

RECEIVED
MAY - 2 2016
Washington State
Supreme Court
h/h

NO. 92489-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

JESS NELSON, an individual,

Petitioner,

vs.

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

Respondents.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Mary Yu, Judge

SUPPLEMENTAL BRIEF OF RESPONDENTS

REED McCLURE

By Marilee C. Erickson

WSBA #16144

Suzanna Shaub

WSBA #41018

Attorneys for Respondents

Address:

Financial Center
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161-1087
(206) 292-4900

TABLE OF CONTENTS

	Page
I. NATURE OF THE CASE.....	1
II. ISSUES PRESENTED.....	1
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT.....	4
A. DIVISION I'S DECISION IS CONSISTENT WITH <i>NICCUM V. ENQUIST</i>.....	4
B. NEITHER <i>NICCUM</i> NOR DIVISION I USED OR PROHIBITED CONTRACT PRINCIPLES.....	12
V. CONCLUSION	14

TABLE OF AUTHORITIES
Washington Cases

	Page
<i>Bearden v. McGill</i> , ___ Wn. App. ___ (April 11, 2016, No. 72926-8-1),.....	6
<i>Haley v. Highland</i> , 142 Wn.2d 135, 12 P.3d 119 (2000)	5
<i>Haywood v. Aranda</i> , 143 Wn.2d 231, 19 P.3d 406 (2001).....	5
<i>Hutson v. Costco Wholesale Corp.</i> , 119 Wn. App. 332, 80 P.3d 615 (2003).....	6
<i>Nevers v. Fireside, Inc.</i> , 133 Wn.2d 804, 947 P.2d 721 (1997).....	5
<i>Niccum v. Enquist</i> , 152 Wn. App. 496, 215 P.3d 987 (2009), <i>rev'd</i> , 175 Wn.2d 441, 286 P.3d 966 (2012).....	8
<i>Niccum v. Enquist</i> , 175 Wn.2d 441, 286 P.3d 966 (2012).....	1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13
<i>Perkins Coie v. Williams</i> , 84 Wn. App. 733, 929 P.2d 1215, <i>rev. denied</i> , 132 Wn.2d 1013 (1997)	6
<i>Wiley v. Rehak</i> , 143 Wn.2d 339, 20 P.3d 404 (2001).....	6
Statutes	
RCW ch. 7.06.....	3
RCW 7.06.050	5, 13
RCW 7.06.050(1)(a)	5
RCW 7.06.050(1)(b).....	5
RCW 7.06.060	4
RCW 7.06.060(1).....	4, 5
Rules and Regulations	
Mandatory Arbitration Rules (MAR)	1
MAR 7.3	3, 4, 5, 6, 7, 8, 10, 14
RAP 13.4.....	4
063060.000054/625820	

I. NATURE OF THE CASE

This case concerns whether a party improves his position on trial de novo when the offer of compromise amount is a sum certain and is more than the jury's verdict. Division I of the Court of Appeals correctly concluded Mr. Erickson improved his position at the trial de novo where the verdict amount was \$27,167 and the offer of compromise was \$27,522.19. Division I's decision is consistent with *Niccum v. Enquist*, 175 Wn.2d 441, 286 P.3d 966 (2012), and the purposes of MAR. This Court should affirm.

II. ISSUES PRESENTED

1. When a party offers to settle a case for "\$26,000 plus taxable costs incurred at arbitration" and the taxable costs at arbitration are \$1,522.19 is the amount of the offer of compromise \$27,522.19?

2. When a party confirms he will settle a case for \$27,522.19, does a court correctly compare that amount to the verdict amount to determine whether a party has improved his position on trial de novo?

III. STATEMENT OF THE CASE

Plaintiff/petitioner Jess Nelson sued defendant/respondent Michael Erickson for injuries from an automobile accident. (CP 1-4) The case was moved to mandatory arbitration. (CP 9-10) The arbitrator awarded Nelson \$43,401.59 in compensatory damages and taxable costs of

\$1,522.19. (CP 832, 928, 1081) Erickson filed a timely request for a trial de novo. (CP 12)

Nelson presented Erickson with a written offer of compromise stating:

Pursuant to RCW 7.06.050 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.

(CP 839) (emphasis added). Erickson confirmed that Nelson would settle the case for \$27,522.19, the \$26,000 plus the \$1,522.19 taxable costs awarded at arbitration. (CP 938)¹

Erickson did not accept the offer of compromise, and the case proceeded to a jury trial. (CP 544) The jury awarded Nelson \$24,167 in compensatory damages. (CP 635) The jury did not award any future non-economic damages. (CP 635) The trial court granted Nelson's motion for additur and awarded an additional \$3,000. (CP 670-71) Judgment was entered in favor of Nelson in the total amount of \$27,896.98, which included \$24,167.00 for the jury verdict, \$3,000.00 for the additur, and \$729.98 in costs. (CP 723-24)

¹ The offer of compromise was sent on September 25, 2013, and included a ten calendar day deadline for acceptance. (CP 839, 937) The confirmation of the settlement amount is contained in an October 24, 2013, e-mail exchange between counsel. (CP 938)

Nelson moved for attorney fees pursuant to MAR 7.3 and RCW ch. 7.06. (CP 795-822) The motion was initially denied then granted on reconsideration. (CP 1005-09, 1010-18, 1024) On reconsideration, the trial court determined Erickson had not improved his position at trial relative to the \$27,167.00 verdict because Nelson's offer of compromise was for \$26,000 and excluded costs. (CP 1047-55)

In a handwritten addendum to the order, the court stated as follows:

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 awarded Nelson MAR 7.3 fees and costs and entered an amended judgment. (CP 1044-46, 1047-55) Erickson timely appealed. (CP 1056-80)

On September 14, 2015, Division I of the Court of Appeals issued its unpublished decision affirming the trial court's award of additur, reversing the trial court's MAR 7.3 attorney fees and costs, and remanding with instructions to vacate the MAR 7.3 award of fees and costs. Division I determined Erickson improved his position at the trial de novo because the jury verdict did not exceed Nelson's offer of compromise in the

amount of \$27,522.19 (\$26,000.00 plus the \$1,522.19 in costs awarded by the arbitrator). Nelson was therefore not entitled to a MAR 7.3 award of fees and costs. This Court granted review under RAP 13.4 and should affirm.

IV. ARGUMENT

A. DIVISION I'S DECISION IS CONSISTENT WITH *NICCUM v. ENQUIST*.

Niccum tells us that when a jury's verdict is less than the offer of compromise, a party has improved his position on trial de novo. *Niccum v. Enquist*, 175 Wn.2d 441, 452, 286 P. 3d 966 (2012). Here the jury's verdict plus additur was less than Nelson's offer of compromise, therefore Erickson improved his position at the trial de novo. Consistent with *Niccum*, Division I reversed the trial court's award of MAR 7.3 fees and costs. This Court should affirm.

RCW 7.06.060 and MAR 7.3 impose an obligation upon a party who appeals a mandatory arbitration award and requests a trial de novo. If the party does not improve his position on the trial de novo, then he must pay his opponent's attorney fees and costs incurred after the de novo request. RCW 7.06.060.

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.

MAR 7.3 (emphasis added). Similarly, RCW 7.06.060(1) provides:

The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo.

When a party serves an offer of compromise after the arbitration, the compromise offer becomes the amount used to determine whether a party has improved his position at the trial de novo. RCW 7.06.050(1)(a) and (b). The statute provides as follows:

(b) In any case in which an offer of compromise is not accepted by the appealing party within ten calendar days after service thereof, for purposes of MAR 7.3, the amount of the offer of compromise shall replace the amount of the arbitrator's award for determining whether the party appealing the arbitrator's award has failed to improve that party's position on the trial de novo.

RCW 7.06.050(1)(b) (emphasis added).

The primary goal of mandatory arbitration is to reduce congestion in the courts and delays in hearing cases. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997); *Haywood v. Aranda*, 143 Wn.2d 231, 238, 19 P.3d 406 (2001). The legislature intended MAR 7.3 and RCW 7.06.050 to encourage settlement and discourage meritless appeals. *Niccum v. Enquist*, 175 Wn.2d at 451.

[The possibility of MAR 7.3 fees] should compel parties to assess the arbitrator's award and the likely outcome of a trial de novo with frankness and prudence; meritless trials de novo must be deterred.

Haley v. Highland, 142 Wn.2d 135, 159, 12 P.3d 119 (2000), J. Talmadge concurring opinion.

“A supplemental goal of the mandatory arbitration statute is to discourage meritless appeals.” *Wiley v. Rehak*, 143 Wn.2d 339, 348, 20 P.3d 404 (2001); *Perkins Coie v. Williams*, 84 Wn. App. 733, 737-38, 929 P.2d 1215, *rev. denied*, 132 Wn.2d 1013 (1997). Stated another way, a goal of mandatory arbitration is to permit meritorious appeals. “[A]n interpretation of MAR 7.3 that discourages meritorious appeals would also frustrate the purposes of the mandatory arbitration system.” *Bearden v. McGill*, ___ Wn. App. ___ (April 11, 2016, No. 72926-8-1), slip op. at 14 (emphasis in original) (*citing Hutson v. Costco Wholesale Corp.*, 119 Wn. App. 332, 338, 80 P.3d 615 (2003); *Niccum*, 175 Wn.2d at 452). The trial court’s interpretation of MAR 7.3 here undermines a party’s right to a meritorious trial de novo.

Niccum teaches us that the offer of compromise is the amount for which a party is willing to settle the case. *Niccum* encourages parties to make clear, not confusing, offers of compromise.

Consistent with *Niccum*, this case involves a trial de novo where Nelson made an offer of compromise. Nelson told Erickson he would settle the case for payment of \$27,522.19 (i.e., \$26,000 plus the \$1,552.19 taxable costs awarded at arbitration). (CP 839) Erickson assessed the likely outcome at trial de novo and decided to proceed. The jury’s award plus the trial court’s additur was less than the offer of compromise.

Erickson's trial was meritorious and he improved his position at trial de novo. Therefore, Division I correctly decided Erickson is not liable for MAR 7.3 fees and costs.

In *Niccum*, this Court addressed the propriety of subtracting costs from an offer of compromise before comparing that offer to the jury's award for purposes of determining whether a party has improved his position on trial de novo. 175 Wn.2d at 446. After the defendant sought a trial de novo from a mandatory arbitration award, the plaintiff made a confusing offer of compromise. *Id.* at 444. The offer of compromise was for "\$17,350.00 including costs and statutory attorney fees." *Id.* (emphasis omitted). The unspecified amount of "costs and statutory attorney fees" the compromise offer purported to include was unknown at the time. *Id.* In determining whether attorney fees were warranted under MAR 7.3, the trial court subtracted \$1,016.28 in "costs" from the offer of compromise before comparing it to the \$16,650.00 jury award. *Id.* at 445. The Supreme Court reversed. *Id.* at 452-53.

Niccum held that the trial court should have made "a comparison of damages to the lump sum that he offered to accept in exchange for settling the lawsuit." *Id.* at 450. The Court further explained:

It is our view that an ordinary person would consider that the "amount" of an offer of compromise is the total sum of

money that a party offered to accept in exchange for settling the lawsuit.

Id. at 452. Despite the confusing language about inclusive costs in the offer of compromise, the Court determined that the amount the plaintiff was willing to settle for was \$17,350, and that was the number the Supreme Court mandated be compared to the damages awarded at trial. *Id.*

Nelson argues that *Niccum* prohibits a party from including costs in an offer of compromise. Nelson misconstrues the *Niccum* facts and holding. In *Niccum*, the trial court subtracted the amount of the statutory costs awarded at trial from the offer of compromise to calculate the offer of compromise amount. The trial court then compared the jury verdict to the reduced offer of compromise and concluded Enquist had not improved his position. Division III affirmed, stating the “segregated amount of an offer must replace an amount in the same category granted under the arbitrator’s award.” *Niccum v. Enquist*, 152 Wn. App. 496, 550-01, 215 P.3d 987 (2009).

This Court reversed, concluding the offer of compromise cannot be segregated. The Court then explained a party could include some sum in his offer of compromise to cover expenses. 175 Wn.2d at 450. Those expenses are just dollars. The Court stated:

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, at Niccum suggests, but rather a comparison of damages to the lump sum that he offered to accept in exchange for settling the lawsuit.

175 Wn.2d at 450.

Similarly here, Division I compared the amount of the damages Nelson received at the trial de novo with the amount that Nelson “offered to accept in exchange for settling the lawsuit.” *Id.*

The *Niccum* majority and dissenting opinions can be reconciled on the facts presented in *Nelson v. Erickson*.

The *Niccum* majority opinion concluded that when an offer states a sum certain inclusive of unspecified costs, the sum certain becomes the amount of the offer of compromise because costs are not recoverable when a case settles. *Id.* at 450, 452-53.

The *Niccum* dissent did not disagree with the majority’s outcome. The *Niccum* dissent disagreed only with the majority’s conclusion that costs could not be included in an offer of compromise.

The *Niccum* majority and dissent agree that to determine whether Enquist improved his position on the trial de novo, the court had to “determine what exactly was offered in the offer of compromise.” 175

Wn.2d at 456 (Chambers, J. dissenting). “It is our view that an ordinary person would consider that the ‘amount’ of an offer of compromise is the total sum of money that a party offered to accept in exchange for settling the lawsuit.” *Niccum*, 175 Wn.2d at 452 (Alexander, J. majority).

Here Nelson decided to include costs in his offer of compromise. He told Erickson he would settle his case for \$26,000 plus the taxable costs incurred at arbitration. Both Nelson and Erickson knew the amount of the “taxable costs incurred at arbitration.” (CP 839) The amount was \$1,522.19. Erickson knew that he could settle the case and avoid the risk of not improving his position on the trial de novo, if he paid Nelson \$27,552.19. Nelson confirmed he would settle for \$27,522.19.

In *Niccum*, the plaintiff said he would settle (through his offer of compromise) for “17,350.00 including costs and statutory attorney fees.” *Id.* at 444. No costs were awarded at arbitration. At trial, the jury awarded \$16,650 and the trial court awarded \$1,016.28 in costs and statutory attorney fees. Plaintiff argued Enquist, the de novoing party, had not improved his position because the jury verdict of \$16,650 was more than the offer of compromise. Plaintiff claimed the offer of compromise was \$16,333.72 by taking the \$17,350 offer of compromise less the \$1,016.28 in statutory costs. Therefore, plaintiff claimed he was entitled to MAR 7.3 fees and costs.

The *Nelson* offer of compromise did not have the ambiguity contained in the *Niccum* offer of compromise. In *Niccum*, plaintiff wanted to settle for an amount “including costs and statutory attorney fees.” No costs and statutory attorney fees were awarded at arbitration. There was no amount that could be computed to determine what that figure might be. Also, the word “including” created confusion about whether the costs and statutory attorney fees were to be added to the \$17,350 or subtracted from the \$17,350. The *Niccum* majority determined that costs could not be deducted from the \$17,350 because costs are not owed when a case settles. *Id.* at 450.

The *Nelson* offer of compromise was not confusing. Mr. Nelson said he wanted \$26,000 plus taxable costs incurred at arbitration. The amount of the offer of compromise could be easily and certainly calculated. The arbitrator had awarded taxable costs of \$1,522.19. The clear terms of the offer of compromise—the \$1,522.19 in taxable arbitration costs was to be added to the \$26,000.

As Division I correctly concluded, the essential point in *Niccum* was to discourage litigants from making confusing compromise offers.

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.

Id. at 450. Division I’s decision is consistent with *Niccum*. This Court should affirm.

B. NEITHER *NICCUM* NOR DIVISION I USED OR PROHIBITED CONTRACT PRINCIPLES.

Nelson mislabels the confirmation/verification of the settlement amount as a contract principle. (Petition at 7) There were no contract principles applied here. Division I did not rely on contract law when it looked at an e-mail confirming the details of the offer of compromise. Nowhere in the opinion does Division I state that it relied on principles of contract law. Nowhere in the opinion does Division I reference contract law. Rather, Division I relied on the plain language of the offer of compromise to interpret its terms (“Nelson’s offer was quite clear. He offered to settle his case for \$26,000 plus taxable costs incurrent in arbitration”). *Nelson v. Erickson*, 2015 WL 5345709, at *10. The court merely used the October 24, 2013 e-mail as confirmation of the terms of

the offer of compromise.² (*Id.*; CP 839, 938) In other words, it used the e-mail to confirm the amount for which Nelson was willing to settle. *Id.*

Moreover, nothing in *Niccum* prohibits use of contract principles. In addressing the dissenting opinion's conclusion that a party could include "costs" in an offer, the majority referred to a "sort of freedom of contract theory." 175 Wn.2d at 451. The majority noted that no contract was formed. The *Niccum* majority and dissent were both concerned with determining what amount *Niccum* had offered to settle the case. Here, Nelson's settlement amount was clear.

A straightforward application of RCW 7.06.050 and the holding in *Niccum* reveal that Erickson improved his position at trial. Comparing the damages awarded at trial (\$27,167) to the lump sum petitioner offered to accept in exchange for settling the lawsuit (\$27,522.19), as required by *Niccum*, Erickson clearly improved his position at trial. As Division I correctly determined, attorney fees to Nelson were therefore not warranted.

² The e-mail from Erickson's counsel to Nelson's counsel provided, "... I understand that your current demand is: Your prior Offer of Compromise of \$26,000 plus fees and costs awarded at arbitration (\$27,522.19)...." (CP 938)

V. CONCLUSION

Division I correctly reversed the trial court's award of MAR 7.3 attorney fees and costs to plaintiff/petitioner Nelson because Mr. Erickson improved his position on the trial de novo. Mr. Erickson asks this Court affirm.

DATED this 20th day of April, 2016.

REED McCLURE

By 
Marilee C. Erickson WSBA #16144
Suzanna Shaub WSBA # 41-18
Attorneys for Respondents

063060.000054/623622.docx