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COURT OF APPEALS
STATE OF WASHINGTON
2013 AUG 10 AM 11:52

NO. 68257-1-1

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

SOON KIM,

Respondent,

vs.

LINDSAY ROGER,

Appellant.

APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
Honorable Larry McKeeman, Judge

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Respondent fails to address a key issue raised in this appeal, namely that the trial court failed to properly interpret the statute's language according to its plain meaning. Respondent also misapprehends the policies underpinning the mandatory arbitration system. An appropriate review of the applicable law and facts reveals that the appellant improved her position at trial, and attorney fees were improperly granted by the trial court. Appellant asks this Court to reverse the judgment and award of attorney fees.

II. ARGUMENT

A. THE PLAIN LANGUAGE OF THE STATUTE MANDATES REVERSAL.

Kim does not dispute the proposition that a court must interpret the legislature's intent behind rules and statutes as expressed in the plain language. *See State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). Further, Kim does not contest that the plain language of RCW 7.06.050 instructs that "the amount" of the offer of compromise replaces "the amount" of the arbitrator's award. Indeed, Kim altogether ignores the statutory language and the trial court's failure to follow the plain meaning of the statute.

RCW 7.06.050 unequivocally states that "the amount of the offer of compromise shall replace the amount of the arbitrator's award" for determining whether a party improved his position and whether attorney fees are appropriate. RCW 7.06.050(1)(b) (emphasis added). There is no ambiguity about this language, and it should be applied as written. *See*

Roggenkamp, 153 Wn.2d at 625. Thus, the amount of Kim's offer of compromise (\$16,500.00) replaced the amount of the arbitrator's award (\$25,579.04). With the substitution, the amount of the arbitrator's award was lowered, but it remained an award for economic damages and pain and suffering (and not one which included costs or fees). The language of the statute does not allow an offer of compromise to change the nature of the arbitrator's award. The statute could have been written to instruct the court to "replace the arbitrator's award with the offer of compromise." However, it was not written that way, and the legislature's precise language regarding "the amounts" must be followed.

Although Kim argues in favor of "compare[ing] comparables," her analysis avoids the fact that she initially changes the nature of the arbitrator's award by injecting costs and fees. (Respondent's Brief 3-4) This is a key disconnect in Kim's and the trial court's reasoning. RCW 7.06.050 recognizes that, even if an offer of compromise is made, the arbitrator's award must be compared to the jury award. By the plain language of the statute, an offer of compromise can change only the dollar amount, not the nature, of the arbitrator's award.

Kim also fails to address the fact that the trial court's addition of prevailing party costs to the analysis conflicts with the plain language of RCW 7.06.060. Entitlement to prevailing party costs and improving one's position at the trial de novo are two distinct situations. *See Hudson v. Hapner*, 170 Wn.2d 22, 35, ¶¶ 37-38, 239 P.3d 579 (2010) (entitlement to prevailing party costs on appeal differs from a party improving its position

at trial de novo). The trial court ignored the distinction between prevailing party costs and improving one's position at trial de novo by adding prevailing party costs to the jury verdict to determine whether Roger improved her position. This mistake is evident in the trial court's oral ruling in which it referred to "a judgment that exceeds that offer." (RP 6) (emphasis added). It is not the final judgment that bears comparison, but rather the amount of the jury award.

B. THE TRIAL COURT'S DECISION IMPEDES THE PURPOSES OF THE MANDATORY ARBITRATION SYSTEM.

Kim argues that the trial court's ruling furthers the goals of the mandatory arbitration system of reducing congestion and delays in the courts and discouraging meritless appeals. (Respondent's Brief 6) *See Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997); *Wiley v. Rehak*, 143 Wn.2d 339, 348, 20 P.3d 404 (2001). In fact, the trial court's ruling interferes with these goals. Justice Talmadge explained how, even in discouraging meritless appeals, the process must retain a level of fairness:

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

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

There is no way to meet the objectives of the mandatory arbitration process if the parties do not know the amount of the arbitration award that

will later be compared to the jury verdict. When the offer of compromise is made, it must be a liquidated sum so that a party contemplating a trial de novo is able to assess the merits of a trial “with frankness and prudence.” A party who does not know the threshold number cannot intelligently assess whether a de novo trial would have merit. Therefore, a party contemplating a trial de novo must know, at the time she makes her decision, the exact dollar amount that she needs to beat in order to avoid paying attorney fees.

Kim maintains that there was “no ambiguity or uncertainty” in her offer. (Respondent’s Brief 6) Paradoxically, Kim acknowledges that Roger did not know the amount of the cost bill (and thus, the threshold number to avoid fees) until after the trial de novo concluded. (Respondent’s Brief 7) In fact, Kim embraces the very ambiguity she claims does not exist. She argues that the “whole scheme of MAR 7.3 involves an element of guesswork.” (Respondent’s Brief 7)

A party contemplating a trial de novo will necessarily have to make an assessment as to whether she can improve her position at trial. Certainly, this involves a level of estimation – there is no way to precisely know what the outcome at trial will be and whether it will be more or less than the arbitrator’s award (as substituted by the amount of the offer of compromise). However, requiring “guesswork” about the amount of the threshold number adds an additional variable which prevents a party from being able to analyze the situation with Justice Talmadge’s “frankness and prudence.” *Haley*, 142 Wn.2d at 159.

It is instructive to compare the assessment made in a case with an offer of compromise to one with no such offer. If no offer of compromise is made, there is no “guesswork” about the threshold amount. The arbitrator’s award is a fixed amount, and a party analyzes her future chances based on that knowledge. The threshold number should be similarly unambiguous after an offer of compromise. A party considering whether to continue pursuing a trial de novo after an offer of compromise should not have to engage in additional guesswork and deal with an unliquidated threshold amount. The same principals of encouraging frank and prudent assessment apply. There is no indication that the legislature intended that an offer of compromise should result in a more difficult and uncertain analysis than that following an arbitration award. Yet the trial court’s ruling results in precisely this untenable situation.

C. APPELLANT IMPROVED HER POSITION.

Kim argues that the current case is analogous to *Niccum v. Enquist*, 152 Wn. App. 496, 215 P.3d 987 (2009), *rev. granted*, 168 Wn.2d 1022 (2010). (Respondent’s Brief 2) The fact patterns may be similar, but even the *Niccum* outcome does not comport with its own analysis. The *Niccum* Court held that any “segregated amount” in an offer must replace the same category in the arbitrator’s award. *Id.* at 500-01. As with *Niccum*’s offer, Kim’s offer did not contain any segregated amounts, only a vague reference that it included costs and fees. *Niccum* is not a strong precedent

for this Court because it was a Division III case, and it has been accepted for review by the Washington Supreme Court. 168 Wn.2d 1022 (2010).

The Division I case of *Tran v. Yu*, 118 Wn. App. 607, 75 P.3d 970 (2003), provides a more coherent analysis of manipulations of comparables by adding costs. On one hand, Kim acknowledges that *Niccum* relied on the reasoning in *Tran*. (Respondent's Brief 3) On the other hand, Kim maintains that the case before this Court is distinguishable from *Tran*. (Respondent's Brief 4) In fact, *Tran* specifically rejected an attempt to manipulate the numbers for comparison by adding or subtracting costs. *Tran* compared comparables by looking at the compensatory damages of the arbitrator's award and the compensatory damages awarded by the jury at the trial de novo. *Id.* at 616.

In this case, as in *Tran*, the arbitrator's award (as downwardly adjusted by the amount of the offer of compromise) and the jury award were both awards for compensatory damages. These "comparables" did not require any further mathematical manipulations for comparison. Indeed, *Tran* noted that if a court adopted a scheme that adds costs and fees to a jury award and then compares it to the arbitration award, "a party would invariably improve its position because additional costs, attorney fees, and interest would be incurred." 118 Wn. App. at 612. That is precisely what the trial court did in this case.

D. RESPONDENT IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL.

Kim seeks attorney fees on this appeal under MAR 7.3. (Respondent's Brief 7-8) If this Court determines that the trial court erred in granting attorney fees below, then Kim is not entitled to fees on this appeal. Accordingly, the Court should deny Kim's attorney fee request.

III. CONCLUSION

Roger improved her position at the trial de novo. The trial court erred in awarding MAR 7.3 fees and costs. This Court should reverse the judgment and remand for an entry of judgment without attorney fees.

DATED this 9th day of August, 2012.

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