (CP 30-31, 56-57) Monnastes moved the court for an award of attorney fees under MAR 7.3. Monnastes argued that when the statutory costs are added to the verdict, Greenwood did not improve his position at the trial de novo when compared to the compromise offer. (CP 36-46, 54-55)

The trial court granted Monnastes' motion and ruled that attorney fees were appropriate because the amount of costs needed to be added to the jury award in order to compare it to the offer of compromise. (RP 27-28) The court concluded:

The plaintiff was better off having gone to trial than if she had just taken that \$16,000 and the case was over. Mr. Greenwood, or his insurance company, or whoever, was worse off having gone to trial. Accordingly, pursuant to the statute, the court rule, and case law, the plaintiff is entitled to attorneys fees, reasonable attorney's fees on top of the award.

(RP 28) The Court awarded attorney fees in the amount of \$22,500.00. (CP 17-18)

Greenwood moved for reconsideration on the grounds that a "better off – worse off" analysis is not the proper test under RCW 7.06.060 or MAR 7.3. Greenwood also maintained that the trial court improperly interpreted *Niccum v. Enquist*, 152 Wn. App. 496, 215 P.3d 987 (2009), *rev. granted* 168 Wn.2d 1022 (2010), and failed to apply the

rule in *Tran v. Yu*, 118 Wn. App. 607, 75 P.3d 970 (2003). (CP 11-16)  
The court denied reconsideration. (CP 9-10) Greenwood filed a timely notice of appeal.<sup>1</sup> (CP 1-6)

## V. ARGUMENT

### A. STANDARD OF REVIEW.

This Court conducts a de novo review of 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). Here the superior court committed legal error in its interpretation and application of RCW 7.06.050, RCW 7.06.060, and MAR 7.3. This Court should reverse the award of attorney fees and costs under RCW 7.06.060 and remand with instructions to revise the judgment.

### B. THE TRIAL COURT ERRED IN AWARDING FEES AND COSTS BECAUSE GREENWOOD IMPROVED HIS POSITION AT THE TRIAL DE NOVO.

#### 1. The Party Who Requests Trial de Novo Must Only Pay Attorney Fees if He Fails to Improve His Position.

After mandatory arbitration, the party who requests a trial de novo must only pay the fees and costs of the opponent if he fails to improve his

---

<sup>1</sup> Due to the timing of the filing of the judgment and corrections of the judgment, defendant has filed two amended notices of appeal. (CP 75-96)

position at the trial de novo. MAR 7.3; RCW 7.06.060(1). 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.

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.

Washington law also allows for the non-appealing party to make an offer of compromise to settle the case which, if rejected, lowers the threshold for comparison after the trial de novo. 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 MAR 7.3 fees are appropriate. In other words, to determine whether a party has improved his position at the trial de novo, the court must compare the amount of the compromise offer to the amount of the jury verdict.

It is undisputed that the arbitrator's award did not contain any award for costs or fees. (CP 64-65) It is also undisputed that the jury verdict did not contain an award for costs or fees. (CP 61) It is also undisputed that Monnastes's offer of compromise did not in any way reference costs or fees. (CP 32) Finally, it is undisputed that the amount of the jury award (\$15,661.00) was less than the amount of the offer of compromise (\$16,000.00). Greenwood improved his position at the trial

de novo because the jury's award was less than the arbitration award and less than Monnastes's offer of compromise.

**2. Courts Must “Compare Comparables” and Should Reject Manipulations of the Award Amounts by Unnecessarily Adding and Subtracting Costs.**

After the trial concluded, Monnastes sought to manipulate the numbers by adding costs and fees to the jury verdict before comparing it to the offer of compromise. This ploy was specifically rejected by this Court in *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. The *Tran* plaintiff argued she was entitled to MAR 7.3 fees and costs because the total judgment exceeded the arbitration award. *Id.*

The *Tran* 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. This Court 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 award included an award of costs.

There is only one additional wrinkle in this case as compared to *Tran*. Here, Monnastes made an offer of compromise after the arbitration but before the trial de novo, downwardly adjusting the “target” verdict amount. RCW 7.06.050(1)(b) states:

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 plain meaning of the statute is that the amount of the compromise offer simply replaces the amount of the arbitrator’s award for purposes of MAR 7.3. Monnastes’s offer of \$16,000.00 replaced the arbitration award of \$22,719.38 for purposes of determining whether Greenwood improved his position at the trial de novo. The arbitrator’s award consisted only of economic and general damages, and did not contain any provision for costs or fees. Similarly, Monnastes’s compromise offer made no indication that it contained amounts of any other variety than those it replaced in the arbitrator’s award. Thus, with the compromise offer, the arbitrator’s award effectively became \$16,000

which was more than the jury award. As in *Tran*, it was error for the superior court here to add to the jury award for comparison.

The language in the offer of compromise distinguishes this case from 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). 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' offer did not contain similar confusing language.<sup>2</sup>

Plaintiff asserts that her offer of compromise was a "global settlement" of her claims, and thus language about costs and fees was implicit. (CP 40; RP 10) There is no caselaw to support an argument that costs and fees would be implicit in an offer of compromise. Further, when entering into a settlement, a settling party is not entitled to costs and fees. *See* RCW 4.84.010 (only a "prevailing party" is entitled to costs). There were no costs addressed in the offer of compromise, in the arbitrator's award, or in the jury's verdict. There is no reason to manipulate the jury verdict by factoring in costs for the first time at the end of the process.

---

<sup>2</sup> It is also important to note that *Niccum* is a Division III case that has been accepted for review by the Washington Supreme Court. At the time this 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*, the case before this Court can be distinguished due to the lack of specific language in the offer of compromise.

### **3. The Trial Court's Rulings Conflict with the Purposes of Mandatory Arbitration.**

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.

These goals cannot be furthered if a party is allowed to alter -- after the completion of trial -- the numbers to be compared. The arbitrator's award, and any offer of compromise that replaces it, must be liquidated sums so that a defendant can make an informed decision “with frankness and prudence” about whether to pursue a trial de novo. To do so, a party requesting a trial de novo must know the dollar amount that he needs to beat in order to avoid paying attorney fees at the time he makes his decision.

The trial court's approach would result in the absurd situation in which the parties would not know what amount needed to be bettered at

trial by the party requesting de novo review because the amount of costs had not been determined. *See Thurston County ex rel. Bd. of County Comm'rs v. City of Olympia*, 151 Wn.2d 171, 175, 86 P.3d 151 (2004). The trial court did not indicate that it would add the amount of Monnastes's cost bill to the jury award until after the jury returned its verdict. Monnastes made no effort to quantify what costs she would seek as the prevailing party. She never even indicated that costs were a factor in the compromise offer. Greenwood had no way to anticipate, let alone assess with "frankness and prudence," how prevailing party costs would factor into the determination of whether he improved his position at the trial de novo.

Essentially, the court's decision first required Greenwood to know that costs were implied in the offer of compromise (even though the issue of costs had never been raised). Second, Greenwood would have had to guess what costs Monnastes might ask for and what the court might award. Such guessing games are inconsistent with frank and prudent analysis. The statutory purpose of MAR -- discouraging meritless appeals -- is not furthered where a party cannot know exactly what amount serves as the threshold for being meritless. The trial court's inclusion of the prevailing party costs in the calculating whether Greenwood improved his position at trial de novo is patently unfair.

Monnastes's attempt to retroactively apply costs to the MAR 7.3 analysis must be rejected. 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. This is precisely what the trial court allowed Monnastes to do in this case.

**4. The Trial Court’s Order and Judgment Conflict with the Plain Meaning of the Rules and Statutes.**

The trial court’s inclusion of prevailing party costs in its MAR 7.3 analysis is inconsistent with the plain language of RCW 7.06.050 and RCW 7.06.060. When interpreting statutes, courts should not rewrite explicit and unequivocal language. *In re Estate of Black*, 153 Wn.2d 152, 162, 102 P.3d 796 (2004). Courts must assume that the legislature meant exactly what it said and must apply the statute as written. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). Further, statutes should be construed to effect the legislative purpose and to avoid unlikely, strained, or absurd results. *Thurston County v. City of Olympia*, 151 Wn.2d 171, 175, 86 P.3d 151 (2004). A court should not construe a statute as the legislature could have but did not phrase it. *See Hansen v. City of Everett*, 93 Wn. App. 921, 929, 971 P.2d 111, *rev. denied*, 138 Wn.2d 1009 (1999).

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. In this case, the amount of Monnastes’s offer of compromise (\$16,000.00) replaced the amount of the arbitrator’s award (\$22,719.38). A simple substitution of one number for another is all that is required. The arbitrator’s award simply has a lower number after the substitution is made, but it remains an award for economic damages and pain and suffering.

Adding prevailing party costs to analysis also conflicts with the plain language of RCW 7.06.060. The statute treats prevailing party costs and improving one’s position at trial de novo as two separate and distinct items. RCW 7.06.060(3) states:

If the prevailing party in the arbitration also prevails at the trial de novo, even though at the trial de novo the appealing party may have improved his or her position from the arbitration, this section does not preclude the prevailing party from recovering those costs and disbursements otherwise allowed under chapter 4.84 RCW, for both actions.

In other words, one party could prevail at both the arbitration and the trial de novo and be entitled to prevailing party costs while the other party improves his position at the trial de novo. Prevailing party costs and

improving one's position at the trial de novo are two distinct situations. *See Hudson v. Hapner*, 170 Wn.2d 22, 35, ¶¶ 37-38, 239 P.3d 579 (2010) (entitlement to prevailing party costs on appeal differs from a party improving its position at trial de novo).

The trial court ignored the distinction between prevailing party costs and improving one's position at trial de novo when it added prevailing party costs to the jury verdict to determine whether Greenwood improved his position. The court failed to follow the plain and specific language of the statutes.

Not only did the trial court ignore the plain statutory language, but it also created its own measurement of whether a party has improved his position at the trial de novo. The court merely inquired whether one was "better off" or "worse off" after the trial de novo. Neither the caselaw nor statutes contemplate an analysis in which a court must determine whether a party is "better off" or "worse off." (RP 28) Indeed, such a subjective analysis might necessarily include other unknown factors which might tend to make the party who requested the trial de novo "worse off," such as attorney fees or additional costs incurred after the trial de novo request. Rather, the courts are presented with a straight-forward, brightline rule – determine whether a party "improved his position" by comparing the comparable awards made by the arbitrator and the jury.

The trial court's decision turns the *Tran* decision on its head. This ruling would require that every time there was a trial de novo after an arbitration and offer of compromise, the court would have to add the costs to the jury verdict (the very thing that *Tran* rejected) so that it could be compared to the offer of compromise and its "implicit" costs. A comparison of the arbitrator's award (as replaced by the amount of the offer of compromise) to the jury award demonstrates that Greenwood improved his position and MAR 7.3 fees are not warranted.

## VI. CONCLUSION

The trial court's imposition of attorney fees in this case directly conflicts with the ruling in *Tran* and is unsupported by the *Niccum* decision. The ruling improperly interprets the court rules and statutes to reach a decision that runs counter to the purposes of mandatory arbitration. The trial court's award of attorney fees, entry of judgment, and denial of the motion for reconsideration were all in error and should be reversed.

DATED this 16<sup>th</sup> day of June, 2011.

REED McCLURE

By Michael Budelsky  
Marilee C. Erickson WSBA #16144  
Michael Budelsky WSBA # 35212  
Attorneys for Appellant

060349.099291/293896