

71709-0

No. 92489-9

71709-0

No. 71709-0-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JESS NELSON,

Plaintiff-Respondent,

v.

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

Defendants-Appellants.

BRIEF OF RESPONDENT

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FILED
DIVISION I
COURT OF APPEALS
STATE OF WASHINGTON
JAN 25 2011 2:43

TABLE OF CONTENTS

I.	TABLE OF AUTHORITIES	
II.	STATEMENT OF THE CASE.....	1
III.	ISSUES PRESENTED.....	13
IV.	ARGUMENT.....	14
	A.	Standard of Review.....14
	B.	The trial court did not err because there was <u>insufficient evidence</u> to support the jury’s award of \$0 for future noneconomic damages. The uncontroverted evidence showed that Mr. Nelson had permanent pain, which would not only require future treatment, but also affect his ability life and activities.....15
	C.	The Washington Supreme Court’s analysis in <i>Palmer v. Jensen</i> , 132 Wn.2d 193, 937 P.2d 597 (1997), is controlling in this case.24
	D.	Erickson failed to raise the procedural defect to the trial court, and thus the issue was not preserved for review....31
	E.	Attorney fees were properly awarded by the trial court upon finding that Nelson improved his position at trial ...32
	F.	Attorney Fees Should Be Granted to Respondent.....39
IV.	CONCLUSION.....	39

I. TABLE OF AUTHORITIES

CASES

<i>A&W Farms v. Cook</i> , 168 Wn. App. 462, 470, 277 P.3d 67 (2012).....	32
<i>Bunch v. King County Dep't of Youth Servs.</i> , 155 Wn.2d 165, 116 P.3d 381 (2005).....	15
<i>Herriman v. May</i> , 142 Wn. App. 226, 174 P.3d 156	27, 29, 30
<i>Jones v. Hogan</i> , 56 Wn.2d 23, 28, 351 P.2d 153 (1960).....	31
<i>Lopez v. Salgado Guadarama</i> , 130 Wn. App. 87, 122 P.3d 733 (2005).....	27, 28
<i>Myers v. Smith</i> , 51 Wn.2d 700, 321 P.2d 551 (1958).....	25
<i>Niccum v. Enquist</i> , 175 Wn.2d 441, 286 P.3d 966 (2012).....	12, 33, 34, 35, 36, 37, 38
<i>Palmer v. Jensen</i> , 132 Wn.2d 193, 937 P.2d 597 (1997).....	15, 24, 28
<i>Singleton v. Jimmerson</i> , 12 Wn. App. 203, 529 P.2d 17 (1974).....	28
<i>State v. Boast</i> , 87 Wn.2d 447, 451, 553 P.2d 1322 (1976).....	31
<i>State v. Grimes</i> , 165 Wn. App. 172, 267 P.3d 454, <i>review denied</i> 175 Wn.2d 1010, 287 P.3d 594 (2011).....	31

<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).....	31
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	31
<i>State v. Tolias</i> , 135 Wn.2d 133, 140, 954 P.2d 907 (1998).....	31
<i>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 329, 858 P.2d 1054 (1993).....	14, 15

STATUTES

RCW 4.76.030.....	32
RCW 4.84.010.....	37
RCW 7.06.....	12, 14, 33, 38, 41
RCW 7.06.050.....	32
RCW 7.06.060.....	39

RULES

MAR 7.3...12, 32, 33, 38, 39, 41	
RAP 2.5a.....	31
RAP 14.2.....	39
RAP 18.1.....	39

II. STATEMENT OF THE CASE

Jess Nelson was injured on December 23, 2010, when his vehicle was rear-ended by Mr. Erickson's Jeep as Mr. Nelson came to a stop on the freeway due to traffic. RP 310-311.

After filing suit against Erickson, Mr. Nelson placed the case into Mandatory Arbitration pursuant to RCW 7.06 et seq. and received an arbitration award of \$43,401.59. CP 9-10; 1081. Erickson requested a trial de novo. CP 12. On September 25, 2013, Mr. Nelson made a written offer of compromise for \$26,000¹ to Erickson. CP 839.

Erickson failed to respond to the offer of compromise and the case proceeded to trial. Judge Mary Yu presided over the trial. At trial, the parties stipulated that Mr. Nelson was injured and incurred \$9,361.00 in reasonable medical treatment related to the collision, which represented Mr. Nelson's initial 8 months of treatment. CP 317-319. Mr. Nelson had incurred an additional \$1,806.00 in medical treatment that was disputed by Erickson. *Id.* Erickson also disputed Mr. Nelson's need for future medical treatment as well as his past and future noneconomic damages. *Id.*

¹ The offer of compromise stated: "Pursuant to RCW 7.060.050 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."

At trial, Mr. Nelson called three friends (Gary Smith, Matthew Nugent, and Michael Campbell) to testify on his behalf about the impact his injuries has had on his life. Gary Smith testified that Mr. Nelson's work as a home inspector suffered due to his injuries because his inspections took longer to complete. RP 177-178. Smith also testified about the change in Mr. Nelson's physical activities after the collision, including how Nelson was no longer as active with helping out on rebuilding projects or able to enjoy Nelson's longtime hobby of rebuilding engines. RP 173-176, 185.

Matthew Nugent also testified about the effect that Mr. Nelson's injuries had on his life. Nugent testified that Mr. Nelson no longer went boating/fishing (a hobby Nelson had done frequently prior to the collision). RP 188-190. Nugent also testified that Nelson was not as actively hunting as he used to be, and when he did go hunting he struggled to keep up with them. RP 192-193. Nugent also testified that when he gets together with Nelson, he notices Mr. Nelson struggling with the pain. RP 195.

Michael Campbell also testified about the effect that Mr. Nelson's injuries had on his life. Campbell testified that Mr. Nelson no longer fished due to the pain, even though prior to the collision Campbell and Nelson had been fishing regularly for almost 25 years. RP 206-07. Campbell also testified about a multiple day backpacking trip over the Pacific Crest that

Mr. Nelson and his wife had been training for, which Mr. Nelson was unable to do because of his injuries. RP 209-210.

The defense asked no questions of Mr. Campbell on cross-examination. RP 213. During the short cross-examinations of Mr. Nugent and Mr. Smith, the defense only asked clarifying questions about Mr. Nelson's activities. RP 182-185; 198-201. The veracity of the testimony of Mr. Nelson's friends was never questioned, nor was the credibility of any of these witnesses attacked. *See id.*

Mr. Nelson's son, Daniel Nelson, also testified about the impact Mr. Nelson's injuries had on his activities. Daniel testified that his father no longer wrestled with his sons (two of which were collegiate wrestlers) like he used to before his injuries. RP 229-230. He also talked about how his father was much less active than before the collision with his building projects. RP 229-230. Daniel also testified about how his father had difficulty golfing because of his pain. RP 221-222.

The defense asked questions about how much time Daniel had spent at home since the collision, to which Daniel testified that he spent four months each summer, along with winter and spring breaks at home. RP 232-233. But other than these questions, the defense in no way attacked Daniel's credibility or the veracity of his testimony. *See id.*

Mr. Nelson's wife, Nena Nelson, also testified on Mr. Nelson's behalf, testifying about the impact that Mr. Nelson's injuries had taken on his life as well as their marriage. Nena testified about the backpacking trip that they were training for (over the Pacific Crest) that they were unable to go on due to his injuries. RP 236-237. She also testified about how her husband had trouble even carrying a backpack at one point, resulting in him asking her to carry his backpack for him. RP 237-239. This incident really stuck out to Nena because she saw the pain in her husband's face and knew that he was not the type of man who would ask her for help carrying his backpack. RP 237-239. Nena also testified about the toll that his pain took on their marriage, and how she actually went looking for an apartment at one point because Mr. Nelson's pain had made living with him unbearable. RP 241-242

The defense asked no questions of Nena on cross-examination and at no point attacked her credibility or the veracity of her testimony. RP 247.

Jess Nelson also took the stand. Mr. Nelson testified that he had no back or neck pain before the subject collision. RP 309-310. But after the collision, he started having pain in his neck and back, which got progressively worse as the day wore on. RP 313, 315-316. Mr. Nelson also testified that he still continues to have neck and back pain from the collision. RP 317-318. Due to his ongoing pain, he no longer golfs (RP 369), hunts

(RP 303-304; 355-360), goes hiking/backpacking (RP 304; 364-366), goes boating or fishing (RP 352-354) or engages in rebuilding or other construction-type projects (RP 306-309; 361-363) as he had done prior to the collision.

Mr. Nelson also offered testimony about his treatment and how he still had pain despite treating for over a year. Mr. Nelson testified that he went to his chiropractor for 6-8 months and after that tried to get better by changing his lifestyle. RP 318. However, the pain only got worse, so he went to see Dr. Harper. *Id.*

Mr. Nelson testified that he chose not to continue with physical therapy because he was the primary bread-winner of his family and the constant need to attend physical therapy was inconvenient as it consumed too much time away from work. RP 346-347. Mr. Nelson stated that he chose not to get injections because of his fear of potential side effects. RP 348. Mr. Nelson also testified that he had not suffered any subsequent or intervening injuries after the collision. RP 349.

Daniel Washeck, Mr. Nelson's physical therapist, testified that he worked with Mr. Nelson to identify the most successful exercise program to help spread the pressure load that was pressing on the C5 and C6 segments of Mr. Nelson's neck. RP 325-326. Mr. Washeck testified that Mr. Nelson had muscle guarding and reduced range of motion, which were

objective findings supporting the symptoms. RP 327-28, 338-39. Mr. Washeck also testified that Mr. Nelson had only reached 75% of his range of motion for his neck at the time of his last visit in December 2011. RP 336-337. Finally, Mr. Washeck testified that if Mr. Nelson was still in pain three years after the collision, then it was his opinion that Mr. Nelson's pain was permanent. RP 337.

Mr. Nelson also called his treating physician, Larry Harper, M.D., to testify on his behalf. In addition to treating Mr. Nelson, Dr. Harper reviewed all of Mr. Nelson's medical records following the collision. RP 264.

Dr. Harper testified that in August 2011 he examined Mr. Nelson and diagnosed him with cervical dysfunction and lower back dysfunction as a result of the subject crash. RP 267. Based on Dr. Harper's conclusion and findings, Dr. Harper referred Mr. Nelson to a neck and back specialist since the chiropractic treatment Mr. Nelson received from his chiropractor did not resolve his pain. RP 269. Mr. Nelson also had diagnostic imaging performed, which showed that he had degenerative disk disease. RP 272. Dr. Harper explained that although most people have degenerative disk disease as they get older, the condition can be asymptomatic. *Id.* Harper also stated that there was no way to tell whether or not someone with degenerative disk disease would become symptomatic. *Id.* Dr. Harper also

testified that Mr. Nelson had an asymptomatic degenerative disk condition prior to the collision. RP 272-273, 280. He also said that all of Mr. Nelson's medical treatments, including the chiropractic and physical therapy, were reasonable, necessary and related to the collision. RP 268, 277, 278, 293. He also testified that if Mr. Nelson was still having pain in his neck, then it was his opinion that his symptoms were permanent and as a result of the collision. RP 279-280.

On cross-examination, Dr. Harper admitted that when he was previously deposed by defense counsel he testified that he could not answer the questions of whether or not Mr. Nelson's ongoing pain complaints were related to the car crash. RP 285-287. He also admitted that he also testified at his deposition that he could not answer the question of whether or not Mr. Nelson's injuries were permanent. RP 286-287. However, on re-direct, Dr. Harper clarified that the reason he answered the way he did at his deposition was because he had not treated Mr. Nelson for those injuries since 2011. RP 290-292. Nevertheless, according to Dr. Harper, if Mr. Nelson was still having symptoms with his neck and back some three years after the collision, then it was his opinion that Mr. Nelson has permanent symptoms. RP 292-293. Furthermore, Dr. Harper testified that he would refer Mr. Nelson to be seen by a pain specialist for injection treatments and possibly another MRI for the ongoing symptoms. RP 279. Dr. Harper also explained

that a lack of findings in an MRI or x-ray was common because the soft tissue structures that may have been injured may not be visible through imaging. RP 282. He further explained that someone with degenerative changes would likely take a longer period to heal and could develop permanent symptoms. RP 289. And trying to apply average recovery times to an individual like Mr. Nelson, in Dr. Harper's opinion, was unreasonable because individuals heal at different rates. RP 289.

The defense called Allen Jackson, M.D., to testify as to the medical treatment Mr. Nelson received. Jackson testified that he believed that Mr. Nelson and his family and friends were truthful, but there were no objective findings to relate Mr. Nelson's ongoing symptoms to the collision. RP 423.

On cross-examination, Jackson confirmed that Mr. Nelson was asymptomatic prior to the collision. RP 441-442. He also confirmed that after the collision Mr. Nelson started having neck and back pain. RP 442. Dr. Jackson also admitted on cross-examination that Mr. Nelson's symptoms had not gone away post three years after the collision, and that "it's probably permanent" if it has not gone away after three years. RP 445, 450.

Jackson also agreed that just because someone has degenerative disk disease does not mean that it can be predicted whether or not he would have pain as a result of the degeneration. RP 427-428. Jackson also testified that

average recovery rates do not provide specific information as to how long it will take a specific individual to recover, despite the fact that he based his “8 month cutoff” on the average recovery rates for a neck/back injury after a collision. RP 433-434.

Jackson testified that all of the treatment Mr. Nelson received was reasonable and necessary. *Id.* Jackson, however, drew an arbitrary line and opined that after 8 months, Mr. Nelson’s symptoms were no longer caused by the collision. RP 445-446. Jackson’s rationale for 8 months was based on the lack of objective evidence supporting the subjective complaints. RP 445-46. However, Jackson failed to address Mr. Washeck’s objective findings or the loss of cervical range of motion. RP 445-446, 454. Jackson’s ‘arbitrary line’ was also contradicted by the fact that Jackson admitted that he has treated patients who only had subjective complaints that were not objectively quantifiable. RP 460. Further, Jackson testified that if a person was having neck pain three years after a collision, then those symptoms would be considered permanent. RP 450.

Jackson agreed that he believed Mr. Nelson was being truthful about his symptoms, and that the only issue was whether Nelson’s ongoing symptoms were related to the collision. RP 459. Jackson, however, failed to point to any subsequent or intervening injury to explain how the symptoms could no longer be related to the collision. *See id.*

During closing, the parties made competing arguments based on the evidence provided during the trial. The defense admitted in closing that there was no dispute about whether Mr. Nelson was still in pain or that Mr. Nelson's testimony was credible, rather the sole dispute was whether after eight months of treatment Mr. Nelson's symptoms should be considered related to the collision. RP 520, 522.

The jury returned a verdict as follows:

(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.

The verdict included all of the medical expenses incurred, including those incurred **after** eight months of treatment. *Id.* Additionally, the jury awarded Mr. Nelson the future medical expenses Plaintiff's counsel asked for during closing. RP 512-513; CP 635. Based on the jury's verdict, it is reasonable to assume that the jury concluded that (1) Mr. Nelson was injured from the collision, (2) that all of his past medical treatments were reasonable and related, (3) that Mr. Nelson's ongoing pain were related to the collision, and (4) that Mr. Nelson would need future medical treatments recommended by both Dr. Harper and Dr. Jackson to treat the ongoing pain.

See id. Yet, the jury failed to award any monetary amount for future noneconomic damages, including future pain and suffering, future inconvenience, and future loss of enjoyment, even though the jury concluded that Mr. Nelson had ongoing pain that would need future medical treatment. Moreover, it failed to award future noneconomic damages despite the fact that the undisputed evidence established that Mr. Nelson was continuing to have pain, and thus unable to perform and enjoy the same level of activities that he once did prior to the collision.

Nelson moved the court for a new trial and/or for additur based on the jury's failure to award future noneconomic damages. CP 636-47. The Court denied granting a new trial, but granted an additur in the amount of \$3,000.00. CP 670-671. The Court ruled:

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 is 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 moved to have the Court reconsider the granting of the additur, but never raised with the Court the procedural defect related to the Court not offering Erickson the opportunity to consent to the additur in lieu of a new trial. CP 681-686. The Court denied Erickson's motion for reconsideration. CP 728-729. With the \$3,000 additur, the verdict was increased to \$27,167. CP 723-24. Along with statutory costs of \$729.98, the Court entered judgment against Erickson in the amount of \$27,896.98.

Id.

After entry of judgment, Nelson moved for attorney fees pursuant to MAR 7.3 and RCW 7.06. CP 1044-1046, 1047-1053. The Court denied the motion for fees based on *Nicum v. Enquist*, 175 Wn.2d 441 (2012). CP 1005-09. However, the Court incorrectly included costs to Nelson's offer of compromise, which was contrary to the language in *Nicum*. CP 1005-06, 1054-55. As a result, Nelson moved for reconsideration, contending that the Court erred by including costs into Nelson's offer of compromise.

CP 1010-18, 1019-23, 1084-1088. The Court invited a response and reply from the parties. CP 1024-25. After reconsidering the parties' materials, and "re-reading of *Niccum*[,]” Judge Yu granted Nelson’s motion for reconsideration. CP 1054-55. In her order, Judge Yu wrote:

This [Court] 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 [Plaintiff] is entitled to fees & costs.

Id.

The Court then entered Findings of Fact and Conclusions of Law awarding Nelson attorney’s fees in the amount of \$58,980.00 and costs in the amount of \$4,488.90. CP 1047-53. Based on the verdict, additur, fees and costs, the Court entered a Second Amended Judgment for a total amount of \$91,365.88. CP 1044-1046.

Erickson filed a timely appeal. CP 1056-1080.

III. ISSUES

1. Did the trial court correctly grant additur where there was insufficient evidence to support the jury’s award of \$0 for future noneconomic damages?
2. Should this Court dismiss Erickson’s appeal of an alleged procedural error by failing to give Erickson the option of additur or a new trial where the alleged error was not raised by Erickson to the trial court, or

in the alternative, should a new trial be granted if this Court finds that the trial court made a procedural error?

3. Did the trial court properly award attorney fees where it concluded, based on the analysis in *Niccum*, that costs cannot be included in an offer of compromise because costs only take statutory effect once a judgment is entered, and when a de novo appeal is filed, no judgment has been entered?

4. Should this Court award attorney fees and costs to respondent pursuant to MAR 7.3, RCW 7.06.060, RAP 14.2, and RAP 18.1?

IV. ARGUMENT

A. Standard of Review

Determination of the amount of damages is within the province of the jury, and courts are reluctant to interfere with a jury's damage award when fairly made. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 329, 858 P.2d 1054 (1993).

The Washington Supreme Court has ruled that a trial court's order of remitter or additur is to be reviewed de novo.

The statutory standard of review (de novo) applies only when the trial court actually remits an award. When the trial court remits an award it invades the constitutional province of the jury, making the less deferential standard of review appropriate.

Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 176, 116 P.3d 381 (2005).

B. The trial court did not err because there was **insufficient evidence** to support the jury's award of \$0 for future noneconomic damages. The uncontroverted evidence showed that Mr. Nelson had permanent pain, which would not only require future treatment, but also affect his ability life and activities.

Determination of the amount of damages is within the province of the jury, and courts are reluctant to interfere with a jury's damage award **when fairly made**. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 329, 858 P.2d 1054 (1993) (emphasis added). When considering whether to grant a new trial or additur/remittitur where the proponent of a new trial argues the verdict was not based upon the evidence, "appellate courts will look to the record to determine whether there was **sufficient evidence to support the verdict**." *Palmer v. Jensen*, 132 Wn.2d 193, 197, 937 P.2d 597 (1997) (emphasis added).²

The trial court correctly concluded that there was insufficient evidence to support the jury's verdict of \$0 future noneconomic damages for Mr. Nelson. CP 670-671.

² This is the correct analysis that the Court should undertake, as opposed to using the "substantial evidence" standard that Erickson erroneously espouses. *See Erickson's Brief*, p. 8.

Mr. Nelson testified that he was asymptomatic before the subject collision, but after the collision became symptomatic in his neck and back. RP 309-310, 313, 315-316. He also testified that he continues to have ongoing pain in his neck. RP 317-318. This was not disputed by the defense. Further, the defense medical expert, Dr. Jackson, as well as the plaintiff's treating doctor, Dr. Harper, testified that Mr. Nelson was asymptomatic prior to the collision. See RP 442, 272-273, 280. Dr. Jackson also testified that there was no evidence of any subsequent or intervening injury. RP 426-427. Both Dr. Jackson and Dr. Harper further testified that because Mr. Nelson was still having symptoms more than three years after the collision, it was their opinion that his pain was permanent. Both Dr. Jackson and Dr. Harper also recommended various future medical expenses for Mr. Nelson because of his permanent symptoms. RP 450, 279, 293.

Additionally, Mr. Nelson, as well as his friends and family, also testified about the significant toll his pain has taken on him and how he is unable to take part in many recreational activities that he was able to do, and enjoyed doing, prior to the collision. See generally RP 169-186 (Gary Smith); RP 187-203 (Matthew Nugent); RP 204-214 (Michael Campbell); RP 215-234 (Daniel Nelson); RP 235-247 (Nena Nelson); RP 297-318, 340-376 (Jess Nelson).

There was no dispute from Erickson about any of this. Erickson did not attack nor dispute any claims that Mr. Nelson, or any of his friends or family, made about Nelson's pain and the impact it had on Mr. Nelson's life. See RP 213, 182-185, 198-201, 232-233, 247. In fact, Dr. Jackson testified that he believed Mr. Nelson was telling the truth about his pain. RP 423, 459. Dr. Jackson also testified that if Mr. Nelson was still having pain after three years, he considered the pain to be "probably permanent." RP 450. Finally, in Erickson's closing, the defense agreed that Mr. Nelson was telling the truth about his pain. RP 520, 522.

The only significant dispute at trial revolved around whether or not Mr. Nelson's pain and symptoms after 8 months were related to the collision.³ The parties stipulated that \$9,167.00 of Mr. Nelson's prior medical expenses (through eight months) were related to the collision. CP 635. If the jury agreed with Dr. Jackson's opinion that the pain and treatment after the eight month period were not related, then no additional past medical expenses would be awarded beyond the stipulated amount of \$9,160.00. Similarly, no future medical treatment costs would be awarded. If the jury disagreed with Dr. Jackson's opinions, then the jury would award

³ The amount of general damages was disputed, but this was also tied into the question of whether or not Mr. Nelson's symptoms after 8 months were related to the collision.

all of the past treatment costs as well as future treatment costs. They would also award past and future noneconomic damages.

The jury rejected Dr. Jackson's opinion, and awarded all of Mr. Nelson's past medical expenses (\$11,167.00) as well as future medical expenses (\$10,000). *See id.* The jury also awarded Mr. Nelson \$3,000 for past noneconomic damages. CP 635, 625-626. However, even though the undisputed testimony was that Mr. Nelson continues to experience pain, that his pain was permanent, and that he can no longer do many of the recreational activities that he enjoyed doing before the collision as a result of his pain, the jury failed to award any amount for the future noneconomic damages. CP 635. This decision was inconsistent with the jury's decision to award all of Mr. Nelson's past medical specials as well future medical expenses. *See id.* More importantly, the jury's decision to award \$0 for future noneconomic damages was not supported by the evidence that was presented at trial, especially when all of the undisputed testimony established that Mr. Nelson's pain was permanent and that his recreational activities is being affected as a result of it.

Judge Yu correctly found that "the lack of a jury award for future noneconomic damages is 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.” CP 670-71. Judge Yu also correctly concluded that “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.” *Id.*

Nevertheless, Erickson contends that there was sufficient evidence to support the jury’s decision to not award future noneconomic damages to Mr. Nelson. Specifically, he contends that Nelson’s own admission that he continued to work and declined to continue with physical therapy or home exercises was sufficient evidence to support the jury’s decision to not award future noneconomic damages because it could allow the jury to conclude that Nelson’s ongoing complaints were overstated or untrue. *See Appellant’s Brief, pg. 13-14.*

But if Erickson’s contention was correct, and the jury concluded that Mr. Nelson’s complaints of ongoing pain was overstated or untrue, then it would not have awarded \$10,000 for future medical treatment. The fact that the jury awarded \$10,000 for future treatment leads to only one conclusion; that the jury believed Mr. Nelson was continuing to have

ongoing pain, which was caused by the subject collision, and as a result would need future treatment to help him deal with the ongoing pain.⁴

A thorough reading of the testimony at trial, and of the arguments made by counsel at closing definitively show that Mr. Nelson and his friends and family all verified that Mr. Nelson had pain, and continued to have pain, which has affected his life and his activities. Defense counsel never attacked the veracity of any of the lay testimony related to Mr. Nelson's pain, or the effect it has had on Nelson's activities. In fact, defense counsel agreed in closing arguments that there was no dispute as to whether Mr. Nelson was still in pain, or whether Mr. Nelson's testimony was credible, he just disagreed with whether it was related to the collision. RP 520, 522.

And I think it's important to think about and consider in coming to your decision **because what we have disputed in this case is not that Mr. Nelson has pain. It seems clear. I think he's an honest guy. He seems to have pain in his neck that's ongoing.** But a bigger issue is was that -- is that related to the collision that occurred almost three years ago.

RP 520 (Emphasis added).

Erickson next contends that the jury's decision to not award future noneconomic damages was supported by sufficient evidence because Dr.

⁴ As to Erickson's assertion that Mr. Nelson stopped doing home exercises, the actual testimony was that Mr. Nelson continued doing his exercises at Gold's gym in an effort to work his way through his injuries, but eventually stopped when his son tragically died. RP 373-374. This is simply a red herring that Erickson attempts to take out of context, in an effort to mislead and distract this Court.

Jackson testified that there was no objective evidence to support Mr. Nelson's ongoing pain, and that the pain Nelson was experiencing was not related to the collision. *See Appellant's Brief, p. 14.* But again, if this was true, the jury would not have awarded Mr. Nelson with future medical treatment costs. According to Dr. Jackson and defense counsel, it was their contention that any continuing pain beyond 8 months after the collision was not related to the subject collision. The jury rejected that contention by awarding Mr. Nelson future medical treatment costs as well as all of his past medical specials, which was beyond the arbitrary 8 month time frame set by the defense and his expert.

Furthermore, Erickson ignores the fact that Dr. Jackson testified that he treats patients who present with only subjective complaints of pain (RP 460-461); Mr. Nelson presented with objective findings after Jackson's 8 month cutoff (RP 327-328); and Jackson ignored his own objective findings of limited range of motion in Mr. Nelson's neck, findings that were below the AMA guidelines (RP 409-410). But the biggest problem with Jackson's testimony was simply that it did not make sense. Jackson testified that prior to the collision, Mr. Nelson was asymptomatic, but following the collision, Mr. Nelson developed neck and back pain symptoms. RP 442, 444. He also agreed that these symptoms continued through Mr. Nelson's treatment with a chiropractor, his family doctor, a spine specialist, and physical therapy.

RP 444-445. Jackson also testified that the symptoms never went away. RP 445. Jackson went on to testify that Mr. Nelson's pain was now considered permanent. RP 450. Jackson also testified that there were no subsequent or intervening injuries to explain Mr. Nelson's symptoms. RP 459. Despite all of this, Jackson drew an arbitrary line at 8 months and said that Mr. Nelson should have recovered by then, and since he did not, his pain was somehow (perhaps magically) no longer related to the collision. In essence, at 7 months and 29 days, Mr. Nelson's complaints of neck pain would have been related, but those exact same complaints (for pain the never went away) two days later were no longer related. The internal logic of Jackson's testimony was completely lacking, and the jury saw right through it, disregarded it and awarded Mr. Nelson all of his medical specials (beyond Jackson's arbitrary 8 month cutoff) and \$10,000 in future medical specials. CP 635.

Erickson next contends that the jury's decision to not award future noneconomic damages was supported by sufficient evidence because 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." *See Appellant's Brief, p. 14, 16.* But Erickson's representation of Dr. Harper's testimony is not accurate.

Dr. Harper never admitted that he could not relate the ongoing pain complaint to the accident or that Nelson did not have permanent injuries.

On cross-examination, Dr. Harper admitted that when he was previously deposed by defense counsel he testified that he could not answer the questions of whether or not Mr. Nelson's ongoing pain complaints were related to the car crash. RP 285-287. He also admitted that at his deposition he testified that he could not answer the question of whether or not Mr. Nelson's injuries were permanent. RP 286-287. But on re-direct, Dr. Harper clarified that the reason he testified the way he did was because he had not seen Mr. Nelson for his injuries since 2011. RP 290-292. Nevertheless, according to Dr. Harper, it was Dr. Harper's opinion that if Mr. Nelson was still having symptoms with his neck and back some three years after the collision with no intervening events, then those symptoms were permanent and related to the collision. RP 292-293. In fact, Dr. Jackson even agreed that if Mr. Nelson was continuing to have ongoing pain, which never resolved and there was no other intervening or superseding event, then it was his opinion that the pain was permanent and related to the subject collision. RP 445, 450.

The trial court did not abuse its discretion by awarding an additur for future noneconomic damages where there was insufficient evidence to support the zero award. The trial court correctly concluded that the uncontroverted evidence established that Mr. Nelson was entitled to an

award of future noneconomic damages. Therefore, the trial court's decision to grant an additur of \$3,000 should be affirmed.

C. The Washington Supreme Court's analysis in *Palmer v. Jensen*, 132 Wn.2d 193, 937 P.2d 597 (1997), is controlling in this case.

In *Palmer v. Jensen*, supra, our Supreme Court held that additur or a new trial was required when the evidence clearly established the plaintiff had been injured, but the jury awarded no damages for pain and suffering. Palmer was rear ended by Jensen. *Id.* at 195. The jury awarded Palmer a general verdict of \$8,414.89, the exact amount of her special damages, and then reduced the award by 25% for her contributory negligence. *Id.* at 196. On appeal, the Supreme Court held that the trial court abused its discretion in denying Palmer's motion for a new trial because the uncontroverted medical evidence substantiated Palmer's claim that she experienced pain and suffering for over two years after the accident, yet the jury's verdict failed to account for Palmer's pain and suffering as the verdict was precisely equal to her special damages only. *Id.* at 203. As a result, the *Palmer* Court concluded that the jury's verdict, which provided for no pain and suffering, was contrary to the evidence. *Id.*

Like *Palmer*, the jury's verdict in our case was contrary to the evidence. It was undisputed that Mr. Nelson was asymptomatic before the collision. It was also undisputed that after Mr. Nelson got struck by

Erickson he became symptomatic. It was also undisputed that Mr. Nelson continued to have ongoing symptoms with both Drs. Harper and Jackson opining that the ongoing symptoms were permanent. It was also undisputed that as a result of his ongoing symptoms Mr. Nelson's ability to participate in, and enjoy, certain activities has been affected. As a result, the jury awarded Mr. Nelson all of his past medical specials and \$10,000 for future medical specials, yet failed to award him anything for future noneconomic damages, even though it was undisputed that he would continue to have ongoing pain that would require future treatments. The jury's verdict was contrary to the evidence, and the trial court did not abuse its discretion by granting the additur. *See Myers v. Smith*, 51 Wn.2d 700, 321 P.2d 551 (1958) (finding prejudice in the verdict and granting a new trial on all issues, including liability, on grounds that prejudice tainted the entire verdict); RCW 4.76.030.

Nevertheless, Erickson unsuccessfully attempts to distinguish *Palmer* from the case at bar. *See Appellant's Brief*, p. 10. Erickson argues that unlike in *Palmer*, Erickson's expert, Dr. Jackson, did present contradicting expert medical opinions in that he concluded that there was no objective evidence to support Nelson's subjective complaints. *Id.* at 14. Jackson also opined that if Nelson did have ongoing pain that it was not related to the subject collision. *See id.* But the flaw with Erickson's

argument is that the overall verdict shows that the jury did not believe Dr. Jackson. If it had, the jury would not have awarded Mr. Nelson all of his past special damages (beyond the 8 month period that Jackson claimed was the cutoff point), nor would it have awarded Nelson \$10,000 for future medical treatment costs.

At trial, even though Jackson opined that there was no objective evidence to support Nelson's subjective complaints, Dr. Harper testified that it was common for people to only have subjective pain complaints without any objective evidence. RP 281-82. Harper also testified that certain soft tissue injuries are not objectively verifiable. *Id.* Furthermore, Dr. Jackson admitted during cross-examination that in his own personal practice he has treated patients with only subjective pain complaints even though there was no objective evidence. RP 460-61. Finally, Mr. Nelson's physical therapist, Dan Washeck, testified that Mr. Nelson did have objective findings of muscle guarding and lack of range of motion to support his pain complaints. RP 327-28, 338-39.

Based on all of the evidence presented at trial, the jury rejected Dr. Jackson's opinions and accepted Nelson's witnesses' opinions. But the jury erred by not awarding future noneconomic damages when it awarded future medical expenses, and the uncontroverted evidence established Nelson's ongoing pain and the effect it has had on his life. Thus, the trial court's

decision to grant an additur for Mr. Nelson's future noneconomic damages was a correct application of the law.

Erickson argues that the facts of this case more closely resembles *Lopez v. Salgado Guadarama*, 130 Wn. App. 87, 122 P.3d 733 (2005), and *Herriman v. May*, 142 Wn. App. 226, 174 P.3d 156 (2007). *See Appellant's Brief*, p. 10-11. Erickson's reliance on *Lopez* and *Herriman* is misplaced.

In *Lopez*, the appellate court upheld the jury's determination not to award general damages, even though economic damages was awarded because the defense disputed every aspect of Mr. Lopez's damages, and Mr. Lopez's credibility was at issue.

Here, the jury's failure to award damages for pain and suffering was consistent with the evidence. In contrast to the facts presented in *Palmer*, the defense disputed every aspect of Mr. Lopez's damages.

...

Additionally, Mr. Lopez's credibility was at issue. He originally testified he was carried to the ambulance, but when questioned regarding who carried him, he admitted he walked. He also had a difficult time remembering the details of the accident and how much time he took off work.

Id. at 92-93.

Unlike *Lopez*, there was no dispute in our case whatsoever about the veracity of Mr. Nelson's pain and suffering, or how his pain affected his life. Even the defense expert testified that he believed that Mr. Nelson was still in pain, that his pain was permanent, and that it would be reasonable

for Mr. Nelson to seek future treatment (Dr. Jackson only disputed whether Mr. Nelson's symptoms after 6-8 months were related to the 2010 collision). Further, the defense argued in closing that there was no dispute as to Mr. Nelson's pain or how it has affected his life. RP 520, 522. The only dispute was whether the 2010 collision was the proximate cause of Mr. Nelson's pain after 6-8 months. As the *Lopez* court stated, "where the jury verdict approximates the amount of undisputed special damages and the injury and its cause is clear, the court has little hesitancy in granting a new trial." *Id.* at 91 (citing *Singleton v. Jimmerson*, 12 Wn. App. 203, 205, 529 P.2d 17 (1974)).

Even though the defense in this case did dispute damages as it related to causation, the jury verdict was clear that it rejected Erickson's argument that only 6-8 months of pain was caused by the 2010 collision. CP 635. Thus, the facts in this case are distinguishable from the facts in *Lopez*.

Moreover, even the court in *Lopez* recognized the maxim that "a plaintiff who substantiates her pain and suffering with evidence is entitled to general damages." *Lopez*, 130 Wn. App. at 91 (citing *Palmer*, 132 Wn.2d at 201). Mr. Nelson's evidence of ongoing pain and suffering, the permanency of the pain, and how it has impacted his life was undisputed.

As a result, Mr. Nelson was entitled to an award of future noneconomic damages and the trial court was correct in granting an additur.

Erickson's reliance on *Herriman v. May*, 142 Wn. App. 226, 174 P.3d 156 (2007), is also misplaced. In *Herriman*, a division three case, the defense expert testified that tests for malingering showed that Herriman's pain appeared to be greatly exaggerated. *Id.* at 230. The defense expert also testified that Herriman's range of motion was greater when he secretly observed her in the waiting room compared to when he tested her in the examination room. *Id.* The jury awarded Herriman \$16,000 for past economic damages, \$0 for future economic damages, and \$3,000 for past and future loss of consortium. *Id.* at 231. On a motion for a new trial, the trial court granted additur, with an increased verdict of \$138,152 or a new trial unless the defendants agreed to increase the verdict. *Id.* at 231.

On appeal, the appellate court reversed the trial court's decision. *Id.* at 232. The appellate court ruled that because there was evidence that Herriman was exaggerating her symptoms and malingering, the jury could reject Herriman's testimony. *Id.* at 233. The court also pointed to the evidence of Herriman's preexisting physical problems and the evidence that her emotional distress was skewing her physical symptoms as additional bases to substantiate the jury's verdict. *Id.* The court also found that expert testimony, if believed, proved that Herriman was exaggerating her pain and

that she should have recovered within three weeks after the accident. *Id.* at 234-235 (finding that “Herriman had no permanent injuries related to the accident, and no further medical treatment was needed”).

Unlike in *Herriman*, Dr. Jackson specifically testified that he believed Mr. Nelson was in pain and there was no evidence or suggestion of any kind that Mr. Nelson was faking, untruthful or malingering. RP 459. Moreover, while the plaintiff in *Herriman* had preexisting injuries and emotional distress problems which may have been affecting her pain, Dr. Jackson testified in our case that Mr. Nelson was asymptomatic prior to the collision. RP 442. Likewise, no evidence was introduced that in any way suggested that Mr. Nelson had emotional problems affecting, causing or contributing to his pain. RP 426-427. Thus, unlike *Herriman*, the jury in our case did not have sufficient evidence to refuse to award future noneconomic damages after concluding that Mr. Nelson’s symptoms were ongoing and permanent, requiring future medical treatment.

Therefore, the trial court did not err in granting an additur when the jury awarded \$10,000 for future economic damages, but failed to award anything for future noneconomic damages. There was insufficient evidence to support \$0 future noneconomic damages when all of the uncontroverted testimony supported future pain and suffering, future loss of enjoyment of life and future inconvenience.

D. Erickson failed to raise the procedural defect to the trial court, and thus the issue was not preserved for review.

A party may assign error on appeal only on a specific ground made at trial. *State v. Guloy*, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). This objection gives a trial court the opportunity to prevent or cure error. *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976).

The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Talias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); *see also State v. Grimes* 165 Wn. App. 172, 179, 267 P.3d 454, *review denied* 175 Wn.2d 1010, 287 P.3d 594 (2011) (ruling that appellate courts will not reward a party's failure to point out at an error which trial court, if given opportunity, might have been able to correct to avoid appeal); *Jones v. Hogan*, 56 Wn.2d 23, 28, 351 P.2d 153 (1960) (holding that if misconduct occurs, the trial court must be promptly asked to correct it, and counsel cannot remain silent, hoping for a favorable verdict, and when it is adverse, use claimed misconduct as a life preserver).

Erickson appeals the trial court's ruling granting Nelson's motion for additur or a new trial (and also for denying Erickson's motion for reconsideration of this ruling). Specifically, Erickson claims the trial court

failed to follow the procedure of RCW 4.76.030 when it denied Nelson's request for a new trial and granted the additur because the statute requires the trial court to have offered Erickson a choice of a new trial or additur.

But Erickson never raised this issue with the trial court. After the trial court granted the additur Erickson moved for reconsideration of the order granting the additur, but failed to raise the procedural defect with the trial court. CP 122. "An issue involving compliance with a procedural rule rather than a constitutional issue may not be raised for the first time on appeal." *A&W Farms v. Cook*, 168 Wn. App. 462, 470, 277 P.3d 67 (2012). As a result, this issue was not preserved and thus not properly before this Court.

Nevertheless, if this Court was to accept review of the trial court's procedural defect under RCW 4.76.030 and conclude that the trial court erred, the appropriate remedy would be to remand the matter back to the trial court to give Erickson the option of a new trial or accept the additur.

E. Attorney fees were properly awarded by the trial court upon finding that Erickson did not improve his position at the trial de novo.

Erickson next contends that the trial court erred by awarding Nelson attorney's fees pursuant to MAR 7.3 and RCW 7.06.050. According to Erickson, the trial court should have included taxable costs into Nelson's

offer of compromise, which would have resulted in Erickson improving his position at the trial de novo. Erickson's contention is without merit.

In *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012), after obtaining an arbitration award in favor of the plaintiff, the defendant filed a request for trial de novo. Prior to trial, the plaintiff properly served the defendant with two offers of compromise. *Id.* at 444. The final offer stated that it was "intended to replace the arbitrator's award of \$24,496.00 and replace the previous offer of compromise, with an award of \$17,350.00 including costs and statutory attorney fees." *Id.* (emphasis added).

During the trial de novo, the jury returned a verdict for the plaintiff in the amount of \$16,650.0. *Id.* The plaintiff moved for costs and attorney fees, asserting that the defendant failed to improve his position because the second offer of compromise included costs and statutory attorney fees, which meant that the trial court had to subtract \$1,016.28 in costs and statutory fees from the \$17,350.00 offer. *Id.* at 445. The trial court agreed, and reduced \$1,016.28 from the \$17,350 offer, resulting in an amount that was less than the jury verdict. *Id.* As a result, the trial court held that the defendant failed to improve his position at the trial de novo and awarded the plaintiff costs and attorney fees pursuant to MAR 7.3 and RCW 7.06. *Id.* The Court of Appeals upheld the trial court's ruling. *Id.*

The Supreme Court reversed concluding that it was improper to include costs in an offer of compromise because the term ‘costs’ is statutorily defined, and ‘costs’ are only available after an arbitration award is **reduced to judgment**. *Id.* at 449.

Niccum concedes that he was not entitled to costs on account of Enquist's request for trial de novo but insists that he was “not required to waive such costs in order to make an appropriate offer of compromise.” Resp't's Suppl. Br. at 5. In other words, he should be free to ask Enquist for costs even though he could not prevail on the court to award them. Niccum misses the significance of the fact that the arbitrator's award was not reduced to judgment. **Costs are only “allowed to the prevailing party upon the judgment.”** RCW 4.84.010. “In general, a prevailing party is one who receives an affirmative *judgment* in his or her favor.” *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997) (emphasis added). Thus, when a party appeals the arbitrator's award, not only is there no judgment, there is also no “prevailing party” for purposes of RCW 4.84.010. **Since Niccum did not enjoy “prevailing party” status, he did not have the right to include costs in his offer of compromise.**

Niccum's position rests on the premise that an offer of compromise that purports to include costs actually does so. There is, however, no statutory justification for segregating an offer of compromise into separate amounts corresponding to damages and costs. 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. Thus, comparing the jury's \$ 16,650 award to Niccum's \$ 17,350 offer of compromise does not involve a comparison of damages to damages plus costs, as Niccum suggests, but rather a comparison of damages to the lump sum that he offered to accept in exchange for settling the lawsuit.

The fact that a party is unable to include costs in an offer of compromise does not mean that the benefits of prevailing at arbitration will be extinguished by a request for a trial de novo. Although a request for trial de novo prevents the party that prevailed at arbitration from seeking statutory costs, it does not prevent that party from considering its expenses when deciding what amount it is willing to accept in settlement.

Niccum, 175 Wn.2d at 449-451 (emphasis added).

Erickson nevertheless argues that this Court should ignore the language in *Niccum* (termed by Erickson as the “confusing cost language”), and instead focus solely on a subjective analysis that requires the court to enter into the mind of the party making the offer to determine what amount the plaintiff would have settled his/her case for when the offer was made. See Appellant’s Brief, p. 19. Erickson contends that since “the plain meaning of the language in Nelson’s offer of compromise is that he would settle the case for \$26,000 plus the costs awarded at arbitration” the Court should have included the costs to the offer of compromise, which would have made the offer of compromise to be more than the \$26,000 offer, resulting in Erickson having improved his position at the trial de novo. But Erickson’s contention is directly contrary to the Supreme Court’s language in *Niccum*.

Although Nelson’s offer of compromise indicated that he was offering “to settle his claim against Defendant ... in the amount of \$26,000

plus taxable costs incurred at arbitration,” the Supreme Court made it clear that “[t]here is, however, no statutory justification for segregating an offer of compromise into separate amounts corresponding to damages and costs.” *Id.* at 450. “Since [Nelson] did not enjoy ‘prevailing party’ status, he did not have the right to include costs in his offer of compromise.” *Id.* Thus Erickson’s contention that this Court should include the separate taxable costs to the \$26,000 offer of compromise should be rejected as it would contravene the plain language in *Niccum*.

Furthermore, adopting Erickson’s approach would yield to highly inconsistent outcomes as it would cause court’s to venture into guessing what the ‘real settlement value’ of an offer of compromise was in each de novo case, and force the courts to surmise what the plaintiff really meant by his/her offer. For example, Nelson’s offer of compromise was “to settle his claim against Defendant ... in the amount of \$26,000 **plus taxable costs incurred at arbitration.**” Erickson claims that the “plus taxable costs incurred at arbitration” meant “plus costs awarded at arbitration”⁵ which according to Erickson was a known amount at the time of the offer. *See Appellant’s Brief*, p. 20-21. But “taxable costs incurred at arbitration” is not the same as “costs awarded at arbitration.” “Costs incurred at

⁵ Instead of “plus taxable costs incurred at arbitration,” Erickson incorrectly asserts that Nelson’s offer stated “plus the costs awarded at arbitration.” *See Appellant’s Brief*, p. 20-21.

arbitration”⁶ are more limited than the taxable costs awarded by an arbitrator pursuant to RCW 4.84.010. For example, “taxable costs incurred at arbitration” includes only those expenses that became liable as a result of the arbitration such as reports and records ordered to be used at the arbitration, or fees paid to witnesses to attend and testify at the arbitration. But “taxable costs incurred at arbitration” does not include items such as filing fees, service of process fees, fees for publication, or notary fees, which are permitted taxable costs under RCW 4.84.010. The “costs awarded at arbitration” were all of the taxable costs that the arbitrator concluded were permitted under RCW 4.84.010, which was more than what Nelson requested in his offer of compromise.

Simply put, to compel the courts to discern what a plaintiff may have intended by segregating the offer of compromise to separately include cost language into the offer of compromise would cause too much speculation and inconsistent outcomes. Thus, the *Niccum* Court made it clear that since there was “no statutory justification for segregating an offer of compromise into separate amounts corresponding to damages and costs,” the plaintiff “did not have the right to include costs in his offer of compromise.” *Niccum*, at 450. Judge Yu agreed after her “re-reading of *Niccum*” and declined to

⁶ Incurred is defined as “to become liable or subject to.” *See* Merriam-Webster’s Dictionary (www.merriam-webster.com/dictionary/incur).

include costs to the \$26,000 offer. Therefore, this Court should affirm the trial court's decision that Erickson failed to improve his position and also affirm the award fees and costs to Nelson pursuant to MAR 7.3 and RCW 7.06.

2. **The *Niccum* Court specifically addressed an offer of compromise that purported to include costs, and concluded that it cannot include costs because costs have no statutory effect until after a judgment is entered.**

Erickson next argues that *Niccum* “does not dictate that if an offer of compromise referenced costs, such amount must be ignored in the calculations.” *See Erickson Brief*, p. 21. This argument is directly contradicted by the plain language in *Niccum*. The *Niccum* Court specifically rejected the proposition that “an offer of compromise that purports to include costs actually does so.” *Id.* at 450. “[T]he ‘lack of a statutory entitlement’ leaves a court with no basis for giving effect to the inclusion of costs in the offer.” *Id.* at 451 (emphasis added). Since costs are a statutory construction, and the statute states that costs are not allowed unless and until a judgment has been entered and there is a prevailing party, costs cannot be given legal effect in an offer of compromise. *Id.* at 449-450. In the same way, in the instant case, the trial court correctly concluded that the offer of compromise was for \$26,000.

F. Attorney Fees Should Be Granted to Respondent

Pursuant to MAR 7.3 and RCW 7.06.060, the court shall assess costs and reasonable attorney's fees against the appealing party who fails to improve his position following a trial de novo. Should this Court affirm the trial court's decisions, Respondent respectfully requests that this Court grant fees and costs to Respondent pursuant to MAR 7.3, RCW 7.06.060, RAP 14.2 and 18.1.

V. CONCLUSION

At trial, Mr. Nelson presented overwhelming evidence, substantiated by his family, friends, and treating providers, that the collision caused him pain and that he had endured continuing pain since the collision. Both Dr. Jackson and Dr. Harper agreed that Mr. Nelson was asymptomatic prior to the collision, and Dr. Jackson testified that there was no evidence of any subsequent or intervening injury to Mr. Nelson. The jury was properly instructed that Erickson was responsible for the lighting up of an asymptomatic pre-existing condition. The jury found that all of Mr. Nelson's injuries were related to the collision and that his pain was permanent. The jury awarded all past medical specials beyond the arbitrary 8 month 'cutoff' period suggested by Dr. Jackson. The jury also awarded Mr. Nelson \$10,000 in future medical expenses. However, the jury also, inexplicably, awarded \$0 for future noneconomic damages. There was

insufficient evidence to support the jury's verdict as it related to Nelson's future noneconomic damages. As a result, the trial court correctly granted an additur in the amount of \$3,000.

Erickson waived the right to appeal the trial court's procedural mistake of not offering Erickson the option to accept an additur in lieu of a new trial by failing to raise the issue during his motion for reconsideration. Nevertheless, should this Court accept review of that error, and conclude that the trial court did err by failing to give Erickson the option of a new trial or an additur, the correct remedy is to remand the matter to the trial court to give Erickson the option of an additur or a new trial.

As for the trial court's award of attorney fees, the Supreme Court in *Niccum* established that costs are a function of statute, and pursuant to the statute, costs can only be awarded after a judgment has been entered. The *Niccum* Court further held that an offer of compromise cannot be segregated to separately set forth damages and costs, and that the plaintiff did not have the right to include costs in his offer of compromise. In the instant case, once Erickson requested a trial de novo, Nelson was no longer the prevailing party at arbitration, and therefore a judgment on the arbitration could not be entered and statutory costs at arbitration could not be awarded. Since costs could not be awarded at arbitration to Nelson, the offer of compromise which purported to include costs had no legal effect. That was the holding

of *Niccum*, and applied to the instant case, the trial court correctly concluded that Nelson's offer of compromise was \$26,000, which meant that Erickson as the party seeking de novo review failed to improve his position at trial. Therefore, the trial court was correct in awarding attorney fees pursuant to MAR 7.3 and RCW 7.06.

Respectfully submitted this 24th day of September, 2014.

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Jess Nelson

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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JESS NELSON,)
) No. 71709-0-I
)
) Plaintiff-Respondent,)
) AFFIDAVIT OF SERVICE
)
) v.)
)
)
) MICHAEL ERICKSON and JANE)
) DOE ERICKSON, and the marital)
) community composed thereof,)
)
)
) Defendants-Appellants.)
)
)

2014 SEP 25 PM 2:43
COURT OF APPEALS
STATE OF WASHINGTON

SYUZANNA BALIYAN, being first duly sworn on oath, states:

1. I am now and at all times mentioned herein was a resident of the State of Washington, over the age of 18 years, not a party to the above-entitled action or interested therein, and competent to be a witness in this cause.
2. On September 24, 2014 I caused to be served a copy of the *Brief of Respondent* and *Affidavit of Service* via email and legal messenger to the following individuals identified below:

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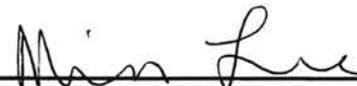
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5 I declare under penalty of perjury under the laws of the State of Washington that the
6 foregoing is true and correct.

7 DATED this 24th day of September, 2014 in Bellevue, Washington.

8
9 
10 **SYUZANNA BALIYAN**

11 SUBSCRIBED AND SWORN to before me this 24th day of September 2014.




NOTARY PUBLIC in and for the State of WA
Printed Name: Min Lee
My commission expires: 4/6/15