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Supreme Court No. 92489-9  
Court of Appeals No. 71709-0-I

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**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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**JESS NELSON,**  
**Plaintiff/Petitioner**

**v.**

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

**Defendants/Respondents**

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**SUPPLEMENTAL BRIEF OF PETITIONER**

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 **ORIGINAL**

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## I. INTRODUCTION

The purpose of this supplemental memorandum is to set forth *all* of the pertinent facts and case law necessary to decide the narrow issue before this Court. As discussed below, the pertinent facts are few and undisputed, and the controlling rule of decision is set forth in this Court's opinion in *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012). Indeed, not only is it clear that the Court of Appeals erroneously interpreted and applied *Niccum*, that same court recently issued two other opinions that *correctly* interpret *Niccum* and *contradict* the ruling at issue here. This Court should summarily reverse the Court of Appeals' erroneous decision in this case and reinstate the trial court's ruling awarding attorney fees and costs under MAR 7.3.

## II. PERTINENT FACTS

The pertinent facts are as follows. Plaintiff Jess Nelson filed a lawsuit against Defendant Michael Erickson after Erickson rear-ended Nelson's truck. CP 1-4. The matter proceeded to mandatory arbitration, and the arbitrator awarded \$43,401 in damages and \$1,522 in attorney fees and costs in favor of Nelson. CP 832. Erickson then requested a trial de novo. CP 12. Prior to the trial, Nelson sent Erickson an offer of compromise in which he offered to settle for "\$26,000 plus taxable costs incurred at arbitration." CP 839.

At the conclusion of the trial de novo, the jury returned a verdict in favor of Nelson for \$24,167, but neglected to award future economic damages. CP 635. Nelson filed a motion for additur to remedy that error. The trial court – Judge (now Justice) Mary Yu – granted that motion, which increased the amount of damages awarded to Nelson to \$27,167. CP 670-71, 723-24. There is no issue before this Court regarding the propriety of the trial court’s additur (which the Court of Appeals affirmed), so the final result of the trial de novo is \$27,167.

Because \$27,167 exceeded \$26,000 (the amount of Nelson’s offer of compromise excluding costs and fees), Nelson requested attorney fees and costs under MAR 7.3 and RCW 7.06.050(1)(b). Under MAR 7.3, “the court shall assess costs and reasonable attorney fees against a party who appeals the [arbitration] award and fails to improve the party’s position on the trial de novo.” Under RCW 7.06.050(1)(b), “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 trial court initially denied Nelson’s motion for attorney fees and costs, so Nelson filed a motion for reconsideration. CP 1005-18. The court then invited a response and reply and granted the motion for reconsideration. CP 1024, 1054-55. The court explained:

The Ct. grants the Motion to Reconsider based on a re-reading of Niccum. This Ct. 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 Pl. is entitled to fees + costs.

CP 1055. The court then awarded reasonable attorney fees totaling \$58,980 and costs totaling \$4,488. CP 1047-53.

Erickson appealed (CP 1056-80), and the Court of Appeals reversed the award of attorney fees based on its conflicting interpretation of *Niccum*. Nelson then filed a motion for discretionary review regarding that issue, which this Court granted.

### III. ARGUMENT

#### A. **This Court's Opinion In *Niccum* Squarely Resolves The Issue Before The Court In Nelson's Favor.**

The determinative issue in this appeal is whether the amount of costs awarded by the arbitrator (\$1,522, including statutory attorney fees) should be considered in determining the amount of Nelson's offer of compromise. If the offer of compromise *does not* include costs in the arbitration – as the trial court ruled (CP 1055) – then the amount of the offer is \$26,000. If so, Erickson did not improve his position on the trial de novo (because \$27,167 is more than \$26,000) and is therefore liable for costs and reasonable attorney fees under MAR 7.3.

This Court’s opinion in *Niccum* directly addresses and resolves the foregoing issue as a matter of law. In *Niccum*, the plaintiff made an offer of compromise following mandatory arbitration that, similar to Nelson’s offer, expressly referred to “costs and statutory attorney fees.” 175 Wn.2d at 444. Also similar to the circumstances presented here, whether the defendant in *Niccum* improved his position on the trial de novo turned on whether the trial court included or excluded costs in determining the amount of the offer of compromise. *Id.* at 445-46.

Addressing that issue, this Court squarely and unequivocally held that it was “improper” for the trial court to consider costs in determining the amount of the plaintiff’s offer of compromise *even though* the plaintiff’s offer “purports to include them.” *Id.* at 446, 448. The Court also explained the legal basis for its holding: “if a party appeals the arbitrator’s award, the award is not reduced to judgment, meaning that the party prevailing at arbitration is not entitled to costs, at least, not before the entry of judgment on trial de novo.” *Id.* at 449 (internal footnote omitted). The Court further explained:

[W]hen 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.*

*Id.* at 449-50 (emphasis added, internal footnote omitted). Based on this reasoning, the Court squarely rejected the argument “that an offer of compromise that purports to include costs actually does so.” *Id.* at 450.

It necessarily follows that Judge Yu in this case *correctly* awarded costs and reasonable attorney fees under MAR 7.3. As Judge Yu ruled on reconsideration, based on her “re-reading of Niccum,” she had previously “erred ... by including costs in the offer” and, excluding costs as required by *Niccum*, “Nelson’s offer of compromise was for \$26,000.00.” CP 1055. As a result, “Erickson failed to improve his position at trial and Pl. is entitled to fees + costs.” *Id.* Judge Yu correctly applied *Niccum* to Nelson’s offer of compromise, and her ruling should be affirmed.

**B. The Court Of Appeals’ Decision Is Contrary To *Niccum* And Inconsistent With Its Subsequent Opinions Applying *Niccum*.**

Ignoring this Court’s holding and meticulous explanation of that holding in *Niccum*, the Court of Appeals focused instead on “[t]he essential point in *Niccum*,” which it postulated is “to discourage litigants from making confusing offers.” Opinion at 18. The court then concluded that “Nelson’s offer was quite clear.” *Id.* at 19. But under *Niccum*, the “quite clear” meaning of Nelson’s offer of compromise is that he was willing to settle for \$26,000 plus a variable (taxable costs) that this Court has held is equal to \$0. Just as “\$17,350 including costs” equals \$17,350

in *Niccum*, “\$26,000 plus costs” equals \$26,000 here. And Erickson is presumed to know that. See *Maynard Inv. Co. v. McCann*, 77 Wn.2d 616, 624, 465 P.2d 657 (1970) (“every person is presumed to know the law and is bound thereby”). Contrary to the Court of Appeals’ analysis, the only way that Nelson’s offer of compromise can be read to mean something *other than* \$26,000 is if the reader *ignores* this Court’s holding in *Niccum* that a plaintiff does “not have the right to include costs in his offer of compromise.” 175 Wn.2d at 450.

Indeed, since the Court of Appeals issued its ruling in this case, the same court has issued two other opinions that *correctly* interpret *Niccum* and *contradict* the ruling at issue here. In *Bearden v. McGill*, \_\_\_ Wn. App. \_\_\_, 2016 WL 1436700, \*5 (Wash. Ct. App. Apr. 11, 2016), the Court of Appeals recognized that “in *Niccum*, the Supreme Court excluded fees and costs from its comparison because a party making an offer of compromise is not yet entitled to fees and costs.” *Id.* at \* 5 (internal footnote omitted). And in *McKillop v. Pers. Representative of Estate of Carpine*, \_\_\_ Wn. App. \_\_\_, 2016 WL 492646 (Wash. Ct. App. Feb. 8, 2016), the Court of Appeals applied *Niccum* to a similar offer of compromise and correctly held that because the plaintiff “had no entitlement to costs at the time of her offer,” the trial court “had ‘no basis for giving effect to the inclusion of costs in the offer.’” *Id.* at \*3 (quoting

*Niccum*, 175 Wn.2d at 451). These subsequent opinions are correct; the earlier decision is not.

**C. Erickson's Attempts To Distinguish *Niccum* Are Unpersuasive And Wrong.**

Erickson's arguments regarding *Niccum* easily fail. First, Erickson asserted in his answer to Nelson's petition for review that *Niccum* is distinguishable because the costs and attorney fees at issue in *Niccum* were "unspecified and unknown at the time of the offer." Answer at 8. While the arbitrator in *Niccum* did not award costs and fees, this Court recognized that *Niccum* had "requested costs and attorney fees." 175 Wn.2d at 449 n.7. In any event, the Court's holding in *Niccum* had nothing to do with whether the costs and fees were known at the time of the offer of compromise; it turned instead on the plaintiff's lack of any legal entitlement to such costs and fees when, as here, the defendant has requested a trial de novo.

Second, Erickson attempted in his answer to Nelson's petition for review to distinguish between "costs" – the term used in the offer of compromise in *Niccum* – and "taxable costs" – the phrase used in Nelson's offer of compromise here. Answer at 12. That is a meaningless distinction, as "taxable costs" are merely those costs that can be taxed against a party that does not prevail in litigation. See *Weiss v. Bruno*, 83

Wn.2d 911, 916-17, 523 P.2d 915 (1974) (describing “taxable costs” on appeal). As this Court held in *Niccum*, there is “no basis” to give legal effect to a party’s reference to such costs in an offer of compromise under RCW 7.06.050(1)(b) because the plaintiff has no statutory entitlement to recover those amounts at the time of the offer. 175 Wn.2d at 451.

Lastly, Erickson relies on an email that his counsel sent to Nelson’s counsel “as confirmation of the terms of the offer of compromise.” Answer at 9. But that email was written by Erickson’s counsel, not Nelson’s counsel, and it was sent to Nelson’s counsel *after* Erickson had rejected Nelson’s offer of compromise. CP 938. Nelson was not required to respond to the email, nor did he. In addition, this Court recognized in *Niccum* that an offer of compromise under RCW 7.06.050(1)(b) is not governed by contract principles but is instead “given legal effect only by statute.” 175 Wn.2d at 451. The email from Erickson’s counsel is not a statute, and it cannot alter the legal effect of Nelson’s previous reference to taxable costs.

#### **IV. CONCLUSION**

For the foregoing reasons, the Court should reverse the decision of the Court of Appeals, reinstate the trial court’s ruling awarding attorney fees and costs under MAR 7.3, and award additional attorney fees and

costs in favor of Nelson under MAR 7.3 as Nelson requested in the Court of Appeals. *See* RAP 18.1(b).

DATED: April 29, 2016

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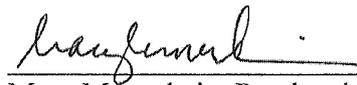
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\_\_\_\_\_  
Mary Monschein, Paralegal

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Enclosed for filing in the above-referenced matter is the Supplemental Brief of Petitioner.

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Thank you for your attention to this matter.

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