

COURT OF APPEALS
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STATE OF WASHINGTON
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NO. 42977-2-II

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

KENNETH HUNTINGTON, RESPONDENT

Vs.

JENNIFER MUELLER, APPELLANT

APPELLANT'S BRIEF

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I.
INTRODUCTION

The only issue addressed in this appeal is whether the trial court erred in granting attorney's fees and costs to Plaintiff/Respondent, pursuant to RCW 7.06.060(1) and MAR 7.3. This case arises from an automobile accident on Highway 101 in Clallam County on September 3, 2007. It involved two vehicles, one driven by Jennifer Mueller and the other by Jacqueline Henry. Mr. Huntington was a passenger in the Henry vehicle. The highway at the point of the collision had two lanes west, one lane east, and a center turn lane. Both vehicles were west-bound. Ms. Mueller's lane was ending and she needed to move to the lane on her left. Mrs. Henry's van was in that lane and she refused to slow down or move to her left. Ms. Mueller testified that Mrs. Henry had accelerated and essentially attempted to run her off the road. She was faced with the choice of hitting a guardrail or merging. Mrs. Henry denied seeing Ms. Mueller before the collision, but she told the police that "the other car would not back off." When Ms. Mueller was forced to merge, the vehicles collided. Mr. Huntington was the only person who made a personal injury claim at trial. He sued both Mrs. Henry and Ms. Mueller, claiming they were jointly and severally liable.

The case was submitted to mandatory arbitration. The arbitrator, John Mitchell, awarded Mr. Huntington \$50,000.00 and found Ms. Mueller to be 100% at fault. Defendant/Appellant Mueller filed a timely Request for Trial de Novo. The case was tried to a jury and the jury awarded damages of \$60,161.35, and found each defendant 50% at fault for Mr. Huntington's injuries. Plaintiff then moved for fees and costs, pursuant to RCW 7.06.060(1) and MAR 7.3. Defendant Mueller objected, since she had improved her position by filing a Request for Trial de Novo. The trial court granted Plaintiff's motion and awarded fees and costs. This appeal followed.

Since the filing of this appeal, Defendant Mueller satisfied the principal judgment, and was reimbursed for one-half of the judgment by Defendant Henry. Only the issue of attorney's fees and costs remains to be decided. Appellant's position is that prior to the Request for Trial de Novo, she was liable for \$50,000.00, but that liability was reduced to \$30,080.67. Ms. Mueller paid the entire judgment and was then reimbursed for 50% of the judgment by Defendant Henry. Since Defendant/Appellant Mueller improved her position by almost \$20,000.00 she is not liable for fees and costs. Plaintiff's recovery of a higher damage figure is irrelevant. Appellant seeks a reversal of the trial court's award of fees and costs.

II.
ASSIGNMENTS OF ERROR

1. The trial court committed error by awarding attorney fees and litigation costs to Respondent, because Appellant improved her position from the arbitration by filing a Request for Trial de Novo.

II.
ISSUES PRESENTED

1. Did the trial court misinterpret RCW 7.06.060(1) and MAR 7.3 by awarding attorneys fees and costs to Respondent, even though Appellant improved her position at trial?

III.
STATEMENT OF THE CASE

This case arises from an automobile accident on Highway 101 in Clallam County on September 3, 2007. (CP 115) It involved two vehicles, one driven by Jennifer Mueller and the other by Jacqueline Henry. Mr. Huntington was a passenger in the Henry vehicle. (CP 117) The highway at the point of the collision had two lanes west, one lane east, and a center turn lane. Both vehicles were west-bound. (CP 118) Ms. Mueller was in a lane that merged into the lane occupied by Ms. Henry. As she was merging, the two vehicles collided. Ms. Mueller denied liability, asserting that Mrs. Henry accelerated and attempted to run her off the road. She was faced with the choice of hitting a guardrail or merging. Her position was that Mrs. Henry was the person whose negligence proximately causes the accident. (CP 108-110) Mrs. Henry denied seeing Ms. Mueller before the collision. Mr. Huntington was the only person making a personal injury claim at trial. He sued both Mrs. Henry and Ms. Mueller, claiming they were jointly and severally liable. (CP 118) Ms. Mueller's Answer and Affirmative Defenses stated that the claims should be allocated, pursuant to RCW 4.222.070. (CP 108)

The case was submitted to mandatory arbitration. The arbitrator, John Mitchell, awarded Mr. Huntington \$50,000.00 and found Ms.

Mueller 100% at fault. (CP 101, 57-58) Defendant/Appellant Mueller filed a timely Request for Trial de Novo. (CP 100) The case was tried to a jury and the jury awarded damages of \$60,161.35, but found each defendant to be 50% at fault for Mr. Huntington's injuries. (CP 97-99) Plaintiff then moved for fees and costs, pursuant to RCW 7.06.060(1) and MAR 7.3. Ms. Mueller objected, since she had improved her position by filing a Request for Trial de Novo. (CP 52-58) The trial court granted Plaintiff's motion and awarded fees and costs. (CP 34-35,21-22) This appeal followed. (CP 6-7)

Since the filing of this appeal, Defendant Mueller satisfied the principal judgment, and was reimbursed for one-half of the judgment by Defendant Henry. Only the issue of attorney fees and costs remains to be decided. Appellant submits that prior to the Request for Trial de Novo, she was liable for \$50,000.00, and that liability was reduced to \$30,080.67 by the jury. Since Defendant/Appellant Mueller improved her position by almost \$20,000, she is not liable for fees and costs. That Mr. Huntington's recovered more damages than the arbitrator awarded is irrelevant. The issue is whether the person seeking the appeal improved her position, not whether the Plaintiff increased his overall damage award. Appellant seeks a reversal of the trial court's award of fees and costs.

**IV
ARGUMENT**

A. Appellant Mueller improved her position by filing a Request for Trial de Novo.

The resolution of the issue in this case is not based on the amount of money Plaintiff eventually receives. The key factor is the amount owed by the party who requested a trial de novo. The focus must be on whether the party appealing improves her position, not whether the amount all parties pay to the non-appealing party increases. RCW 7.06.060(1) states:

(1) 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.** The court may assess costs and reasonable attorneys' fees against a party who voluntarily withdraws a request for a trial de novo if the withdrawal is not requested in conjunction with the acceptance of an offer of compromise. [Emphasis supplied]

MAR 7.3 also deals with the issue of fees.

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.** The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo. "Costs" means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule. [Emphasis supplied]

The rule is easy to apply in a two-party case. If the verdict is lower, the party making the appeal improved his or her position. The issue in a multiparty case is decided as to the position of each party at the end of the case. In this case, the end result of the trial was Ms. Mueller saving almost \$20,000.00 by filing a Request for Trial de Novo. The jury allocated fault in a manner that made the responsible parties pay their fair share to the injured party, pursuant to RCW 4.22.070. This apportionment was the major change from the arbitration award and resulted in Ms. Mueller improving her position.

In a multiparty case, in which the jury allocated fault, the ultimate amount paid by individual defendants determines if the appealing party improved their position. Professor Tegland discusses the rule in multiparty cases at 4A, Washington Practice MAR 7.3:

Multiparty cases. When assessing attorney fees in a multiparty case, the court normally looks to the outcome as to each party, rather than the outcome in the case as a whole. Thus, in a 1997 case involving four defendants, a trial de novo resulted in an increase in the total amount of damages awarded to the plaintiff. As a result of a reallocation of fault, however, two of the defendants actually owed less as a result of the trial de novo. The court held that the two defendants who owed less were not required to pay attorney fees to the plaintiff. Sultani v. Leuthy, 86 Wash. App. 753, 943 P.2d 1122 (1997).

This rule has also been cited in *Christie-Lambert Van & Storage v. McLeod*, 39 Wn. App. 298, 304, 693 P.2d 161 (1984).

A denial of attorney fees to Christie-Lambert in this case would run counter to the general rule that attorney fees and costs in multi-party cases as well as in certain consolidated cases are awarded to different parties on the basis of the separate judgments obtained, not the overall trial result. [Citations omitted]

The focus on any inquiry must be on whether the party filing the appeal improved its position, thereby showing that the appeal had merit. This is discussed in *Hutson v. Rehrig International, Inc.*, 119 Wn. App. 332, 335, 80 P.3d 615 (2003):

The term “position” used in RCW 7.06.060(1) and MAR 7.3 “was meant to be understood by ordinary people who, if asked whether their position had been improved following a trial de novo, would certainly answer ‘no’ in the face of a superior court judgment against them for more than the arbitrator awarded.” *Cormar, Ltd. v. Sauro*, 60 Wash.App. 622, 623, 806 P.2d 253 (1991) (footnote omitted). Here, Costco would certainly answer “yes” if asked whether it improved its position following the trial de novo, as it is now liable for \$20,000 less in damages.

Hutson, Supra, dealt with the issue of claims between defendants. Here the issue is what Ms. Mueller paid to Mr. Huntington. It is clear that Ms. Mueller, by lowering the damages paid by almost \$20,000.00, thereby improved her position.

B. Ms. Mueller was required to file a Request for Trial de Novo to preserve her right of contribution against her co-defendant.

Even though Ms. Mueller obviously improved her position, thereby proving that her appeal had merit, the trial court awarded fees to Plaintiff. The trial court's Order seems to take the position that Ms. Mueller could have settled with Plaintiff and then brought an action to gain contribution from her co-defendant. This is both factually and legally incorrect. There is nothing in the record to show that any settlement was ever discussed. Ms. Mueller was required to file a Request for Trial de Novo, or she would have lost the ability to seek contribution from her codefendant. If she had not appealed, the arbitration award would have been reduced to judgment. See MAR 7.2. The doctrine of res judicata would have prevented any contribution action against Mrs. Henry.

The statute and rule do not allow claim splitting. Ms. Mueller could not request a trial de novo against only one party, on the issue of contribution. The entire case must be appealed. See: *Perkins Coie v. Williams*, 84 Wn. App. 733, 740, 929 P.2d 1215 (1997). More importantly, the trial court assumes that Ms. Mueller did not contest Mr. Huntington's damage claims. There are no facts in the record to support that conclusion. The entire arbitration result was appealed and Ms. Mueller's damage position was substantially improved.

The case most on point here is *Sultani v. Leuthy*, 86 Wn. App. 753, 759, 943 P.2d 1122 (1997). The facts in that case are very similar to this one. Mr. Sultani sued four defendants for two accidents. He was rear-ended in each case and was fault free. The case was put into arbitration and the arbitrator awarded damages, but did not apportion fault among the defendants. One defendant appealed. The jury found that the defendants' negligence was a proximate cause of Sultani's injuries, and apportioned fault among the defendants. Although the plaintiff received a higher damage award, the party requesting a trial de novo, Pollard, wound up paying less to the plaintiff. The Court held that since Mr. Pollard improved his position, he owed no fees to the Plaintiff. This case is almost identical. The merit of Ms. Mueller's appeal must be judged by whether she improved her position. Since she had to pay almost \$20,000.00 less than if she had accepted the arbitration award, her award obviously had merit. Plaintiff's overall recovery is not a consideration in the application of MAR 7.3 and RCW 7.06.060(1). The focus is on the final position of the party who appeals. In order to improve her position, Ms. Mueller was required to file a Request for Trial de Novo.

C. Joint and Several Liability is not a factor in this case.

The trial court committed error in this case in part because of a misunderstanding of the doctrine of joint and several liability. Mr.

Huntington was just a passenger in Mrs. Henry's van. He is fault free. The same thing was true of Mr. Sultani. A fault free plaintiff bringing an action against more than one tortfeasor is guaranteed joint and several liability against any defendant found to be an entity at fault.¹ The jury was asked to apportion fault between the defendants, pursuant to RCW 4.22.070. That section allows a jury to allocate fault between parties and non-parties, with a few exceptions that do not apply here.² RCW 4.22.070(2) makes it clear that joint and several liability is not affected by allocation of fault, when the plaintiff is fault free. Joint and several liability applies to any party "against whom judgment has been entered." *Washburn v Beatt Equipment Co.*, 120 Wn.2d 246, 294, 840 P.2d 860 (1992). Since both Ms. Mueller and Ms. Henry were found liable, they have joint and several liability. The allocation of fault by the jury does not convert their liability to several liability. The finding of joint and several liability is required for any claim of contribution.

Mr. Huntington's position seems to be that, since joint and several liability exists in this case, it is somehow distinguishable from *Sultani*. He

¹ RCW 4.22.030 Nature of Liability: Except as otherwise provided in RCW 4.22.070, if more than one person is liable to a claimant on an indivisible claim for the same injury, death or harm, the liability of such persons shall be joint and several.

² RCW 4.22.070:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages except entities immune from liability to the claimant under Title 51 RCW. The sum of the percentages of the total fault attributed to at-fault entities shall

is incorrect. The defendants in that state were jointly and severally liable to Mr. Sultani. That case involved in two accidents a few months apart. Both involved two other vehicles. Both were rear end collisions in which Mr. Sultani had no fault. The case went to arbitration and the arbitrator filed an award for \$38,535.20, but he did not allocate fault among the defendants. One of the defendants, Mr. Pollard, appealed. The jury allocated fault among the defendants, including Mr. Gough, who did not appear at trial. As a result of his trial de novo, Mr. Sultani was awarded \$55,250.00, but Mr. Pollard was found to be responsible for only \$3,729.37 of the damages. *Sultani, Supra* at 756. This did not eliminate joint and several liability. It merely gave the defendants a right of contribution against each other. *Sultani, Supra*, at 759, acknowledges that Mr. Sultani could collect the entire judgment against any defendant, but Mr. Pollard still improved his position by appealing.

The right of contribution is only available to defendants who are jointly and severally liable.³ See: RCW 4.22.040(1). If the arbitration award had reduced to judgment, Ms. Mueller would have been responsible for a \$50,000.00 judgment and would have no right of contribution against

³ RCW 4.22.040(1) states: (1) A right of contribution exists between or among two or more persons who are jointly and severally liable upon the same indivisible claim for the same injury, death or harm, whether or not judgment has been recovered against all or any of them. It may be enforced either in the original action or by a separate action brought for that purpose.

Mrs. Henry. Her only alternative was to appeal, and she was successful at trial.

The court acknowledges that there is joint and several liability in that case, as it is in this case. It also rejects the argument that the losing party in arbitration has a duty to settle with the plaintiff and seek contribution from a co-defendant in a separate action. *Sultani, Supra*, holds at 759:

Thus, although the appellants had a right of contribution against each other and against the other defendants as a result of the arbitration award, there still existed the possibility that one or both appellants, rather than all four defendants, would have borne the full responsibility of making Sultani whole. Sultani's argument would force this court to speculate as to whether the appellants would have been able to obtain a contribution from one another and from the other defendants, and if so, for how much.

In this case, the record shows that Ms. Mueller ultimately paid almost \$20,000.00 less than she would have if she accepted the arbitration award. Her appeal obviously had merit. Like Mr. Sultani, Mr. Huntington's recovery of a verdict larger than the arbitration award does not give him a right to recover attorney fees. Plaintiff's increase in total recovery is irrelevant. Mr. Huntington has no right to attorney's fees.

The trial court relied on *Christie-Lambert Van & Storage v. McLeod*, 39 Wn. App. 298, 304, 693 P.2d 161 (1984), in making its decision. This was error. *Christie-Lambert Van & Storage, Supra* was a suit brought to

collect two debts from two defendants. It involved two separate transactions. The plaintiff in that case was hired to move and store furniture by an attorney, Mr. McLeod, acting for his client, Ms. Nolan. Later, it negotiated directly with Ms. Nolan to move the furniture again. *Id.* at 300. The case was placed in arbitration and the arbitrator awarded damages severally against each party for their transaction. The arbitrator awarded attorney fees against the defendants jointly. *Id.* The arbitrator refused to rule on the cross claim by Mr. McLeod against Ms. Nolan, because it had not been properly served and jurisdiction was lacking. *Id.* Mr. McLeod filed a Request for Trial de Novo. By the time the case came to trial, it appears that both defendants had raised cross claims. At trial, the plaintiff recovered the same damages, but Mr. McLeod substantially prevailed on his cross claim. Since he ultimately was required to pay less in damages, he argued that the plaintiff had no right to fees under MAR 7.3. The Court disagreed. The rule only applies to the claims and defenses which were arbitrated, not claims or defenses added after the filing of a Request for Trial de Novo. The court recognized that the general rule in multiparty cases is that responsibility for fees is based on the individual liability of the defendants, not the total received by the plaintiff. See *Id.* at 305. Mr. McLeod had not improved his position on the issues which were not at issue in the arbitration. Mrs. Mueller's claim that

Mrs. Henry was partly at fault was before the arbitrator in this case and raised in her answer, and Mrs. Mueller improved her position on that point at trial. The result was a substantial improvement in her position.

Arguments about joint and several liability have no application to this case. *Christie-Lambert Van & Storage, Supra*, is a case involving several liability, but that was not the factor that resulted in an award of fees. The holding in that case is that a party appealing an arbitration award may not improve its position by adding defenses and claims that were not part of the arbitration. It has no application to this case. *Sultani, Supra*, is the controlling authority. It establishes that the focus of the inquiry about the entitlement to fees is on how much the defendant will be paying, not how much the plaintiff will be recovering. Ms. Mueller substantially improved her position by appealing the arbitration award. This prevents the award of fees.

**IV.
CONCLUSION**

The trial court erred because it focused on the total amount of damages awarded to Mr. Huntington, rather than the amount paid by Ms. Mueller. In determining whether the party appealing the arbitration improved her position, the court must focus on the amount Ms. Mueller ultimately had to pay, not the total recovery by Mr. Huntington. It is undisputed that Ms. Mueller reduced her payment to Mr. Huntington from \$50,000.00 to \$30,080.67, a savings of \$19,919.33. Appellant obviously improved her position, thereby eliminating Mr. Huntington's right to an award of attorney fees. The record is also clear that both defendants paid the same amount of money in this case. Had Appellant not appealed the arbitration award, it would have been reduced to judgment, and she would have lost any right to seek contribution from her co-defendant, Mrs. Henry. The Mueller appeal had merit, as shown by the result. The existence of joint and several liability does not alter the rule. The undisputed facts of this case show that the trial produced a significant reduction in the amount paid by Appellant. In a multiparty case, the amount paid by individual defendants is the determinative factor in determining if the party seeking a trial de novo was successful. There can be no doubt that Appellant was

successful in improving her position. Mr. Huntington is not entitled to attorney fees. The trial court's order awarding fees should be reversed.

Respectfully submitted this 1st day of May, 2012.

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The undersigned certifies that on the 1st day of May 2012, s/he caused original/true copy of the following documents: **Appellant's Brief and Certificate of Service** to be served on the parties listed below by first class U.S. Mail:

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