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NO. 68257-1-I

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

SOON KIM,

Appellant,

vs.

LINDSAY ROGER,

Respondent.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Larry McKeeman, Judge

BRIEF OF APPELLANT

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I. NATURE OF THE CASE

This appeal arises out of the trial court's award of MAR 7.3 attorney fees to plaintiff. Defendant requested a trial de novo after mandatory arbitration. Prior to trial, plaintiff made an offer of compromise to defendant which was not accepted. A jury then awarded plaintiff damages which were less than both the arbitrator's award and the offer of compromise.

Nevertheless, the trial court awarded plaintiff MAR 7.3 costs and fees. By improperly adding the statutory costs to the jury award, the trial court erroneously concluded that defendant had not improved her position. The trial court's ruling, judgment, and findings of fact and conclusions of law constitute reversible error.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering judgment which included an award for attorney fees and costs pursuant to MAR 7.3 where defendant improved her position at trial relative to the award at arbitration as modified by the offer of compromise. (CP 10-12, 51-52, 100, 116-17)

2. The trial court erred in entering findings of fact and conclusions of law that included an award for attorney fees and costs pursuant to MAR 7.3 where defendant improved her position at trial

relative to the award at arbitration as modified by the offer of compromise. (CP 13-16, 51-52, 100, 116-17)

III. ISSUES PRESENTED

1. Did the trial court commit reversible error by awarding plaintiff MAR 7.3 fees and costs where defendant did, in fact, improve her position at trial relative to the award at arbitration and the subsequent offer of compromise? (Pertaining to Assignments of Error Nos. 1 and 2)

2. Did the trial court commit reversible error by adding statutory costs to the jury award when calculating whether defendant had improved her position at the trial de novo? (Pertaining to Assignments of Error Nos. 1 and 2)

IV. STATEMENT OF THE CASE

Plaintiff Soon Kim and defendant Lindsay Roger were in a car accident on September 28, 2008. (CP 114) Kim sued Roger and then transferred the matter to mandatory arbitration. (CP 113-15, 105-07) The arbitrator awarded Kim **$25,579.04** for medical special damages ($7,261.00), mileage expense for medical treatment ($818.04), and general damages ($17,500.00). (CP 116-17) Roger timely requested a trial de novo. (CP 103-04) On October 21, 2010, plaintiff made an offer of compromise to Roger which stated, in part:

> Plaintiff is willing to resolve this matter for **$16,500.00** inclusive of attorney fees and costs. 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.

(CP 51-52) (emphasis added).

Roger did not accept the offer, and the case proceeded to a jury trial. On November 9, 2011, the jury issued its verdict awarding plaintiff **$14,761.00** which was comprised of economic damages ($7,261.00) and non-economic damages (nature and extent of the injuries -- $2,500.00; pain and suffering -- $4,000.00; and inconvenience -- $1,000.00). (CP 100) Kim filed a cost bill on November 16, 2011. (CP 98, 99) Roger opposed a portion of that bill, and Kim field a reply brief. (CP 83-87, 88-89, 90-92) The court ultimately entered its judgment awarding plaintiff the jury award and the requested statutory costs for a "total judgment" of $17,096.39. (CP 78-79)

Kim then filed a motion for an award of costs and attorney fees with supporting declarations. (CP 28-74) Kim argued that when the cost bill was added to the jury verdict, that amount ($17,096.39) exceeded the offer of compromise ($16,500.00), and thus Roger had failed to improve her position at the trial de novo. (CP 65-68) Roger opposed both the

award of attorney fees and costs under MAR 7.3 and the calculation of those attorney fees. (CP 17-27)

The trial court granted Kim's motion and concluded that attorney fees were proper under MAR 7.3, but that they should be reduced from $40,198.12 (the amount requested by Kim) to $22,811.25.[1] (CP 71; RP 6, 11-12) The court determined that attorney fees were warranted because Roger "face[s] a judgment that exceeds that offer." (RP 6) Consistent with its oral ruling, the trial court entered Findings of Fact and Conclusions of Law and an Amended Judgment (CP 10-12, 13-16) Roger filed a timely notice of appeal. (CP 1-9)

V. ARGUMENT

A. STANDARD OF REVIEW.

This Court conducts a de novo review of a trial court's decisions 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

[1] Roger does not appeal the decision as to the amount of attorney fees awarded, other than if the Court reverses the trial court decision, then no fees or costs are appropriate.

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 7.06.050, RCW 7.06.060, and MAR 7.3 and remand with instructions to revise the judgment.

B. THE TRIAL COURT ERRED IN AWARDING ATTORNEY FEES AND COSTS BECAUSE ROGER IMPROVED HER POSITION ON APPEAL.

1. The Party Who Requests Trial de Novo Must Only Pay Attorney Fees if She Fails to Improve Her Position.

After mandatory arbitration, the party who requests a trial de novo must only pay the fees and costs of the opponent if she fails to improve her 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 116-17) It is also undisputed that the jury verdict did not contain an award for costs or fees. (CP 100) Finally, it is undisputed that the amount of the jury award ($14,761.00) was less than the amount of the offer of compromise ($16,500.00). (CP 51, 100) Roger improved her position at the trial de novo because the jury's award was less than the arbitration award and less than Kim'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, Kim 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, Kim 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 <u>the amount</u> of the compromise offer simply replaces <u>the amount</u> of the arbitrator's award for purposes of MAR 7.3. Kim's offer of $16,500.00 replaced the arbitration

award of $25,579.04 for purposes of determining whether Roger improved her 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. Thus, with the compromise offer, the arbitrator's award effectively became $16,500, an amount 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 Division III appellate decision in *Niccum v. Enquist*, 152 Wn. App. 496, 215 P.3d 987 (2009), *rev. granted*, 168 Wn.2d 1022 (2010), can be distinguished from the case before this Court. In *Niccum*, the court held that any "segregated amount" in an offer must replace the same category in the arbitrator's award. *Id.* at 500-01. Kim's offer did not contain any segregated amounts. The vague reference to the offer being "inclusive of attorney fees and costs" is immaterial. (CP 51) The offer did not articulate a segregated amount that qualified as costs and fees, and Kim cannot manipulate the number over a year later and after the de novo trial has concluded. Further, it is important to note that *Niccum* is a Division III case that has been accepted for review by the Washington Supreme Court. 168 Wn.2d 1022 (2010). Thus, not only is *Niccum* not binding on this Court, it is also not a final decision. *Id.*

Further, plaintiff's offer of compromise is, in essence, a settlement offer. 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). Any language about costs or fees in a settlement offer is

superfluous because a settling party is not entitled to such costs or fees anyway. Costs were not addressed in the arbitration award, and there is no reason to manipulate the jury verdict by factoring in costs for the first time at the end of the process on the pretense of conforming with ambiguous language in an 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 supplemental 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) (statutes should be construed to effect the legislative purpose and to avoid unlikely, strained, or absurd results). The trial court did not indicate that it would add the amount of Kim's cost bill to the jury award until after the jury returned its verdict. Kim made no effort to quantify what costs she would seek as the prevailing party. Roger had no way to anticipate, let alone assess with "frankness and prudence," how prevailing party costs would factor into the determination of whether she improved her position at the trial de novo.

Roger would have had to guess what costs Kim 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 calculating whether Roger improved her position at trial de novo is patently unfair.

Kim'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 Kim 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 Kim's offer of compromise ($16,500.00) replaced the amount of the arbitrator's award ($25,579.04). A simple substitution of one number for another is all that is required. The arbitrator's award has a lower number after the substitution is made, but it remains an award for economic damages and pain and suffering.

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," so the subsection (1)(b) – stating that the amount of the offer "shall" replace the amount of the arbitrator's award – is construed as mandatory. The number from the

offer becomes the arbitrator's award, and there is no room for further mathematics.

The trial court's addition of prevailing party costs to the 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 Roger improved her position. This mistake is evident in the trial court's oral

ruling in which it referred to "a judgment that exceeds that offer." (RP 6) (emphasis added). It is not the final judgment that bears comparison but rather the amount of the jury award. The court failed to follow the plain and specific language of the statutes.

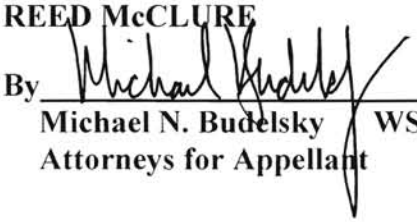
The trial court's decision turns the *Tran* decision on its head. This ruling would require that every time there was a trial de novo after an arbitration and offer of compromise, the court would have to add the costs to the jury verdict (the very thing that *Tran* rejected) so that it could be compared 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 Roger improved her 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 entry of findings of fact and conclusions of law were all in error and should be reversed. This case should be remanded for entry of judgment without any award of MAR 7.3 costs or fees.

DATED this 10th day of May, 2012.

REED McCLURE

By 

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