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SUMMARY
March 25, 2021

2021COA39

No. 19CA1129, *Mitchell v. Xu* — Attorney Fees — Offer of Settlement — Costs

A division of the court of appeals concludes that a statutory offer of settlement, under section 13-17-202, C.R.S. 2020, purporting to cover "all claims" includes actual costs pre-dating the offer. Construing the offer of settlement to include costs, the division holds that a "final judgment" is the amount that disposes of the entire litigation and must include the plaintiff's actual costs accrued before the settlement offer.

Here, because the actual costs plaintiff accrued before the settlement offer are included, her final judgment exceeded the amount of defendant's settlement offer. We must reverse and remand for the trial court to enter judgment in plaintiff's favor consistent with this opinion. Defendant is not entitled to costs.

Judge Lipinsky agrees that the judgment must be reversed but writes separately to explain his disagreement with the interpretation of section 13-17-202(1)(a)(II) in *Miller v. Hancock*, 2017 COA 141, ¶ 32. Under his reading of the 2008 amendment to the statute, the trial court was required to include the amount of plaintiff's actual costs predating defendant's offer of settlement in its calculation of plaintiff's final judgment for purposes of the first sentence of section 13-17-202(1)(a)(II), regardless of whether the offer of settlement included costs.

COLORADO COURT OF APPEALS **2021COA39**

Court of Appeals No. 19CA1129
City and County of Denver District Court No. 17CV34409
Honorable David H. Goldberg, Judge

Patricia Mitchell,

Plaintiff-Appellant,

v.

Chengbo Xu,

Defendant-Appellee.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division A
Opinion by JUDGE FOX
Freyre J., concurs
Lipinsky, J., specially concurs

Announced March 25, 2021

Bachus & Schanker, LLC, Brian C. Petroff, Scot C. Kreider, Denver, Colorado, for Plaintiff-Appellant

Law Office of Robert B. Hunter, Matthew D. Baukol, Denver, Colorado, for Defendant-Appellee

¶ 1 In a personal injury case with a verdict in plaintiff Patricia Mitchell's favor, she appeals the district court's award of "actual costs" to defendant, Chengbo Xu. The dispute concerns the effect of Xu's two pre-trial statutory offers of settlement under section 13-17-202, C.R.S. 2020. Because the district court's challenged order misconstrued the statute, we reverse the judgment and remand.

I. Background

¶ 2 On January 30, 2019, a jury awarded Mitchell $2,700.00 in economic damages. On February 5, 2019, the court entered judgment for Mitchell, effective January 30, 2019, and declared her the prevailing party. The court later awarded costs to both parties.

¶ 3 Before trial, Xu made two statutory offers of settlement. The first February 14, 2018, offer proposed to settle "all claims asserted and that may be or could have been asserted, in the amount of three thousand five hundred and 00/100 dollars ($3,500.00), inclusive of costs." The second September 14, 2018, offer proposed a settlement of "all claims asserted and that may be or could have been asserted, in the amount of five thousand and 00/100 dollars ($5,000.00)." There was no explicit reference to costs. Mitchell declined both offers of settlement.

¶ 4 After trial, both parties moved for costs pursuant to section 13-17-202. Mitchell claimed that as the "prevailing party" she was entitled to recover pre- and post-judgment interest and actual costs that accrued before Xu's September 14, 2018, offer of settlement. Xu, invoking section 13-17-202(1)(a)(II), maintained she was entitled to recover her actual costs because her September offer of settlement exceeded Mitchell's recovery.

¶ 5 Reviewing the two offers of settlement and the accrued interest and costs incurred, the court awarded Mitchell $829.08 in costs and $331.43 in pre-judgment interest (and post-judgment interest). It also awarded Xu $12,370.31 in costs. The court examined the prejudgment interest accrued before each offer of settlement but only considered the costs incurred before the first offer:

	February 14, 2018 Offer ($3,500, with costs)	September 14, 2018 Offer ($5,000)
Verdict	$2,700.00	$2,700.00
Pre-offer Prejudgment Interest (PJI)	$331.43	$486.95
Pre-Offer Costs	$829.08[1]	
Verdict+PJI	$3,031.43	$3,186.95
Verdict+PJI+Costs	$3,860.51	

The court accounted for costs pursuant to section 13-17-202(1)(a)(II), which incorporates the provisions of section 13-16-104, C.R.S. 2020. Mitchell asked that costs also be included in the court's analysis of the September offer to determine whether Xu's offer exceeded the amount of the final judgment. The court declined to do so because the September offer's language differed from the language of the February offer. As we explain below, while the language of the offers differed, we conclude that the second offer also included costs.

¶ 6 After deciding that Mitchell was entitled to $3,860.51 — an amount that was more than the $3,500 February offer of

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[1] Mitchell had requested $831.48 in costs; the court only awarded $829.08. As to pre-September actual costs, Xu did not challenge whether Mitchell's claimed costs were reasonable or qualified as actual costs.

settlement, but less than the $5,000 September offer — the court awarded Mitchell and Xu costs. In evaluating the September offer against Mitchell's trial success, the court included the verdict and prejudgment interest, but excluded $2,983.61 in actual costs Mitchell incurred before September 14, 2018. If these costs had been included, Mitchell's final judgment (as of September 14, 2018) would total $6,169.61 (excluding postjudgment interest).

¶ 7 On appeal, Mitchell challenges the district court's interpretation of the law as applied to the September offer of settlement and the resulting cost award to Xu. As we explain below, because the district court erred in applying the relevant statute, we reverse and remand.

II. Statutory Offers of Settlement

¶ 8 Mitchell claims the district court misapplied the law. We agree.

A. Preservation and Standard of Review

¶ 9 The issue is preserved. We review questions of law and statutory interpretation de novo. *Tulips Invs., LLC v. State ex rel. Suthers*, 2015 CO 1, ¶ 11; *Jefferson Cnty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 935 (Colo. 2010).

B. Legal Framework

¶ 10 In civil litigation, when a plaintiff "recovers . . . damages . . . then the plaintiff . . . shall have judgment to recover against the defendant his costs to be taxed; and the same shall be recovered, together with the . . . damages." § 13-16-104; *see also* C.R.C.P. 54(d) (a prevailing party is entitled to costs, unless the court otherwise directs). Section 13-16-122, C.R.S. 2020, in turn, identifies what items are includable as costs. But, to encourage settlement, Colorado's "offer of settlement" statute shifts the burden of *actual costs* to a plaintiff who rejects a defendant's offer of settlement only to recover less after trial.[2] § 13-17-202; *Morgan v. Genesee Co., LLC*, 86 P.3d 388, 393 (Colo. 2004) (recognizing the purpose of section 13-17-202); *Danko v. Conyers*, 2018 COA 14, ¶ 91.

¶ 11 As relevant here, section 13-17-202(1) provides that

> (a) . . . (II) [i]f the defendant serves an offer of settlement in writing at any time more than fourteen days before the commencement of the trial that is rejected by the plaintiff, and the plaintiff does not recover a final judgment in

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[2] As described in section 13-17-202(b), "actual costs" are broader than costs allowed by sections 13-16-104 and -122, C.R.S. 2020.

> excess of the amount offered, then the defendant shall be awarded actual costs accruing after the offer of settlement to be paid by the plaintiff. However, as provided in section 13-16-104, if the plaintiff is the prevailing party in the action, the plaintiff's final judgment shall include the amount of the plaintiff's actual costs that accrued prior to the offer of settlement.
>
> . . . .
>
> (b) For purposes of this section, "actual costs" shall not include attorney fees but shall mean costs actually paid or owed by the party, or his or her attorneys or agents, in connection with the case, including but not limited to filing fees, subpoena fees, reasonable expert witness fees, copying costs, court reporter fees, reasonable investigative expenses and fees, reasonable travel expenses, exhibit or visual aid preparation or presentation expenses, legal research expenses, and all other similar fees and expenses.

Relatedly, section 13-17-202(2) provides as follows:

> When comparing the amount of any offer of settlement to the amount of a final judgment actually awarded, any amount of the final judgment representing interest subsequent to the date of the offer in settlement shall not be considered.

¶ 12 The last sentence of section 13-17-202(1)(a)(II) was added in 2008. A division of this court construed the 2008 amendment to entitle "a prevailing plaintiff to recover pre-offer costs if he or she

prevails at trial." *Miller v. Hancock*, 2017 COA 141, ¶ 32; *Novak v. Craven*, 195 P.3d 1115, 1120-22 (Colo. App. 2008) (decided before the 2008 amendments took effect, but recognizing that the amendments changed the law).

¶ 13 And, if the final judgment does not exceed the offer of settlement, a defendant offering to settle recovers actual costs if (1) the actual costs accrued after the offer of settlement, § 13-17-202(1)(a)(II); (2) they are actual costs, excluding attorney fees, § 13-17-202(1)(b); and (3) they are reasonable. *See Scholz v. Metro. Pathologists, P.C.*, 851 P.2d 901, 909-10 (Colo. 1993) (if the statute is implicated, the award of actual costs is mandatory); *Danko*, ¶ 70 (costs must be reasonable).

¶ 14 In determining the meaning of a statute, our primary goal is to ascertain and give effect to the intent of the General Assembly. *Lewis v. Taylor*, 2016 CO 48, ¶ 20. We read the language in the dual contexts of the statute as a whole and the comprehensive statutory scheme, giving consistent, harmonious, and sensible effect to all of the statute's language. *Krol v. CF & I Steel*, 2013 COA 32, ¶ 15. After doing this, if we determine that the statute is not

ambiguous, we enforce it as written and do not resort to other rules of statutory construction. *Id.*

C. Analysis

¶ 15 The core of the parties' dispute is whether, in evaluating Xu's September offer of settlement against Mitchell's final judgment, the court was required to include the actual costs Mitchell incurred before that offer. Our analysis starts with the language of the operative statute.

¶ 16 Section 13-17-202(1)(a)(II) specifies that a plaintiff shall be awarded actual costs only if the "final judgment" exceeds the offer of settlement. While section 13-17-202 does not define "final judgment," the term has acquired a particular meaning — namely, a judgment that "disposes of the entire litigation on the merits," *Novak*, 195 P.3d at 1121 (citation omitted). Regarding Xu's September offer of settlement, Mitchell contends that her pre-September actual costs should be included in her final judgment and Xu posits otherwise.

¶ 17 To determine whether a final judgment obtained by a plaintiff is more favorable than an offer of settlement made by a defendant for purposes of the offer of settlement statute, the terms of the offer

of settlement must be examined. *See Miller*, ¶ 34; *Rubio v. Farris*, 51 P.3d 992, 994 (Colo. App. 2002). That Xu did not expressly reference costs in the September offer of settlement does not mean that the actual costs Mitchell incurred before September are excluded in assessing whether Mitchell's final judgment exceeded Xu's September offer of settlement. *Miller*, ¶ 34. Notably, Mitchell's complaint asked for costs, and the September offer purported to cover "all claims."[3] Similar language has been construed to include a claim for costs. *Id.* at ¶ 36 (offering to settle "all issues" was broad and encompassed costs); *Rubio*, 51 P.3d at 994; *see also Bumbal v. Smith*, 165 P.3d 844, 846 (Colo. App. 2007) (decided before the 2008 amendments and concluding that "all claims" in the offer of settlement encompassed all relief sought on the basis of a claim in the original complaint). We conclude that Xu's September $5,000 offer included actual costs.

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[3] The issue in this case could have been avoided if Xu had indicated that, pursuant to section 13-17-202, she was making an offer of settlement in the amount of $5,000, excluding costs accrued before this offer. If she wanted to make clear that she was including costs, she could have said the offer of settlement was in the amount of $5,000, plus costs accrued before this offer.

¶ 18 In examining the 2008 amendments to section 13-17-202, *Miller* opined that a plaintiff's recovery has "no bearing on how a final judgment is compared to a statutory settlement offer." *Miller*, ¶ 32. Looking at the amendments alone, perhaps.[4] But, considering the statute as a whole, as we must, *Krol*, ¶ 15, we conclude that the scope of the offer of settlement must be compared to the scope of the "final judgment," § 13-17-202 — meaning the amount that disposes of the entire litigation. *Novak*, 195 P.3d at 1121; *see also Catlin v. Tormey Bewley Corp.*, 219 P.3d 407, 414 n.1 (Colo. App. 2009). If the legislature had intended the offer of settlement to be compared to an award of damages — as opposed to a final judgment — it could have so provided. We refuse to give the

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[4] In *Bennett v. Hickman*, 992 P.2d 670, 672-73 (Colo. App. 1999), *superseded by statute as stated in Danko v. Conyers*, 2018 COA 14, a division of this court held that the then-effective version of section 13-17-202(1)(a)(II) not only entitled a defendant who made an offer in excess of a plaintiff's recovery at trial to recover his or her post-offer costs, but also barred an otherwise prevailing plaintiff from recovering his or her pre-offer costs pursuant to section 13-16-104. The 2008 amendments were aimed at correcting this perceived "inequity." *See* Hearings on H.B. 08-1020 before the S. Judiciary Comm., 66th Gen. Assemb., 1st Sess. (Jan. 28, 2008) (remarks of Senator Jennifer Veiga). The result Xu seeks is consistent with *Bennett* but inconsistent with the 2008 amendments to the statute.

term “final judgment” as used in a single statute a different meaning unless the General Assembly so directs. Mitchell’s actual costs accrued before the offer of settlement, § 13-17-202(1)(a)(II), are part of that calculus. *See Rubio*, 51 P.3d at 994-95 (where settlement offer included costs and interest, it had to be compared to a judgment figure that included pre-offer costs and interest). Here, the legislature chose to exclude from the final judgment equation “interest subsequent to the date of the offer in settlement.” § 13-17-202(2). We therefore reject Xu’s invitation to conclude that, in comparing Xu’s September offer of settlement to Mitchell’s final judgment, the court properly excluded the costs Mitchell incurred before that offer.

¶ 19 To the extent Xu claims that statements in *Ferrelgas, Inc. v. Yeiser*, 247 P.3d 1022 (Colo. 2011), demand a different result, we disagree. While the supreme court commented about costs of litigation, the issue there involved how to account for a set-off, not costs. *Id.* at 1029-30. In any event, the supreme court recognized that if an offer of settlement includes costs — and we conclude that costs were included in the offers of settlement at issue — then it is fair for the court to include those when determining whether the

settlement would have been more cost-effective and efficient than proceeding to trial. *Id.* at 1030.

¶ 20 Because the district court did not account for Mitchell's costs incurred before September 14, 2018, in calculating her final judgment — nor award those costs to her — we must reverse. *Catlin*, 219 P.3d at 415 (if costs are reasonable, the trial court has no discretion to deny those costs). Had the court included Mitchell's pre-September costs along with prejudgment interest and the jury's verdict, it would have arrived at a $6,169.61 final judgment in Mitchell's favor.[5] That judgment exceeded Xu's $5,000 offer of settlement. Thus, Mitchell was entitled to recover her costs and Xu was not entitled to recover his costs because the offer of settlement was less than Mitchell's final judgment.

III. Conclusion

¶ 21 The judgment is reversed. We remand the case for the trial court to enter judgment in Mitchell's favor consistent with this opinion.

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[5] Mitchell remains entitled to postjudgment interest, even if it is not counted in the "final judgment" amount used to compare to the statutory offer of settlement. *See* § 13-17-202(2).

JUDGE FREYRE concurs.

JUDGE LIPINSKY specially concurs.

JUDGE LIPINSKY, specially concurring.

¶ 22 I find no fault with the majority's well-reasoned opinion and join in its determination that the trial court miscalculated the amount of Mitchell's final judgment for purposes of comparing that final judgment to Xu's offer of settlement and, thus, erred by holding that Xu was entitled to recover actual costs pursuant to section 13-17-202(1)(a)(II), C.R.S. 2020. But I would take a slightly shorter path than the route the majority travels to reach that destination.

¶ 23 As I explain further below, I respectfully disagree with the reasoning of *Miller v. Hancock*, 2017 COA 141, 410 P.3d 819, that, in applying section 13-17-202(1)(a)(II), a court must determine whether the offer of settlement included the plaintiff's costs before turning to whether the offer of settlement entitles the defendant to recover actual costs. In my view, the second sentence of section 13-17-202(1)(a)(II) (the 2008 amendment), which the General Assembly added to the statute in 2008, requires the court to include the "amount of the plaintiff's actual costs that accrued prior to the offer of settlement" in its calculation of the plaintiff's "final

judgment” under the first sentence of the statute — regardless of whether the offer of settlement included costs.

¶ 24 My analysis rests on the plain language of section 13-17-202(1)(a)(II):

> If the defendant serves an offer of settlement in writing at any time more than fourteen days before the commencement of the trial that is rejected by the plaintiff, and the plaintiff does not recover a final judgment in excess of the amount offered, then the defendant shall be awarded actual costs accruing after the offer of settlement to be paid by the plaintiff. However, as provided in section 13-16-104, if the plaintiff is the prevailing party in the action, the plaintiff’s final judgment shall include the amount of the plaintiff’s actual costs that accrued prior to the offer of settlement.

¶ 25 The first sentence of section 13-17-202(1)(a)(II) requires the court to compare two numbers whenever a defendant advises the court, following a trial, that it made an offer of settlement which the plaintiff rejected: (1) the amount of the plaintiff’s “final judgment” and (2) the amount of the offer of settlement. If the second number is larger than the first number, the defendant is entitled to recover the “actual costs” she accrued after the date of the “offer of settlement.” (The court must also determine whether those “actual

costs" are reasonable and were necessarily incurred. *See Danko v. Conyers*, 2018 COA 14, ¶¶ 70-71, 432 P.3d 958, 970.)

¶ 26 But the first sentence of section 13-17-202(1)(a)(II) does not provide courts with guidance for calculating the amount of the "final judgment." The 2008 amendment and section 13-17-202(2) provide that guidance. The 2008 amendment addresses whether the court must include in the "final judgment" the plaintiff's pre-offer "actual costs" and section 13-17-202(2) addresses whether the "final judgment" must include "interest subsequent to the date of the offer in settlement." (Xu does not appeal the trial court's determination of the amount of interest included in Mitchell's "final judgment.")

¶ 27 In my view, the 2008 amendment specifically instructs courts that, in calculating the amount of the plaintiff's "final judgment" for purposes of the first sentence of the statute, the court must decide whether the plaintiff was the "prevailing party" and, if so, must include in its calculation of the "final judgment" the "amount of the plaintiff's actual costs that accrued prior to the offer of settlement." After complying with the 2008 amendment, the court compares the amount of the "final judgment" and the amount of the "offer of

settlement." But this reading of the 2008 amendment differs from that of the *Miller* division.

¶ 28 *Miller*'s conclusion that the 2008 amendment requires courts to determine whether the offer of settlement included costs rests on the division's view that the 2008 amendment is ambiguous. *See Miller,* ¶ 27, 410 P.3d at 826. The division reasoned that the 2008 amendment could mean one of two things: (1) "that in calculating a prevailing plaintiff's judgment for comparison purposes, a trial court *must* include a plaintiff's pre-offer costs, regardless of the language used by the defendant in his or her offer of settlement"; or (2) "that once a trial court determines whether a prevailing plaintiff's judgment exceeds the defendant's offer of settlement, a prevailing plaintiff is still entitled to recover his or her pre-offer costs, even if his or her judgment was less than the defendant's offer of settlement." *Id.* at ¶ 26, 410 P.3d at 826.

¶ 29 The division noted that "both interpretations . . . are plausible readings" of the 2008 amendment.

> On the one hand, the . . . language references a "plaintiff's final judgment," which is, after all, what the defendant's offer is being compared to when determining whether a defendant is entitled to recover his or her post-offer costs.

> This interpretation accords "final judgment" the same meaning in both portions of the same subsection. On the other hand, the new language is set off by the word "[h]owever," indicating that the operation of awarding a prevailing plaintiff his or her pre-offer costs is performed after the court first determines whether the plaintiff's judgment exceeds the defendant's offer. This interpretation avoids rendering the term "[h]owever" superfluous.

Id. at ¶ 27, 410 P.3d at 826.

¶ 30 To decide which reading of the 2008 amendment is the correct one, the *Miller* division took a detour to explore the legislative history of the 2008 amendment. *Id.* at ¶¶ 29-30, 410 P.3d at 826-27. The division cited legislators' remarks that the 2008 amendment was intended to overturn the holding in *Bennett v. Hickman*, 992 P.2d 670, 672-73 (Colo. App. 1999), *superseded by statute as stated in Danko*, that, under the version of section 13-17-202(1)(a)(II) then in effect, "a party who rejects [an offer of settlement] and recovers less at trial" is barred from recovering "his or her costs, even though that party is determined to be the prevailing party." *See Bennett,* 992 P.2d at 672-73.

¶ 31 After wading through pages of legislative debates, as well as parsing the structure of 2008 amendment, the division concluded

that the 2008 amendment "entitles a prevailing plaintiff to recover pre-offer costs if he or she prevails at trial, but *it has no bearing on how a final judgment is compared to a statutory settlement offer*." *Miller*, ¶¶ 31-32, 410 P.3d at 827-28 (emphasis added). In other words, according to *Miller*, the 2008 amendment did nothing more than overturn *Bennett*. *Id.*

¶ 32 I believe this reading of the 2008 amendment is too narrow. In my view, there is no inconsistency between interpreting the 2008 amendment to mean that, where the plaintiff is the prevailing party, (1) the trial court must include the amount of the plaintiff's pre-offer costs in calculating the amount of the plaintiff's "final judgment" for comparison purposes, regardless of whether the defendant's offer of settlement included costs; and, (2) even if the defendant's offer of settlement exceeds the amount of the "final judgment," the court must award the prevailing plaintiff her pre-offer costs.

¶ 33 I would interpret the 2008 amendment to mean what it plainly says: the amount of the "final judgment" referenced in the first sentence of section 13-17-202(1)(a)(II) must include "the amount of the plaintiff's actual costs that accrued prior to the offer of

settlement." It does not say that the "final judgment" includes accrued actual costs only if the offer of settlement included costs. Thus, I believe there is no need for a court to determine whether the offer of settlement included, or did not include, costs in applying section 13-17-202(1)(a)(II).

¶ 34 Contrary to the division in *Miller*, I see nothing in the 2008 amendment stating that it applies only after the trial court has already calculated the amount of the "final judgment" for purposes of the first sentence of section 13-17-202(1)(a)(II) and determined whether the amount of that "final judgment" exceeds the amount of the defendant's offer of settlement. The word "[h]owever" in the 2008 amendment means that, even though the defendant may be entitled to recover its actual costs under section 13-17-202(1)(a)(II), the prevailing plaintiff is nonetheless entitled to recover her pre-offer actual costs. (The reference to "actual costs" in the 2008 amendment does appear to be inconsistent with the reference a few words earlier to section 13-16-104, C.R.S. 2020, which allows for awards of "costs," but not awards of "actual costs." But this appeal does not require us to address that inconsistency.)

¶ 35 Thus, I respectfully disagree with the *Miller* division's reading of the 2008 amendment to mean that "the operation of awarding a prevailing plaintiff his or her pre-offer costs is performed after the court first determines whether the plaintiff's judgment exceeds the defendant's offer." This reading would render "the term '[h]owever' superfluous." *See* ¶ 27, 410 P.3d at 826.

¶ 36 *Miller*'s analysis of the 2008 amendment is further flawed because it allows the amount of the "final judgment" referenced in the first sentence of section 13-17-202(1)(a)(II) to differ from the amount of the "final judgment" referenced in the second sentence of section 13-17-202(1)(a)(II). This potential inconsistency violates the canon of statutory interpretation that all terms within a statute must be given the same meaning. *See Freedom Newspapers, Inc. v. Tollefson*, 961 P.2d 1150, 1153 (Colo. App. 1998) ("[T]he rule of consistent usage requires that, when the General Assembly uses the same words or phrases in different parts of a statute, then, in the absence of any manifest indication to the contrary, the meaning attributed to the words or phrases in one part of the statute should be ascribed to the same words or phrases found elsewhere in the statute.").

¶ 37 Lastly, the *Miller* division erroneously relied on legislative history to vary the plain language of the 2008 amendment and to hold that the 2008 amendment did nothing more than abrogate *Bennett*. *See Welsh v. W.J. Dillner Transfer Co.*, 91 F. Supp. 685, 688 (W.D. Pa. 1950) (Where statutory language is "plain and concise and the meaning is clear," a court should not vary that meaning "by resort to reports of [legislative] committees or other familiar aids to statutory construction.").

¶ 38 For these reasons, under my reading of section 13-17-202(1)(a)(II), our analysis of this case can be completed in three steps, without the need for an additional step to consider whether Mitchell's September 14, 2018, offer of settlement included costs.

¶ 39 Step 1: Add the amounts of (a) the verdict ($2,700.00); (b) the accrued pre-September 14, 2018, interest on that sum ($486.95); and, per the mandatory language of the 2008 amendment, (c) Mitchell's "actual costs" incurred before September 14, 2018 ($2,983.61), because the trial court found that Mitchell was the prevailing party. That total — $6,169.61 — is the amount of Mitchell's "final judgment."

¶ 40 Step 2: Compare the amount of the $6,169.61 “final judgment” to the amount of Mitchell’s September 14, 2018, offer of settlement ($5,000.00).

¶ 41 Step 3: Because $6,169.61 is greater than $5,000.00, Xu was not entitled to recover his actual costs from Mitchell under the first sentence of section 13-17-202(1)(a)(II).

¶ 42 Thus, I agree with the majority that the trial court erred by awarding actual costs to Xu. But, under my reading of the 2008 amendment, I would skip the step of determining whether Xu’s offer of settlement included costs. I would include Mitchell’s pre-offer actual costs in the calculation of her “final judgment” for purposes of comparing the amount of that “final judgment” and the amount of Xu’s offer of settlement, regardless of whether the offer included costs.

¶ 43 I respectfully urge the supreme court to provide guidance regarding the meaning of the 2008 amendment.